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Court of Appeals

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, by Eric T. Schneiderman, Attorney General for the State of New York, and STATE OF NEW YORK, ex rel. EMPIRE STATE VENTURES, LLC,

Plaintiffs-Respondents,

—against—

SPRINT NEXTEL CORP., SPRINT SPECTRUM L.P., NEXTEL OF NEW YORK, INC., and NEXTEL PARTNERS OF UPSTATE NEW YORK, INC.,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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*(*pro hac* admission pending)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of this Court's Rules of Practice, defendants-appellants Sprint Nextel Corporation (now known as Sprint Communications, Inc.); Sprint Spectrum L.P.; Nextel of New York, Inc.; and Nextel Partners of Upstate New York, Inc., state as follows:

1. Sprint Communications, Inc., is a subsidiary of Sprint Corporation, which in turn is a subsidiary of SoftBank Corp.

2. Sprint Spectrum L.P.; Nextel of New York, Inc.; and Nextel Partners of Upstate New York are subsidiaries of Sprint Communications, Inc.

3. Subsidiaries of Sprint Corporation are listed in Addendum A.

4. Major publicly traded subsidiaries and associates of SoftBank Corp. are listed in Addendum B.

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PRELIMINARY STATEMENT

New York has excluded all interstate telecommunications service from sales tax since 1965. In this case, however, the Attorney General takes the position that New York consumers must pay sales tax on interstate mobile voice services if they purchased those services as part of a fixed monthly charge. On that basis, the Attorney General seeks to impose liability on various subsidiaries of Sprint Corporation (collectively "Sprint") for failing to collect that sales tax from their New York customers. Because the New York Tax Law does not require consumers to pay that tax in the first place, however, Sprint was under no obligation to collect it. All of the Attorney General's claims therefore fail as a matter of law.

The Attorney General claims otherwise. He asserts that amendments to the Tax Law made in 2002 abolished the interstate exclusion for interstate mobile voice services that are (1) sold as part of a fixed monthly charge and (2) not separately stated on a customer's bill. He concedes, however, that the exclusion remains in effect for interstate mobile voice services sold by themselves; interstate mobile voice services that are separately stated on a customer's bill; and interstate non-voice mobile services, such as text messaging. The Attorney General's interpretation is contrary to the plain language of the Tax Law; lacks any plausible policy justification; and, if correct, would be preempted by the Mobile Telecommunications Sourcing Act (MTSA), a

federal law that prohibits states from imposing tax on mobile telecommunications services sold as part of a fixed monthly charge solely because the charges for those services are stated in the aggregate rather than separately.

The Attorney General does not merely seek recovery of the amount of tax that Sprint's customers supposedly owed—an amount that, according to the Attorney General, runs to approximately $100 million. The Attorney General is also pursuing treble damages and penalties under the New York False Claims Act (FCA). He does so on the theory that Sprint's tax returns constituted knowingly false statements, even though Sprint's interpretation of the Tax Law was objectively reasonable and no court had ever given the Tax Law a contrary interpretation.

The Supreme Court denied Sprint's motion to dismiss in relevant part, and the Appellate Division, First Department, affirmed. The Appellate Division's decision was erroneous and should be reversed.

All of the Attorney General's causes of action are based on the underlying premise that Sprint's New York customers owed sales tax on interstate voice services that were sold as part of a fixed monthly charge. That premise, however, is legally erroneous for two independent reasons. *First,* the Tax Law does not require New York consumers to pay sales tax on interstate voice services that were sold for a fixed monthly charge. To the contrary, section 1105(b)(1)(B) of the Tax Law categorically excludes all interstate

telecommunications services, including interstate voice services, from taxation. The Attorney General contends that another provision, section 1105(b)(2), changes that rule with respect to the portion of a fixed monthly charge that is attributable to interstate mobile voice services. Yet that provision expressly incorporates section 1105(b)(1)(B) (and its exclusion of interstate services from taxation)—with the result that only intrastate services, and not interstate services, may be taxed when sold as part of a fixed monthly charge. And a third provision, section 1105(b)(3), confirms that tax is imposed only on "intrastate" mobile telecommunications services. At the very least, the statutory language is ambiguous and, under the well-established canon of construction applicable to tax laws, must be construed in the taxpayer's favor. The Attorney General's contrary interpretation violates numerous principles of statutory construction and rests on an erroneous and revisionist history of the Legislature's 2002 amendments.

Second, if the Attorney General's construction were correct, it would directly conflict with, and therefore be preempted by, the federal Mobile Telecommunications Sourcing Act (MTSA). The 2002 amendments to the Tax Law were enacted for the specific purpose of conforming the Tax Law to the MTSA. That federal statute allows a state to tax otherwise non-taxable services that are aggregated with, and not separately stated from, taxable services, but *only* if mobile providers are allowed to unbundle the non-

taxable charges based on their books and records to protect their customers from taxation. Under the Attorney General's interpretation of New York law, however, the taxability of interstate voice services would turn on whether charges for those services are aggregated with, and not separately stated from, taxable services. Mobile providers would never be allowed to unbundle those charges, and consumers would always be required to pay tax on the otherwise non-taxable services at issue. That is precisely what the MTSA prohibits. Because the Attorney General's interpretation of the Tax Law is both erroneous and directly contrary to the MTSA, the Appellate Division's three-paragraph decision affirming the Supreme Court's denial of Sprint's motion to dismiss should be reversed, and the action dismissed in its entirety.

Even if the Attorney General's interpretation of the Tax Law were correct and not preempted, his FCA claim would be subject to dismissal on additional grounds. To begin with, the Attorney General cannot plausibly allege that Sprint knowingly violated the FCA, as is required to impose liability under the FCA, because Sprint's interpretation of the Tax Law was objectively reasonable. The FCA punishes only knowingly false statements. As a matter of law, a statement is not false, much less knowingly so, if it is based on an objectively reasonable interpretation of unsettled law (even if that interpretation turns out to have been mistaken). The Attorney General, in contrast, claims that a taxpayer acts recklessly for purposes of the FCA

when it disagrees with the Department of Taxation and Finance's non-binding views regarding the meaning of the Tax Law. That position is as troubling as it is flawed. New York taxpayers are not required to choose between capitulating to the Department's interpretation of an ambiguous law and challenging that interpretation at the risk of treble damages and penalties. At the very least, the Ex Post Facto Clause of the federal Constitution bars application of the FCA to statements made before August 13, 2010, when the statute took effect. Although a civil statute, the FCA is punitive in both purpose and effect and thus triggers the Ex Post Facto Clause. At a minimum, therefore, the Attorney General's FCA claim should have been dismissed.

QUESTIONS PRESENTED

1. Whether the New York Tax Law unambiguously imposes sales tax on interstate voice service sold by a mobile provider with other services for a fixed monthly charge.

The Appellate Division erroneously answered yes.

2. Whether, if the New York Tax Law were interpreted to impose sales tax on interstate voice service sold by a mobile provider with other services for a fixed monthly charge (when the provider has not separately stated the charge for interstate voice service), that interpretation would be

preempted by the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. § 123(b).

The Appellate Division erroneously answered no.

3. Whether a plaintiff fails to state a claim under the New York False Claims Act when the allegedly false statement constitutes an objectively reasonable interpretation of a statute.

The Appellate Division erroneously answered no.

4. Whether the Ex Post Facto Clause of the federal Constitution prohibits a plaintiff from pursuing claims under the New York False Claims Act based on allegedly false tax returns submitted before August 13, 2010, when the Act took effect.

The Appellate Division erroneously answered no.

STATEMENT OF JURISDICTION

This Court has jurisdiction under New York Civil Practice Law & Rules § 5602(b)(1). On February 27, 2014, the Appellate Division affirmed the Supreme Court's order denying Sprint's motion to dismiss the complaint. Rvi-ix. Sprint timely sought permission to appeal, which the Appellate Division granted on June 12, 2014. Rv.

Sprint has preserved for this Court's review all of the questions presented in this appeal. Sprint raised and argued each issue before the Supreme Court and the Appellate Division, and the issues were ruled on by

both courts. *See* Rviii-ix; R10-21; R37-55; R131-145; Sprint App. Div. Br. 13-46; Sprint App. Div. Reply Br. 2-25.

STATEMENT OF FACTS

A. Background

1. Factual Background

Sprint is a wireless telecommunications service provider that does business in New York. R63 (¶¶ 15-18). Sprint sells wireless calling plans, including "flat-rate" plans that include a certain number of minutes of talk time for a fixed charge; for example, Sprint offers 450 minutes of talk time for $39.99 per month. R60 (¶ 4); R64 (¶ 20).

In 2005, Sprint began a nationwide program of disaggregating—or "unbundling"—charges within plans sold for a fixed monthly charge. R70 (¶ 44). Specifically, Sprint unbundled the portion of the fixed monthly charge that was attributable to intrastate mobile voice services (*i.e.*, services between persons or phones within the same state) from the portion attributable to interstate mobile voice services (*i.e.*, services between persons or phones in different states). R64 (¶ 21); R70 (¶ 44). Sprint then collected sales tax only on the portion of the fixed charge attributable to intrastate mobile voice services. R70 (¶ 44). That portion constituted a majority of the charge for wireless voice services; for the tax years at issue, the percentage of the fixed monthly charge on which Sprint collected sales tax ranged from 71.5% to

86.3%. R78-79 (¶ 81). Sprint did not separately state on a customer's bill the charges for interstate voice services or other charges included in the flat-rate plan. R65 (¶¶ 27-28).

The Attorney General's complaint alleges that Sprint's decision to unbundle its plans sold for a fixed monthly charge "was driven by its desire to gain an advantage over its competitors by reducing the amount of sales taxes it collected from its customers and, thereby, appearing to be a low-cost carrier." R70-71 (¶ 47). Belying that allegation, however, the complaint also alleges that Sprint did not "communicat[e] with [its] customers about the fact that [it] was unbundling" and did "not educate[] [its] customers on how [it was] de-bundling transactions for their tax relief." R84-85 (¶¶ 108-109). Because the sales tax at issue is a pass-through tax, any amounts due would ultimately have been paid by Sprint's New York customers. *See* R59 (¶ 1) (alleging that Sprint failed "to *collect* and pay").[1]

2. Statutory Background

New York imposed sales tax on "telephony" and "telephone . . . service" in 1965, when it enacted section 1105(b) of the New York Tax Law. Ch. 93, § 1, 1965 N.Y. Laws 649, 654. That provision imposed a tax on "telephony and telegraphy and telephone and telegraph service of whatever nature *except interstate and international telephone and telegraph service*." N.Y.

[1] All emphases are added unless otherwise indicated.

Tax Law § 1105(b) (1965). The exclusion of all interstate telecommunications from sales tax was clear and unequivocal.

New York was not alone in excluding interstate telecommunications service from taxation. By 1965, the distinction between interstate and intrastate telecommunications services was already firmly established. The Federal Communications Act of 1934 had "establishe[d] a dual federal and state system of regulating interstate and intrastate telecommunications services by specifically granting the Federal Communications Commission jurisdiction over 'all interstate and foreign' telecommunications services, but expressly exempting from its authority 'intrastate communication service.'" *People's Choice TV Corp.* v. *City of Tucson*, 46 P.3d 412, 415 (Ariz. 2002) (en banc) (quoting 47 U.S.C. § 152(a) and (b)); *accord Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 360 (1986). Consistent with that regulatory distinction, many states taxed intrastate, but not interstate, telecommunications services. *See People's Choice TV*, 46 P.3d at 415.

Section 1105(b) remained largely unchanged until 2002, when the Legislature amended the Tax Law to bring it into conformance with the federal Mobile Telecommunications Sourcing Act (MTSA). The MTSA resulted from a joint effort by the mobile telecommunications industry and state and local tax administrators to simplify the taxation of mobile telecommunications services. *See* H.R. Rep. No. 106-719, at 8 (2000), *reprinted in* 2000

U.S.C.C.A.N. 508, 510. At the time of the MTSA's enactment in 2000, states had authority under the Commerce Clause to tax not only intrastate telecommunications, but also interstate telecommunications with a sufficient nexus to the state. *See Goldberg* v. *Sweet*, 488 U.S. 252, 263-264 (1989). Because states and localities did not employ a uniform approach for determining the location of mobile telecommunications for tax purposes, however, it was complicated and expensive for mobile telecommunications carriers to collect taxes, and the same transaction could be subject to tax in multiple jurisdictions. *See* H.R. Rep. No. 106-719, at 7-8.

One way in which the MTSA sought to address those problems was by establishing a uniform nationwide rule for determining which jurisdiction has the authority to tax mobile telecommunications services. *See* 4 U.S.C. § 117. Under the MTSA's "sourcing" rule, mobile telecommunications services are assigned, or "sourced," to the customer's "place of primary use," and only that jurisdiction has the authority to tax them. *Id.*[2] Importantly, the MTSA did not impose any tax, nor did it require states to begin taxing services that they did not previously tax. *See* 4 U.S.C. § 118(1); S. Rep. No. 106-326, at 8 (2000). Instead, the MTSA merely modified a state's authority to tax mobile telecommunications services by replacing the preexisting *Goldberg* standard

[2] The MTSA defines "place of primary use" as "the street address representative of where the customer's use of the mobile telecommunications service primarily occurs." 4 U.S.C. § 124(8).

with a uniform nationwide standard, while leaving it up to each jurisdiction to decide how to exercise that authority.

Of particular relevance here, the MTSA also sought to "provide customers with simpler billing statements" by ensuring that the taxability of services sold as part of a fixed monthly charge would not turn on whether those charges are separately stated on a customer's bill. H.R. Rep. No. 106-719, at 6. Specifically, the MTSA provides:

> If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business.

4 U.S.C. § 123(b). Under that provision, a state may impose tax on otherwise non-taxable charges that are aggregated with and not separately stated from taxable charges, *but only if* mobile providers are allowed to unbundle the non-taxable charges based on their books and records to protect those charges from taxation. Put another way, if a mobile provider can identify from its books and records the portion of the fixed monthly charge that is attributable to those non-taxable services, the state may not tax those services merely because they are included in a bundle. Notably, the mobile provider is not required to state that amount as a separate line item on the

customer's bill because doing so would complicate, rather than simplify, customer billing statements.

In 2002, the Legislature amended the Tax Law to bring it into conformance with the MTSA's sourcing rule. *See* Ch. 85, pmbl., 2002 N.Y. Laws 2705, 2705. As amended, section 1105(b) (referred to in the statute as "subdivision" (b)) has three subsections—paragraph (b)(1)(B), paragraph (b)(2), and paragraph (b)(3). In relevant part, section 1105(b) provides:

> [T]here is hereby imposed and there shall be paid a tax of four percent upon:
>
> . . . .
>
> (b)(1) The receipts from every sale, other than sales for resale, of the following: . . . (B) telephony and telegraphy and telephone and telegraph service of whatever nature *except interstate and international telephony and telegraphy and telephone and telegraph service* and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision; . . . .
>
> (2) The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, *that are voice services, or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision, sold for a fixed periodic charge (not separately stated)*, whether or not sold with other services.
>
> (3) The tax imposed *pursuant to this subdivision* is imposed on receipts from charges for *intrastate mobile telecommunications service* of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state.

N.Y. Tax Law § 1105(b).

As the italicized language illustrates, section 1105(b)(1)(B) continues unequivocally to exclude all interstate telecommunications service from taxation. The Legislature did not repeal that longstanding exclusion in the 2002 amendments, and it thus remains in effect with respect to all "interstate and international telephony," including mobile telecommunications services. Sections 1105(b)(2) and (b)(3) were added in the 2002 amendments.[3] Section 1105(b)(2) imposes sales tax only on those mobile telecommunications services that are both taxable under section 1105(b)(1)(B) and sold for a fixed periodic charge; section 1105(b)(3) confirms that only intrastate, and not interstate, mobile telecommunications services are taxable (and, with respect to those services, adopts the MTSA's sourcing rule).

Section 1111(*l*) was also added in the 2002 amendments. Section 1111 offers "special rules for computing" the amounts subject to tax under section 1105, N.Y. Tax Law § 1111, and paragraph (*l*) specifically addresses certain "bundled" services, *id.* § 1111(*l*). As to mobile telecommunications providers, that provision states that, with respect to certain enumerated services that do not include interstate voice service, a "home service provider shall collect and pay over tax, and a mobile telecommunications customer shall pay such

[3] In the 2002 amendments, the Legislature also added the final "except" clause to paragraph (b)(1)(B). That clause ensures that services that are subject to tax under new paragraph (b)(2)—*i.e.*, mobile telecommunications services that would be taxable under (b)(1)(B)—are taxed only once.

tax, on receipts from any charge that is aggregated with and not separately stated from other charges for mobile telecommunications service." *Id.* § 1111(*l*)(2). With respect to the enumerated non-voice services, if the provider "uses an objective, reasonable and verifiable standard for identifying each of the components of the charge for mobile telecommunications service," it "may separately account for and quantify the amount of each such component charge," and such charges will not be subject to tax. *Id.*[4]

B. Procedural History

1. On March 31, 2011, Empire State Ventures, LLC, filed suit against Sprint under the New York False Claims Act, N.Y. State Fin. Law § 189. R62 (¶ 10). On April 19, 2012, the Attorney General filed a superseding complaint, which converted the relator's action into a civil-enforcement action by the Attorney General. R62 (¶ 11).

The Attorney General's complaint alleges that section 1105(b)(2) "requires the payment of sales taxes on the *full amount* of fixed periodic charges for wireless voice services sold by companies like Sprint to New York customers." R66 (¶ 33) (emphasis in original). It further alleges that section

[4] The Attorney General acknowledged in his complaint that section 1111(*l*) applies only to non-voice services. R69 (¶ 42) (alleging that, "[u]nder [section 1111(*l*)], wireless providers are permitted to treat separately for sales tax purposes certain components of a bundled charge for mobile telecommunications services, so long as the charges are *not* for voice services" (emphasis in original)).

1111(*l*) permits wireless providers to "treat separately for sales tax purposes certain components of a bundled charge for mobile telecommunications services, so long as the charges are *not* for voice services." R69 (¶ 42) (emphasis in original). The complaint does not mention section 1105(b)(1)(B), the provision that categorically excludes interstate telecommunications service from taxation, or section 1105(b)(3), the provision that confirms that tax is imposed only on intrastate mobile telecommunications. The complaint asserts that Sprint violated the Tax Law by failing to collect sales tax on the portion of its flat-rate charge that was attributable to interstate voice service. R78 (¶¶ 79-80).

The complaint includes four causes of action, all of which are based on the same underlying contention that Sprint violated the Tax Law. For the first cause of action, the complaint alleges a violation of the New York False Claims Act, N.Y. State Fin. Law § 189(1)(g). R85 (¶¶ 111-113). Specifically, the complaint alleges that Sprint knowingly submitted false statements each time it filed tax forms that "purported to spell out the amount of sales taxes due to be paid by Sprint to the New York State and local governments" but understated the amount of sales tax due. R82 (¶ 96). The complaint seeks treble damages and penalties of $6,000 to $12,000 for each violation of the FCA. R87.

For the second cause of action, the complaint alleges that the Sprint defendants conspired to violate the FCA. R85-86 (¶¶ 114-116).

For the third cause of action, the complaint alleges that Sprint violated section 63(12) of the Executive Law when it "repeatedly engaged in the fraudulent and illegal acts of failing to collect and pay sales taxes due and owing and submitting false sales tax filings to the New York Department of Taxation & Finance in violation of [section] 1105." R86 (¶ 119).

Finally, for the fourth cause of action, the complaint alleges that Sprint violated Article 28 of the Tax Law when it "failed to collect and pay over sales taxes, penalties and interest imposed by said Article." R87 (¶ 121).

Notably, the complaint does not allege that Sprint violated the Tax Law or the MTSA by failing to unbundle the portion of its flat-rate charge attributable to interstate voice service in a particular way. Rather, all of the claims are based on the premise that New York law imposed tax liability on Sprint's customers *regardless* of whether, and how, Sprint broke out those charges. *See* R69-70 (¶¶ 42-43).

2. Sprint moved to dismiss the complaint. As is relevant here, Sprint argued that the complaint should be dismissed in its entirety for two independent reasons. *First*, Sprint argued that section 1105(b) does not impose sales tax on interstate voice service sold by a mobile provider as part of a fixed monthly charge. *See* R38-47. *Second*, Sprint argued that, to the

extent the Tax Law were interpreted to prohibit mobile providers from unbundling mobile interstate voice service for sales-tax purposes, it would conflict with the MTSA and thus would be preempted by federal law. *See* R47-49.

Sprint made two additional arguments with respect to the FCA claims. Sprint argued that it could not be held liable under the FCA because its interpretation of section 1105(b), even if incorrect, was objectively reasonable. *See* R50-51. Sprint also contended that the Ex Post Facto Clause of the federal Constitution barred application of the FCA claims to allegedly false statements made before August 13, 2010, when the FCA took effect. *See* R53-55.

3. The Supreme Court denied Sprint's motion to dismiss in relevant part. *See* R9-24.[5] With respect to the Tax Law, the court reasoned that section 1105(b)(2) imposes sales tax "on receipts from every sale of mobile telecommunications services . . . that are voice services sold for a fixed periodic charge." R14. The court briefly considered sections 1105(b)(1)(B)

[5] The Supreme Court dismissed the second cause of action on the ground that a corporation cannot conspire with its subsidiaries, *see* R21, and it dismissed the third and fourth causes of action to the extent that they apply to periods before March 31, 2008, on the ground that the limitations period for those claims is only three years, *see id.* The Attorney General did not cross-appeal those rulings to the Appellate Division, and they are not before this Court.

and 1105(b)(3), but summarily concluded that "nothing in [those provisions] addresses plaintiff's allegations that Sprint knowingly avoided New York sales taxes on the sale of mobile telecommunications services for a fixed monthly recurring access charge." *Id.* Without addressing the potential preemption of section 1105(b), the court then held that section 1111(*l*) was not preempted by the MTSA because "[t]here is no apparent conflict between" the two laws. *Id.* at 16. In so holding, the court construed the MTSA as applying only to taxing jurisdictions "that do not otherwise subject *aggregated* mobile telecommunications services to taxation." *Id.* The court concluded that section 1105(b) subjects aggregated mobile telecommunications services to taxation and, based on that conclusion, reasoned that there was no conflict between the two statutes. *Id.*

The court proceeded to reject Sprint's argument that it could not be liable under the FCA because its interpretation of the Tax Law was reasonable. *See* R16-17. Rather than addressing the objective reasonableness of Sprint's interpretation—a question of law—the court summarily concluded that "[t]he criterion on a motion to dismiss is whether the proponent of the pleading has a cause of action." *Id.*

Finally, the court rejected Sprint's argument that the imposition of liability under the FCA for allegedly false statements made before August 13, 2010 would violate the Ex Post Facto Clause of the federal Constitution. *See*

R17-21. The court concluded that the FCA "is not sufficiently punitive in nature" to trigger the Ex Post Facto Clause. *Id.* at 21.

Sprint filed a timely notice of appeal to the Appellate Division, First Department. R7-8. On February 27, 2014, the Appellate Division issued a summary order concluding that the Supreme Court "properly denied the motion to dismiss the complaint in its entirety." Rviii.

Sprint sought leave from the Appellate Division to appeal to this Court on the threshold legal questions raised in Sprint's motion to dismiss. The Appellate Division granted Sprint's request on June 12, 2014, with respect to the question whether "the order of the Supreme Court, as affirmed by [the Appellate Division, was] properly made." Rv. Proceedings in the Supreme Court have been stayed for the pendency of this appeal.

ARGUMENT

All of the Attorney General's causes of action are based on the same underlying premise: that New York consumers owe sales tax on interstate mobile voice services that are sold as part of a fixed monthly charge, and, as a result, Sprint violated the Tax Law by failing to collect that sales tax from its New York customers. That premise is erroneous as a matter of law for two independent reasons. *First*, section 1105(b) does not tax interstate voice services, even when they are sold as part of a fixed monthly charge. *Second*, if the Attorney General's interpretation of section 1105(b) were correct, it

would flatly conflict with, and therefore be preempted by, the "unbundling" provision of the federal MTSA. Because the Attorney General's complaint fails to allege a violation of the Tax Law, the Supreme Court should have dismissed the complaint in its entirety, and the Appellate Division's decision affirming the Supreme Court accordingly should be reversed.

Even if the Attorney General's interpretation of the Tax Law were valid, moreover, the Attorney General's surviving FCA claim suffers from additional infirmities. As a matter of law, Sprint cannot be held liable for knowingly violating the Tax Law because its interpretation of the relevant statute was objectively reasonable. And at the very least, the Ex Post Facto Clause of the federal Constitution bars application of the FCA to statements made before August 13, 2010. Even if this Court were to accept the Attorney General's interpretation of the Tax Law, therefore, it should reverse the Appellate Division's decision as to the remaining FCA claim.

I. THE NEW YORK TAX LAW DOES NOT IMPOSE SALES TAX ON INTERSTATE MOBILE VOICE SERVICES SOLD AS PART OF A FIXED MONTHLY CHARGE

The central issue in this appeal concerns the interpretation of section 1105(b), the subdivision of the New York Tax Law that governs the imposition of sales tax on "telephony and telegraphy," including mobile telecommunications services. Section 1105(b) explicitly excludes interstate voice service from taxation, including when it is bundled and sold for a fixed monthly

charge. The Attorney General's contrary interpretation—that section 1105(b)(2) imposes tax on interstate voice service (but not non-voice service) sold as part of a fixed monthly charge—is erroneous. At a minimum, the Attorney General cannot show that section 1105(b) unambiguously compels his interpretation, as is required in order to impose tax liability.

The Court's ultimate purpose in interpreting a statute is to "discern and give effect to the Legislature's intention." *Albany Law School* v. *New York State Office of Mental Retardation & Developmental Disabilities*, 19 N.Y.3d 106, 120 (2012). It is well settled that "the text of a provision is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning." *Id.* (internal quotation marks and citation omitted). In addition, special rules of statutory interpretation apply in the tax context. Most importantly, a tax statute "must be narrowly construed," with "any doubts concerning its scope and application . . . resolved in favor of the taxpayer." *Debevoise & Plimpton* v. *New York State Department of Taxation & Finance*, 80 N.Y.2d 657, 661 (1993); *accord, e.g.*, *Expedia, Inc.* v. *City of New York Department of Finance*, 22 N.Y.3d 121, 127 (2013). Also, "it is the established rule not to extend [the] provisions [of tax statutes], by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out." *American Locker Co.* v. *City of New York*, 308 N.Y. 264, 269

(1955) (internal quotation marks and citation omitted).[6] Thus, even if this Court were to conclude that section 1105(b) is unclear on the question whether interstate voice service is subject to taxation when it is sold as part of a fixed monthly charge, it should reverse the Appellate Division's judgment and order dismissal of the complaint as a matter of law.

A. The Statutory Text Clearly Establishes That Interstate Voice Service Is Not Taxable, Including When It Is Sold By A Mobile Provider As Part Of A Fixed Monthly Charge

Although section 1105(b) contains three paragraphs, the Attorney General's erroneous interpretation ignores two of them and relies entirely on paragraph (b)(2). Indeed, the Attorney General argued to the Supreme Court that "paragraph (b)(2) stands alone and is neither limited nor illuminated by paragraphs (b)(1)(B) or (b)(3)." R104. As a preliminary matter, the Attorney General's approach flouts the bedrock principle of statutory construction that a statute "is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent."

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[6] The Attorney General contended to the courts below, in footnotes, that the well-established rule that an ambiguous tax statute must be construed in favor of the taxpayer does not apply here "because Sprint seeks an *exception* from sales tax." Resp. App. Div. Br. 20 n.11 (emphasis in original); *see also* R102 n.4. Although it is true that the ambiguity rule is inapplicable where a taxpayer seeks an *exemption* from an otherwise applicable tax, it plainly applies where, as here, a taxpayer argues that a transaction is excluded from taxation in the first place. *See Matter of Grace* v. *New York State Tax Commission*, 37 N.Y.2d 193, 196 (1975).

McKinney's Cons. Laws of N.Y., Book 1, Statutes § 97; *see also Albany Law School*, 19 N.Y.3d at 120. That principle has particular force here, given that paragraph (b)(2) expressly refers to paragraph (b)(1)(B).

In fact, the other paragraphs of section 1105(b) are critical to a proper understanding of paragraph (b)(2). To begin with, paragraph (b)(1)(B) establishes the general rule that a sales tax of 4% is imposed on "telephony and telegraphy and telephone and telegraph service of whatever nature." N.Y. Tax Law § 1105(b)(1)(B). That tax, however, does not apply to "interstate and international telephony and telegraphy and telephone and telegraph service." *Id.* It is undisputed that interstate mobile telecommunications services fall within that exception: the Attorney General acknowledged to the Supreme Court that the exclusion of interstate telecommunications services from sales tax is "explicit" and "applies to mobile services." R104; R105 n.6.

Paragraph (b)(2) provides a specific rule regarding the application of the 4% sales tax to mobile telecommunications services. It makes clear that the tax applies to "[t]he receipts from every sale of mobile telecommunications service provided by a home service provider . . . *that are voice services, or any other services that are taxable under [section 1105(b)(1)(B)], sold for a fixed periodic charge (not separately stated), whether or not sold with other services*." N.Y. Tax Law § 1105(b)(2). By its plain terms, para-

graph (b)(2) applies only to those services that are *both* taxable under paragraph (b)(1)(B) *and* sold for a fixed periodic charge without separate statement of the individual components. Because interstate services are excluded from taxation under paragraph (b)(1)(B), they are not taxable under paragraph (b)(2), including when they are sold as part of a fixed monthly charge. The effect of paragraph (b)(2) is to prevent the erosion of New York's tax base by ensuring that services that are taxable under paragraph (b)(1)(B) (*e.g.*, intrastate mobile telecommunications services) do not escape taxation simply because they are bundled with non-taxable services (*e.g.*, interstate mobile telecommunications services).[7]

Finally, paragraph (b)(3) confirms that the tax imposed under "this subdivision"—that is, section 1105(b) in its entirety, including paragraph (b)(2)—is imposed on "*intrastate* mobile telecommunications service." N.Y. Tax Law § 1105(b)(3). It also adopts the MTSA's "sourcing" rule with respect to those taxable services: intrastate mobile telecommunications "of whatever nature in any state" are taxable "if the mobile telecommunications customer's place of primary use" is in New York. *Id.*

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[7] The Attorney General argued to the courts below that Sprint's reading of paragraph (b)(2) renders that provision superfluous because section 1111(*l*)(2) serves the same purpose. *See* Resp. App. Div. Br. 36; R106-107. That is incorrect: Section 1111(*l*)(2) provides that certain *non-taxable* services *remain* non-taxable as long as the provider unbundles the charges in the manner specified in the provision. *See* N.Y. Tax Law § 1111(*l*)(2).

Read as a whole, therefore, section 1105(b) excludes from taxation all interstate telecommunications service, including interstate voice service sold by mobile providers. To the extent there is any ambiguity on the question, the statute necessarily must be construed in Sprint's favor. *See, e.g.*, *Debevoise*, 80 N.Y.2d at 661.

B. The Statutory Structure Supports The Conclusion That Interstate Voice Service Sold By A Mobile Provider As Part Of A Fixed Monthly Charge Is Not Taxable

In other provisions of the Tax Law, the Legislature has explicitly and unambiguously imposed sales tax on certain kinds of interstate telecommunications services. For example, section 1105(c)(9)(i) imposes a sales tax on "entertainment service" and "information service" regardless of whether they are "delivered by means of . . . telephone or telegraph service (*whether intrastate or interstate*) of whatever nature." N.Y. Tax Law § 1105(c)(9)(i). And section 1105(b)(1)(D) imposes sales tax on "[p]repaid telephone calling service," a phrase that is expressly defined in a separate provision to include "intrastate, interstate or international telephone calls." *Id.* § 1101(b)(22).

Those provisions demonstrate that, if the Legislature had intended to impose sales tax on interstate mobile voice services sold as part of a fixed monthly charge, it would have done so explicitly. For example, the Legislature could have enacted a new provision imposing tax on "all mobile tele-

communications voice services (whether intrastate or interstate) sold for a fixed periodic charge (not separately stated)." The absence of such language in section 1105(b)(2) is strong evidence that the Legislature did not intend to impose such a tax. *See, e.g.*, *Flores* v. *Lower East Side Service Center, Inc.*, 4 N.Y.3d 363, 369 (2005); *Matter of Albano* v. *Kirby*, 36 N.Y.2d 526, 530 (1975).

Notably, those states that have imposed taxes on interstate telecommunications services have done so using specific and explicit language. For example, New Jersey imposes a sales tax on "receipts from every sale . . . of *intrastate, interstate, or international* telecommunications services." N.J. Rev. Stat. Ann. § 54:32B-3(f)(1) (2014). Sprint's home state, Kansas, imposes a sales tax on "the gross receipts from *intrastate, interstate or international* telecommunications services." Kan. Stat. Ann. § 79-3603(b) (2014). Other states use similar language. *See, e.g.*, Ky. Rev. Stat. Ann. § 139.200, (2)(e) (2014) (imposing sales tax on "the gross receipts derived from . . . [t]he furnishing of . . . [i]ntrastate, interstate, and international communications services"); Miss. Code Ann. § 27-65-19(1)(e)(i)(2) (2014) (imposing sales tax on "the gross income received from all charges for interstate telecommunications services"). Not surprisingly given the clarity of those laws, Sprint collects and remits sales tax on both intrastate and interstate voice services in all of those states.

C. The Legislative History Of Section 1105(b) Confirms That Interstate Voice Service Sold By A Mobile Provider As Part Of A Fixed Monthly Charge Is Not Taxable

Because the statutory text of section 1105(b) is clear, it is unnecessary to resort to legislative history or other extrinsic materials to elucidate its meaning. *See*, *e.g.*, *Matter of Lloyd* v. *Grella*, 83 N.Y.2d 537, 546 (1994). But the legislative history of section 1105(b) confirms Sprint's interpretation.

By the time the Legislature added sections 1105(b)(2) and (b)(3) in 2002, interstate telecommunications services had been excluded from taxation under section 1105(b)(1)(B) for nearly 40 years. Indeed, New York had *never* imposed sales tax on interstate telecommunications services. There is no indication that, in enacting paragraphs (b)(2) and (b)(3), the Legislature intended to abolish that longstanding exclusion with respect to interstate mobile voice services and impose a new tax on New York consumers who purchase interstate voice service as part of a fixed monthly charge.[8] To the contrary, paragraph (b)(2) specifically incorporated the limitations of para-

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[8] The bill jacket for Assembly Bill 9762-B—the bill containing what is now section 1105(b)(2) and (b)(3)—includes a letter from the Department of Taxation and Finance to Governor Pataki submitted after the Legislature had already passed the bill and while it was awaiting the Governor's action. *See* Letter from Department of Taxation and Finance, May 20, 2002, Bill Jacket, L. 2002, ch. 85 (Letter). To the extent that letter opines on the effect of section 1105(b)(2) and (b)(3), it is entitled to little if any weight in discerning the intent of the Legislature, which already had voted on the bill. *See Albany Law School* v. *New York State Office of Mental Retardation and Developmental Disabilities*, 19 N.Y.3d 106, 123 n.5 (2012).

graph (b)(1)(B), and paragraph (b)(3) cemented the distinction between interstate and intrastate telecommunications service by confirming that section 1105(b) taxes "intrastate" mobile telecommunications services.

Sprint's reading of section 1105(b) is wholly consistent with the purpose of the 2002 amendments. As the Attorney General acknowledged to the courts below, the amendments were intended to bring the New York Tax Law into conformance with the MTSA. *See* Resp. App. Div. Br. 8.; R109.[9] As discussed above, *see* p. 10, the MTSA established a uniform "sourcing" rule for mobile telecommunications services. *See* H.R. Rep. No. 106-719, at 8, 13 (2000), *reprinted in* 2000 U.S.C.C.A.N. 508, 510, 515. That rule assigned, or "sourced," all services to the customer's "place of primary use," and gave that jurisdiction—and only that jurisdiction—the authority to tax them. *Id.* at 6-8 (internal quotation marks omitted). The 2002 amendments conformed New York law with the MTSA's sourcing rule by providing that the tax

[9] The Department of Taxation and Finance's post-enactment letter to Governor Pataki states that the purpose of the amendments is to "conform [the Tax Law] to *the situsing provisions*" of the MTSA. Letter 14. That letter also shows, however, that the Department intended to circumvent the MTSA's unbundling provision, 4 U.S.C. § 123(b), which allows mobile providers to unbundle otherwise non-taxable charges based on the provider's books and records. According to the Department's letter, the Legislature enacted section 1111(*l*)(2) to create a special "New York" rule to govern the unbundling of non-taxable charges, "even if the providers are found to be authorized to use another definition of books and records under the [MTSA]." Letter 14, 20.

imposed under section 1105(b) applies to "charges for *intrastate mobile telecommunications service* of whatever nature in any state *if the mobile telecommunications customer's place of primary use is in this state*." N.Y. Tax Law § 1105(b)(3). In other words, the 2002 amendments adopted the MTSA's sourcing rule with respect to the category of mobile telecommunications services—*i.e., intrastate* mobile telecommunications services—that is subject to taxation under section 1105(b).

The Attorney General argued to the Appellate Division that the purpose of the MTSA (and thus of the Legislature's 2002 amendments to the Tax Law) was to "abolish[]" the "distinction between interstate and intrastate calls." Resp. App. Div. Br. 6; *see also id.* at 34-35. That assertion is demonstrably incorrect. As discussed above, *see* pp. 10-11, the MTSA did not itself impose any tax or require states to impose any new tax; it simply addressed *which state* could levy tax.[10] As a result, the MTSA could not have been intended to eliminate the distinction between interstate and intrastate mobile telecommunications services that had existed in many states long before its enactment. If it were otherwise, one would expect jurisdictions consistently to subject all mobile telecommunications services to taxation. To

[10] Indeed, the MTSA explicitly states that it does not "provide authority to a taxing jurisdiction to impose a tax, charge, or fee that the laws of such jurisdiction do not authorize such jurisdiction to impose." 4 U.S.C. § 118(1). It remains up to each state to decide what it wants to tax.

the contrary, a number of states—like New York—continue to treat interstate and intrastate mobile telecommunications services differently for purposes of taxation.[11]

In any event, the purpose the Attorney General assigns to the MTSA is belied by his own interpretation of section 1105(b). Under that interpretation, the exclusion of "interstate and international telephony" still applies to certain interstate mobile telecommunications services: namely, non-voice services, as well as voice services that are sold individually or separately stated on a customer's bill. *See* Resp. App. Div. Br. 9; R105 n.6. If the MTSA had actually abolished the interstate/intrastate distinction, as the Attorney General claims, the Legislature would not have retained that distinction with respect to some interstate services. The only explanation the Attorney General has offered is that the Legislature wanted to proceed "cautious[ly]" by taxing only those services that the MTSA clearly authorized it to tax. *See* Resp. App. Div. Br. 40. That is clearly wrong. The Attorney General has provided no support for his suggestion that the MTSA clearly authorized the state to tax only *voice* services. Nor has he provided any

[11] *See, e.g.*, Ariz. Rev. Stat. Ann. § 42-5064(A) (2014) (imposing "[t]ransaction privilege" tax on "the business of providing *intrastate* telecommunications services"); Utah Code Ann. § 59-12-103(1)(b)(ii) (2014) (imposing sales tax on "mobile telecommunications service that *originates and terminates within the boundaries of one state*").

other plausible explanation for his reading of section 1105(b)—further confirmation that his reading cannot be correct.

D. The Department of Taxation and Finance's Regulations Further Confirm That Interstate Voice Service Sold By A Mobile Provider As Part Of A Fixed Monthly Charge Is Not Taxable

The regulations promulgated by the Department of Taxation and Finance also confirm that section 1105(b) does not impose sales tax on interstate voice service when sold by a mobile provider as part of a fixed monthly charge. The pertinent regulation states, without qualification, that "[t]he provisions of section 1105(b) of the Tax Law with respect to telephony and telegraphy and telephone and telegraph service impose a tax on receipts from *intrastate* communication by means of devices employing the principles of telephony and telegraphy." N.Y. Comp. Codes R. & Regs. tit. 20, § 527.2(d)(1).

Although that regulation was promulgated before the enactment of section 1105(b)(2) in 2002, the Department of Taxation and Finance did not amend the regulation, or issue an additional regulation separately addressing section 1105(b)(2), in the wake of its enactment. If section 1105(b)(2) had in fact eliminated the longstanding exclusion for interstate telecommunications services, as the Attorney General claims, one would expect the Department to have modified its regulations accordingly. The Department did not do so

and has not done so to this day—even after the Attorney General commenced this litigation.

E. The Attorney General's Contrary Interpretation Of Section 1105(b) Is Erroneous

The Attorney General's interpretation of section 1105(b) ignores the plain language of that provision, reads words into the statutory text, and relies on non-binding and unpersuasive agency guidance.

1. Rather than trying to reconcile his interpretation of paragraph (b)(2) with the paragraphs that surround it, the Attorney General has attempted to dismiss those paragraphs as irrelevant, first, by arguing that paragraph (b)(2) "stands alone," and second, by straining to construe those paragraphs in a manner consistent with his erroneous interpretation of paragraph (b)(2). R104; *see also* Resp. App. Div. Br. 41-42. That approach flouts the bedrock principle of statutory construction that a statute is to be construed as a whole, *see* pp. 22-23, *supra*, and fails to give effect to the plain meaning of the statutory text, *see* p. 21, *supra*.

For example, the Attorney General argued to the courts below that paragraph (b)(1)(B), including its exclusion of interstate telecommunications services, has no application at all to mobile telecommunications services sold as part of a fixed monthly charge. Resp. App. Div. Br. 9; R104-105. But the language on which the Attorney General relied—the final clause of paragraph (b)(1)(B), which states that the tax in that paragraph does not apply to

"any telecommunications service the receipts from the sale of which are subject to tax under [paragraph (b)(2)]," N.Y. Tax Law § 1105(b)(1)(B)—merely makes clear that services covered by both provisions are not subject to double taxation. Because interstate telecommunications services are excluded from taxation under paragraph (b)(1)(B), and because that exclusion is expressly incorporated in paragraph (b)(2), it necessarily follows that interstate voice service is not subject to tax under paragraph (b)(2).

In the Appellate Division, the Attorney General similarly attempted to dismiss paragraph (b)(3) as irrelevant by arguing that it addresses only the situation where "mobile telecommunications services are *not* sold for a fixed periodic charge, or the services are *not* 'voice services.'" Resp. App. Div. Br. 41 (emphasis in original). That limitation, however, appears nowhere in the text of paragraph (b)(3), which plainly states, without qualification, that the "tax imposed pursuant to this subdivision"—*i.e.*, section 1105(b) in its entirety—"is imposed on receipts from *charges for intrastate mobile telecommunications service*." N.Y. Tax Law § 1105(b)(3).

2. As to paragraph (b)(2) itself, the Attorney General's interpretation again would read words into the statute. In the complaint, the Attorney General asserted that paragraph (b)(2) "unequivocally imposes sales taxes on the *entire amount* of fixed monthly charges for wireless voice services" and "requires the payment of sales taxes on the *full amount* of fixed periodic

charges for wireless voice services." R60 (¶ 4); R66 (¶ 33) (second emphasis in original). But one searches the statutory text in vain for the phrases "entire amount" and "full amount." Paragraph (b)(2) provides only that certain services "sold for a fixed periodic charge" and "not separately stated" are subject to being taxed—not that every cent of that charge is taxable. N.Y. Tax Law § 1105(b)(2).

The Attorney General argued to the courts below that, as a matter of logic, paragraph (b)(2) must impose tax on the entire amount of the fixed monthly charge because that charge is actually for "access to the calling network, not for specific calls." R103; *see also* Resp. App. Div. Br. 43. Section 1105(b), however, says nothing about "access" charges; it speaks in terms of "telephony" and explicitly excludes "interstate" telephony from taxation. The Attorney General conceded in the complaint that Sprint determines the portion of its flat-rate charge that is attributable to "interstate" service and excludes that portion from taxation. R70 (¶ 44); R75-76 (¶¶ 67, 71-72). The Attorney General thus cannot avoid the question presented here—*viz.*, whether section 1105(b) imposes sales tax on interstate voice services sold as part of a fixed monthly charge—merely by relabeling that charge an "access" charge.

3. The Attorney General's only argument regarding the actual text of section 1105(b)(2) rests on a single punctuation mark. The Attorney Gen-

eral argued to the courts below that section 1105(b)(2) unambiguously imposes sales tax on mobile voice services because the Legislature included a comma and the word "or" between "voice services" and "any other services that are taxable under [paragraph (b)(1)(B)]." Resp. App. Div. Br. 38 (internal quotation marks omitted); *see also* R107. Not surprisingly, that comma—and the matching comma after "that are taxable under [paragraph (b)(1)(B)]"—cannot bear the weight the Attorney General places on them. The commas merely serve to separate the first requirement for taxation under paragraph (b)(2) (that the services are taxable under paragraph (b)(1)(B)) from the second (that the services are sold for a fixed periodic charge). Were it not for those commas, the sentence would be ungrammatical, and indeed incomprehensible, as the following modified version of paragraph (b)(2) illustrates:

> (2) The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, that are voice services[] or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision[] sold for a fixed periodic charge (not separately stated), whether or not sold with other services.

N.Y. Tax Law § 1105(b)(2) (commas omitted).

Whatever can be said about those commas, they cannot be said to demonstrate *unambiguously* that the Legislature intended to repeal, for mobile voice services sold for a fixed monthly charge, the unqualified, dec-

ades-old exclusion of interstate telecommunications service from sales tax. If that had been the Legislature's intention, it would have said so in so many words, as it did elsewhere in the Tax Law. *See* p. 25, *supra*.

By far the more natural reading of paragraph (b)(2) is that the requirement that the services be taxable under paragraph (b)(1)(B) applies to all types of mobile telecommunications service, whether voice or non-voice. At the very least, the Attorney General is hard pressed to argue that the mere presence of the commas unambiguously supports the contrary reading—in a context in which, pursuant to well-established rules of statutory construction, any ambiguity should redound to Sprint's benefit.

4. Finally, the Attorney General relied in the courts below on a post-enactment memorandum issued by the Department of Taxation. *See* Resp. App Div. Br. 12-13 (citing Department of Taxation and Finance, Office of Tax Policy Analysis, Technical Services Division, *Amendments Affecting the Application of the Sales and Use Tax and Excise Tax Imposed on Mobile Telecommunications Service*, Memorandum No. TSB-M-02(4)C (July 30, 2002) (Department Memorandum)); R109-110 (same). That memorandum carries no weight here for two reasons.

First, the memorandum expresses the Department's views on a question of pure statutory interpretation and thus is entitled to no formal judicial deference. *See Matter of Belmonte* v. *Snashall*, 2 N.Y.3d 560, 565-566 (2004);

Debevoise, 80 N.Y.2d at 664; *SIN, Inc.* v. *Department of Finance*, 71 N.Y.2d 616, 620 (1988). Deference would be particularly inappropriate here given that the Department was interpreting a tax statute, which must be "construed most strongly against the government and in favor of the citizen." *Matter of Carey Transportation, Inc.* v. *Perrotta*, 34 A.D.2d 147, 149 (1st Dep't 1970) (internal quotation marks and citation omitted), *aff'd*, 29 N.Y.2d 814 (1971). Consistent with that principle, memoranda issued by the Department of Taxation are merely advisory in nature; they "do not have legal force or effect, do not set precedent and are not binding." N.Y. Comp. Codes R. & Regs. tit. 20, § 2375.6(c); *see also Lorillard Tobacco Co.* v. *Roth*, 99 N.Y.2d 316, 322-323 (2003). Indeed, courts and administrative tribunals routinely reject agency interpretations of tax statutes, including interpretations of the very statute at issue here. *See, e.g.*, *Debevoise*, 80 N.Y.2d at 661.[12]

Second, the memorandum here is hardly persuasive even on its own terms. It summarily concludes that "the total charge for a given number of

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[12] *See also Empire State Building Co.* v. *Department of Taxation and Finance*, 185 A.D.2d 201, 201 (1st Dep't 1992) (rejecting Department's interpretation of section 1105(b)), *aff'd*, 81 N.Y.2d 1002 (1993); *Compass Adjusters & Investigators, Inc.* v. *Commissioner of Taxation & Finance*, 197 A.D.2d 38, 42 (3d Dep't 1994); *Matter of Stuckless*, DTA No. 819319, 2006 WL 2468525, at *17 (N.Y. Tax. App. Trib. Aug. 17, 2006); *Matter of 244 Bronxville Associates*, DTA Nos. 814542 & 815566, 1999 WL 417891, at *13 (N.Y. Tax. App. Trib. June 10, 1999); *Matter of Birds Eye Foods, Inc.*, DTA No. 822701, 2010 WL 1539166, at *6-*7 (N.Y. Div. Tax. App. Apr. 8, 2010).

minutes of air time that may be used for voice transmission is subject to sales tax under new section 1105(b)(2)." Department Memorandum 3. The memorandum then asserts, again without elaboration, that the monthly amount charged for a flat-rate calling plan is "subject to sales tax under section 1105(b)(2) of the Tax Law, regardless of whether the calls made under the plan were intrastate, interstate, or international calls." *Id.* The memorandum does not engage in any analysis of the statutory text, much less explain why interstate voice service is not excluded from taxation under paragraph (b)(2) given that provision's express incorporation of paragraph (b)(1)(B). Nor does the memorandum address whether interstate voice service would still be taxable under paragraph (b)(2) if the provider were to unbundle identifiable charges for such calls according to its books and records, as allowed by federal law, *see* 4 U.S.C. § 123(b). As a result, even if deference were warranted in this context, the memorandum contains no analysis to which deference could be given. Because the statutory text does not unambiguously support the interpretation contained in the memorandum and advanced by the Attorney General in this litigation, that interpretation should be rejected.

F. The Lower Courts Erred In Concluding That The Complaint Alleges A Violation Of The Tax Law

In accepting the Attorney General's interpretation of section 1105(b) and permitting his claims to proceed, the Appellate Division offered no anal-

ysis. In the decision that the Appellate Division summarily affirmed, the Supreme Court offered little more—and what analysis it did offer was seriously flawed.

While purporting to construe the statute as a whole, the Supreme Court relied entirely on paragraph (b)(2) and concluded, without elaboration, that "nothing in the plain language of Tax Law §§ 1105(b)(1) or (b)(3) addresses plaintiff's allegations that Sprint knowingly avoided New York sales taxes on the sale of mobile telecommunications services for a fixed monthly recurring access charge." R14. As to paragraph (b)(2), the court failed even to acknowledge Sprint's argument that paragraph (b)(2) expressly incorporates the exception in paragraph (b)(1)(B) for interstate telecommunications services—much less to explain why that argument was unavailing. Instead, the court concluded, again without elaboration, that section 1105(b)(2) "unambiguous[ly]" imposes sales tax "on receipts from every sale of mobile telecommunications services . . . that are voice services sold for a fixed periodic charge." R13-14.

In addition, the Supreme Court plainly erred when it concluded that section 1111(*l*), the provision addressing certain "bundled" services, "expressly requires mobile telecommunications providers to collect and pay state sales taxes on mobile telecommunications services included in a fixed periodic charge." R15. Section 1111(*l*) addresses only certain enumerated

mobile telecommunications services that *do not* include interstate voice services. *See* pp. 13-14, *supra*. Thus, even if the court were correct that section 1111(*l*) separately imposes a tax, that provision plainly does not impose a tax on interstate voice services.

In sum, section 1105(b) excludes from taxation interstate voice service sold by mobile providers as part of a fixed monthly charge. At the very least, it is ambiguous whether the Legislature intended to impose sales taxes on that service when it enacted section 1105(b)(2), given that interstate voice service had been excluded from taxation for more than three decades. The Appellate Division erred by affirming the Supreme Court's holding that section 1105(b)(2) unambiguously compelled the contrary conclusion, and the Appellate Division's order should therefore be reversed.

II. THE ATTORNEY GENERAL'S INTERPRETATION OF THE TAX LAW, IF CORRECT, WOULD BE PREEMPTED BY THE FEDERAL MTSA

Under the Attorney General's interpretation of the Tax Law, interstate voice services that are sold as part of a fixed monthly charge and not separately stated on a customer's bill would be subject to tax under section 1105(b)(2), and mobile providers would not be allowed to unbundle those charges under section 1111(*l*)(2). As a result, New York consumers would be required to pay tax on interstate mobile voice services despite the clear and undisputed exclusion of interstate voice services from sales tax in section

1105(b)(1)(B). If that interpretation were correct, New York law would be preempted by the "unbundling" provision of the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. § 123(b).

The principles governing the preemption analysis here are familiar. Federal law may preempt state law "by express provision, by implication, or by a conflict between federal and state law." *Lee* v. *Astoria Generating Co.*, 13 N.Y.3d 382, 391 (2009) (internal quotation marks and citation omitted). "[I]n order for conflict preemption to apply, the activity that is forbidden by state law need not be required by federal law; it is sufficient that the activity that state law prohibits is federally authorized." *Pacific Capital Bank, N.A.* v. *Connecticut*, 542 F.3d 341, 351-352 (2d Cir. 2008).

Here, it could not be clearer that the Attorney General's interpretation of New York law would give rise to a conflict warranting preemption. In relevant part, the MTSA provides as follows:

> If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation *unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business*.

4 U.S.C. § 123(b). As noted above, *see* p. 11, one of Congress's goals in enacting the MTSA was to provide customers with simpler billing statements.

Section 123(b) furthers this goal by providing that states may not transform a non-taxable mobile telecommunications service into a taxable one simply because the provider has not stated the non-taxable charge separately on a customer's bill. As long as the provider unbundles and can account for that service in its books and records, it remains non-taxable.

The Attorney General's interpretation of New York law would impose precisely such a prohibited burden on mobile providers. It is undisputed that, if Sprint were separately to state the charge for the interstate portion of its flat-rate plans on a customer's bill, that charge would be excluded from sales tax under section 1105(b)(1)(B).[13] Under the Attorney General's interpretation, such services become taxable only when they are sold by a mobile provider as part of a fixed monthly charge *and without a separate line item on the customer's bill*. In other words, according to the Attorney General, the taxability of interstate voice services turns on whether those services are "aggregated with and not separately stated from charges that are subject to taxation." 4 U.S.C. § 123(b).

[13] The Attorney General stated to the Supreme Court that section 1105(b)(1)(B) applies to interstate mobile telecommunications services, "except where it carves them out and they are addressed in (b)(2)." R105 n.6. But paragraph (b)(2) addresses only services that are "sold for a fixed periodic charge (not separately stated)." N.Y. Tax Law § 1105(b)(2).

That is precisely what the MTSA prohibits. The MTSA does not allow a state to tax otherwise non-taxable services that are aggregated with and not separately stated from taxable services unless mobile providers are allowed to unbundle the non-taxable charges to protect them from taxation. *See id.* The Attorney General's claim that New York prohibits mobile providers from unbundling otherwise non-taxable interstate voice services, *see* Resp. App. Div. Br. 39; R110-111, is simply irreconcilable with the MTSA.

The Attorney General argued to the Appellate Division that there is "no possible conflict" between his interpretation of the Tax Law and the MTSA because "there is no non-taxable 'interstate' voice services component to 'unbundle' or disaggregate." Resp. App. Div. Br. 47; *see also* R110-111. In so contending, however, the Attorney General contradicts his own interpretation of the Tax Law. Even in the Attorney General's view, interstate mobile voice services are non-taxable in two circumstances: (1) when they are sold individually or (2) when they are sold for a fixed monthly charge but separately stated. *See* R105 n.6. According to the Attorney General, those services become taxable *only* when they are sold for a fixed monthly charge without a separate statement of the charge on the customer's bill. For that reason, interstate voice services are clearly "otherwise non-taxable" services that a mobile provider is allowed to unbundle under the MTSA.

The Supreme Court rejected Sprint's preemption argument on the ground that "[t]here is no apparent conflict between the MTSA and Tax Law § 1111(*l*)," the state-law provision concerning the taxation of certain bundled services. R16. That misses the point. Sprint's preemption argument was not premised principally on section 1111(*l*). Instead, Sprint argued that "[t]he [c]omplaint's interpretation of New York law" more generally—including its interpretation of section 1105(b)—was preempted by the MTSA. R48. The Supreme Court entirely failed to address that argument.

Compounding its error, the Supreme Court based its conclusion that there was no conflict between section 1111(*l*) and the MTSA—a conclusion that the Appellate Division summarily affirmed—on the premise that New York "subject[s] aggregated mobile telecommunications charges to taxation" and the MTSA only applies to "jurisdictions that do not otherwise subject aggregated mobile telecommunications services to taxation." R16. That reasoning, however, reflects a fundamental misunderstanding of both the MTSA and the New York Tax Law.

As to the MTSA: nothing in that statute limits its reach to states that do *not* subject aggregated charges for mobile telecommunications services to taxation, as the Supreme Court's opinion suggests. Indeed, the whole point of the MTSA's "unbundling" provision is to ensure that, in states that *do* impose tax on otherwise non-taxable services when they are aggregated with

and not separately stated from taxable charges, mobile providers can unbundle the non-taxable services so that they remain non-taxable. The Supreme Court's overly narrow interpretation of the MTSA's "unbundling" provision would completely undermine that goal.

As to the Tax Law: contrary to the Supreme Court's assertion, New York does not subject "aggregated" mobile telecommunications services to taxation. Even under the Attorney General's flawed reading of section 1105(b)(2), services that are bundled and sold "for a fixed periodic charge" are taxable *only* when they are "not separately state[d]." R102. Under that reading, therefore, the taxability of interstate voice services under New York law would turn on whether the charge is separately stated on a customer's bill—giving rise to a direct conflict with the MTSA.[14]

In an attempt to avoid Sprint's argument about preemption, the Attorney General alternatively argued to the courts below that, even if Sprint is allowed to unbundle charges for interstate voice services, Sprint nonetheless violated the MTSA or the Tax Law by failing to satisfy section 1111(*l*)(2)'s requirements in how it went about unbundling those charges. *See* Resp. App. Div. Br. 44-45; R111 n.12. That argument, however, is nothing short of an effort retroactively to amend the complaint and should be rejected on that

[14] Section 1111(*l*) cannot remedy that conflict, because it does not address voice services. *See* N.Y. Tax Law § 1111(*l*)(2).

basis. All of the Attorney General's claims are based on the theory that New York flatly prohibited Sprint from unbundling any charges for interstate voice services. *See* R69-70 (¶¶ 42-43).

III. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE NEW YORK FALSE CLAIMS ACT

Regardless of whether Sprint violated the Tax Law, the Appellate Division erred by permitting the Attorney General's claim under the New York False Claims Act to proceed. Sprint's interpretation of the Tax Law was objectively reasonable—and, for that reason, Sprint did not make any knowingly false statements within the scope of the FCA, even if that interpretation were incorrect. At the very least, the Ex Post Facto Clause of the federal Constitution bars the application of the FCA to allegedly false statements made before August 13, 2010, when the statute took effect.

A. The Attorney General's FCA Claim Fails As A Matter Of Law Because Sprint's Interpretation Of Section 1105(b) Was Objectively Reasonable

To state a claim under the FCA, the Attorney General must establish that Sprint made a knowingly false statement. As a matter of law, however, Sprint's statements were not knowingly false because they were based on an objectively reasonable interpretation of section 1105(b).

1. The FCA Punishes Only Knowingly False Statements

The FCA imposes treble damages and penalties on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government." N.Y. State Fin. Law § 189(1)(g). The complaint alleges that Sprint violated the FCA by submitting tax returns that, because of Sprint's unbundling of interstate voice services, misstated the amount of sales tax owed to the State. R82-83 (¶¶ 95-101); R85 (¶¶ 111-113).

In order to prevail on that claim, the Attorney General must show not only that Sprint actually misstated the amount of sales tax owed, but that it did so "knowingly": that is, that Sprint "(i) ha[d] actual knowledge of the information; (ii) act[ed] in deliberate ignorance of the truth or falsity of the information; or (iii) act[ed] in reckless disregard of the truth or falsity of the information." N.Y. State Fin. Law § 188(3)(a). It is not sufficient to show that Sprint acted "by mistake or as a result of mere negligence." *Id.* § 188(3)(b). As one court has stated concerning the federal False Claims Act, which is materially identical in this respect,[15] a false-claims statute is "not an appropriate vehicle" for policing compliance with statutes and regulations;

[15] New York's FCA is "closely modeled on the federal [False Claims Act]" and is therefore construed consistently with that statute. *United States ex rel. Pervez* v. *Beth Israel Medical Center*, 736 F. Supp. 2d 804, 816 (S.D.N.Y. 2010); *accord State ex rel. Seiden* v. *Utica First Insurance Co.*, 96 A.D.3d 67, 71 (1st Dep't 2012).

rather, it is a "fraud prevention statute" that imposes liability only for knowing lies. *United States ex rel. Ramadoss* v. *Caremark Inc.*, 586 F. Supp. 2d 668, 691 (W.D. Tex. 2008) (internal quotation marks and citation omitted), *aff'd in part and rev'd in part*, 634 F.3d 808 (5th Cir. 2011).

2. Sprint's Tax Returns Were Not Knowingly False Because Sprint's Interpretation Of Section 1105(b) Was At Least Objectively Reasonable

Should this Court agree with Sprint about the correct interpretation of section 1105(b), the Attorney General's remaining FCA claim would obviously fail. But even if the Court were to adopt the Attorney General's contrary interpretation, it should still order dismissal of the FCA claim, because Sprint's interpretation of section 1105(b) was not objectively unreasonable—and, for that reason, the statements on its tax returns were not knowingly false.

The United States Supreme Court's decision in *Safeco Insurance Co.* v. *Burr*, 551 U.S. 47 (2007), is illustrative. *Safeco* involved a claim under the Fair Credit Reporting Act (FCRA)—a statute that, like the New York False Claims Act, requires the defendant to have acted knowingly or recklessly. *Cf.* 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 2.06[C], at 2-293 (4th ed. 2013) (noting that the FCRA's "intent standard was essentially the same as that in the [federal] FCA"). Relying on the common law, the Court held that, in order to establish that a defendant recklessly violated a

statute, a plaintiff must show that a defendant's reading of the statute was so objectively unreasonable that it raised an "unjustifiably high risk" that the defendant's conduct violated it. *Safeco*, 541 U.S. at 70 (internal quotation marks omitted). Although the Court disagreed with the defendant's interpretation of the underlying statute in that case, it nevertheless concluded that the defendant did not knowingly or recklessly violate the statute, in light of the "less-than-pellucid statutory text" and lack of binding judicial or agency guidance. *Id.* The Court explained that, where there is more than one reasonable interpretation of the statute, "it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Id.* at 70 n.20.

In the context of the federal False Claims Act, courts have consistently recognized that, when an asserted false claim relates to a failure to meet an obligation imposed by a statute, a plaintiff must show that "there is no reasonable interpretation of the law that would make the allegedly false statement true." *United States ex rel. Hixson* v. *Health Management Systems, Inc.*, 613 F.3d 1186, 1191 (8th Cir. 2010). In *Hixson*, the relator alleged that the defendants had violated the federal False Claims Act by failing to seek reimbursement from health-care providers for certain expenses. *Id.* at 1187. The Eighth Circuit affirmed dismissal of the claim, holding that "the relators ha[d] not stated a claim under the [federal False Claims Act]" because "there

[was] a reasonable interpretation of the law that d[id] not obligate the defendants to seek reimbursement." *Id.* at 1191.

As discussed above, Sprint's interpretation of section 1105(b) is substantively correct, especially because any ambiguity in that statute must be construed in Sprint's favor. At a minimum, however, Sprint's interpretation was objectively reasonable at the time Sprint submitted the tax returns at issue. At that time, no court had considered whether section 1105(b) required the payment of sales tax on interstate voice service sold by a mobile provider as part of a fixed monthly charge, and what little agency guidance existed on the issue was non-binding. *See* pp. 36-37, *supra*. As a New York federal court recently recognized in dismissing a parallel shareholder derivative action for failure to allege that Sprint's directors knowingly caused the company to violate New York law, Sprint was interpreting "murky legal concepts" involving an "unsettled question of law." *Louisiana Municipal Police Employees' Retirement System* v. *Hesse*, 962 F. Supp. 2d 576, 589 (S.D.N.Y. 2013).

Notably, Sprint was not the only mobile telecommunications provider that failed to collect sales tax from its New York customers on interstate mobile voice services sold as part of a fixed monthly charge. The Division of Tax Appeals recently issued an opinion arising out of an audit of a mobile provider, Helio, for failing to collect such tax. *See Matter of Helio, LLC*,

DTA No. 825010, 2014 WL 2809222 (N.Y. Div. Tax App. June 12, 2014). That opinion found that Helio and another provider, Virgin Mobile, "[had] separately identified portions of fixed monthly charges attributable to interstate wireless voice service and did not charge New York sales tax thereon." *Id.* at *6.[16] Although the Division ultimately upheld the tax assessment against Helio in relevant part (based largely on the Supreme Court's erroneous decision in this case), the decision of the Department of Taxation and Finance to impose minimum interest on Helio because it had "reasonable cause" for failing to collect the tax further supports the reasonableness of Sprint's interpretation. *Id.* at *9.[17] So too does the fact that at least two other mobile telecommunications service providers interpreted the New York Tax Law in the same manner as Sprint.

In sum, because Sprint's interpretation of the Tax Law is at least objectively reasonable, the Attorney General's remaining FCA claim fails as a

[16] Although Sprint now owns both Helio and Virgin Mobile, the tax practices at issue pre-dated Sprint's acquisition.

[17] The Department of Taxation and Finance imposes minimum interest only when "a person required to collect tax can establish that the failure or delay to file a return or to pay or pay over any tax was due to reasonable cause and not due to willful neglect." N.Y. Comp. Codes R. & Regs. tit. 20, § 536.1(c). Thus, even the department that issued the non-binding guidance memorandum on which the Attorney General so heavily relies considered Helio's position reasonable.

matter of law. The Appellate Division erred when it permitted that claim to go forward.[18]

3. ***The Attorney General's Position Concerning The FCA's Knowledge Requirement Is Legally Erroneous And Deeply Troubling For New York Taxpayers***

Remarkably, the Attorney General argued to the lower courts that Sprint's interpretation was unreasonable simply because two employees of the Department of Taxation and Finance told it so. *See* Resp. App. Div. Br. 29; R114. Under that extraordinary reasoning, the government could impose treble damages and penalties under the FCA any time it wished simply by having an auditor take a taxpayer-adverse position on the interpretation of a statute and inform the defendant of that view. The government could there-

[18] The Attorney General argued to the courts below that Sprint's subjective views regarding the meaning of the Tax Law are relevant to the knowledge inquiry. *See* Resp. App. Div. Br. 21, 27-28; R113. That argument is squarely foreclosed by *Safeco*. There, the United States Supreme Court rejected as "unsound" the notion that "evidence of subjective bad faith can support a willfulness finding even when the company's reading of the statute is objectively reasonable." 551 U.S. at 70 n.20. In any event, the complaint does not support the Attorney General's attempts to paint Sprint as a knowing or reckless tax evader. At most, the complaint alleges that Sprint knew its approach to unbundling was "aggressive" and "risky." *See* R70 (¶ 45); R73 (¶ 57). It is undisputed, however, that the tax Sprint was allegedly required to pay was a pass-through sales tax that would ultimately have been borne by Sprint's customers, not Sprint itself. *See, e.g.*, Resp. App. Div. Br. 12 (alleging that Sprint "failed to *collect* and pay sales tax"). And Sprint did not hide its taxing practices from New York authorities: the complaint itself alleges that a Department field auditor "informed [Sprint] of the illegality of [its] practice" as early as 2009. R81 (¶ 94).

by use the threat of treble damages to force parties to capitulate to its views on issues of first impression involving the Tax Law, depriving parties of the opportunity to have those issues litigated by the courts. That possibility is both legally erroneous and deeply troubling for New York taxpayers. Regulatory agencies are not the arbiters of truth—especially the Department of Taxation and Finance, whose non-binding opinions on the interpretation of a tax statute and on the amount of taxes it is owed are entitled to no deference as a matter of law. *See Debevoise*, 80 N.Y.2d at 664.

The Attorney General has never disputed Sprint's arguments in this regard. Instead, the Attorney General argued to the Appellate Division that it would be reckless for a taxpayer to "assume . . . that a court will ultimately reject" the non-binding interpretation of the Department of Taxation and Finance and to proceed without "seeking any form of ruling rejecting the guidance." Resp. App. Div. Br. 31. Under that reasoning, however, an agency's non-binding interpretation would effectively become binding, absent the procedural safeguards afforded by rulemaking, *see, e.g.*, N.Y. State Administrative Procedure Act § 202, allowing the Department to quash disagreements with its tax positions simply by threatening to sue. Contrary to the Attorney General's suggestion, New York taxpayers are not required either to seek the Department's permission before acting inconsistently with an agency's non-binding interpretation, or to challenge that interpretation

administratively. If entities such as Sprint that collect and remit taxes were required to take such measures in each of the thousands of state and local taxing jurisdictions in which they operate, the delays and costs of compliance would be extraordinary.

4. The Lower Courts Erred In Concluding That The Complaint States A Claim Under The FCA

In denying Sprint's motion to dismiss the FCA claim, the Supreme Court concluded that the complaint had adequately pleaded a violation of the FCA because it "allege[d] at length that Sprint realized that their approach to unbundling was aggressive and risky, and that their decision to unbundle was motivated by a desire to gain a competitive advantage over other wireless carriers." R16. Even taking those allegations as true, adopting an aggressive tax position is a far cry from knowingly or recklessly making false statements on tax returns. *See Hesse*, 962 F. Supp. 2d at 590 (reasoning that Sprint's adoption of an aggressive tax strategy "is not clear evidence of misconduct").

In concluding that the complaint had adequately pleaded a violation of the FCA, the Supreme Court failed to address Sprint's argument that the Attorney General could not state a claim under the FCA because Sprint's interpretation of the Tax Law was objectively reasonable. Instead, the court summarily concluded that "[t]he criterion on a motion to dismiss is whether the proponent of the pleading has a cause of action." R16-17. True enough,

but the question whether Sprint's interpretation of the Tax Law was objectively reasonable (and therefore whether the Attorney General has a cause of action) is a question of law—one that the court was required to consider, and resolve, at the motion-to-dismiss stage. Because Sprint's interpretation was plainly objectively reasonable—even assuming, *arguendo*, that it was ultimately incorrect—the Appellate Division erred by summarily affirming the Supreme Court's decision permitting the Attorney General's remaining FCA claim to go forward.

B. The Ex Post Facto Clause Bars Liability Under The FCA For Allegedly False Statements Made Before August 13, 2010

The Ex Post Facto Clause of the federal Constitution, U.S. Const. Art. I, § 9, cl. 3, prohibits a state from enacting laws that punish conduct that was not unlawful at the time it occurred. *See Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). The Legislature did just that, however, when it amended the FCA to make it retroactively applicable to false statements in tax returns. Accordingly, even if this Court determines that New York law unambiguously taxes interstate voice service sold by a mobile provider as part of a fixed monthly charge; that such an interpretation is not preempted by the MTSA; and that Sprint's contrary interpretation is not objectively reasonable, it nevertheless should dismiss the remaining FCA claim to the extent it is based on statements made before August 13, 2010—the effective date of the FCA amendment.

1. The FCA Imposes Punishment And Therefore Triggers The Ex Post Facto Clause

As originally enacted, the New York FCA did "not apply to claims, records, or statements made under the tax law." N.Y. State Fin. Law § 189(4) (Supp. 2008). On August 13, 2010, Governor Paterson signed into law an amendment that removed the word "not," thereby allowing FCA claims based on statements in tax returns. *See* Ch. 379, § 3, 2010 N.Y. Laws 1160, 1162. The amendment sought to apply this change retroactively to statements made "prior to . . . April 1, 2007." *Id.* § 13, 2010 N.Y. Laws at 1165.

The Ex Post Facto Clause is implicated both by criminal laws and by civil laws that are intended to punish. *See Smith* v. *Doe*, 538 U.S. 84, 92 (2003). A civil law is "intended to punish" if "the statutory scheme is 'so punitive either in purpose or effect as to negate the State's intention' to deem it 'civil.'" *Id.* (alteration omitted) (quoting *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980)). To determine if a civil law is sufficiently punitive to trigger the Ex Post Facto Clause, courts look for guidance to the factors set out by the United States Supreme Court in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). *See Doe*, 538 U.S. at 97.

Under *Mendoza-Martinez*, a court must consider whether the sanction at issue (1) "involves an affirmative disability or restraint"; (2) "has historically been regarded as a punishment"; (3) "comes into play only on a finding of *scienter*"; (4) "will promote the traditional aims of punishment—

retribution and deterrence"; (5) applies to behavior that "is already a crime"; (6) "may rationally be connected" to "an alternative purpose"; and (7) "appears excessive in relation to the alternative purpose." 372 U.S. at 168-169.

At least five of those factors support the conclusion that the FCA is "punitive either in purpose or effect." *Ward*, 448 U.S. at 249. The Supreme Court correctly determined that the FCA's sanctions are "excessive in relation to the alternative purpose assigned," given that the FCA's treble damages go far beyond any realistic compensatory purpose. R20. But it erred with respect to four other factors, as discussed below.

a. Decisions of this Court and the United States Supreme Court, as well as the FCA's statutory structure, leave no doubt that the FCA's penalties have historically been regarded as punishment under the second *Mendoza-Martinez* factor. This Court recently characterized the sanctions imposed by the FCA as punitive. *See State ex rel. Grupp* v. *DHL Express (USA), Inc.*, 19 N.Y.3d 278, 286-287 (2012). In *Grupp*, this Court rejected the notion that the FCA merely "redress[es] the harm actually suffered" or "compensat[es] the State." *Id.* Instead, this Court ruled that the FCA seeks solely to "*punish* and consequently deter . . . future conduct" and "evinces a . . . *punitive goal* of deterring fraudulent conduct against the State." *Id.*[19]

[19] The question in *Grupp* was whether FCA claims were subject to the market-participant exception to preemption, not whether the imposition of liability under the FCA would violate the Ex Post Facto Clause. In deter-

This Court's decision in *Grupp* is consistent with decisions of the United States Supreme Court, which has long held that treble damages are generally punitive. The Supreme Court has observed that the "very idea of treble damages reveals an intent to punish past, and deter future, unlawful conduct." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). Consistent with that proposition, the Supreme Court has approvingly cited the suggestion that "retroactive application of punitive treble damages provisions . . . would present a potential *ex post facto* problem." *Landgraf* v. *USI Film Products*, 511 U.S. 244, 281 (1994) (internal quotation marks and citation omitted). With specific reference to the federal False Claims Act, moreover, the Court has held that, while that statute's treble-damages provision has some "compensatory traits," treble damages maintain a "punitive character." *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 130 (2003); *accord Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000).[20] This Court relied on those

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mining that the market-participant exception was not applicable "[i]n light of the FCA's regulatory effect," this Court squarely held that the sanctions imposed by the FCA are, in fact, punitive. *Grupp*, 19 N.Y.3d at 287.

[20] New York's FCA imposes even harsher sanctions than the federal False Claims Act because it expressly permits the recovery of "three times the amount of all damages, *including consequential damages.*" N.Y. State Fin. Law § 189(1)(h).

decisions in characterizing the sanctions imposed by the New York FCA as punitive. *See Grupp*, 19 N.Y.3d at 287.

b. The third *Mendoza-Martinez* factor—whether the statute contains a scienter requirement—also weighs in favor of a determination that the FCA imposes punishment. The FCA prohibits "*knowingly* mak[ing or] us[ing] . . . a false record or statement." N.Y. State Fin. Law § 189(1)(g). "Scienter" is the Latin word for "knowingly," *see Oxford Latin Dictionary* 1703 (1982), and means "[a] degree of knowledge that makes a person legally responsible," whether in the civil or criminal context. *Black's Law Dictionary* 1547 (10th ed. 2014). Thus, the FCA plainly "comes into play only on a finding of scienter." *Mendoza-Martinez*, 372 U.S. at 168.

c. The next *Mendoza-Martinez* factor—whether the FCA's sanctions "promote the traditional aims of punishment—retribution and deterrence," 372 U.S. at 168—has already been effectively resolved by this Court. As discussed above, in *Grupp*, this Court determined that the FCA's sanctions were intended to "punish" and to "deter . . . future conduct," thereby "evinc[ing] a . . . punitive goal." 19 N.Y.3d at 286-287.

d. The FCA also satisfies the fifth *Mendoza-Martinez* factor, because its sanctions apply to behavior that "is already a crime." 372 U.S. at 168. New York's criminal tax statute, N.Y. Tax Law § 1804, punishes actions similar to those proscribed by the FCA. When a nominally civil law applies

to behavior that the Legislature already has decided to punish as a crime, it suggests that the "civil" law is actually punitive. *See Mendoza-Martinez*, 372 U.S. at 168 (citing *United States* v. *La Franca*, 282 U.S. 568, 572-573 (1931)).

2. The Ex Post Facto Clause Bars Retroactive Application Of The FCA

In sum, five of seven factors show that the FCA is punitive "in purpose or effect." The FCA (1) imposes sanctions historically regarded as "punishment"; (2) contains a scienter requirement; (3) promotes the traditional aims of punishment; (4) penalizes conduct that is already criminal; and (5) imposes sanctions that are excessive in relation to the sole alternative purpose to which they rationally relate. Under the framework established by the United States Supreme Court in *Mendoza-Martinez*, the FCA imposes punishment and therefore triggers the Ex Post Facto Clause.[21]

[21] A federal district court in California has held that New York's FCA is sufficiently punitive to trigger the Ex Post Facto Clause. *See United States ex rel. Hendrix* v. *J-M Manufacturing Co.*, Civ. No. 06-55, Dkt. 258-1, at 11-18 (C.D. Cal. Sept. 2, 2010) (attached as Addendum C). Other courts have reached the same result with respect to the federal and other state false-claims statutes. *See United States* v. *Hawley*, 812 F. Supp. 2d 949, 961 (N.D. Iowa 2011) (federal FCA); *United States ex rel. Baker* v. *Community Health Systems, Inc.*, 709 F. Supp. 2d 1084, 1112 (D.N.M. 2010) (federal FCA); *New Mexico ex rel. Foy* v. *Austin Capital Management, Ltd.*, 297 P.3d 357, 372 (N.M. Ct. App. 2012) (New Mexico Fraud Against Taxpayers Act), *cert. granted*, 300 P.3d 1181 (N.M. 2013). The Attorney General relied in the courts below on two federal court of appeals decisions holding that the retroactive application of the federal FCA does not violate the Ex Post Facto Clause, but the reasoning of those decisions is severely flawed. *See Sanders* v. *Allison Engine Co.*, 703 F.3d 930, 945-946 & n.13 (6th Cir. 2012) (failing to

As a result, the Ex Post Facto Clause prohibits application of the FCA to conduct that was lawful at the time it occurred—*i.e.*, any statements made by Sprint before August 13, 2010. At a minimum, the Attorney General's remaining FCA claim should have been dismissed to that extent. Because the Attorney General's interpretation of the Tax Law is not unambiguously correct, however, the complaint should have been dismissed in its entirety. The Appellate Division's order affirming the Supreme Court's denial of Sprint's motion to dismiss should therefore be reversed.

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evaluate whether treble damages specifically (as opposed to monetary penalties generally) have been regarded as punishment), *cert. denied*, 133 S. Ct. 2855 (2013); *United States ex rel. Miller* v. *Bill Harbert International Construction, Inc.*, 608 F.3d 871, 878 (D.C. Cir. 2010) (per curiam) (disposing of the defendants' Ex Post Facto Clause argument in summary fashion).

CONCLUSION

The Appellate Division's order should be reversed, and the action dismissed in its entirety with prejudice.

Respectfully submitted,

s/ E. Leo Milonas

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SEPTEMBER 2, 2014

ADDENDUM A

The subsidiaries of Sprint Corporation are as follows:

ACI 900, Inc.
AirGate PCS, Inc.
AirGate Service Company, Inc.
Alamosa (Delaware), Inc.
Alamosa (Wisconsin) Properties, LLC
Alamosa Delaware GP, LLC
Alamosa Holdings, Inc.
Alamosa Holdings, LLC
Alamosa Limited, LLC
Alamosa Missouri Properties, LLC
Alamosa Missouri, LLC
Alamosa PCS Holdings, Inc.
Alamosa PCS, Inc.
Alamosa Properties, LP
Alamosa Wisconsin GP, LLC
Alamosa Wisconsin Limited Partnership
Alda Wireless Holdings, LLC
American PCS Communications, LLC
American PCS, L.P.
American Personal Communications Holdings, Inc.
American Telecasting Development, LLC
American Telecasting of Anchorage, LLC
American Telecasting of Bend, LLC
American Telecasting of Columbus, LLC
American Telecasting of Denver, LLC
American Telecasting of Fort Myers, LLC
American Telecasting of Ft. Collins, LLC
American Telecasting of Green Bay, LLC
American Telecasting of Lansing, LLC
American Telecasting of Lincoln, LLC
American Telecasting of Little Rock, LLC
American Telecasting of Louisville, LLC
American Telecasting of Medford, LLC
American Telecasting of Michiana, LLC

American Telecasting of Monterey, LLC
American Telecasting of Redding, LLC
American Telecasting of Santa Barbara, LLC
American Telecasting of Seattle, LLC
American Telecasting of Sheridan, LLC
American Telecasting of Yuba City, LLC
American Telecasting, Inc.
APC PCS, LLC
APC Realty and Equipment Company, LLC
ASC Telecom, Inc.
Assurance Wireless of South Carolina, LLC
ATI of Santa Rosa, LLC
ATI Sub, LLC
ATL MDS, LLC
Atlanta MDS Co., Inc.
Bay Area Cablevision, LLC
Bluebottle USA Holdings L.P.
Bluebottle USA Investments L.P.
Boost Mobile, LLC
Boost Worldwide, Inc.
Bright PCS Holdings, Inc.
Bright Personal Communications Services, LLC
Broadcast Cable, LLC
C FON Corporation
Caroline Ventures, Inc.
Cedar TowerCo, LLC
Clear Global Services LLC
Clear Management Services LLC
Clear Partner Holdings LLC
Clear Share I, LLC
Clear Share II, LLC
Clear Share III, LLC
Clear Wireless LLC
Clearwire Communications LLC
Clearwire Corporation
Clearwire Europe B.V.
Clearwire Europe S.a.r.l.
Clearwire Finance, Inc.

Clearwire Hawaii Partners LLC
Clearwire Hawaii Partners Spectrum, LLC
Clearwire International, LLC
Clearwire IP Holdings LLC
Clearwire Ireland II Limited
Clearwire Legacy LLC
Clearwire Spectrum Holdings II LLC
Clearwire Spectrum Holdings III LLC
Clearwire Spectrum Holdings LLC
Clearwire Telecommunications Services, LLC
Clearwire XOHM LLC
Dial Call Midwest, Inc.
Domestic USF Corp.
Enterprise Communications Partnership
EQF Holdings, LLC
FCI 900, Inc.
Fixed Wireless Holdings, LLC
Fresno MMDS Associates, LLC
G & S Television Network, Inc.
Georgia PCS Leasing, LLC
Georgia PCS Management, L.L.C.
Gulf Coast Wireless Limited Partnership
Helio LLC
Horizon Personal Communications, Inc.
Independent Wireless One Corporation
Independent Wireless One Leased Realty Corporation
iPCS Equipment, Inc.
iPCS Wireless, Inc.
iPCS, Inc.
IWO Holdings, Inc.
Kennewick Licensing, LLC
LCF, Inc.
Los Angeles MDS Company, Inc.
Louisiana Unwired, LLC
Machine License Holding, LLC
MinorCo, L.P.
NCI 700, Inc.
NCI 900 Spectrum Holdings, Inc.

New York MDS, Inc.
Nextel 220 License Acquisition Corp.
Nextel 700 Guard Band Corp.
Nextel Boost Investment, Inc.
Nextel Boost of California, LLC
Nextel Boost of New York, LLC
Nextel Boost of Texas, LLC
Nextel Boost of the Mid-Atlantic, LLC
Nextel Boost South, LLC
Nextel Boost West, LLC
Nextel Broadband, Inc.
Nextel Communications of the Mid-Atlantic, Inc.
Nextel Communications, Inc.
Nextel Data Investments 1, Inc.
Nextel Finance Company
Nextel License Acquisition Corp.
Nextel License Holdings 1, Inc.
Nextel License Holdings 2, Inc.
Nextel License Holdings 3, Inc.
Nextel License Holdings 4, Inc.
Nextel of California, Inc.
Nextel of Puerto Rico, Inc.
Nextel of Texas, Inc.
Nextel Operations, Inc.
Nextel Partners Equipment LLC
Nextel Partners Operating Corp.
Nextel Partners, Inc.
Nextel Retail Stores, LLC
Nextel South Corp.
Nextel Systems Corp.
Nextel Unrestricted Relocation Corp.
Nextel West Corp.
Nextel West Services, LLC
Nextel WIP Corp.
Nextel WIP Expansion Corp.
Nextel WIP Expansion Two Corp.
Nextel WIP Lease Corp.
Nextel WIP License Corp.

Northern PCS Services, LLC
NPCR, Inc.
NPFC, Inc.
NSAC, LLC
OneLouder Apps, Inc.
PCS Leasing Company, L.P.
PCTV Gold II, LLC
PCTV of Salt Lake City, LLC
PCTV Sub, LLC
People's Choice TV Corp.
People's Choice TV of Albuquerque, LLC
People's Choice TV of Houston, LLC
People's Choice TV of St. Louis, LLC
PhillieCo Equipment & Realty Company, L.P.
PhillieCo Partners I, L.P.
PhillieCo Partners II, L.P.
PhillieCo Sub, L.P.
PhillieCo, L.P.
Pin Drop Insurance, Ltd.
Pinsight Media+, Inc.
Private Trans-Atlantic Telecommunications System (N.J.), Inc.
Private TransAtlantic Telecommunications System, Inc.
San Francisco MDS, Inc.
SCC X, LLC
SFE 1, LLC
SFE 10, LLC
SFE 11, LLC
SFE 12, LLC
SFE 13, LLC
SFE 14, LLC
SFE 15, LLC
SFE 2, LLC
SFE 3, LLC
SFE 4, LLC
SFE 5, LLC
SFE 6, LLC
SFE 7, LLC
SFE 8, LLC

SFE 9, LLC
SGV Corporation
SIHI Mexico S. de R.L. de C.V.
SIHI New Zealand Holdco, Inc.
SIHI Scandinavia AB
S-N GC GP, Inc.
S-N GC HoldCo, LLC
S-N GC LP HoldCo, Inc.
SN Holdings (BR I) LLC
SN UHC 1, Inc.
SN UHC 2, Inc.
SN UHC 3, Inc.
SN UHC 4, Inc.
SN UHC 5, Inc.
Southwest PCS Properties, LLC
Southwest PCS, L.P.
SPCS Caribe Inc.
Speedchoice of Detroit, LLC
Speedchoice of Phoenix, LLC
Sprint (Bay Area), LLC
Sprint Asian American, Inc.
Sprint Brasil Servicos de Telecomunicacoes Ltda.
Sprint Capital Corporation
Sprint Communications Company L.P.
Sprint Communications Company of New Hampshire, Inc.
Sprint Communications Company of Virginia, Inc.
Sprint Credit General, Inc.
Sprint Credit Limited, Inc.
Sprint eBusiness, Inc.
Sprint Enterprise Mobility, Inc.
Sprint Enterprise Network Services, Inc.
Sprint Enterprises, L.P.
Sprint eWireless, Inc.
Sprint Federal Management LLC
Sprint Federal Operations LLC
Sprint Global Venture, Inc.
Sprint Healthcare Systems, Inc.
Sprint HoldCo, LLC

Sprint Hong Kong Ltd.
Sprint International Argentina SRL
Sprint International Australia Pty. Limited
Sprint International Austria GmbH
Sprint International Caribe, Inc.
Sprint International Chile Limitada
Sprint International Colombia Ltda.
Sprint International Communications Canada ULC
Sprint International Communications Corporation
Sprint International Communications Singapore Pte. Ltd.
Sprint International Czech Republic S.R.O.
Sprint International do Brasil Ltda.
Sprint International Holding, Inc.
Sprint International Holding, Inc. - Japanese Branch Office
Sprint International Holding, Inc. - Shanghai Representative Office
Sprint International Hungary Korlátolt Felelõsségû Társaság
Sprint International Incorporated
Sprint International Incorporated - Beijing Representative Office
Sprint International Japan Corp.
Sprint International Korea
Sprint International Network Company LLC
Sprint International New Zealand
Sprint International Norway AS
Sprint International Spain, S.L.
Sprint International Taiwan Limited
Sprint International Venezuela, S.R.L.
Sprint Iridium, Inc.
Sprint Licensing, Inc.
Sprint Limited
Sprint Mexico, Inc.
Sprint Nextel Aviation, Inc.
Sprint Nextel Holdings (ME) Corp.
Sprint PCS Assets, L.L.C.
Sprint PCS Canada Holdings, Inc.
Sprint PCS License, L.L.C.
Sprint RUS LLC
Sprint Solutions, Inc.
Sprint Spectrum Equipment Company, L.P.

Sprint Spectrum Holding Company, L.P.
Sprint Spectrum Realty Company, L.P.
Sprint TELECENTERs, Inc.
Sprint Telecom India Private Limited
Sprint Telephony PCS, L.P.
Sprint Ventures, Inc.
Sprint Wavepath Holdings, Inc.
Sprint WBC of New York, Inc.
Sprint/United Management Company
SprintCom ECP I, L.L.C.
SprintCom ECP II, L.L.C.
SprintCom Equipment Company L.P.
SprintCom, Inc.
SprintLink Belgium BVBA
SprintLink Denmark ApS
SprintLink France SAS
SprintLink Germany GmbH
Sprintlink India Private Limited
SprintLink International (Switzerland) GmbH
Sprintlink International Malaysia SDN. BHD.
Sprintlink International Philippines, Inc.
SprintLink Ireland Limited
SprintLink Italy S.r.l.
SprintLink Netherlands B.V.
Sprintlink Poland sp. z o.o
SprintLink UK Limited
STC Five LLC
STC Four LLC
STC One LLC
STC Six Company
STC Three LLC
STC Two LLC
STE 14 Affiliate LLC
SWGP, L.L.C.
SWLP, L.L.C.
SWV Eight, Inc.
SWV Five, Inc.
SWV Four, Inc.

SWV One Telephony Partnership
SWV One, Inc.
SWV Seven, Inc.
SWV Six, Inc.
SWV Three Telephony Partnership
SWV Three, Inc.
SWV Two Telephony Partnership
SWV Two, Inc.
Tavigator, Inc.
TDI Acquisition Corporation
TDI Acquisition Sub, LLC
Texas Telecommunications, LP
Texas Unwired
Tower Parent Corp.
Transworld Telecom II, LLC
Transworld Telecommunications, Inc.
UbiquiTel Inc.
UbiquiTel Leasing Company
UbiquiTel Operating Company
UCOM, Inc.
United Telecommunications, Inc.
Unrestricted Extend America Investment Corp.
Unrestricted Subscriber Equipment Leasing Company, Inc.
Unrestricted Subsidiary Funding Company
Unrestricted UMTS Funding Company
US Telecom of New Hampshire, Inc.
US Telecom, Inc.
US Unwired Inc.
USST of Texas, Inc.
UT Transition Corporation (Inactive)
Utelcom, Inc.
Velocita Wireless Holding Corp.
Velocita Wireless Holding, LLC
Via/Net Companies
Virgin Mobile USA, Inc.
Virgin Mobile USA, L.P.
VMU GP, LLC
VMU GP1, LLC

Washington Oregon Wireless Properties, LLC
Washington Oregon Wireless, LLC
Wavepath Holdings, Inc.
Wavepath Sub, LLC
WBS of America, LLC
WBS of Sacramento, LLC
WBSFP Licensing, LLC
WBSY Licensing, LLC
WCOF, LLC
Wireless Broadband Services of America, LLC
Wireless Broadcasting Systems of America, Inc.
Wireless Cable of Florida, Inc.
Wireless Leasing Co., Inc.
WirelessCo, L.P.
Wireline Leasing Co., Inc.

ADDENDUM B

The major publicly traded subsidiaries and associates of SoftBank Corp. are as follows:

ASKUL Corporation
Broadmedia Corporation
Carview Corporation
GRAVITY Co., Ltd.
GungHo Online Entertainment, Inc.
ITmedia, Inc.
Renren Inc.
SoftBank Technology Corp.
ValueCommerce Co., Ltd.
Vector Inc.
Yahoo Japan Corporation

ADDENDUM C

United States ex rel. Hendrix v. J-M Mfg. Co., Inc., et al., Case No. ED CV-06-0055-GW

Tentative Rulings on:

MOTION 1: **Motion to Dismiss Plaintiffs' Second Amended Complaint [F.R.C.P. 12(b)(6) and 9(b)]**

MOVANT: Defendant J-M Manufacturing Company, Inc. (joined by defendant Formosa Plastics Corporation, U.S.A.)

RESP.: Intervenors States of Delaware, Nevada and Tennessee and Commonwealth of Virginia (joined by California Intervening Parties and Relator)

MOTION 2: **Motion to Strike Portions of Plaintiffs' Second Amended Complaint [F.R.C.P. 12(f)]**

MOVANT: Defendant J-M Manufacturing Company, Inc. (joined by defendant Formosa Plastics Corporation, U.S.A.)

RESP.: Relator John Hendrix

MOTION 3: **Motion to Dismiss Qui Tam Plaintiff John Hendrix's Corrected Second Amended Complaint**

MOVANT: Defendant Formosa Plastics Corporation, U.S.A. (joined by defendant J-M Manufacturing Company, Inc.)

RESP.: Intervenors States of Delaware, Nevada and Tennessee and Commonwealth of Virginia (joined by the California intervenors and Relator)

MOTION 4: **Motion to Convene Status Conference at Upcoming Hearing or, in the Alternative, to Permit Limited Discovery**

MOVANT: Multiple Intervenors

RESP.: Defendants J-M Manufacturing Company, Inc. and Formosa Plastics Corporation, U.S.A.

I. Background

This *qui tam* action brought by plaintiff John Hendrix ("Relator") charges defendants J-M Manufacturing Company, Inc. ("J-M") and Formosa Plastics Corporation, U.S.A. ("FP") with the violation of multiple federal and state false claims acts' ("FCAs") provisions in connection with the sale of polyvinyl chloride ("PVC") pipe to governmental entities beginning in January 18, 1996. *See* Second Amended Complaint for Violation of Federal and State False Claims Acts [Corrected Version] ("SAC") ¶¶ 1-

2. In total, the SAC sets forth 32 claims for relief, as follows: 1) substantive violations of the Federal False Claims Act, 31 U.S.C. §§ 3729(a)(1), (a)(2) and 3732(b), against J-M; 2) substantive violations of California's False Claims Act, Cal. Gov't Code §§ 12651(a)(1), (a)(2), against J-M; 3) substantive violations of California's False Claims Act, Cal. Gov't Code § 12651(a)(8), against both defendants; 4) substantive violations of Delaware's False Claims and Reporting Act, Del. Code tit. 6, §§ 1201(a)(1), (a)(2), against J-M; 5) substantive violations of the District of Columbia's False Claims Act, D.C. Code § 2-308.14(a)(1), (a)(2), against J-M; 6) substantive violations of Florida's False Claims Act, Fla. Stat. Ann. § 68.082(2)(a), (2)(b), against J-M; 7) substantive violations of Illinois's Whistleblower and Reward and Protection Act, 740 Ill. Comp. Stat. Ann. §§ 175/3(a)(1), (a)(2), against J-M; 8) substantive violations of Indiana's False Claims and Whistleblower Protection Act, Ind. Code Ann. §§ 5-11-5.5-2(b)(1), (b)(2), against J-M; 9) substantive violations of Massachusetts's False Claims Act, Mass. Gen. Laws ch. 12 §§ 5B(1), 5B(2), against J-M; 10) substantive violations of Massachusetts's False Claims Act, Mass. Gen. Laws ch. 12 § 5B(9), against both defendants; 11) substantive violations of Nevada's False Claims Act, Nev. Rev. Stat. Ann. §§ 357.040(1)(a), (1)(b), against J-M; 12) substantive violations of Nevada's False Claims Act, Nev. Rev. Stat. Ann. § 357.040(1)(h), against both defendants; 13) substantive violations of New Mexico's Fraud Against Taxpayers Act, N.M. Stat. §§ 44-9-3(A)(1), (A)(2), against J-M; 14) substantive violations of New Mexico's Fraud Against Taxpayers Act, N.M. Stat. § 44-9-3(A)(9), against both defendants; 15) substantive violations of New York's False Claims Act, N.Y. State Fin. Law §§ 189(1)(a), (1)(b), against J-M; 16) substantive violations of Tennessee's False Claims Act, Tenn. Code Ann. §§ 4-18-103(a)(1), (a)(2), against J-M; 17) substantive violations of Tennessee's False Claims Act, Tenn. Code Ann. § 4-18-103(a)(8), against both defendants; 18) substantive violations of Virginia's Fraud Against Taxpayers Act, Va. Code Ann. §§ 8.01-216.3(a)(1), (a)(2), against J-M; 19) employment discrimination under the Federal False Claims Act, 31 U.S.C. § 3730(h), against J-M; 20) substantive violations of the Federal False Claims Act, 31 U.S.C. §§ 3729(a)(1), (a)(2) and 3732(b), against FP; 21) substantive violations of California's False Claims Act, Cal. Gov't Code §§ 12651(a)(1), (a)(2), against FP; 22) substantive violations of Delaware's False Claims and Reporting Act, Del. Code tit. 6, §§ 1201(a)(1), (a)(2), against FP; 23) substantive violations of the

District of Columbia's False Claims Act, D.C. Code § 2-308.14(a)(1), (a)(2), against FP; 24) substantive violations of Florida's False Claims Act, Fla. Stat. Ann. § 68.082(2)(a), (2)(b), against FP; 25) substantive violations of Illinois's Whistleblower and Reward and Protection Act, 740 Ill. Comp. Stat. Ann. §§ 175/3(a)(1), (a)(2), against FP; 26) substantive violations of Indiana's False Claims and Whistleblower Protection Act, Ind. Code Ann. §§ 5-11-5.5-2(b)(1), (b)(2), against FP; 27) substantive violations of Massachusetts's False Claims Act, Mass. Gen. Laws ch. 12 §§ 5B(1), 5B(2), against FP; 28) substantive violations of Nevada's False Claims Act, Nev. Rev. Stat. Ann. §§ 357.040(1)(a), (1)(b), against FP; 29) substantive violations of New Mexico's Fraud Against Taxpayers Act, N.M. Stat. §§ 44-9-3(A)(1), (A)(2), against FP; 30) substantive violations of New York's False Claims Act, N.Y. State Fin. Law §§ 189(1)(a), (1)(b), against FP; 31) substantive violations of Tennessee's False Claims Act, Tenn. Code Ann. §§ 4-18-103(a)(1), (a)(2), against FP; and 32) substantive violations of Virginia's Fraud Against Taxpayers Act, Va. Code Ann. §§ 8.01-216.3(a)(1), (a)(2), against FP.

II. Relief Requested

Motion 1: Dismiss all counts for failure to state a claim; dismiss counts 1-18 and 20-32 for failure to plead with sufficient particularity; dismiss all counts insofar as they arise from "Private Developer Transactions"; dismiss counts 3, 10, 12, 14 and 17 for failure to plead liability under allegedly applicable "beneficiary" provisions; dismiss counts 4-5, 8-18 and 22-23, 26-32 insofar as they seek to impose liability prior to the effective dates of the particular statutes.

Motion 2: Strike various limited portions of the SAC.

Motion 3: Dismiss all claims in the SAC alleged against FP; dismiss counts 3, 10, 12, 14 and 17 for failure to plead liability under allegedly applicable "inadvertent submission" provisions; dismiss claims to the extent based upon 1) alleged violations of the Federal FCA occurring before February 5, 2004, 2) alleged violations of Indiana's FCA occurring before July 1, 2005, and 3) alleged violations of New Mexico's FCA occurring before February 5, 2006.

Motion 4: Convene scheduling conference or permit early discovery.

III. Analysis

<u>Motion 1</u>

J-M raises a number of arguments in support of its motion to dismiss. They will be analyzed sequentially, as best as possible, following a general discussion of standards of review in connection with motions to dismiss under Fed. R. Civ. P. 12(b)(6) and pleading requirements for the alleged violations of the Federal False Claims Act (which the parties agree mirror, in large part, the provisions of the state FCAs).

A. <u>12(b)(6) Standards</u>

Under Rule 12(b)(6), a court must (1) construe the complaint in the light most favorable to the plaintiff, and (2) accept all well-pleaded factual allegations as true, as well as all reasonable inferences to be drawn from them. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). The Court need not accept as true "legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Rather, to survive a motion to dismiss, the plaintiff must allege facts that, if accepted as true, are sufficient "to raise a right to relief above the speculative level," and to "state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 556, 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. Dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *see also Twombly*, 550 U.S. at 561 (dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief).

B. False Claims Act Liability

Prior to a recent amendment, 31 U.S.C. § 3729(a)(1) and (a)(2) provided for liability for any person who, respectively, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1), or who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government, 31 U.S.C. § 3729(a)(2). Section 3732(b) – the last of the three federal statutory subsections Relator cites in the SAC – simply provides that federal district courts "shall have jurisdiction" over any action under state law "for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence" as an action brought by, among others, a *qui tam* plaintiff such as the Relator here. 31 U.S.C. § 3732(b).

The essential elements of FCA liability under the Federal FCA are (1) a false statement or fraudulent course of conduct, 2) made with scienter, 3) that was material, causing 4) the government to pay out money or forfeit moneys due. *See United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006), *cert. denied*, 550 U.S. 903 (2007); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008) ("To state a claim for a FCA violation, a plaintiff must allege that the defendant actually violated the FCA by knowingly submitting a false claim or providing faulty goods to the government."); *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1003 (9th Cir. 2002) ("Under [31 U.S.C. § 3729(a)(1)], a prima facie case requires proof that (1) the defendant submitted a claim to the United States, (2) the claim was false or fraudulent, and (3) the defendant knew the claim was false or fraudulent."); *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992).

Without a false or fraudulent *claim*, there is no liability. *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) ("[T]he Act attaches liability, not to underlying fraudulent activity, but to the 'claim for payment.' What constitutes the FCA offense is the knowing presentation of a claim that is either fraudulent or simply false.") (omitting internal citation), *cert. denied*, 519 U.S. 1115 (1997); *cf. Hendow*, 461 F.3d at 1173 ("[F]or a false statement or course of action to be actionable under the false

certification theory of false claims liability, it is necessary that it involve an actual claim, which is to say, a call on the government fisc . . . . [A] claim arises whenever the government is asked to 'pay out money or to forfeit moneys due.'") (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999)); *Hopper*, 91 F.3d at 1266 ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit."). That is, the "[k]nowing submission of claims that…are not false or fraudulent[] obviously does not give rise to liability." *United States ex rel. Lindenthal v. Gen. Dynamics Corp.*, 61 F.3d 1402, 1412 (9th Cir. 1995), *cert. denied sub nom.*, *United States ex rel. Willis v. Gen. Dynamics Corp.*, 517 U.S. 1104 (1996).

"'False' does not mean 'scientifically untrue, but a lie.'" *Pfingston*, 284 F.3d at 1003 (quoting *Wang*, 975 F.2d at 1421). A person "knowingly" submits a false claim not only when he or she "has actual knowledge of the information," but also when he or she "acts in deliberate ignorance" or "reckless disregard" of the truth or falsity of the information. *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1053 (9th Cir. 2001); *see also United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). "[K]knowingly billing for worthless services or recklessly doing so with deliberate ignorance may be actionable under § 3729." *Lee*, 245 F.3d at 1053. "So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach." *Hendow*, 461 F.3d at 1172.

For purposes of the causation element, "[t]he FCA reaches 'any person who knowingly *assisted in* causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." *United States v. Mackby*, 261 F.3d 821, 827 (9th Cir. 2001). "Thus, a person need not be the one who actually submitted the claim forms in order to be liable." *Id.* That relative breadth is consistent with the notion that "the False Claims Act is 'intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" *Hendow*, 461 F.3d at 1170 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)). Thus, "the scope of false or fraudulent claims

should be broadly construed." *Id.* As a result, even where the defendant itself is not a party to the claim made to a governmental entity, it still may be liable where false statements it makes which lead to the approval or payment of a claim are "relevant to the government's decision to confer a benefit." *United States v. Eghbal*, 548 F.3d 1281, 1283 (9th Cir. 2008) (quoting *Hendow*, 461 F.3d at 1173). In other words, "FCA liability attaches to a false statement that has a 'material effect' on the Government's eventual decision to pay a claim." *Id.* (quoting *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. 662, __, 128 S.Ct. 2123, 2130-31 (2008)); *see also Hendow*, 461 F.3d at 1172, 1174. However, under section 3729(a)(2), it is not sufficient to merely show that "a false statement *resulted in* the use of Government funds to pay a false or fraudulent claim." *Allison Engine*, 553 U.S. at __, 128 S.Ct. at 2128 (emphasis added). Instead, "a person must have the *purpose* of getting a false or fraudulent claim 'paid or approved by the Government'" to be liable under that particular provision. *Id.* (emphasis added).

C. Particularity

J-M first argues that the SAC fails to state a claim from a particularity standpoint, insofar as that level of detail is required by way of Federal Rule of Civil Procedure 9(b). It asserts that there are no specific fraudulent transactions alleged and no identification of any particular pipe that was deficient according to any contract, specification or standards requirement. In fact, it takes the position that it is not even clear that any of the governmental entities even purchased any pipe from J-M.

On August 9, 2010, the Ninth Circuit issued its ruling in *Ebeid ex rel. United States v. Lungwitz*, __ F.3d __, 2010 U.S. App. LEXIS 16438 (9th Cir. Aug. 9, 2010). That decision, among other things, reaffirmed that Rule 9(b) governs fraud allegations in connection with FCA claims. *See id.*, 2010 U.S. App. LEXIS 16438, *11-12; *see also Mendiondo*, 521 F.3d at 1103 ("Because the FCA is an anti-fraud statute and requires fraud allegations, complaints alleging a FCA violation must fulfill the requirements of Rule 9(b)."); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). This means that Relator is required to "state with particularity the circumstances constituting fraud or mistake," including "the who, what, when, where, and how of the misconduct charged." *Ebeid*, 2010 U.S. App. LEXIS 16438, *12 (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)). In addition, Relator must "set forth what is false or

misleading about a statement, and why it is false." *Id.* (quoting *Vess*, 317 F.3d at 1106). These requirements apply even where the information allegedly necessary to provide that detail is of the type that would normally be outside the reach of an outsider. *See id.*; *see also Lee*, 245 F.3d at 1052 ("[G]iven that Lee worked as a supervisor at NETC for over twenty years, was knowledgeable about the tests allegedly falsified, and was employed by SmithKline when he filed this action, he cannot fairly allege that SmithKline has sole possession of the facts evidencing an FCA violation."); *Bly-Magee*, 236 F.3d at 1019. At the very least, "allegations of fraud must be 'specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" *Bly-Magee*, 236 F.3d at 1019 (quoting *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)).

However, the *Ebeid* decision also made clear it rejected the view that "as a matter of course," a relator would have to "identify representative examples of false claims to support every allegation," 2010 U.S. App. LEXIS 16438, *12, distancing the Ninth Circuit on that issue from, among other cases, the Eleventh Circuit's decision in *United Sates ex rel. Clausen v. Lab Corp. of America, Inc.*, 290 F.3d 1301, 1312 n.21 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003). *See also Lee*, 245 F.3d at 1051 ("Rule 9(b) may not require Lee to allege, in detail, all facts supporting each and every instance of false testing over a multi-year period."). Instead, "use of representative examples" was only "one means of meeting the pleading obligation." *Ebeid*, 2010 U.S. App. LEXIS 16438, *13. It would also be sufficient, the court ruled, "to allege 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" *Id.* (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)). The same standard applies to pleading with particularity "a reasonable basis to infer that the government either paid money or forfeited moneys due." *Id.* at n.4.

Under this standard, Relator has sufficiently pled both that claims were actually submitted and that those claims were paid. Among other things, he has pled that "[f]ederal military bases, State Roads and Highway Projects, cities, public water distribution, and sewer collection agencies are the primary purchasers of J-M's PVC

pipe." SAC ¶ 3. He has identified lists of example governmental entities that purchased or otherwise acquired J-M's pipe, along with examples of federal projects where the United States purchased those projects. *See id.* ¶ 16 & Exhs. 1-3(l)[1]. He has set forth at least one instance where it would appear that sub-standard pipe was shipped to (albeit unidentified) customers. *See id.* ¶¶ 135-47, 151, 183-98, 216, 227.

In addition, he has adequately pled "the who, what, when, where, and how of the misconduct charged," along with what was false or misleading, and why it was false.[2] Relator has pled, at the very least, that J-M lied about its pipe being tested in accordance with industry standards, whereas its products were neither made nor tested in conformity with those standards, leading to the pipe (and marketing materials related to the pipe) displaying false markings along with other false representations concerning pipe characteristics upon which customers rely in their purchasing decisions. *See, e.g., id.* ¶¶ 15, 36, 39, 51, 53-55, 78, 82, 86-91, 105, 112-117, 129, 270-73, 287-88; *cf. United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 910 (9th Cir. 1998) ("Northrop was entitled to get paid for the flight data transmitters only if they were tested according to specifications and if the fluid stayed liquid in cold temperatures according to specifications. The government recovered the easy way, on the claim Northrop conceded, because Barajas admitted he had faked the tests…. [T]he government could and did recover the money it had paid on Northrop's false invoices, based on the testing fraud.'""). Instead, J-M both allegedly cherry-picked (*i.e.*, non-randomly) pipe that differed from its normal product and avoided required re-testing despite direct knowledge that its pipe failed relevant tests. *See, e.g., id.* ¶¶ 56-65, 67, 76, 78, 83-85, 90-91, 97-99, 103-04, 107, 132-34, 153, 157-61, 164-67, 172-73, 175, 185-87, 197-202, 204-06. According to the intervenors, these facts affect all of the pipe that is at issue in this case, forming a basis for FCA claims based at least on a theory that J-M committed fraud in connection with the nature of its products. *See Hopper*, 91 F.3d at 1266 (noting that

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[1] These exhibits are not actually attached to the SAC, but are attached to the original Complaint, filed on January 7, 2006.

[2] At best (for defendants' purposes), the SAC would fail to allege with particularity that claims were based on sales of pipe that was deficient or flawed in the manner Relator alleges. However, as with the submission of claims and payment of those claims, there seems to be little reason why the "reliable indicia" framework could not also be used in connection with this aspect of Relator's allegations. Assuming that it can, Relator would have again satisfied that standard.

"FCA actions have…been sustained under theories of supplying substandard products or services," amongst others) (citing *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972)). *But see cf. Pfingston*, 284 F.3d at 1004 (affirming summary judgment ruling in favor of defendant where only admissible evidence was relator's "own observations…that the leak detection system was malfunctioning and that the tanks were operational despite" lack of certification, evidence that the Ninth Circuit characterized as falling "far short of setting forth a prima facie case under the False Claims Act").

As such, Rule 9(b) will not stand in the way of Relator's action proceeding. Almost necessarily, therefore, Relator has also satisfied the requirements imposed by *Twombly* and *Iqbal*. With satisfaction of these basic thresholds, the further details of Relator's action can be discovered by way of discovery procedures.

D. FCA Liability for Judgment Calls

J-M argues that differences in opinion regarding technical, engineering and scientific judgments cannot form the basis for FCA liability. Indeed, innocent mistakes, mere negligent misrepresentations and differences in interpretations are insufficient for FCA liability to attach. *See Hendow*, 461 F.3d at 1174. "The [False Claims] Act is concerned with ferreting out 'wrongdoing,' not scientific errors. What is false as a matter of science is not, by that very fact, wrong as a matter of morals." *Wang*, 975 F.2d at 1421. Of course, it is also true that though it may be relevant to the question of knowing falsity, where regulations are "not discretionary," even if they are "unquestionably technical and complex," a "reasonable interpretation" of that regulation does not preclude falsity for purposes of a False Claims Act action. *See United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462-63 (9th Cir. 1999), *cert. denied sub nom.*, *Parsons Corp. v. United States ex rel. Oliver*, 530 U.S. 1228 (2000). Otherwise, "[a] defendant could submit a claim, knowing it is false or at least with reckless disregard as to falsity, thus meeting the intent element, but nevertheless avoid liability by successfully arguing that its claim reflected a 'reasonable interpretation' of the requirements." *Id.* at 463 n.3. Here, unlike *Wang*, for instance, Relator has alleged more than simply "innocent mistakes," "negligence," "criticism of…calculations," "[b]ad math," "low quality" or "faulty" work or design, or "common failings of engineers and other scientists." *Wang*, 975 F.2d at 1420-21. Taking those allegations as true, J-M's argument in this regard will

not lead to a dismissal of this case.

E. Retroactivity[3]

J-M argues that nine of the twelve state, district or commonwealth FCAs at issue in this case (Delaware, the District of Columbia, Indiana, Massachusetts, Nevada, New Mexico, New York, Tennessee and Virginia) were enacted after 1996, which is the start date for the time period Relator seeks to cover by way of this action. *See* SAC ¶ 2. Under the analysis required by *Landgraf v. USI Film Products*, 511 U.S. 244 (1994),[4] J-M asks that the Court rule that each of these nine non-Federal FCAs cannot be applied retroactively.

Landgraf analysis is "not always a simple or mechanical task." *Id.* at 268. Rather, it is usually a multi-step process:

> The Supreme Court in *Landgraf* articulated a two-step test for determining whether a federal statute applies retroactively. A court first must "determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. If Congress has clearly provided that a statute will apply retroactively, the court's work ends. However, "absent clear congressional intent favoring" retroactive application, *id.*, the court must move to the second step of the *Landgraf* test, under which it determines whether "the new provision attaches new legal consequences to events completed before its enactment" such that it interferes with "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 270; *see also Chang [v. United States]*, 327 F.3d [911,] 920 & n. 8 [9th Cir. 2003].

Camins v. Gonzales, 500 F.3d 872, 880 (9th Cir. 2007); *see also Scott v. Boos*, 215 F.3d 940, 943 (9th Cir. 2000). Though *Camins* stands for the proposition that "the court's work ends" if there is a clear expression that a statute should operate retroactively, it did

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[3] FP joins in this argument in its entirety. FP makes the additional point in its joinder that, insofar as there are no facts pled in the SAC concerning any false claims from 2007 to the present, FCAs such as New Mexico's and New York's (assuming they may not be applied retroactively) cannot apply in this action. As such, FP asserts that claims 14, 29 and 30 should be dismissed. Of course, even under that argument, Relator would be allowed to amend, if possible, to state claims based upon any false claims made after the applicable dates in question.

[4] The parties appear to agree here that, because the non-Federal FCAs are patterned after the Federal FCA, *Landgraf* analysis of the latter informs the necessary analysis of the former. J-M further argues that the *Landgraf* analysis would apply whether or not it is deemed substantive or procedural under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Neither Relator nor any intervenor argues otherwise, apparently conceding the point.

not cite to *Landgraf* for that particular point,[5] and the statement contrasts with the Ninth Circuit's earlier indication that even an express statement concerning a statute's proper reach would still be "subject…to constitutional constraints." *Koch v. S.E.C.*, 177 F.3d 784, 786 (9th Cir. 1999).

As *Camins* intimated, where silence, rather than express indications, are all that legislation provides on the question, *i.e.* "[w]here Congress has not defined a statute's temporal reach and expressed no intent that it be given retroactive effect, courts follow the default rule that the statute has prospective application only." *Id.* Nevertheless, that "default rule" is not necessarily the end-result:

> If the statute does not clearly specify its own temporal reach, we must next determine "whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." If the statute does operate retroactively, "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."

Id. at 786 (internal citations omitted); *see also id.* at 786 n.3 (indicating that "[s]ince the statute is, by hypothesis, silent in such circumstances, intent is presumably discerned from the legislative history"); *see also Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1130 (9th Cir. 2007), *cert. denied sub nom.*, *Saravia-Paguada v. Mukasey*, 128 S.Ct. 2499 (2008). "A clear statement that Congress intended legislation to apply retroactively will overcome the antiretroactivity presumption, *assuming that the legislation affords due process and does not otherwise run afoul of constitutional prohibitions*." *Koch*, 177 F.3d at 785 (emphasis added).

In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Supreme Court already determined that an amendment to the Federal FCA (which reflected no express retroactive intent from Congress) had an impermissible retroactive effect, and the amendment in that case merely extended "an FCA cause of action to private parties in circumstances where the action was previously foreclosed." *Id.* at 949.

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[5] *Landgraf* did contain language supporting the point: "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Landgraf*, 511 U.S. at 280.

It was deemed retroactive because "[i]n permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially create[d] a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." *Id.* at 950; *see also Rivas v. Rail Delivery Serv., Inc.*, 423 F.3d 1079, 1084 (9th Cir. 2005) (following *Hughes Aircraft* and concluding that statute has retroactive effect where it retroactively expands the universe of potential plaintiffs so as to "increase Defendants' potential liability"). *But see Lindenthal*, 61 F.3d at 1408. The Ninth Circuit has also suggested (though without deciding the question) that amendments to the federal FCA, "such as those that explicitly raise the penalties for submission of false claims" might be impermissibly retroactive or, in other words, improper to apply "retrospectively." *Lindenthal*, 61 F.3d at 1408 & n.6.[6]

Of the nine non-Federal FCAs, J-M acknowledges that four – Massachusetts, Nevada, New Mexico and Tennessee – have express retroactivity provisions. As to those four, however, J-M argues that retroactive application would violate the United States Constitution's Ex Post Facto and Due Process clauses.[7] *See Koch*, 177 F.3d at 786. This is so, it asserts, because where the legislature enacting the potentially-retroactive legislation had a punitive or penal intent at the time it was enacted, actual retroactive application violates the Ex Post Facto clause. *See generally Smith v. Doe*, 538 U.S. 84, 92 (2003). Even if such intent is absent, J-M contends that where the legislation is punitive either in its purpose or effect, this can still serve to negate the intention of deeming it civil. *See id.*

The intervenors respond that J-M has not provided any evidence of any legislative intent to punish wrongdoers by way of enactment of the FCAs. In Reply, J-M asserts that this position is inaccurate, that they have provided some evidence of legislative intent at least with respect to the Nevada and Tennessee FCAs. As to the second question, the

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[6] *Lindenthal*, 61 F.3d at 1407 ("This Court has clarified the terminology *Landgraf* employs by using the term 'retrospective' to describe application of a new statute to events that occurred before its enactment, and reserving the term 'retroactive' to describe a statute that, if applied, would attach new legal consequences to conduct or transactions already completed. Thus, *Landgraf* teaches that courts should not apply 'retroactive' statutes 'retrospectively' absent clear congressional intent.").

[7] As to the remaining five (one of which – the District of Columbia – has an express *anti*-retroactivity provision), J-M asserts that there is no need to reach the Constitutional analysis.

intervenors assert that even if the FCAs have some punitive effect, they also have compensatory characteristics. Yet, J-M argues that the imposition of punitive damages means that a statute is necessarily punitive and that, with the exception of the District of Columbia's FCA (which does not have an express retroactivity provision), all of the FCAs in question under this argument provide for mandatory penalties.

Assuming the Ex Post Facto clause does not bar retroactive application of the non-Federal FCAs here, J-M argues that the Due Process clause would have the effect of precluding retroactive application. Under that theory, it argues that it would have been deprived of notice and it would be punished despite its reliance on state law as then written in light of an increase in the penalty applicable to the conduct. That punitive damages would also have been available for common law fraud would not, in J-M's view, negate that conclusion.

In response, the intervenors highlight the fact that J-M has not cited any case where the Due Process clause has been relied upon to invalidate retroactive application of an FCA. In addition, they assert that the FCAs cannot run afoul of the Due Process clause because the legislation furthers a legitimate purpose and that J-M has the burden of demonstrating that the legislatures acted in an irrational or arbitrary manner in passing the statutes. *See, e.g.*, *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005) (analyzing substantive due process argument against retroactivity); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1051-52 (9th Cir. 2004) (Pregerson, J., concurring); *SeaRiver Maritime Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 678 (9th Cir. 2002). However, J-M responds that the cases upon which the intervenors rely did not involve statutory provisions that were punitive, that increased liability, or that imposed treble damages.

With respect to the four non-Federal FCAs that are silent on the retroactivity question (Delaware, Indiana, New York and Virginia), J-M asserts that the imposition of new duties and the increase in liability from the enactment of these statutes (not just enactments of amendments to the statutes, but the enactments of *entire statutes*) plainly means that they cannot be given retroactive effect. In fact, J-M cites to one federal district court as having already reached the effective conclusion that there can be no retroactive effect with respect to the New York FCA. *See United States ex rel. Romano*

v. New York-Presbyterian Hosp., No. 00 Civ. 8792 (LLS), 2008 U.S. Dist. LEXIS 17002, *3-5 (S.D.N.Y. Mar. 5, 2008). Moreover, even ignoring the *Landgraf* analysis, J-M points out that the legislatures of both Virginia and New York have passed general (*i.e.*, not limited to the context of their FCA legislation) anti-retroactivity laws.

The intervenors counter that, not only is the New York FCA not silent concerning its retroactive effect, but two courts have already reached the conclusion that it is to be applied retroactively.[8] In Reply, J-M indicates that the intervenors are relying upon *uncodified* provisions as an *express* indication of retroactive effect and that the decisions reaching the conclusion that the New York FCA is to be applied retroactively are both not only unpublished decisions, but not even *written* decisions.

While all of these arguments are interesting and hotly disputed, J-M has filed only a motion to dismiss pursuant to Rule 12(b)(6). At best, with certain limited exceptions, a ruling in its favor would only *limit* a number of claims. The question is whether the Court is permitted to – or should – dismiss *part* of a claim under Rule 12(b)(6). The Court would decline to do so, leaving the question to be addressed upon appropriate motion or other later proceedings.[9]

Nevertheless, as pointed out in FP's joinder, the entirety of claims 14, 15, 29 and 30[10] (involving the FCAs of New Mexico[11] and New York[12]) would be dismissed if the

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[8] The intervenors fail to address the other three "silent" FCAs – Delaware, Indiana and Virginia – which J-M understands as a concession.

[9] This is an especially appropriate approach here, where there is very little – or no – law on the retroactive application of many of the state FCAs. Though that fact may not change between now and when the issue is properly addressed to this Court, it counsels in favor of not reaching the issue until it is properly addressed. The Court might even order the parties, if and when they address the *Landgraf*/retroactivity analysis again, to do so by way of a single-issue summary judgment motion, to permit full argument and exploration of the issue.

[10] Although FP's specific argument in its joinder did not target claim 15, insofar as that same statute provides the basis for claim 30 (which FP does specifically target), the analysis here would also apply to claim 15.

[11] N.M. Stat. § 44-9-3(A)(1) and (A)(2) provide, respectively, that:

> [a] person shall not: (1) knowingly present, or cause to be presented, to an employee, officer or agent of the state or to a contractor, grantee or other recipient of state funds a false or fraudulent claim for payment or approval; [or] (2) knowingly make or use, or cause to be made or used, a false, misleading or fraudulent record or statement to obtain or support the approval of or the payment on a false or fraudulent claim[.]

FCAs implicated therein are non-retroactive. If so, those claims are validly addressed on this motion.

The New Mexico legislation provides that a civil action under it "may be brought at any time" and "may be brought for conduct that occurred prior to the effective date of that act, but not for conduct that occurred prior to July 1, 1987." N.M. Stat. § 44-9-12(A). A New Mexico state trial court has recently concluded, following a lengthy and detailed analysis, that that state's provision expressly signaling retroactive application violates the Ex Post Facto clause. *See State of N.M. ex rel. Foy v. Vanderbilt Capital Advisors*, LLC, D-101-CV-2008-1895 (attached to J-M's Request for Judicial Notice[13], Exh. K) at 1-22. The intervenors respond that the ruling in *Foy* is both questionable and on appeal. J-M denies that it is being appealed, though they admit that post-ruling motions have been filed, including motions for reconsideration and interlocutory appeal.

As to the New York legislation, both sides would appear to be correct, at least in certain respects. Though the statute itself is silent, the intervenors assert that the bill enacting the statute indicated that it was to "apply to claims filed or presented prior to, on or after April 1, 2007." Opposition at 34:1-3 (quoting 2007 N.Y. Laws 58); *see also Romano*, 2008 U.S. Dist. LEXIS 17002, *4. On the other hand, J-M (and FP) correctly note that, such an indication, insofar as it is not codified, cannot serve to satisfy the first step in the *Landgraf* process, and that the intervenors have not provided this Court with either of the two (oral) decisions they say support the application of New York's FCA retroactively. As to that first issue, however, while J-M correctly argues about the lack of effect this information might have at the first *Landgraf* step, they conspicuously do not address the second. At the second step, even if J-M is otherwise correct that application

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[12] New York State Fin. Law § 189(1)(a) and (b) provide, respectively, for the liability of any person who "knowingly presents, or causes to be presented, to any employee, officer or agent of the state or a local government, a false or fraudulent claim for payment or approval" or who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the state or a local government." N.Y. State Fin. Law § 189(1)(a), (1)(b).

[13] The Court would decline to permit J-M's Request for Judicial Notice with respect to Exhibits F, G and L attached thereto. Otherwise, however, the Court would reject the intervenors' and Relator's attempt to challenge the Request for Judicial Notice. *See Employers Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003) ("Granite correctly notes that we may consider unpublished state decisions, even though such opinions have no precedential value.").

of New York's FCA would otherwise have retroactive effect, the intervenors have pointed to clear "[legislative] intent favoring such a result." *Koch*, 177 F.3d at 786.

The Court need not reach J-M's due process argument in connection with the New Mexico and New York statutes because they would both violate the Ex Post Facto clause if applied retroactively, as both *Foy* and *Romano* support. Both states enacted entirely new statutes (not just amendments to pre-existing statutes), including provisions for treble damages and mandatory penalties. The FCAs contain clearly penal and/or punitive characteristics and would, therefore, run afoul of the Ex Post Facto clause. *See Smith v. Doe*, 538 U.S. 84, 92 (2003) (indicating that, in conducting Ex Post Facto analysis, clause is considered violated where, among other circumstances, "the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil"); *cf. Landgraf*, 511 U.S. at 247, 281 (concluding that legislation creating a right to recover compensatory and punitive damages would not be applied to case pending on appeal at time of enactment – "The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question."); *Lindenthal*, 61 F.3d at 1408 & n.6.[14] This conclusion is supported by two other district courts to have looked at the issue in detail. *See United States ex rel. Sanders v. Allison Engine Co., Inc.*, 667 F.Supp.2d 747, 752-58 (S.D. Ohio 2009); *United States ex rel. Baker v. Community Health Sys., Inc.*, Civ. No. 05-279 WJ/WDS, 2010 U.S. Dist. LEXIS 51545, *54-67 (D.N.M. Mar. 19, 2010).[15]

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[14] As FP argues in Motion 3, this conclusion is particularly appropriate in relation to "beneficiary" or "inadvertent submission" liability under several of the non-Federal FCAs involved here (though, of these two states, only New Mexico's FCA contains such a provision).

[15] To the extent that *United States ex rel. Miller v. Bill Harbert International Construction, Inc.*, 608 F.3d 871 (D.C. Cir. 2010), conflicts with this determination by way of its summary announcement that "[t]he FCA is not penal," *id.* at 878, J-M correctly points out that this position appears to conflict with the Supreme Court's viewpoint on that question. *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000). *But see cf. Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003) ("While the tipping point between payback and punishment defies general formulation, being dependent on the workings of a particular statute and the course of particular litigation, the facts about the FCA show that the damages multiplier has compensatory traits along with the punitive."). The parties' most recent submission of supplemental authority on this question, *United States ex rel. Drake v. NSI, Inc.*, 3:94-cv-963 (WWE), 2010 U.S. Dist. LEXIS 87983 (D. Conn. Aug. 26, 2010), takes the position

As such, the Court would dismiss claims 14, 15, 29 and 30, though, as noted *supra* Footnote 3, Relator should be allowed to amend, if he indicates that he has a basis on which to do so.

F. Private Developer Transactions

J-M argues that Relator's attempt to hold it liable for so-called "Private Developer Transactions" ("PDT") – where J-M has sold pipe to private developers (or their contractors), who purchased the pipe with their own funds and then used the pipe in developments that are later deeded over to governmental entities, and there has been no contact between J-M and those governmental entities, *see* SAC ¶ 6 – seeks to expand FCA liability beyond the reach of those statutes. J-M points out that only one court has addressed the theory, rejecting it. *See Los Angeles Department of Water and Power ex rel. Armenta v. James Jones Co.*, Case No. BC 173487 (L.A. Sup. Ct. Oct. 4, 2004) (attached as Exhibit A to J-M's Request for Judicial Notice).

Relator's theory here is that these transactions fit within FCA liability because the governmental entities had released performance bonds and/or provided water and/or water maintenance services upon the private developers' certifications that the development or private project was completed in accordance with the entities' specifications. *See* SAC ¶ 9. J-M argues, however, that the performance bond (and/or warrant bond, *see* SAC ¶ 10) theory does not work because the bond was never any governmental entity's property and it is also not property administered by any government entity on behalf of others. Instead, the performance bond funds, if property at all, are only a governmental entity's contingent property, dependent upon a developer's failure to perform and indemnify.[16] In fact, J-M further argues that, even if the theory is permitted here, Relator has not satisfied Rule 9(b)'s particularity requirements with

that the Supreme Court's *Cook County* decision "retreated from" the conclusions respecting the "punitive nature of the FCA." *Id.* at *19. However, *Cook County* did not involve an ex post facto setting (although neither did *Vermont Agency*). Its language in that regard, therefore, cannot dictate the conclusion *Drake*, the intervenors and Relator seek. Beyond that, *Drake* simply reaches a different conclusion than *Sanders* and *Baker* upon analysis of the relevant factors. *See id.* at *21-26.

[16] J-M likens Relator's theory to a "reverse false claim" theory. In their Opposition brief, however, the intervenors take the position that there is no reverse false claims theory present in this action, a point J-M concedes in its Reply, while still taking the position that it is the theory that is most analogous to what the SAC does allege in connection with the PDT.

respect to the theory because it has not alleged the terms of any agreement between any private contractor and government entity for purposes of demonstrating what conditions would allow the entity to hold back funds under the bond. J-M also argues that the provision of J-M pipe is simply insufficiently linked to the provision of water and "water services" for there to be any causal link.

In response, the intervenors argue that FCAs are to be given a broad construction. Relator's theory in connection with this part of his claim is that J-M caused private developers to themselves submit fraudulent claims for money, property and services. To disallow such a theory from proceeding, the intervenors argue, would run counter to the notion that a person cannot insulate their actions from FCA liability through *indirect* dealings with the government. In addition, they point out that the scope of liability is already expanded by virtue of both the possibility of holding manufacturers like J-M liable for the distribution of their pipe through distributors as opposed to directly selling the pipe (and making subsequent claims) to the governmental entities and liability for "causing" another to make a false claim. *See, e.g.*, *Allison Engine*, 553 U.S. at __, 128 S.Ct. at 2130 ("[A] subcontractor violates § 3729(a)(2) if the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim.").

The intervenors make the further point that performance bonds are "property," at least because inchoate rights are included within that concept. However, J-M's argument is that, even assuming that is true, performance bonds are not any governmental entity's property until the condition permitting the entity to retain funds occurs. The intervenors assert, however, that the SAC alleges that had the entities known about the deficiencies of the pipe, they would have been entitled to make claims under those bonds.

The intervenors argue that the exchange of water involved an exchange of both property <u>and</u> services.[17] As to J-M's causal link argument, the intervenors point out that

[17] The intervenors make the related argument that even those statutes that do not contain the term "services" should be understood to nevertheless include that term because such an understanding would be consistent with the legislative history of those statutes. However, where a statute is plain on its face, there is no need to consult the legislative history. Those statutes which do not include the term "services," therefore, should not be read as if they do.

it is directly contrary to the allegations of the SAC, *see* SAC ¶ 9, which must be taken as true on this motion. They also argue that this court cannot consider Judge Lichtman's decision in *Armenta* because it is unpublished and that, even if it could, it is not controlling or persuasive. J-M responds that, though its position would contradict the allegations of the SAC, those allegations are entirely conclusory, and there is no reason to doubt or deviate from Judge Lichtman's decision in *Armenta*.

All that being said, unless the language quoted below from the Supreme Court's *Allison Engine* decision means something other than what it would appear to mean, the Court need not consider the parties' arguments concerning whether performance bonds, water and/or water services would suffice, nor need it rely on the *Armenta* decision. That would appear to be so because, while *Allison Engine* certainly supports the notion that FCA liability extends to indirect claims on the government fisc, it also makes clear that

> [i]f a subcontractor or another defendant makes a false statement to a private entity and does not intend the Government to rely on that false statement as a condition of payment, the statement is not made with the purpose of inducing payment of a false claim "by the Government." In such a situation, the direct link between the false statement and the Government's decision to pay or approve a false claim is too attenuated to establish liability. Recognizing a cause of action under the FCA for fraud directed at private entities would threaten to transform the FCA into an all-purpose antifraud statute. Our reading of § 3729(a)(2), based on the language of that statute, gives effect to Congress' efforts to protect the Government from loss due to fraud but also ensures that "a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct."

Id. (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 470 (2006)).[18] *Allison Engine* did not involve a claim under subsection 3729(a)(1), but that subsection has a "presentment" requirement. If, as *Allison Engine* appears to hold, a PDT would not give rise to J-M's liability under subsection 3729(a)(2), there would seem to be even less of a reason why it should do so under subsection 3729(a)(1). As such, the Court should grant J-M's motion insofar as it seeks to dismiss all claims to the extent they are dependent

[18] For whatever reason, neither J-M nor FP seized upon this passage from *Allison Engine*. The Court will give the parties an opportunity to explain why it should not be understood as plainly barring liability under a PDT theory.

upon PDT.[19]

G. "Beneficiary" Liability

Relator sets forth a "beneficiary" theory of liability in connection only with the California, Massachusetts, Nevada, New Mexico and Tennessee FCAs. J-M contends that the SAC's allegations in this regard are only conclusory, leaving out how J-M was a beneficiary, who inadvertently submitted the claims in question and when and how J-M discovered the false claims. It takes the further position that the only theory of liability which even potentially works against J-M includes allegations of the intentional – not inadvertent – submission of false claims. The intervenors incorporate their response to this argument as set forth in their Opposition to FP's motion. As such, analysis of this argument is better left for assessment in connection with Motion 3 below. As discussed in connection with that motion, Relator's pleading under this theory is presently deficient and must be amended in particular respects, if possible.

H. Leave to Amend

J-M summarily asserts that leave to amend should be denied here. There is no sufficient reason to deny leave to amend here. *See Lee*, 245 F.3d at 1052.

Motion 2

J-M moves to strike certain limited portions of the SAC pursuant to Fed. R. Civ. P. 12(f). Under Rule 12(f), a party may move to strike any "redundant, immaterial, impertinent or scandalous matter." Fed. R. Civ. P. 12(f). "Immaterial" means "that the matter has no bearing on the controversy before the court." *In re 2TheMart.com Secs. Litig.*, 114 F.Supp.2d 955, 965 (C.D. Cal. 2000); *see also Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) ("Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being plead.") (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1382, at 706-07

[19] Insofar as it is the opposing parties' contention that the non-federal FCAs, "like the [Federal] FCA on which they are modeled,…'should also be given the broadest possible construction consistent with [the] purpose' of preventing fraud on the public treasury," Intervenors' Opposition at 20:14-17, the ruling and analysis should seemingly apply equally to the attempt to reach PDT transactions under the non-federal FCAs.

(1990) (quotation marks omitted)), *rev'd on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). "Impertinent" means "allegations that are not responsive or irrelevant to the issues that arise in the action and which are inadmissible as evidence." *In re 2TheMart.com*, 114 F.Supp.2d at 965; *see also Fantasy*, 984 F.2d at 1527 ("Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question.") (quotation marks and citation omitted). "Scandalous" means "any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court." *Pigford v. Veneman*, 215 F.R.D. 2, 4 (D.D.C. 2003) (quoting 2 Moore's Federal Practice § 12.37[3], at 12-97). Where there is "any doubt as to whether the allegations might be an issue in the action, courts will deny" a Rule 12(f) motion. *In re 2TheMart.com*, 114 F.Supp.2d at 965. Thus, such motions are generally disfavored, *see RDF Media Ltd. v. Fox Broadcasting Co.*, 372 F.Supp.2d 556, 566 (C.D. Cal. 2005), though they are obviously made available to parties for a reason, where appropriate, *see id.*.

In particular, J-M asks that the Court strike from the SAC the phrases "of Taiwan" in paragraph 18 and "in Taiwan" in paragraph 27, along with all of paragraph 28. In sum, the basis for J-M's motion is its belief that the SAC's inclusion of this material is, at best, an example of racial innuendo and irrelevant to this case and, at worst, a simple effort to pander to racist or xenophobic feelings.

The terms "of Taiwan" and "in Taiwan," as included in paragraphs 18 and 27 of the SAC are indeed immaterial and impertinent, though they do not appear to be in any way scandalous, racist or xenophobic. There is simply no point – or at least none that the Relator has identified in opposition to this motion – why it is at all relevant or pertinent to this matter that the Wang family is "of Taiwan." SAC ¶ 18. While it might be relevant and pertinent that J-M began replacing an experienced work-force with employees who were "significantly less experienced and [who had] fewer credentials," that they did so because of J-M's and/or Walter Wang's connections with FP, and that Barry Lin was allegedly an example of this trend, there is, again, nothing about Lin having come from FP's management center "in Taiwan" that adds to this case or to that theory. Though the SAC does contain a claim under the Federal FCA for employment discrimination tied to the denial of a promotion for Relator and the termination of his employment, Relator

alleges only that the termination was an action of retaliation for Relator's investigation of J-M's allegedly fraudulent practices in preparation for filing this lawsuit. For these reasons, the Court would strike both of those phrases.

Similarly, Relator can easily make the point that one of the attractive benefits of hiring employees with less experience and fewer credentials was that they "garnered smaller salaries" without any comment whatsoever on the national origin of any such employees.[20] Paragraph 28, therefore, at least as written (and without question the second sentence of that paragraph), would also be stricken.

Finally, to the extent Relator expects the Court to issue some sort of gag order over J-M's and/or FP's communications concerning this lawsuit, he has not come close to establishing a basis for such extraordinary relief.

Motion 3[21]

A. FP as a Proper Defendant

FP's primary argument in support of its motion to dismiss is, in effect, that this case should be about, if anyone, J-M, not FP. FP never produced the pipe in question, but simply provided raw material resin and compounds to J-M. In sum, according to FP, Relator's allegations involving it amount to the assertion that FP knew J-M was producing sub-standard pipe and submitting false claims, along with the conclusory allegation that FP was "directly involved" in the manufacture of the pipe. FP argues that these allegations fall short of meeting the pleading standards enunciated in *Iqbal* and *Twombly* and the pleading requirements established by Rule 9(b).

One particular argument FP makes is that there is an insufficient link between any

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[20] Relator repeatedly asserts that J-M hired Taiwanese nationals "apparently" because J-M and FP (not Relator) had certain pre-conceived notions about shared characteristics (or "unfounded stereotypes," to use Relator's terminology) of such individuals – that they would "be predisposed to be more loyal to [FP] and perhaps less likely to question authority or expose J-M's fraud. *See* Relator's Opposition Brief at 1:13-17, 5:15-17, 6:1-4. Yet, Relator has not provided any evidence, facts or even allegations supporting these contentions. *See* Schwarzer, Tashima, California Practice Guide: Federal Civil Procedure Before Trial (2008) §§ 9:403-405 (indicating that motions to strike usually are to be based only on material on face of the complaint or judicially noticeable material)

[21] J-M joins in various portions of Motion 2, including the general argument that the SAC fails to state claims under the FCAs, that various statutes of limitations limit Relator's ability to recover (and that relation-back does not operate in his favor), and that the Court should deny Relator leave to amend.

of its acts and any false claims. As noted above, it is the falsity of the claims which renders activity actionable under the FCA. However, as also noted above, "[t]he FCA reaches 'any person who knowingly *assisted in* causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." *Mackby*, 261 F.3d at 827. "[T]he False Claims Act is 'intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" *Hendow*, 461 F.3d at 1170 (quoting *Neifert-White*, 390 U.S. at 232). Thus, "the scope of false or fraudulent claims should be broadly construed." *Id.* As a result, even where the defendant itself is not a party to the claim made to a governmental entity, it still may be liable where false statements it makes which lead to the approval or payment of a claim are "relevant to the government's decision to confer a benefit." *Eghbal*, 548 F.3d at 1283 (quoting *Hendow*, 461 F.3d at 1173). In other words, "FCA liability attaches to a false statement that has a 'material effect' on the Government's eventual decision to pay a claim." *Id.* (quoting *Allison Engine*, 128 S.Ct. at 2130-31); *see also Hendow*, 461 F.3d at 1172, 1174.

Relator's theory is that FP manufactured the resin used by J-M and required J-M to use it, collaborated with J-M on the adoption of policies and procedures resulting in the manufacture and sale of substandard pipe, knew of the submission of false claims by J-M and directly benefited from such submissions. *See* SAC ¶¶ 19, 32-33, 38, 289-92. In short, though FP is no doubt somewhat removed from the actual claims' submission and there is far less detail in the SAC concerning FP as compared to J-M, given the breadth of the scope of conduct subject to the FCA, as understood by the Ninth Circuit, this Court would not conclude that *Iqbal* and *Twombly* require that the SAC be dismissed, in its entirety, as pled against FP, or that this theory is insufficient to potentially peg FP with liability under the FCAs. *See, e.g.*, *United States v. Bornstein*, 423 U.S. 303, 313 (1976). Nor, under *Ebeid*, would Relator have fallen short of alleging "reliable indicia" indicating that FP's resins were used in pipe shipped or any of the other claims' details FP finds wanting.

However, FP also argues that, even if there is a sufficient causal link between its acts and the claims for purposes of surviving a Rule 12(b)(6) motion, Relator still has failed to adequately allege that FP had any intent that any governmental entity rely upon

any false record or statement, as required to state a claim under section 3729(a)(2). Intervenors never directly address this argument in their Opposition, though their response seems to be that FP knew false claims were being submitted (general allegations of knowledge being sufficient under Rule 9(b)) so that its intent can be inferred from the fact that it continued to supply J-M with the resin used to manufacture the pipe (and to thereby participate in the manufacturing itself). *See* SAC ¶¶ 293-95. Intervenors also direct the Court to the SAC's allegations that FP jointly adopted the manufacturing and cost-cutting policies which led to false markings on the pipe, false representations in marketing materials and false certifications. *See* SAC ¶¶ 32-33. Insofar as intent can be alleged generally, *see* Fed. R. Civ. P. 9(b), this allegation is likely sufficient to withstand dismissal based upon FP's argument in this regard as well.

B. Inadvertent Submission / Beneficiary

FP also directly challenges Relator's ability to proceed under any of the "inadvertent submission" provisions (referred to in connection with J-M's motion as the "beneficiary" provisions) of five non-Federal FCAs – those of California, Massachusetts, Nevada, New Mexico and Tennessee. FP takes the position (in its strongest argument[22]) that Relator's allegations suggesting FP acted intentionally cannot be squared with the requirement, under these provisions (all of which have the same elements), that any false claims be the product of *inadvertent* submissions that a defendant benefits from, later learns is false and fails to disclose that falsity. *See* Cal. Gov't Code § 12651(a)(8) (rendering liable any person who "[i]s a beneficiary of an inadvertent submission of a false claim, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim"); Mass. Gen. Laws ch. 12 § 5B(9); Nev. Rev. Stat. Ann. § 357.040(1)(h); N.M. Stat. § 44-9-3(A)(9)[23]; Tenn. Code Ann. § 4-18-103(a)(8). The problem with FP's

[22] The Court would summarily reject FP's argument that it cannot be seen as a "beneficiary" and that Relator has not plausibly pled that J-M profited (and therefore passed along profits to FP) on its sales of the pipe in question). *See Armenta ex rel. City of Burbank v. Mueller Co.*, 142 Cal.App.4th 636, 645-49 (2006); SAC ¶ 296.

[23] If the Court ultimately adopts the tentative rulings set forth above in connection with the retroactivity issue raised in J-M's motion, claim 14 would be dismissed without any need to address this argument.

argument in this regard, and the authority upon which it primarily relies, *see In re Pharm. Indus. Average Wholesale Price Litig.*, 478 F.Supp.2d 164, 176 (D. Mass. 2007), is that they do not account for Relator's ability to plead in the alternative. *See, e.g.*, *MB Fin. Group, Inc. v. U.S. Postal Serv.*, 545 F.3d 814, 819 (9th Cir. 2008); *PAE Gov't Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 858-59 (9th Cir. 2007) ("[W]e allow pleadings in the alternative – even if the alternatives are mutually exclusive.").

Taking intervenors at their word that Relator was only pleading in the alternative, however, FP notes that this actually requires that he *plead* in the alternative (not that he – or someone on his behalf – raise an alternative pleading theory in an opposition brief). While intervenors' theory is that the inadvertent submission was by those downstream from J-M and FP (*i.e.*, distributors, contractors and developers), FP correctly observes that this theory is not actually pled in the SAC. Moreover, as FP also points out, if indeed it was the beneficiary of inadvertent submissions, Relator must also plead that they subsequently discovered the falsity of the claim and failed to disclose it within a reasonable time thereafter. These allegations (or at least plausible, fact-based allegations in this regard, as required by *Iqbal* and *Twombly*) are unquestionably missing, even if Relator is allowed to plead in the alternative. *See* SAC ¶ 297. As such, Relator must amend if his inadvertent submission / beneficiary theory is to survive.

C. Statutes of Limitations / Relation-Back

For the same reasons as addressed in connection with the parties' arguments concerning retroactive application of the non-federal FCAs, the Court would decline to consider the parties' competing arguments in connection with the Federal, New Mexico and Indiana FCAs' statutes of limitation and whether claims would relate back in light of the fact that they would, at best, only resolve *parts* of claims. Unlike the retroactivity issue as it related to the New Mexico and New York FCAs, the parties do not assert that this issue would entirely dispose of any particular claim (and, in any event, if the Court adopts the tentative ruling above in connection with Motion 1, claims pursuant to New Mexico's FCA would be dismissed). Instead, like the approach recommended *supra*, Footnote 9, the Court will invite the parties to, when prepared, submit a separate summary judgment motion (or motions) addressing this issue.

D. Leave to Amend

Finally, FP also argues that Relator should be denied leave to amend because this case has already been around for almost five years and it has been amended before. Even had the Ninth Circuit not reversed one of the principal authorities FP relied upon for this proposition, *see Frazier ex rel. United States v. Iasis Healthcare Corp.*, Nos. 08-16243, 08-16305, 2010 U.S. App. LEXIS 16894, *5 (9th Cir. Aug. 12, 2010), the Court would still not have acceded to that request. These are the first motions to dismiss to challenge the pleadings in this case. Now having been informed of what J-M and FP believe are the SAC's defects, Relator should be given at least one opportunity to cure.

Motion 4

In Motion 4, certain intervenors request that the Court begin to discuss the case management plan, in particular discovery issues, at the September 2, 2010, hearing,[24] or to alternatively allow certain intervenors to begin to issue requests for discovery. They take this position because of their concern that J-M is issuing Public Records Act requests to several of them. In brief, it is J-M's right to issue Public Records Act requests and that right is not limited because of J-M's status as a defendant in this action. *See Mid-Atlantic Recycling Techs., Inc. v. City of Vineland*, 222 F.R.D. 81, 85-87 (D.N.J. 2004); *County of Los Angeles v. Superior Court (Axelrad)*, 82 Cal.App.4th 819, 826 (2000). Nor do the Public Records Act activities violate the "spirit" of the Federal Rules of Civil Procedure, as they are entirely outside of those rules.

Federal Rule of Civil Procedure 26(d)(1) provides that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except…when authorized…by court order." Courts generally apply a "good cause" standard in assessing early discovery requests, such that the discovery must, of course, be relevant, and "the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002); *see also In re Countrywide*

[24] The intervenors also asked, by way of this motion, that the Court order a Fed. R. Civ. P. 26(f) submission by August 30, 2010. Insofar as this motion is not even set to be heard until September 2, 2010, that request will obviously be moot (at least as to that requested date) by the time of the hearing.

Fin. Corp. Derivative Litig., 542 F.Supp.2d 1160, 1179 (C.D. Cal. 2008). Discovery procedures ordinarily follow the normal course as established in the Federal Rules of Civil Procedure, and having identified no particular issues or areas with regards to which they wish to obtain discovery, the intervenors have not established any "good cause" to permit them to obtain discovery earlier than they otherwise might. Indeed, having failed to provide that information, it would appear that the intervenors simply seek to use early discovery (or the threat of early discovery), not for any proper purpose, but simply as a way of getting back at the parties for J-M's Public Records Act activities. This is particularly true with respect to FP, which has not joined in J-M's Public Records Act efforts.

That being said, this case does call for case management and relevant scheduling orders soon. The Court sets a Scheduling Conference for September 30, 2010, the next day the parties are to appear in this action. This would kick-start the parties' obligations to confer under Fed. R. Civ. P. 26(f)(1). Indeed, even J-M asks that the Court set a Rule 16 conference in conjunction with any rulings on the motions to dismiss – though it also takes the position that rulings on the motion for leave to file the complaints-in-intervention should precede that conference.

The only drawback to timing the scheduling conference for September 30 is, as J-M suggests, the existence of the complaints-in-intervention[25] that are the subject of motions for leave to file and which contain common law claims. However, the evidence in support of those common law claims will unquestionably overlap with the FCA claims currently at issue in this case, so if any later adjustment of the scheduling order is necessary to take into consideration those additional claims (assuming that the complaints-in-intervention are actually filed), that adjustment would likely be minimal.

In sum, therefore, the Court would grant in part and deny in part Motion 4.

[25] FP asks that the Court should, at the very least, set final dates by which any governmental entities must elect to intervene and file their complaints-in-intervention. This would also appear to be a sensible request.