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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

STATE OF CALIFORNIA, ex rel. **BRYAN BASHIN**, and **BRYAN BASHIN**, in his individual capacity,

Plaintiffs,

vs.

CONDUENT, INCORPORATED, a New York corporation; **CONDUENT STATE & LOCAL SOLUTIONS, INC.**, a New York corporation; and **US EDIRECT, INC.**, a New York corporation,

Defendants.

Case No.: RG18888208

ASSIGNED FOR ALL PURPOSES TO JUDGE EVELIO M. GRILLO, DEPT. 21

PLAINTIFF-RELATOR BRYAN BASHIN'S MEMORANDUM IN OPPOSITION TO DEFENDANTS CONDUENT INCORPORATED AND CONDUENT STATE & LOCAL SOLUTIONS, INC.'S MOTION FOR SUMMARY JUDGMENT AND ADJUDICATION

Hearing
Dafte: April 25, 2023
Time: 10:00 AM
Place: 1225 Fallon St., Oakland, CA 94612

Reserv. No. 519812688668
Action Filed: January 8, 2018
Trial Date: June 7, 2023

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INTRODUCTION

This Court should deny Conduent State and Local Solutions, Inc.'s ("Conduent")[1] motion for summary judgment and summary adjudication because ample evidence demonstrates that Conduent knowingly made false statements material to the false claims for payment it submitted to the California Department of Parks and Recreation ("DPR") and violated Plaintiff-Relator Bryan Bashin's rights under the Unruh Act. DPR hired a contractor, Conduent, to design and construct a website through which the public could reserve DPR campgrounds and other public amenities. Conduent assured DPR throughout the bidding process that its team could construct a website accessible to users who were blind and whose disabilities required screen readers, which DPR was legally obligated to provide, and assumed the project management responsibility of ensuring that all contract requirements, including website accessibility, were fulfilled. DPR relied on these representations regarding accessibility in selecting the companies for this lucrative bid.

When the ReserveCalifornia.com website (the "Website") went live to the public on August 1, 2017, it was profoundly and fundamentally inaccessible to blind users and others whose disabilities require the use of assistive equipment. The deficiencies, many of which were not corrected for years, were not mere technical deviations, but threshold accessibility barriers involving basic tools for navigating the Website, such as the calendar/date picker. As a result of these barriers, blind and disabled users either cannot research or reserve sites at all or are placed at a significant and often dispositive disadvantage in competing with sighted users to reserve the most desirable campsites and amenities.

Conduent did nothing to alert DPR to these accessibility barriers. When DPR attempted to investigate the accessibility barriers after receiving Plaintiff-Relator Bryan Bashin's complaint, Conduent dismissed DPR's concerns out of hand even though it had utterly failed to monitor Website accessibility or accessibility testing. Further, Conduent violated Mr. Bashin's rights under the Unruh Act by misrepresenting the accessibility of the Website to DPR and failing to ensure that

[1] Plaintiff-Relator concedes that Conduent Incorporated is not a proper party to the case. Plaintiff-Relator and Conduent State and Local Solutions, Inc. have reached a stipulation that Conduent, Inc. will cover any damage award against Conduent State & Local Solutions, Inc. that Conduent State & Local Solutions, Inc. is unable to satisfy.

US eDirect even attempted to comply with the applicable accessibility standards.

DPR has an obligation under California law to provide an accessible website, and because of Defendants' conduct, it has been unable to do so. As a result, thousands of people who are blind and require assistive technology are shut out of enjoying the state's parks because of their disabilities.

FACTS

A. Defendants Falsely Represented Their Ability to Develop an Accessible Website.

In March 2016, Conduent—then incorporated as Xerox State & Local Solutions, Inc.[2]—entered into a contract with DPR in March of 2016 (the "Contract") to replace DPR's reservations system with a public-facing website, ReserveCalifornia.com, and supporting technology (collectively, "Recreation and Reservations Sales Service" or "R2S2") through which users would have 24/7 access to research and reserve campsites, cabins, and tours in more than 300 DPR facilities around California. Plaintiff-Relator's Additional Material Facts ("AMF"), ¶ 1. The Contract prescribed a "Go Live" date of August 1, 2017, and Conduent estimated its value in excess of $66 million. *Id.* ¶¶ 6-7.

California law requires all public-facing State agency websites to be accessible to blind and other disabled users. *Id.* ¶ 3. Because it was required by law to provide an accessible website, DPR specified in the Contract that compliance with Section 508 of the Rehabilitation Act, the Web Content Accessibility Guidelines ("WCAG") 2.0, California Government Code § Section 11135, and State Administrative Manual 4833 (collectively, the "Accessibility Requirements") was "mandatory." *Id.* ¶¶ 4-5, 8. Had it known Conduent would not comply with the Accessibility Requirements, DPR could not have awarded it the Contract. *Id.*¶ 15.

Because Conduent had no experience with the development of reservations websites, *Id.* ¶ 20, it needed to find a subcontractor capable of providing that expertise. It chose US eDirect, Inc. ("US eDirect"), a company with whom it had no prior relationship, because US eDirect had developed and deployed the Recreation Dynamics ("RD") reservation platform in several other

[2] After Xerox State & Local Solutions, Inc. entered into the Contract with DPR, the Contract was amended to change the name of Xerox State & Local Solutions, Inc. to Conduent State & Local Solutions, Inc. Conduent SSUMF, ¶ 14. Throughout this brief, "Conduent" will refer to both the Xerox and the Conduent entities.

states. *Id.* ¶¶ 16, 21-22. In deciding to contract with US eDirect, Conduent did not inquire whether the other US eDirect websites were accessible, check those websites itself, or even ask US eDirect if the RD platform met the Accessibility Requirements. *Id.* ¶¶ 24-27. In the absence of this bare minimum of vetting, Conduent did not discover that, at least twice before, US eDirect had built reservations websites that were later found to be inaccessible, *Id.* ¶¶ 28, 38-45, and consequently could not disclose these errors to DPR.

Instead, US eDirect and Conduent affirmatively misrepresented their capacity to deliver an accessible website. In its August 12, 2015 Bidder Detailed Response ("BDR"), Conduent assured DPR that the proposed website complied with the Accessibility Requirements and inaccurately asserted that an automated testing tool called WAVE (developed by WebAIM) could demonstrate compliance. *Id.* ¶¶ 22, 29-30, 32. Conduent made this representation even though the WebAIM website makes clear that WAVE cannot demonstrate compliance with WCAG 2.0. *Id.* ¶¶ 35-36. Further, the BDR represented that "[accessibility] testing is conducted throughout the design process to conform to standards," *id.* ¶ 30, and purported to show that the RD platform had been tested and had "no [accessibility] issues," *id.* ¶ 32. Finally, the BDR represented that the "system interface is compliant with most states' accessibility standards; any additional requirements specific to the State of California will be made prior to UAT testing." *Id.* ¶ 32. This entire portion of the BDR is repeated verbatim in the Website Design Plan Conduent delivered to DPR in March 2017, just three weeks after US eDirect received much more detailed findings about thirty systemic accessibility violations from a third client—the Minnesota Department of Natural Resources ("MNDNR"). *Id.* ¶¶ 31, 44.

DPR awarded the R2S2 project to Conduent, and the Contract (incorporating all of the BDR representations) became effective on March 30, 2016. *Id.* ¶¶ 1-2.

B. The Conduent Team Managed a Tightly-Controlled Testing Process.

The Contract and Test and Evaluation Master Plan require the Conduent team to internally test Contract requirements in a step called System Functional Testing ("SFT"). *Id.* ¶¶ 92-94. SFT was performed by Conduent's contractor Red River, checked the functionality of the Website against the requirements of the Contract using scripts Red River wrote, and, before Go Live,

preceded another testing step called User Acceptance Testing ("UAT"). *Id.* ¶¶ 94-96. The goal of SFT was to catch errors to make the website "as foolproof as possible before it went to the end users" for testing. *Id.* ¶¶ 97-98.

After SFT, the Conduent team managed and organized UAT to test the same contract requirements as SFT. *Id.* ¶¶ 100-113. Although Defendants now contend that DPR conducted UAT entirely independently of them, the record tells a different story: "ownership" of UAT shifted from DPR to Defendants in late 2016, months before UAT began, and Conduent was responsible for the "planning, preparation, and execution of the UAT phase." *Id.* ¶¶ 106, 109. Prior to Go Live, Conduent attended regular, sometimes daily, UAT meetings and tracked UAT results. *Id.* ¶¶ 112-113. Indeed, Defendants guarded their control over UAT carefully, and when they perceived that a DPR contractor (VF Partners) was overstepping its role, Conduent complained—successfully—to DPR to retain control over the process. *Id.* ¶¶ 107-108.

UAT was to be performed by following specific step-by-step scripts typically drafted by Red River. *Id.* ¶¶ 100-101. DPR personnel "performed" UAT only insofar as they followed these scenarios provided by the Conduent team. *Id.* ¶¶ 100-101. The Conduent team prescribed each aspect of UAT: testers retrieved and executed their scripts and logged results in Jama, Conduent's project management program; UAT was conducted only after Defendants had conducted SFT; and UAT was coordinated by Red River. *Id.* ¶¶ 100-113. When Defendants perceived that DPR testers were varying too far from the scenarios, they complained to DPR. *Id.* ¶¶ 107-108.

C. Conduent Failed to Track or Manage Accessibility as a Contract Requirement.

Under the terms of the Contract, Conduent was responsible for the delivery and management of all Contract requirements. As Conduent concedes, its role on the R2S2 project is as a "systems integrator," engaging and managing the work of subcontractors. Conduent's Separate Statement of Undisputed Material Fact ("SSUMF"), ¶ 12; AMF, ¶ 47. The Contract both holds Conduent ultimately responsible for the work of its subcontractors, AMF, ¶¶ 17-19, and requires the Conduent team to design a project management system that ensures the delivery of Contract requirements, *id.* ¶ 13. Among other responsibilities, the Contract requires the Conduent team to provide a Requirements, Test, and Quality Manager to track the work done by various parties to meet those

requirements, including ensuring that each requirement has been adequately tested. *Id.* ¶¶ 10-12.

Conduent admits that it abandoned these responsibilities when it came to it came to Website accessibility—and only Website accessibility. Unlike every other Website requirement, Conduent and its contractors neither conducted SFT on nor managed a UAT process for Website accessibility, *id.* ¶¶ 99-113, 115-120, 124-128. Conduent did nothing to ensure that US eDirect had actually performed the ongoing accessibility testing promised under the Contract or ask for any records of accessibility testing until October 2018. *Id.* ¶¶ 53-56, 152. While the Conduent team tracked the testing and fulfillment of every other contract requirement, *no one* tracked Website accessibility or accessibility testing. *Id.* ¶¶ 65-75. Instead, Conduent accepted without question US eDirect's representations. *Id.* ¶ 59.

Even if it had intended to actively manage US eDirect's compliance with the Accessibility Requirements, Conduent admits that it had no experience managing the creation of reservations websites, its project managers lacked experience with accessibility, and it did not even look up the applicable California accessibility standards before submitting its bid. *Id.* ¶¶ 20, 23, 49-52, 64; *see also id.* ¶¶ 60-61. Conduent also failed to establish a system to trace Website accessibility requirements down to the underlying code to ensure they were met, *id.* ¶ 48; *see also id.* ¶¶ 67-69, and refused to use US eDirect's project management tool for greater transparency, *id.* ¶¶ 62-63.

D. DPR Did Not Approve an Inaccessible Website Before Go Live.

1. DPR Shared the Accessibility Requirements with Defendants and Emphasized Their Importance.

In May 2016, after Conduent was awarded the Contract, DPR began reviewing the R2S2 requirements with Defendants. *Id.* ¶ 76. Before a discussion regarding Website accessibility, DPR emailed to Defendants both those portions of the Contract relevant to the Accessibility Requirements and the "outside" accessibility standards referenced in the Contract. *Id.* ¶¶ 77-81. After the May 6, 2016 meeting in which Defendants and DPR discussed the Accessibility Requirements, Julia Cox, a DPR employee, circulated a layperson's summary of the discussion, emphasizing, "The contractor must comply with accessibility standards throughout the contract agreement." *Id.* ¶¶ 82-84. Her summary confirmed that an alternative method such as a Contact

Center could be offered instead of an accessible Website *only* if the Accessibility Requirements could not be met due to "cost or other constraints," *and* if the alternative method provides "comparable service." *Id.* ¶ 85. She also wrote that DPR would validate whether the Accessibility Requirements had been met specifically through the highly-managed UAT process. *Id.* ¶¶ 86, 114. DPR did not purport to change the substantive Accessibility Requirements. *Id.* ¶ 87. Neither Defendant has ever approached DPR with evidence that "cost or other constraint" justified the use of the Contact Center as an alternative to an accessible Website. *Id.* ¶¶ 188-189. The Contact Center does not provide comparable service to the Website because it is available only seventy hours per week and can involve lengthy wait times. *Id.* ¶ 190; *see also id.* ¶ 219. Around May 2020, the Contact Center number was hidden on the Website from most blind screen reader users. *Id.* ¶ 191.

DPR has never waived the Accessibility Requirements; to the contrary, DPR made clear that accessibility was a "critical" feature for the "initial go-live." *Id.* ¶¶ 173-178.

2. DPR Could Not Have Tested the Website for Accessibility in Fall 2016.

In October and November 2016, US eDirect led "configuration sessions" for DPR. *Id.* ¶¶ 88-90. During these meetings, DPR personnel and US eDirect employees reviewed mocked-up images of the Website as a group and DPR personnel provided feedback on how they wanted the Website to be set up. *Id.* ¶ 89. Although accessibility came up "occasionally," US eDirect's Deputy Project Manager testified that "it was not" the goal to address accessibility during these session because "it would have been pointless at this point to review accessibility" given that there was not yet a working version of the Website. *Id.* ¶ 91.

3. Defendants Did Not Manage a UAT Process for Website Accessibility.

Conduent knowingly excluded accessibility testing from UAT. Conduent's contract with Red River explicitly carved out accessibility testing from Red River's responsibilities, *id.* ¶¶ 71-72, and Conduent did not fill this gap to ensure that UAT included accessibility testing. When Defendants presented the Website Design Plan in March 2017, DPR asked why US eDirect's accessibility testing was not documented. Conduent's R2S2 project manager, Ginger Salone, informed DPR that such testing "is for web standard conformance and is not part of SFT or UAT, so won't be documented in Jama or anything like that. The testing will be executed again when the

website features are finalized to ensure the website does still meet the [Accessibility Requirements]." *Id.* ¶ 127.

Defendants instead identified Jason Stora—a DPR employee with no background in website accessibility testing, no technical skills, and limited tools relevant to testing—to perform some accessibility review contemporaneous with the UAT process, *id.* ¶¶ 116, 121-123, 132-134.[3] In contrast to their oversight of non-accessibility UAT testing, Defendants gave Mr. Stora no instructions to follow, *id.* ¶ 118—no scripts, scenarios, or test cases—and no supervision. Mr. Stora was left to simply poke around the Website to identify problems with his "naked eye" because he was unable to use the screen reader technology that a blind user would employ. *Id.* ¶¶ 121-122, 129-131. Defendants did not give Mr. Stora any way to log his findings, so he jotted them down in a Word document. *Id.* ¶ 120. Unsurprisingly, Mr. Stora repeatedly testified that he had not performed UAT, or any other kind of accessibility testing, and that Defendants never told him that he was responsible for Website accessibility UAT or that they intended to rely exclusively on his review to identify accessibility problems with the Website. *Id.* ¶¶ 115, 117, 124-125, 129-130, 136-138; *see also*, 104, 126, 128, 139. When he completed his *ad hoc* review, he never approved the accessibility of the Website. *Id.* ¶ 138; *see also* 175.

E. Defendants Misrepresented the Accessibility of the Website at and After Go Live.

On August 1, 2017, Defendants launched to the public a Website that was both technically deficient and entirely unusable to blind people and people with other disabilities. *Id.* ¶¶ 208-212, 216, 218. Having relied on Defendants' repeated assurances that the RD platform was accessible, that accessibility testing was occurring, and that Defendants' approach ensured accessibility, DPR was entirely unaware of the Website's inaccessibility. *Id.* ¶¶ 14, 32-33, 167-168, 192-193.

[3] Conduent's insistence that Mr. Stora was designated as a "subject matter expert" for "ADA Compliance" is highly misleading. Mr. Stora's expertise focused primarily on the physical accessibility of campsites and amenities and the feedback he provided reflected that focus. AMF, ¶ 132. Indeed, US eDirect's own Deputy Project Manager admitted that, at the time Mr. Stora was designated as a subject matter expert, DPR did not know that the subject matter experts would later test the Website for accessibility, or anything else. *Id.* ¶ 135; *see also id.* ¶ 128 (DPR did not understand Mr. Stora to be conducting UAT).

After Go Live, Defendants continued to misrepresent the accessibility of the Website. When DPR first learned of a complaint about the inaccessibility of the Website in February 2018, it immediately took action, asking Conduent if the Website was accessible and for information about the methods Defendants employed to ensure its ongoing accessibility. *Id.* ¶ 147. Without knowing whether the Accessibility Requirements applied to the public-facing Website or what testing for accessibility, if any, had occurred, Conduent's project manager reassured DPR that "[w]e believe that it is compliant," put the onus on DPR to identify specific accessibility barriers, and dismissed DRP's concerns out of hand. *Id.* ¶¶ 51-58, 148-152.

F. DPR Demanded Remediation.

Since first learning of the Website's inaccessibility, DPR has consistently sought information about how the site can be brought into compliance and demanded remediation plans from Conduent. In the summer of 2018, DPR requested accessibility testing results from Conduent and asked the California Department of Rehabilitation to conduct a limited accessibility survey of the Website. *Id.* ¶ 154. When that agency identified multiple systemic accessibility barriers that would prevent a blind user from navigating the Website, *id.*, DPR demanded that Defendants remedy these barriers, *id.* ¶ 202. DPR's Chief Information Officer ("CIO") convened a meeting with Defendants on October 15, 2018 and made clear that an "ADA review and report is required to be provided to [him] before he will approve any production update." *Id.* ¶ 200. Summarizing that October 15 meeting, the CIO wrote to Conduent, emphasizing that "ensuring those with disabilities have the ability to use the R2S2 system to access and enjoy our State Parks is paramount." *Id.* ¶ 201.

DPR has never accepted or approved of the inaccessibility of the Website. *Id.* ¶¶ 169-170, 179-180. In contemporaneous documents and in deposition testimony, numerous DPR personnel expressed their understanding that the Website was required to meet the Accessibility Requirements when it launched and continuously throughout the life of the project. *Id.* ¶¶ 165-166.

Each month since Go Live, Conduent has presented one or more invoices to DPR, impliedly representing that it is entitled to payment because it has complied with the Accessibility Requirements. *Id.* ¶ 203. Defendants repeatedly—and falsely—assured DPR that there were not

accessibility problems or that they were fixing problems that had been identified, and DPR was entirely reliant on those representations. *Id.* ¶¶ 145-152, 155-163, 168, 183. Further, DPR believed that, if it stopped paying Conduent, Defendants "would take their ball and go home," and that DPR would be left without any Website at all. *Id.* ¶¶ 181-182, 184.

G. DPR Did Not Excuse Conduent's Compliance with the Accessibility Requirements.

DPR did not agree that "continuous improvement" toward the Accessibility Requirements was sufficient under the Contract or that Conduent need not meet the Accessibility Requirements at Go Live. *Id.* ¶¶ 165, 173, 177-178. Despite Conduent's assertions, the first time the phrase "continuous improvement" was ever applied to Defendants' Website accessibility obligations was in October 2018, when DPR's CIO realized the agency was stuck with a Website that blind people could not use, demanded that Conduent take immediate steps to remediate the deficiencies, and recognized that the only possible way to meet the Accessibility Requirements was by "continual process improvement." *Id.* ¶ 201. Neither Defendant cites to a single piece of contemporaneous evidence in which DPR adopted this standard as legally sufficient.

LEGAL STANDARD AT SUMMARY JUDGMENT

Conduent's motion for summary judgment must be denied unless Conduent shows there is no triable issue as to any material fact and that it is entitled to judgment as a matter of law. Cal. Civ. Pro. § 437c(c). "The moving party bears the burden of showing the court that the plaintiff has not established, and cannot reasonably expect to establish, the elements of his or her cause of action." *Wilson v. 21st Century Ins. Co.*, 42 Cal. 4th 713, 720 (Cal. 2007) (internal quotations omitted). The Court must draw all reasonable inferences in favor of Plaintiff-Relator. *Miller v. Dep't of Corrections*, 36 Cal. 4th 446, 470 (Cal. 2005). Further, this Court may deny summary judgment "if the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact." Cal. Civ. Pro. § 437c(c).

ARGUMENT

I. There is a Dispute of Fact as to Whether Conduent Violated the CFCA.

A. The California False Claims Act

An entity violates the CFCA where it "[k]nowingly presents or causes to be presented a false

or fraudulent claim for payment or approval," Cal. Gov. Code § 12651 (a)(1), or "[k]nowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim," *id.* at § 12651(a)(2). An entity also violates the CFCA if it "[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." *Id*. at § 12651(a)(8). The CFCA "must be construed broadly so as to give the widest possible coverage and effect to the prohibitions and remedies it provides." *City of Pomona v. Superior Court*, 89 Cal. App. 4th 793, 801 (Cal. App. Ct. 2001) (internal citation omitted); *see also San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.*, 182 Cal. App. 4th 438, 446 (Cal. App. Ct. 2010) (*Contreras I*).[4]

B. Conduent Made False Statements and Submitted False Claims for Payment.

In an implied false certification claim under the CFCA, a contractor is liable when it seeks payment for goods or services that do not conform to contractual terms or when it makes false records or statements regarding contractual compliance material to the false claims for payment, even if it does not expressly certify contractual compliance on the face of its invoices. *Contreras I*, 182 Cal. App. 4th at 447; *accord Pomona*, 89 Cal. App. 4th at 801(holding that "the claim itself need not be false, but only need be underpinned by fraud."). As the Court of Appeals reasoned in *San Francisco Unified School District ex rel. Contreras v. Laidlaw Transit, Inc*:

> ***It is reasonable for governmental entities to assume that contractors seeking payment are in compliance with the material terms of their contracts.*** If a contractual provision turns out to be unduly onerous or a contractor needs more time to comply, the contractor does not expose itself to liability under the CFCA if it informs the governmental entity of the problem and seeks an accommodation. ***But if that same contractor is aware of the noncompliance and chooses to seek payment without informing the government, then it is a fraud appropriately within the scope of the CFCA***.

[4] Because the CFCA is patterned on the federal False Claims Act, California courts have held that courts may turn to federal cases for guidance interpreting the CFCA, but only when "[t]here is a dearth of California authority pertinent to the issues raised." *Pomona*, 89 Cal. App. 4th at 802.

182 Cal. App. 4th 438, 453 (Cal. App. Ct.) (internal citations omitted) (emphases added). Falsity is an objective inquiry that is "determined by whether [a defendant's] representations were accurate in light of applicable law." *United States ex rel. Oliver v. Parsons*, 195 F.3d 457, 463 (9th Cir. 1999). Here, Conduent contracted to build a Website that conformed to the Accessibility Requirements, repeatedly represented that the Website complied, knowingly delivered a Website that was unusable by blind people, but nonetheless sought payment without informing DPR. Conduent never suggested that the Accessibility Requirements were "unduly onerous" or that it "need[ed] more time to comply." It thus committed "a fraud appropriately within the scope of the CFCA."

1. The Website was Inaccessible at and After Go Live.

Conduent effectively concedes that the Website does not comply with the Accessibility Requirements: at no point does Conduent contend or identify evidence to establish that the Website met the technical requirements included in the Accessibility Requirements. Nor could it.

Based on the assessment of multiple third parties, a reasonable fact finder could conclude that Conduent's claims for payment and assertions of compliance with the Accessibility Requirements were false: **(1)** Mr. Bashin found that the Website was entirely unusable by a blind person in September 2017 and found numerous accessibility barriers thereafter. AMF, ¶¶ 208- 212. **(2)** On September 29, 2018, the Website received a score from an automated test called SiteImprove of just 62.1 out of 100, with an "Accessibility Score progress" history showing a similar score as far back as October 10, 2017. DPR was not informed of those scores. *Id.* ¶ 155. **(3)** Sina Bahram, Mr. Bashin's expert witness on Website accessibility, conducted comprehensive audits of the website in December 2017, June 2019, December 2019, May 2020, and March 2021, as well as a spot check in March 2023, demonstrating that, in fact, a blind person could not use the Website at all through at least December 2019. *Id.* ¶¶ 205, 216-217. **(4)** On August 7, 2018, the California Department of Rehabilitation issued an Accessibility Assessment Report identifying nine distinct accessibility barriers appearing on multiple pages of the Website. *Id.* ¶ 154. **(5)** In July 2019, US eDirect hired eSSENTIAL Accessibility ("eA") to identify "accessibility issues" on the Website. eA's "initial report" identified 157 WCAG violations on the Website, 130 of which were described as "high" in severity and two (2) of which were described as "critical" in severity. According to eA, a "high

severity" violation "results in serious barriers for individuals with disabilities" meaning "some content will be inaccessible." A "critical" violation "results in blocked content for individuals with disabilities. Until a solution is implemented content will be completely inaccessible." *Id.* ¶ 142-143. **(6)** On December 31, 2019, an accessibility consultant retained by the California Attorney General identified 969 WCAG violations, categorizing 283 of these as "high" in severity. *Id.* ¶ 204. **(7)** In April of 2020, US eDirect reported that eA had remediated 260 accessibility issues since July 2019. *Id.* ¶ 206. **(8)** In October 2020, the California Attorney General's office notified counsel for Conduent that members of the California Council of the Blind had identified accessibility barriers on the Website that prevented blind users from researching availability and making reservations in California parks. *Id.* ¶ 220.

2. DPR Did Not Knowingly Accept the Inaccessible Website.

i. DPR Never Agreed that Mere "Substantial Conformance" or "Continuous Improvement" Was an Alternative to Contractual Compliance.

Having delivered and maintained a Website that is not accessible to blind and other disabled visitors, Conduent now contends that it did not submit false claims because, notwithstanding the express language of the Contract, the Website was not required to meet the Accessibility Requirements at all. At times, Conduent claims that DPR agreed to accept mere "substantial conformance" with the Accessibility Requirements or "continuous improvement" towards meeting the Accessibility Requirements—terms it uses interchangeably but does not define. At others, it asserts that DPR waived Contract provisions requiring compliance with the Accessibility Requirements at Go Live by permitting the Website to begin operations.

A reasonable fact finder could readily discredit these *post hoc* assertions. Conduent's argument that the Website was not required to comply with the Accessibility Requirements when it launched is based entirely on the recent declaration of DPR's former CIO Phil Minas, which was prepared in support of summary judgment briefing in this litigation. Conduent Mem. at 11. Mr. Minas claims that DPR designated the Accessibility Requirements as requirements that were not essential for Go Live. But Mr. Minas made no mention of this alleged designation when he was deposed in this case and the documentary record shows precisely the opposite: DPR designated the

Accessibility Requirements as "Priority 1" items "considered critical for initial go-live." AMF, ¶ 178; *see also id.* ¶ 177. While DPR has accepted *other* contractual requirements, DPR has not issued a contractual acceptance either of the Website as a whole or the Website's accessibility in particular. *Id.* ¶¶ 169-171, 180. DPR's CIO confirmed that no one at DPR had "the authority to waive accessibility requirements … It's a statewide requirement." *Id.* 172-176.

A reasonable factfinder could also easily conclude that neither "continuous improvement" nor "substantial conformance" satisfied the Accessibility Requirements. Conduent again relies on the November 2022 declaration of Phil Minas to support its recasting of its accessibility obligation as mere "continuous improvement in the area of accessibility." Conduent Mem. at 11. But this recent declaration is undermined by Mr. Minas's own contemporaneous writings and earlier deposition testimony. The term does not appear in any communication between Mr. Minas and Conduent during his tenure at DPR, and Mr. Minas did not use "continuous improvement" a single time in his June 3, 2021 deposition. Indeed, the first time the phrase or anything similar appears in any communication related to accessibility is in October 2018. Then, DPR's CIO demanded that Conduent and US eDirect take immediate steps to remediate the accessibility deficiencies by engaging in "continual process improvement"—the term thus described necessary remedial measures rather than a contractual standard. AMF, ¶ 201.[5] Far from endorsing "continuous improvement," numerous DPR personnel expressed their understanding, including in contemporaneous documents, that the Website was required to meet the Accessibility Requirements when it launched and continuously throughout the life of the project. *Id.* ¶ 165.

Similarly, DPR's former Chief Information Officer confirmed that no one at DPR "authorize[d] mere substantial compliance or substantial conformance as satisfactory under the contract," and Conduent has not identified any evidence to the contrary. *Id.* ¶ 176. Instead, Conduent attempts to argue that courts have "universally accepted" "substantial conformance" with "WCAG standards" as sufficient. Conduent Mem. at 10-11. But Conduent has failed to identify a

[5] By November of 2018, DPR had been alerted through the filing of the complaint in this case that there were concerns about the accessibility of the Website, and it met with Conduent and US eDirect to discuss those concerns. In spite of this meeting, Conduent and US eDirect did not reveal the extent of the problem to DPR for several more years, as discussed below.

single case where a court decided that "substantial conformance" fulfilled the requirements of WCAG 2.0, only consent judgments, settlements, and a default judgment where actual compliance was never raised. *Id.* That courts have accepted settlements in which litigants voluntarily agree to adopt a "substantial conformance" standard after settlement negotiations says nothing at all about whether "substantial conformance" with the "WCAG standard" is legally sufficient. Of course, the Accessibility Requirements include WCAG 2.0 AA, but also incorporate other requirements, including actual usability.

In any event, the Website did not "substantially conform" to WCAG 2.0 or any other part of the Accessibility Requirements. In addition to the evidence gathered by Plaintiff-Relator's expert demonstrating hundreds of violations of the Accessibility Requirements, the California Attorney General's auditor identified 283 "high" severity accessibility violations as late as December 2019. AMF, ¶ 204. In practical terms, the experiences of Mr. Bashin, Mr. Bahram, and members of the California Council of the Blind demonstrate that blind people could not actually use the Website at various points in time from September 2017 through at least December 2019. *Id.* ¶¶ 207-216.

Conduent's evidence of "substantial conformance" borders on incoherent. First, Conduent points to a certificate of "substantial conformance" with WCAG 2.0 that US eDirect received for a different website in 2015. But the fact that US eDirect received a certificate of "substantial conformance" with WCAG 2.0 for a different website in 2015 has no bearing on whether *this* Website met the Accessibility Requirements in *this* Contract.[6] *Id.* ¶¶ 140-141; *see also id.* ¶ 5.

Conduent also conflates Contract compliance with the Website's passing of a single automated test. Although Defendants did misrepresent to DPR that WAVE could adequately test for accessibility, DPR did not adopt the WAVE test as the exclusive measure of compliance with the Accessibility Requirements, and the WebAIM website plainly stated that WAVE cannot determine

[6] Conduent contends that the certificate issued two years earlier for a different website is relevant because US eDirect "built the Website using the same 'core code'… that it had used for… other government projects also subject to accessibility requirements." Conduent Mem. at 12. But US eDirect's own employees could not determine whether accessibility fixes applied to earlier websites built on the RD platform actually altered the "core code." AMF, ¶ 46. Further, between working on the US Capitol Visitor Center and building the Website, US eDirect built at least one website that also experienced significant accessibility failures, indicating that the changes US eDirect made to RD in 2015 left significant accessibility failures unaddressed. *Id.* ¶¶ 44-45.

if a webpage is accessible. *Id.* ¶¶ 35, 37. Even if WAVE were the measure of compliance, the single set of WAVE results sent to DPR—without any explanation as to its meaning—was run months before Go Live and shows ten errors and dozens of alerts. *Id.* ¶ 144.

Finally, Conduent's claims that the Website substantially conformed with the Accessibility Requirements because DPR conducted two rounds of testing before go-live are factually false.[7] The so-called "testing" in the fall of 2016 was not testing at all: the purpose of the configuration sessions was not to review for accessibility, no one from DPR could interact with the Website to conduct this alleged testing, and US eDirect's Deputy Project Manager testified that "it would have been pointless at this point to review accessibility" because it was too early in the process. *Id.* ¶¶ 88-91. And, as addressed in greater detail, *supra*, Conduent failed to manage and organize a UAT process for Website accessibility in the spring of 2017 and never received approval of Website accessibility from DPR. AMF, ¶¶ 104, 118, 120-121, 129-130, 138, 175. In any event, "the government's knowledge of the falsity of a claim does not preclude a finding of falsity." *Gonzalez v. Planned Parenthood of Los Angeles, et al*., No. CV 05-8818, 2011 WL 1481398, *5 (C.D. Cal. Apr. 19, 2011); *see also Oliver*, 195 F.3d at 463. Thus, even if this Court accepted Conduent's arguments that "substantial conformance" fulfilled Conduent's legal obligations, a reasonable jury could easily conclude that Conduent failed to meet even that lesser standard.

ii. DPR Never Approved the Contact Center as an Alternative to Compliance.

Attempting to avoid CFCA liability, Conduent claims that DPR permitted it to develop and operate an inaccessible Website so long as it provided a "Contact Center" for blind and disabled users. Conduent Mem. at 13-14. This strategy rests on May 2016 e-mail correspondence from a DPR employee named Julia Cox, but that email does not do the work Conduent claims.

At Defendants' request, Ms. Cox provided Defendants with the "outside" accessibility laws and regulations expressly referenced in the contract in advance of a May 6, 2016 meeting with Defendants. AMF, ¶¶ 77-81, 84. After the meeting, Ms. Cox wrote: "[t]he contractor must comply with accessibility standards throughout the contract agreement." *Id.* ¶¶ 84, 85. She then continued

[7] Further, as is explained in greater detail, *infra*, testing by DPR would only be relevant to Conduent's liability if Conduent had provided all relevant information about accessibility to DPR and DPR had knowingly approved the Website's inaccessibility. Here, neither is true.

with a layperson's interpretation of Section 508's undue burden test, which would permit an alternative approach if a contractor established—to DPR's satisfaction—that complying with the Accessibility Requirements would impose a significant difficulty or expense.[8] "If these standards can't reasonably be met in a particular vehicle due to costs or other constraints, alternative methods that provide comparable service must be available." *Id.* ¶ 85. She emphatically was not telling Defendants—fifteen months before Go Live—that they need not comply with the Accessibility Requirements as long as they provided a Contact Center. *Id.* ¶ 87. As Defendants never demonstrated or even sought to demonstrate that they could not comply with the Accessibility Requirements or that the Contact Center provided comparable service, the undue burden test simply was not implicated. *Id.* ¶¶ 188-190.

Conduent's assertion that DPR "expressly authorized Conduent S&L to provide alternative accommodations such as a call center" in place of an accessible Website, Conduent Mem. at 13-14, also flatly contradicts the record. Bill Anderson, US eDirect's Deputy Project Manager until 2018, testified that, when he asked in October 2016 if the Contact Center was an acceptable "alternate path" to complying with the Accessibility Requirements, DPR "said no, that's not—that's not acceptable. It's good, but … it doesn't replace for anything else that you have to do to make the website—improvements on the website for accessibility." AMF, ¶¶ 186-187.

3. Conduent's Implied False Certifications of Compliance with the Accessibility Requirements Violate the CFCA.

In the face of this overwhelming evidence of falsity, this Court should reject Conduent's attempt to escape liability by rewriting California law regarding implied false certification claims. Conduent urges this Court to reject the applicable California precedent in *Contreras I* in favor of the standard for implied false certification claims found in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016). Conduent Mem. at 15. No appellate court interpreting the CFCA has ever adopted the implied false certificatbuion standard from *Escobar*, as Conduent appears to recognize.[9] Further, California courts may only turn to the FCA for guidance in

[8] *See* 29 U.S.C. § 794d(a)(1)(B); 36 C.F.R. pt. 1194, appendix A E202.6.3.

[9] Conduent may sincerely believe the California Supreme Court "would adopt the reasoning and requirements of *Escobar*," Conduent Mem. at 15, but that is no more than speculation. That "no

interpreting the CFCA if "[t]here is a dearth of California authority pertinent to the issues raised in [a] case." *Pomona*, 89 Cal. App. 4th at 802. In this case, however, *Contreras I* is directly on point and adopts a standard that is more protective of the State coffers than the *Escobar* standard. Under these circumstances, there is no basis for the Court to ignore this applicable California precedent.

C. The Falsity of Conduent's Statements and Claims was Material to Payment.

1. False Representations that the Website Complied with the Accessibility Requirements Were Material to DPR's Payment Decisions.

A claim is "material" under the CFCA if it has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money, property, or services." Cal. Gov't Code § 12650(b)(4); *see also Pomona*, 89 Cal. App. 4th at 802. [10] In order to ensure that the CFCA is "given the broadest possible construction" to "prevent fraud on the public treasury," *Contreras I*, 182 Cal. App. 4th at 446, California courts have focused the materiality inquiry on "the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered… Thus, the government contracting entity's actual reaction upon learning of a false claim is not dispositive of the issue of materiality." *San Francisco Unified School Dist. ex rel. Contreras v. First Student, Inc.*, 224 Cal. App. 4th 647, 642 (Cal. App. Ct. 2014) (*Contreras II*) (citations omitted). Instead of focusing on the government's response, the CFCA inquiry under *Contreras II* asks whether Defendants' alleged falsity had a "natural tendency" to influence DPR's initial award of the Contract and its subsequent payment decisions. *Id.* Here it plainly did.

Ample evidence in the record demonstrates that assurances about website accessibility had a natural tendency to influence DPR's initial contract award and later payment decisions. First, State law requires DPR to maintain a website complying with the Accessibility Requirements, AMF, ¶¶ 3-4, 21, and so as a matter of logic and common sense, a reasonable jury could conclude that Defendants' false representations of compliance with those requirements—supporting their subsequent claims of payment—had the "natural tendency to influence, or [were] capable of

published California appellate decisions since [2014] have addressed the 'implied false certification' theory of CFCA liability," *id.* at 16, is only an indication that the criteria articulated in *Contreras I* remain the law in California.

[10] Mr. Bashin's claim under Cal. Gov't Code § 12651(a)(8) that Conduent is a "beneficiary of an inadvertent submission of a false claim"—does not require a showing of materiality.

influencing" DPR's payment of Conduent's invoices. *See Contreras II*, 224 Cal. App. 4th at 640 (recognizing a defendant's alleged falsities can be material "as a matter of common sense.").

DPR reflected this legal requirement by including web accessibility as a "mandatory" term in the scope of work. AMF, ¶¶ 8, 15; *see also id.* ¶ 195. The importance of the mandatory requirements, including the Accessibility Requirements, is reinforced by the Contract provision entitling DPR to impose liquidated damages of up to $10,000 per day that the Website does not comply with a mandatory requirement. *Id.* ¶ 9. *See Contreras I*, 182 Cal. App 4th at 455-56 (a liquidated damages provision "indicates the special importance of the provisions to the contractee.").

It is clear from Defendants' bid submission that Defendants themselves knew this term was material to DPR. In their BDR, Conduent included a draft Website Design Plan and assured DPR that it "demonstrates compliance with Section 11135 of the California Government Code and USAB Section 508 standards, and Web Content Accessibility Guidelines (WCAG) 2.0 developed by the World Wide Web Consortium (W3C)." AMF, ¶¶ 29, 30. In awarding the Contract, DPR relied on that assurance and on US eDirect's representation that the RD platform on which the R2S2 Website was to be built had been tested and had "no [accessibility] issues," that test "results show conformance with WCAG 2.0 Level AA," and that the "system interface is compliant with most states' accessibility standards; any additional requirements specific to the State of California will be made prior to UAT testing." *Id.* ¶ 167. Then, as described above, when DPR was forced to defer some contract requirements to ensure the Website could go live on time, it refused to waive the accessibility requirements. *Id.* ¶¶ 177-178.

Finally, as soon as DPR learned from Mr. Bashin's lawsuit that the Website did not comply with the Accessibility Requirements, it took steps to ensure accessibility, further demonstrating that it deemed compliance with the Accessibility Requirements to be material. DPR asked that the California Department of Rehabilitation review the accessibility of the Website. *Id.* ¶¶ 154, 196. DPR's CIO also convened a meeting with Defendants on October 15, 2018 to make clear that an "ADA review and report is required to be provided to [him] before he will approve any production update. US eDirect will ensure improvements are being made for ADA…." *Id.* ¶ 200; *see also id.* ¶

197. Summarizing that meeting, the CIO wrote to Conduent on November 8, 2018 that "ensuring those with disabilities have the ability to use the R2S2 system to access and enjoy our State Parks is paramount." *Id.* ¶ 201. And although Defendants argue that DPR's "approval" of the website demonstrates that its inaccessibility is immaterial, DPR has never issued such approval: that there has been no formal "service acceptance" or Deliverable Acceptance Document concerning Accessibility Requirements compliance. *Id.* ¶ 179.[11]

2. *Contreras II*, Not *Escobar*, Governs CFCA Materiality.

In the face of ample evidence of materiality, Conduent purposefully obscures the differences between California and federal law and attempts to replace applicable California precedent with the standards under the federal False Claims Act articulated in *Escobar*. Conduent Mem. at 17-18. Specifically, Conduent asserts that "proof that a government paid an invoice with knowledge of all relevant facts defeats" Plaintiff-Relator's showing of materiality. *Id.* at 18. That is flatly wrong under California law.[12]

In reality, California's appellate courts have adopted the *Contreras II* materiality standard, and that standard is more protective of the State's treasury than is *Escobar*. Conduent cites federal decisions that have applied *Escobar* to the *federal* FCA, Conduent Mem. at 17-18, but fails to mention that no California appellate court has adopted the *Escobar* standard for the CFCA. While California courts may turn to the FCA for guidance in interpreting the CFCA when "[t]here is a dearth of California authority pertinent to the issues raised in [a] case." *Pomona*, 89 Cal. App. 4th at 802, they may not abandon California precedent in favor of a different, federal standard.[13]

Conduent's attack on the materiality prong rests entirely on its mistaken assumptions that

[11] While Conduent now argues that failing to produce an accessible Website would not be material to DPR's payment decision, on August 19, 2019, it wrote US eDirect that it was "in material breach of its performance obligations under the Subcontract" in part based on its failure "to ensure the accessibility of the DPR website to persons with disabilities" and confirming that, to the extent the Website failed to comply with the Accessibility Requirements, US eDirect was required to cure that breach of its subcontract. AMF, ¶ 199.

[12] Even under *Escobar*, evidence that the government continued to pay claims with "actual knowledge" of falsity is merely "strong evidence" of a lack of materiality. 579 U.S. at 1995. It does not preclude materiality as a matter of law.

[13] Conduent cites to two federal cases affirming grants of summary judgment partly on materiality grounds. Both are distinguishable in that each was brought under the federal FCA and was governed by a standard other than *Contreras II*.

Escobar applies and that DPR had "knowledge of all relevant facts" of Defendants' false claims and DPR paid the invoices anyway. Conduent Mem. at 18-20. But there is abundant evidence that Conduent withheld information from DPR concerning its compliance with the Accessibility Requirements, leaving DPR with only a fraction of the knowledge that might diminish Conduent's culpability. AMF, ¶¶ 146-148, 150-152, 155-157, 161-163. DPR at most paid invoices after the Website launched while working with Defendants to remediate its inaccessibility. Thus, even after Mr. Bashin alerted DPR to accessibility problems with his complaint, DPR did not have "knowledge of all relevant facts" concerning accessibility. Without this "critical factual predicate," *Contreras II*, 224 Cal. App. 4th at 641, Defendants' materiality challenge fails.

Even if DPR acquired "knowledge of all relevant facts" at some point in the last six years, under *Contreras II,* its decision to pay Conduent's invoices is not controlling on the issue of materiality: "Courts best give effect to the law 'by holding a party liable if the false statement it makes in an attempt to obtain government funding has a natural tendency to influence or is capable of influencing the government's funding decision, *not whether it actually influenced the government not to pay a particular claim*.'" *Contreras II*, 224 Cal. App. 4th at 643 (citation omitted; emphasis added). Put another way, "the government's actual response to the claim cannot be dispositive on the issue of materiality." *Id.* That is because the "decision to continue payments could reflect acceptance of [Defendants'] representations of compliance, the expense and difficulty of investigating the wrongdoing … or concerns about the possibility of disrupting services." *Id.* Here, there is evidence that DPR relied on Defendants' continued misrepresentations of their own compliance and believed that, if it stopped paying Conduent, Defendants "would take their ball and go home," disrupting the reservations system for more than 300 California Parks facilities. AMF, ¶¶ 183-184; *see also id.* ¶ 181 (DPR was "caught between a rock and a hard place"). It "was no secret" to Defendants that DPR had no effective option to terminate the Contract without "taking the entire reservations system down." *Id.* ¶ 182.

Because a reasonable jury could conclude that Conduent's representations of compliance with the standards—at and after Go Live—could influence DPR's payment decision, summary judgment is not appropriate on this point.

D. Conduent Submitted False Claims with Reckless Disregard or Deliberate Ignorance of the Falsity of Claims and Statements About Accessibility.

1. Conduent Acted with Reckless Disregard or Deliberate Ignorance.

Mr. Bashin can establish that Conduent "knowingly" presented false or fraudulent claims for payment or approval by showing that (1) Conduent had actual knowledge of the falsity of its representations that the Website complied with the Accessibility Requirements or (2) Conduent acted with deliberate ignorance or (3) reckless disregard for the truth of those representations. Deliberate ignorance "attempts to reach ... [a] situation where an individual has buried his head in the sand and failed to make simple inquiries which would alert him that false claims are being submitted." *United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Grp., Inc.*, 370 F. Supp. 2d 18, 41 (D.D.C. 2005); *see also Contreras II* at 646. Reckless disregard refers to an aggravated form of gross negligence, *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 945 n. 12 (10th Cir. 2008); *see United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 837 (6th Cir. 2018), and "address[es] the refusal to learn of information which an individual, in the exercise of prudent judgment, should have discovered." *Ervin,* 370 F. Supp. 2d at 42. Specific intent to defraud is expressly not required. Cal. Gov. Code § 12650(3).

A reasonable fact finder could easily conclude that Conduent acted with at least reckless disregard or deliberate ignorance by abandoning its management role with respect to Website accessibility—and only Website accessibility. Conduent's own papers describe its R2S2 role as a "systems integrator," engaging and managing the work of subcontractors, Conduent SSUMF, ¶ 12, AMF, ¶ 47, and Conduent assumed responsibility under the Contract for the work of its subcontractors in general and for tracking, testing, and ensuring the delivery of Contract requirements in particular. AMF, ¶¶ 10-13, 17-18. But Conduent concedes that it failed to ensure that Website accessibility underwent the same testing and management process as every other Website requirement. Unlike other Website requirements, Website accessibility did not undergo either SFT or UAT. *Id.* ¶¶ 99-120, 124-128. While the Conduent team tracked the testing and fulfillment of every other contract requirement, it admits that *no one* tracked Website accessibility or accessibility testing. *Id.* ¶¶ 65-66, 69-75.

Conduent now claims it relied on US eDirect's accessibility testing, but Conduent did not ask for testing reports or even verify any accessibility testing occurred until October 2018—months after it was put on notice of accessibility problems by DPR's inquiries. *Id.* ¶¶ 53-57, 148. Conduent also failed to establish any system by which it could trace Website accessibility requirements down to the underlying code level, *id.* ¶ 48, even though the Requirements Management Plan required it, *id.* ¶¶ 66-68, and when given the opportunity to use US eDirect's project management tool, which would have made the process more "collaborative and transparent," Conduent refused, *id.* ¶¶ 62, 63. This failure to fulfill its contractual role to manage the work of its subcontractors was reckless in and of itself. *Cf. United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir. 1997).

Had Conduent made any attempt to track accessibility as a Contract requirement or review US eDirect's testing, it would have learned information casting its representations of accessibility into doubt. It would have learned, for example, that in February 2017—just weeks before Conduent submitted a Website Design Plan that reiterated the assurances about RD's accessibility and US eDirect's accessibility testing from the BDR—US eDirect had receive detailed findings about thirty systemic accessibility violations in the website it built for MNDNR. AMF, ¶¶ 44-45. Instead, Conduent's project manager reassured DPR that testing would be executed later to ensure the Website "still" met the Accessibility Requirements, even though she had no idea if the Website *currently* met the Accessibility Requirements. AMF, *Id.* ¶¶ 51-59, 146, 149-152. Further, the record makes clear that between 2017 and 2020, Conduent's project managers, who were "ultimately responsible for the performance of the work described" in the Contract, neither understood the Website accessibility requirements, nor paid any attention to them. *Id.* ¶¶ 11, 49-50, 51-52. When DPR asked Conduent's project manager for evidence of compliance with the Accessibility Requirements in February 2018, the project manager had no idea whether the accessibility standards applied to the Website or what testing for accessibility had occurred, but nonetheless dismissed accessibility concerns out of hand as "just typical tweaks to screens" and "small potatoes." *Id.* ¶¶ 151-152. And Conduent admits that it did not even look up the applicable California standards before submitting its bid. *Id.* ¶ 23. *See United States v. Mackby*, 261 F. 3d 821, 828 (9th Cir. 2001) ("By failing to inform himself of those requirements, …he acted in reckless disregard or in

deliberate ignorance of those requirements…"); *Siebert v. Gene Security Network, Inc.*, 75 F. Supp. 3d 1108, 1118 (N.D. Cal. 2014).

This Court should reject Conduent's attempt to evade responsibility by claiming it was entitled to rely on US eDirect's representations. Conduent Mem. at 13, 22-23. This argument fails for at least three reasons. **First**, Conduent is wrong in claiming the CFCA categorically exempts contractors when they rely on the representations of their subcontractors. Conduent Mem. at 22. Many courts have held contractors liable under the FCA and CFCA for knowing fraud related to work performed by their subcontractors when the contractors themselves acted with reckless disregard, deliberate ignorance, or actual knowledge of the falsity of the subcontractors' representations. *See, e.g., Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 793 (4th Cir. 1999); *Hanover Ins. Co. v. United States*, 134 Fed. Cl. 51, 67-68 (Fed. Cl. 2017); *Ervin*, 370 F. Supp. 2d at 41-42. Here, Plaintiff-Relator has produced evidence that blanket reliance on US eDirect's representations constituted at least reckless disregard or deliberate ignorance.

Second, Conduent's selection and vetting of US eDirect as a potential subcontractor was reckless in and of itself. Although Conduent claims to have relied on the fact US eDirect built reservations websites for other state and local governments, it did nothing to ascertain if those websites complied with any accessibility standards or even ask US eDirect about the accessibility of RD. *Id.* ¶¶ 24-27. Had it engaged in this minimal vetting, it would have learned that, shortly before Conduent submitted the BDR touting the team's expertise, WebAIM had identified numerous accessibility violations on at least two other websites built on the RD platform. *Id.* ¶¶ 28, 38-45.

Third, as noted, *supra*, Conduent's assertion that it relied on US eDirect's accessibility testing is false as a factual matter. *Id.* ¶¶ 53-56.

The Court should also reject Conduent's analogy to products liability cases, where an absence of complaints can be evidence that a defendant did not have actual or constructive knowledge.[14] *See* Conduent Motion at 23. This is not a products liability case and Mr. Bashin does not need to show actual or constructive knowledge of falsity. The purpose of the CFCA's reckless disregard and deliberate ignorance standards is to prevent defendants from doing precisely what

[14] In addition, there *were* complaints about the accessibility of the Website. AMF, ¶ 207.

Conduent did: bury its head in the sand and "fail to make simple inquiries which would alert [it] that false claims are being submitted." *JPMorgan Chase Bank, N.A. v. Superior Ct.*, 85 Cal. App. 5th 477, 492 (2022); *see Contreras II*, 224 Cal. App. 4th at 646 (contractors have a duty "to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek").

Finally, whether an individual DPR employee subjectively felt that he was "deceived" by a contractor has no bearing on any element of a claim under the CFCA, which focuses on *Conduent's* actions. Of course, DPR employees, including former CIO Patrick Dennis, *did* express their concerns regarding Conduent's conduct, regardless of any statements made by Mr. Minas in a *post hoc* declaration in support of summary judgment. AMF, ¶ 185. Nor must Mr. Bashin affirmatively prove that Conduent did not act in good faith. Good faith is an affirmative defense under the CFCA for which Conduent bears the burden—which it has not even attempted to meet. *See, e.g.*, *United States ex rel. Baker v. Comm. Health Systems, Inc.*, No. 05-279, 2014 WL 10212441, at *4-*6 (D.N.M. Jan. 3, 2014).[15]

2. DPR Did Not Approve of Conduent's False Statements and Claims, and the "Government Knowledge" Inference Does Not Apply.

This Court should similarly reject Conduent's argument that it relied on "testing" by DPR and that alleged "government knowledge" of its false claims negates the falsity of those claims it submitted or its own knowledge of that falsity.[16] Conduent Mem. at 17. As an initial matter, Conduent misstates the law: "Government knowledge is not a stand-alone defense to a CFCA claim." *San Francisco Bay Area Rapid Transit District v. Spencer*, 2007 WL 1450350, at *8 (N.D. Cal. May 14, 2007). That is of course the case, because in every case where a relator alerts the

[15] It also waives privilege. *United States v. Ormat Indus., Ltd*, No. 3:14-cv-00325, 2016 WL 4107682, at *4-*5 (D. Nev. Aug. 1, 2016), *Hamilton v. Yavapai Comm. College Dist.*, No. CV-12-08193, 2016 WL 8199695, at *1-*2 (D. Ariz. Jun. 29, 2016). Because Conduent has not produced relevant, otherwise privileged documents during discovery, it has waived an affirmative defense it acted in good faith. *See Bittaker v. Woodford*, 331 F.3d 715, 721 (9th Cir. 2003).

[16] Conduent contends that the government's alleged knowledge of falsity can mitigate a plaintiff's showing of falsity or knowledge. Conduent Mem. at 17-18. The Ninth Circuit has held that falsity is "determined by whether [a defendant's] representations were accurate in light of applicable law." *Oliver*, 195 F.3d at 463, and thus the "government knowledge inference" is relevant only to a defendant's knowledge, *see United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 327-28 (9th Cir. 1995). Accordingly, Plaintiff-Relator addresses Conduent's argument based on alleged government knowledge in the knowledge portion of its brief.

government to a falsehood, the government comes to have knowledge of the relator's allegations. However, there may be circumstances when a defendant can—by showing that it has "completely cooperated and shared all information" with the government *and* the government approves of its conduct—create an inference that it did not act with the knowledge required by the CFCA. *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 327-28 (9th Cir. 1995).

Despite the misnomer, the so-called "government knowledge inference" is "less about what the government knew than it is about what the contractor said and did….[T]his aspect of the 'defense' is really focused on the contractor's conduct and how that conduct reflects on the contractor's state of mind." *United States ex rel. Berg v. Honeywell Int'l, Inc.*, No. 3:07-CV-00215-SLG, 2017 WL 1843688, at *6 (D. Alaska May 8, 2017); *see Burlbaw*, 548 F.3d at 952–53. Even then, "it is only an inference. It does not *automatically* preclude" CFCA liability, *Burlbaw*, 548 F.3d at 952–53, and that inference must be weighed against other evidence that the defendant acted with reckless disregard, deliberate ignorance, or actual knowledge of the falsity of its claims. *Id.*

But Conduent never disclosed Defendants' noncompliance with Accessibility Requirements—to the contrary, when confronted with evidence of inaccessibility, it denied there was a problem. *Butler*, 71 F.3d at 327-28; *see also United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Grp., Inc.*, 400 F.3d 428, 454 (6th Cir. 2005) (rejecting government knowledge inference because defendant "neglected to disclose all the pertinent information"). As a result, it cannot seek refuge in the "government knowledge" inference. The BDR represented that the RD platform was accessible, AMF, ¶¶ 29-32, even though Conduent had no idea if that assertion was true, *id.* ¶¶ 24-27. As early as February 2017—six months before Go Live date—Conduent responded to DPR's concerns about accessibility by representing that the Website was "still" accessible, even though Conduent had seen no accessibility testing to support that assertion. *Id.* ¶¶ 53-57, 146, 148, 152. When the Website was launched on August 1, 2017, Conduent failed to inform DPR that the Website was entirely inaccessible to blind users, *id.* ¶¶ 192-193, and when DPR raised its concerns about accessibility in February of 2018, Conduent dismissed them out of hand. *Id.* ¶¶ 51-58, 148-152. The record is also replete with evidence that DPR was not provided with complete results and reports of accessibility testing conducted after Go Live. *Id.* ¶¶ 155-163.

Even if Conduent had been fully transparent with DPR, DPR still never accepted or approved of the inaccessibility of the Website. Neither the Contract in general nor Website accessibility in particular has ever been accepted by DPR. *Id.* ¶¶ 169-170, 179-180. Relying on the 11th hour declaration of a former DPR employee that is inconsistent with his previous deposition testimony, Conduent claims that DPR agreed that the Website did not need to be fully compliant with the Accessibility Requirements when the Website launched. Conduent Mem. at 18-19. At the very least, that assertion is disputed by the testimony of a former DPR Director and numerous DPR employees and all available documentary evidence. AMF, ¶¶ 165-178.

Conduent's claim that it acted without knowledge also relies heavily on the false assertion that DPR signed off on Website accessibility by virtue of Jason Stora's informal review months before Go Live. While DPR did agree to participate in UAT concerning Website accessibility, it did so in a context in which the Contract and Test and Evaluation Master Plan required Defendants to devise and operate a highly-structured and closely-managed UAT environment. *Id.* ¶¶ 86, 100-114. Conduent utterly failed to provide this environment for UAT testing. *Id.* ¶¶ 104, 118, 120-122, 129-131, 138, 175. In particular, Defendants failed to provide Mr. Stora a step-by-step script to follow when he reviewed the Website—unlike every other function that went through UAT. *Id.* ¶¶ 100-101, 118. Further, when Conduent requested that Mr. Stora review the Website for accessibility, it failed to tell DPR of the expertise necessary, ensure that Mr. Stora had that expertise and necessary tools, give him a way to record his findings, or inform him that Conduent intended to rely on his review as DPR's approval of Website accessibility. *Id.* ¶¶ 115-139. In any event, Mr. Stora neither performed comprehensive accessibility testing on the Website, nor approved its accessibility. *Id.* ¶¶ 129-131, 138, 175. Conduent's reliance on this process is evidence of recklessness in and of itself.

3. Mr. Bashin Does Not Need Personal Knowledge of Fraud.

Finally, Conduent contends that Mr. Bashin has "conceded" he has no evidence of Conduent's knowledge. This is plainly false: Mr. Bashin has made no such concession and Plaintiff-Relator's briefing explains at length the evidence of Conduent's knowledge of the falsity of its claims for payment and statements that the Website complied with the Accessibility Requirements.

Conduent's only basis for this assertion is statements from Mr. Bashin that he has no

personal knowledge of Conduent's reckless disregard or deliberate ignorance. But a relator does not need personal knowledge of any element in order to bring a CFCA claim, Cal. Gov. Code § 12652(c)(1) (any "person" may file a *qui tam*), and Conduent cites no support for the contention that personal knowledge is required. Courts have permitted or expressly endorsed claims brought by relators lacking personal knowledge, including competitors, *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 20, 30 n.9 (D.D.C. 2010), third-party consultants, *State of California et al. ex rel. OntheGo Wireless, LLC v. Cellco Partnership et al.*, Case No. 34-2012-00127517 (Sacramento Cty. Super. Ct. 2012), and groups acting in the public interest, *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 495 F. Supp. 2d 375, 380-83 (S.D.N.Y. 2007).[17]

E. Damages

Conduent's assertion that DPR suffered no damages rehashes its baseless argument that its claims were not false and that DPR got what it paid for under the Contract. As explain, *supra*, Conduent is wrong. Further, Defendants' false representations and claims *have* caused damage to the government. Generally, the measure of damages under the CFCA is "the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful." *United States v. Woodbury,* 359 F.2d 370, 379 (9th Cir.1966). Although Conduent assumes that the proper measure of damages is linked to the number of reservations that could not be made as a result of the Website's inaccessibility, it provides no explanation for this assumption.

Courts have accepted at least three distinct ways damages could be measured, and Plaintiff-Relator has evidence of each. First, there is evidence that, had Conduent disclosed that the Website would not comply with the Accessibility Requirements, DPR would never have entered into a contract with Conduent at all, because the Accessibility Requirements were mandatory under state

[17] The only circumstances when relator's personal knowledge may be relevant is if substantially the same allegations have been publicly disclosed under circumstances specified in the statute. Cal. Gov. Code § 12652(d)(3)(A). In that case, a court must dismiss the action unless the relator is an "original source" of the information or the Attorney General's Office opposes dismissal. *Id.* Here, the allegations were not publicly disclosed before Mr. Bashin filed a complaint, *see* Opp. to US eDirect's Demurrer to the TAC at 6-8, and the Attorney General's Office filed a Notice of the Attorney General's Opposition to Dismissal on the Basis of the Public Disclosure Bar on September 10, 2021. As a result, this Court has already held that the claims in this case are "not barred by the public disclosure bar." Order re: Ruling on Submitted Matter, Jan. 27, 2022 at 4.

law. AMF, ¶¶ 8, 15. Thus, damages could be measured by all payments DPR made to Conduent pursuant to the Contract. *Mackby*, 261 F.3d at 829-31; *see* Ex. 132.

Alternatively, the Court could use the Contract's liquidated damages clause as the measure of damages. Conduent portrays the use of a liquidated damages clause as unprecedented, but courts have previously looked to liquidated damages clauses in CFCA cases, *San Francisco Bay Area Rapid Transit Dist. v. Spencer*, No. C 04-04632 SI, 2006 WL 8431021, at *13 (N.D. Cal. Dec. 5, 2006); *Contreras I*, 182 Cal. App. 4th at 457. Further, the use of the liquidated damages provision would be highly appropriate here—where Conduent's product apparently allowed sighted users to conduct transactions via the Website, but it remains unusable by blind and other disabled users—because such a provision typically reflects the agreement of parties to a contract that it may be difficult to quantify the actual damages that flow from a breach. *See, e.g.*, *H.S. Perlin Co. v. Morse Signal Devices*, 209 Cal. App. 3d 1289, 1295 (1989). Moreover, in contracts between two corporations for business purposes, liquidated damages clauses are presumptively valid, *see* Cal. Civ. Code § 1671; *see also* Cal. Gov. Code § 53069.85, and the burden of proving they are not rests with Conduent, *see Radisson Hotels Int'l, Inc. v. Majestic Towers, Inc.*, 488 F. Supp. 2d 953, 958-59 (C.D. Cal. 2007). Under the contract, liquidated damages are based on the number of days that the Website has been out of compliance, and the Court could take judicial notice of the number of days since Go Live.

Finally, the Court could assess damages based on the estimated cost of remediating the inaccessibility of the Website under the theory that the cost of remediation is equal to the value of the Website for which DPR contracted minus the value of the Website it received. Plaintiff-Relator has issued discovery requests to US eDirect seeking information about its payments to the third-party experts it hired in 2019 and 2021 and could rely on that information to establish remediation costs. Finally, even if the Court accepted Conduent's unsupported damages measure, there have been complaints about the accessibility of the Website. AMF, ¶ 207. Given that the parties have not even briefed any particular damages theory, this evidence is more than enough to defeat summary judgment on the damages element.

II. Unruh Act

The Unruh Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their … disability … are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever," and "[a] violation of the right of any individual under the federal Americans with Disabilities Act of 1990 ["ADA"] … shall also constitute a violation of this section." Cal. Civ. Code §§ 51(b), (f). Mr. Bashin has adduced sufficient evidence to support his claim that Conduent violated the Unruh Act because it interfered with his right under the ADA to enjoy equal access to DPR's services. Title IV of the ADA provides, in relevant part, that it is "unlawful to . . . interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this chapter." 42 U.S.C. § 12203(b). As outlined below, federal regulations make clear that an entity like Conduent can be held liable for interfering with those rights.

A plaintiff in the Ninth Circuit can establish interference by (1) "identify[ing] a right to which she was entitled under the ADA," (2) "alleg[ing] that the [defendant] interfered with that right in some way," and (3) demonstrat[ing] that "she suffered a 'distinct and palpable injury' as a result of" the interference. *Annenberg v. Clark Cnty. Sch. Dist.*, 818 F. App'x 674, 678 (9th Cir. 2020) (quoting *Brown v. City of Tucson*, 336 F.3d 1181, 1193 (9th Cir. 2003)); *see also Levine v. Sleep Train*, No. 2:15-CV-0002, 2016 WL 2961100, at *2 (E.D. Cal. May 23, 2016).

Mr. Bashin meets each criterion. First, his right to equal access to the programs and benefits available through the Website is a "right granted or protected" by Title II of the ADA. *See, e.g.*, *Hindel v. Husted*, No. 2:15-CV-3061, 2017 WL 432839, at *2 (S.D. Ohio Feb. 1, 2017) (inaccessible voter services website hindered blind citizens' ability to register to vote); *Martin v. Metro. Atlanta Rapid Transit Auth.*, 225 F. Supp. 2d 1362, 1366 (N.D. Ga. 2002) (inaccessibility of public bus system's website's routes and schedules prevented blind customers from using the bus system in an equal manner to sighted individuals). Indeed, DPR sought to ensure that right by making compliance with the Accessibility Requirements a "Mandatory" element of the Contract. Second, Conduent interfered with Mr. Bashin's Title II right by failing to manage or track accessibility as a contract requirement and misrepresenting the Website's accessibility to DPR.

Finally, Mr. Bashin suffered the "distinct and palpable injury" because Conduent's acts blocked his ability to make reservations. AMF, ¶¶ 191, 208-215, 219.

Conduent's attempt to import an intent requirement should be rejected. No Ninth Circuit case has required a showing that a defendant was motivated by discriminatory intent in order to establish a § 12203(b) interference claim. Instead, Conduent relies on *Frakes v. Peoria Sch. Dist. No. 150*, where the Seventh Circuit imported the burden-shifting analysis of an interference claim under the Fair Housing Act to an interference claim under § 12203(b). *See* 872 F.3d 545, 550-51 (7th Cir. 2017). But no such analysis has been adopted in the Ninth Circuit. To the contrary, in *Brown v. City of Tucson*, the Ninth Circuit considered and expressly declined to adopt this approach where the plaintiff, like Mr. Bashin, brought only an interference claim, and not interference and retaliation claims under § 12203(b). 336 F.3d 1181, 1190 (9th Cir. 2003). Subsequent decisions confirm that, in the Ninth Circuit, discriminatory intent is not required to establish an interference claim under § 12203(b). *See Annenberg*, 818 F. App'x at 678; *Levine*, 2016 WL 2961100, at *2. [18]

III. Conduent's Joinder

Conduent assumes that "[t]o the extent the Court grants summary judgment for US eDirect on any grounds…, the Court should also grant summary judgment in favor of the Conduent Defendants," Conduent Mem. at 30. This assumption is incorrect. Just like any other statute, the CFCA liability of each defendant be assessed separately. *See San Francisco Bay Area Rapid Transit Dist. v. Spencer*, No. C 04-04632, Dkt. 330, at 17 (instructions to jury in CFCA case that "[y]ou must consider the liability of each defendant separately").

CONCLUSION

For the foregoing reasons, this Court should deny Conduent's Motion for Summary Judgment and Summary Adjudication.

[18] Mr. Bashin's claim for declaratory relief is derivative of his claim under the Unruh Act. Because a reasonable jury could conclude Conduent violated the Unruh Act, this Court should deny Conduent's motion with respect to Mr. Bashin's claim for declaratory relief.

Dated: April 11, 2023

/s/ Michael Allen

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PROOF OF SERVICE

I, Kelis Johnson, declare:

1. I am over 18 years of age and not a party to this action.

2. My business address is 1225 19th Street NW, Suite 600, Washington, DC 20036.

3. On April 11, 2023, I served the following document(s) via email on all parties of record in this action:

Plaintiff-Relator Bryan Bashin's Memorandum in Opposition to Defendants Conduent Incorporated and Conduent State & Local Solutions, Inc.'s Motion for Summary Judgment and Adjudication

4. Persons served include:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Washington, DC on April 11, 2023.

/s/ Kelis Johnson

Kelis Johnson