

1 **William K. Hanagami, SBN 119832**
2 **THE HANAGAMI LAW FIRM**
3 **A PROFESSIONAL CORPORATION**
4 **21700 OXNARD STREET, SUITE 1150**
5 **WOODLAND HILLS, CA 91367-7572**
6 **(818) 716-8570 / (818) 716-8569 FAX**
7 **BillHanagami@esquire.la**

8 **Abram J. Zinberg, SBN 143399**
9 **THE ZINBERG LAW FIRM**
10 **A PROFESSIONAL CORPORATION**
11 **412 OLIVE AVENUE, SUITE 528**
12 **HUNTINGTON BEACH, CA 92648**
13 **(714) 374-9802 / (714) 969-0910 FAX**
14 **AbramZinberg@gmail.com**

15 Attorneys for Plaintiff and Qui Tam Relator,
16 James M. Swoben

17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA

19 UNITED STATES OF AMERICA and
20 STATE OF CALIFORNIA, *ex rel* JAMES
21 M. SWOBEN,

22 Plaintiffs,

23 vs.

24 SCAN HEALTH PLAN, a California
25 corporation, fka SENIOR CARE
26 ACTION NETWORK, et al.

27 Defendants.

Case No: CV09-5013 JFW(JEMx)
[Hon. John F. Walter, Ctrm. 16]
Complaint Filed: July 13, 2009

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF RELATOR'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT

Moving Party:
Plaintiff and Relator, James M.
Swoben

Opposing Party:
Plaintiffs, United States of America
and State of California

DATE: March 30, 2015
TIME: 1:30 p.m.
CTRM: 16

28 COMES NOW, plaintiff and relator James M. Swoben, and submits the
following Memorandum of Points and Authorities in support of his Motion for Partial
Summary Judgment against plaintiffs United States of America (U.S. Government) and
State of California (California).

///

THE ZINBERG LAW FIRM
A Professional Corporation

THE HANAGAMI LAW FIRM
A Professional Corporation

Dated: January 30, 2015

By: /s/William K. Hanagami
William K. Hanagami
Attorneys for Plaintiff and Relator, James M.
Swoben

TABLE OF CONTENTS

<u>Argument</u>	<u>Page</u>
TABLE OF AUTHORITIES	v
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. SUMMARY OF FACTS	1
A. SWOBEN'S <i>QUI TAM</i> COMPLAINT	1
B. UNCONTROVERTED FACTS	3
C. THE BROWNFIELD MEMO	5
III. LEGAL ARGUMENT	7
A. A PARTY MAY MOVE FOR PARTIAL SUMMARY JUDGMENT AS TO A PART OF A CLAIM FOR RELIEF OR DEFENSE UPON A SHOWING THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT WITH RESPECT THERETO	7
B. APPLICABLE SUBSTANTIVE LAW	8
1. Pre-2010 Version of the False Claims Act	8
2. Pre-2010 Version of the California False Claims Act	9
3. The Public Disclosure Bar	10
a. Public Disclosure	11
i. Disclosures to the Government	11
ii. Disclosures to the Defendant	12
iii. Disclosures of Governmental Investigations Triggered by the Relator-Employee	14
iv. Private Disclosures	15
b. Allegations and Transactions	16
C. THE BROWNFIELD MEMO WAS NOT PUBLICLY DISCLOSED BEFORE JULY 13, 2009	17
1. The SCO's Provision of the Brownfield Memo to DHCS and California Legislators, and DHCS's Provision of the Brownfield Memo to CMS, Were Not Public Disclosures	17

1	a.	The CPRA’s Definition of “Member of the	
2		Public” Only Applies in the Context of the	
		CPRA and the CPRA was Not Invoked	19
3	b.	Assuming, <i>Arguendo</i> , That Senator Lowenthal	
4		Is a “Member of the Public” under the False	
5		Claims Acts, the “Public Disclosure” Bar Does	
		Not Apply to Swoben Because the Brownfield	
6		Memo Was Privately Disclosed to Senator	
		Lowenthal	21
7	2.	Senator Lowenthal’s Provision of the Brownfield	
		Memo to Swoben Was Not a Public Disclosure	22
8	3.	Swoben’s Provision of the Brownfield Memo to	
9		OIG and Congressman Henry Waxman Was Not	
		a Public Disclosure	22
10	4.	DHCS’s Provision of the Brownfield Memo to	
11		SCAN Was Not a Public Disclosure	23
12	D.	THE BROWNFIELD MEMO DOES NOT CONTAIN	
		ALLEGATIONS OR TRANSACTIONS OF FRAUD	
13		BY SCAN	23
14	1.	The Brownfield Memo Does Not Contain Allegations	
		of Fraud Against SCAN	24
15	2.	The Brownfield Memo Does Not Reveal A Transaction	
16		of Fraud By SCAN	24
17	IV.	CONCLUSION	25

TABLE OF AUTHORITIES

Federal Cases

<i>Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson</i> , 559 U.S. 280, 130 S.Ct. 1396, 176 L.Ed.2d 225 (2010)	9
<i>Hughes Aircraft Co. v. U.S. ex rel. Schumer</i> , 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997)	<i>passim</i>
<i>In re Cervantes</i> , 219 F.3d 955 (9th Cir. 2000)	20
<i>In re Uehling</i> , 2013 WL 3283212 (E.D.Cal. 2013)	15, 21
<i>Malhotra v. Steinberg</i> , 770 F.3d 853 (9th Cir. 2014)	<i>passim</i>
<i>Seal 1 v. Seal A</i> , 255 F.3d 1154 (9th Cir. 2001)	<i>passim</i>
<i>United States ex rel. Casady v. American Intern. Group, Inc.</i> , 2014 WL 1286552 (S.D.Cal. 2014)	16, 24
<i>United States ex rel. Cericola v. Federal National Mortgage Assn.</i> , 2007 WL 4632135 (C.D.Cal. 2007)	16, 24
<i>United States ex rel. Devlin v. California</i> , 84 F.3d 358 (9th Cir.1996) ...	15, 16, 22
<i>United States ex rel. Doe v. John Doe Corp.</i> , 960 F.2d 318 (2nd Cir. 1992)	13
<i>United States ex rel. Foundation Aiding the Elderly v. Horizon West Inc.</i> , 265 F.3d 1011 (9th Cir. 2001)	<i>passim</i>
<i>United States ex rel. Hagood v. Sonoma County Water Agency</i> , 929 F.2d 1416 (9th Cir. 1991)	11, 14, 18, 23
<i>United States ex rel. Meyer v. Horizon Health Corp.</i> , 565 F.3d 1195 (9th Cir. 2009)	<i>passim</i>
<i>United States ex rel. Newsham v. Lockheed Missiles and Space Co., Inc.</i> , 722 F.Supp. 607 (N.D.Cal. 1989)	9, 12, 21
<i>United States ex rel. Newsham v. Lockheed Missiles and Space Co., Inc.</i> , 190 F.3d 963 (9th Cir. 1999)	9
<i>United States ex rel. Putnam v. Eastern Idaho Reg. Med. Ctr.</i> , 2009 WL 2901233 (D.Idaho 2009)	12, 14, 18
<i>United States ex rel. Schumer v. Hughes Aircraft Co.</i> , 63 F.3d 1512 (9th Cir. 1995), vacated on other grounds, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997)	12, 13
<i>United States ex rel. Springfield Terminal Ry. Co. v. Quinn</i> , 14 F.3d 645 (D.C. Cir. 1994)	<i>passim</i>
<i>United States v. Johnson Controls, Inc.</i> , 457 F.3d 1009 (9th Cir. 2006)	9, 10

1	<i>Wang Laboratories, Inc. v. Mitsubishi Electronics America, Inc.</i> ,	
2	860 F.Supp. 1448 (C.D.Cal. 1993)	7
3	<u>State Cases</u>	
4	<i>City of Pomona v. Superior Court</i> ,	
5	89 Cal.App.4th 793, 107 Cal.Rptr.2d 710 (2001)	10
6	<i>City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.</i> ,	
7	109 Cal.App.4th 1668, 1 Cal.Rptr.3d 312 (2003)	9, 11, 16, 24
8	<i>Copley Press, Inc. v. Superior Court</i> ,	
9	6 Cal.App.4th 106, 7 Cal.Rptr.2d 841 (1992)	20
10	<i>Mao's Kitchen, Inc. v. Mundy</i> ,	
11	209 Cal.App.4th 132, 146 Cal.Rptr.3d 787 (2012)	12, 18, 23
12	<i>Olszewski v. Scripps Health</i> , 30 Cal.4th 798, 135 Cal.Rptr.2d 1 (2003)	2
13	<i>Pantos v. City and County of San Francisco</i> ,	
14	151 Cal.App.3d 258, 198 Cal.Rptr. 489 (1984)	19, 20
15	<i>People ex rel. Allstate Ins. Co. v. Weitzman</i> ,	
16	107 Cal.App.4th 534, 132 Cal.Rptr.2d 165 (2003)	10, 16, 24
17	<i>RCJ Medical Services, Inc. v. Bonta</i> ,	
18	91 Cal.App.4th 986, 111 Cal.Rptr.2d 223 (2001)	17
19	<i>Richards v. CH2M Hill, Inc.</i> ,	
20	26 Cal.4th 798, 111 Cal.Rptr.2d 87, 29 P.3d 175 (2001)	10
21	<i>Zumbrun Law Firm v. California Legislature</i> ,	
22	165 Cal.App.4th 1603, 82 Cal.Rptr.3d 525 (2008)	20
23	<u>Federal Statutes</u>	
24	31 U.S.C. §§ 3729, et seq.	1, 8
25	31 U.S.C. § 3730(b)(4)	9
26	31 U.S.C. § 3730(d)	2
27	31 U.S.C. § 3730(e)(4)	10
28	31 U.S.C. § 3730(e)(4)(A)	<i>passim</i>
	42 U.S.C. 1396a(a)(25)	2
	42 C.F.R. 430.10	1
	42 C.F.R. § 431.10(a)	18
	Fed.R.Civ.P. 56(a)	7
	<u>California Statutes</u>	
	Government Code §§ 6250, et seq	19
	Government Code § 6252	19
	Government Code § 9070, et seq	20
	Government Code § 9075(h)	20-22
	Government Code § 9080	20
	Government Code §§ 12650, et seq	1, 9
	Government Code § 12652(d)(3)(A)	<i>passim</i>
	Insurance Code § 1871.7(h)(2)	10

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION AND SUMMARY OF ARGUMENT

4 On July 13, 2009, plaintiff and relator James M. Swoben (Swoben) filed his *qui*
 5 *tam* Medi-Cal fraud Complaint against SCAN Health Plan (SCAN) for violations of
 6 the Federal and California False Claims Acts. After the U.S. Government and
 7 California (collectively, "Governments") intervened in the action and settled the Medi-
 8 Cal fraud claims against SCAN, the Governments claimed that Swoben is not entitled
 9 to a relator's share because the *qui tam* Complaint is purportedly barred by the public
 10 disclosure bars of the applicable versions of 31 U.S.C. § 3730(e)(4)(A) and *California*
 11 *Government Code* § 12652(d)(3)(A) based upon the purported pre-filing public
 12 disclosure of a California State Controller's Office (SCO) investigative report
 13 (Brownfield Memo) that was initiated by Swoben's complaints and information
 14 provided to the SCO.

15 Swoben moves for partial summary judgment that the Brownfield Memo does
 16 not trigger the public disclosure bars under Federal and California False Claims Acts
 17 because the Brownfield Memo was not publicly disclosed and/or it does not reveal
 18 allegations or transactions of SCAN's fraud alleged in the Complaint.

19 II.

20 SUMMARY OF FACTS

21 A. SWOBEN'S *QUI TAM* COMPLAINT.

22 On July 13, 2009, Swoben filed his *qui tam* Medi-Cal fraud Complaint on behalf
 23 of the U.S. Government and California¹ against SCAN alleging First and Second
 24 Claims for Relief for violations of the Federal False Claims Act, 31 U.S.C. §§ 3729,
 25 et seq., and the California False Claims Act, *California Government Code* §§12650,

26
 27
 28 ¹The U.S. Government and California are appropriate plaintiffs in a Medi-Cal fraud *qui tam* action because Medi-Cal (Medicaid in other states) is funded by both the U.S. Government and California. See, 42 C.F.R. § 430.10.

et seq., respectively.² Doc. #1. SCAN is a health plan or HMO that provided managed healthcare services to the elderly in Southern California under Medicare and Medi-Cal contracts. ¶¶7-10, Doc. #1.

The Complaint alleges, among other things, that SCAN was awarded a Medicare demonstration project Social HMO contract to provide in-home services to nursing home-certifiable³ Medicare Advantage beneficiaries, and was subsequently awarded a Medi-Cal managed care contract to provide in-home services to nursing home-certifiable Medi-Cal beneficiaries. ¶¶9-10, Doc. #1. The two contracts provided overlapping coverage for dual-eligible beneficiaries.⁴ ¶¶11-12, Doc. #1.

SCAN had numerous dual-eligible beneficiaries. ¶12, Doc. #1. SCAN provided such dual-eligible beneficiaries in-home services covered under both contracts and received capitated Medi-Cal payments even though such services were covered and chargeable to the Medicare Social HMO contract because the Medicare Social HMO contract is primary and the Medi-Cal managed care contract is secondary, i.e., Medi-Cal is the payor of last resort. ¶¶12-13, Doc. #1; 42 U.S.C. § 1396a(a)(25); *California Welfare & Institutions Code* § 14000(b); *Olszewski v. Scripps Health*, 30 Cal.4th 798, 817, 135 Cal.Rptr.2d 1 (2003).

²Swoben subsequently filed amended complaints adding Medicare fraud claims against SCAN and Medicare and Medi-Cal claims against other health plans and providers. Docs. #11, 23, 37. The seal was continuously extended while the U.S. Government and California investigated Swoben's *qui tam* claims. During August 2012, the Governments settled their claims against SCAN, intervened in the Medi-Cal fraud claims for relief against SCAN, and recovered more than \$300 million from SCAN. Request for Judicial Notice (RJN) No. 1.

Subsequently, the Governments declined to intervene in Swoben's *qui tam* claims against the remaining (non-SCAN) defendants. Doc. #57. On August 5, 2013, the Court granted the non-SCAN defendants' motions to dismiss Swoben's *qui tam* action against them without leave to amend. Doc. #135.

In its August 20, 2012 Order arising from the SCAN settlement, the Court retained jurisdiction over Swoben's 31 U.S.C. § 3730(d) and/or *California Government Code* § relator share claims to the SCAN settlement recovery. Doc. #45, RJN No. 2.

³A nursing home-certifiable patient is one whose activities of daily living are determined to potentially require the services of a long term nursing facility.

⁴A dual-eligible beneficiary is one covered under both the Medicare Social HMO contract and the Medi-Cal managed care contract.

1 The Complaint alleges that SCAN defrauded Medi-Cal by submitting cost
 2 reports and other financial reports to Medi-Cal that failed to disclose SCAN's receipt
 3 of monies under the Medicare Social HMO contract (which covered the in-home
 4 services provided to dual-eligible beneficiaries), which "caused Medi-Cal to overpay
 5 SCAN for services it already undertook by virtue of the Medicare Social HMO
 6 contract, and concealed such overpayments." ¶14, Doc. 1. SCAN was aware that such
 7 overpayments by Medi-Cal were due and owing to Medi-Cal, but SCAN continued to
 8 conceal said overpayments through the use of fraudulent cost reports and other
 9 financial reports that concealed from Medi-Cal the payments made under the Medicare
 10 Social HMO contract. ¶14, Doc. #1. SCAN knew that its cost reports, medical loss
 11 ratio reports, and other financial reports submitted to Medi-Cal were fraudulent. ¶15,
 12 Doc. #1.

13 SCAN violated the Federal and California False Claims Acts by making and
 14 using false records and statements, i.e., its fraudulent cost reports, loss ratio reports,
 15 and other financial reports submitted to Medi-Cal, to continue to get excessive
 16 payments under the Medi-Cal managed care contract. ¶¶18, 27, Doc. #1.

17 B. UNCONTROVERTED FACTS.

18 Between March 2004 and September 2006, Swoben was employed with SCAN
 19 Health Plan as its data encounter manager. Uncontroverted Fact (UF) 1. Swoben
 20 duties as such included overseeing the transmission of SCAN's Medicare and Medi-
 21 Cal cost data (i.e., the amount paid by SCAN to the provider for the service, or the
 22 amount paid on SCAN's behalf to a provider by a SCAN-contracted entity) to the
 23 Centers for Medicare and Medicaid Services (CMS) and the California Department of
 24 Health Care Services (DHCS). UFs 2-3.

25 Pursuant to instructions from SCAN's management, Swoben transmitted
 26 SCAN's Medicare and Medi-Cal encounter data to DHCS in connection with SCAN's
 27 Medi-Cal managed care contract. This data included encounter data for in-home
 28 services for patients covered under both SCAN's Medicare Social HMO and Medi-Cal

1 managed care contracts. UFs 4-5.

2 During April 2007, Swoben complained to California State Senator Alan
3 Lowenthal that, among other things, SCAN had realized excessive profits because
4 Medi-Cal had overpaid SCAN under its Medi-Cal managed care contract. UF 6.
5 Senator Lowenthal caused Swoben's complaints about SCAN to be referred to the
6 SCO. UF 7.

7 On or about April 9, 2008, Swoben was interviewed by members of the SCO
8 Division of Audits. UF 8. Swoben advised the SCO Division of Audits that SCAN
9 had a Medicare Social HMO contract and Medi-Cal managed care contract that had
10 overlapping benefits and that the Medi-Cal rates were excessively high, resulting in
11 SCAN realizing excessive profits on the Medi-Cal managed care contract. UF 9.
12 Swoben also advised the SCO Division of Audits that DHCS did not know SCAN's
13 true costs of providing services under the Medi-Cal managed care contract, and that
14 SCAN's submitted medical loss ratios were improper. UFs 10-11. Swoben's
15 information assisted the SCO Division of Audits in its investigation. UF 12.

16 On or about June 30, 2008, Jeffrey Brownfield of the SCO's Division of Audits
17 prepared a memorandum (the "Brownfield Memo), a copy of which is attached as
18 Exhibit 2008-06-30 to the Appendix of Exhibits,⁵ and submitted it to California State
19 Controller John Chaing. UF 13. Swoben is the "former employee of SCAN" and
20 "former employee" referenced on page 1 and the last full paragraph on page 2,
21 respectively, of the Brownfield Memo. UF 14.

22 Before July 13, 2009 (the date Swoben's *qui tam* Complaint was filed):

- 23 1. The SCO sent a copy of the Brownfield Memo to DHCS and California
24 State Senator Lowenthal [UF 15];
- 25 2. DHCS sent a copy of the Brownfield Memo to SCAN and CMS [UF 16];
- 26 3. Swoben received a copy of the Brownfield Memo from Senator

27
28 ⁵Unless otherwise indicated, all Exhibits are attached to the Appendix of Exhibits concurrently
filed with this Memorandum.

1 Lowenthal's office [UF 17]; and

2 4. Swoben sent a copy of the Brownfield Memo to the Office of Inspector
3 General of the United States Department of Health and Human Services
4 (OIG), and United States Congressman Henry Waxman [UF 18].

5 On July 13, 2009, Swoben filed his Complaint in this action under seal. UF 19.

6 C. THE BROWNFIELD MEMO.

7 The June 30, 2008 Brownfield Memo, Exhibit 2008-06-30,⁶ reflects that it was
8 created in "response to a referral from Senator Alan Lowenthal," in which the SCO
9 Division of Audits "made an inquiry into the State's contracting practices as they relate
10 to" SCAN. The first paragraph of the Brownfield Memo states that "a former
11 employee of SCAN alleges that the company has been able to generate exorbitant
12 profits because the contract reimbursement rate are too high." Swoben is said "former
13 employee." UF 14.

14 The Brownfield Memo provides a background of the Medicare Social HMO
15 demonstration project, SCAN's award of a Medicare Social HMO contract, and
16 SCAN's subsequent award of a Medi-Cal managed care contract that provided some
17 services that were similar to those covered under the Medicare Social HMO contract
18 when both contracts were concurrently in force. [Pages 1-2.]

19 The Brownfield Memo describes the SCO Division of Audits' interview with
20 "the former SCAN employee⁷ who made the original complaint with Senator
21 Lowenthal's Office," and describes some of the information Swoben provided, such
22 as (a) DHCS did not consider the amounts SCAN received under the Medicare Social
23 HMO contract when determining the capitated rates for the Medi-Cal managed care
24 contract, given that SCAN's Medi-Cal beneficiaries were also Medicare-eligible, (b)
25 Medi-Cal should reduce its capitated payment rates to SCAN in light of the Social

26 _____
27 ⁶A copy of the Brownfield Memo is also attached to this Memorandum as Exhibit 2008-06-30.

28 ⁷Swoben is the "former SCAN employee." UF 14.

1 HMO/Medi-Cal manage care contracts' overlapping coverage, and (c) Medi-Cal
2 overpaid SCAN about \$200 million to \$300 million because such overlapping benefits
3 were already paid by and covered under the Medicare Social HMO contract. [Page 2.]

4 The Brownfield Memo reflects that Swoben referred the SCO Division of Audits
5 to another former SCAN employee that corroborated Swoben's statement that SCAN
6 realized exorbitant profits from the Medi-Cal managed care contract in light of the
7 overlapping coverage provided by the Medicare Social HMO contract. [Page 2.] The
8 other former SCAN employee also provided the SCO Division of Audits with a federal
9 report addressing the lack of cost effectiveness of the Social HMO demonstration
10 project program conducted by Medicare. [Pages 2-3.]

11 The Brownfield Memo reflects information that the SCO Division of Audits
12 obtained by DHCS:

- 13 1. DHCS did not consider SCAN's costs to provide the services under the
14 Medi-Cal managed care contract when DHCS established the Medi-Cal
15 capitated rates. Instead, DHCS used a flawed rate calculation model
16 based upon the costs of the services that the Medi-Cal managed care
17 contract sought to *avoid* (i.e., the costs of long-term care facilities), and
18 SCAN may be generating excessive profits from the Medi-Cal managed
19 care contract.
- 20 2. DHCS did not perform a thorough evaluation of the cost-effectiveness of
21 the SCAN/Medi-Cal managed care contract.
- 22 3. DHCS did not verify through sampling SCAN's nursing home-certifiable
23 population. [Pages 3-4.]

24 The Brownfield Memo concludes with five (5) recommendations: (a) determine
25 the extent to which Medi-Cal achieved its goal of keeping senior citizens out of long-
26 term care facilities; (b) determine the cost-effectiveness of the Medi-Cal managed care
27 program; (c) determine the reasonableness of the contract rates by obtaining SCAN's
28 cost data and comparing SCAN's profit margin against industry standards; (d)

1 determine the likelihood of the nursing home-certifiable population that will actually
2 need placement in long-term care facilities; and (e) explore alternatives to obtain
3 similar services for senior citizens at reduced costs. [Page 4.]

4 As discussed in Section III(D) below, the Brownfield Memo does not contain
5 any “allegations or transactions” or fraud by SCAN that are similar to the medi-Cal
6 fraud allegations in the Complaint.

7 III.

8 LEGAL ARGUMENT

9 A. A PARTY MAY MOVE FOR PARTIAL SUMMARY
10 JUDGMENT AS TO A PART OF A CLAIM FOR RELIEF OR
11 DEFENSE UPON A SHOWING THAT THERE IS NO GENUINE
12 ISSUE OF MATERIAL FACT WITH RESPECT THERETO.

13 Fed.R.Civ.P. 56(a); *Wang Laboratories, Inc. v. Mitsubishi Electronics America,*
14 *Inc.*, 860 F.Supp. 1448, 1451 (C.D.Cal. 1993). The Court shall grant partial summary
15 judgment if the movant shows that there is no genuine dispute as to any material fact
16 and the movant is entitled to partial summary judgment as a matter of law.
17 Fed.R.Civ.P. 56(a); *Wang Laboratories*, 860 F.Supp. at 1451. The Court should state
18 on the record the reasons for granting or denying the motion. Fed.R.Civ.P. 56(a).

19 Because the Governments contend that the Court does not have subject matter
20 jurisdiction of Swoben’s *qui tam* Complaint, Swoben has the burden of establishing
21 subject matter jurisdiction by a preponderance of the evidence. *United States ex rel.*
22 *Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009).

23 Swoben moves the Court for a partial summary judgment as to the following
24 issues as a matter of law:

25 1. There was no “public disclosure” of the Brownfield Memo within the
26 meaning of the pre-2010 version of 31 U.S.C. § 3730(e)(4)(A) as to Swoben before
27 July 13, 2009;

28 2. The Brownfield Memo does not contain “allegations or transactions” of
fraud against or by SCAN Health Plan, within the meaning of the pre-2010 version of

1 31 U.S.C. § 3730(e)(4)(A);

2 3. The Brownfield Memo does not trigger the “public disclosure bar” of the
3 pre-2010 version of 31 U.S.C. § 3730(e)(4)(A) as to the Complaint’s First Claim for
4 Relief;

5 4. There was no “public disclosure” of the Brownfield Memo within the
6 meaning of the pre-2010 version of *California Government Code* § 12652(d)(3)(A) as
7 to Swoben before July 13, 2009;

8 5. The Brownfield Memo does not contain “allegations or transactions” of
9 fraud against or by SCAN Health Plan, within the meaning of the pre-2010 version of
10 *California Government Code* § 12652(d)(3)(A); and

11 6. The Brownfield Memo does not trigger the “public disclosure bar” of the
12 pre-2010 version of *California Government Code* § 12652(d)(3)(A) as to the
13 Complaint’s Second Claim for Relief.

14 B. APPLICABLE SUBSTANTIVE LAW.

15 1. Pre-2010 Version of the False Claims Act.

16 The False Claims Act, 31 U.S.C. §§ 3729, et seq. (FCA), is the U.S.
17 Government’s chief weapon in combating fraud, waste and abuse. The FCA’s *qui tam*
18 provisions “provide cash bounties in certain circumstances to private citizens who
19 successfully bring suit against those who defraud the federal government. *Qui tam*
20 provisions are designed to set up incentives to supplement government enforcement,
21” *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649
22 (D.C. Cir. 1994).

23 During 1986, Congress enacted Senate Bill 1562, which became the 1986 False
24 Claims Amendments Act, that was “aimed at correcting restrictive [court]
25 interpretations” of the FCA which “tend to thwart the effectiveness of the statute.”
26 S.Rep. No. 99-345, 4, 13. “One of the goals of the 1986 Amendments was to
27 encourage potential relators to come forward with information of fraudulent
28 misconduct by removing the statutory bar to *qui tam* plaintiffs who gave information

1 to the Government prior to the commencement of a suit.”⁸ *United States ex rel.*
2 *Newsham v. Lockheed Missiles and Space Co., Inc.*, 722 F.Supp. 607, 609, fn. 4
3 (N.D.Cal. 1989). The 1986 Amendments amended former Section 3730(b)(4) and
4 recodified it as 31 U.S.C. § 3730(e)(4)(A):

5 “No court shall have jurisdiction over an action under this section
6 based upon the public disclosure of allegations or transactions in
7 a criminal, civil, or administrative hearing, in a congressional,
8 administrative, or Government Accounting Office report, hearing,
audit, or investigation, or from the news media, unless the action
is brought by the Attorney General or the person bringing the
action is an original source of the information.”

9 Although Section 3730(e)(4)(A) was later amended in 2010, Pub.L. 111-148,
10 Title X, § 10104(j)(2), Mar. 23, 2010, the pre-2010 version of Section 3730(e)(4)(A)
11 governs the Complaint, filed July 13, 2009, because the frauds complained of took
12 place prior to 2010 Amendment and the 2010 Amendment does not apply retroactively.
13 *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S.
14 280, 283, fn. 1, 130 S.Ct. 1396, 176 L.Ed.2d 225 (2010); *Hughes Aircraft Co. v. U.S.*
15 *ex rel. Schumer*, 520 U.S. 939, 948, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997).

16 2. Pre-2010 Version of the California False Claims Act.

17 The California False Claims Act (CFCA), *California Government Code* §§
18 12650, et seq., is patterned after the FCA. *City of Hawthorne ex rel. Wohlner v. H&C*
19 *Disposal Co.*, 109 Cal.App.4th 1668, 1676, 1 Cal.Rptr.3d 312, 317 (2003). “[T]he
20 purposes of the California and federal statutes – and, in particular, the purposes of the
21 public disclosure bar provisions of those statutes – are similar.” *United States v.*
22 *Johnson Controls, Inc.*, 457 F.3d 1009, 1021 (9th Cir. 2006).

23 *California Government Code* § 12652(d)(3)(A), effective Jan 1, 2000 to Dec. 31,

24 _____
25 ⁸Before the 1986 Amendments, former 31 U.S.C. § 3730(b)(4) (i.e., the “Government
26 Knowledge Bar”) required dismissal of a qui tam action if it was “based on evidence or information
27 the Government had when the action was brought.” *United States ex rel. Newsham v. Lockheed*
28 *Missiles and Space Co., Inc.*, 190 F.3d 963, 968 (9th Cir. 1999). “Over time, Congress learned that
this restriction essentially eliminated the financial incentive for private citizens to bring fraudulent
conduct to the attention of the government, and the use of qui tam suits to fight fraud on behalf of the
government dramatically declined.” *Id.* at 966. The 1986 Amendments amended Section 3730(b)(4)
and recodified it as Section 3730(e)(4)(A). *Id.*

1 2009, which is similar to 31 U.S.C. §3730(e)(4)(A) from the same period, provides:

2 “No court shall have jurisdiction over an action under this article
3 based upon the public disclosure of allegations or transactions in
4 a criminal, civil, or administrative hearing, in an investigation,
5 report, hearing, or audit conducted by or at the request of the
6 Senate, Assembly, auditor, or governing body of a political
subdivision, or by the news media, unless the action is brought by
the Attorney General or the prosecuting authority of a political
subdivision, or the person bringing the action is an original source
of the information.”

7 “Where the wording and objectives of a California statute are similar to the
8 wording and objectives of a federal statute, California courts look to interpretations of
9 the federal statute for guidance in interpreting the state statute.” *Johnson Controls*,
10 457 F.3d at 1021. *See also, Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798, 812, 111
11 Cal.Rptr.2d 87, 29 P.3d 175 (2001); *People ex rel. Allstate Ins. Co. v. Weitzman*, 107
12 Cal.App.4th 534, 563, 132 Cal.Rptr.2d 165, 187 (2003) [applying this principle to
13 *California Insurance Code* § 1871.7(h)(2) and 31 U.S.C. § 3730(e)(4)]. “Applying
14 this precept, California courts interpreting the CFCA generally rely on FCA cases.
15 *Johnson Controls*, 457 F.3d at 1021; *City of Pomona v. Superior Court*, 89
16 Cal.App.4th 793, 802, 107 Cal.Rptr.2d 710, 716 (2001) [“Given the lack of California
17 authority and the very close similarity of [the CFCA] to [the FCA], it is appropriate to
18 turn to federal cases for guidance in interpreting the [CFCA].”].

19 3. The Public Disclosure Bar.

20 The Public Disclosure Bars of 31 U.S.C. § 3730(e)(4)(A) and *California*
21 *Government Code* § 12652(d)(3)(A) are triggered only if the *qui tam* Complaint was
22 based upon the “public disclosure” of “allegations or transactions” in enumerated
23 sources or by the news media, unless the relator (the person bringing the *qui tam*
24 action) is an “original source” of the information.

25 In determining whether the Public Disclosure Bars apply, “the court must
26 determine whether, at the time the complaint was filed, there has been a “public
27 disclosure” of the “allegations or transactions” on which the claim is based.” *Seal 1*
28 *v. Seal A*, 255 F.3d 1154, 1159 (9th Cir. 2001). If there was no “public disclosure”

1 before the Complaint was filed, the Court has subject matter jurisdiction regardless of
2 whether the relator qualifies as an “original source.” *Id.* Likewise, the Court has
3 subject matter jurisdiction if pre-filing public disclosures do not disclose the
4 “allegations or transactions” of fraud upon which the Complaint is based. *United*
5 *States ex rel. Foundation Aiding the Elderly v. Horizon West Inc.*, 265 F.3d 1011,
6 1014-1015 (9th Cir. 2001); *Wohlner*, 109 Cal.App.4th at 1685, 1 Cal.Rptr.3d at 323.

7
8 a. Public Disclosure.

9 The Governments’ interrogatory responses indicate that they contend that the
10 Public Disclosure Bars of 31 U.S.C. § 3730(e)(4)(A) and *California Government Code*
11 § 12652(d)(3)(A) were triggered when the Brownfield Memo was disclosed to various
12 governmental entities and employees, defendant SCAN, and/or relator Swoben.⁹
13 However, as discussed below, such disclosures do not constitute “public disclosures”
14 under the Public Disclosure Bar statutes.

15 i. Disclosures to the Government.

16 The Ninth Circuit has long held that disclosure to the government or a
17 governmental employee is not a “public disclosure” under Section 3730(e)(4)(A).
18 *Malhotra v. Steinberg*, 770 F.3d 853, 859 (9th Cir. 2014) [disclosure to government
19 employee does not trigger Section 3730(e)(4)(A)]; *Meyer*, 565 F.3d at 1200, fn. 3
20 [“disclosure to the government, without more, is not a public disclosure under §
21 3730(e)(4)(A)”]; *Seal 1*, 255 F.3d at 1161 [“a government employee to whom
22 information relevant to an FCA action is disclosed is not a member of the public”
23 under Section 3730(e)(4)(A)]; *United States ex rel. Hagood v. Sonoma County Water*
24 *Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991) [“one government employee telling
25 another government employee is *not* public disclosure” under Section 3730(e)(4)(A)].
26 Likewise, a relator’s pre-filing disclosure of Medi-Cal fraud to the state is not a public

27
28 ⁹See, U.S. Government’s Answer to Interrogatory 1, page 9, line 23 to page 11, line 2;
California’s Answer to Interrogatory 2.

1 disclosure under Section 3730(e)(4)(a). *United States ex rel. Putnam v. Eastern Idaho*
2 *Reg. Med. Ctr.*, 2009 WL 2901233 at p. 4 (D.Idaho 2009). California is in accord.
3 *Mao's Kitchen, Inc. v. Mundy*, 209 Cal.App.4th 132, 149, 146 Cal.Rptr.3d 787, 800
4 (2012) [Disclosures to state government are not "public disclosures" under
5 *Cal.Gov.Code* § 12652(d)(3)(A)]. Otherwise, a relator's provision of information to
6 the governmental would be considered a "public disclosure" and defeat the public
7 policy of encouraging whistleblowers to bring their fraud complaints to governmental
8 entities or employees. *Newsham*, 722 F.Supp. at 609, fn. 4.

9 Further, "even when the government has the information, it is not publicly
10 disclosed under the Act until it is actually disclosed to the public." *Meyer*, 565 F.3d
11 at 1201. For there to be a "public disclosure," there must be actual disclosure, not
12 simply that a document is available if a request under the Freedom of Information Act
13 or California Public Records Act is made. *Meyer*, 565 F.3d at 1200-1201; *Schumer*,
14 63 F.3d at 1520; *Berg*, 502 Fed.Appx. at 676.

15 ii. Disclosures to the Defendant.

16 Likewise, the Ninth Circuit has repeatedly held that disclosure to the *qui tam*
17 defendant or its employees does not constitute a "public disclosure."

18 In *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir.
19 1995), *vacated on other grounds*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135
20 (1997), the defendants argued that the dissemination of government audits to
21 employees of the defendants constituted a "public disclosure" under Section
22 3730(e)(4)(A). Declaring that "disclosure to [defendant] company employees does not
23 constitute public disclosure," *Schumer*, 63 F.3d at 1519, the Ninth Circuit held that this
24 result was mandated by Congress's intent in enacting Section 3730(e)(4)(A)'s public
25 disclosure bar:

26 "As this circuit has noted, the 1986 amendments were adopted in
27 part to correct a restrictive interpretation of the Act which barred
28 *qui tam* suits whenever 'the government already possessed the
information' upon which the lawsuit was based. [Citations.] The

1 *Doe* rule¹⁰ would run contrary to this purpose, for it drastically
2 curtails the ability of insiders to bring suit once the government
3 becomes involved in the matter. If revelation to employees at this
4 stage would constitute public disclosure, any employee who
5 receives word of government allegations would be barred from
6 bringing suit. Contrary to Congress's intentions for the
7 jurisdictional bar, the *Doe* rule 'effectively shifts the standard
8 from 'public disclosure' back to 'government investigation,' so
9 that government possession of information relating to fraud
10 effectively forecloses *qui tam* suits. [Citation.] [¶] Such a
11 restrictive interpretation necessarily requires greater reliance on
12 government action. Yet in passing the 1986 amendments,
13 Congress specifically sought to diminish the government's ability
14 'to sit on, and possibly suppress, allegations of fraud when
15 inaction might seem to be in the interest of the government.'
16 [Citations.] The 1986 amendments also reflected Congress's
17 recognition that the government simply lacks the resources to
18 prosecute all viable claims, even when it knows of fraudulent
19 conduct. [Citation.] Thus, we reject the *Doe* court's definition of
20 "public disclosure," which forecloses many insiders from
21 bringing *qui tam* actions, as contrary to the intent of the statute."
22 *Schumer*, 63 F.3d at 1518-1519.

23 In *Seal 1*, the Ninth Circuit confirmed its rejection of the argument that
24 disclosure to the *qui tam* defendant is a "public disclosure" under Section
25 3730(e)(4)(A):

26 "We have also rejected, in *Schumer*, 63 F.3d at 1519, a Second
27 Circuit decision holding that employees of a corporation later
28 sued under the FCA were members of the public for purposes of
that suit." *Seal 1*, 255 F.3d at 1161.

29 In *Malhotra*, the Ninth Circuit recently reaffirmed its holding in *Schumer* that
30 disclosures to the defendant's employees do not constitute public disclosures under
31 Section 3730(e)(4)(A) because they are "insiders" to the government's investigation:

32 "In *Seal 1*, we had no occasion to define with precision the
33 meaning of "outsider." Gale was neither an employee of the target
34 of the investigation (Zenith) nor an employee of the
35 government—the two categories of individuals who, even under
36 the broadest reading of our precedents, could be deemed
37 "insiders." See *United States ex rel. Schumer v. Hughes Aircraft*
38 *Co.*, 63 F.3d 1512, 1518–19 (9th Cir. 1995), *vacated on other*
grounds, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997);

39 ¹⁰In *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322 (2nd Cir. 1992), the
40 Second Circuit held that a pre-filing disclosure to the defendant constituted a "public disclosure"
41 under Section 3730(e)(4)(A). In rejecting this position, the Ninth Circuit has repeatedly held that a
42 pre-filing disclosure to the defendant is not a "public disclosure" under Section 3730(e)(4)(A).
43 *Schumer*, 63 F.3d at 1518-1519; *Seal 1*, 255 F.3d at 1161.

1 *United States ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929
2 F.2d 1416, 1419–20 (9th Cir. 1991).” *Malhotra*, 770 F.3d at 859.

3 Accordingly, a pre-filing disclosure to SCAN does not constitute a “public
4 disclosure” under 31 U.S.C. § 3730(e)(4)(A) and *California Government Code* §
5 12652(d)(3)(A).

6 iii. Disclosures of Governmental Investigations
7 Triggered by the Relator-Employee.

8 In *Malhotra*, the Ninth Circuit recently made clear that while a governmental
9 disclosure to an “outsider to the investigation” can trigger the Public Disclosure Bar,
10 a disclosure to an “insider” to the investigation does not. Reviewing its decision in
11 *Seal 1*,¹¹ the *Malhotra* court declared:

12 “[In *Seal 1*,] Gale was a ‘member of the public’ for purposes of
13 the Zenith investigation because he was “an outsider to the
14 investigation.” [Citation.] [¶] In *Seal 1*, we had no occasion to
15 define with precision the meaning of ‘outsider.’ Gale was neither
16 an employee of the target of the investigation (Zenith) nor an
17 employee of the government—the two categories of individuals
18 who, even under the broadest reading of our precedents, could be
19 deemed ‘insiders.’ [Citations.] That made it easy to conclude that
20 Gale was an ‘outsider’ to the Zenith investigation.” *Malhotra*,
21 770 F.3d at 859.

22 Likewise, the disclosure to the relator of a state agency’s investigation that was
23 triggered by the relator is not a “public disclosure” as to the *qui tam* relator under
24 Section 3730(e)(4)(A). *United States ex rel. Putnam v. Eastern Idaho Reg. Med. Ctr.*,
25 2009 WL 2901233, pp. 6-7 (D.Idaho 2009).

26 Further, there is no public disclosure as to the *qui tam* relator when a
27 governmental entity makes a disclosure to a third party resulting from a governmental
28 investigation based on information provided by the *qui tam* relator. *Biddle*, 161 F.3d
at 536; *Barajas*, 5 F.3d at 411. Otherwise, allowing the “government to limit the
potential recovery of *qui tam* plaintiffs unfairly simply by initiating a . . . investigation
[that the government makes public], . . . would subvert Congress’s desire to combat

27 ¹¹In *Seal 1*, the Ninth Circuit held that the Government’s disclosure of its investigation to an
28 “outsider” to the investigation could not be the basis of that relator’s *qui tam* complaint. *Seal 1*, 255
F.3d at 1162-1163.

1 fraud by providing broad incentives for qui tam suits.” *Barajas*, 5 F.3d at 411; *see*
2 *also, Biddle*, 161 F.3d at 536 [“the government should not be able to stifle a plaintiff’s
3 qui tam suit by launching a public investigation”].

4 iv. Private Disclosures.

5 In the Ninth Circuit, the public disclosure bar is not triggered as to the *qui tam*
6 relator when private pre-filing disclosures are made to others. *Malhotra*, 770 F.3d at
7 858;¹² *Meyer*, 565 F.3d at 1200;¹³ *Schumer*, 63 F.3d at 1518 [“Under a ‘practical,
8 commonsense interpretation’ of the jurisdictional provisions, information that was
9 ‘disclosed in private’ has not been publicly disclosed.”]; *Berg v. Honeywell Intern.,*
10 *Inc.*, 502 Fed.Appx. 674, 676 (9th Cir. 2012) [“In *Schumer*, the court distinguished
11 public disclosures from ‘the release of information within a private sphere,’ stating that
12 under a ‘practical, commonsense interpretation, ... information that was disclosed in
13 private has not been publicly disclosed.”]; *see also, In re Uehling*, 2013 WL 3283212
14 at p. 3 (E.D.Cal. 2013) [Citing *Schumer* and *Devlin*, “[t]he Ninth Circuit has held that
15 ‘information that was disclosed in private’ is not a public disclosure under the Act.”]

17 ¹²In *Malhotra*, the Ninth Circuit recently construed its opinion in *Seal I*, 255 F.3d 1161-1162,
18 stating,

19 “There, we construed the word ‘public’ in § 3730(e)(4)(A) as
20 essentially a term of art. We held that a disclosure need not be made
21 to the public at large to qualify as ‘public’ under the statute. 255 F.3d
22 at 1161–62. A disclosure made to a single individual can constitute a
23 ‘public disclosure’ *as to that individual* in certain circumstances, even
24 though it might not constitute a public disclosure as to other
individuals. *Id.* A public disclosure as to one member of the public,
we stressed, doesn’t mean that a public disclosure has occurred ‘as to
some other member of the public who independently comes upon
information already possessed by the government.’ *Id.* at 1162.”
Malhotra, 770 F.3d at 858.

25 ¹³As the Ninth Circuit stated in *Meyer*,

26 “‘information that was ‘disclosed in private’ is not a public disclosure
27 under the Act. [Citations]; *see also United States ex rel. Devlin v.*
California, 84 F.3d 358, 360 (9th Cir.1996) (holding that, although a
28 newspaper article was a public disclosure, a relator’s private disclosure
to a reporter in advance of publication was not a public disclosure).”
Meyer, 565 F.3d at 1200.

1 For instance, a disclosure to a journalist that is not published in the media is not
2 a public disclosure as to the *qui tam* relator. *Meyer*, 565 F.3d at 1200; *Devlin*, 84 F.3d
3 at 360. Likewise, a disclosure to a governmental employee is not a public disclosure
4 as to the *qui tam* relator. *Meyer*, 565 F.3d at 1200-1201; *Schumer*, 63 F.3d at 1518.

5 b. Allegations and Transactions.

6 Assuming, *arguendo*, there was a pre-filing Section 3730(e)(4)(A) public
7 disclosure of the Brownfield Memo, the Court must determine whether the content of
8 the disclosure consisted of “allegations or transactions” of the fraud alleged in the
9 Complaint. *Foundation Aiding the Elderly*, 265 F.3d at 1015. However, publicly
10 disclosed “allegations or transactions” of fraud, not information, trigger the Public
11 Disclosure Bar of Section 3730(e)(4)(A). *Id.* at 1014.

12 In *Foundation Aiding the Elderly*, the Ninth Circuit defined a publicly disclosed
13 “allegation” of fraud under Section 3730(e)(4)(A):

14 “In analyzing whether *allegations* of fraud were previously
15 disclosed, we must determine whether there was a public
16 disclosure of fraud which was ‘substantially similar to those
disclosed in the earlier ... action.’ [Citation.]” *Foundation Aiding
the Elderly*, 265 F.3d at 1015.

17 As discussed in Section III(D)(1) below, the Brownfield Memo does not contain
18 an allegation that SCAN committed a fraud “substantially similar to those” alleged in
19 the Complaint.

20 On the other hand, a “transaction” is “an exchange between two parties or things
21 that reciprocally affect or influence one another.” *Springfield*, 14 F.3d at 654; *United*
22 *States ex rel. Casady v. American Intern. Group, Inc.*, 2014 WL 1286552, at p. 5
23 (S.D.Cal. 2014); *United States ex rel. Cericola v. Federal National Mortgage Assn.*,
24 2007 WL 4632135 at p. 7 (C.D.Cal. 2007); *Weitzman*, 107 Cal.App.4th at 559, 132
25 Cal.Rptr.2d at 184; *H&C Disposal Co.*, 109 Cal.App.4th at 1682, 1 Cal.Rptr.3d at 321.
26 In the Ninth Circuit, a publicly disclosed “transaction of fraud” must meet the test first
27 enunciated in *Springfield*, 14 F.3d at 654:

28 “[I]f $X + Y = Z$, Z represents the allegation of fraud and X and Y

1 represent its essential elements. In order to disclose the fraudulent
2 transaction publicly, the combination of X and Y must be
3 revealed, from which readers or listeners may infer Z, i.e., the
4 conclusion that fraud has been committed. [¶] . . . [Where] X and
Y inevitably stand for but two elements: ‘a misrepresented state
of facts and a true state of facts.’ [Citation.]” *Foundation Aiding
the Elderly*, 265 F.3d at 1015.

5 As discussed in Section III(D)(2) below, the Brownfield Memo does not disclose
6 a “transaction of fraud” because its does not disclose an exchange of “a misrepresented
7 state of facts and a true state of facts” by SCAN.

8 C. THE BROWNFIELD MEMO WAS NOT PUBLICLY
9 DISCLOSED BEFORE JULY 13, 2009.

10 There was no “public disclosure” of the Brownfield Memo before the Complaint
11 was filed, within the meaning of the pre-2010 versions of 31 U.S.C. § 3730(e)(4)(A)
12 and *California Government Code* § 12652(d)(3)(A). [Issues 1 and 4.]

13 The SCO’s dissemination of the Brownfield Memo to DHCS and California
14 legislators does not constitute a “public disclosure” under these statutes. California
15 state Senator Lowenthal’s provision of the Brownfield Memo to Swoben does not
16 constitute a “public disclosure” because it is based upon Swoben’s complaints and
17 information provided to the SCO and Swoben is an “insider” to the SCO’s
18 investigation. Likewise, Swoben’s provision of the Brownfield Memo to OIG and
19 Congressman Henry Waxman does not constitute a “public disclosure” because they
20 are representatives of the U.S. Government. Last, DHCS’ provision of the Brownfield
21 Memo to SCAN does not constitute a “public disclosure” as to Swoben because (a)
22 SCAN is an “insider” to the investigation, and/or (b) it was provided by DHCS, the
23 California state agency administering the Medi-Cal program on behalf of both the U.S.
24 Government and California. 42 C.F.R. § 431.10(a); *RCJ Medical Services, Inc. v.*
25 *Bonta*, 91 Cal.App.4th 986, 999, 111 Cal.Rptr.2d 223 (2001).

26 1. The SCO’s Provision of the Brownfield Memo to
27 DHCS and California Legislators, and DHCS’s
Provision of the Brownfield Memo to CMS, Were
28 Not Public Disclosures.

As discussed in Section III(B)(3)(a)(i), *supra*, the provision of information to a

1 governmental agency or representative is not a “public disclosure” within the meaning
2 of the pre-2010 versions of 31 U.S.C. § 3730(e)(4)(A) and *California Government*
3 *Code* § 12652(d)(3)(A). *Malhotra*, 770 F.3d at 859 (9th Cir. 2014) [disclosure to
4 government employee does not trigger Section 3730(e)(4)(A)]; *Meyer*, 565 F.3d at
5 1200, fn. 3 [“disclosure to the government, without more, is not a public disclosure
6 under § 3730(e)(4)(A)”]; *Seal I*, 255 F.3d at 1161 [“a government employee to whom
7 information relevant to an FCA action is disclosed is not a member of the public”
8 under Section 3730(e)(4)(A)]; *Hagood*, 929 F.2d at 1419 [“one government employee
9 telling another government employee is *not* public disclosure” under Section
10 3730(e)(4)(A)]; *Berg*, 502 Fed.Appx. at 676 [disclosure to a government representative
11 is not a public disclosure]; *Putnam*, 2009 WL 2901233 at p. 4 [a pre-filing disclosure
12 of Medicaid fraud to the state is not a public disclosure under Section 3730(e)(4)(a)];
13 *Mao’s Kitchen*, 209 Cal.App.4th at 149, 146 Cal.Rptr.3d at 800 [disclosures to state
14 government are not “public disclosures” under *Cal.Gov.Code* § 12652(d)(3)(A)].
15 Accordingly, the SCO’s provision of the Brownfield Memo to DHCS and California
16 Legislators, such as California Senator Alan Lowenthal, and DHCS’s provision of the
17 Brownfield Memo to CMS, were not public disclosures within the meaning of the pre-
18 2010 versions of 31 U.S.C. § 3730(e)(4)(A) and *California Government Code* §
19 12652(d)(3)(A).

20 Swoben anticipates that the Governments will argue that the SCO’s provision
21 of the Brownfield Memo to Senator Lowenthal is a “public disclosure” because
22 members of the California legislature are purportedly considered “members of the
23 public” under the California Public Records Act (CPRA), *California Government Code*
24 §§ 6250, et seq.¹⁴ This contention fails because (a) as discussed in Section

25
26 ¹⁴*California Government Code* § 6252 provides, in relevant part:

27 “As used in this chapter:

28 . . .

(b) “Member of the public” means any person, except a member, agent,

1 III(B)(3)(a)(i) and (iii), *supra*, disclosures to government representatives are not public
2 disclosures and Lowenthal is an “insider” to the SCO’s investigation [UF 7], (b) the
3 CPRA’s definition of “member of the public” only applies in the context of the CPRA
4 (Cal.Govt.C. § 6252 [“As used in this chapter”]), (c) the CPRA was not invoked
5 to compel the SCO to provide the Brownfield Memo to Senator Lowenthal, (d) the
6 public disclosure of California legislative documents is not governed by the CPRA;
7 (e) the Government’s argument leads to an absurd result; and (f) assuming, *arguendo*,
8 that Senator Lowenthal is a “member of the public,” the “public disclosure” bar does
9 not apply as to Swoben because the SCO privately disclosed the Brownfield Memo to
10 Senator Lowenthal.

11 a. The CPRA’s Definition of “Member of the Public”
12 Only Applies in the Context of the CPRA and the
13 CPRA was Not Invoked.

14 The CPRA’s definition of “member of the public” is inapplicable here for a
15 number of reasons. First, the CPRA was not invoked in the SCO’s transmission of the
16 Brownfield Memo to Senator Lowenthal.

17 Second, the first words in *California Government Code* § 6252 (which contains
18 the definition of “member of the public”) make clear that its definitions only apply to
19 the CPRA and not to other Acts. [“As used in this chapter”]

20 Further, the CPRA does not apply to members of the state legislature, such as
21 California Senator Lowenthal. *Pantos v. City and County of San Francisco*, 151
22 Cal.App.3d 258, 262, 198 Cal.Rptr. 489, 492 (1984) [The CPRA does not apply to the

23 officer, or employee of a federal, state, or local agency acting within
24 the scope of his or her membership, agency, office, or employment.

25 . . .

26 (f) “State agency” means every state office, officer, department,
27 division, bureau, board, and commission or other state body or agency,
28 except those agencies provided for in Article IV (except Section 20
thereof) or Article VI of the California Constitution.

29 . . .”

30 Article IV (except Section 20 thereof) pertains to the California state Senate and Assembly.
Article VI pertains to the California state courts and judges, officers and employees thereof.

1 judiciary in light of *Cal. Gov. C. § 6252*'s definition of "state agency" excluding "those
2 agencies provided for in Article IV ... [the Legislature] or Article VI [the judiciary] of
3 the California Constitution."];¹⁵ *see also, Copley Press, Inc. v. Superior Court*, 6
4 Cal.App.4th 106, 111, 7 Cal.Rptr.2d 841, 843-844 (1992). Rather, the public
5 disclosure of documents in the possession of California legislators is governed by the
6 California Legislative Open Records Act (LORA), *California Government Code §*
7 *9070, et seq.*¹⁶ *Zumbrun Law Firm v. California Legislature*, 165 Cal.App.4th 1603,
8 1617-1618, 82 Cal.Rptr.3d 525, 536-537 (2008).¹⁷ *California Government Code §*
9 *9075(h)* provides that "Correspondence of and to individual Members of the
10 Legislature and their staff, except as provided in Section 9080"¹⁸ are exempt from
11 LORA's public disclosure requirements.

12 Statutes are to be given an interpretation so as to avoid absurd results. *In re*
13 *Cervantes*, 219 F.3d 955, 960-961 (9th Cir. 2000). Interpreting the CPRA to mean that
14 state legislators are "members of the public" for purposes outside the CPRA context,
15 and in an FCA context, leads to the absurd result of all documents in the possession of
16 state legislators being publicly available documents, in violation of LORA's mandate

17
18 ¹⁵In *Pantos*, the court held that the CPRA did not apply to the judiciary because *Cal. Gov. C. §*
19 *6252*'s definition of "state agency" excluded "those agencies provided for in Article IV ... [the
20 Legislature] or Article VI [the judiciary] of the California Constitution." Since the CPRA does not
21 apply to the judiciary because "state agency" excludes agencies provided for in Article VI of the
California Constitution, *Pantos*, 151 Cal.App.3d at 262, 198 Cal.Rptr. at 492, the CPRA likewise does
not apply to the state legislature because "state agency" excludes agencies provided for in Article IV
of the California Constitution.

22 ¹⁶Likewise, the judiciary is subject to *California Rule of Court 10.500*, as permitted by Article
I, Section 3(b)(3) of the California Constitution.

23 ¹⁷Indeed, Article I, Section 3(b)(6) of the California Constitution constrains the CPRA from:

24 "repeal[ing], nullifi[ng], supersed[ing], or modifi[ng] protections for
25 the confidentiality of proceedings and records of the Legislature, the
26 Members of the Legislature, and its employees, committees, and
caucuses provided by Section 7 of Article IV, state law, or legislative
rules adopted in furtherance of those provisions;"

27 ¹⁸*California Government Code § 9080* concerns "legislative records relating to bills,
28 resolutions, or proposed constitutional amendments before the Legislature." The Brownfield Memo
does not relate to a bill, resolution or proposed constitutional amendment.

1 that "Correspondence of and to individual Members of the Legislature and their staff,
2 except as provided in Section 9080" are exempt from LORA's public disclosure
3 requirements, *California Government Code* § 9075(h), and defeats the public policy
4 behind the 1986 Amendments "to encourage potential relators to come forward with
5 information of fraudulent misconduct by removing the statutory bar to qui tam
6 plaintiffs who gave information to the Government prior to the commencement of a
7 suit." *Newsham*, 722 F.Supp. at 609, fn. 4. Further, the Governments' argument flies
8 in the face of established case law that disclosures to the government and its
9 representatives are not "public disclosures" under 31 U.S.C. § 3730(e)(4)(A) and
10 *California Government Code* § 12652(d)(3)(A). See, Section III(B)(3)(a)(i), *supra*.

11 The Court should reject any attempt to transport the CPRA's definition of
12 "member of the public" into the Federal and California False Claims Acts because (a)
13 the definition only applies within the confines of the CPRA, (b) the CPRA was not
14 invoked in the SCO's provision of the Brownfield Memo to Senator Lowenthal, (c) the
15 CPRA does not apply to members of the state legislature, such as Senator Lowenthal,
16 (d) the Government's contention leads to an absurd result, and/or (e) disclosures to the
17 government and its representatives are not "public disclosures" under the FCA and
18 CFCA.

19 b. Assuming, Arguendo, That Senator Lowenthal Is a
20 "Member of the Public" under the False Claims Acts,
21 the "Public Disclosure" Bar Does Not Apply to
Swoben Because the Brownfield Memo Was Privately
Disclosed to Senator Lowenthal.

22 Assuming, *arguendo*, that Senator Lowenthal is a "member of the public" under
23 the False Claims Acts, the public disclosure bar does not apply to Swoben because the
24 Brownfield Memo was privately disclosed to Senator Lowenthal by the SCO.¹⁹ UF 15.

25 _____
26 ¹⁹*Meyer*, 565 F.3d at 1200; *Schumer*, 63 F.3d at 1518 ["Under a 'practical, commonsense
27 interpretation' of the jurisdictional provisions, information that was 'disclosed in private' has not been
28 publicly disclosed."]; *Berg*, 502 Fed.Appx. at 676 ["In *Schumer*, the court distinguished public
disclosures from 'the release of information within a private sphere,' stating that under a 'practical,
commonsense interpretation, ... information that was disclosed in private has not been publicly
disclosed.'"]; see also, *In re Uehling*, 2013 WL 3283212 at p. 3 (E.D.Cal. 2013) [Citing *Schumer* and

1 The Brownfield Memo was privately disclosed to Senator Lowenthal because, among
2 other things, the Brownfield Memo is not required to be produced by Senator
3 Lowenthal under LORA. *California Government Code* § 9075(h). Accordingly, the
4 public disclosure bar does not apply to Swoben. *See*, footnote 13, *supra*.

5 2. Senator Lowenthal's Provision of the Brownfield
6 Memo to Swoben Was Not a Public Disclosure.

7 Senator Lowenthal's provision of the Brownfield Memo to Swoben was not a
8 "public disclosure" because Swoben is an "insider" to the investigation that led to the
9 Brownfield Memo and/or the Brownfield Memo is based upon Swoben's complaints
10 and information Swoben provided to Lowenthal and the SCO. UFs 1-14.

11 As discussed in Section III(B)(3)(a)(iii), *supra*, the Ninth Circuit made clear in
12 *Malhotra*, 770 F.3d at 859, that a disclosure to an "insider" to the investigation does
13 not trigger the public disclosure bar. Here, Swoben was an "insider" to the
14 investigation leading to the Brownfield Memo because (a) he was a SCAN employee
15 who had first hand knowledge of SCAN's operations in transmitting cost data to
16 DHCS [UFs 1-5; *Malhotra*, 770 F.3d at 859 (employee of the defendant is an
17 "insider")], (b) Swoben complained to Senator Lowenthal and the SCO investigators
18 about SCAN's excessive profits arising from its Medi-Cal managed care contracts [UF
19 6-11], (c) Swoben's complaints to Senator Lowenthal led to the SCO conducting an
20 investigation that resulted in the creation of the Brownfield Memo [UFs 6-7], and/or
21 (d) the SCO admits that Swoben's complaints and information were helpful in its
22 investigation of SCAN [UF 12]. Accordingly, Senator Lowenthal's provision of the
23 Brownfield Memo to Swoben did not trigger the public disclosure bar.

24 3. Swoben's Provision of the Brownfield Memo to OIG
25 and Congressman Henry Waxman Was Not a Public
26 Disclosure.

27 As discussed in Section III(B)(3)(a)(i), *supra*, disclosures to the government and

28 *Devlin*, "[t]he Ninth Circuit has held that 'information that was disclosed in private' is not a public
disclosure under the Act."]

1 its representatives are not “public disclosures” under Section 3730(e)(4)(A). *Malhotra*,
2 770 F.3d at 859; *Meyer*, 565 F.3d at 1200, fn. 3; *Seal I*, 255 F.3d at 1161; *Hagood*,
3 929 F.2d at 1419; *Mao’s Kitchen*, 209 Cal.App.4th at 149, 146 Cal.Rptr.3d at 800.
4 Accordingly, Swoben’s provision of the Brownfield Memo to OIG and Congressman
5 Waxman did not trigger the public disclosure bar.

6 4. DHCS’s Provision of the Brownfield Memo to SCAN
7 Was Not a Public Disclosure.

8 As discussed in Section III(B)(3)(a)(ii), *supra*, the Ninth Circuit has repeatedly
9 held that a pre-filing disclosure to the *qui tam* defendant is not a “public disclosure”
10 under Section 3730(e)(4)(A). *Malhotra*, 770 F.3d at 859; *Seal I*, 255 F.3d at 1161;
11 *Schumer*, 63 F.3d at 1519. Accordingly, DHCS’s provision of the Brownfield Memo
12 to SCAN was not a public disclosure.

13 Further, as discussed in Section III(B)(3)(a)(iii), *supra*, there is no public
14 disclosure as to the *qui tam* relator when a governmental entity makes a disclosure
15 resulting from a governmental investigation based on information provided by the *qui*
16 *tam* relator. *Biddle*, 161 F.3d at 536; *Barajas*, 5 F.3d at 411. Here, the SCO’s
17 investigation that led to the creation of the Brownfield Memo was initiated by
18 Swoben’s complaints about SCAN to Senator Lowenthal and the SCO. UFs 6-14.
19 Accordingly, Section 3730(e)(4)(A) and *California Government Code* §
20 12652(d)(3)(A) are not triggered by DHCS’s dissemination of the Brownfield Memo
21 to SCAN.

22 D. THE BROWNFIELD MEMO DOES NOT CONTAIN
23 ALLEGATIONS OR TRANSACTIONS OF FRAUD BY SCAN.

24 In order to trigger the Public Disclosure Bars of Section 3730(e)(4)(A) and
25 *California Government Code* § 12652(d)(3)(A), there must be a pre-filing public
26 disclosure of the “allegations or transactions” of the defendant’s fraud alleged in the
27 Complaint. *Foundation Aiding the Elderly*, 265 F.3d at 1015. The public disclosure
28 bar is not triggered because the Brownfield Memo does not contain “allegations or
transactions” of SCAN’s fraud alleged in the Complaint.

1 1. The Brownfield Memo Does Not Contain Allegations
2 of Fraud Against SCAN.

3 In *Foundation Aiding the Elderly*, the Ninth Circuit analyzed Section
4 3730(e)(4)(A), and stated:

5 “In analyzing whether *allegations* of fraud were previously
6 disclosed, we must determine whether there was a public
7 disclosure of fraud which was ‘substantially similar to those
8 disclosed in the earlier ... action.’ [Citation.]” *Foundation Aiding*
9 *the Elderly*, 265 F.3d at 1015.

10 Here, the Brownfield Memo does not contain any allegations of fraud which are
11 substantially similar to those alleged in the Complaint. The focus of the Brownfield
12 Memo is *DHCS’s* acts and omissions in determining the capitated rates of the
13 SCAN/Medi-Cal managed care contract. The Brownfield Memo does not state nor
14 infer that SCAN committed any fraudulent act similar to those alleged in the
15 Complaint.

16 2. The Brownfield Memo Does Not Reveal A
17 Transaction of Fraud By SCAN.

18 The Brownfield Memo does not reveal a transaction of fraud by SCAN.²⁰

19 First, the Brownfield Memo does not reveal an exchange of a misrepresented
20 fact by SCAN to either the U.S. Government or California.²¹

21 Second, the Brownfield Memo does not reveal the misrepresented facts alleged
22 in the Complaint, i.e., that SCAN’s cost of providing services under the Medi-Cal

23 ²⁰As discussed in Section III(B)(3)(b), *supra*, a publicly disclosed “transaction of fraud” must
24 meet the test first enunciated in *Springfield*, 14 F.3d at 654:

25 “[I]f X + Y = Z, Z represents the allegation of fraud and X and Y
26 represent its essential elements. In order to disclose the fraudulent
27 transaction publicly, the combination of X and Y must be revealed,
28 from which readers or listeners may infer Z, i.e., the conclusion that
 fraud has been committed. [¶] . . . [Where] X and Y inevitably stand
 for but two elements: ‘a misrepresented state of facts and a true state
 of facts.’ [Citation.]” *Foundation Aiding the Elderly*, 265 F.3d at 1015.

²¹A “transaction” is “an exchange between two parties or things that reciprocally affect or
 influence one another.” *Springfield*, 14 F.3d at 654; *Casady*, 2014 WL 1286552, at p. 5; *Cericola*,
 2007 WL 4632135 at p. 7; *Weitzman*, 107 Cal.App.4th at 559, 132 Cal.Rptr.2d at 184; *H&C Disposal*
 Co., 109 Cal.App.4th at 1682, 1 Cal.Rptr.3d at 321.

1 contract were misrepresented and false. ¶14, Doc. #1.

2 Last, the Brownfield Memo does not reveal the true state of facts underlying
3 Swoben's fraud Complaint, i.e., that SCAN's costs of providing care under the Medi-
4 Cal managed care contract were substantially less than SCAN had indicated in its cost
5 information, medical loss ratio reports and other financial information submitted to
6 DHCS, which caused DHCS to continue to overpay SCAN. ¶¶14-15, Doc. #1.

7 Although the Brownfield Memo reveals that SCAN earned excessive profits
8 from the Medi-Cal contract (a fact first told by Swoben to Senator Lowenthal and the
9 SCO, UFs 6-9), the Brownfield Memo places the blame squarely on DHCS for
10 improperly setting excessive capitated rates. Clearly, the Brownfield Memo does not
11 reveal SCAN's transaction of fraud similar to that alleged in the Complaint.

12 Accordingly, the Brownfield Memo does not reveal a transaction of fraud by
13 SCAN similar to fraud alleged in the Complaint. Therefore, the Brownfield Memo
14 does not trigger the public disclosure bar of 31 U.S.C. § 3730(e)(4)(A) nor *California*
15 *Government Code* § 12652(d)(3)(A). *Foundation Aiding the Elderly*, 265 F.3d at
16 1014-1015.

17 IV.

18 CONCLUSION

19 The Brownfield Memo does not trigger the public disclosure bars of the Federal
20 and California False Claims Acts. Accordingly, Swoben respectfully requests the
21 Court grant the requested partial summary judgment in his favor.

22
23 THE ZINBERG LAW FIRM
A Professional Corporation

24 THE HANAGAMI LAW FIRM
A Professional Corporation

25
26 Dated: January 30, 2015

27 By: /s/William K. Hanagami
William K. Hanagami
Attorneys for Plaintiff and Relator, James M.
28 Swoben

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2015, I electronically transmitted the attached document to the United States District Court Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Abram J. Zinberg (AbramZinberg@gmail.com) Attorney for Plaintiff and Relator, James M. Swoben

Susan R. Hershman (susan.hershman@usdoj.gov, Attorneys for Plaintiff,
USACAC.Civil@usdoj.gov) United States of America

John E. Lee (john.lee2@usdoj.gov,
USACAC.Civil@usdoj.gov)

Donald W. Yoo (donald.yoo@usdoj.gov)

Brian V. Frankel (brian.frankel@doj.ca.gov) Attorneys for Plaintiff,
Lora Fox Martin (lora.martin@doj.ca.gov) State of California

John P. Fisher (john.fisher@doj.ca.gov)

David J. Schindler (david.schindler@lw.com) Attorneys for Defendant,
SCAN Health Plan

/s/William K. Hanagami
William K. Hanagami