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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LOS ANGELES COUNTY METROPOLITIAN TRANSPORTATION AUTHORITY et al., Plaintiffs, Cross-defendants and Appellants, v. PARSONS-DILLINGHAM METRO RAIL CONSTRUCTION MANAGER JOINT VENTURE, Defendant, Cross-complainant and Respondent.	B265863 (Los Angeles County Super. Ct. Nos. BC150298 and BC179027)

APPEAL from a judgment and postjudgment order of the Superior Court of Los Angeles County, Warren Ettinger and John Shepard Wiley Jr., Judges. Affirmed.

Mary Wickham, County Counsel, Charles Safer, Assistant County Counsel; Nossaman, Stephen P. Wiman and Jennifer L. Meeker, for Plaintiff and Appellant Los Angeles County Metropolitan Transportation Authority.

Louis J. Cohen and Louis J. Cohen for Plaintiff and Appellant United States of America ex rel. J. Martin Gerlinger.

Kupferstein Manuel, Phyllis Kupferstein; Gibson, Dunn & Crutcher, Theodore J. Boutrous Jr., Marcellus McRae, Theane Evangelis, James L. Zelenay Jr., Andrew G. Pappas and Jeremy S. Smith for Defendant and Respondent Parsons-Dinngham Metro Rail Construction Manager Joint Venture.

Xavier Becerra, Attorney General, Kathleen A. Kenealy, Chief Assistant Attorney General, Martin H. Goyette, Senior Assistant Attorney General, Frederick W. Acker and Maria Ellinikos, Deputy Attorneys General, for California Attorney General as Amicus.

The Los Angeles County Metropolitan Transportation Authority (MTA) and J. Martin Gerlinger, on behalf of himself and as qui tam relator on behalf of the United States of America, appeal from the judgment entered following summary judgment/summary adjudication orders rejecting their claims under the federal and state False Claims Acts against Parsons-Dillingham Metro Rail Construction Manager Joint Venture (Parsons) and the three entities that had formed the joint venture.[1] In their lawsuit MTA and Gerlinger ultimately alleged,

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[1] The joint venturers and codefendants were Parsons Infrastructure & Technology Group, Inc. (formerly The Ralph M. Parsons Company), Parsons Transportation Group, Inc. (formerly

in essence, that Parsons, which had a cost-reimbursement contract with MTA to manage construction of the Metro Red Line, intentionally overbilled and submitted false claims or statements to MTA for unauthorized general and administrative (G&A) and overhead costs, as well as for unauthorized subcontractor overhead charges.

Based on our holding that Parsons did not improperly bill MTA for G&A and overhead charges in the related appeal involving MTA's breach of contract claims (*Los Angeles County Metropolitan Transportation Authority v. Parsons-Dillingham Metro Rail Construction Manager Joint Venture* (Feb. 26, 2018, B255450) [nonpub. opn.] (the MTA/Parsons contract appeal)),[2] we affirm the judgment in favor of Parsons.[3] We also affirm the postjudgment order awarding costs and expert witness fees to Parsons as the prevailing party in the litigation.

De Leuw Cather & Company and Parsons De Leuw, Inc.) and Dillingham Construction, N.A., Inc.

[2] California Rules of Court, rule 8.1115(b)(1) authorizes citation to an unpublished opinion when it is "relevant under the doctrines of law of the case, res judicata, or collateral estoppel."

[3] In light of our affirmance of the judgment, we dismiss as moot Parsons's motion to dismiss the appeal for MTA's failure to timely serve the California Attorney General pursuant to the requirements of Government Code section 12656.

FACTUAL AND PROCEDURAL BACKGROUND

1. *General Background: Contract 3369 and the Red Line Project*

The original contract between MTA and Parsons for the Red Line project (Contract 3369) was in effect, with amendments, from 1984 through April 30, 1991. This base contract was superseded in 1991 by amendment 13/14, which added segment two to the Red Line project,[4] and in 1993 by amendment 17, which added segment three to the project.[5]

Pursuant to Article CP-3.A. of the amended contract, which governed payments to Parsons for its construction management services, Parsons was entitled only to its "Recoverable Costs," defined as, "(i) allowable direct labor costs . . . (ii) associated allowable Indirect Costs (also referred to herein as 'Overhead' or 'Overhead Costs') in an amount stated as a percentage (the 'Overage Rate') of the appropriate component of Direct Labor, (iii) costs of subcontracts, and (iv) other direct charges ('ODCs')

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[4] The Red Line project was divided into segments, designated minimum operable segments (MOS), that could be built in distinct phases. MOS-1 consisted of five stations from Union Station to Westlake/MacArthur Park. MOS-2 added three stations from Westlake/MacArthur Park to Wilshire/Western (now part of the Purple Line) and five stations from Wilshire/Vermont to Hollywood/Vine. Amendment 13 superseded the base contract as to MOS-1; contemporaneous amendment 14 addressed MOS-2.

[5] MOS-3 extended the Red Line from Hollywood/Vine to North Hollywood, where it now ends. The pertinent provisions in amendments 13/14 and 17 are substantially identical.

necessarily and reasonably required in the performance of this Contract. . . ."

In a multi-page "Overhead" section (Article CP-3.C.), the amended contract provided that MTA would pay Parsons "an Overhead allowance for Indirect Costs ('Actual Overhead Rate') of the Home Offices, Field Offices and Project Office for each Joint Venturer. Until determination of the Actual Overhead Rates for each Joint Venturer, [Parsons] shall receive a provisional allowance for Indirect Costs ('Provisional Overhead Rates') incurred by each Joint Venturer, stated as a percentage of the Direct Labor provided by each Joint Venturer at its respective offices, as follows . . . ." A separate paragraph identified the Provisional Overhead Rates for subcontractors. Under the terms of the contract Parsons was to submit after the close of each fiscal year its actual overhead rates and a description of the methodologies used to determine them.

2. *Gerlinger's Federal and State Court Qui Tam Lawsuits*

On October 4, 1994 Gerlinger, a former Parsons employee,[6] sued Parsons in a qui tam action in federal district court for violating the federal False Claims Act (31 U.S.C. § 3729 et seq.). The complaint contained a single count, alleging Parsons had knowingly made false statements and claims to obtain payments in connection with the Red Line project by overbilling for direct and indirect costs, including improper payroll markups and charging for nonrecoverable cost items. On April 1, 1996 the United States declined to prosecute Gerlinger's action.

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[6] Gerlinger served as a project business manager on the Red Line project from August 1991 through March or early April 1993.

On May 20, 1996 Gerlinger filed a first amended complaint in his federal action. On the same day he filed a substantially similar qui tam complaint in state court under California's False Claims Act (Gov. Code, § 12560 et seq.), as well as the federal False Claims Act. The state court complaint also included a cause of action on Gerlinger's behalf personally for retaliation in violation of Government Code section 12653, subdivision (a).

Gerlinger's federal action was dismissed without prejudice on October 3, 1996 for failure to serve the defendants. On October 25, 1996 MTA elected to intervene and to proceed as party plaintiff in Gerlinger's state court action for violation of California's False Claim Act.

3. *MTA's Breach of Contract Action and the Consolidation of the Two State Court Lawsuits*

MTA filed a separate lawsuit against Parsons for breach of contract, fraud and an accounting on October 3, 1997. The complaint alleged MTA made certain payments to Parsons at the specified provisional overhead rates and Parsons had breached its obligation to provide MTA with its calculation of interim actual overhead rates and thereafter to adjust the provisional rates to actual overhead rates as required by the parties' amended contract. MTA also alleged Parsons had improperly overbilled by including reimbursed costs in overhead and by charging for other costs for which the amended contract did not permit recovery or costs in excess of the maximum amounts set forth in the amended contract.

In January 1998 Parsons filed a cross-complaint, and in August 1998 an amended cross-complaint, for breach of contract and declaratory relief alleging MTA had, in violation of the contract, unilaterally adjusted the contract's provisional overhead

rates to an arbitrary overhead rate of 68 percent and, as a result, had underpaid Parsons. The amended cross-complaint also alleged MTA had engaged in tortious interference with Parsons's business relationships.

On April 14, 1999 the court consolidated the False Claims Act and breach of contract cases for purposes of discovery and trial.[7] MTA and Gerlinger jointly filed the operative first amended complaint in the false claims action on June 8, 1999. The first cause of action under the federal False Claims Act was pleaded on behalf of Gerlinger as qui tam relator for the United States and on his own behalf; the second cause of action under California's False Claims Act was asserted by both MTA and Gerlinger; the third cause of action for retaliation was asserted by Gerlinger only. In their pleading MTA and Gerlinger alleged Parsons had overbilled for its services by overstating overhead, payroll burden and certain direct charges incurred in the performance of the amended contract and failed to adjust for recoverable actual overhead once actual overhead was known.

On February 16, 2001 the court bifurcated trial of the consolidated cases, ordering an initial bench trial to address contract issues and deferring resolution of damages and the causes of action under the federal and state False Claims Acts.

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[7] The trial court granted summary adjudication on MTA's fraud claim, ruling it was barred by the statute of limitations. We upheld that decision in a nonpublished decision denying MTA's petition for a writ of mandate. (*Los Angeles Metropolitan Transportation Authority v. Superior Court* (May 24, 2000, B134038).)

4. *Parsons's Initial Summary Adjudication Motions Directed to the Causes of Action under the Federal and State False Claims Acts*

In June 1999 retired judge Leonard Wolf, the referee appointed pursuant to Code of Civil Procedure sections 638 and 639, subdivision (e), by stipulation of the parties and court order, denied Parsons's motion for summary adjudication of the false claims causes of action based on overhead rate billings from Dillingham Construction, one of the three joint venturers, finding material issues of fact existed as to whether the firm had submitted inaccurate billings and, if so, whether they were submitted with knowledge of their falsity or with reckless disregard for whether they were true or false.[8]

On December 3, 1999 the court denied Parsons's motion for judgment on the pleadings directed to Gerlinger's federal false claim cause of action and based on the first-to-file rule (31 U.S.C. § 3730(b)(5)), which bars a later-filed false claims lawsuit by a qui tam relator if it is based on the same elements of fraud described in an earlier filed, pending lawsuit (here, Gerlinger's earlier filed federal district court action). The court held the jurisdictional bar of the first-to-file rule was removed when MTA and Gerlinger filed a first amended complaint in the state action after the federal action had been dismissed.

On September 14, 2000 the referee granted motions for summary adjudication directed to the false claims causes of action against Parsons Transportation Group and Parsons Infrastructure & Technology Group, the other two joint

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[8] MTA alleged Parsons improperly calculated Dillingham Construction's overhead by including only salaried labor, not hourly labor, in its overhead rate base.

venturers, ruling that MTA and Gerlinger had failed to present any evidence demonstrating either entity had the requisite scienter to establish liability.

5. *Trial and Judgment on MTA's Contract Claims*

On April 11, 2001, prior to commencement of the Phase 1 trial of contract issues, MTA and Parsons settled a number of so-called "ancillary issues," some of which involved claims by Parsons for payment from MTA, and others that were MTA claims for repayments or refunds from Parsons. Trial began May 7, 2001 and proceeded regularly through November 2001 on the remaining contract issues. It then continued sporadically over the next several years due to the trial court's schedule, ultimately totaling the equivalent of approximately 100 trial days.

After both sides rested and following extensive briefing, the court (Judge Warren Ettinger) on June 3, 2009 issued a 67-page statement of decision on Phase 1 issues. Most significantly, the court found that most of Parsons's billed G&A costs were not recoverable. According to the ruling, recovery of G&A was prohibited by the provision in the amended contract that "All Recoverable Costs must be reasonably incurred by [Parsons] exclusively in connection with the performance of the Services subsequent to the date of this Contract." The court interpreted this language to mean Parsons could charge only for costs incurred solely in connection with the amended contract and could not allocate to the Red Line project a proportionate share of general expenses necessary for the operation of the business.

Following reassignment of the case to Judge John Shepard Wiley Jr., MTA moved for judgment on its contract claims, seeking nearly $160 million for four categories of nonrecoverable

costs including payroll burden, overhead and subcontractors. In August 2013 the court granted MTA's motion, awarding it $29,954,835.03 in damages for improperly charged overhead, including G&A, adhering to the prior ruling that Parsons could charge only for costs incurred exclusively in connection with the contract, not items that needed to be apportioned or allocated. The court, however, rejected MTA's claim for $86 million for allegedly unsupported subcontractor costs, ruling that MTA had failed to carry its burden of proving Parsons's breach of contract on this issue. The court also ruled equitable estoppel barred MTA from recovering $35 million in payroll burden costs.

A month after this decision MTA filed a new motion for judgment or, alternatively, for a new trial, on subcontractor overhead. MTA argued, like Parsons's overhead, subcontractor overhead violated the exclusivity provision in the amended contract. MTA also sought recovery of prejudgment interest on the damage awards for both Parsons's and subcontractors' overhead. In an order dated February 13, 2014 the court granted MTA's motion in part and denied it in part. The court agreed the 2009 interpretation of the exclusivity clause, which barred recovery of Parsons's overhead and G&A costs, also precluded recovery of subcontractors' overhead charges. Accordingly, MTA was entitled to an additional recovery of $25,141,057.94. The court awarded prejudgment interest on the damages awarded for overpayment of Parsons's overhead and G&A costs but denied prejudgment interest on the new award for subcontractor overhead costs.

6. *Resolution of the Remaining False Claims Causes of Action*

On October 25, 2013 Parsons moved for judgment on the false claims causes of action pursuant to Code of Civil Procedure section 631.8. In its February 13, 2014 order, which granted in part and denied in part MTA's renewed motion for judgment in the contract action, the court denied Parsons's motion as procedurally deficient, explaining Parsons had based it on past summary adjudication orders, not on MTA's presentation of evidence at trial. However, in the tentative ruling prepared for the hearing on the motions, included in the record on appeal, the court observed that neither MTA nor Gerlinger had presented evidence of scienter, as required to establish liability under the federal and state False Claims Acts: "This court has ruled Parsons billed MTA for costs it could not recover under the contract. But MTA cites no evidence of scienter." The court urged the parties to move promptly for summary judgment or summary adjudication to finally resolve the issue.

In March 2014 Parsons moved for summary judgment or summary adjudication on the remaining false claims causes of action against Dillingham Construction, as well as Parsons (the joint venture). In July 2014 the court (now Judge Mary Strobel) granted the motion for summary adjudication on all issues except billings for Dillingham Construction's overhead rates, agreeing with Parsons that with respect to all other claims it had not acted with the requisite scienter. However, according to the court, viewing the evidence most favorably to MTA and Gerlinger, triable issues existed whether Dillingham Construction knew the amounts billed for overhead did not comply with the terms of the amended contract when its invoices were submitted.

On January 16, 2015 Parsons once again moved for summary judgment on the remaining false claims causes of action relating to Dillingham Construction's overhead rates. The court (once again, Judge Wiley) granted the motion on May 14, 2015, reasoning that, since Parsons had submitted only invoices based on the provisional rates specified in the amended contract, it did not submit any false claims for payment: "The provisional invoices complied with the contract and were not false." The court rejected MTA's argument that liability could be based on a reverse false claims theory (that is, Parsons failed to adjust its billed overhead rates as required by the amended contract to conceal or avoid its obligation to refund overpayments based on the difference between provisional and actual overhead rates), finding the issue had been waived.

On April 15, 2015, a few weeks before granting Parsons's motion for summary judgment on the ground no false claims for payment had been submitted, the court granted Parsons's motion for summary adjudication as to Gerlinger's federal False Claims Act cause of action, ruling it was barred under the first-to-file rule because Gerlinger's state court complaint had been filed while his federal action was still pending. The court did not reach Parsons's alternative argument that Gerlinger's federal false claims cause of action was subject to the public disclosure bar—that is, that his action was based upon allegations of fraud that had been publicly disclosed.

The trial court entered judgment in favor of Parsons in the false claims action on May 26, 2015.

7. *The Award of Costs and Expert Fees*

Parsons submitted a memorandum of costs in the false claims action pursuant to Code of Civil Procedure sections 1032,

subdivision (b), and 1033.5, seeking an award of $60,185.07. Parsons also requested $249,473.50 in expert fees pursuant to Code of Civil Procedure section 998, subdivision (b), based on a March 20, 2015 offer to compromise that MTA did not accept. MTA moved to tax costs. The trial court ruled Parsons was the prevailing party and awarded Parsons costs and expert fees of $309,535.57 against MTA.[9]

CONTENTIONS

MTA contends the trial court improperly permitted Parsons to file multiple summary judgment/adjudication motions on the same issues, incorrectly found MTA had waived the reverse false claims theory of liability and ruled on MTA's allegations relating to subcontractor billings although not properly raised in Parsons's summary judgment papers. MTA also contends its evidence established material issues of fact (or its entitlement to judgment in its favor) regarding the submission of false claims by Parsons, Parsons's knowledge of its billing irregularities and Parsons's liability for knowingly concealing its obligation to refund overpayments based on the difference between provisional and actual overhead rates. Finally, MTA argues it, not Parsons, was the prevailing party and the court otherwise abused its discretion in awarding costs and expert fees to Parsons.

Gerlinger contends the first-to-file rule does not bar his cause of action under the federal False Claims Act because the rule is not jurisdictional and, in any event, the filing of the first amended complaint after his federal action had been dismissed removed any impediment to proceeding with the state court

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[9] The trial court awarded costs against MTA only, not Gerlinger.

action. He also contends the trial court implicitly—and correctly—rejected Parsons's argument the public disclosure provisions of the federal act barred his federal false claims cause of action.[10]

DISCUSSION

1. *Overview of the Federal and State False Claims Acts*

The federal False Claims Act prohibits false or fraudulent claims for payment to the United States. (31 U.S.C. § 3729(a).) "Enacted in 1863, the [federal] False Claims Act 'was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War.' [Citation.] '[A] series of sensational congressional investigations' prompted hearings where witnesses 'painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.' [Citation.] Congress responded by imposing civil and criminal liability for 10 types of fraud on the Government, subjecting violators to double damages, forfeiture, and up to five years' imprisonment. [Citation.]

"Since then, Congress has repeatedly amended the Act, but its focus remains on those who present or directly induce the submission of false or fraudulent claims. See 31 U.S.C. § 3729(a) (imposing civil liability on 'any person who . . . knowingly

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[10] Gerlinger has adopted by reference MTA's opening brief challenging the judgment and trial court rulings with respect to the second cause of action under California's False Claims Act. (Cal. Rules of Court, rule 8.200(a)(5).) Gerlinger's third cause of action for whistleblower retaliation was resolved and is not at issue in this appeal.

presents, or causes to be presented, a false or fraudulent claim for payment or approval'). A 'claim' now includes direct requests to the Government for payment as well as reimbursement requests made to the recipients of federal funds under federal benefits programs. [Citation.] The Act's scienter requirement defines 'knowing' and 'knowingly' to mean that a person has 'actual knowledge of the information,' 'acts in deliberate ignorance of the truth or falsity of the information,' or 'acts in reckless disregard of the truth or falsity of the information.' [Citation.] And the Act defines 'material' to mean 'having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.'" (*Universal Health Servs. v. United States ex rel. Escobar* (2016) ___ U.S. ___ [136 S.Ct. 1989, 1996, 195 L.Ed.2d 348]; see *Kellogg Brown & Root Servs. v. United States ex rel. Carter* (2015) 575 U.S. ___ [135 S.Ct. 1970, 1973, 191 L.Ed.2d 899] ["The False Claims Act (FCA) imposes liability on any person who 'knowingly presents . . . a false or fraudulent claim for payment or approval,' [citation], 'to an officer or employee of the United States,' [citation]."].)

The Supreme Court in *Universal Health Servs. v. United States ex rel. Escobar*, *supra*, 136 S.Ct. at p. 2003, noting "[t]he materiality standard is demanding" (*Id.* at p. 2003), explained for purposes of the federal False Claims Act, "materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" (*Id.* at p. 2002.) The Court continued, "A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of

the defendant's noncompliance." (*Id.* at p. 2003.) "[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." (*Id.* at pp. 2003-2004.)[11]

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[11] In an amicus brief that takes no position on the ultimate merits of this action, the Attorney General cites and discusses *San Francisco Unified School Dist. ex rel. Contreras v. First Student, Inc.* (2014) 224 Cal.App.4th 627, a case not previously addressed by the parties. The *Contreras* court held the materiality determination in California False Claims Act cases "turns on whether the alleged false statement was such that it had a natural tendency to influence or was capable of influencing government action." (*Id.* at p. 642.) The court "agree[d] with decisions under the federal FCA that have concluded the materiality test 'focuses 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.' [Citations.] [¶] Thus, the government contracting entity's *actual* reaction upon learning of a false claim is not dispositive of the issue of materiality. If a false statement was clearly material when it was made, the fact that the contracting entity did not treat the falsity as material upon discovering it would not preclude a claim under the CFCA." (*Ibid.*) Under *Contreras*, the Attorney General argues, government payment notwithstanding knowledge of the contractor's alleged false statements does not establish lack of materiality as a matter of law.

In its answer to the amicus brief Parsons explains that *Universal Health Servs. v. United States ex rel. Escobar*, *supra*, 136 S.Ct. 1989 was decided after the federal circuit opinions upon which the *Contreras* court relied and points out, as discussed, that *Escobar* made clear the actual effect of an alleged false statement is "very strong evidence" of whether that statement was material.

The federal False Claims Act may be enforced by the Government and by private parties, called relators, "in the name of the Government" through civil qui tam actions. (31 U.S.C. § 3730(b); *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, *supra*, 135 S.Ct. at p. 1973.) A defendant found liable for violating the federal False Claims Act is subject to treble damages plus civil penalties up to $10,000 per false claim. (31 U.S.C. § 3729(a).)

Like its federal counterpart on which it was based, the California False Claims Act is designed to prevent fraud on the public treasury. (*State of California v. Altus Finance* (2005) 36 Cal.4th 1284, 1296 ["California courts have consistently reaffirmed that the Legislature 'obviously designed the [California False Claims Act] to prevent fraud on the public treasury . . . .'"]; accord, *State ex rel. Bartlett v. Miller* (2016) 243 Cal.App.4th 1398, 1405-1406.) It now prohibits false or fraudulent claims for payment to the State of California or local agencies or entities (Gov. Code, § 12651, subd. (a)).[12]

By its terms, the California False Claims Act permits the State or a political subdivision of the State to recover civil penalties and treble damages from any person who knowingly presents a false claim for payment to the State or one of its political subdivisions (Gov. Code, § 12651, subd. (a)(1)) or who knowingly files a false record or statement to conceal or decrease

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[12] The federal False Claims Act was amended in 2009 (Pub.L. No. 111-21, § 4 (May 20, 2009) 123 Stat. 1617), and the state act as of 2010 (Stats. 2009, ch. 277, §§ 1-4). All parties agree the false claims causes of action are properly analyzed under the statutes as they existed prior to these amendments.

an obligation to pay the State or local governments (Gov. Code, § 12651, subd. (a)(7)).

A false claim or false record or statement in support of a false claim must be literally untrue. (See *Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 548-549 [the word "false" in the False Claims Act has no special meaning].) However, a specific intent to defraud need not be proved for a false claim to be made "knowingly." (Gov. Code, § 12650, subd. (b)(3).) In addition, although "actual knowledge of the information" satisfies the "knowingly" element (Gov. Code, § 12650, subd. (b)(3)(A)), "[t]he [CFCA] does not demand a deliberate lie but allows for liability where the defendant acts in deliberate ignorance or in reckless disregard of the truth of the claim." (*Thompson Pacific Construction*, at pp. 549-550.)

2. *MTA's Contract Claims and Their Relationship to the False Claims Causes of Action*

The trial court in the consolidated contract action, discussed in detail in the MTA/Parsons contract appeal, ruled that Parsons had improperly billed MTA for approximately $55 million in unauthorized, nonrecoverable G&A and overhead costs. As explained in its 2009 statement of decision, the court found Parsons could charge only for costs incurred exclusively in connection with the amended Red Line contract, not items that needed to be apportioned or allocated among two or more projects. The court subsequently ruled subcontractor overhead, included by Parsons in its billings to MTA, like Parsons's own overhead, violated the so-called exclusivity provision in the amended contract.

With those findings and the resulting damage award as the cornerstone for its argument, MTA asserts, "It is irrefutable that

Defendants submitted false claims when they overbilled the MTA $55 million in non-recoverable costs." In fact, MTA argues, in connection with its overbilling for nonrecoverable G&A and overhead, Parsons was not only guilty of making literally false claims for payment but also liable for falsely certifying it had complied with the amended contract in order to receive payments to which it was not entitled and for submitting false statements to conceal its obligation to repay or refund overpayments to MTA.

As described by MTA, although Parsons was entitled to initially bill at specified provisional (maximum) overhead rates, the amended contract obligated Parsons to submit interim determinations of its actual overhead rates at the end of each fiscal year and to adjust its billings downward for the next year to reflect the prior year's actual recoverable costs.[13] In violation of these contractual requirements, MTA contended, Parsons continued to use the provisional overhead rates specified in the amended contract (until MTA unilaterally reduced those amounts to 68 percent of the specified rates) and thus continued to include nonrecoverable G&A and overhead in its invoices. Parsons's submission of these invoices seeking payment for nonrecoverable

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[13] Parsons disputes this interpretation of the contract, arguing it was MTA's responsibility to trigger any retroactive adjustments between provisional and actual rates by accepting the interim actual rates furnished by Parsons or initiating an audit to establish the actual rates. The trial court agreed with this interpretation, ruling in connection with the false claims action that Parsons was entitled to continue to bill at the provisional rates specified in the amended contract.

costs constituted false claims for payment—MTA's primary theory of liability.[14]

In addition, MTA contended, in submitting the invoices Parsons falsely certified they were in material compliance with the amended contract even though Parsons had failed to reconcile provisional rates and calculated interim actual rates as required. Finally, Parsons belatedly submitted its interim actual rate determinations and certifications, which falsely stated they had only billed MTA for recoverable costs, thereby concealing its overbilling for nonrecoverable G&A and overhead costs—MTA's reverse false claim theory.

Contrary to MTA's theories and the trial court's ruling, in the MTA/Parsons contract appeal we held G&A and overhead were, in fact, recoverable costs under the parties' amended contract. Accordingly, we reversed the judgment in favor of MTA, concluding it had failed to prove Parsons overbilled for nonrecoverable costs or otherwise breached the parties' amended contract. That holding necessarily dooms MTA's and Gerlinger's false claims causes of action, including their reverse false claims theory.

3. *The Judgment in Favor of Parsons Must Be Affirmed Notwithstanding MTA's Procedural and Substantive Challenges*

MTA succinctly states that the question of false claims liability is whether Parsons's conduct "constituted more than a simple breach of the Contract?" As we held in the MTA/Parsons

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[14] MTA also argued Parsons had inflated the interim actual overhead rates for Dillingham Construction by calculating its overhead rate base using only salaried labor, not hourly labor.

contract appeal, however, Parsons did not improperly overbill MTA for G&A or overhead costs and did not breach the parties' contract. Thus, Parsons cannot be liable for violating the false claims statutes: "'[E]vidence of an actual false claim is "the sine qua non of a False Claims Act violation."'" (*United States ex rel. Booker v. Pfizer, Inc.* (1st Cir. 2017) 847 F.3d 52, 57.)[15]

As discussed, the elements of a false claims cause of action under both federal and state statutes are (1) a false record or statement or a false or fraudulent claim for payment submitted to the government, (2) made knowingly (that is, with scienter), (3) that was material to the government's payment decision. (See, e.g., *Universal Health Servs. v. United States ex rel. Escobar*, *supra*, 136 S.Ct. at p. 1996; *San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 452-453.)

MTA cannot prove the falsity element necessary for its claim. As we have held, Parsons did not submit false claims for payment to MTA for nonrecoverable G&A or overhead, either for itself or its subcontractors. It was contractually entitled to the payments it requested and received. Nor did it falsely certify, either expressly or impliedly, it was billing only for sums to which it was entitled under the terms of the parties' amended

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[15] MTA argues throughout its briefing that it is entitled to entry of judgment in its favor on the false claims causes of action, not simply reversal of summary judgment and remand for trial, based on the trial court's determination following an extended trial that Parsons had breached the amended contract and was liable for $55 million in contract damages. We agree with MTA that resolution of its breach of contract claim determines the issue of liability under the False Claims Act.

contract.[16] Finally, because it was entitled to the payments it received, Parsons did not conceal, by false statements or otherwise, overpayments it was obligated to return or refund.

What, then, of the various alleged procedural and substantive trial court errors MTA identifies in its appellate briefs?

It is a fundamental principle of appellate review that error alone does not warrant reversal of a judgment. Rather, the appellant must demonstrate the error has resulted in a "miscarriage of justice"—that is, that a different result would have been probable if the error had not occurred. (Cal. Const., art. VI, § 13 ["[n]o judgment shall be set aside, or new trial granted, in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"]; Code Civ. Proc., § 475 [same]; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) The burden rests with the party claiming error to demonstrate not only error but also the resulting

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[16] Even if its alleged failure to timely provide interim actual overhead rates and to adjust its billings to reflect those rates were breaches of its contractual obligations, Parsons always billed at or below the provisional rates specified in the amended contract and never falsely stated it was doing otherwise. Moreover, because Parsons was entitled to recover G&A and overhead and, in the end, owes nothing on MTA's breach of contract claims, any failure to adjust from provisional to interim actual overhead rates could not have been material. (Cf. *Universal Health Servs. v. United States ex rel. Escobar*, *supra*, 136 S.Ct. at pp. 2002-2003.)

prejudice. (*Carolina Casualty Ins. Co. v. L.M. Ross Law Group, LLP* (2012) 212 Cal.App.4th 1181, 1196-1197; *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 51-52.)

Because MTA ultimately failed to prove during a five-year bench trial that Parsons had improperly billed for G&A or overhead charges, or otherwise received payments to which it was not entitled under the parties' amended contract, it is unable to establish the essential falsity element of its false claims cause of action. Accordingly, even were we to agree that the trial court improperly allowed Parsons to proceed with repetitive motions for summary judgment/adjudication in violation of Code of Civil Procedure section 437c, subdivision (f)(2),[17] or that Parsons omitted invoicing for subcontractor overhead costs from its separate statement of undisputed material facts in its 2014 motion,[18] those purported procedural errors are harmless.

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[17] Parsons argues MTA forfeited this argument by not making it in the trial court and, in any event, its several motions were directed to distinct wrongful acts and therefore permissible.

[18] Even if its separate statement was imperfect, Parsons responds, the issue of subcontractor billings was plainly before the court and was addressed by MTA in its opposition papers. (See *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118 [denial of a motion on the basis of a failure to comply with California Rules of Court, rule 3.3150 "is discretionary, not mandatory"]; see also *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 523 ["[t]he trial court did not abuse its discretion by not denying the motion due to an inadequate separate statement"]; see generally *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1210-1211.)

We reach the same conclusion with respect to the trial court's orders granting summary judgment and summary adjudication dismissing MTA's claims against Parsons and the individual joint venturers for lack of proof that they submitted false claims for payment with the requisite scienter. The fundamental premise for MTA's cause of action under the state False Claims Act is that "the submission of invoices containing items not subject to reimbursement constitutes false claims" and Parsons, "at a minimum, acted recklessly in billing, receiving and retaining monies" to which it was not entitled under the parties' amended contract. Even if the trial court erred in concluding there were no triable issues of material fact with respect to those issues, and therefore Parson's motions for summary judgment/adjudication should have been denied, the ultimate determination, following trial and appeal, that Parsons did not submit invoices containing items not subject to reimbursement renders any error in granting the summary judgment/adjudication motions harmless. (See *Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1011 [""[a] decision based on less evidence (i.e., the evidence presented on the summary judgment motion) should not prevail over a decision based on more evidence (i.e., the evidence presented at trial)""]; cf. *Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407, 1410-1411 ["[a]s a general rule, the denial of summary judgment is harmless error after a full trial covering the same issues"]; *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 343 ["[i]n general, an order denying a motion for summary judgment or summary adjudication does not constitute prejudicial error if the *same question* was subsequently

decided adversely to the moving party after a trial on the merits"].)

Similarly, even if the trial court's ruling that MTA had forfeited its reverse false claims theory were error,[19] that claim necessarily fails on the merits in light of the decision in the MTA/Parsons contract appeal. Under the applicable version of the federal and California False Claims Acts, a reverse false claim requires a false statement or record that conceals an obligation to repay the government. (See Gov. Code, § 12651, subd. (a)(1); 31 U.S.C. § 3729(a)(7).) If there was no such obligation, there could not be a false statement concealing it.

4. *Gerlinger's Federal False Claims Act Cause of Action Is Similarly Barred by the Resolution of the MTA's Contract Action*

The trial court held Gerlinger's federal False Claims Act cause of action as relator on behalf of the United States was barred under the "first-to-file" rule set forth in title 31 United States Code section 3730(b)(5). That section provides, "When a

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[19] Parsons insists MTA and Gerlinger never pleaded a reverse false claims theory of liability and, therefore, it had no obligation to address it in its 2015 summary judgment motion. (See *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 585 [defendant moving for summary judgment need address only the issues raised by the complaint].) Parsons also argues the trial court correctly found forfeiture because MTA failed to raise the reverse false claims theory in its opposition to the 2015 summary judgment motion. (But see *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1534 [if defendant fails to meet its initial burden of showing entitlement to judgment as a matter of law, burden does not shift to plaintiff, and motion is properly denied without regard to plaintiff's opposition].)

person brings an action under this subsection [allowing for a qui tam complaint], no person other than the Government may . . . bring a related action based on the facts underlying the pending action." "The first-to-file bar thereby ensures only one relator will share in the government's recovery and encourages prompt filing from relators desiring to be first to the courthouse." (*United States ex rel. Shea v. Cellco Partnership* (D.C.Cir. 2017) 863 F.3d 923, 927.)

Gerlinger's state court action unquestionably violated the first-to-file rule when it was filed on May 20, 1996. At that time his federal lawsuit, originally filed in October 1994 and alleging the same fraudulent billing activity by Parsons as his subsequently filed state court action, was still pending. The question presented by Gerlinger's appeal is whether the joint filing of a first amended complaint in state court by MTA and Gerlinger on June 8, 1999, more than 18 months after the federal lawsuit had been dismissed, lifted the first-to-file bar. (Cf. *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, *supra*, 135 S.Ct. at p. 1979 ["a *qui tam* suit under the FCA ceases to be 'pending' once it is dismissed"].)

The federal Courts of Appeals are divided on this issue. The District of Columbia Circuit in *United States ex rel. Shea v. Cellco Partnership*, *supra*, 863 F.3d at page 928 and the Fourth Circuit in *United States ex rel. Carter v. Halliburton Co*. (4th Cir. 2017) 866 F.3d 199, 209 have held amendment of the state court action does not cure the violation, and the appropriate response is dismissal of the state court action without prejudice to refiling. The First Circuit in *United States ex rel. Gadbois v. PharMerica Corp*. (1st Cir. 2015) 809 F.3d 1, 6, in contrast, held that

supplementing an original complaint after an earlier filed action had been dismissed could cure the bar of the first-to-file rule.[20]

We need not resolve this issue or Parsons's alternative argument, not reached by the trial court when granting summary judgment in Parsons's favor, that the public disclosure provisions of the federal False Claims Act barred Gerlinger's cause of action (see former 31 U.S.C. § 3730(e)(4) ["no court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or . . . an original source of the information"]). Even if Gerlinger's federal false claims cause of action survived the first-to-file and public disclosure bars, our resolution of the contract issues in the MTA/Parsons contract appeal necessarily precludes his claim, as it does MTA's. Absent a false invoice by Parsons, there is no viable false claims cause of action, federal or state.

5. *The Superior Court Properly Awarded Costs and Expert Fees to Parsons*

a. *Parsons was the prevailing party in the false claims action*

Except as otherwise provided by statute or by agreement of the parties, the "prevailing party" in litigation "is entitled as a matter of right to recover costs." (Code Civ. Proc., § 1032,

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[20] Whether violation of the first-to-file rule is jurisdictional or bears only on the merits of the relator's action—an issue also raised by Gerlinger—has similarly divided the federal circuits. (Compare *United States ex rel. Carson v. Manor Care, Inc.* (4th Cir. 2017) 851 F.3d 293, 303 [jurisdictional] with *United States ex rel. Hayes v. Allstate Ins. Co.* (2d Cir. 2017) 853 F.3d 80, 85-86 [not jurisdictional].)

subds. (b) & (c).)[21] "Prevailing party" for purposes of the recovery of costs is defined in section 1032, subdivision (a)(4), to include "the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." Subdivision (a)(4) continues, "If any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion may allow costs or not . . . ."

The False Claims Act litigation ended with a judgment in favor of Parsons, which we today affirm. Nonetheless, in the trial court and again on appeal MTA argues it, not Parsons, was the prevailing party because, pursuant to the parties' 2001 settlement agreement, it had received a credit of $1,773,546.38 against payments otherwise due Parsons in exchange for dismissal of certain of its False Claims Act claims. Thus, MTA asserts, it achieved a net monetary recovery and is entitled to costs under section 1032.

Relying on *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 188, which held the term "net monetary recovery" in section 1032 did not include settlement proceeds received by the plaintiff in exchange for a dismissal in favor of the defendant, the trial court rejected MTA's argument. Four months after the trial court's ruling on MTA's motion to tax costs, the Supreme Court disapproved *Chinn* in *DeSaulles v.*

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[21] Statutory references in this section are to the Code of Civil Procedure unless otherwise stated.

Community Hospital of Monterey Peninsula (2016) 62 Cal.4th 1140 (*DeSaulles*). The *DeSaulles* Court held, "When a defendant pays money to a plaintiff in order to settle a case, the plaintiff obtains a 'net monetary recovery,' and a dismissal pursuant to such a settlement is not a dismissal 'in [defendant's] favor'" within the meaning of section 1032, subdivision (a)(4). (*DeSaulles*, at p. 1144.)

Although viewed post hoc the trial court's reliance on *Chinn* was error, its conclusion Parsons was the prevailing party is correct; *DeSaulles* does not require a contrary result.

The parties' settlement agreement resolved 14 "ancillary issues" that involved both claims by Parsons for additional payments from MTA and MTA claims for repayment or refunds of alleged overcharging or improper billings by Parsons. The agreement specified, with respect to ancillary issues that were alleged as false claims, MTA would use good faith efforts to obtain Gerlinger's consent to the dismissal of those claims or would apply to the court for permission to dismiss those claims notwithstanding his objections. The settlement was contingent on obtaining Gerlinger's consent or a court order. Gerlinger's counsel signed the agreement.

Notably, the settlement agreement does not provide for any payment by Parsons to MTA in consideration of the settlement of the enumerated issues, nor does not it expressly provide for any form of "credit" to MTA. However, a Stipulation To Facts Regarding Billings for the May 7, 2001 Phase 1 trial states, "The amounts billed to the MTA that were settled pursuant to the parties' partial settlement agreement and specific release dated April 11, 2001, total $1,773,546.38." An exhibit attached to the stipulation indicates this sum was part of the difference between

what Parsons's had billed MTA and what MTA had been paid as of February 1, 2001. By giving MTA a credit, therefore, Parsons was effectively forgoing sums it had initially claimed were due, not making a payment to MTA. In short, MTA did not obtain a "net monetary recovery" from the parties' partial settlement, let alone from the false claims litigation as a whole. (See *DeSaulles*, *supra*, 62 Cal.4th at p. 1154 ["[w]e conclude that the term 'recovery' in section 1032(a)(4) encompasses situations in which a defendant settles with a plaintiff for some or all of the money that the plaintiff sought through litigation"].)[22]

In addition to not providing for any payment to MTA in return for a dismissal of the false claims action, as had been the case in *DeSaulles*, the parties' settlement agreement specified its contents would not be used in any manner except in a proceeding to enforce its terms: "Each Party covenants and agrees that it will not use the existence or content of this Agreement against the other in any fashion or otherwise make reference to the existence of this Agreement in the Litigation or any other proceeding between each other except in a proceeding to enforce the terms of this Agreement and to inform the Court in the Litigation that the matters herein no longer need to be tried as a result of this Agreement." Moreover, the stipulation identifying the credit MTA now claims constitutes a "net monetary recovery"

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[22] The parties' stipulation recited that Parsons had billed $365,567,931.00 and MTA had paid on account $354,617,246.82. The difference of $10,950,684.18 was comprised of the $9,177,137.80 "short pay amount"—the sum Parsons's cross-complaint alleged it had been underpaid as a result of MTA's unilateral adjustment of the contract's provisional overhead rates—and the $1,773,546.38 credit.

provided, "The facts set forth in this stipulation are entered into for the purposes of Phase 1 of this trial only and are presumed to be true for the purposes of the Court's findings in Phase 1." As discussed, the court's bifurcation order limited Phase 1 to contract issues; all federal and state False Claims Act issues were deferred for later determination.

The *DeSaulles* Court emphasized its holding set forth a default rule only: "[S]ettling parties are free to make their own arrangements regarding costs." (*DeSaulles*, *supra*, 62 Cal.4th at pp. 1144, 1157.) The parties' settlement agreement made clear that their resolution of the 14 ancillary issues was not to be considered in further proceedings.[23] Their stipulation regarding the $1,773,546.38 credit was similarly explicit that it was not to be used for purposes unrelated to the contract issues addressed in the Phase 1 trial. Thus, the credit, even if it were a form of monetary recovery, was not properly included in determining whether Parsons was the prevailing party entitled to costs.

For both these reasons, we agree with the trial court that judgment in favor of Parsons in the false claims lawsuit entitled it to costs as the prevailing party under section 1032.

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[23] That Parsons discussed the substance of the settlement agreement in opposition to MTA's motion to tax costs, which had relied on the agreement to argue it had obtained a net recovery and was the prevailing party in the false claims litigation, hardly constitutes a forfeiture of its argument that neither side could properly refer to the agreement in assessing Parsons's right to recover costs after judgment was entered in its favor.

b. *There was no abuse of discretion in awarding Parsons costs and expert fees*

MTA also contends the trial court abused its discretion in awarding costs under sections 1032 and 1033.5 because it failed to reasonably apportion Parsons's costs (including expert fees recoverable under section 998, subdivision (c)) between its successful defense in the false claims litigation and the unsuccessful consolidated breach of contract action. MTA also argues the court ignored its legitimate evidentiary objections to Parsons's declarations filed in support of its claims for costs and fees. Neither point has merit.

First, in explaining in its tentative ruling its reasons for the amount of the award to Parsons, the trial court expressly stated costs had been apportioned: "Here, Parsons prevailed on the False Claims Act portion of this dispute, but not on the breach of contract claims. Recognizing this fact, Parsons has limited its request for deposition costs to the depositions of 20 witnesses it contends are relevant to the False Claims Act claim." The court then found that Parsons had met its burden "to show that the deposition costs it incurred for these witnesses were reasonably necessary to the False Claims Act claim." As for expert witness fees, the court emphasized "all of the expert witness fees [Parsons] seeks to recover are from eight months after the court entered judgment in the breach of contract action, and therefore relate only to the False Claims Act action."

Second, the trial court's implied overruling[24] of MTA's evidentiary objections to the declarations of two Parsons

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[24] "[I]f the trial court fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled, the trial court considered the evidence in

attorneys submitted to support its claim for costs and expert fees did not constitute an abuse of discretion. (See *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317 [evidentiary rulings reviewed for abuse of discretion]; *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 885 [same]; see generally *People v. McDowell* (2012) 54 Cal.4th 395, 430 ["'a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it'"].)

In her declaration Phyllis Kupferstein stated she had represented Parsons during the negotiations that led to the parties' 2001 partial settlement and provided an explanation of the resolution of the various ancillary claims as they related to the pleadings in the breach of contract and false claims litigation. MTA objected on the grounds of lack of foundation and impermissible secondary evidence. Kupferstein's direct participation in the settlement negotiations established her personal knowledge and provided a sufficient foundation for this portion of her declaration. (See Evid. Code, §§ 170, 702, subd. (b).)[25] To the extent her declaration repeated the contents of the settlement agreement, which MTA had already placed before the court, any inadmissible secondary evidence was plainly harmless. (See Evid. Code, § 353, subd. (b) [ruling may not be

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ruling . . . , and the objections are preserved on appeal." (*Reid v. Google* (2010) 50 Cal.4th 512, 534; accord, *Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1032.)

[25] MTA did not object to the portions of Kupferstein's declaration that provided the court with copies of invoices and records of costs incurred in the false claims litigation.

reversed based on erroneous admission of evidence unless error "resulted in a miscarriage of justice"].)

James Zelenay, another Parsons attorney, submitted invoices paid by Parsons for expert witnesses in the false claims litigation. (See § 998, subd. (c) [if plaintiff rejects settlement offer and fails to obtain a more favorable judgment, court has discretion to award defendant expert witness fees "actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant"].) Zelenay stated in his declaration, "I am familiar with the work performed by Defendants' expert witnesses Mark Stevens, Dr. Robert Wunderlich, Andrew Mintzer, and Dr. Louis I. Rosen, as well as the work performed by their assistants. The fees requested by Defendants for these experts and their assistants were incurred in preparation for trial and proceedings in the FCA action only. In fact, Mr. Stevens and Dr. Wunderlich were retained exclusively for the FCA action and were never involved in any form in the breach-of-contract action."

Pointing out that Zelenay had only recently become counsel of record in the litigation (approximately October 2013) and, therefore, lacked personal knowledge as to costs prior to that time, as well as Zelenay's statement, "[t]o the best of my knowledge and belief, all costs requested by Defendants were necessarily incurred in Case No. BC150298 [the false claims litigation]," MTA objected to his declaration for lack of foundation. Although, by itself, "to the best of my knowledge" generally is insufficient to establish personal knowledge within the meaning of Evidence Code section 702 (see *Bowden v. Robinson* (1977) 67 Cal.App.3d 705, 719-720), use of that phrase does not necessarily require exclusion of a declaration. (*Pelayo v.*

J.J. Lee Management Co., Inc. (2009) 174 Cal.App.4th 484, 494; *Katelaris v. County of Orange* (2001) 92 Cal.App.4th 1211, 1215.) It is up to the trial court to determine whether the phrase, in context, introduced an unacceptable level of uncertainty or whether the balance of the declaration demonstrates the declarant's personal knowledge. (*Pelayo*, at p. 494; *Katelaris*, at p. 1216.) Here, the trial court concluded Zelenay's review of the experts' work, even if not done contemporaneously with the performance of that work itself, was sufficient to permit him to generally describe the nature and extent of the experts' activities. The court's determination was neither irrational nor arbitrary.

Finally, MTA argues $249,473.50 for expert fees is an unreasonable sum if, as Parsons argued, it related only to work for the false claims litigation where expert discovery had not yet commenced, and not also for work done in connection with the breach of contract lawsuit. The determination that the expert witness fees sought were reasonably necessary for Parsons's defense of the False Claims Act lawsuit, however, lies peculiarly within the broad discretion of the trial court. (See *Adams v. Ford Motor* Co. (2011) 199 Cal.App.4th 1475, 1487.) MTA has failed to show the award constituted an abuse of that discretion.

DISPOSITION

The judgment and postjudgment award of costs and fees are affirmed. Parsons is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. SEGAL, J.