IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

ELLEN ROSENBLUM, the Attorney General for the State of Oregon; STATE OF OREGON, by and through Ellen Rosenblum, the Attorney General for the State of Oregon, the Oregon Health Authority, and the Oregon Department of Human Services; and the OREGON HEALTH INSURANCE EXCHANGE CORPORATION, dba Cover Oregon, an Oregon public corporation, Plaintiffs, vs. ORACLE AMERICA, INC., a Delaware corporation; STEPHEN BARTOLO, an individual; THOMAS BUDNAR, an individual; KEVIN CURRY, an individual; SAFRA CATZ, an individual; BRIAN KIM, an individual; RAVI PURI, an individual; and MYTHICS, INC., a Virginia corporation, Defendants.	Case No. 14C20043 THE HONORABLE COURTLAND GEYER DEFENDANTS ORACLE AMERICA, INC., STEPHEN BARTOLO, THOMAS BUDNAR, KEVIN CURRY, SAFRA CATZ, AND BRIAN KIM'S MOTION FOR JUDGMENT ON THE PLEADINGS (ALL CLAIMS) ***REDACTED COPY*, ORIGINAL COPY FILED UNDER SEAL PURSUANT TO AMENDED PROTECTIVE ORDER** **(ORAL ARGUMENT REQUESTED)**

710118.0003/6619098.1

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I. UTCR 5.010 INFORMATION

Pursuant to UTCR 5.010, counsel for defendants Oracle America, Inc. ("Oracle"), Brian Kim, Kevin Curry, Thomas Budnar, Safra Catz, and Stephen Bartolo (collectively, "the Individual Defendants") conferred in good faith by telephone and email with counsel for plaintiffs regarding the bases for this motion. We were not able to resolve the dispute.

II. UTCR 5.050 INFORMATION

Pursuant to UTCR 5.050, Oracle and the Individual Defendants request oral argument on this motion and estimate that the time required for argument on this motion will be one (1) hour. Official court reporting services are requested.

III. MOTION

Pursuant to ORCP 21 B, and 21 G(4), Oracle and the Individual Defendants move this Court for an order entering judgment in their favor as to all Claims for Relief based upon the following:

1. Oracle is entitled to judgment in its favor on all state-law claims asserted against it because Plaintiffs seek the recovery of funds originating in federal grants, and Oregon statutes require application of federal law in such circumstances;

2. Claims of violation of the Oregon False Claims Act ("OFCA") are preempted by the Affordable Care Act, which expressly incorporates the federal False Claims Act ("FCA"), because:

   a. the OFCA impermissibly conflicts with the FCA by imposing a materially different enforcement and penalty scheme with respect to federal funds; and

   b. the assertion of such claims interferes with federal discretion on when and how to enforce claims concerning the misuse of federal grant funds; and

   c. Plaintiffs have a conflict of interest that precludes them from pursuing federal funds.

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3. The OFCA applies only to false claims for payment of state funds, and Plaintiffs allege only false claims concerning federal grant funds.

4. Plaintiffs have suffered no injury, because the funds the State seeks to recover originated exclusively with the federal government, and Plaintiffs have no interest in such money.

In support of this Motion, Defendants rely on the following Points and Authorities and the pleadings on file with the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

IV. INTRODUCTION

All of Oregon's claims against Oracle and the individual defendants fail under both Oregon and federal law for one overriding reason: they purportedly are brought under Oregon *state* law, yet they all seek recovery of *federally*-granted funds – nearly $300 million worth – and thus are based on injuries that are fundamentally *federal* in nature. On the following grounds, they must be dismissed:

First, Oregon statutes expressly require application of federal law in cases involving federally-granted funds, thereby explicitly prohibiting the prosecution of such claims under state law, as Oregon seeks to do here.

Second, the Oregon False Claims Act ("OFCA") claims are preempted by federal law on two grounds: (i) as applied to federal grant funds, the OFCA impermissibly conflicts with the federal False Claims Act ("FCA") (which is expressly incorporated into the federal Affordable Care Act ("ACA")) by imposing its own separate and significantly different enforcement and penalty scheme; and (ii) Oregon's prosecution of OFCA claims involving federal grant funds interferes with the federal government's discretion to determine when and how to enforce compliance with the ACA and federal grant law.

Indeed, Oregon has a conflict of interest that exacerbates this interference-with-federal-discretion problem and renders the State inherently incapable of protecting federal interests

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through its OFCA claims. The conflict arises from the strong incentive Oregon has to conceal its *own* potential liability to the federal government for improperly spending and administering the ACA funding it received. Though the presence of the conflict is evident from the face of the State's own complaint, lest there be doubt about the depth and breadth of the State's misconduct, there are hundreds of documents that have been produced so far in this case that demonstrate that the State massively mismanaged the projects, and then engineered a public campaign to blame Oracle for the State's own failings.

Third, even if Oregon's OFCA claims were not federally preempted, those claims fail as a matter of law insofar as they concern invoices paid with *federal* grant funds. That is because the OFCA only covers false "claims"—*i.e.*, requests or demands for money—that were paid at least in part with *state* funds.

Fourth, all of Oregon's other claims—state-law fraud, breach of contract, and state-law RICO ("ORICO")—are fatally defective because Oregon has suffered no cognizable injury. It seeks to recover federally-granted funds, all of which belong solely to the federal government and were expended through a distinctly federal program. If anyone suffered harm, it was the federal government and ***not Oregon***.

All of these grounds for dismissal have a common element. In bringing its state-law claims against Oracle seeking recovery of federally-granted funds, Oregon is improperly attempting to usurp the federal authority over and interest in those funds. The ACA constitutes a massive federal overhaul of the nation's health care system, funded almost entirely with federal funds, and structured according to very precise federal statutes and implementing regulations. Justice Ginsburg has described the overarching federal role in the program: "Far from trampling on States' sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need." *Nat'l Fed. of Indep. Businesses v. Sebelius*, 132 S. Ct. 2566, 2628 (2012) (Ginsburg, J., dissenting in pert. part). Thus, while states enjoy "wide latitude" in certain respects, *id.*, they were not given broad discretion as to how to expend or

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recover the federal grant funds awarded to them under the ACA.

This federal interest is clear and controlling here. Under Oregon's own statutes and standards as well as federal law, Oregon's claims are impermissible and must be dismissed.

V. LEGAL STANDARD

Under ORCP 21 B, any party may move for judgment on the pleadings "[a]fter the pleadings are closed, but within such time as not to delay the trial." No such prejudice to the trial date exists here; discovery will continue while the motion is pending. In considering a Rule 21 B motion, the Court must apply the same standards applicable to motions to dismiss under ORCP 21 A(8). *Compare Boyer v. Salomon Smith Barney*, 344 Or. 583, 586, 188 P.3d 233 (2008), *with Gafur v. Legacy Good Samaritan Hosp. & Med. Ctr.*, 344 Or. 525, 528-529, 185 P.3d 446 (2008). Thus, a court must accept all well-pleaded factual allegations in a complaint as true. *See Swanson v. Warner*, 125 Or. App. 524, 526, 865 P.2d 493 (1993). A court should give no weight, however, to legal conclusions unsupported by the facts alleged. *See Lourim v. Swensen*, 328 Or. 380, 384, 977 P.2d 1157 (1999) ("Conclusions of law alone * * * are insufficient"); *Huang v. Claussen*, 147 Or. App. 330, 334, 936 P.2d 394 (1997) ("[M]ere recitation of the elements of a particular claim for relief, without more, is not a statement of ultimate facts sufficient to constitute that claim for relief"). Dismissal and/or judgment is appropriate where a plaintiff fails to assert a cognizable legal theory or, though asserting a cognizable legal theory, alleges facts that do not make out a violation. *See Zehr v. Haugen*, 318 Or. 647, 655-56, 871 P.2d 1006 (1994). Moreover, a court may only draw *reasonable* inferences from the facts alleged. *See Ramex, Inc. v. Nw. Basic Indus.*, 176 Or. App. 75, 85, 29 P.3d 1211 (2001); *Lowe v. Philip Morris USA, Inc.*, 344 Or. 403, 407 n.1, 183 P.3d 181 (2008).

Oregon courts also "shall dismiss" claims over which they lack subject matter jurisdiction. ORCP 21 G(4). "Subject matter jurisdiction is the authority to deal with the general subject involved." *Greeninger v. Cromwell*, 127 Or. App. 435, 438, 873 P.2d 377 (1994). "It exists when the constitution, the legislature or the law has told a specific court to do something

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about the specific kind of dispute in issue." *Id.* (citing *School Dist. No. 1, Mult. Co. v. Nilsen,* 262 Or. 559, 566, 499 P.2d 1309 (1972)). "Circuit courts have subject matter jurisdiction over all actions unless a statute or rule of law divests them of jurisdiction." *Id.* While this can include federal causes of action, the circuit courts of Oregon lack subject matter jurisdiction where there is a "provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). For the reasons discussed more fully below, both Oregon statutes and governing federal law foreclose this Court's adjudication of the State's claims asserted here.

VI. ARGUMENT

A. Oregon's Own Statutes Expressly Preclude All of Oregon's State Law Claims.

In this case, the State of Oregon and several of its agencies or related entities (the Oregon Health Authority ("OHA"), the Oregon Department of Human Services ("DHS"), and the Oregon Department of Business and Consumer Services ("DCBS") as successor to the Oregon Health Insurance Exchange Corporation, dba Cover Oregon) ("Cover Oregon") have brought claims under state law that seek recovery of federal grant funds. Relevant provisions of the Oregon Revised Statutes, however, expressly and unanimously require that *federal* laws and rules govern in cases involving federal grant funds. These statutes supersede or preclude application of state law that might otherwise apply. They include one catchall provision with extremely broad applicability, and several additional provisions that govern the specific state agencies involved in this litigation. Together, these statutes codify the Oregon Legislature's unequivocal intent that federal laws should control where federal grant funds are at issue, and that state laws are completely displaced in such circumstances. Inasmuch as (i) Oregon brought all of its claims under state law, (ii) federal funds indisputably supported the work on the health insurance exchange ("HIX") that is the subject of the litigation, and (iii) the funds Oregon seeks to recover are federal funds, all of Oregon's claims are unauthorized, unlawful, and *ultra vires* under Oregon's own statutory scheme.

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Oregon law expressly precludes application of state law in cases concerning federal grant funds. ORS § 283.020 provides: "***In all cases*** where ***federally granted funds*** are involved, ***the federal laws***, rules and regulations applicable thereto ***shall govern***[.]" (Emphasis added). The general operating statutes of the Oregon agencies involved in the HIX project employ equivalent language. One explicitly refers to preemption in its title, "Federal law ***supersedes*** state law." Another begins with the language "***[n]otwithstanding any other provision of law***, federal law shall govern." (Emphasis added). These statutes confirm the Oregon's Legislature's broad intent to embrace federal preemption principles:

- The provision in the Department of Human Services chapter is titled, "***Federal law supersedes state law,***" and provides, "***In all cases where federally granted funds are involved***, the ***federal laws***, rules and regulations applicable thereto ***shall govern*** notwithstanding any provision to the contrary in [various DHS statutes]." ORS § 409.040 (emphasis added).
- The provision in the Oregon Health Authority chapter provides, "***Notwithstanding any other provision of law, federal laws shall govern*** the administration of federally granted funds. The Director of the Oregon Health Authority may request a waiver of any federal law in order to fully implement provisions of state law using federally granted funds." ORS § 413.071 (emphasis added).
- The provision in the Cover Oregon chapter provides, "In ***all cases*** where federally granted funds are involved and the applicable federal laws, rules and regulations ***conflict*** with any provision of sections 1 to 11 and 13 to 23 of this 2011 Act [establishing Cover Oregon], or require additional conditions not required under state statute, the applicable federal requirement ***governs***." 2011 Or. Laws Ch. 415 § 13.[1]

[1] The Oregon legislature's decision in 2015, to abolish Cover Oregon and assign its functions to the Department of Consumer and Business Services under SB 1 (2015) does not change this analysis as it pertains to Cover Oregon's claims. The specific state-law preclusion statute at issue for Cover Oregon, 2011 Or. Laws Ch. 415 § 13, was not repealed by SB 1 (2015) and remains in effect. Moreover, under the terms of SB 1, the "transfer of powers, rights, obligations

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The key language above, "federal law shall govern," is standard language preempting the application of state law. *See Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 146 n.10 (2d Cir. 2005) (Sotomayor, J.) ("If Congress had not wished to limit the types of state laws subject to preemption, it could have quite easily provided that '*federal law shall govern* the interpretation and enforcement of contract terms under this chapter which relate to the nature, provision, or extent of coverage or benefits.'") (emphasis added), *aff'd*, 547 U.S. 677 (2006).

In this case, there is no question that Oregon has brought exclusively state-law claims: common-law fraudulent inducement, common-law breach of contract, OFCA and ORICO. There also is no question that Oregon's claims seek to recover and keep for Oregon's own benefit *federal* grant funds—grant funds that the federal Department of Health and Human Services ("HHS") paid to Oregon agencies as grantees to develop Oregon's HIX. The federal origin of the funds in question is clear from Oregon's complaint and Cover Oregon's financial statements. (*See* 1st Am. Compl. ¶¶ 44-48 (describing initial federal grant of $48 million awarded in 2011); *id.* ¶ 101 (alleging that Cover Oregon's business plan called for it to be funded entirely by federal grants through 2014 and for operations to be funded through other revenues beginning only in 2015); *id.* ¶ 109 (further alleging funding from a federal grant); Declaration of Karen Johnson-McKewan ("Johnson-McKewan Decl.") Exhibit 20 at 6-7 (Oregon Health Ins. Exchange Corp. 2013 and 2014 financial statements explaining that federal grants of $231.7 million accounted for almost all of Cover Oregon's revenue for 2012-14; that HIX operating

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and liabilities" of Cover Oregon "to the Director of the Department of Consumer and Business Services by section 1 of this 2015 Act does not affect any action, proceeding or prosecution involving or with respect to such powers, rights, obligations and liabilities begun before and pending at the time of the transfer, except that the State of Oregon, by and through the Department of Consumer and Business Services, is substituted for the Oregon Health Insurance Exchange Corporation in the action, proceeding or prosecution." 2015 Or. Laws Ch. 3, § 5. The statute further provides that the transfer itself did not affect any substantive rights or liabilities (with one exception not pertinent here): "(2) The rights, obligations and liabilities of the Oregon Health Insurance Exchange Corporation legally incurred before the operative date of section 1 of this 2015 Act are transferred to the Department of Consumer and Business Services. The department is the successor to those rights, obligations and liabilities, notwithstanding any prohibition on assignment contained in contracts assumed by the department under sections 1 and 2 of this 2015 Act." *Id.*, § 6.

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costs during those years were fully funded by the federal grants; and that $6.6 million separately raised by Cover Oregon in 2014 was placed in reserve account); *id.* at 15 (discussing Cover Oregon's reliance on federal grant funding through December 31, 2014, and its use of federal grant funds for start-up costs in 2011).)[2] OHA, DHS, and Cover Oregon in turn used these federal funds to pay contractors providing services to help develop the HIX, including Oracle.

These funds never lost their federal character and always remained federal funds, even when channeled through state entities and a state-created public corporation as grantees. That is because the funds always had to be used in conformance with federal law, federal regulation, and the terms of the federal award and, at all times, remained subject to federal oversight and control and reimbursable to the federal government if expended improperly on unallowable costs.[3] *See In re Joliet-Will Cty. Cmty. Action Agency*, 847 F.2d 430, 432 (7th Cir. 1988) (Posner, J.) (pointing to extensive federal regulatory controls in holding that federal grant funds in the hands of the grantee, as well as personal property purchased with grant money, remained federal property, and the grantee was essentially "a trustee, custodian, or other intermediary, who * * * is merely an agent for the disbursal of funds belonging to another," with "nominal" ownership);

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[2] As this document is a publicly available financial statement of a quasi-public corporation that is a plaintiff in this case, Oracle hereby asks the Court to take judicial notice of it. *See SAIF v. Calder*, 157 Or. App. 224, 227, 969 P.2d 1050 (1998) (affirming that a court may take judicial notice of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned). Alternatively, this motion should be considered a motion for summary judgment and Plaintiffs should be required to demonstrate the existence of a material fact regarding whether federal grant funds were used to pay Oracle. *See Slagle v. Hubbard*, 176 Or. App. 1, 3, 29 P.3d 1195 (2001) (simultaneously granting defendants' motion for judgment on the pleadings and motion for summary judgment, which defendants brought in the alternative on the theory that "the pleadings and the evidence were insufficient as a matter of law to establish [the alleged claims].")

[3] For example, if a state's Medicaid payment to a provider proves to be unallowable due to a false claim or other deficiency, the federal government recovers its full share of any funds recovered by the state. (*See* Johnson-McKewan Decl. Exhibit 21 (Centers for Medicare and Medicaid Services. HHS statement explaining its "policy regarding refunding of the Federal share of Medicaid overpayments, damages, fines and penalties, and any other component of a legal judgment or settlement when a State recovers pursuant to legal action under its State False Claims Act (SFCA)" and stating that the Social Security Act's "broad mandate demands that a State return not only the Federal amount originally paid attributable to fraud or abuse, but also a[] [Federal Medical Assistance Percentage]-rate proportionate share or any other recovery").)

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id. at 433 (affirming that "federal funds in the hands of a grantee remain the property of the federal government unless and until expended in accordance with the terms of the grant"); *Hayle v. United States*, 815 F.2d 879, 882 (2d Cir. 1987) (holding that where the federal government "exercised sufficient supervision and control over [grantee's] funds," the funds "were moneys of the United States" subject to federal embezzlement laws); (Office of Management and Budget, Cost Principles for State, Local, and Indian Tribal Governments, Circular No. A-87, Attach. A ¶ C.2, *available at* https://www.whitehouse.gov/omb/circulars_a087_2004/#c (obligating states to spend federal grant funds only on "allowable" costs, which include "reasonable costs" conforming to federal law, federal regulation, and the terms of the federal award).)[4] All of Oregon's claims rest exclusively on state law, allege wrongs concerning the expenditure of federally-granted funds, and seek recovery of federally-granted funds. They are therefore unauthorized, unlawful, and *ultra vires* under Oregon's own statutory scheme. They must be dismissed.

B. Federal Law Preempts Oregon's OFCA Claims.

Just as Oregon law precludes application of the OFCA in cases involving federally-granted funds, federal law itself preempts the OFCA in cases involving federally-granted funds. Under the doctrine of conflict preemption, federal law supplants state law "where 'compliance with both state and federal law is impossible,' or where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (internal quotation marks and citations omitted).[5]

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[4] *See also* Johnson-McKewan Decl. Exhibit 22 (GAO Redbook stating that "*grant funds in the hands of a grantee continue to be treated as federal funds*" and that "the court[s] reject[]" the argument that "the funds or property were no longer federal funds or property," irrespective of whether "the funds may have been commingled with nonfederal funds" because the "holdings are based on the continuing responsibility of the federal government to oversee the use of the funds") (citations omitted, emphasis added).

[5] A second form of preemption—field preemption—is also material here. Under field preemption, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance" as the result of either a "framework of regulation 'so pervasive * * * that Congress left no room for the

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State laws typically pose an obstacle to federal law in either of two situations: (a) when they impose their own differing remedies or standards for conduct that violates federal law, or (b) when the state usurps the federal role, including the federal government's discretion, in enforcing a federal law.

The ACA itself explicitly codifies preemption doctrine for any state law conflicting with its terms. As the Eighth Circuit has explained, Section 1321(d) of the ACA provides that *any* state law that conflicts with the ACA *is* preempted. *See St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1022 (8th Cir. 2015) (Section 1321(d) means that "those state laws that 'hinder or impede' the implementation of the ACA run afoul of the Supremacy Clause"); 42 U.S.C. § 18041(d) ("[n]othing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title"). By explicitly codifying conflict-preemption doctrine, the ACA demonstrates "the clear and manifest purpose of Congress," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted), that any state law or regulatory scheme that conflicts with Title I of the ACA is preempted by the ACA.

These conflict preemption principles apply here. Oregon is using a *state* anti-fraud statute to recover *federal* funds granted to implement a *federal* program (the ACA) with its own anti-fraud requirements and mechanisms. The ACA makes the *federal government* responsible for monitoring and enforcing federal requirements regarding the creation of state health insurance exchanges, including how federal funds are used. Section 1313(a)(6) of the ACA explicitly incorporates the standards and sanctions of the federal FCA for all payments made (*i.e.*, federal funds used) in connection with an exchange: "Payments made by, through, or in connection with an Exchange are subject to the False Claims Act * * * if those payments include

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States to supplement it' or where there is a 'federal interest * * * so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). In cases where a state statute conflicts with an overarching federal statute, field preemption may overlap with conflict preemption, such that the Supreme Court has applied both doctrines jointly without worrying about semantic precision. *See, e.g., id.* at 2503. For that reason, this motion focuses on conflict preemption principles, but field preemption principles apply as well.

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any Federal funds." 42 U.S.C. § 18033(a)(6). Moreover, Subsection 1313(a)(5) of the ACA imposes a mandatory duty on the HHS Secretary to "implement any measure or procedure that * * * is appropriate to reduce fraud and abuse in the administration of this title," including the use of federal funds to establish an exchange. 42 U.S.C. §§ 18033(a)(5), 18031(a). The HHS Secretary thus has the express "authority to oversee financial integrity, compliance with HHS standards, and efficient and non-discriminatory administration of State Exchange activities." 78 Fed. Reg. 65,046, 65,048 (Oct. 30, 2013) (final rule).

Given the federal government's broad mandate under the ACA to oversee the integrity of the use of federal funds to establish state exchanges, Oregon's OFCA claims against Oracle are categorically preempted on two separate grounds. First, the OFCA imposes substantially different standards of conduct and remedies than the federal scheme despite addressing the same conduct. Second, the OFCA disrupts and interferes with the federal government's discretion to determine when and how to enforce compliance with the ACA's anti-fraud provisions. That is particularly so under the circumstances of this case, where Oregon has an irreconcilable conflict of interest in targeting Oracle as the culpable party when Oregon itself is potentially liable to the federal government for the same claims. Oregon's OFCA claims should be dismissed on both grounds.

1. Oregon's OFCA claims interfere with the method Congress chose for prosecuting false claims involving federal funds awarded under the ACA. State law "is pre-empted if it interferes with the methods by which the federal statute was designed to reach [its] goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Under this test, even if the goals of state law mirror federal objectives, whenever "'two separate remedies are brought to bear on the same activity,'" or a state has imposed separate "standards of conduct inconsistent with the substantive requirements" of federal law, conflict preemption occurs, because such "'[conflict] in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.'" *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986)

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(citation omitted). Both of these considerations—different standards of conduct and different remedies—are in play here. As applied to federal grant funds expended under the ACA, the OFCA conflicts with the federal FCA by expanding the scope of wrongful conduct and by altering the recovery scheme.

First, under the federal FCA, only false statements "material" to false claims are actionable; under Oregon's OFCA statute, at least as Oregon has framed its claims, *any* false statement, material or not, made in the course of presenting a claim is actionable. *Compare* 31 U.S.C. § 3729(a)(1)(B) *with* ORS 180.755(1)(b). The materiality requirement is crucial to preserving the federal FCA's intent to prevent fraud, and federal courts strictly enforce it in order to bar both *qui tam* relators and the federal government from converting ordinary contract disputes into federal FCA actions. *See, e.g., United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628, 637 (4th Cir. 2015) ("The best manner for continuing to ensure that plaintiffs cannot shoehorn a breach of contract claim into an FCA claim is 'strict enforcement of the Act's materiality and scienter requirements.'") (quoting *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1270 (D.C. Cir. 2010)); *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 388 (1st Cir. 2011) (same).[6] Oregon's assertion of OFCA claims for false statements against Defendants in this case is, therefore, an attempt to expand Defendants' liability beyond what Congress contemplated in incorporating the FCA into the ACA.

Second, under the OFCA, an individual's failure to disclose an OFCA violation is itself a *separate* violation of the OFCA, which subjects the silent party to the same range of substantial civil penalties and damages as the actual violator. *See* ORS 180.755(1)(i). The federal FCA, by

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[6] A leading FCA scholar describes materiality as a "critical" or "essential" element of the FCA. (*See* John T. Boese, *The Past, Present, and Future of "Materiality" under the False Claims Act*, 3 St. Louis U. J. of Health Law & Policy 291, 292 (2010) ("[m]ateriality is a critical determination"); *id.* at 294 ("materiality is one of two key issues (the other being intent) that renders an otherwise innocent defendant liable under the FCA"); *id.* at 302 ("Materiality is critical to one issue of great importance to hospitals * * *"); John T. Boese, CCH Civil False Claims and Qui Tam Actions, § 2.04 *Materiality*, 2015 WL 4602836, at 2 (2015) ("concepts of falsity and materiality are essential for FCA liability"); *id.* at 16 ("the concept of materiality [i]s an essential element of liability under the False Claims Act").)

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contrast, does not proscribe or punish the failure to disclose a violation. This, too, means that the OFCA outlaws more conduct—and different conduct—than does the federal FCA.

Third, in its Opposition to the Motion to Dismiss previously filed by the individual Defendants (at 50), Oregon has maintained that the OFCA proscribes material *omissions* from statements made in support of claims for payment, citing, *inter alia*, ORS 180.755, ORS 180.760(5), and ORS 180.750(2)(c). The federal FCA, by contrast, does not apply to omissions.

Fourth, under Oregon law, the State's litigation fees and costs, including the costs of investigation, are recovered first. Under federal cost-recovery principles, however, such fees and costs are not allowable, meaning they *cannot* be paid to the State out of federal funds. *Compare* ORS 180.780 *with* OMB Circular No. A-87, Attach. B ¶ 19(a)(4) (stating that "[c]osts of prosecutorial activities" are not allowable unless specified by the program statute or regulation).

These and other disparities[7] make the OFCA's scope and enforcement remedies significantly broader than its federal counterpart. Therefore, as applied to federal funds awarded under the ACA, the OFCA impermissibly conflicts with federal law. *See, e.g.*, *Arizona*, 132 S. Ct. at 2503 (finding conflict in "inconsistency between [a state law] and federal law with respect to penalties"); *id.* at 2505 (finding "conflict in the method of enforcement"); *Wisconsin Dep't*,

[7] Other departures include: (1) different definitions of a "claim;" the OFCA expressly includes "services" and "benefits," whereas the FCA does not, *compare* ORS 180.750(1)-(2) *with* 31 U.S.C. § 3729(b)(2); and (2) different penalties and damages; the OFCA provides that a "court shall award to the state all damages arising from a violation of ORS 180.755" and, in addition, "shall award to the state a penalty equal to the greater of $10,000 for each violation or an amount equal to twice the amount of damages incurred for each violation," whereas the federal law allows the government to recover three times the damages and $5,500 to $11,000 per penalty. *Compare* ORS 180.760(4) *with* 31 U.S.C. § 3729(a).

Moreover, Oregon's expansive interpretation of the OFCA takes it far beyond the reach of the FCA in key respects. For example, as addressed in the briefing on the individual Defendants' Motion to Dismiss, Oregon contends that any statement made "in the course of presenting a claim"—language that is not present in the FCA—applies to statements made by individuals who are not themselves presenting a claim. (5/11/15 Opp. to Mot. to Dismiss at 29-30). While Defendants continue to vigorously dispute Oregon's expansive interpretation of that provision, Oregon's interpretation, if it is not reversed by this Court or an appellate court, would give the OFCA a substantially broader reach than the FCA, particularly as to individual defendants. Statements made by individuals who are not themselves presenting a claim for payment are not actionable under the FCA.

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475 U.S. at 286 (imminent conflict occurs "whenever 'two separate remedies are brought to bear on the same activity'").

Lest there be any doubt about the impact of the OFCA's conflicts with the federal FCA, Oregon's claims *in this case* exceed those that could be brought under the federal FCA. Unlike its fraud and breach of contract claims, which contain materiality requirements and are pled accordingly, (*see* 1st Am. Compl. ¶¶ 187, 198, 280, 295, 316) Oregon's OFCA claims make no such allegations of materiality, allegations it would have to prove under the federal FCA. (*See id.* at ¶¶ 207-10, 214-18, 222-25, 229-31, 235-38, 242-46, 251-53, 256-59, 263-67, 271-74.) Likewise, Oregon has asserted that individual Defendant Thomas Budnar is liable for alleged omissions arising from his purported failure to correct misstatements by another Defendant. (*See* 1st Am. Compl. ¶¶ 242(a), 242(c), 242(d), 246.) Such claims are not actionable under the federal FCA. Oregon also is seeking reimbursement of its fees and costs, including the costs of investigation, in this action, which, under Oregon law, must be awarded on a priority basis. *See* ORS 180.780; (1st Am. Compl. ¶¶ 213, 221, 228, 234, 241, 250, 255, 262, 270, 277.). Under federal law, no federal grantee may seek such relief, let alone priority relief, in an action seeking recovery of federal grant funds subject to OMB Circular No. A-87. Hence, this is a clear case where "'two separate remedies are brought to bear on the same activity,'" and where a state has imposed separate "standards of conduct inconsistent with the substantive requirements" of federal law. *Wisconsin Dep't*, 475 U.S. at 286 (citation omitted); *see also Arizona*, 132 S. Ct. at 2503, 2505 (citing "inconsistency * * * regarding penalties" and "conflict in the method of enforcement").

The Supreme Court's recent decision in *Arizona v. United States* is instructive. In *Arizona*, the Court struck down a state-law provision making it a misdemeanor for undocumented aliens to work when no such criminal sanction existed under federal law, even though the state law was enacted to assist the federal government in enforcing federal immigration laws. It reasoned that enforcing the state-law provision "would interfere with the

careful balance struck by Congress" by creating "a conflict in the method of enforcement." *Arizona*, 132 S. Ct. at 2505. The Court also struck down a separate provision making it a state misdemeanor for an undocumented alien to fail to carry a registration card because it outlawed more conduct and prescribed more draconian penalties than federal law.[8] *See id.* at 2502-03. As the Court explained, "[p]ermitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted * * * This state framework of sanctions creates a conflict with the plan Congress put in place." *Id.* That is exactly what Oregon is attempting to do here.

This principle has been widely applied, both by the Supreme Court and lower courts. For instance, in *Wisconsin Dep't*, the Court held that a Wisconsin statute that debarred certain repeat violators of the National Labor Relations Act ("NLRA") from doing business within the state was preempted by the NLRA because it superimposed state remedies and enforcement on a federal scheme, a fundamental conflict. As the Court explained, "States [are prevented] not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." 475 U.S. at 286. Doing so interferes with Congress's scheme "by adding a remedy to those prescribed by the NLRA," *id.* at 287, providing the State with a remedy not available to the NLRB, *id.*, and expanding the range of punitive sanctions, *id.* at 288 n.5.[9]

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[8] Notably, *Arizona* did *not* rest on the primacy of the federal government's plenary role in immigration issues, *i.e.*, it did *not* apply a broad, generalized field-preemption analysis precluding all state regulation related to immigration. For instance, the Court ruled that a different provision of Arizona law that did not pose a substantial conflict with federal laws was not preempted despite its overlap with federal immigration laws. *See id.* at 2507-10. Thus, even though it arose in the context of a subject generally reserved to plenary federal power, *Arizona*'s preemption analysis is strong precedent for reviewing other state schemes that obstruct a federal scheme.

[9] Numerous other cases have found analogous disparities between federal and state enforcement schemes sufficient to warrant preemption. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) (holding that states may not impose their own punishment for fraud on the FDA); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000) ("the

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The same principles apply here. The absence of any materiality requirement in the OFCA, the proscription against the failure to report violations, the alleged liability for material omissions, and the priority recovery of the State's fees, costs and investigative expenses all make the Oregon scheme substantially more expansive and draconian than the federal scheme when it comes to recovering federal funds. The Oregon Legislature, like the Arizona Legislature, went in a direction that Congress specifically and deliberately rejected. *See Arizona*, 132 S. Ct. at 2504; *cf. Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 156 (1982) (finding conflict preemption where state law limited availability of option that federal agency considered essential).

Given the substantial differences between the OFCA and the federal FCA, Oregon may not use the OFCA as an enforcement mechanism as to federal funds awarded under the ACA grant program. That program specifically provides for the federal FCA to be utilized and for the HHS Secretary to provide oversight and enforcement. Oregon's OFCA claims are preempted.

2. Oregon's OFCA claims interfere with federal enforcement power. Another type of obstacle preemption leads to the same result. If a state law interferes with a vital federal interest, such as "the discretion of the Federal Government" as to how and when to enforce its laws, the state law is in conflict with federal law and is preempted. *Arizona*, 132 S. Ct. at 2506; *see also, e.g.*, *Crosby*, 530 U.S. at 373-74, 374-77 (holding that federal law's "delegation of

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inconsistency of sanctions [may] undermine[ ] the congressional calibration of force"); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (holding that state tort lawsuit seeking to impose liability for lack of airbags was preempted where federal agency had intended for flexibility in required safety devices); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1062-63 (9th Cir. 2014) (holding that state law prohibiting undocumented immigrant children from obtaining driver's licenses conflicted with federal government policy allowing such immigrants to work, even if conflict was not direct on its face); *Villas at Parkside Prtnrs. v. City of Farmers Branch, Tex.*, 726 F.3d 524, 528-36 (5th Cir. 2013) (en banc) (holding that statute imposing criminal sanctions for harboring undocumented aliens was preempted by federal immigrations law lacking such sanctions), *cert denied*, 134 S. Ct. 1491 (2014); *United States v. Alabama*, 691 F.3d 1269, 1287-88, 1292-96 (11th Cir. 2012) (holding that statutes imposing criminal sanctions for undocumented aliens and prohibiting contracts with undocumented aliens conflicted with and were preempted by federal statutes lacking such provisions), *cert denied*, 133 S. Ct. 2022 (2013).

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effective discretion to the President to control economic sanctions" preempted state or local sanctions intended to augment federal sanctions). A state, in short, may not usurp the federal government's enforcement power over federal programs when Congress has entrusted that power to a federal agency. Yet that is exactly what Oregon seeks to do here: by bringing its own claims in its own court under its own laws to recover federal funds, Oregon has unilaterally usurped the authority of the Secretary of HHS and the Department of Justice to enforce compliance with the provisions of the ACA regarding the establishment of state health insurance exchanges and with federal grant requirements.

Oregon's prosecution of OFCA claims to recover federal funds awarded under the ACA plainly interferes with federal enforcement discretion and the overriding federal interest in ensuring proper administration of federal grants. *Arizona* proscribes precisely this kind of interference. The Supreme Court held that, because provisions in Arizona law divested federal immigration officers of the discretion to decide who to detain and who to remove from the United States, they were preempted. *See Arizona*, 132 S. Ct. at 2503 ("Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies."); *id.* at 2506 ("By authorizing state officers to decide whether an alien should be detained for being removable, § 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government"). This type of obstacle preemption is well-established. *See, e.g.*, *Buckman*, 531 U.S. at 348 (finding that federal scheme that "amply empowers the FDA to punish and deter fraud against the [FDA]" is used by the FDA "to achieve a somewhat delicate balance of statutory objectives" and could "be skewed by allowing fraud-on-the-FDA claims under state tort law"); *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia*, 790 F.3d 457, 477 (3d Cir. 2015) (holding that state court could not enforce conditions of Federal grant program against federal grantee for allegedly violating federal grant

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conditions, because only a federal agency has power to determine if grantee "has complied with the terms of its federal grants and to attach consequences to noncompliance" and the risk of separate state enforcement decisions could "interfere" with federal discretion); *Villas at Parkside*, 726 F.3d at 534-35 ("The Ordinance puts local officers in this impermissible position [of prosecuting and arresting individuals] based on perceived unlawful presence," which "would allow the state to achieve its own immigration policy" and result in "unnecessary harassment") (internal quotation marks omitted); *United States v. South Carolina*, 720 F.3d 518, 533 (4th Cir. 2013) ("allowing the state to prosecute individuals for violations of a state law that is highly similar to a federal law strips federal officials of that discretion"); *Alabama*, 691 F.3d at 1295 (finding conflict where state law allows the state to "unilaterally determine" whether an alien can live within its borders "regardless of whether the Executive Branch would exercise its discretion to permit the alien's presence"); *Buquer v. City of Indianapolis*, No. 1:11-cv-00708, 2013 U.S. Dist. LEXIS 45084, at *34-35 (S.D. Ind. Mar. 28, 2013) ("Section 20 significantly disrupts and interferes with federal discretion relating to immigration enforcement and the appropriate, preferred methods for carrying out those enforcement responsibilities."). It is the prerogative of the federal government, not a state grantee, to decide whether and against whom to seek recovery for false claims related to federal funds. Accordingly, Oregon may not usurp the federal government's authority and interest in enforcing the grant requirements and principles applicable to the federal funds it obtained under the ACA.

This is especially true in this case, which is an even stronger case for exclusive federal control than the cases cited above. Unlike those cases, where presumably valid ***and untainted*** state interests were weighed against federal interests, Oregon is laboring under an irremediable conflict of interest arising from its potential liability to the federal government for any false claims arising from the development of the HIX. Oregon ultimately is responsible for any failure to manage and monitor the subgrantees and contractors it paid with federal funds. (*See, e.g.*, Department of Health and Human Services, HHS Grants Policy Statement (Jan. 1, 2007) at I-6,

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available at http://www.hhs.gov/asfr/ogapa/aboutog/hhsgps107.pdf (providing that, as a grantee, a state "is legally accountable for the performance of the award and the expenditure of funds," and that "[t]hese responsibilities include accountability both for the appropriate use of funds awarded and the performance of the grant-supported project or activities as specified in the approved application"); *see also id.* at I-37, II-2, II-48, B-8.) Therefore, Oregon *itself* may be liable to the federal government under the federal FCA for false claims, whether Oregon made them on its own or through its subgrantees and contractors.

There should be no doubt that the State faces real exposure to the federal government for its mismanagement of federal grant money. The State's conflict is evident from the face of its complaint, which is all the Court needs to evaluate this question for purposes of this motion. Lest there be doubt on that point, however, the Court should understand that there are volumes of evidence that will also support that proposition. We start with a sampling of statements from the head of the State's Legislative Fiscal Office, Bob Cummings, who was unrestrained in his criticism of the State's and Cover Oregon's project management. For example, in March of 2012, Cummings described the HIX program leadership as

> [i]nexperienced, undisciplined, and much too reactive to get a robust, comprehensive new business up in such a short timeframe. * * * In my opinion, the program 'side' of HIX has wasted a good part of the past 10+ months. If they have made a lot of progress (which I highly doubt), then they've done an incredibly poor job of communicating, sharing, and show-casing it.

(*See* Johnson-McKewan Decl. Exhibit 1.)

Later the same month, Cummings wrote:

> Overall, the HIX effort is dysfunctional and a quality QA [Quality Assurance consultant] would have been nailing them big time for most of the past year. It was convenient that the program side chose to have little or no independent oversight from the beginning of their effort. * * * That decision has allowed them to waste a good part of the past 8-10 months.

(*Id.* Exhibit 2 at 1.)

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In May of 2012, Cummings wrote, "[t]he lack of solid key foundational business planning for the exchange is of great concern to me." (*Id.* Exhibit 3 at 1.) In July of 2012, he wrote:

> Both the HIX Corporation and IT staff are 'out of control' charging down a road that may or may not take them where they'd like to be. They are currently building a system without first modeling/designing the business it has to support. This is incredibly stupid and dangerous.

(*Id.* Exhibit 4 at 1.) That same month, Cummings wrote to Cover Oregon's Executive Director, Rocky King, that "[t]he fact that no one on either side of HIX can describe the basic process of setting up the business (and its processes, business rules, and data), simultaneous with the IT development cycle (SDLC), the 27 iterations, and the leveraging of Oracle's COTS products to each of the 11 lines of business (including the internal supporting processes), is very disconcerting to me." He continued, in all capitals:

> THIS IS SO FUNDAMENTAL TO A[N] IT DEVELOPMENT PROJECT, THAT THE THOUGHT OF PROCEEDING WITHOUT IT BEING FULLY UNDERSTOOD, PLANNED, AND THOUGHT OUT KEEPS ME UP LATE AT NIGHT. * * * FAILING TO PLAN, IS PLANNING TO FAIL.

(*Id.* Exhibit 5 at 2.)

In September 2012, he continued the drumbeat, writing that the State's failure to develop fundamental business requirements for the HIX was dooming the IT project, noting "[u]ntil the business itself, and its design, are better defined, anything that is developed is subject to major changes in later software iteration development. HIX is busy building software when much is still unknown." (*Id.* Exhibit 6 at 4.)

By December, 2012—less than a year before the system was expected to fully go live—King had grown tired of Cummings' lengthy criticisms, and wrote that "Mr. Cummings has received my instructions that no more than 2 paragraphs in IT talk should ever be sent to me – I will not read anything after two and if they are long, there is danger in losing me even with only 2." (*Id.* Exhibit 7 at 4.)

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Cummings' criticisms continued into 2013, observing that "it does not appear that we have a rock solid scope, solid business model, a corresponding fully documented integrated business/IT infrastructure process model, a fully integrated data model, integrated shared services model, all integrated with the use cases * * * I still have not seen a clearly defined set of implementation options * * * [there are] significant areas of risk in trying to build the needed IT infrastructure for a moving target business." (*Id.* Exhibit 8 at 1.)

In August 2013, in a report to the federal government on project status, the state of Oregon reported that it had delivered a fully functional exchange to Cover Oregon four months earlier. (*Id.* Exhibit 26.) [redacted] (*Id.* Exhibit 25.)

When Cummings' predictions came true, and Cover Oregon missed the October 1, 2013 go-live date, Governor Kitzhaber's campaign consultants swung into action. In November, 2013, one of those consultants [redacted] (*Id.* Exhibit 9.) Not long thereafter, [redacted] (*id.* Exhibit 10), the Governor's campaign staff announced a plan for "some specific, intensive management of the Cover Oregon issues." (*Id.* Exhibit 11.) [redacted] (*id.* Exhibit 12 at 2), and [redacted] (*Id.* Exhibit 13 at 1.)[10] By early April, 2014, Patricia McCaig, the chair of Kitzhaber's re-election campaign, advised him that she and Kitzhaber's chief of staff, Mike Bonetto favored a strategy of blaming Oracle:

[10] This is further confirmed by the 2013 Cover Oregon Annual Report, which stated that the "[a]gent and community partner portal is working," and that "Cover Oregon's technology plays a critical role in processing the applications for customers who prefer to apply on their own." (*Id.* Exhibit 15 at 5.)

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> Mike and I talked offline about Oracle - we're leaning, regardless of which option, of announcing we're going 'after' them. Cobbling a narrative together for the CO thursday [sic] which has to do with getting CO/you on the side of doing everything you can to stay within the budget, daylighting what that actually means in terms of product, ***and going after Oracle***.

(*Id.* Exhibit 14 at 1) (emphasis added).

[redacted]

(*Id.* Exhibit 16 at 1) (emphasis added).

[redacted]

(*See, e.g., Id.* Exhibit 17 [redacted] Exhibit 18 [redacted]

(*Id.* Exhibit 19 at 10.)

This is a small sample of the evidence showing the State's keen interest in blaming Oracle for problems of its own creation with Cover Oregon; this Court need not consider this evidence, but it reinforces the self-interested conflict that is evident from the pleadings. Given Oregon's *own* potential (and very substantial) liability to the federal government for its *own* mistakes or malefactions, Oregon has every incentive to deflect to third parties like Oracle, or

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even to conceal, all responsibility for its own misuse of federal funds and its failure to monitor the expenditure of federal funds.[11] As a result, Oregon's OFCA claims not only interfere with federal law enforcement discretion, but potentially *undermine* the federal interest in prosecuting waste, fraud, and abuse in federal grant programs. Under these unique circumstances, Oregon *cannot* possibly be allowed to usurp the federal government's plenary enforcement authority regarding the federal grant funds awarded for the development of the HIX.

In view of the differing standards and remedies in the OFCA and the federal FCA, and Oregon's interference with the federal government's law enforcement discretion, the preemption analysis is not close. The ACA expressly vests oversight and enforcement authority over ACA funds in the federal government. Yet with its OFCA claims, Oregon has taken it upon itself to determine how and when to enforce the federal government's grant requirements and, in the process, has sought to avoid addressing its own potential liability to the federal government for its own false claims. Oregon has yet to acknowledge the overriding federal interest in the funds it seeks to recover, or to renounce any interest in keeping any recovery for itself. Because Oregon's usurpation of federal power is impermissible under the Supremacy Clause, its OFCA claims are preempted.[12]

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[11] The First Amended Complaint tellingly asserts that ***Plaintiffs*** were damaged by "the full amount of every claim paid" by them to Oracle. (*See* 1st Am. Compl. ¶ 218.) It never reconciles that assertion with the fact that the funds in question are federal funds and thus that the injury, if any, was suffered by the federal government. This raises the very real question of whether Oregon intends to repay the federal government if it recovers under its OFCA claims or whether it intends to keep any such recovery for itself. Nothing in the First Amended Complaint, or in any other pleading filed by Oregon, indicates any intent to pass on the recovery to the federal government. Indeed, by Oregon statute, recovery of a judgment would first be used to cover the State's litigation fees and costs the state expended. ORS 180.780. This raises yet another potential conflict of interest that further requires preemption of the OFCA. Surely, federal law preempts a state's use of state law and state courts to pursue recovery of federal funds distributed under a federal grant program that belong to the federal government, where the state's intent is to divert that recovery to the state treasury and to deflect scrutiny of its own potential liability to the federal government. Unless Oregon is willing to renounce any interest in any recovery in this lawsuit, its conflict of interest is overwhelming. No court should allow a state to usurp federal interests under these circumstances.

[12] The preemption doctrine requires dismissal of Oregon's OFCA claims both for failure to state a claim pursuant to ORCP 21 G(3) *and* for lack of subject matter jurisdiction pursuant to ORCP 21 G(4). The preemption doctrine deprives this court of subject matter jurisdiction for two

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C. Oregon's OFCA Claims Fail as a Matter of Law Insofar as They Are Based on Invoices Paid With Federal, Not State, Funds.

Even assuming Oregon's OFCA claims were not federally preempted, they fail as a matter of law insofar as they are based on invoices paid with *federal* funds.

The OFCA prohibits the knowing submission of false "claims." The Act defines "claim" as "a request or demand made to a public agency * * * that seeks ***moneys * * * that will be provided*** in whole or in part ***by a public body***, whether directly or through reimbursement of another public agency that provides the moneys * * * [.]" ORS 180.750(1) (emphasis added). The Act defines "public body" to include state or local government entities, but *not* the federal government. *See* ORS 180.750(4) (incorporating ORS 174.109's definition of "public body"); ORS 174.109 ("'public body' means state government bodies, local government bodies and special government bodies."). Thus, a contractor's invoice qualifies as a "claim" for OFCA purposes only if it seeks money that will be "provided" at least in part by the *State*. The State "provides" money when it spends its own dollars. When the money "provided" to pay a contractor is purely *federal* grant money, the OFCA does not apply.

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independent reasons. *First*, this Court lacks subject matter jurisdiction to adjudicate Oregon's OFCA claims under the preemption doctrine because federal courts alone have the authority to impose the civil penalties the FCA prescribes under 28 U.S.C. § 1335, which provides federal courts with original jurisdiction "exclusive of the courts of the States" over recovery of "any fine, penalty, or forfeiture incurred under an Act of Congress." Moreover, the FCA itself has certain provisions requiring utilization of federal procedural mechanisms. By establishing exclusive jurisdiction in the federal courts, Congress made the FCA's preemptive effect jurisdictional. *See Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 391 (1986) (finding no subject matter jurisdiction in state court where "Congress intended for the [National Labor Relations] Board generally to exercise exclusive jurisdiction in this area"). *Second*, Oregon courts do not have jurisdiction to hear FCA claims under the preemption doctrine because state courts lack jurisdiction over federal causes of action when there exists a "disabling incompatibility between the federal claim and state-court adjudication." *Gulf Offshore*, 453 U.S. at 477-78. Here, Oregon's clear conflict of interest, as well as the facts that Oregon may be more concerned with covering up its own wrongdoing and appeasing Oregon voters than it is with ensuring that the federal government is made whole, establishes a disabling incompatibility between the preempting federal FCA claims and adjudication in this Court. Accordingly, the Court should dismiss the OFCA claims under the conflict preemption doctrine not only for failure to state a claim, but also for lack of subject matter jurisdiction.

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This reading of the OFCA is confirmed by its legislative history. At a legislative hearing on the bill, the Oregon Department of Justice ("DOJ")—which proposed and urged adoption of the OFCA—stated that the law's purpose was "to help preserve *the tax dollars that we are all unfortunately spending*," "to make sure that that money is spent on the things that * * * *the [Oregon] House and the Senate decide that the money should be spent on*" and "to deter fraud on *the taxpayers*." (Hrg. of the House Comm. on Judiciary (Feb. 16, 2009) http://oregon.granicus.com/MediaPlayer.php?clip_id=6194.) DOJ added that the law was intended "to focus on the areas in which *you legislators decide to spend the public money* for it is in those areas that unfortunately the fraud will occur as we spend *our* money." (*Id.*) "The bill allows DOJ to *protect the taxpayers' money.* * * * This bill is targeting people who know they are submitting a false invoice to the state of Oregon and want *hard-earned taxpayer dollars*." (*Id.*) This intent was reiterated at the final hearing on the bill, where it was noted that "[t]he purpose of this legislation is pretty simple; it is to help us *preserve our precious tax dollars*, deter fraud, and punish those who fraudulently bill the state of Oregon," and that the law would aid the "effort to recoup *state moneys*." (Hrg. of Senate Comm. on Judiciary (May 19, 2009), http://oregon.granicus.com/MediaPlayer.php?clip_id=5047.)

Case law further supports this reading of the statute. Although there are no Oregon cases interpreting the term "provided" as used in the OFCA, cases construing similar language in the federal FCA—on which the OFCA was modeled—are instructive.[13] When the OFCA was enacted, the federal FCA defined a "claim" to include "any request * * * for money * * * made to a contractor, grantee, or other recipient if the United States Government ***provides any portion***

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[13] (*See* Recording of Feb. 16, 2009 Hrg., http://oregon.granicus.com/MediaPlayer.php?clip_id=6194 (noting that "the bill is very similar to the federal False Claims Act").) Interpretations of the federal law therefore can provide "useful context for interpreting [the Oregon] statute." *State v. Walker*, 356 Or. 4, 23-24 & n.10 (2014) (Oregon RICO); *accord Marks v. McKenzie High School Fact-Finding Team*, 319 Or. 451, 457-60 (1994) (Oregon Public Records Law).

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of the money * * * requested."[14] 31 U.S.C. § 3729(c) (2006) (emphasis added). Courts interpreting this provision have held that the federal government "provides any portion" of funds only where the funds are "[]traceable to the United States Treasury" such that the United States has a "financial stake" in the payment of fraudulent claims. *United States ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379, 385 (5th Cir. 2014) (dismissing federal FCA claims because allegedly false claims were paid with money supplied by corporate contributions, even though the FCC regulated the fund from which the claims were paid); *see also United States ex rel. Sanders v. Am.-Amicable Life Ins. Co. of Texas*, 545 F.3d 256, 260 (3d Cir. 2008) (rejecting federal FCA claim based on claims paid through payroll deductions because "the federal government [does not] 'provide[]' funds when it simply release[s] the salary of its employees (per their instructions) directly to a third party"). As a result, the "submission of false claims to the United States government for approval which do not or would not cause *financial loss* to the government are not within the purview of the False Claims Act. * * * Unless these claims would result in *economic loss* to the United States government, liability under the False Claims Act does not attach." *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 184 (3d Cir. 2001) (emphasis added) (affirming dismissal of federal FCA claims based on fraudulently inflated legal bills submitted to U.S. bankruptcy court because the bills would be paid with money from the bankruptcy estate, not government funds, even though the bankruptcy court was responsible for approving payment of the bills).

Applying this rationale here, any federal grant money that Oregon used to pay Oracle's invoices was "provided" by the federal government, *not* Oregon. Indeed, those funds are not "traceable" to the Oregon treasury, and the payment of Oracle's invoices with those funds does not cause a "financial loss" or "economic loss" to Oregon. As was true of the federal government's relationship to the FCC-regulated fund in *Shupe*, Oregon "may have a regulatory

[14] Although Congress has since amended the federal FCA (and expanded this definition), the Oregon legislature modeled the OFCA on the pre-amendment language and thus that language is pertinent here.

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interest in" Cover Oregon's payment of Oracle invoices, but Oregon "does not have a financial stake in [Cover Oregon's] fraudulent losses." 759 F.3d at 385.

Insofar as the invoices here were paid with federal grant money, they do not qualify as "claims" under the OFCA because no part of the money "provided" to pay the claims was *state* money. *See* ORS 180.750(1). The First Amended Complaint does not allege that *any* state money was used to pay Oracle's invoices; it instead indicates that Oracle was paid using federal grant money. (*See* 1st Am. Compl. ¶¶ 44-48, 101, 109.) Thus, Oregon's OFCA claims must be dismissed.

D. As the Funds at Issue Are Federal Funds That Belong to the Federal Government, Oregon Has Not Suffered a Cognizable Injury Sufficient to State a Claim for Breach of Contract, Fraud, or Violation of Oregon's RICO Law.

Injury to the plaintiff is an essential element of Oregon's breach of contract, fraud, and ORICO claims. *See, e.g., Moini v. Hewes*, 93 Or. App. 598, 602-03, 763 P.2d 414 (1988) (stating that "[d]amage is an essential element of any breach of contract action" and granting JNOV where "there was no evidence that plaintiffs suffered damage due to [defendant's] breach") (citing *Wm. Brown & Co. v. Duda*, 91 Or. 402, 406-07, 179 P. 253 (1919)); *Conzelmann v. Nw. Poultry & Dairy Prods. Co.*, 190 Or. 332, 350, 225 P.2d 757 (1950) ("Comprehensively stated, the elements of fraud" include "consequent and proximate injury," "[e]ach of the[se] essential elements of fraud must be proved, and the failure to prove any one or more is fatal to the cause of action"); *Ainslie v. First Interstate Bank of Oregon, N.A.*, 148 Or. App. 162, 187, 939 P.2d 125 (1997) (affirming that the ORICO statute "makes civil liability under ORICO contingent on proof that the plaintiff suffered damage 'by reason of' the defendant's violations of ORICO").

In this case, Oregon has not alleged any cognizable injury. To the contrary, Oregon's claims for breach of contract, fraud and ORICO violations seek to recover *federal* funds to which Oregon, as a state grantee, has *no* claim. (*See, e.g.*, Johnson-McKewan Decl. Exhibits 20-22, 24 at Attach. A ¶ C.2); *In re Joliet-Will Cty. Cmty. Action Agency*, 847 F.2d at 432-33. Any

recovery in this case would belong to the federal government, not Oregon. *See* 45 C.F.R. § 92.52 ("Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government.").[15]

Oregon has no claim to recover damages purportedly incurred by the federal government. It therefore cannot satisfy the mandatory injury-in-fact requirement of its claims for breach of contract, fraud and ORICO violations. Accordingly, those claims must be dismissed. Oregon may not use its own laws to piggyback on alleged harms to federal taxpayers.

VII. CONCLUSION.

Under both Oregon law and federal law, Oregon's lawsuit is unauthorized, unlawful, and *ultra vires*. All of Oregon's claims are precluded by Oregon's own statutes; Oregon's OFCA claims are federally preempted and fail as a matter of federal law; and Oregon's fraud, breach of contract and ORICO claims are also fatally defective because the funds they seek to recover are federal funds in which Oregon has no recoverable interest. Because the function of ensuring that the ACA funds awarded to Oregon were properly expended is exclusively the province of federal law, Oregon's lawsuit should be dismissed.

DATED: March 7, 2016

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and

[15] (*See* Johnson-McKewan Decl. Exhibit 23 at II-24 (HHS Grants Policy Statement defining "reasonableness" requirement for allowable costs; if the funds were misused, they must not have been "necessary" and thus are not recoverable by the grantee). *See id.* at II-25 ("[t]he cost principles * * * address considerations such as whether the cost is of a type generally necessary for the organization's operations or the grant's performance"); *id.* Exhibit 24 at Attach. B. ¶ 5 (OMB Circular No. A-87 noting that "bad debts * * * are unallowable").)

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2016, I caused to be served a copy of the foregoing ***REDACTED COPY*** DEFENDANTS ORACLE AMERICA, INC., STEPHEN BARTOLO, THOMAS BUDNAR, KEVIN CURRY, SAFRA CATZ, AND BRIAN KIM'S MOTION FOR JUDGMENT ON THE PLEADINGS (ALL CLAIMS) on the following person(s) in the manner indicated below at the following address(es):

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