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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Case No. CV 14-06979 DDP (PJWx)
	)	
Plaintiff,	)	<b>ORDER DENYING DEFENDANTS' MOTION</b>
	)	<b>TO DISMISS CASE</b>
v.	)	
	)	[DKT. NO. 12]
RELIANCE MEDICAL	)	
SYSTEMS, LLC; APEX MEDICAL	)	
TECHNOLOGIES, LLC; KRONOS	)	
SPINAL TECHNOLOGIES, LLC;	)	
BRET BERRY; JOHN HOFFMAN;	)	
ADAM PIKE; and ARIA O.	)	
SABIT, M.D. ,	)	
	)	
Defendants.	)	
	)	

Presently before the Court is Defendants' motion to dismiss the action (the "Motion"). (Docket No. 12.) For the reasons stated in this order, the Motion is DENIED.

**I. Background**

Plaintiff United States of America ("Plaintiff") brings this action against Reliance Medical Systems, LLC ("Reliance"); Apex Medical Technologies, LLC ("Apex"); Kronos Spinal Technologies, LLC ("Kronos"); Bret Barry ("Barry"); John Hoffman ("Hoffman"); Adam Pike ("Pike"); and Aria O. Sabit, M.D. ("Dr. Sabit") (collectively,

1 "Defendants") to recover damages and civil penalties under the  
2 False Claims Act ("FCA") and related common law claims. (See  
3 Complaint, Docket No. 1, ¶ 1.) Plaintiff alleges that Defendants  
4 were part of a scheme to knowingly submit fraudulent claims to  
5 Medicare. (Id.)

6 Reliance is a company that sells spinal implants, which are  
7 medical devices surgically inserted into patients by doctors during  
8 spinal fusion surgeries to help stabilize the spine.<sup>1</sup> (Id. ¶¶ 2,  
9 44.) Reliance operated and controlled multiple distributor  
10 companies for their spinal implant products, including Apex and  
11 Kronos, that had financial relationships with physician-investors.  
12 (Id. ¶¶ 9-13.)

13 Defendants Berry and Pike are founders and owners of Reliance,  
14 and each is an investor in approximately twenty companies that  
15 distribute Reliance spinal implants, including Apex and Kronos.  
16 (Id. ¶¶ 14, 16.) Defendant Hoffman is a distributor for Reliance  
17 and an investor in approximately five companies that distribute  
18 Reliance spinal implants, including Apex and Kronos. (Id. ¶ 15.)  
19 Defendant Dr. Sabit was an Apex physician-investor from 2010 to  
20 2012. (Id. ¶ 17.)

21 Plaintiff alleges, essentially, that Berry and Pike offered  
22 investment opportunities in Kronos and Apex to physicians who  
23 agreed to use Reliance implants in their spinal surgeries. (Id. ¶  
24 98.) Plaintiff alleges that this arrangement was improper and  
25 violated the Anti-Kickback Statute ("AKS"). (Id. ¶ 303.) Plaintiff

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27 <sup>1</sup>Paragraphs 49-58 of the Complaint describe certain types of  
28 spinal implant devices and the amount that Reliance charged for  
those devices.

1 alleges that physicians who were asked to invest often actually  
2 invested very little or no capital and were subject to a "trial  
3 period," during which time Apex or Kronos would determine whether  
4 the physician was using a high volume of Reliance implants. (Id. ¶¶  
5 138-155.) If the physician was using a sufficient volume of  
6 Reliance implants, the physician was asked to become an "investor"  
7 and would be paid a substantial amount in comparison to that  
8 physician's smaller capital contribution. (Id. ¶¶ 108-110, 115-119,  
9 223-242.) Plaintiff alleges that this "investment" scheme was  
10 really a scheme to pay the physicians for their use of Reliance  
11 devices in their surgeries. (Id. ¶¶ 112, 120.) In some instances,  
12 physician-investors were pushed out, or their shares "bought out,"  
13 by Apex or Kronos (or by another physician-investor), allegedly  
14 when the original physician was not using a high enough volume of  
15 Reliance products. (Id. ¶¶ 156-169.) Plaintiff includes substantial  
16 specific factual allegations that illustrate this arrangement and  
17 that support its allegation that Berry, Pike, and Hoffman expected  
18 physician-investors to meet this "requirement" that they use a high  
19 volume of Reliance products.

20       Plaintiff alleges that Defendants violated the False Claims  
21 Act through this scheme, by which they knew that the physician-  
22 investors and hospitals would submit false or fraudulent Medicare  
23 claims for surgeries performed by the physician-investors.  
24 Plaintiff alleges that the Medicare claims were false or fraudulent  
25 because the claims were tainted by the kickbacks that the  
26 physician-investors received in exchange for their use of Reliance  
27 implants. Further, Plaintiff alleges that some of the surgeries  
28 performed were not medically necessary or were more extensive than

1 necessary as result of this scheme, as physician-investors  
2 allegedly performed such surgeries to increase their usage of  
3 Reliance products (and thereby increase the amount of kickbacks  
4 received). Plaintiff alleges that some of the Medicare claims were  
5 false or fraudulent for this additional reason. Plaintiff also  
6 alleges a conspiracy claim under the False Claims Act, unjust  
7 enrichment claims against Berry, Hoffman, Pike, and Dr. Sabit, and  
8 a payment by mistake claim against Dr. Sabit. Defendants, with the  
9 exception of Dr. Sabit,<sup>2</sup> now move to dismiss all claims. (Docket  
10 No. 12.)

## 11 **II. Legal Standard**

12 A complaint will survive a motion to dismiss when it contains  
13 "sufficient factual matter, accepted as true, to state a claim to  
14 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.  
15 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
16 570 (2007)). When considering a Rule 12(b)(6) motion, a court must  
17 "accept as true all allegations of material fact and must construe  
18 those facts in the light most favorable to the plaintiff." Resnick  
19 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint  
20 need not include "detailed factual allegations," it must offer  
21 "more than an unadorned, the-defendant-unlawfully-harmed-me  
22 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or  
23 allegations that are no more than a statement of a legal conclusion  
24 "are not entitled to the assumption of truth." Id. at 679. In other  
25 words, a pleading that merely offers "labels and conclusions," a  
26 "formulaic recitation of the elements," or "naked assertions" will

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27  
28 <sup>2</sup>Dr. Sabit has not appeared in the action and has not joined  
the Motion.

1 not be sufficient to state a claim upon which relief can be  
2 granted. Id. at 678 (citations and internal quotation marks  
3 omitted).

4 "When there are well-pleaded factual allegations, a court  
5 should assume their veracity and then determine whether they  
6 plausibly give rise to an entitlement of relief." Id. at 679.  
7 Plaintiffs must allege "plausible grounds to infer" that their  
8 claims rise "above the speculative level." Twombly, 550 U.S. at  
9 555. "Determining whether a complaint states a plausible claim for  
10 relief" is a "context-specific task that requires the reviewing  
11 court to draw on its judicial experience and common sense." Iqbal,  
12 556 U.S. at 679.

### 13 **III. Discussion**

14 There appear to be two reasons that Plaintiff contends that  
15 the claims submitted for Medicare reimbursement as part of the  
16 alleged scheme were false: (1) all of the claims involved unlawful  
17 kickbacks, and (2) some of the claims were for procedures or  
18 devices that were not medically necessary or were more extensive  
19 than necessary.

#### 20 **A. Kickbacks**

21 As to the unlawful kickbacks, Defendants do not directly  
22 challenge the sufficiency of these allegations, though they  
23 certainly disagree as to what the underlying facts will show after  
24 discovery. However, one theme of Defendants' papers is that the  
25 overall allegations in Plaintiff's complaint are implausible. As a  
26 result, a brief discussion of the law surrounding whether the  
27 claims at issue represent "false" claims under the FCA as a result  
28 of a violation of the AKS is warranted.

1           The Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, prohibits  
2 "knowingly and willfully solicit[ing] or receiv[ing] any  
3 remuneration (including any kickback, bribe, or rebate) directly or  
4 indirectly, ... in cash or in kind" in exchange for referring, or  
5 inducing another to refer, an individual to particular goods or  
6 services "for which payment may be made in whole or in part under a  
7 Federal health care program." Under the False Claims Act, "any  
8 person who ... knowingly presents, or causes to be presented, a  
9 false or fraudulent claim for payment ... is liable to the United  
10 States Government." 31 U.S.C. § 3729(a)(1). Essentially,  
11 Plaintiff's claim in this action is that the scheme at issue  
12 constituted a violation of the AKS; as a result, the claims for  
13 Medicare reimbursement for the medical procedures and equipment  
14 resulting from the kickback scheme were "false" claims because the  
15 submission of such claims for reimbursement implies compliance with  
16 applicable laws, where such compliance is required for payment. See  
17 Hanlester Network v. Shalala, 51 F.3d 1390, 1399 (9th Cir. 1995);  
18 see also U.S. ex rel. Wilkins v. United Health Group, Inc., 659  
19 F.3d 295, 313-14 (3d Cir. 2011); U.S. ex rel. Hutcheson v.  
20 Blackstone Medical, Inc., 647 F.3d 377, 389 (1st Cir. 2011).

21           Under Hanlester, the Ninth Circuit has found a claim of this  
22 nature to be viable where it was implied to investors that  
23 "eligibility to purchase shares depended on an agreement to refer  
24 program-related business;" where prospective investors were told  
25 that "the number of shares they would be permitted to purchase ...  
26 would depend on the volume of business they referred;" and where  
27 "partners who did not refer business would be pressured to leave  
28 the partnerships." Hanlester, 51 F.3d at 1399. However, mere

1 "encourage[ment]" of physician-investors to refer business, along  
2 with telling the investors that the "success of the limited  
3 partnerships depended on referrals from the limited partners," is  
4 not enough to establish a FCA claim under these circumstances. Id.  
5 A high volume of referrals, or a large return on investment,  
6 similarly are not enough. Id. Further, in order to prove a  
7 violation of the AKS, the conduct must have been knowing and  
8 willful. Id.

9 Plaintiff's allegations in this case are sufficient to support  
10 a plausible inference that the scheme at issue here crosses the  
11 line articulated in Hanlester. Plaintiff does not merely allege  
12 that Defendants "encouraged" the physician-investors to use  
13 Reliance products in their surgeries, but also includes facts that  
14 strongly suggest that Apex and Kronos would not even consider  
15 offering a physician an interest in the company until the company  
16 could verify that the physician performed substantial surgeries  
17 using Reliance products. Further, Plaintiff alleges that some of  
18 the physicians invested almost no capital. There are also facts  
19 suggesting that physician-investors who continued to use a high  
20 volume of Reliance products began receiving higher payments from  
21 Apex and Kronos, while physician-investors who performed fewer  
22 surgeries or did not otherwise meet the "expectations" of Reliance  
23 were bought out of their investment. It is also plausible to infer  
24 from the alleged facts that Berry, Pike, and Hoffman knew that, as  
25 a result of their inducements of the physician-investors, false  
26 claims would be submitted; indeed, the complaint includes facts  
27 suggesting that Defendants ignored legal advice that specifically  
28 informed them that such a scheme would be a problem under existing

1 law. (Complaint ¶¶ 179-202.) Therefore, as a general matter,  
2 Plaintiff has alleged sufficient facts to survive the Motion.

3 Defendants bring up two specific arguments regarding the  
4 alleged violations of the AKS. First, Defendants argue that none of  
5 the claims submitted prior to March 23, 2010 may be deemed to be  
6 false under the Ninth Circuit law prior to that date. Second,  
7 Defendants argue that all claims submitted on or after that date  
8 may only be found to be false as to the hospital bills, which  
9 include payments for medical devices, but not on the physician  
10 bills, which presumably bill only for physician labor or services.

11 On March 23, 2010, Congress amended the AKS to include the  
12 following: "in addition to the penalties provided under [the AKS],  
13 a claim that includes items or services resulting from a violation  
14 of this section constitutes a false or fraudulent claim for the  
15 purposes of [the FCA]." 42 U.S.C. § 1320a-7b(g). Defendants argue  
16 that until this amendment was made, if a hospital submitted claims  
17 that it had no reason to believe were false, those claims cannot be  
18 considered to be "false claims" under the FCA. Plaintiff contends  
19 that the amendment was merely a clarification of the existing law  
20 such that the amendment has retroactive effect. The question, then,  
21 is whether, prior to the March 23, 2010 amendment, a hospital  
22 submitting a Medicare claim that resulted from a violation of the  
23 AKS would have to know about the kickbacks in order for the claim  
24 to constitute a violation of the FCA.

25 Prior to this amendment, other circuits were already following  
26 the approach announced by the amendment. The Ninth Circuit joined  
27 these other circuits in recognizing the viability of an "implied  
28 false certification" theory, whereby the submission of a claim



1 impliedly certifies that the claim complies with all express  
2 requirements for payment under the applicable federal law. See  
3 Ebeid ex rel. U.S. v. Lungwitz, 616 F.3d 993, 996-97 (9th Cir.  
4 2010). In Ebeid, the Ninth Circuit cited the standard articulated  
5 by the Second Circuit in Mikes v. Straus, whereby "a claim under  
6 the [FCA] is legally false only where a party certifies compliance  
7 with a statute or regulation as a condition to governmental  
8 payment." 274 F.3d 687, 697 (2d Cir. 2001). Further, Mikes holds  
9 that "[l]iability under the [FCA] may properly be found therefore  
10 when a defendant submits a claim for reimbursement while knowing  
11 ... that payment expressly is precluded because of some  
12 noncompliance by the defendant." Id. However, it does not appear  
13 that this logic is inconsistent with allowing Plaintiff's claims to  
14 proceed here. Though the hospital did not have knowledge that the  
15 claims were false when it submitted them, Plaintiff's theory is  
16 that Defendants *caused* the hospital to submit false claims that the  
17 Defendants *knew* were false because of violations of the AKS.

18 Defendants further argue that even after March 23, 2010, the  
19 only bills that may be considered violations of the FCA are  
20 hospital bills, which include billing for surgical devices, but not  
21 the physicians' bills for services. This argument is unavailing.  
22 The use of a particular device, and the need for reimbursement for  
23 the cost of the device itself, does not occur in a vacuum. A  
24 physician must perform a surgery during which the device is  
25 implanted in a patient. The AKS plainly states that "a claim that  
26 includes items or services resulting from a violation ...  
27 constitutes a false or fraudulent claim." 42 U.S.C. § 1320a-7b(g)  
28 (emphasis added). This makes sense; without a qualified physician

1 willing and able to perform the surgery to implant a Reliance  
2 device, there is no need for the device. Thus, the physician's  
3 services are themselves an integral part of the alleged scheme at  
4 issue here, and claims for reimbursement for physician services  
5 stemming from the scheme constitute false claims to the same extent  
6 that claims for reimbursement for the implants do. Therefore, the  
7 Court DENIES the Motion as to Plaintiff's claims based on  
8 violations of the AKS.

9       B. Medically Unnecessary Procedures

10       Defendants also argue that Plaintiff has not sufficiently  
11 alleged FCA claims based on the performance of medically  
12 unnecessary (or more extensive than necessary) surgeries using  
13 Reliance devices. As Plaintiff points out in its opposition, this  
14 is an alternative basis for establishing the fraudulent nature of a  
15 subset of the claims at issue in this case. Plaintiff alleges that  
16 all claims submitted as part of the alleged scheme were false due  
17 to the kickbacks, but that some of the claims are false for the  
18 additional reason that the procedures for which reimbursement was  
19 sought were not medically necessary.

20       Plaintiff includes sufficient details regarding five specific  
21 procedures to plausibly establish that some of the medical  
22 procedures performed as part of the alleged scheme were medically  
23 unnecessary. (See Complaint, ¶¶ 251-301.) As to Dr. Sabit, who  
24 allegedly performed three of the five "example" procedures, it is  
25 clear that Plaintiff has stated a claim, since it would be highly  
26 plausible that Dr. Sabit, as a medical professional, would have  
27 known that the procedures were unnecessary (or more extensive than  
28 necessary) and therefore known that false claims would be submitted

1 regarding those surgeries. Whether the surgeries were in fact  
2 medically unnecessary is not an issue that may be resolved at this  
3 time.

4 As to the moving Defendants (those other than Dr. Sabit), the  
5 requisite knowledge is less clear, but the Court finds that the  
6 pleadings plausibly establish that Berry, Pike, and Hoffman may  
7 have known that their scheme would induce physicians to perform  
8 more surgeries than necessary in order to satisfy the quotas  
9 expected of them. (See Complaint ¶ 173.) Generally, a defendant may  
10 be held liable for causing another to submit a false claim where  
11 the submission of such claim was "reasonably foreseeable." See U.S.  
12 ex rel. Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 415-16 (3d  
13 Cir. 1999). If Plaintiff is successful in proving that the  
14 physician-investors received unlawful kickbacks for their use of  
15 Reliance devices, it is plausible to infer that Defendants knew  
16 that the physicians would do whatever it took to continue receiving  
17 such large kickbacks, including performing unnecessary or more  
18 extensive than necessary surgeries. Therefore, the Court DENIES the  
19 Motion as to this alternative theory of liability.

20 **IV. Conclusion**

21 For the foregoing reasons, the Motion is DENIED.

22  
23 IT IS SO ORDERED.

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26 Dated: November 5, 2014



DEAN D. PREGERSON  
United States District Judge

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