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APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0056p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.* SHANNON MARTIN, M.D.; UNITED STATES OF AMERICA *ex rel.* DOUGLAS MARTIN, *Relators-Appellants*, *v.* DARREN HATHAWAY, M.D.; SOUTH MICHIGAN OPHTHALMOLOGY, P.C.; ELLA E. M. BROWN CHARITABLE CIRCLE, dba Oaklawn Hospital, *Defendants-Appellees*.	No. 22-1463

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:19-cv-00915–Jane M. Beckering, District Judge.

Argued: March 8, 2023

Decided and Filed: March 28, 2023

Before: SUTTON, Chief Judge; SILER and MATHIS, Circuit Judges.

COUNSEL

United States Court of Appeals, Sixth Circuit.

ARGUED: Julie A. Gafkay, GAFKAY LAW PLC, Saginaw, Michigan, for Appellants. Mary Massaron, PLUNKETT COONEY, Bloomfield Hills, Michigan, for Appellees Darren Hathaway, M.D. and South Michigan Ophthalmology, P.C. Jonathan S. Feld, DYKEMA GOSSETT PLLC, Chicago, Illinois, for Appellee Ella E. M. Brown Charitable Circle. Daniel Winik, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for United States as Amicus Curiae. **ON BRIEF:** Julie A. Gafkay, GAFKAY LAW PLC, Saginaw, Michigan, Floyd E. Gates, Jr., Christopher J. Zdarsky, BODMAN PLC, Grand Rapids, Michigan, for Appellants. Mary Massaron, PLUNKETT COONEY, Bloomfield Hills, Michigan, for Appellees Darren Hathaway, M.D. and South Michigan Ophthalmology, P.C. Jonathan S. Feld, Mark J. Magyar, Andrew T. VanEgmond, DYKEMA GOSSETT PLLC, Chicago, Illinois, Lisa A. McNiff, SCHROEDER DEGRAW PLLC, Marshall, Michigan, for Appellee Ella E. M. Brown Charitable Circle. Daniel Winik, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Jessica L. Ellsworth, HOGAN LOVELLS US LLP, Washington, D.C., for Amici Curiae.

SUTTON, C.J., delivered the opinion of the court in which SILER, J., joined in full, and MATHIS, J., joined in part and in the judgment. MATHIS, J. (pg.

17), delivered a separate opinion concurring in all but Section II.A. of the opinion.

OPINION

SUTTON, Chief Judge. The False Claims Act imposes civil liability for "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim [to the government] for payment or approval." 31 U.S.C. § 3729(a)(1)(A). The Act allows individuals with knowledge of false claims to bring private lawsuits, known as *qui tam* lawsuits, on behalf of the government. *Id.* § 3730(b). Among other types of false claims, the Act covers claims for "items or services resulting from a violation" of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(g), which prohibits medical providers from making referrals "in return for" "remuneration," *id.* § 1320a-7b(b)(1)(A). At issue in this case is (1) whether a hospital's decision not to hire an ophthalmologist in return for a general commitment of continued surgery referrals from another ophthalmologist for patients from the local community counts as the kind of "remuneration" covered by the Anti-Kickback Statute and (2) whether claims from such continued referrals "result[] from" violations of the statute. *Id.* § 1320a-7b(b)(1), (g). Because we agree with the district court that this kind of claim does not establish a cognizable kickback scheme, we affirm the dismissal of this *qui tam* complaint.

I.

Oaklawn Hospital is located in Marshall, Michigan, a small city in the southern part of the State. When Oaklawn patients from Marshall need ophthalmology services, they have one locally based option, South Michigan Ophthalmology, P.C. This practice group had two private physicians, Dr. Darren Hathaway (the owner of the practice) and Dr. Shannon Martin (an employee of the practice). When these two ophthalmologists referred patients from Marshall for surgery, they tended to use the most convenient local option, Oaklawn. Oaklawn and South Michigan have referred Marshall-based patients to each other for many years.

Friction in these business relationships developed in 2018. Dr. Hathaway, the sole shareholder of South Michigan, began negotiating a merger with Lansing Ophthalmology, P.C. (LO Eye), a larger practice based in the State's Capitol. When Dr. Martin heard about the merger, she asked whether she would be able to work with LO Eye. When that fell through, she began negotiations with Oaklawn.

Dr. Martin's discussions with Oaklawn had a promising start, perhaps facilitated by her husband, Douglas Martin, who served as the Director of Finance for Oaklawn Hospital. On October 17, Oaklawn extended her a tentative offer to be a physician based at the hospital, subject to board approval. Consistent with the offer, the Board heard a rumor that Dr. Hathaway planned to move South Michigan's surgeries

elsewhere—an Ambulatory Surgery Center located in Battle Creek, about a thirty-minute drive from Marshall—after his merger with LO Eye, making it sensible for South Michigan to hire an internal ophthalmologist.

An Oaklawn employee told Dr. Hathaway about the pending offer and conveyed Oaklawn's impression that Dr. Hathaway intended to move his surgeries to another hospital. Dr. Hathaway met with Oaklawn's interim CEO, Gregg Beeg, on October 22. Dr. Hathaway told Beeg that in fact he did not have any plans to pull his surgeries from Oaklawn, that he wanted to continue referring his Marshall patients who needed surgery to Oaklawn, and that he actually "expect[ed] business to increase" in the future. R.64-4 at 9. Dr. Hathaway told him that, if the Board approved the offer, it would be the "death knell" of his practice because Oaklawn's future patient referrals would go to Dr. Martin, the new, internal ophthalmologist. R.64 ¶ 23. Beeg encouraged Dr. Hathaway to speak to other board members.

In the coming days, Dr. Hathaway spoke with at least four board members. Dr. Hathaway also drafted a letter to the Board reiterating these points and explaining that his merger with LO Eye would allow LO Eye to take over his administrative duties and, with "more efficient operations" after the merger, he expected that he could increase business for Oaklawn. R.64-5 at 3. If Oaklawn hired Dr. Martin, Dr. Hathaway argued, that would be a lose-lose situation because it would cost Oaklawn "hundreds (plural) of thousands of

dollars" to set up an internal ophthalmology line while it would "force" Dr. Hathaway "against [his] will (because [he had] no desire to pull out whatsoever), to pull out [his] cases and take them elsewhere." *Id.* at 3-4. LO Eye confirmed Dr. Hathaway's account in a letter to the Board, stating that it "anticipate[d] the surgical volume of the practice will be greater in this new model, and [it had] no intention of taking that volume elsewhere." *Id.* at 5.

The Board met on October 26. Before the vote, several board members expressed concern about losing business if they hired Dr. Martin. The Board voted not to hire Dr. Martin. The Board Chairman called Dr. Hathaway to let him know about the decision. Another member texted Dr. Hathaway that Oaklawn "appreciate[d] all of [his] support," wanted to "continue that partnership," and that she was "[l]ooking forward to increased surgical volume." R.64 ¶ 47. Dr. Hathaway responded, "[i]t's coming." *Id.* As it turns out, the LO Eye merger with South Michigan fell through. And as things eventually played out, Dr. Hathaway continued as sole proprietor of South Michigan, and Dr. Martin set up her own practice in Marshall.

All of this did not sit well with Dr. Martin. She and her husband sued Dr. Hathaway, South Michigan, and Oaklawn Hospital in this *qui tam* action under the federal False Claims Act, 31 U.S.C. §§ 3729(a), 3730(b), and Michigan's Medicaid False Claims Act, Mich. Comp. Laws § 400.601. The Martins claimed that Dr. Hathaway and Oaklawn engaged in an illegal fraudulent scheme under the Anti-Kickback Statute, 42

U.S.C. § 1320a-7b, and that claims for Medicare and Medicaid reimbursement resulting from the kickbacks violated the False Claims Act. The Martins sought between $5,000 and $10,000 for each fraudulent claim plus treble damages. After receiving notice of the lawsuit, the United States declined to intervene. The district court dismissed the Martins' complaint with leave to amend because it did not particularly allege any false claims that Oaklawn or Dr. Hathaway submitted to the government.

The Martins filed an amended complaint, adding 22 claims that Oaklawn and South Michigan submitted for reimbursement based on referrals. Oaklawn and Dr. Hathaway again moved to dismiss. The district court granted the motion, rejecting each of the federal claims as a matter of law and declining to exercise supplemental jurisdiction over the state law claims.

II.

Each of the allegations in the complaint turns on a variation on a theme—that Oaklawn Hospital's rejection of Dr. Martin's employment in return for Dr. Hathaway's commitment to continue sending local surgery referrals violated the Anti-Kickback Statute. At the motion to dismiss stage of a case, we must accept as true all plausible factual allegations in the complaint. In the context of allegations of "fraud," Rule 9(b) of the Federal Rules of Civil Procedure requires the claimant to state with "particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). That means *qui*

tam plaintiffs must "adequately allege the entire chain—from start to finish—to fairly show defendants caused false claims to be filed." *United States ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 874 F.3d 905, 914 (6th Cir. 2017). The complaint thus must specify the "who, what, when, where, and how" of the alleged fraudulent scheme. *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (quotation omitted).

This complaint contains two legal flaws under the Anti-Kickback Statute and the False Claims Act. It does not turn on a cognizable theory of remuneration, and it fails to establish causation.

A.

Remuneration. The Anti-Kickback Statute establishes criminal and civil liability for "knowingly and willfully offer[ing] or pay[ing] any *remuneration* (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person . . . to refer an individual to a person for the furnishing . . . of any item or service" that is reimbursable under a federal health care program. 42 U.S.C. § 1320a-7b(b)(2)(A) (emphasis added). The statute applies to solicitations and receipts of such payments: Anyone who "solicits or receives any remuneration . . . in return for referring an individual" under the same circumstances will also face criminal and civil liability. *Id.* § 1320a-7b(b)(1)(A).

The statute does not define remuneration. At stake is whether it covers just payments and other transfers of value or any act that may be valuable to another. For the reasons that follow, it covers just payments and other transfers of value.

Congress first penalized the offer of "remuneration" in return for patient referrals in 1977 when it amended the Social Security Act. Medicare-Medicaid Anti-Fraud and Abuse Amendments, Pub. L. 95-142, § 4(a), (b), 91 Stat. 1179, 1181 (1977). Dictionaries around that time consistently described remuneration as a form of payment. *See*, *e.g.*, *Remuneration*, Webster's Third New International Dictionary 1921 (1976) ("an act or fact of remunerating," further defined as "to pay an equivalent for (as a service, loss, expense)"); *Remuneration*, Webster's New Twentieth Century Dictionary 1530 (2d ed. 1975) (similar); *Remuneration*, The American Heritage Dictionary of the English Language 1101 (1975) (similar); *Remunerate*, The Oxford Universal Dictionary Illustrated 1702 (3d ed. rev. 1970) (similar); *see also Remuneration*, Black's Law Dictionary 1165 (5th ed. 1979) ("Reward; recompense; salary; compensation.").

Other uses of remuneration by Congress around the same time treated remuneration as something "paid" or transferred. *See*, *e.g.*, Tax Treatment Extension Act of 1977, Pub. L. 95-615, § 209, 92 Stat. 3097, 3109 (1978) (applying a wage withholding amendment to "remuneration paid after the date of enactment"); Social Security Amendments of 1977, Pub. L. 95-216, § 103, 91 Stat. 1509, 1513 (1977) (determining

contribution and benefit base "with respect to remuneration paid"); *id.*, § 355, 91 Stat. at 1555 (allowing employers to take certain tax deductions if they "pa[id] to an employee cash remuneration").

Context points in a similar direction. In the relevant sentence, the statute refers to remuneration in "cash" or in "kind," two words that suggest payments or transfers of some sort. The statute also offers three non-exhaustive examples of remuneration: kickbacks, bribes, and rebates. Kickbacks and bribes usually involve payments of money or transfers of specific items of value, and rebates customarily involve amounts of money owed. As the Supreme Court recently confirmed, other federal laws that prohibit bribery require more than acts that may be of value to another. They bar "*quid pro quo* corruption—the exchange of a thing of value for an 'official act.'" *McDonnell v. United States*, 579 U.S. 550, 574 (2016).

In exempting some payments and transfers from remuneration, Congress conveyed a similar impression. The statute excludes several financial exchanges from potential criminal penalty, confirming that Congress thought these practices otherwise counted as remuneration. Notably, each exemption has a payment quality. The safe harbor exemptions range from certain discounts or reductions in price and vendor payments to provisions of "goods, items, services, donations, loans, or a combination thereof" to health center entities serving underserved populations. 42 U.S.C. § 1320a-7b(b)(3)(I); *cf. Arellano v. McDonough*, 143 S. Ct. 543, 548-49 (2023) (drawing structural inference

from a list of sixteen statutory exceptions). At the same time, Congress also directed the Secretary of the Department of Health and Human Services to promulgate regulations adding any other safe harbors "specifying *payment practices* that shall not be treated as a criminal offense under [the Anti-Kickback Statute]." 42 U.S.C. § 1320a-7d(a)(1)(A)-(B) (emphasis added). A common theme links each of these regulatory safe harbors: a transfer of value from one to another. *See generally* 42 C.F.R. § 1001.952; *see also HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2177 (2021) (concluding that "extension" had a temporal character because other listed "extensions" shared the same quality).

A cousin of the Anti-Kickback Statute—the civil penalties section of the Social Security Act—also indicates that remuneration requires a payment or transfer of value to another. It imposes fines on any person who "offers [] or transfers remuneration to any individual eligible for benefits" to influence the individual's choice of medical providers. Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, § 231, 110 Stat. 1936, 2014 (1996); *see* 42 U.S.C. § 1320a-7a(a)(5). Congress defined "remuneration" to "includ[e] the waiver of coinsurance and deductible amounts . . . and transfers of items or services for free or for other than fair market value." § 231, 110 Stat. at 2014; 42 U.S.C. § 1320a-7a(i)(6). Our circuit has assumed twice before that this definition—one that entails a "transfer"—applies to the Anti-Kickback Statute and the Social Security Act. *See Miller v.*

Abbott Labs., 648 F. App'x 555, 561 (6th Cir. 2016) (per curiam); *Jones-McNamara v. Holzer Health Sys.*, 630 F. App'x 394, 400 (6th Cir. 2015).

Other statutes across the legal landscape refer to different types of remuneration yet none of them changes the essence of remuneration as a payment or transfer. The Railroad Retirement Tax Act's reference to "money remuneration" excludes stock options because elsewhere in the U.S. Code Congress referred to "all remuneration." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071-72 (2018). The Social Security Act offers a range of settings: "[W]ages" in one context is "remuneration paid," 42 U.S.C. § 409(a); services in another are activities "performed for remuneration or gain," *id.* § 422(c)(2); and in another "rebates, discounts, [and] price concessions" are described as forms of remuneration, *id.* § 1395w-115(f)(3)(A)(i). The same goes for other federal laws. *See*, *e.g.*, 8 U.S.C. § 1324c(e) (criminalizing the failure to disclose that a person received a "fee or other remuneration" for assisting with false applications for immigration benefits); 10 U.S.C. § 974(b) (prohibiting military musicians from receiving additional "remuneration for an official performance"); 22 U.S.C. § 1641p (using remuneration to describe payments to agents, attorneys, and representatives); 26 U.S.C. § 4960(c)(3) (defining remuneration as wages); 29 U.S.C. § 1185n(a)(9) (requiring group health plans to annually submit a report on "[a]ny impact on premiums by rebates, fees, and any other remuneration paid by drug manufacturers to the plan").

The Office of Inspector General seems to accept this approach. *See* 42 U.S.C. § 1320a-7d. Its advisory opinions define "remuneration" as "the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind." U.S. Dep't of Health & Hum. Servs, Off. of Inspector Gen., Advisory Op. No. 22-14, at 5 (June 29, 2022) (provision of continuing education programs); *see also* U.S. Dep't of Health & Hum. Servs, Off. of Inspector Gen., Advisory Op. No. 99-8 (July 13, 1999) (provision of free physician consultations). The Office's guidance sticks to the same trail. It describes the Anti-Kickback Statute as a "criminal prohibition against *payments* (in any form, whether the payments are direct or indirect) made purposefully to induce or reward the referral." OIG Supplemental Compliance Program Guidance for Hospitals, 70 Fed. Reg. 4858, 4863-64 (Jan. 31, 2005) (emphasis added). In issuing a special fraud alert, the Office focused on potentially illegal incentives that hospitals may offer to physicians. The variety of flagged practices all entail exchanges of financial value, such as the "use of free or significantly discounted office space," "free or significantly discounted billing, nursing or other staff services," "interest-free loans," and low-cost "[c]overage on hospitals' group health insurance plans." Publication of OIG Special Fraud Alerts, 59 Fed. Reg. 242 (Dec. 19, 1994).

While other appellate courts have not faced this precise issue, they define remuneration in the same way, one that entails a payment or transfer. *See Wis. Cent. Ltd.*, 138 S. Ct. at 2071 (A statute that taxed "'any form of money remuneration,' . . . indicate[d

that] Congress wanted to tax monetary compensation."); *United States v. Greber*, 760 F.2d 68, 71 (3d Cir. 1985) ("Remunerates" covers efforts "to pay an equivalent for service." (quotation omitted)); *Guilfoile v. Shields*, 913 F.3d 178, 189 (1st Cir. 2019) ("Essentially, the [Anti-Kickback Statute] targets any remunerative scheme through which a person is paid in return for referrals to a program under which payments may be made from federal funds." (quotation omitted)); *Pfizer, Inc. v. HHS*, 42 F.4th 67, 75 (2d Cir. 2022) (" 'Remuneration' means [p]ayment; compensation, esp[ecially] for a service that someone has performed, and the modifier 'any' further broadens the scope of the phrase." (alteration in original) (quotation omitted)).

The setting of this statute also supports this reading. Recall that the same language creates civil *and* criminal liability. In the context of dual-application statutes like this one, we give the same interpretation to the same words, whether applied in a civil or criminal setting. That means that, if ambiguity exists over the meaning of a provision, the rule of lenity favors the narrower definition. *Barber v. Thomas*, 560 U.S. 474, 488 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *United States v. Thompson / Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality); *id.* at 519 (Scalia, J., concurring in judgment); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 727 (6th Cir. 2013).

There is one other problem with the broader definition. It lacks a coherent end point. Consider the hospital that opens a new research center, purchases top of the line surgery equipment, or makes donations to

charities in the hopes of attracting new doctors. Or consider the general practitioner who refuses to send patients for kidney dialysis treatment at a local health care facility until it obtains more state-of-the-art equipment. Are these all forms of remuneration? Unlikely at each turn.

Measured by this definition, the complaint fails to allege a cognizable kickback scheme.

The complaint's key theory of remuneration turns on the Oaklawn Board's refusal to hire Dr. Martin in return for Dr. Hathaway's general commitment to continue sending surgery referrals for his patients to Oaklawn. But Oaklawn's decision not to hire someone does not entail a payment or transfer of value to Dr. Hathaway. While Oaklawn's decision may have benefitted Dr. Hathaway—it prevented Oaklawn's patient referrals from being sent to an ophthalmologist who worked at the hospital—Oaklawn never offered Dr. Hathaway anything at all. Oaklawn's decision not to hire or support Dr. Martin, it is true, helped Dr. Hathaway continue his practice as before and perhaps helped him to further negotiations to merge with LO Eye. But that is not remuneration by any standard definition of the term. The long and the short of it is that this business dispute ended as it began: Dr. Hathaway continued to treat patients in Marshall and continued to refer them to Oaklawn for any needed surgeries.

Even under an anything-of-value definition of remuneration, moreover, it is doubtful that the Martins allege a cognizable referrals-for-referrals scheme.

Consider how vague, how nonconcrete, the alleged agreement was. It had no time frame. It had no specific volume requirement. It applied only to patients from the same town in which the hospital was located and only if the hospital offered the surgery service—thus applying only when it was most natural to refer patients in each direction. It had no condition on use of certain services at the hospital—say use of a certain type of medical equipment based on how many referrals a doctor made. And it did not come with any other guarantees. While it is difficult to imagine a statute with criminal application applying to something as vague as "anything of value," we suspect that any such application would be ironed out with more specific requirements, conditions, and commitments. Any such refinements are not found in this complaint or the briefs of the parties. Nor for similar reasons, we suspect, have we found any cases treating a decision not to hire someone as remuneration covered by the Anti-Kickback Statute.

The Martins and the government, as *amicus curiae*, resist this conclusion. They note that the law prohibits "any" remuneration, a word of expansion, not confinement. *United States v. Gonzales*, 520 U.S. 1, 5 (1997). But that reality proves only that the statute covers remuneration of any type (cash, services, goods), not that Congress altered its customary meaning.

The Martins and the government point out that the 1972 precursor to the Anti-Kickback Statute made it a misdemeanor to solicit, offer, or receive kickbacks, bribes, and rebates, suggesting that the 1977 addition

of remuneration to the statute expanded coverage of the law. Social Security Amendments of 1972, Pub. L. 92-603, §§ 242(c), 278(b)(9), 86 Stat. 1329, 1419, 1454 (1972). Maybe so. The new law, it is true, covered "any remuneration (including any kickback, bribe, or rebate)"—and made the improper transfer a felony to boot. But, again, this does not show that Congress rejected the traditional meaning of remuneration. It shows only that payments in any form in this context—"directly or indirectly, overtly or covertly, in cash or in kind"—would not escape criminal penalty. *See Greber*, 760 F.2d at 72 ("By adding 'remuneration' to the statute . . . Congress sought to make it clear that even if the transaction was not considered to be a 'kickback' for which no service had been rendered, payment nevertheless violated the Act.").

What of the statute's purpose—to dissuade medical providers from making patient recommendations with an eye toward financial motives rather than medical necessity? But statutory purpose is best gleaned from the four corners of the statute. While the word remuneration may be broad, it customarily requires a payment or transfer of some kind. "[E]ven the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012). In this instance, there is no evidence that anyone paid anyone anything or changed the value or cost of any services that otherwise would have been received.

The Martins and the government insist that Oaklawn Hospital's decision not to hire Dr. Martin

amounted to an offer of referrals to Dr. Hathaway. But that's not what happened. In refusing to hire Dr. Martin, Oaklawn simply left things where they were. Taken to its no-stopping-point conclusion, Dr. Martin's theory of liability might make *her* liable for referrals from Oaklawn before these negotiations began in connection with her referral of surgery patients to Oaklawn. Nothing in the complaint, moreover, shows that physicians at Oaklawn lacked authority to refer their patients to whatever ophthalmologists they wished.

The reader may recall that the False Claims Act uses the word "payment" and the Anti-Kickback Statute uses the word "remuneration," prompting the question whether remuneration means something broader. *Compare* 31 U.S.C. § 3729(a)(1)(A) (prohibiting the presentment of false claims "for payment or approval"), *with* 42 U.S.C. § 1320a-7b(b)(1)-(2) (prohibiting the solicitation or receipt of "remuneration" in exchange for referrals). Two problems face this argument. One is that it is unclear whether the words capture any difference in meaning. Keep in mind that the relevant dictionaries defined "remuneration" as "payment." *See*, *e.g.*, *Remuneration*, Webster's Third New International Dictionary 1921 (1976). The other is that payment in this context amounts to nothing more than the cash form of remuneration. That's because the False Claims Act takes aim at cash reimbursements from the government, while the Anti-Kickback Statute targets more types of payments, including those made "in cash or in kind." 42 U.S.C. § 1320a-7b(b)(1)-(2).

B.

Causation. The claimants face another problem: Neither Oaklawn nor Dr. Hathaway submitted claims for Medicare or Medicaid reimbursement for "items or services resulting from [the] violation" of the Anti-Kickback Statute. *Id.* § 1320a-7b(g). When it comes to violations of the Anti-Kickback Statute, only submitted claims "resulting from" the violation are covered by the False Claims Act. *Id.* The ordinary meaning of "resulting from" is but-for causation. *See Burrage v. United States*, 571 U.S. 204, 210-11 (2014). That understanding applies unless strong "textual or contextual indication[s]" indicate a "contrary" meaning. *Id.* at 212. None exists. As in *Burrage*, Congress added the "resulting from" language in 2010, against the backdrop of a handful of cases that observed similar language as requiring but-for causation. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) ("because of"); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007) ("based on"); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 265-68 (1992) ("by reason of"). Our cases embrace a similar approach. *United States v. Volkman*, 797 F.3d 377, 392 (6th Cir. 2015) (applying *Burrage*); *United States v. Miller*, 767 F.3d 585, 591-92 (6th Cir. 2014) ("because of"); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012) (en banc) ("because of"); *see also Wild Eggs Holdings, Inc. v. State Auto Prop. & Cas. Ins. Co.*, 48 F.4th 645, 649 (6th Cir. 2022) ("resulting from" in insurance policy); *Nicholas v. Mut. Benefit Life Ins. Co.*, 451 F.2d 252, 256-57 & n.3 (6th Cir. 1971) ("results from" in insurance policy).

The Eighth Circuit took this approach in this precise setting. *United States ex rel. Cairns v. D.S. Medical L.L.C.* reasoned that context could not overcome the ordinary meaning of the text—that "resulting from" means but-for causation. 42 F.4th 828, 834-36 (8th Cir. 2022). The government argued that several pre-2010 false certification cases did not require a causal link between the kickback scheme and the claim presented. As the government saw it, the 2010 statutory amendment had "simply codified" the holdings of those cases. *Id.* at 836 (quotation omitted). The Eighth Circuit responded that Congress could have codified those cases by using language that did so. *Id.* "[T]ainted by" or "provided in violation of," for example, would have set out an alternative causation standard. *Id.* But Congress used "resulting from," an "unambiguously causal" standard even in the face of these pre-amendment cases. *Id.* Where a statute "yields a clear answer, judges must stop." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

The Martins have not plausibly alleged but-for causation. The problem for the Martins is that the alleged scheme did not change anything. Before any of the alleged misconduct took place, Oaklawn was the only hospital in Marshall, and South Michigan was the only local ophthalmology group. The two entities naturally referred Marshall-based patients to each other—in one direction for eye check-ups and the like, in the other direction for surgeries. When Oaklawn decided not to establish an internal ophthalmology line at the hospital, the same relationship continued just as it

always had. There's not one claim for reimbursement identified with particularity in this case that would not have occurred anyway, no matter whether the underlying business dispute occurred or not.

While the Martins identify 14 different surgeries for which Oaklawn submitted reimbursement claims to Medicare or Medicaid after the Board's decision, Dr. Martin notably performed 11 of those surgeries. Yet the Martins pleaded that Oaklawn's hiring decisions induced *Dr. Hathaway* to refer surgeries back to Oaklawn. They did not plead that Oaklawn's hiring decision induced Dr. Martin to make the same choice with her patients. Nor did the Martins plead that Dr. Hathaway ordered or required Dr. Martin to perform her surgeries at Oaklawn. And as for the three surgeries that Dr. Hathaway performed, two of those patients were first referred to Dr. Martin after the Board's decision, and only later went to Dr. Hathaway. Dr. Martin's independent decisions break any plausible chain of causation.

That leaves one surgery that Dr. Hathaway performed after the Board's decision for which Oaklawn sought reimbursement. But Dr. Hathaway performed that surgery in June 2019, over seven months after the Board's decision. Temporal proximity by itself does not show causation, and seven months would create few inferences of cause and effect anyway. *See United States ex rel. Greenfield v. Medco Health Sols., Inc.*, 880 F.3d 89, 100 (3d Cir. 2018) ("It is not enough . . . to show temporal proximity between [the] alleged kickback plot and the submission of claims for

reimbursement."); *see also Boshaw v. Midland Brewing Co.*, 32 F.4th 598, 605 (6th Cir. 2022) (three-month time lapse between protected activity and an adverse employment action indicated lack of a causal link). Just how far into the future should the Board's alleged inducement extend? We can't say because the Martins don't tell us. The same problem that casts a pall over their remuneration theory exists here: No identifiable exchange of value occurred to anchor the scheme in time or place. In the Martins' and "the [g]overnment's view, nearly anything a [doctor] accepts . . . counts as a *quid*; and nearly anything a [doctor refers] . . . counts as a *quo*." *McDonnell*, 579 U.S. at 574-75. But that simply is not the law.

The Martins also identify eight claims that Dr. Hathaway's practice submitted for Medicare or Medicaid reimbursement after the Board's decision. According to the Martins, these claims resulted from Oaklawn's referrals. But the Oaklawn Board only decided not to hire an internal ophthalmologist. Oaklawn's individual physicians ultimately decided to whom they would refer patients. Because the Martins failed to allege that Oaklawn could control or direct the referral decisions of its physicians, their independent choices doom the chain of causation here, too.

The government, as *amicus curiae*, argues that, because Congress did not require but-for causation in the Anti-Kickback Statute, there's no reason why it would have done the same for a corresponding claim under the False Claims Act. But the "resulting from" language applies to all kinds of fraud claims without

regard to whether the underlying claim has a causation component. The government also relies on legislative history that indicates the sponsors of the bill hoped to overrule a then-recent district court decision that had dismissed a False Claims action because the wrongdoer did not personally submit the resulting claim. 155 Cong. Rec. S10,853 (daily ed. Oct. 28, 2009) (Sen. Kaufman). But we generally do not consider legislative history in construing a statute with criminal applications, the idea being that no one should be imprisoned based on a document or statement that never received the full support of Congress and was presented to the President for signature. *United States v. R.L.C.*, 503 U.S. 291, 307-10 (1992) (Scalia, J., concurring); *United States v. Brock*, 501 F.3d 762, 770-71 (6th Cir. 2007), *abrogated on other grounds by Ocasio v. United States*, (2016); *Carter*, 736 F.3d at 735 (Sutton, J., concurring). For that reason, the Third Circuit's contrary conclusion offers little assistance because it turns primarily on legislative history. *See Greenfield*, 880 F.3d at 96-97.

All in all, reading causation too loosely or remuneration too broadly appear as opposite sides of the same problem. Much of the workaday practice of medicine might fall within an expansive interpretation of the Anti-Kickback Statute. Worse still, the statute does little to protect doctors of good intent, sweeping in the vice-ridden and virtuous alike. *Cf. McDonnell*, 579 U.S. at 581 (rejecting "boundless" interpretation of bribery based on similar concerns in the political context). Examples clarify the point. Take the doctor concerned

with outdated surgical equipment who tells a hospital that she will send referrals only if the hospital upgrades its facilities. That's a promised referral on one side. And if the other side is remuneration just because it's valuable, that's an Anti-Kickback Statute violation at the outset and a False Claims Act violation down the road for any claims resulting from those referrals. That's so even if the doctor's only motivation is ensuring the highest quality equipment for her patients. Or take the rural county that uses incentives to bring a hospital or a physician to its isolated community. Or take the hospital board that believes hiring one internal ophthalmologist would be worse for patient care than referring the work to several outside doctors.

A faithful interpretation of the "remuneration" and "resulting from" requirements still leaves plenty of room to target genuine corruption. Interpreted as a transfer of value, remuneration potentially encompasses a range of payments: consulting contracts, *United States v. McClatchey*, 217 F.3d 823, 827 (10th Cir. 2000), inflated rent payments, *McNutt ex rel. United States v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1258 (11th Cir. 2005), bogus salaries, *United States v. Borrasi*, 639 F.3d 774, 777 (7th Cir. 2011), "bonuses," *United States ex rel. Parikh v. Brown*, 587 F. App'x 123, 126 (5th Cir. 2014), speaking fees, *Lawton ex rel. United States v. Takeda Pharm. Co.*, 842 F.3d 125, 129 (1st Cir. 2016), "referral fees," *Guilfoile*, 913 F.3d at 184, commission payments to a romantic partner, *Cairns*, 42 F.4th at 831, and the opportunity to purchase company stock, *id.* So long as proof exists that

the referrals would not have been made without the remuneration, and that claims would not have been submitted to the government without those referrals, causation for False Claims lawsuits would be satisfied too. *Id.* at 836-37.

III.

Two considerations remain. Because the Martins failed to allege a cognizable claim under the Anti-Kickback Statute, the district court did not abuse its discretion when it declined to exercise supplemental jurisdiction over the Martins' remaining state law claim. *See Robert N. Clemens Tr. v. Morgan Stanley DW, Inc.*, 485 F.3d 840, 853 (6th Cir. 2007). And because the Martins failed to allege a cognizable claim, we need not address whether the district court should have considered Oaklawn's and Dr. Hathaway's motions to strike material from the Martins' complaint.

We affirm.

CONCURRENCE

MATHIS, Circuit Judge, concurring in part and concurring in the judgment. I concur in the majority opinion, except as to Section II.A. As the majority opinion thoroughly explains, Dr. Shannon Martin and Douglas Martin failed to plausibly allege that the

claims identified in their *qui tam* complaint "result[ed] from" a violation of the Anti-Kickback Statute. 42 U.S.C. § 1320a-7b(g). This dooms their claim brought under the False Claims Act. I would save the interpretation and analysis of "remuneration" for another day because even under the Martins and the government's broad interpretation, the allegations in the complaint fail to show causation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-1463

UNITED STATES OF AMERICA ex rel. SHANNON MARTIN, M.D.; UNITED STATES OF AMERICA ex rel. DOUGLAS MARTIN,

Relators-Appellants,

v.

DARREN HATHAWAY, M.D.; SOUTH MICHIGAN OPHTHALMOLOGY, P.C.; ELLA E. M. BROWN CHARITABLE CIRCLE, dba OAKLAWN HOSPITAL,

Defendants-Appellees.

Before: SUTTON, Chief Judge; SILER and MATHIS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's dismissal of the complaint is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHANNON MARTIN, et al.,

Plaintiffs,

v.

DARREN HATHAWAY, et al.,

Defendants. /

Case No. 1:19-cv-915

HON. JANE M. BECKERING

OPINION AND ORDER

(Filed May 11, 2022)

Now pending before the Court in this qui tam case are Defendants' motions to strike a paragraph from Plaintiffs' Second Amended Complaint (ECF Nos. 77 & 83). Plaintiffs filed a response in opposition (ECF No. 87), and Defendant Ella E. M. Brown Charitable Circle d/b/a Oaklawn Hospital ("Oaklawn") has moved for leave to file a reply (ECF No. 89). Defendants have also moved to dismiss Plaintiffs' Second Amended Complaint (ECF Nos. 96 & 99), and Plaintiffs have moved for leave to file a Third Amended Complaint (TAC) to add new claims (ECF No. 74). Having considered the parties' submissions, the Court concludes that oral argument is unnecessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d). For the following reasons, the Court grants leave to file the proposed reply,

dismisses as moot the motion to strike, grants Defendants' motion to dismiss as to Count I of Plaintiffs' Second Amended Complaint, and denies Plaintiffs leave to file a Third Amended Complaint. Because this Opinion and Order resolves all pending claims, the Court will also enter a Judgment to close this case.

I. BACKGROUND

Plaintiff Shannon Martin, M.D., was formerly employed by South Michigan Ophthalmology, P.C. ("SMO"), where she worked with Defendant Darren Hathaway, M.D., for eight years until December 31, 2018 (Second Amended Complaint [SAC] ¶ 13). According to Dr. Hathaway, "Oaklawn receive[d] 100% of [SMO's] Marshall surgical volume and it cost[ ] them zero dollars" (*id.* ¶ 34).

In 2018, Dr. Martin sought to become a hospital-employed physician (*id.* ¶¶ 18-19). On October 17, 2018, Dr. Martin accepted an offer of employment from Oaklawn (*id.* ¶ 19), an offer that was contingent on approval by Oaklawn's board (*id.* ¶ 27). According to Dr. Hathaway, "[i]f Oaklawn hire[d] a [new] ophthalmology line, contractually, all of the Oaklawn [Medical Group (OMG)] providers will have to send their referrals to that person," a change that Dr. Hathaway described as a "death knell" to SMO, as "[t]here's no other substantive group in the area that can replace the referrals that come from Oaklawn Medical Group" (*id.* ¶ 62).

Dr. Martin and her husband, Plaintiff Douglas Martin, allege that when Dr. Hathaway learned of the offer, he interfered with her prospective hiring by Oaklawn by meeting with Oaklawn's interim CEO on October 22, 2018; calling board members; and sending the board a letter on October 25, 2018 (*id.* ¶¶ 25-35). In the letter, Dr. Hathaway indicated that if Oaklawn "take[s] Dr. Martin on as a new [ophthalmology] service line, . . . I would be forced . . . to pull out my cases and take them elsewhere" (*id.* ¶ 34). Additionally, Dr. Hathaway promised that referrals from SMO to Oaklawn would "increase" with SMO's contemplated merger with Lansing Ophthalmology, PC ("LO Eye") (*id.* ¶¶ 15, 47 & 63). The merger with LO Eye, however, did not take place (*id.* ¶ 57).

On April 22, 2019, the Martins sued Dr. Hathaway in Michigan state court for tortious interference, breach of contract, and other claims. Oaklawn was not named as a party to the state-court litigation.[1]

Approximately six months later, on October 30, 2019, the Martins also filed this qui tam case in this Court against Dr. Hathaway, SMO and Oaklawn (ECF No. 1). On November 12, 2019, Plaintiffs filed a First Amended Complaint (FAC) (ECF No. 3), alleging one False Claims Act (FCA) claim under this Court's federal-question jurisdiction and a state-law FCA claim

[1] Plaintiffs represented on July 6, 2021 that the judge in the state court case had recused himself after hearing dispositive motions and transferred the case to a different jurisdiction (7/6/21 Hrg. Tr. at 4-5, ECF No. 62 at PageID.755-756). The recusal decision was appealed to the Michigan Court of Appeals (*id.*).

under this Court's supplemental jurisdiction, as follows:

I. Violation of the Federal False Claims Act, 31 U.S.C. § 3729 et seq.

II. Violation of the Michigan Medicaid False Claims Act, MICH. COMP. LAWS § 400.601 et seq.

According to Plaintiffs, Dr. Hathaway's promise of continued and/or potentially increased referrals to Oaklawn "induced" Oaklawn to provide him "remuneration" in the form of the hospital board's October 26, 2018 decision not to hire Dr. Martin and start the hospital's own internal ophthalmology service line (FAC ¶¶ 61-63 & 80).

On June 22, 2020, the United States declined to intervene in this litigation (ECF No. 20). In January 2021, Defendant Oaklawn filed a motion to dismiss Plaintiffs' First Amended Complaint. Defendants Hathaway and SMO filed their own motion to dismiss, incorporating and substantially mirroring Oaklawn's motion. Plaintiffs filed a response in opposition, arguing that this Court should deny both motions or, alternatively, permit them to file their proposed second amended complaint, which they attached to their response. Following a hearing on July 6, 2021, this Court granted the motions to dismiss, holding that neither Plaintiffs' First Amended Complaint nor their proposed second amended complaint satisfied pleading requirements; however, the Court ruled that the dismissal was without prejudice to Plaintiffs filing an

amended pleading (7/6/21 Hrg. Tr. at 50-51 & 56-57, ECF No. 62 at PageID.801-802 & 807-808; Order, ECF No. 63).

On July 20, 2021, Plaintiffs filed a Second Amended Complaint (ECF No. 64), a pleading that included a new paragraph 119, describing fourteen claims for procedures referred by "South Michigan/Hathaway to Oaklawn on or after October 26, 2018 and for which Oaklawn, in fact, received reimbursement from Medicare and/or Medicaid" (*id.* at PageID.834).

On September 10, 2021, Defendant Oaklawn moved to strike paragraph 119 of Plaintiffs' Second Amended Complaint (ECF No. 77), arguing that the information therein was obtained in violation of the Health Insurance Portability and Accountability Act (HIPAA), 42 U. S.C. § 1320d *et seq.* Oaklawn attached to its motion a Declaration by Janice Walton, Oaklawn's Director of Corporate Compliance and HIPAA Privacy Officer, in which Walton indicated that the credentials of Plaintiff Douglas Martin, who is employed as OMG's Director of Finance, were used to search the confidential patient information on July 6 and 7, 2021, following the motion hearing in this Court (Walton Decl. [ECF No. 79-1] ¶¶ 6 & 15-16). Walton indicated that Martin's position as Director of Finance did not require him to access the computer system that Oaklawn uses to document patient care, let alone the confidential private patient information contained therein (*id.* ¶ 6). Walton indicated that the searches related to outpatient services on the "facilities side" of Oaklawn

and were unrelated to Martin's role as OMG's Director of Finance on the "[p]rofessional side" of Oaklawn (*id.* ¶ 17). Walton explained that because the searches were not within Martin's scope of employment, the searches violated Oaklawn's policies and HIPAA and prompted her review, investigation, and issuance of breach notifications to the affected patients (*id.* ¶¶ 19-24). Defendants Hathaway and SMO filed a concurrence in Oaklawn's motion to strike (ECF No. 83). Plaintiffs filed a response in opposition to the motion to strike (ECF No. 87). Defendant Oaklawn has moved for leave to file a reply (ECF No. 89), which Plaintiffs oppose (ECF No. 92).

Defendant Oaklawn also moves to entirely dismiss Plaintiffs' Second Amended Complaint (ECF No. 96). Defendants Hathaway and SMO concur in the motion (ECF No. 99). Plaintiffs filed a response in opposition to the motion (ECF Nos. 101-102), and Defendants filed their respective replies (ECF Nos. 98 & 100). The United States has filed a Statement Concerning Proposed Dismissal of Relators' Second Amended Complaint (ECF No. 105).

Last, Plaintiffs have moved for leave to file a Third Amended Complaint (ECF No. 74), seeking to add new state and federal retaliation claims alleging that Oaklawn threatened and harassed Douglas Martin for his "activities in furtherance of Plaintiffs' lawsuit and allegations of false claims" (*id.* at PageID.993). Defendant Oaklawn filed a response in opposition to Plaintiffs' motion for leave to file a Third Amended Complaint (ECF No. 85).

On January 5, 2022, this case was reassigned from the Honorable Janet T. Neff to the undersigned (ECF No. 103).

II. ANALYSIS

A. Defendants' Motions to Strike

As a threshold matter, Defendant Oaklawn moves to strike paragraph 119 of Plaintiffs' Second Amended Complaint (ECF No. 77), and Defendants Hathaway and SMO concur in the motion (ECF No. 83). Defendants argue that Douglas Martin violated HIPAA by improperly accessing Oaklawn's patient records to provide the patient payment information lacking from Plaintiffs' previous complaints (ECF No. 78 at PageID.1065). Defendants argue that "[t]he Court's allowing the Martins one more chance to meet Rule 9(b) is not a basis to trample over patients' HIPAA rights, nor was it a license to engage in improper self-help discovery" (*id.*).

In response, Plaintiffs argue that no HIPAA violation occurred because use and disclosure of Protected Health Information (PHI) is permitted for payment and health care operations (ECF No. 87 at PageID.1316, citing 45 C.F.R. § 164.506(c)). Plaintiffs further argue that Douglas Martin is a whistleblower under HIPAA, 45 C.F.R. § 164.502(j), making his access and disclosure of information to his attorney in furtherance of his qui tam action permissible (*id.*). Last, Plaintiffs argue that even if a HIPAA violation occurred, such a violation does not provide a basis for

striking the allegations from the complaint (*id.* at PageID.1317).

In its proposed reply, which the Court accepts for docketing, Defendant Oaklawn asserts that Plaintiffs do not explain how Douglas Martin's access of PHI in this litigation was "for treatment, payment, or health care operations" within the meaning of 45 C.F.R. § 154.506 (ECF No. 89-1 at PageID.1347-1348). Oaklawn further points out that the safe harbor "only permit[s] certain '[d]isclosures by whistleblowers'—not improper access of PHI—and only when those *disclosures* are made 'for the purpose of determining [ ] legal *options*'" (*id.* at PageID.1348-1349, quoting 45 C.F.R. § 164.502(j) (emphases added by Oaklawn)).

Federal Rule of Civil Procedure 12(f) provides that a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). "Motions to strike are viewed with disfavor and are not frequently granted." *Operating Engineers Loc. 324 Health Care Plan v. G & W Const. Co.*, 783 F.3d 1045, 1050 (6th Cir. 2015). Striking a pleading "should be 'resorted to only when required for the purposes of justice" and when "the pleading to be stricken has no possible relation to the controversy.'" *Anderson v. United States*, 39 F. App'x 132, 135 (6th Cir. 2002) (quoting *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953)).

The relevant federal regulation defines "[p]rotected health information" as "individually identifiable

health information ... [m]aintained in electronic media; or ... [t]ransmitted or maintained in any other form or medium." 45 C.F.R § 160.103. In order to qualify as individually identifiable health information, the information either "identifies the individual" or provides enough details so "there is a reasonable basis to believe the information can be used to identify the individual." 42 U.S.C. § 1320d; 45 C.F.R. § 160.103.

Paragraph 119 does not identify any individuals by name, but the information disclosed, which includes the dates and types of procedures as well as the names of the physicians performing the procedures, may be sufficiently detailed for the identities of patients to be ascertained. Further, as set forth more fully by Defendants, it does not appear that Douglas Martin's search would fall within the HIPAA whistleblower exception where the information was not disclosed "for the purpose of determining the legal options of the workforce member." *See* 45 C.F.R. § 164.502(j)(1)(*ii*)(B). While Defendants' contention that the information contained in paragraph 119 was improperly obtained appears to have some merit, the Court need not reach the issue of whether to strike paragraph 119, given the Court's conclusion that Plaintiffs' Count I is properly dismissed in its entirety. For the reasons stated *infra*, the allegations in paragraph 119, even if retained, do not change this Court's conclusion. Therefore, the Court will simply dismiss as moot Defendants' motion to strike paragraph 119.

B. Defendants' Motions to Dismiss Plaintiffs' Second Amended Complaint

1. Motion Standards

A complaint under the FCA must meet the pleading requirements of both Federal Rules of Civil Procedure 8(a)(2) and 9(b). *United States ex rel. Bledsoe v. Cmty. Health Sys.*, 501 F.3d 493, 503 (6th Cir. 2007) ("*Bledsoe II*"). Rule 8(a)(2) requires a pleading to "contain a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). A complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face" to survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 570 (2007).[2] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.*

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[2] In the Government's Statement Concerning Proposed Dismissal of Relators' Second Amended Complaint (ECF No,. 105, PageID.1633), it cites to the "no set of facts" standard in *DirecTV v Treesh*, 487 F.3d 471, 476 (6th Circ 2007). However, the long-standing rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim was overturned by *Bell Atlantic Corp.* As noted in *Bell Atlantic Corp*, the complaint must "nudge" the plaintiffs' claims "across the line from conceivable to plausible" or it "must be dismissed." *Bell*, 550 U.S. at 570.

Rule 9(b) requires the plaintiff to "state with particularity the circumstances constituting fraud[.]" FED. R. CIV. P. 9(b). In other words, a plaintiff must state "the who, what, when, where, and how of the alleged fraud." *United States ex rel. Roycroft v. Geo Grp., Inc.*, 722 F. App'x 404, 406 (6th Cir. 2018). Additionally, a relator bringing an action under the FCA must allege specific false claims with particularity in order to comply with Rule 9(b) because the fraudulent submission of a claim is "the *sine qua non* of a False Claims Act violation." *Bledsoe II*, 501 F.3d at 504 (citation omitted), 509. Last, "the claims that are pled with specificity must be 'characteristic example(s)' that are 'illustrative of [the] class' of all claims covered by the fraudulent scheme." *Bledsoe II*, 501 F.3d at 510-11 (citation omitted).

2. Relevant Statutory Framework

"The False Claims Act is not an all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract[.]" *Universal Health Servs., Inc. v. United States ex rel. Escobar*, ___ U.S. ___; 136 S. Ct. 1989, 2003 (2016). Rather, the FCA is a federal antifraud statute that prohibits the knowing submission of a "false or fraudulent claim for payment" to the federal government. 31 U.S.C. § 3729(a)(1). The statute "imposes civil liability that is 'essentially punitive in nature' on those who defraud the U.S. government." *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 826 (6th Cir. 2018) (quoting *Escobar*, 136 S.Ct. at 1996). The three

essential elements of an FCA claim are (1) a statement or claim in order to receive money from the government, (2) the statement was false, and (3) the defendant knew it was false. *Bledsoe v. Cmty. Health Sys.*, 342 F.3d 634, 640 (6th Cir. 2003) ("*Bledsoe I*"). The FCA "reaches claims submitted by health-care providers to Medicare and Medicaid—indeed, one of its primary uses has been to combat fraud in the health-care field." *Chesbrough v. VPA*, P.C., 655 F.3d 461, 467 (6th Cir. 2011).

Here, Plaintiffs allege that Defendants violated the FCA by violating the Anti-Kickback Statute (AKS). The AKS is a statute separate from the FCA. In pertinent part, the AKS makes it a crime to "knowingly and willfully solicit or receive any remuneration . . . in return for referring any individual to a person for the furnishing . . . of any item or service for which payment may be made in whole or in part under a Federal health care program[.]" 42 U.S.C. § 1320a-7b(b)(1)(A). Compliance with the AKS is a condition of payment for any claim submitted to a federal health care program, including Medicare and Medicaid; therefore, liability under the FCA can be predicated on a violation of the AKS. The AKS expressly provides that "a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of [the False Claims Act]." 42 U.S.C. § 1320a-7b(g). *See generally Jones-McNamara v. Holzer Health Sys.*, 630 F. App'x 394, 400 (6th Cir. 2015) (describing how "AKS violations can constitute FCA violations where a claim submitted to the government for

reimbursement includes items or services resulting from a violation of the AKS," or "where cost reports submitted to the government for reimbursement include an express certification that the underlying claims comply with the AKS.").

3. Discussion

In support of dismissal of Count I, Defendants argue that despite having had two years and now four opportunities to amend their pleading, Plaintiffs have still failed to supply the Court with a complaint that satisfies the particularity required by Rule 9(b) where Count I fails to allege (1) that "Dr. Martin's patients were treated at Oaklawn *because of* the alleged kickback scheme," (2) causal links between alleged false claims submitted by Oaklawn for Dr. Hathaway's patients, or (3) causal links between claims submitted by SMO and the alleged scheme (ECF No. 97 at PageID.1448, 1451-1456 [emphasis in original]). Defendants argue that Count I also fails to allege a predicate AKS violation where Plaintiffs do not allege remuneration and do not adequately allege Oaklawn's intent to offer or pay remuneration (*id.* at PageID.1448, 1457-1459). Last, Defendants argue that Count I fails to plausibly allege the FCA's scienter requirement (*id.* at PageID.1459-1460).[3]

[3] Defendants also argue that Plaintiffs' Count II, which contains their Michigan False Claims Act, should be dismissed as barred by the "public disclosure" rule where Plaintiffs' state-court pleading contains the same factual allegations as alleged in this case (ECF No. 97 at PageID.1448, 1460-1462). In response,

In response, Plaintiffs argue that their FCA claim in Count I of the Second Amended Complaint plausibly alleges the particulars of an AKS scheme resulting in false claims for items or services by Defendants to Medicare and/or Medicaid (ECF No. 102 at PageID.1598). Specifically, Plaintiffs point to a portion of their pleading describing how Defendants entered into the kickback scheme to induce further cross-referrals between the parties (*id.*, citing SAC ¶¶ 78-89). According to Plaintiffs, they need only allege that "at least one purpose" of the remuneration was to continue the cross-referrals (*id.* at PageID.1600-1603). Plaintiffs argue that they also plausibly allege Defendants' scienter in alleging that Dr. Hathaway had knowledge of the anti-kickback law and that quid pro quo relationships are legally impermissible (*id.* at PageID.1603, citing SAC ¶¶ 64-65). Further, according to Plaintiffs, it is sufficient if the claims were submitted to the federal government for reimbursement after the kickback was struck, and Plaintiffs delineate the purported "kickback-tainted" claims (*id.* at PageID.1608-1609, citing SAC ¶¶ 106, 119 & 123).

Defendants' argument has merit.

As a threshold matter, the Court determines that Plaintiffs' Count I does not state a plausible kickback scheme. The AKS defines "remuneration" as "transfers of items or services for free or for other than fair

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Plaintiffs argue that "the mere fact that there is an allegation in Plaintiffs' present SAC, which was previously pled in a state contract action, does not equate to a public disclosure under the law" (ECF No. 102 at PageID.1610-1611).

market value." 42 U.S.C. § 1320a-7a(i)(6). The Sixth Circuit has recognized that "courts widely agree that the 'gravamen of Medicare fraud is inducement' " and that "[s]everal courts have affirmed this expansive understanding of remuneration as 'anything of value in any form whatsoever.' " *Jones-McNamara*, 630 F. App'x at 400 (citation omitted). *See*, *e.g.*, *United States ex rel. Rembert, et al. v. Bozeman Health Deaconess Hosp.*, No. 15-80-BU-SHE, 2017 WL 514205, at *4-*5 (D. Mont. Feb. 7, 2017) (holding, on a motion to dismiss, that the competitive benefits of non-compete agreements from health care providers constituted plausible "remuneration" under the AKS).

Here, Dr. Hathaway allegedly sent communications to the board, including an October 25, 2018 letter to dissuade the hospital from "tak[ing] Dr. Martin on as a new service line" (SAC ¶ 34), as it would take business away from him. However, Plaintiffs have not alleged how the scheme afforded the hospital any new competitive benefit, i.e., a "kickback." Even accepting the factual matter in Count I as true and drawing all reasonable inferences in Plaintiffs' favor, there is not a basis upon which this Court may plausibly conclude that claims submitted to the government after the board's October 26, 2018 decision were "tainted" by an illegal inducement under the AKS.

Even assuming arguendo that Plaintiffs' Count I states a plausible kickback scheme, the Court agrees with Defendants that Plaintiffs have not alleged plausible causal connections between the scheme and the claims they have now identified in their current

pleading. The Second Amended Complaint alleges that "claims submitted to the federal government by Oaklawn, Dr. Hathaway, and/or South Michigan after October 26, 2018 and reimbursed by the federal government were as a result of the Defendants' kickback scheme and are false claims under the FCA" (SAC ¶ 152). Plaintiffs generally allege that "Oaklawn made 238 patient referrals to Dr. Hathaway/South Michigan from November 1 [] 2018 through June 30, 2021 (and ongoing) (many of which were reimbursed by Medicare or Medicaid)" (*id.* ¶ 106). Specifically, Plaintiffs delineate fourteen claims submitted by Oaklawn Hospital for surgical services provided to patients of both Dr. Martin and Dr. Hathaway (*id.* ¶ 119) and eight claims submitted by "South Michigan/Dr. Hathaway" for surgical services provided to patients of both Dr. Martin and Dr. Hathaway (*id.* ¶ 123) as purportedly "characteristic false claims."

The claims submitted by Oaklawn for services provided to Dr. Martin's patients wholly fail to supply the causal connection necessary for a plausible FCA claim. Plaintiffs allege that Dr. Martin was "not aware that the procedures that she was performing for and being billed by South Michigan pursuant to her employment contract were false claims" (*id.* ¶ 126). Dr. Martin's decision to select Oaklawn's facilities cannot be part of an alleged kickback scheme where she concedes that she did not know of the scheme. The Court agrees with Defendants that these claims do not support any missing links in the required causal chain between claims submitted by SMO and the purported kickback

scheme. The claims are not "characteristic examples" that help illustrate the purported scheme.

The claims submitted by Oaklawn for services provided to Dr. Hathaway's patients are also not adequately connected to the purported scheme. While Plaintiffs have attempted to label October 26, 2018 as a new dividing line, Plaintiffs do not state a kickback scheme merely by asserting that the referrals made after October 26 are "false," or, as described in the motion briefing, "tainted." Again, the FCA only reaches claims that include services "resulting from" an underlying AKS violation. 42 U.S.C. § 1320a-7b(g). Plaintiffs allege no facts from which the Court can reasonably infer that the post-October 26 referrals, unlike the pre-October 26 referrals, were caused by or "result from" the submission of a false claim.[4] Rule 9(b) does not permit speculation. *See Eberhard*, 642 F. App'x at 553. Although the plausibility standard is not equivalent to a "'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)). *See*, *e.g.*, *United States ex rel. Greenfield v. Medco Health*

[4] Indeed, Defendant Oaklawn points out that two of the patients—Patient #258 and Patient #2161—were treated by Dr. Martin in 2018 and then by Dr. Hathaway in 2019 (ECF No. 97 at PageID.1453).

Sols., Inc., 880 F.3d 89, 100 (3d Cir. 2018) ("It is not enough . . . to show temporal proximity between [an] alleged kickback plot and the submission of claims for reimbursement").

In sum, the Court determines that Plaintiffs have not alleged a plausible kickback scheme and have not supplied any requisite characteristic examples of the purported scheme, even if their new paragraph 119 is retained in the Second Amended Complaint Therefore, the Court concludes that Count I is properly dismissed.

4. Effect of Dismissal of Count I

"Ordinarily, if a district court grants a defendant's 12(b)(6) motion, the court will dismiss the claim without prejudice to give parties an opportunity to fix their pleading defects." *Crosby v. Twitter, Inc.*, 921 F.3d 617, 627 (6th Cir. 2019). Indeed, "a district court can abuse its discretion if it denies a plaintiff this opportunity without stating its reasons for doing so." *Id.* However, "this protection is not absolute" as "[t]here are important procedural requirements to follow," specifically: "a formal motion to amend." *Id. See also Golf Vill. N., LLC v. City of Powell, Ohio*, 14 F.4th 611, 624 (6th Cir. 2021) (reiterating the holding in *Crosby*); *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545, 551-52 (6th Cir. 2008) (opining that a district court is "not required to engage in a guessing game" as to what a plaintiff might plead to save her claim); W.D. Mich. LCivR 5.7(f) (instructing that "if the filing of an electronically submitted document requires leave of court,

such as an amended complaint ... , the proposed document must be attached as an exhibit to the motion seeking leave to file").

Defendants have reiterated their request that this Court's dismissal be with prejudice (ECF No. 96 at PageID.1443; ECF No. 97 at PageID.1462; ECF No. 99 at PageID.1575, 1579; ECF No. 100 at PageID.1584, 1587). In contrast, Plaintiffs have neither requested leave to amend Count I, nor filed a formal motion to do so. Having considered the case circumstances, including Plaintiffs' repeated attempts to cure the deficiencies in their pleading as well as the prejudice to Defendants from the delay in resolving this 2019 case, the Court will dismiss Count I with prejudice as to Plaintiffs. However, the dismissal is without prejudice as to the United States. *See United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 455-56 (5th Cir. 2005) (explaining that dismissal without prejudice guards against obligating the government to intervene to cure a deficient claim); *see also Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1057 (11th Cir. 2015) (relying on *Williams* to modify the district court's judgment of dismissal to be without prejudice to the government).

Having decided to dismiss Count I, the Court additionally decides that it will decline to exercise supplemental jurisdiction over Plaintiffs' remaining state-law claim in Count II. *See* 28 U.S.C. § 1367(c)(3) ("[D]istrict courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—(3) the district court has dismissed all claims over

which it has original jurisdiction"); *Gamel v. City of Cincinnati*, 625 F.3d 949, 952 (6th Cir. 2010) ("When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims....").

C. Plaintiffs' Motion for Leave to File a Third Amended Complaint

Last, Plaintiffs seek leave to file a third amended complaint to add state and federal retaliation claims—new counts III and IV—based on Oaklawn's investigation of Plaintiff Douglas Martin's actions taken in furtherance of his False Claims complaint. Plaintiffs argue that the factors governing leave to amend are readily satisfied where (1) no discovery has occurred in this case, (2) Plaintiffs have not delayed their motion for leave, and (3) no party would be prejudiced by the amendment (ECF No. 74 at PageID.997).

In its response in opposition, Defendant Oaklawn asserts that Douglas Martin tried to save his False Claims Act case from dismissal by improperly accessing Oaklawn's patients' PHI in violation of HIPAA (ECF No. 85 at PageID.1271). According to Oaklawn, when it learned of that potential violation, it began an inquiry as required by its HIPAA Policy and by the relevant regulation (*id.*). Oaklawn points out that pursuant to its HIPAA Policy, Oaklawn "could have contacted Mr. Martin directly, as an employee, to request and schedule an interview; instead, in light of this matter and as a courtesy, Oaklawn's outside

counsel contacted Mr. Martin's counsel in this matter" (*id.*). Oaklawn emphasizes that "[n]o contact was made directly with Mr. Martin. No employment action was, or has been, taken" (*id.*). Oaklawn argues that Plaintiffs' motion to amend should be denied because the retaliation claims are futile and meritless in light of longstanding precedent in the Sixth Circuit recognizing that "investigations are not adverse employment actions" (*id.* at PageID.1273-1276). Further, Oaklawn argues that the safe harbor provision of HIPAA, on its face, does not apply to Douglas Martin's conduct (*id.* at PageID.1276-1277).

Defendants' argument has merit.

The Federal Rules of Civil Procedure instruct district courts to "freely give leave [to amend] when justice so requires." FED. R. CIV. P. 15(a)(2). "Guided by that overarching principle, the district court may weigh the following factors when considering a motion to amend: undue delay or bad faith in filing the motion, repeated failures to cure previously-identified deficiencies, futility of the proposed amendment, and lack of notice or undue prejudice to the opposing party." *Knight Cap. Partners Corp. v. Henkel AG & Co., KGaA*, 930 F.3d 775, 786 (6th Cir. 2019). "A motion to amend is futile 'where a proposed amendment would not survive a motion to dismiss.'" *Banerjee v. Univ. of Tenn.*, 820 F. App'x 322, 329 (6th Cir. 2020) (citation omitted).

The new retaliation claims in Plaintiff's proposed Third Amended Complaint stem from their factual claim that "Oaklawn threatened and harassed Mr.

Martin stating that he was under investigation for a potential HIPAA violation and wanted to interview him" (proposed TAC ¶¶ 163 & 173, ECF No. 74-1 at PageID.1050-1051).

To state a prima facie case of retaliation, a plaintiff must plead, among other elements, "an adverse employment action." *Kuhn v. Washtenaw Cnty.*, 709 F.3d 612, 628 (6th Cir. 2013). The Sixth Circuit has repeatedly held that an investigation regarding an employee does not constitute an adverse employment action against that employee. *See*, *e.g.*, *Kuhn* at 625 ("[A]n internal investigation into suspected wrongdoing by an employee" does not "constitute[ ] an adverse employment action.") (quotation marks omitted); *Virostek v. Liberty Twp. Police Dep't/Trs.*, 14 F. App'x 493, 505 (6th Cir. 2001) ("We do not believe that an investigation alone is sufficient to establish an adverse employment action."); *Harrison v. City of Akron*, 43 F. App'x 903, 905-06 (6th Cir. 2002) ("[I]nternal investigations are not adverse employment actions."); *Groening v. Glen Lake Cmty. Sch.*, 884 F.3d 626, 631 (6th Cir. 2018) ("[E]mployers are permitted to investigate their employees for wrongdoing. . . ."). Under this governing case law, Plaintiffs' new retaliation claims would not survive a motion to dismiss; therefore, granting Plaintiffs leave to file an amended pleading would be futile. Their motion is properly denied.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendant Oaklawn's Motion for Leave to file a Reply (ECF No. 89) is GRANTED, and the proposed reply (ECF No. 89-1) is accepted for docketing.

IT IS FURTHER ORDERED that Defendants' motions to strike paragraph 119 of Plaintiffs' Second Amended Complaint (ECF Nos. 77 & 83) are DISMISSED AS MOOT.

IT IS FURTHER ORDERED that Defendants' motions to dismiss Plaintiffs' Second Amended Complaint (ECF Nos. 96 & 99) are GRANTED IN PART as to Count I. The dismissal of Count I is with prejudice as to Plaintiffs Shannon and Douglas Martin and without prejudice as to the United States. Defendants' motions to dismiss are otherwise DISMISSED as moot.

IT IS FURTHER ORDERED that the Court declines to exercise supplemental jurisdiction over Plaintiffs' state-law claim in Count II.

IT IS FURTHER ORDERED that Plaintiffs' motion for leave to file a Third Amended Complaint (ECF No. 74) is DENIED.

Because this Opinion and Order resolves all pending claims, the Court will also enter a Judgment to close this case. *See* FED. R. CIV. P. 58.

Dated: May 11, 2022

/s/ Jane M. Beckering
JANE M. BECKERING
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHANNON MARTIN, et al.,

Plaintiffs,

v.

DARREN HATHAWAY, et al.,

Defendants. /

Case No. 1:19-cv-915

HON. JANE M. BECKERING

JUDGMENT

(Filed May 11, 2022)

In accordance with the Opinion and Order entered this date:

IT IS HEREBY ORDERED that Plaintiffs' Count I is dismissed with prejudice as to Plaintiffs Shannon and Douglas Martin and without prejudice as to the United States, and this Court declines to exercise supplemental jurisdiction over the state-law claim in Plaintiffs' Count II.

This action is terminated.

Dated: May 11, 2022

/s/ Jane M. Beckering
JANE M. BECKERING
United States District Judge

APPENDIX D

No. 22-1463

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA EX REL. SHANNON MARTIN, M.D.; UNITED STATES OF AMERICA EX REL. DOUGLAS MARTIN, Relators-Appellants, v. DARREN HATHAWAY, M.D.; SOUTH MICHIGAN OPHTHALMOLOGY, P.C.; ELLA E. M. BROWN CHARITABLE CIRCLE, DBA OAKLAWN HOSPITAL, Defendants-Appellees.	ORDER (Filed May 16, 2023)

BEFORE: SUTTON, Chief Judge; SILER and MATHIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk
Deborah S. Hunt, Clerk

APPENDIX E

31 U.S. Code § 3729 provides:

False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

. . .

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–410 [1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

. . .

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

. . . .

42 U.S. Code § 1320a–7b provides:

Criminal penalties for acts involving Federal health care programs

(b) ILLEGAL REMUNERATIONS

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than 10 years, or both.

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than 10 years, or both.

. . .

(g) LIABILITY UNDER SUBCHAPTER III OF CHAPTER 37 OF TITLE 31

In addition to the penalties provided for in this section or section 1320a–7a of this title, a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of subchapter III of chapter 37 of title 31.

* * *