UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

United States of America and State of California, *ex rel.* Douglas Dalitz and Randy Gray,

Plaintiffs and Relators,

V.

Amsurg Corp.; Gastroenterology Associates Endoscopy Center, LLC; Redding Gastroenterology, LLC d/b/a Redding Endoscopy Center; Gaddam Naresh Reddy, M.D.; Piyush Kumar Dhanuka, M.D.; and B. Nicholas Namihas, M.D.

Defendants.

No. 2:12-cv-02218-TLN-CKD

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This matter is before the Court pursuant to Defendants' AmSurg Corporation ("AmSurg"); Gastroenterology Associates Endoscopy Center, L.L.C. ("GAEC"); Redding Gastroenterology L.L.C. d/b/a Redding Endoscopy Center ("REC"); Gaddam Naresh Reddy, M.D. ("Reddy"); Piyush Kumar Dhanuka, M.D. ("Dhanuka"); and B. Nicholas Nimhas, M.D. ("Nimhas") (collectively "Defendants") Motion to Dismiss Plaintiffs' Amended Complaint. (ECF No. 35.) Plaintiffs and *qui tam* Relators Douglas Dalitz ("Dalitz") and Randy Gray ("Gray") (collectively "Plaintiffs") filed an Opposition to Defendants' motion. (ECF No. 38.) The Court has carefully considered the arguments raised in Defendants' motion and reply, as well

as Plaintiffs' opposition. For the reasons set forth below, Defendants' Motion to Dismiss is DENIED.

I. FACTUAL BACKGROUND

Plaintiffs bring this suit against Defendants for false certification under the Federal False Claims Act ("FCA"), 31 U.S.C. § 3729(a)(1)–(2), and California False Claims Act ("CFCA"), Cal. Gov. Code § 12651(a)(1)–(2); conspiracy under the Federal False Claims Act, 31 U.S.C. § 3729(a)(3), and California False Claims Act, Cal. Gov. Code § 12651(a)(3); and retaliation in violation of the Federal False Claims Act, 31 U.S.C. § 3730(h), and the California Whistleblower Law, Cal. Labor Code § 1102.5.

Defendant AmSurg is a for-profit corporation based in Tennessee that provides management services to ambulatory surgery centers ("ASCs").[1] (Amended Complaint, ECF No. 23 at ¶ 9.) Defendants Reddy, Dhanuka, and Namihas (collectively "REC Physicians") are surgeons specializing in Gastroenterology. (ECF No. 23 at ¶¶ 12–14.) Defendants REC Physicians and AmSurg own Defendants GAEC and REC as joint ventures in California. (ECF No. 23 at ¶¶ 10–11.)

Plaintiffs worked at REC as Certified Registered Nurse Anesthetists ("CRNAs"). (ECF No. 23 at ¶¶ 2–5.) The Center employed Dalitz from September 27, 2010, to December 17, 2010, and Gray from around November 1, 2010, to December 17, 2010. Plaintiffs were responsible for reviewing pre-surgical assessments and providing anesthesia to patients. (ECF No. 23 at ¶ 7.)

a. Medicare Program

To be a Medicare provider and receive payments from Medicare, an ASC must enter into an agreement with the Centers for Medicare and Medicaid ("CMS") and meet the conditions in Part 416 of the Code of Federal Regulations. (ECF No. 23 at ¶ 23.) Pursuant to 42 C.F.R. § 416.42(a) and 42 C.F.R. § 416.52(a), providers must perform and place in the patient's record: 1) a medical history and physical assessment ("H&P"); 2) pre-surgical assessment; and 3) anesthetic risk assessment on patients before surgery.[2] (ECF No. 23 at ¶ 24.)

[1] The factual allegations in this section are taken from Plaintiffs' Amended Complaint. For the purposes of a motion to dismiss, the factual allegations in the complaint are accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

[2] Plaintiffs additionally cite to a CMS memorandum, a CMS manual, American Society of Anesthesiologists

Plaintiffs state that during their employment REC Physicians either did not perform the H&Ps and pre-surgical assessments, or performed them in such a cursory manner that Plaintiffs did not have adequate information to properly assess whether the patient was fit to receive anesthesia or undergo surgical procedures. (ECF No. 23 at ¶ 43.) In addition, Plaintiffs allege that REC Physicians did not properly acquire and place patients' H&Ps in their medical records. (ECF No. 23 at ¶ 45.)

b. Plaintiffs' Reporting

On around September 27, 2010, Dalitz raised concerns regarding the REC Physicians' failure to perform pre-surgical assessments and comprehensive H&Ps to the office manager of REC. (ECF No. 23 at ¶ 48.) Per the office manager's instruction, Dalitz brought the issue up at a staff meeting where the office manager, REC Physicians, and AmSurg's Regional Vice President agreed to resolve the issue as soon as possible. (ECF No. 23 at ¶ 49.)

Gray also brought his concerns regarding the REC Physicians' failure to perform pre-surgical assessments and comprehensive H&Ps to REC's office manager, REC Physicians, and AmSurg's Regional Vice President on "multiple occasions." (ECF No. 23 at ¶ 55.) They assured Gray they would take corrective action. Plaintiffs allege that no corrective action was taken despite their complaints. (ECF No. 23 at ¶ 57.)

Plaintiffs' Amended Complaint provided four examples of REC Physicians' failure to perform comprehensive H&Ps and pre-surgical assessments. Patient A was scheduled for a colonoscopy with Namihas around November or December 2010. (ECF No. 23 at ¶ 50.) Namihas had not performed a comprehensive H&P on Patient A before surgery. However, Dalitz evaluated Patient A himself, and determined Patient A should not be treated in an ASC. After Dalitz informed Nahimas that he would not administer anesthesia to Patient A, Nahimas stated "we did the prep, and that's what we're paying you for." Namihas proceeded with the colonoscopy without anesthetizing the patient. (ECF No. 23 at ¶ 50.)

On April 22, 2011, Reddy performed a colonoscopy on Patient B. Patient B's record

---

standards, and American Association of Nurse Anesthetist standards of care. The Court finds it sufficient to focus on Defendants' violations of Federal regulations for the purposes of this motion and does not consider these additional sources at this time. (ECF No. 23 at ¶ 27.)

shows Reddy signed the patient's H&P at 7:42 a.m. (ECF No. 23 at ¶ 51.) However, Patient B's procedure began at 6:51 a.m. That same morning, Reddy performed a colonoscopy on Patient C. Reddy signed Patient C's H&P at 7:45 am, and started Patient C's procedure at 7:45 am. (ECF No. 23 at ¶ 51.) Contrary to CMS guidelines, Reddy performed Patient B's H&P after his surgery, and could not have performed a comprehensive H&P for Patient C given the brief amount of time between Patient B and Patient C's procedures. (ECF No. 23 at ¶ 51.)

Patient D was scheduled for an endoscopy and colonoscopy with Reddy around December 2, 2010. Reddy did not perform a comprehensive H&P or pre-surgical assessment on Patient D. (ECF No. 23 at ¶ 56.) Patient D informed Gray he had been to the emergency room the night before for heart palpitations. Gray expressed his concern for going forward with the procedure, but Reddy insisted that Gray administer the anesthesia prior to the surgery. (ECF No. 23 at ¶ 56.) Once Gray administered the anesthesia to Patient D, Patient D experienced a sudden onset of profound bradycardia. (ECF No. 23 at ¶ 56.) Reddy had to immediately stop the procedure.

c. Termination of Employment

Plaintiffs attended a final meeting with AmSurg management around December 13, 2010. (ECF No. 23 at ¶ 57.) Gray again expressed concerns that REC was not complying with Medicare regulations. On December 17, 2010, Plaintiffs received letters informing them that REC had terminated their employment.

II. STANDARD OF LAW

Federal Rule of Civil Procedure 8(a) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Under notice pleading in federal court, the complaint must "give the defendant fair notice of what the claim . . . is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

On a motion to dismiss, the factual allegations of the complaint must be accepted as true.

Cruz v. Beto, 405 U.S. 319, 322 (1972). A court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege "'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." *Twombly*, 550 U.S. at 570. "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." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. 544, 556 (2007)).

Nevertheless, a court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume that the plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged[.]" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 697 (quoting *Twombly*, 550 U.S. at 570). Only where a plaintiff fails to "nudge[] [his or her] claims . . . across the line from conceivable to plausible[,]" is the complaint properly dismissed. *Id.* at 680. While the plausibility requirement is not akin to a probability requirement, it demands more than "a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. This plausibility inquiry is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

In ruling upon a motion to dismiss, the court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of

Evidence 201. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

If a complaint fails to state a plausible claim, "'[a] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 484, 497 (9th Cir. 1995)); *see also Gardner v. Marino*, 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of discretion in denying leave to amend when amendment would be futile). Although a district court should freely give leave to amend when justice so requires under Rule 15(a)(2), "the court's discretion to deny such leave is 'particularly broad' where the plaintiff has previously amended its complaint[.]" *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir. 2013) (quoting *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004)).

III. ANALYSIS

a. False Certification of Claims under Federal and State False Claims Acts (Count I)

Plaintiffs seek to bring an action against Defendants for false certification of claims in violation of Federal and State False Claims Acts. (ECF No. 23 at ¶ 80.) The Court finds Plaintiffs have properly stated these claims and DENIES Defendants' Motion to Dismiss Count I.

i. Sufficient Pleading of Routine False Certification

First, Defendants contend Plaintiffs' allegations fail to meet the particularity standards of Rule 9(b). (ECF No. 35-2 at 13.) Rule 9(b) provides that a party must plead fraud with particularity. With respect to the FCA, Plaintiffs must "state with particularity the circumstances constituting fraud or mistake," including "the who, what, when, where, and how of the misconduct charged," as well as "what is false or misleading about a statement, and why it is false." *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). Plaintiffs are required to "provide enough detail to give [defendants] notice of the particular misconduct which is alleged to constitute the fraud charged so that [they] can defend against the charge and not just deny that [they have] done anything wrong." *Id.* at 999 (internal quotation marks omitted).

Defendants argue that Plaintiffs have failed to identify any claims submitted to a government payer or to provide reliable indicia leading to a strong inference that claims were actually submitted. (ECF No. 35-2 at 14–15.) Defendants argue that Plaintiffs simply assume comprehensive H&Ps and pre-surgical assessments were not completed, that Patients A, B, C, and D were Medicare or Medi-Cal beneficiaries, and that claims were submitted for these procedures on behalf of the beneficiaries. (ECF No. 35-2 at 16.)

This Court is unpersuaded by Defendants' arguments. Plaintiffs discuss the "who, what, when, where, and how" of incidents involving Patients A, B, C, and D in the Amended Complaint. (ECF No. 23 at ¶¶ 50–56.) Moreover, Plaintiffs stated they observed REC Physicians routinely failing to perform comprehensive H&Ps and pre-surgical assessments at REC. (ECF No. 23 at ¶¶ 47, 53.) In doing so, Plaintiffs plead their claims with "sufficient particularity to lead to a strong inference that false claims were actually submitted." *Frazier ex rel. U.S. v. Iasis Healthcare Corp*., 392 F. App'x 535, 537 (9th Cir. 2010)

Additionally, Defendants argue Plaintiffs have not established that any claims were actually submitted to a government payer. (ECF No. 35-2 at 15.) At the pleading stage, Plaintiffs must simply allege enough facts giving rise to a reasonable expectation that discovery will reveal evidence of the submitted claims. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). It is Defendants, not Plaintiffs, who have access to these billing records. Therefore, it is not Plaintiffs' burden to provide evidence that might only be encountered through the process of discovery. Thus Plaintiffs have sufficiently met 9(b) pleading standards in their allegations.

ii. Pleading of Elements under the Federal and California False Claims Acts

Second, Defendants argue Plaintiffs fail to identify any false claims or statements material to a government payment. Because Plaintiffs are not able to satisfy the materiality requirement, Defendants contend Plaintiffs have not properly stated a claim under the Federal or State False Claims Act.

Congress enacted the Federal False Claims Act ("FCA") in 1863. *United States v. McNinch*, 356 U.S. 595, 602 n.2 (1958) (Douglas, J., concurring in part and dissenting in part). In 1986, Congress amended the Act to discourage fraud against the government in the fields of

defense and health care. *See* S. Rep. No. 99-345, at 2-4, 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267-69, 5273. The law includes a *qui tam* provision that allows private individuals, called "relators" (informally "whistleblowers"), to file actions on behalf of the government. *See Mikes v. Straus*, 274 F.3d 687, 692 (2d Cir. 2001).

California enacted its own False Claims Act ("CFCA") in 1987. *See* Cal. Gov. Code § 12650 *et seq.* Courts rely on FCA precedent to interpret the CFCA. *See San Francisco Unified Sch. Dist. ex rel. Contreras v. Laidlaw Transit, Inc.*, 224 Cal. App. 4th 627, 637 (2014); *State v. Altus Fin., S.A.*, 36 Cal. 4th 1284, 1299 (2005) ("the CFCA 'is patterned on similar federal legislation' and it is appropriate to look to precedent construing the equivalent federal FCA"); *City of Pomona v. Superior Court*, 89 Cal.App.4th 793, 802 (2001). FCA cases are authoritative in construing the CFCA to the extent the language of the two acts are similar. *See Fassberg Const. Co. v. Hous. Authority of Los Angeles*, 152 Cal.App.4th 720, 735 (2007). The language in the sections of the FCA and CFCA supporting the false certification and conspiracy claims are nearly identical.[3] As such, the Court will address the FCA claims here and apply its analysis to the CFCA claims.

A claim of a FCA violation requires: (1) a false statement or fraudulent course of conduct (2) that the defendant knew was fraudulent, (3) and was material, causing (4) the government to pay out money or forfeit moneys due. *See U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1168 (9th Cir. 2006). The false statement or course of conduct must be material to the government's decision to pay out money to the claimant. *Id.* at 1172.

In *Ebeid ex rel. U.S. v. Lungwitz*, the Ninth Circuit adopted the implied false certification theory from the Second Circuit Medicare case *Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001).

---

[3] The Federal False Claims Act makes liable 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; and (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G). 31 U.S.C. § 3729(a)(1)(A)-(C).

The California False Claims Act makes liable any person who (1) knowingly presents or causes to be presented a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim; and (3) conspires to commit a violation of the subdivision. Cal. Gov. Code § 12651(a)(1)–(3).

Ebeid ex rel. U.S. v. Lungwitz, 616 F.3d 993, 996–97 (9th Cir. 2010). Implied certification is based on the notion that claims for payment submitted to the government represent an implied certification of a defendant's continuing adherence to program requirements. *Id* at 996. An entity is thus liable for previously undertaking to expressly comply with a law, rule, or regulation, even though a certification of compliance with that law, rule, or regulation is not actually required in submitting each individual claim for payment. *Id.* at 998. The defendant's noncompliance renders the claims "false," and liability attaches under the FCA. Therefore, an entity can be liable for false certification even if it does not expressly certify compliance in seeking a claim for payment.

The *Mikes v. Straus* court imposes a further requirement on FCA violation claims: the condition violated must be a condition of payment rather than a condition of participation. *See Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001). While there is no definitive way to distinguish between what constitutes a condition of payment vs. participation,[4] *Mikes* describes conditions of payment as "prerequisites to receiving reimbursement." *See id.* at 701–02. The Ninth Circuit has not clearly adopted the participation-payment differentiation set forth in *Mikes*. *Compare Hendow*, 461 F.3d at 1176-78 (holding that the distinction between a condition of participation and a condition of payment was a "distinction without difference" and replying to apply the analysis offered in *Mikes*) *and Ebeid*, 616 F.3d at 997–99 (finding that the "participation-payment differentiation set forth in *Mikes* was limited to the Medicare context"). However, this Court finds that Plaintiffs' complaint would meet the requirements of both the implied certification theory and the condition of payment distinction, should it apply. Therefore, the Court does not reach the issue of whether the condition of payment distinction applies in this case.

To enroll as providers in Medicare, Defendants signed Medicare Form CMS-855B ("Form 855-B"), by which they agreed to follow the requirements of Medicare statutes, regulations, and rules. (ECF No. 38 at 3.) The form includes Section 15, a "certification statement" that states:

> I agree to abide by the Medicare laws, regulations and program instructions that

[4] Benjamin A. Dacin, *Legal Materiality and the Implied Certification Theory of the False Claims Act: Why Courts Have Rejected the Traditional Standards of Materiality in Favor of A Precondition to Payment Requirement*, 17 Mich. St. U. J. Med. & L. 31, 46 (2012).

> apply to this supplier. The Medicare laws, regulations, and program instructions are available through the Medicare contractor. I understand that payment of a claim by Medicare is conditioned upon the claim and the underlying transaction complying with such laws, regulations, and program instructions (including, but not limited to, the Federal anti-kickback statute and the Stark law), and on the supplier's compliance with all applicable conditions of participation in Medicare.

Here, Defendants undertook an obligation to expressly comply with Medicare regulations 42 C.F.R. § 416.42(a) and 42 C.F.R. § 416.52(a). Plaintiffs allege Defendants failed to comply with these regulations. Although Defendants were not required to submit an explicit certification of compliance along with each claim for payment, the certification is implied in the language of Form 855-B. The form states Medicare payment is contingent upon Defendants' compliance with "Medicare laws, regulations, and program instructions." Thus, under the theory of implied certification, Plaintiffs properly state a claim that Defendants violated the FCA.

Moreover, even if the *Mikes* condition of payment distinction was to apply, Plaintiffs could argue the language in Form 855-B comprises a condition of payment rather than participation. The court in *Mikes* found that the disputed Medicare *regulation* could not present a condition of payment and therefore dismissed the claim in favor of defendants. *Mikes*, 274 F.3d at 700. However, here Plaintiffs do not rely on a Medicare regulation, but instead they argue that Form 855-B provides the basis for their claim. Because Form 855-B states, "I understand that payment of a claim by Medicare is conditioned upon the claim and the underlying transaction complying with such laws, regulations, and program instructions," Plaintiffs could successfully argue that such language provides a condition for payment – meeting the requirements under *Mikes*, should the Ninth Circuit find that the distinction applies.

Because Plaintiffs' claim meets the requirements of the implied certification theory, as well as the condition for payment distinction, the Court DENIES Defendant's Motion to Dismiss Count I.

b. Conspiracy to Submit False Claims in Violation of Federal and State False Claims Acts (Count II)

Plaintiffs allege Defendants combined, conspired, and agreed together to defraud the United States and the California Medi-Cal program. (ECF No. 23 at ¶ 90.) Defendants argue that

Plaintiff cannot plead conspiracy where Defendants are employees, agents, and/or alter egos of one another. (ECF No. 35 at 23.) Plaintiffs respond in their opposition that they plead conspiracy as an alternative theory of liability in the event that Defendants rely on their complicated corporate structure to avoid liability. (ECF No. 38 at 23.) Defendants refuse to affirm or deny they are agents of one another in their Reply to Plaintiffs' Opposition to the Motion to Dismiss. (ECF No. 39 at 12.) Defendants do not address Plaintiffs' argument that their conspiracy claim presents an alternative theory of liability and the Court finds no reason why an alternative theory may not be plead. *Grosvenor Properties Ltd. v. Southmark Corp*., 896 F.2d 1149, 1152 (9th Cir. 1990). Therefore, so long as Defendants refuse to confirm that they are employees, agents, partners, and/or alter egos of one another, Plaintiffs may plead a conspiracy claim in the alternative. This Court DENIES Defendants' Motion to Dismiss the conspiracy claims in Count II.

c. Retaliation in Violation of Federal False Claims Act and California Whistleblower Law (Count III)

i. FCA Retaliation Claim

A FCA retaliation claim requires proof of three elements: (1) the employee must have been engaging in conduct protected under the Act; (2) the employer must have known that the employee was engaging in such conduct; and (3) the employer must have discriminated against the employee because of her protected conduct. *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1060 (9th Cir. 2011). The focus of the claim is the employee's protected action, such as investigating fraud, and whether the employer retaliated against the employee because of that action. *See Mendiondo v. Centinela Hosp. Medical Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). An employee must in good faith, as a reasonable employee would in similar circumstances, believe her employer is possibly committing fraud against the government. *Moore v. California Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 846 (9th Cir. 2002).

First, Defendants argue that Plaintiffs do not state a claim for retaliation under the FCA because a reasonable employee in Plaintiffs' circumstances would not believe fraud was being committed against the government. (ECF No. 35-2 at 24.) Here, Plaintiffs repeatedly

complained to management about its failure to perform comprehensive H&Ps and pre-surgical evaluations. (ECF No. 38 at 24.) An employee in Plaintiffs' positions could have reasonably believed REC Physicians were defrauding the government by failing to conduct, yet billing to Medicare, the pre-surgical work required before procedures. Plaintiffs could have reasonably concluded Defendants were engaging in fraudulent billing practices against the government. Therefore, Defendants' argument is unpersuasive.

Second, Defendants argue Plaintiffs fail to meet the employer knowledge element in a FCA retaliation claim. Defendants contend that because Plaintiffs did not raise their concerns about Medicare or Medi-Cal fraud to their employers, Defendants were not aware that Plaintiffs were even engaging in conduct protected by the FCA. (ECF No. 35-2 at 24.) However, Plaintiffs point out that no "magic words" are necessary in bringing concerns about fraud to an employer. (ECF No. 38 at 24 (citing *Mendiondo v. Centinela* Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008) and *Shaw v. AAA Eng'g & Drafting, Inc*., 213 F.3d 519, 528, 535 (10th Cir. 2000)).) An employee's complaints to management about "possible civil and criminal violations" are sufficient to satisfy the second element of a FCA retaliation claim requiring that employers know employees are engaging in protected conduct. *Mendiondo*, 521 F.3d at 1104. Plaintiffs' Amended Complaint states that Plaintiffs repeatedly complained to management about failure to perform legally compliant evaluations. (ECF No. 23 ¶ 48–49, 53–55, 57.) Therefore, the Court DENIES Defendants' Motion to Dismiss the FCA retaliation claim in Count III.

ii. State Retaliation Claim

The California Whistleblower Law provides that an employer shall not retaliate against an employee for "refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation." Cal. Labor Code § 1102.5(c). The California Supreme Court suggested in 2005 that Plaintiffs are required to exhaust their administrative remedies before pursuing a claim for retaliation under California's whistleblower protection laws. *Campbell v. Regents of the Univ. of California*, 35 Cal.4th 311, 328-29 (2005). Defendants argue Plaintiffs' state law retaliation claim fails because they did not exhaust their administrative remedies. (ECF No. 35-2 at 25.)

However, as of January 1, 2014, the California Labor Code was amended to make clear that a plaintiff is not required to exhaust administrative remedies prior to filing suit for Labor Code violations. *See* Cal. Labor Code § 244(a); *see also* § 98.7(g) ("In the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures."). Moreover, the Ninth Circuit concluded these amendments apply retroactively to render administrative exhaustion unnecessary for claims brought pursuant to section 1102.5. *Reynolds v. City & Cnty. of San Francisco*, 576 F. App'x 698, 701 (9th Cir. 2014).

Accordingly, the Court finds Plaintiffs were not required to exhaust administrative remedies prior to filing this action and declines to dismiss Plaintiffs' claims on this basis. Thus, the Court DENIES Defendants' Motion to Dismiss Count III.

IV. **CONCLUSION**

For the reasons set forth above, the Court hereby DENIES Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. (ECF No. 35.)

IT IS SO ORDERED.

Dated: December 23, 2014

Troy L. Nunley
United States District Judge