NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UPPI LLC, qui tam as Relator, Plaintiff-Appellant, and UNITED STATES OF AMERICA, Plaintiff, v. CARDINAL HEALTH, INC.; CARDINAL HEALTH 414 LLC, DBA Cardinal Health Nuclear Pharmacy Services; CARDINAL HEALTH 200 LLC; D'S VENTURES LLC, DBA Logmet Solutions LLC; CARING HANDS HEALTH EQUIPMENT & SUPPLIES LLC; OBIE B. BACON; DEMAURICE SCOTT; OTHER UNNAMED SMALL BUSINESS FRONT COMPANIES; UNNAMED INDIVIDUALS, Defendants-Appellees.	No. 21-35905 D.C. No. 2:17-cv-00378-RMP MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Rosanna Malouf Peterson, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted August 9, 2022
Anchorage, Alaska

Before: S.R. THOMAS, McKEOWN, and CLIFTON, Circuit Judges.

Relator UPPI LLC appeals from the district court's order granting the motions to dismiss Relator's qui tam complaint alleging violations of the False Claims Act (FCA). *See* 31 U.S.C. § 3729(a)(1). Defendants are Cardinal Health,[1] Caring Hands Health Equipment & Supplies LLC, its owner Obie B. Bacon, Logmet Solutions LLC, and its owner DeMaurice Scott. We review de novo, *SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1117 (9th Cir. 2022), and reverse.

We raise the issue of appellate jurisdiction sua sponte and conclude, despite some ambiguity in the district court's order, that the order was final and appealable. *See Unified Data Servs., LLC v. FTC*, 39 F.4th 1200, 1207 (9th Cir. 2022); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 983 (9th Cir. 2000); *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

Turning to the merits, the district court dismissed the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a well-pleaded complaint must be plausible. *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

[1] We refer to several related defendants collectively as Cardinal Health: Cardinal Health 414, LLC, Cardinal Health 200 LLC, and Cardinal Health, Inc.

Federal Rule of Civil Procedure 9(b) also requires that the facts establishing fraud be pleaded with "particularity." "To satisfy Rule 9(b), a pleading must identify 'the who, what, when, where, and how of the misconduct charged,' as well as 'what is false or misleading about [the purportedly fraudulent] statement, and why it is false.'" *Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (alteration in original) (quoting *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010)).

The complaint in this case centers around what Relator describes as a "rent-a-vet" scheme, in which a large company exploits the statutory and regulatory preferences given to service-disabled veteran owned small businesses (SDVOSBs) in government contracting. The defendants—large enterprise Cardinal Health and SDVOSBs Caring Hands and Logmet—allegedly misled the government into awarding contracts to the SDVOSBs for the supply and distribution of radiopharmaceutical products to Veterans Affairs (VA) hospitals. The complaint alleges that in reality, Cardinal Health performed the vast majority of the work and kept the majority of the revenue, while the SDVOSBs took only a small cut for doing some nominal invoicing.

"[T]he essential elements of False Claims Act liability are: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due."

United States ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890, 902 (9th Cir. 2017). The district court held that the first amended complaint (FAC) failed to plead (a) falsity and (b) materiality with sufficient particularity and plausibility to survive dismissal. We disagree.

As to falsity, the FAC presents two theories under which the defendants might be liable for false statements: promissory fraud, or fraud in the inducement, and implied false certification. The FAC viably pleads falsity under either theory.

Under the promissory fraud theory, "liability will attach to each claim submitted to the government under a contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct." *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1173 (9th Cir. 2006). "[I]n the context of the complaint as a whole," the FAC "adequately allege[s] the who, what, when, where and how of the alleged fraud" with sufficient particularity. *United States ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1181 (9th Cir. 2016). The eight specific contracts are identified in the FAC and, indeed, are themselves in the record. The who (defendants), what (those eight contracts), where (in the locations identified in the contracts), when (at the time the contracts were bid on, negotiated, and executed), and how (by falsely promising that the SDVOSBs would perform the contract) are adequately discernable such that Rule 9(b)'s purposes of providing defendants'

notice of their alleged wrongdoing and deterring frivolous fraud lawsuits are fulfilled. *See id.* at 1180.

The district court found irrelevant "whether the supply contracts must legally have contained a subcontracting limitation . . . because contractual requirements have no bearing on the truthfulness of Defendants' statements or representations." It is true that the FCA is not designed to "punish[] garden-variety breaches of contract." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 194 (2016). But false promises in the contract can constitute false statements under the FCA. *See Hendow*, 461 F.3d at 1174–75.

> [F]ailure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not to keep is fraud. If the [defendant] knew about the rule and told the [government] that it would comply, while planning to do otherwise, it is exposed to penalties under the False Claims Act.

Id. at 1174 (alterations omitted) (quoting *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 917 (7th Cir. 2005)).

Here, if the SDVOSBs agreed to comply with the subcontracting limitations but had no intent to do so, as the FAC alleges, the falsity element is met under a promissory fraud theory. Any dispute over the meaning of contractual terms is a question inappropriate for resolution at the motion to dismiss stage. *See Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1118 (9th Cir. 2018) ("If a contract is ambiguous, it presents a question of fact inappropriate for resolution on a motion to dismiss.").

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