IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	CRIMINAL ACTION NO.
v.	:	1:17-CR-0234-AT
	:	
JOHN HOLLAND, et al.,	:	**UNDER SEAL**
	:	
Defendants.	:	

ORDER UNDER SEAL

Issues surrounding the testimony of alleged co-conspirators in this case have been roiling the parties and Court throughout this litigation. Defendants have filed motions seeking a hearing pursuant to *United States v. James*, 590 F.2d 575 (5th Cir. 1979). [Docs. 195, 218, 223.] The Government originally identified as many as fifty-five alleged unindicted co-conspirators and argued that a *James* hearing would be impractical. As a compromise, the Court directed the Government to provide a list of co-conspirator statements and its position as to why such statements were admissible. [*See* June 21, 2019 Order, Doc. 446 at 68.] The Court then directed Defendants to file a motion seeking to exclude whatever statements from the Government's provided list that they believed should be excluded. [*Id.*][1]

[1] Consistent with the Court's June 21, 2019 Order, the Government, on August 20, 2019, provided a list of eleven co-conspirator and its position as to why their statements were admissible.

The Court proposed this plan in hopes that this process would narrow the issues in dispute between the parties. [*See* February 11, 2020 Order, Doc. 497 at 1-2.] This hope was not realized. After reviewing the parties' subsequent submissions and holding oral argument on October 3, 2019, the Court explained that the parties' submissions were still insufficient and so directed the parties to try again. [*Id*. at 2.] In so directing, the Court explained that it intended to have "what amounts to a *James* hearing on paper, and the parties must provide their evidence and argument in a manner that will enable this Court to determine whether the Government has met its burden of demonstrating that the Rule 801(d)(2)(E) statements are admissible under the standard described in" *United States v. Hough*, 803 F.3d 1181, 1193 (11th Cir. 2015). [*Id*. at 3.] Because the Government bears the burden of establishing admissibility in this context, the Court directed the Government to file a motion seeking admission of the co-conspirator statements and directed Defendants to respond with argument and evidence as to why particular statements should be excluded under Rule 801(d)(2)(E). [*Id*. at 9-10.]

In accordance with that directive, the Government filed the instant motion to admit co-conspirator statements, now before the Court. [Doc. 507.] Defendants John Holland, [Doc. 520], William Moore, [Doc. 521], and Edmundo Cota, [Doc. 526], have each responded to the motion, and Holland and Moore seek to adopt each other's responses, [Docs. 523, 524], and Cota seeks to adopt the responses of

Holland and Moore, [Doc. 527]. All three Defendants seek to supplement their responses, [Doc. 537], which the Government opposes, [Doc. 538]. As before, Defendants maintain that the Government has failed to establish by a preponderance of the evidence, for purposes of Rule 801(d)(2)(E), that a conspiracy existed at all. The Court addresses the Government's motion and all relevant arguments below.

I. Background

Relevant to the discussion below, Defendants have been charged in a thirteen-count, second superseding indictment (the "Indictment"), alleging that they took part in an illegal kickback conspiracy involving payments for patient referrals. [Doc. 121]. The Government alleges that in exchange for payments, Cota's health clinic ("Clinica")[2] funneled pregnant Hispanic women in need of childbirth services to hospitals owned by Tenet Healthcare Corporation ("Tenet") and run by Holland and Moore. The Government contends that Defendants accomplished this scheme by entering into purportedly sham contracts that disguised the kickbacks as payments for services provided by Clinica to the hospitals. According to the Government, the contracts provided for, *inter alia*, the management of an OB-GYN residency clinic, translations services, Medicaid eligibility paperwork services, community outreach and marketing services. [Doc. 507 at 4, 12]. Further, the Government alleges that

[2] "Clinica" refers globally to the company that owned obstetric clinics as well as the successor entities operated by Edmund and Tracey Cota. The Cotas divorced during the period that the alleged conspiracy occurred, and they split the company into two separate entities. That circumstance is relevant to what occurred but not to the issue now before the Court.

"[t]hese services were in many instances not needed, not justifiable, duplicative, substandard or problematic, and/or not rendered at all." *Id.*

Count 1 of the Indictment accuses Defendants of engaging in a conspiracy, in violation of 18 U.S.C. § 371, to violate the Anti-Kickback Statute (AKS), 42 U.S.C. § 1320a-7b(b)(1)(A), (1)(B), (2)(A), and (2)(B) by paying for or accepting payment in exchange for the referral of patients. In its motion, the Government seeks to admit into evidence the statements of several alleged, unindicted co-conspirators pursuant to Fed. R. Evid. 801(d)(2)(E).

II. Legal Standard

A. Introduction of Co-Conspirator Statements

> For a co-conspirator statement to be admissible under [Rule 801(d)(2)(E)], the Government must show by a preponderance of the evidence that: (1) a conspiracy existed; (2) the defendant and the declarant were members of the conspiracy; and (3) the statement was made during the course and in furtherance of the conspiracy. *United States v. Dickerson*, 248 F.3d 1036, 1049 (11th Cir. 2001). In determining whether the government has met those three requirements, the district court may consider both the co-conspirator's out-of-court statement and evidence independent of it. *Id.* The rule expressly provides, however, that "[t]he statement . . . does not by itself establish . . . the existence of the conspiracy or participation in it." Fed. R. Evid. 801(d)(2); *see United States v. Hasner*, 340 F.3d 1261, 1274-75 (11th Cir. 2003).

United States v. Hough, 803 F.3d 1181, 1193 (11th Cir. 2015).

As an initial matter, this Court stresses that the Government's repeated reliance on *United States v. Calderon*, 127 F.3d 1314, 1326 (11th Cir. 1997), for the

proposition that it need present only "'slight evidence to connect a particular [individual] to the conspiracy,'" [e.g., Doc. 507 at 8], is entirely indefensible after the Eleventh Circuit in *United States v. Toler*, 144 F.3d 1423, 1426-27 (11th Cir. 1998), noted that *Calderon* is at odds with the en banc opinion in *United States v. Malatesta*, 590 F.2d 1379, 1382 (5th Cir. 1979) (en banc) ("The 'slight evidence' rule as used and applied on appeal in conspiracy cases since 1969 should not have been allowed to worm its way into the jurisprudence of the Fifth Circuit. It is accordingly *banished* as to all appeals hereafter to be decided by this Court.") (emphasis in original); *see Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981). Moreover, *Calderon* says nothing about the Rule 801(d)(2)(E) determination; rather, it discusses the standard applied on appeal in reviewing the sufficiency of the evidence to affirm a conviction and not the standard applied by a finder of fact. *See United States v. Zielie*, 734 F.2d 1447, 1457 (11th Cir. 1984) (noting that the district court sits as finder of fact in the Rule 801(d)(2)(E) determination) *abrogated on other grounds by Bourjaily v. United States*, 483 U.S. 171 (1987). Under the Rule 801(d)(2)(E) test, the Government must establish all elements of a conspiracy by a preponderance of the evidence.

To establish that a conspiracy existed, the Government must show that the individuals "knowingly entered into an agreement to commit an unlawful act," *United States v. Chandler*, 388 F.3d 796, 800 (11th Cir. 2004) (citing *United States*

v. Parker, 839 F.2d 1473 (11th Cir. 1988)), and an overt act by one of the conspirators in furtherance of the conspiracy, *United States v. Urban*, 154 F. App'x 132, 133 (11th Cir. 2005); *United States v. Tombrello*, 666 F.2d 485, 490 (11th Cir. 1982). To demonstrate an agreement to enter a conspiracy, the Government need not present direct evidence that an agreement was formed. Rather, "[i]nferences from the conduct of the alleged participants or from other circumstantial evidence of a scheme may provide the basis for establishing that a conspiratorial agreement existed." *United States v. Pantoja–Soto*, 739 F.2d 1520, 1525 (11th Cir. 1984).

This Court must apply a liberal standard in determining whether a statement was in furtherance of a conspiracy. *United States v. Siegelman*, 640 F.3d 1159, 1181 (11th Cir. 2011). "The out of court statement need not be necessary to the conspiracy; it must only further the conspiracy" by, for example, intending "to affect future dealings between the parties." *United States v. Caraza*, 843 F.2d 432, 436 (11th Cir. 1988) (citations and quotations omitted). As a result, "statements between conspirators which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy further the ends of the conspiracy." *Siegelman*, 640 F.3d at 1181 (quotation, alteration, and citation omitted). Likewise, "boasting or bragging is in furtherance of a conspiracy if the statements are directed at obtaining the confidence or allaying the suspicions of co-conspirators." *Id.*

B. The Anti-Kickback Statute

The Government alleges that the unindicted conspirators, all of whom worked for Tenet, conspired to violate the AKS by paying remuneration to Clinica in exchange for referring patients to Tenet hospitals in violation of 42 U.S.C. § 1320a-7b(b)(2). Relevant to this discussion, under that section of the Code it is a crime when an individual

> 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,

The language of § 1320a-7b(b)(2) is generally quite broad in relation to the types of activity that are forbidden but is limited by the requirement that the Government establish that the defendant acted willfully. Under the AKS, "'willfully,' 'means the act was committed voluntarily and purposely, with the specific intent to do something the law forbids, that is with a bad purpose, either to disobey or disregard the law." *United States v. Vernon*, 723 F.3d 1234, 1256 (11th Cir. 2013) (quoting *United States v. Starks*, 157 F.3d 833 (11th Cir. 1998) and 11th Cir. Pattern Jury Instr. 9.1); *see also United States v. Nerey*, 877 F.3d 956, 969 (11th Cir. 2017). The statutory "willfulness" element requires proof of an intentionally wrongful act, and a defendant who believes in good faith that he has not committed

a wrongful act, no matter how unreasonable that belief is, is not guilty. *See Cheek v. United States*, 498 U.S. 192, 203-04 (1991). However, in establishing that a defendant violated the AKS, the Government need not demonstrate that the defendant knew that a specific "referral arrangement violated the [AKS]." *Starks*, 157 F.3d at 837. Rather, "[the AKS] is not a highly technical tax or financial regulation that poses a danger of ensnaring persons engaged in apparently innocent conduct[, and] the giving or taking of kickbacks for medical referrals is hardly the sort of activity a person might expect to be legal." *Id.* at 838.

Accordingly, in order to admit an alleged, unindicted co-conspirator's statement under Rule 801(d)(2)(E), this Court must find that the Government has demonstrated by a preponderance of the evidence (1) that a conspiracy that included Defendants existed, (2) that the alleged co-conspirator knowingly agreed to enter into that conspiracy with Defendants, (3) that the agreement was to pay or receive remuneration in exchange for patient referrals, (4) that the alleged co-conspirator knew that the remuneration-for-referrals arrangement was illegal, and (5) that the statement was made during the course and in furtherance of the conspiracy.

C. Safe Harbor

Subsection 1320a-7b(b)(3) excludes certain acts from coverage under the statute, including §1320a-7b(b)(3)(E), which allows the Secretary of the Department of Health and Human Services to adopt regulations creating safe harbors. Relevant

to this matter, one of the safe harbors appears at 42 C.F.R. § 1001.952(d), which allows medical service providers to enter into contracts with individuals or entities that refer patients if (1) a written agreement exists between the parties, (2) the term of the agreement is at least one year, (3) the agreement covers all of the services to be provided by the referring individual or entity and sets forth the referring individual's or entity's duties with specificity, (4) the aggregate compensation paid to the referring individual or entity over the term of the agreement is set in advance, is consistent with fair market value in an arms-length transaction, and is not determined by the volume or value of any referrals or business otherwise generated between the physician and the hospital, and (5) the services provided do not exceed what is reasonably necessary to accomplish the purpose of the agreement.[3]

D. The One-Purpose Rule

A significant point of contention between the parties is the "one-purpose" or "any purpose" rule that some federal circuit courts (but not the Eleventh Circuit) have adopted. Under that rule, an AKS violation occurs if any purpose of a payment for services was to induce, or was in exchange for, patient referrals, even if services were rendered. *See United States v. Nagelvoort*, 856 F.3d 1117, 1125-26 (7th Cir.

[3] The § 1001.952(d) safe harbor provision is an affirmative defense. *United States v. Kloess*, 251 F.3d 941, 945 (11th Cir. 2001). This Court could locate no case law that discussed whether consideration of a possible affirmative defense is either required or permitted in connection with the Rule 801(d)(2)(E) inquiry. In its motion, the Government indicated that such consideration is appropriate, [Doc. 507 at 6-7], but seemed to change course in its reply, [Doc. 530 at 10]. For a variety of reasons discussed in the text, such as the Government's burden to demonstrate willfulness and the fact that the unindicted co-conspirators are not represented in this action, this Court concludes that consideration of the safe harbor is proper.

2017); (defendants' service contracts violated the AKS because the agreements "took into account the physician's potential referrals"); *United States v. Borrasi*, 639 F.3d 774, 782 (7th Cir. 2011) ("Because at least part of the payments to Borrasi was 'intended to induce' him to refer patients to Rock Creek, 'the statute was violated, even if the payments were also intended to compensate for professional services.'"); *accord United States v. McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000) ("[A] person who offers or pays remuneration to another person violates the Act so long as one purpose of the offer or payment is to induce Medicare or Medicaid patient referrals."); *United States v. Miles*, 360 F.3d 472, 479 (5th Cir. 2004) (AKS "criminalizes the payment of any funds or benefits designed to encourage an individual to refer another party to a Medicare provider for services to be paid for by the Medicare program").

Defendants argue that the one-purpose rule should not apply if the agreement between the Tenet hospitals and Clinica meets the criteria of the safe harbor described above. Under § 1001.952(d), payments made pursuant to a contract that meets the criteria of the regulation is not "remuneration" under the AKS, and none of the criteria impose a requirement similar to the one-purpose rule. Defendants thus argue that the judicially-created one-purpose rule should give way to the express language of the safe harbor. Defendants also point to language of the Office of the Inspector General of the U.S. Department of Health and Human Services ("OIG")

in a Federal Register filing that announced the final version of the safe harbor provision. MEDICARE AND STATE HEALTH CARE PROGRAMS: FRAUD AND ABUSE; OIG ANTI-KICKBACK PROVISIONS, 56 F. Reg. 35952-01, 1991 WL 304395 (July 29, 1991). Defendants contend that the OIG's filing shows that, in implementing the safe harbor, the OIG "intended to override the judicially-created one purpose rule." [Doc. 520 at 10].

Having reviewed the OIG's language in context, however, at most, the OIG's language on the one-purpose rule is neutral, and it appears that the OIG states the opinion that the safe harbor provision conforms with the one-purpose case law. In discussing the meaning of the term "to induce" in the AKS, the OIG stated that its "interpretation of the statute is fully supported by its case law." It then went on to describe several cases that have adopted the one-purpose rule without indicating that the safe harbor was adopted to abrogate those holdings.

Moreover, "guidance documents"[4] authored by the OIG after the adoption of the safe harbor indicate the OIG's belief that the one-purpose rule applies even if the safe harbor requirements are met. In one such guidance discussing the payment of kickbacks by pharmaceutical companies, the OIG stated:

[4] "A guidance document is a statement of general applicability issued by an agency to inform the public of its policies or legal interpretations." DOJ Justice Manual § 1-19.000. Guidance documents "do not have the force and effect of law," *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015) (citation omitted), and "do not bind the public and are not treated as binding by the courts." Justice Manual § 1-19.000. However, a guidance can, for example, "'advise the public' of how the agency understands, and is likely to apply, its binding statutes and legislative rules." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality opinion) (quoting *Perez*, 575 U.S. at 97).

> Although liability under the anti-kickback statute ultimately turns on a party's intent, it is possible to identify arrangements or practices that may present a significant potential for abuse. Initially, a manufacturer should identify any remunerative relationship between itself (or its representatives) and persons or entities in a position to generate federal health care business for the manufacturer directly or indirectly . . . . The next step is to determine whether any one purpose of the remuneration may be to induce or reward the referral or recommendation of business payable in whole or in part by a Federal health care program. Importantly, a lawful purpose will not legitimize a payment that also has an unlawful purpose.

OIG COMPLIANCE PROGRAM GUIDANCE FOR PHARMACEUTICAL MANUFACTURERS, 68 F. Reg. 23731-01 (May 5, 2003).

In a 2001 guidance, directed at physicians' referrals to health care entities, the OIG said, "[i]f any one purpose of remuneration is to induce or reward referrals of Federal health care program business, the statute is violated." MEDICARE AND MEDICAID PROGRAMS; PHYSICIANS' REFERRALS TO HEALTH CARE ENTITIES WITH WHICH THEY HAVE FINANCIAL RELATIONSHIPS, 66 F. Reg. 856-01 (Jan. 4, 2001) (citing *Kats*, 871 F.2d 105 and *Greber*, 760 F.2d 68). In an update to that guidance, the OIG posed and answered the following inquiry:

> With respect to any remunerative relationship so identified, could one purpose of the remuneration be to induce or reward the referral or recommendation of business payable in whole or in part by a Federal health care program? Importantly, under the anti-kickback statute, neither a legitimate business purpose for the arrangement, nor a fair market value payment, will legitimize a payment if there is also an illegal purpose (i.e., inducing Federal health care program business).

OIG SUPPLEMENTAL COMPLIANCE PROGRAM GUIDANCE FOR HOSPITALS, 70 F. Reg. 4858, 4864, 2005 WL 192293 (Jan. 31, 2005). Accordingly, even though the plain language of the safe harbor provision states that faithful performance of a contract that complies with the § 1001.952(d) requirements does not violate the AKS, the OIG—the entity that drafted the safe harbor—appears to believe that the one-purpose rule remains in place.[5] *But see* Department of Health and Human Services, Office of Inspector General, MEDICARE AND STATE HEALTH CARE PROGRAMS: FRAUD AND ABUSE; OIG ANTI–KICKBACK PROVISIONS, 59 F. Reg. 37,202, 37,203 (1994) (clarifying the effect of the safe-harbor provisions by stating that "[w]hether a particular payment practice violates the statute is a question that can only be resolved by an analysis of the elements of the statute as applied to that set of facts. Generally speaking, however, the original final [safe-harbor provisions] *did describe payment practices that would be prohibited, where the unlawful intent exists, but for the safe harbor protection that has been granted*.") (emphasis supplied).

Significant to this Court's analysis is the fact that, in the leading cases in federal courts of appeals that adopt the one-purpose rule, the facts were much more egregious than the facts here.[6] *E.g. Nagelvoort*, 856 F.3d at 1121 (physician paid

[5] The OIG could, of course, simply put one-purpose language in the regulation to simplify the issue.

[6] This Court adds that the facts of those cases are more egregious than the facts here — *at least those facts as developed by the Government so far*. This Court recognizes that the Government contends that the services contracts between the Tenet hospitals and Clinica were sham or pretextual contracts and that the services provided under the contracts "were in many instances not needed, not justifiable, duplicative, substandard or problematic, and/or not rendered at all." [Doc. 507 at 4]. However, as is discussed herein, the Government has not yet produced any evidence that Clinica

for services that he never provided); *Borrasi*, 639 F.3d at 777 (physician put on payroll for job he did not perform and submitted sham timesheets); *McClatchey*, 217 F.3d at 830 (hospital administrator entered contract with physician to provide services that were neither needed nor provided). The safe harbor clearly would not have applied in any of those cases. However, this Court could locate only six court opinions that directly addressed the question of whether the one-purpose rule applied even if the arrangement arguably fell within a safe harbor, and four of them (one of which came from the Northern District of Georgia) indicate that the one-purpose rule survived application of the safe harbor. *See U.S. ex rel. Raven v. Georgia Cancer Specialists I, P.C.*, 1:11-CV-00994-CAP, 2019 WL 13040801, at *17 (N.D. Ga. Mar. 28, 2019) ("Fair market value evidence will not absolve a defendant if one purpose of the exchange is directed towards referrals."); *U.S. ex rel. Westmoreland v. Amgen, Inc.*, 812 F. Supp. 2d 39, 48 (D. Mass. 2011) ("If the requisite intent to willfully or knowingly solicit or offer a kickback is present, formal compliance with a safe harbor is not sufficient to avoid liability under the Anti–Kickback Statute."); *U.S. ex rel. Armfield v. Gills*, 8:07-CV-2374-T-27TBM, 2012 WL 12918277, at *4 (M.D. Fla. Oct. 18, 2012) (denying summary judgment based on the "one purpose"

was paid for services that were not provided, that the amount paid exceeded the fair market value of the services that were provided, that the services were not needed by the hospitals. As to substandard service, one witness/co-conspirator, Joe Austin, is reported in an FBI-302 as recalling that most of the translators did not do a good job, but he also complained about the translators to Ed Cota, [Doc. 522-53 at 5-6], indicating that at least some at Tenet sought to compel Clinica to perform under the terms of the contract.

test despite the defendant's "undisputed fair market value evidence"); *Purcell v. Gilead Scis., Inc.*, 439 F. Supp. 3d 388, 399 & n.88 (E.D. Pa. 2020) (noting that if one purpose is to induce referrals, the arrangement "falls out" of the safe harbor); *but see U.S. ex rel. Chao v. Medtronic PLC*, 2:17-CV-01903-MCS-SS, 2021 WL 4816647, at *6 (C.D. Cal. Apr. 12, 2021) (noting that the AKS is violated if one purpose is to induce referrals but holding that relator must allege facts showing payments were outside of safe harbor); *but see also United States v. Halifax Hosp. Med. Ctr.*, 6:09–cv–1002–Orl–31TBS, 2013 WL 6196562, at *8 (M.D. Fla. Nov. 26, 2013) (noting that applying the one-purpose rule when the 42 U.S.C. § 1320a–7b(b)(3) "Bona Fide Employment Exception" was met would "eviscerate" the exception). Significantly, none of those cases discussed the fact that the one-purpose rule was at odds with a plain reading of the safe harbor.

Then we have the unpublished Eleventh Circuit opinion in *Bingham v. HCA, Inc.*, 783 F. App'x 868 (11th Cir. 2019), cited by Defendants, that further confuses the issue. *Bingham*, a *qui tam* action, concerned two hospitals that built medical office buildings.[7] The physicians who leased space in the buildings referred patients to the hospitals, and the relator argued that the leases were sweetheart deals to encourage referrals in violation of the AKS. *Id.* at 870-71. In affirming the district

[7] Technically, the hospitals hired third party contractors to build the hospitals and lease the medical office space, but the Eleventh Circuit treated the contractors as agents of the hospitals. *Bingham*, 783 F. App'x at 871-72.

court's grant of summary judgment to one of the hospitals and dismissal of the relator's claims against the other hospital, the Eleventh Circuit focused on the word "remuneration" in the AKS and determined that in order for there to be remuneration under the statute, there must be compensation (payment of some form) in exchange for a benefit (referral of patients). *Id.* at 873. Accordingly, the Eleventh Circuit determined, "[i]n a business transaction like those at issue in this case, the value of a benefit can only be quantified by reference to its fair market value," *id.*, and concluded that, because the only evidence in the record indicated that the physicians paid fair market rent for the office space, the relator could not demonstrate that they received remuneration in exchange for referrals, *id*. at 874.[8] Of course, the Eleventh Circuit did not mention the one-purpose rule, but its holding indicates that, in order to demonstrate that Tenet paid remuneration to Clinica to establish an AKS violation, the Government must establish that Tenet paid in excess of fair market value for the services provided by Clinica, which in turn indicates that if a contractual relationship fits within the safe harbor, there is no AKS violation regardless of purpose.

[8] Related to the marginal discussion above regarding whether this Court should consider Defendants' affirmative defenses, *see supra n.2*, the Eleventh Circuit stated in *Bingham* that "the issue of fair market value is not limited to [defendant]'s safe harbor defense, as Relator suggests, but is rather something Relator must address in order to show that [defendant] offered or paid remuneration to physician tenants." *Bingham*, 783 F. App'x at 873. It thus appears that fair market value (or a lack thereof) is a part of the Government's burden in establishing an AKS violation.

To confuse matters yet even more, consider *United States v. Shah*, 981 F.3d 920 (11th Cir. 2020). In that case Shah, a podiatrist, was convicted for his role in a kickback scheme that involved writing prescriptions for costly compounded drugs issued to TRICARE beneficiaries. Shah received $5,000.00 per month to purportedly serve as a "medical director" for company which directed a compounding pharmacy to fill the prescriptions. *Id.* at 923. Under the contract that Shah signed with the company, he was paid the monthly "salary" and was given office space in exchange for "performing on-site supervision and training, management, and administrative responsibilities." *Id.* However, Shah never performed these duties, and, in fact, did not know where his supposed office space was located. *Id.*

The district court gave a one-purpose jury instruction at Shah's trial. *Id.* at 924. The Eleventh Circuit concluded that the one-purpose instruction was erroneous because the AKS "does not require proof of the defendant's motivation for accepting the payment." *Id.* at 925. In other words, with respect to establishing whether the *payee* in a kickback scheme violated the AKS, the Government does not have to prove that any purpose of the remuneration was in exchange for referrals. *Id.* According to the court:

> The text does not require proof of a defendant's 'purposes in soliciting or receiving' a payment. The statute's key phrase—'remuneration . . . in return for [writing Tricare prescriptions]'—says nothing about the reasons *the defendant* accepted the payment. Instead, the words 'in

> return for' are an adjectival prepositional phrase describing *the payment*.")

Id. (emphasis and alterations in original).

The court determined that there was no need to "read a state of mind component into" the payee part of the offense because the statute already included one: that acceptance of the payment was done knowingly and willfully. *Id.*[9] After appearing, at least with respect to the payee of a kickback, to adopt—for lack of a better term—a "no-purpose" rule, the Eleventh Circuit went on to state that its result "creates no tension with other circuits' precedents interpreting the statute [because] [n]one of our sister circuits' opinions addressing the payee crime decided the question raised by the parties' briefs." *Id.* at 925 (referring to the circuit court cases that have adopted the one-purpose rule).[10]

The two Eleventh Circuit cases just discussed do not directly address the one purpose rule, and given the weight of the case law and the OIG's apparent position, this Court deems it appropriate to conclude (again, *see* [Doc. 446 at 47]) that the one-purpose rule applies even if Defendants are able to show that their contracts would otherwise meet the requirements of the safe harbor. However, given that (1)

[9] The Eleventh Circuit contrasted the "payee" language of the AKS with the "payor" language, which requires proof that the payor provided remuneration to "induce" referrals. *Shah*, 981 F.3d at 925.

[10] Because the Government repeatedly cites to *United States v. Hill*, 745 Fed. App'x 806, 815 & n.9 (11th Cir. 2018), for the proposition that an AKS violation is established when a payment was made "at least in part" to induce referrals, the Court points out that *Hill* involved direct payments to patients to visit doctors to obtain prescriptions for compounded medicinal creams, a scheme that would not have qualified under any safe harbor.

neither the Eleventh Circuit nor the majority of the federal courts of appeals have ruled on the issue, (2) no court opinion that this Court could locate has squarely addressed the fact that the one-purpose rule seems to be at odds with the express language of the safe harbor, and (3) the Eleventh Circuit's discussion in *Bingham* that indicates that fair market payments cannot constitute remuneration, this Court further concludes that the issue is unsettled and unclear in this circuit such that, even if the Government can establish that one purpose of the Tenet-Clinica contracts was to induce referrals, that fact does not serve to establish willfulness under the AKS.

Notably, attorneys at an Atlanta law firm, Arnall Golden Gregory LLP, posted a commentary on the Eleventh Circuit's opinion in *Shah*. After describing the opinion's facts and holdings, they noted that the opinion "raises more questions than answers."[11] They further state that

> It remains to be seen how the Eleventh Circuit will treat cases where the alleged recipient of a kickback is receiving payments but is actually providing legitimate services and making referrals. Will it be enough if "one purpose" of the payment was to reward referrals, or does that need to be the primary or sole purpose of the payment? Or will there be a different test? For the "knowingly and willfully" elements, will it be enough that the recipient understands that "one purpose" of the payment is to reward referrals or does he have to understand that the primary or sole purpose of the payment is to induce referrals? Even if the recipient's intent to make referrals in exchange for payments is not an element of the crime, these questions still need to be answered to determine whether the payment was "in return for" referrals within the

[11] Aaron M. Danzig, W. Jerad Rissler, and Kara Gordon Silverman, 11TH CIRCUIT CONFINES ANTI-KICKBACK STATUTE'S "ONE PURPOSE" RULE, available at https://www.agg.com/news-insights/publications/11th-circuit-confines-anti-kickback-statutes-one-purpose-rule/.

> meaning of the statute and whether the recipient acted knowingly and willfully.

See supra n.10.

In other words, learned healthcare lawyers at a big Atlanta law firm, who presumably advise clients in the healthcare industry, do not know whether or how the Eleventh Circuit would apply one-purpose rule if the arrangement qualified under the safe harbor. Other commentators have indicated their belief that, if an arrangement fits within a safe harbor, the one-purpose rule does not apply. *E.g.*, Kerry Bollerman et. al., HEALTH CARE FRAUD, 53 Am. Crim. L. Rev. 1393, 1408 (2016); Cameron T. Norris, REVIVING HANLESTER NETWORK: A SAFE HARBOR FOR HARMLESS REMUNERATIONS UNDER THE ANTI-KICKBACK STATUTE, 67 Vand. L. Rev. 137, 142 (2014); Christopher D. Zalesky, AN ANALYTICAL FRAMEWORK FOR NOVEL BUSINESS ARRANGEMENTS OF PHARMACEUTICAL AND MEDICAL DEVICE COMPANIES, 11 J. Health & Life Sci. L. 116, 121 n.13 (2018); Michael M. Mustokoff, et al., HEALTH CARE PROVIDERS DO NOT DESERVE TO BE TREATED AS "DRUG DEALERS": AN ANALYSIS OF THE CRIMINAL INTENT STANDARD UNDER THE ANTI-KICKBACK ACT, 13 Health Law. 13, 17 (2001), and have pointed out the confusion engendered by the one-purpose rule and subsequent jurisprudence on the issue. Norris, *supra*, 67 Vand. L. Rev. at 147 ("[T]he difference between a 'hope or expectation' and 'one purpose' is anything but clear."); Michael E. Paulhus, Note, THE MEDICARE ANTI-KICKBACK STATUTE: IN NEED OF RECONSTRUCTIVE SURGERY FOR THE DIGITAL AGE,

59 Wash. & Lee L. Rev. 677, 695 (2002) (arguing that the *McClatchy* court's failure to elaborate on the distinction between "hoping" and "intending" confused the one purpose test).

This Court thus cannot automatically impute willfulness simply based on the appearance that one purpose of an arrangement was to induce referrals. Rather, the Government must show that the individuals in question must have known they were breaking the law beyond knowing that one purpose of the deal was to induce referrals.

E. The Interests of the Unindicted Co-Conspirators

Finally, this Court notes that the fact that the alleged unindicted co-conspirators are not involved in this process will inform the analysis of whether they were involved in a conspiracy. The Government is asking a federal court to rule that unrepresented parties, at least some of whom apparently continue to work in the healthcare industry, have engaged in the felonious conduct of violating the AKS. In recognizing the potential problems associated with finding that an individual is an unindicted co-conspirator, the old Fifth Circuit noted that "[i]t would be unrealistic to deny that an accusation, even if unfounded, that one has committed a serious felony may impinge upon employment opportunities." *United States v. Briggs*, 514 F.2d 794, 798 (5th Cir. 1975); *see also id.* at 799 (discussing "the opprobrium resulting from being publicly and officially charged by an investigatory body of high

dignity with having committed serious crimes"); *In re Smith*, 656 F.2d 1101, 1107 (5th Cir. 1981) (pointing out that accusing someone of "criminal conduct without affording him a forum for vindication" works to ignore the "presumption of innocence"); Raeed N. Tayeh, IMPLICATED BUT NOT CHARGED: IMPROVING DUE PROCESS FOR UNINDICTED CO-CONSPIRATORS, 47 Akron L. Rev. 551, 551 (2014) (noting that the fact that a person named as an unindicted co-conspirator has no recourse and "will forever be branded with a notorious-sounding moniker that can cause perpetual harm to their reputations and future employment opportunities").

This Court recognizes that the various motions and responsive pleadings on this issue have been filed under seal, and there may be methods available to avoid publicly naming unindicted co-conspirators during the trial (*if* the parties consent). Nonetheless, a significant number of individuals have access to this information, and a breach or inadvertent release is not entirely unlikely. Moreover, there may come a time when the public interest in these proceedings compels this Court to unseal those documents, or the Eleventh Circuit could well decide that sealing the documents was not appropriate. *See Comm'r, Ala. Dept. of Corr. v. Adv. Loc. Media, LLC*, 918 F.3d 1161, 1166 (11th Cir. 2019) ("The common law right of access to judicial records establishes a general presumption that criminal and civil actions should be conducted publicly and includes the right to inspect and copy public records and documents. It is an essential component of our system of justice and is

instrumental in securing the integrity of the process.") (quotations, alterations, and citations omitted). Notably, in *United States v. Ladd*, 218 F.3d 701, 706 (7th Cir. 2000), the Seventh Circuit reversed a district court's order sealing the identities of unindicted co-conspirators whose statements were admitted pursuant to Rule 801(d)(2)(E). Accordingly, in determining whether the Government has met its burden of demonstrating that a given individual was a co-conspirator, this Court deems it necessary to protect that individual's due process rights as much as possible by considering arguments that the individual might have made if given the opportunity to argue before the Court. With the foregoing framework in mind, this Court now proceeds to determine whether the Government has met its burden to demonstrate that the statements should be admitted under Rule 801(d)(2)(E).

III. Discussion

A. Whether the Government has Demonstrated a Conspiracy that Included Defendants

1. The Government's Evidence and Argument

It is beyond dispute that (1) Holland, Moore, and Cota worked together to create contractual relationships between Clinica and Tenet hospitals, (2) under the terms of the contracts, Tenet paid Clinica, and (3) Clinica referred patients to Tenet hospitals. In attempting to show that this relationship constituted a conspiracy to violate the AKS, the Government relies heavily on the *expected* testimony of its witness and alleged co-conspirator Tracey Cota.

Ms. Cota, who was, for part of the period of the alleged conspiracy, married to Defendant Cota and was also the COO of Clinica. She pled guilty to a single count of conspiracy to violate the AKS, and the Government states that she will testify at the trial in this matter consistent with the stipulated facts that she admitted during her guilty plea hearing. [Doc. 509-13]. According to the Government's summary of those stipulated facts at the plea hearing, "the true purpose of the [contractual] arrangements [between Clinica and Tenet] were to pay for Medicaid patient referrals." *Id.* at 14. The Government did not state, and Tracey Cota thus did not admit, that Clinica was paid for services that were not provided, that the payments were above market rates, or that the individuals performing those services were woefully unqualified. Instead, the Government stated that the Tenet hospitals did not need the services provided for under the contracts *unless* Clinica referred its patients to the hospitals. *Id.* at 16-17.[12]

The remainder of the Government's proffer regarding Ms. Cota's expected testimony comes from Federal Bureau of Investigations form FD-302 interview memoranda ("FBI-302s") that were written by FBI agents after they interviewed Ms. Cota to memorialize the discussions. Based on the information in those FBI-302s, the Government asserts that Ms. Cota and Defendants had an understanding that the

[12] According to the Government at Ms. Cota's plea hearing, "it was sort of a chicken and egg thing. If they didn't have the patient—they didn't have the patient population currently, but when—once Clinica agreed to refer those patients, then a need existed, so they created a need for the contracts." [Doc. 509-13 at 17].

hospitals' "contracts with and payments to Clinica were conditioned on and in exchange for Clinica referring its patients." [Doc. 507 at 13].

As evidence of the nature of the relationship between Clinica and Tenet, the Government points to the contract which provided for Clinica's management of a single clinic as a training site for Atlanta Medical Center's ("AMC") OB/GYN residency program (the "Residency Clinic"). The Government states that "Clinica was paid a management fee based on the amount of net collections from the Residency Clinic. In addition, Clinica could earn up to $3,000 per month in consulting fees and marketing fees related only to that Residency Clinic." *Id.* at 16. According to Tracey Cota's expected testimony, the Residency Clinic did not perform well financially, and she was worried that the Residency Clinic "had to stand on its own to properly support and justify the management fee payments from AMC under the contract. She also knew that the patient volumes and financials at [the Residency Clinic] were not sufficient to justify the payments [Clinica] was receiving." *Id.* at 17. When she voiced her concern about the poor performance at the Residency Clinic, alleged co-conspirator Dane Henry, a Tenet employee, told her not to worry because the overall relationship between Clinica and Tenet was beneficial to Tenet because of all the patients that Clinica referred, including patients from clinics other than the Residency Clinic. *Id.* Tracey Cota "knew that AMC was using the deliveries from all three of [Clinica]'s clinics to justify the management

fee they were paying to [Clinica] for [the Residency Clinic]." *Id.* She thus determined "that the whole thing was about patient volume and admissions from [Clinica]'s clinics." *Id.* The Government, however, does not allege or even indicate anywhere in its motion that either Moore or Holland were involved in the Residency Clinic contract.[13]

The Cotas then developed relationships with Holland and Moore who were, at the time, administrators at North Fulton Medical Center. *Id.* They entered agreements for Clinica to provide translation, marketing and other services at North Fulton, and during negotiations for those agreements, North Fulton administrators asked about how many referrals they could expect to justify the expense of the agreements. *Id.* After the agreements were signed, Moore "focused only on obtaining and increasing volume from Clinica." *Id.* at 18. At one point Moore told Tracey Cota that he wanted all the deliveries from Clinica. *Id.* at 18. When Moore became CEO of AMC, he entered more contracts with Clinica. With regard to the translation services agreement that Clinica entered with AMC, Tracy Cota told the FBI that Clinica was

> chosen for translation services because they brought patients to AMC. [Tracy Cota] advised translation was not what they really did; they only did it in their clinics. [Tracy Cota] was asked if MOORE ever asked at

[13] Moreover, Defendants have presented evidence that the Residency Clinic was a part of AMC's Graduate Medical Education Department. The purpose of that department was to train resident physicians, and many of its programs were not profitable. [Doc. 520-35 at 116-17]. As a result, it is not clear that Ms. Cota's belief that the Residency Clinic had to stand on its own financially was accurate.

> all about their qualifications and she advised he never asked, and she never thought about it.

Id. at 19.

More generally, the Government points to expected testimony from Ms. Cota that Holland and Moore focused heavily on patient volume, frequently asking Ms. Cota about the numbers of patients that Clinica expected to refer to Tenet hospitals, but they did not discuss the quality of the services that Clinica provided. The Government has also presented evidence that Holland and Moore also participated in discussions and sent and received communications by and among Tenet employees about the Tenet relationship with Clinica and the fact that, as a result of the contracts, Clinica would begin referring patients to the participating Tenet hospitals and the fact that the number of patients at those hospitals would increase. In an apparent effort to establish willfulness, the Government briefly states that Defendants attended Tenet training sessions about the AKS.

2. Defendants' Evidence and Argument

Defendants point out that the Government has failed to present any evidence that the contracts at issue were shams and assert that the agreements between Tenet and Clinica fit into the § 1001.952(d) safe harbor. They further argue that the Government's heavy reliance on the fact that Defendants and the alleged co-conspirators discussed referrals and patient volumes is misplaced because those discussions do not demonstrate that they violated the AKS. Defendants have also

presented significant evidence regarding the fact that the lawyers on both sides were heavily involved in drafting and monitoring the services contracts, and as a result, the Government cannot prove that they acted willfully.

For example, communications between Tracey Cota and her lawyer Bill Tinsley show that the two worked closely and extensively together in vetting the contracts, and Ms. Cota sought to avoid violating the AKS. [Docs. 520 at 18-24; Doc. 526 at 5-10]. Defendants also point to evidence that they and other alleged co-conspirators relied on the fact that in-house and outside Tenet counsel vetted the contracts. [Doc. 520 at 21, 37, 39, 69, 70; Doc. 521 at 3, 18-19, 46-47, 55, 67; Doc. 526 at 19].

3. Discussion of the Parties' Evidence and Argument

Having reviewed the record and the parties' arguments, it is clear that the Government has presented scant evidence of Defendants' willfulness.[14] As noted, the Government asserts that Defendants attended AKS training sessions stating, "Holland, Moore and many of their co-conspirators received numerous training sessions . . . focused on compliance with the AKS . . . [which] emphasized the 'one-purpose' test." [Doc. 507 at 25]. However, in support of that statement, the Government cites to "App. 753-894, 887, 896-910, 940-48," which is 167-pages of

[14] In its motion, [Doc. 507], the Government does not discuss willfulness. Indeed, a search of the document indicates that no form of the word "willful" appears in the motion.

apparent PowerPoint software slides. The Government might as well have cited to "somewhere in the exhibits." Moreover, the PowerPoint slides provide only a vague idea of the content of the training by merely listing the topics to be discussed. At "App. 887," [Doc. 511-4 at 9], is a slide that states:

> Anti-Kickback Basics
>
> - Prohibited conduct:
>   - Knowing & willful – One purpose test
>   - Solicitation/receipt, or
>   - Offer/payment of
>   - Remuneration (anything with economic value)
>   - In return for referring a Federal program patient, or
>   - To induce the referring, purchasing, leasing, or arranging (or recommending of same) of items or services paid by a federal program
>
> - Remuneration:
>   - Anything of value
>   - Cash or in-kind
>   - Direct or indirect
>   - Examples: gift certificates, free goods, below market rent, free medical waste disposal, free office cleaning

As is evident, the one-purpose rule (or test) might well have been a part of the discussion at an AKS compliance training session, but the Government's evidence does not establish what was said about the one-purpose rule. As the above discussion regarding the one-purpose rule clearly demonstrates, despite the Government's

insistence otherwise, the one-purpose rule is not clear, and whoever led the training could have in good faith read the plain language of the safe harbor (which was also discussed in the training, *id.* at 10) and determined that the one-purpose rule did not apply if a transaction fit within a safe harbor.[15]

This Court also agrees with Defendants that discussions of patient volume do not demonstrate a willful violation of the AKS. It is common sense that a hospital administrator would want to know how many patients are likely to show up at a hospital on a given day (or over a given period) for numerous reasons that have nothing to do with violating the AKS. For example, Tenet hospital administrators likely needed to know how many Spanish-speaking women delivered at a hospital so that they could verify that the payments made to Clinica for translation services were accurate and not above fair market value.

The Government takes exception to the purportedly "myopic view" that it is not a crime to discuss the number of referrals. [Doc. 530 at 6]. However, its purported rationale for focusing on those discussions—to prove that Clinica referred patients to Tenet—is an issue that is entirely undisputed. The Government also argues that evidence of such discussions tends to show intent. While that may be true to a limited extent, because there are many legitimate reasons for a hospital

[15] In its reply memorandum, the Government states that "[c]ompliance training is but one relevant piece of proving Defendant's wrongful intent," [Doc. 530 at 17], but they have not pointed to any other relevant pieces.

administrator to have an interest in volume and referrals, it certainly does not convince this Court that Defendants acted willfully.[16]

The Government also argues that Defendants' discussions of referrals and volume show that the agreements between Tenet and Clinica took into account the volume or value of referrals. [Doc. 507 at 28]. This Court finds, however, that, at most, the discussions are not inconsistent with a finding that the agreements took the value of referrals into account, but they fall short of proving it. As noted, hospital administrators have ample, legal reasons to monitor patient volume, and as a result the discussions, standing alone, do not establish that payments under the agreements were for something more than the value of the services provided.

"Likewise, mere oral encouragement to refer patients or the mere creation of an attractive place to which patients can be referred does not violate the law." *United States v. McClatchey*, 217 F.3d 823, 834 (10th Cir. 2000) (quoting jury instruction); *United States v. LaHue*, 261 F.3d 993, 1003 n.10 (10th Cir. 2001); 4th Cir. Pattern Jury Instructions, available at https: //www.govinfo.gov/content/pkg/USCOURTS-

[16] The Government cites to *United States ex rel. Williams v. Health Management Associates, Inc. et al.*, 3:09-cv-130, 2014 WL 2866250, at *11-12 (M.D. Ga. June 24, 2014), contending that the opinion rejected the argument that "'volume evidence' has no weight in proving an AKS violation." [Doc. 530 at 7]. Aside from the fact that the portion of the opinion that the Government quotes does not relate to volume evidence or discussions of referrals, the citation is interesting because *Williams* is the *qui tam* civil AKS case against, *inter alia*, Tenet about its relationship with Clinica. The Government intervened in that case. In denying the defendants' motions to dismiss, the Middle District of Georgia reviewed the allegations of the complaints, including the Government's complaint, *id.* at 5-10, and those allegations are more damning than the Government's allegations here. *E.g., id.* at 12 ("The factual allegations and exhibits viewed in the light most favorable to Plaintiffs support the conclusion that North Fulton . . . paid for services that [Clinica] did not actually provide."). Presumably, either many of the allegations in the *Williams* complaints proved to be untrue, or the Government is now holding back evidence.

ca4-16-04226/pdf/USCOURTS-ca4-16-04226-0.pdf. It is thus clear that, standing alone, the fact that Moore and/or Holland may have asked—or even badgered—the Cotas to refer more patients is not an AKS violation.

Defendants are also entirely correct in arguing that, while the Government repeatedly states that the contracts between Tenet and Clinica were pretextual, they have not presented any evidence to support that assertion or that Defendants believed the contracts were not legitimate. Accordingly, it appears that the Government hitches its entire claim of willfulness to (1) the one-purpose rule and (2) the facts that the Tenet hospitals did not need the services provided by Clinica unless Clinica referred patients, and the amount of work that Clinica did under the contracts expanded when the number of patients that Clinica referred to Tenet hospitals increased.

However, the discussion above demonstrates that the one-purpose rule is not clear, and this Court has already determined that it cannot infer willfulness based on the one-purpose rule. While the Government may legitimately allege that it appears that one purpose of the contractual relationships between Tenet and Clinica was the referral of patients, it is also apparent that the services provided by Clinica were valuable to Tenet and to the patients. At Tracey Cota's guilty plea hearing, for example, the Government noted that the majority of Clinica's patients did not have health insurance, but many qualified to have the costs associated with labor and

delivery services covered by Medicaid's Emergency Medical Assistance ("EMA") program. According to the Government,

> [t]he EMA paperwork in large part was completed with the patients at the clinics to get the process started. [Tracey Cota] supervised and managed the women who work—women and men who worked in the office who assisted the women with filling out that paperwork.
>
> And then on the back end, the way it works, Your Honor, is you get the financial information from the women to fill out the application, and once the woman delivers her baby, there's a certification that has to be made by the physician who delivered the baby. And, then, that is sent back to Clinica and their folks to fully process the paperwork.

[Doc. 509-13 at 20]. Obviously, Clinica was uniquely situated to provide these services to benefit both the Tenet hospitals and the undocumented patients by securing Medicaid/EMA payments for the delivery of, and treatment for, babies; and, the Government's own statements show that Clinica was good at it. Because of Clinica's work, Tenet was able to secure millions in EMA payments, and the patients left the hospitals with babies and without significant medical debt. Accordingly, there is ample evidence showing that Clinica provided valuable services under the contracts and no evidence that the contracts were a sham. The Government has further failed to dispute, or even respond to, Defendants' contention that the contracts qualified under the § 1001.952(d) safe harbor.

With regard to the Government's reliance on the fact that Tenet did not need the Clinica services unless Clinica referred patients, as noted in the margin above, the Government at Tracey Cota's guilty plea hearing referred to the arrangement as

a "sort of a chicken and egg thing," [Doc. 509-13 at 17], where the need for services did not arise until Clinica referred its patients. Having considered the matter, it seems peculiar and perhaps unjust to base criminal liability on a chicken and egg thing. Common sense tells us that as more Medicaid-covered, Hispanic women show up at a hospital to deliver babies, more translation services, services related to EMA eligibility determination paperwork, educational services, and birth certificate services are needed, and the provider of those services has a legitimate expectation of higher pay for more service.

As this Court has already determined, "a hospital may need a service, and in picking an entity to provide that service, the hospital is not prohibited from choosing to enter into a contract with an entity that also has the capacity to refer patients over one that does not." [Doc. 446 at 46]. This Court has also determined that it does not violate the AKS to create an attractive place to refer patients. *McClatchey*, 217 F.3d at 834. Tenet hospitals hired Clinica to provide staff that could, among other things, act as translators for Hispanic women in labor and complete the Medicaid paperwork so that the hospitals could be reimbursed for delivering the babies. The existence of those services made the Tenet hospitals an attractive place for Clinica to send its patients because Clinica knew that its employees would be there to help with translation and Medicare eligibility. To be sure, it would be naive to believe that Defendants were not, at least, thinking about referrals when they negotiated and

entered the service contracts. Moreover, the Government has presented the statements of some alleged co-conspirators that indicate a more focused attention on referrals than on the quality of the services provided by Clinica. Nonetheless, the evidence produced by the Government does not show by a preponderance of the evidence that Defendants did anything more than create an attractive arrangement for referrals. The fact that Tenet hospitals cancelled the contracts when the Clinica referrals dried up is likewise consistent with Tenet's desire to reduce costs that were not justified; there is less need for translation services if there are fewer Hispanic patients delivering babies.

In its reply memorandum, the Government contends that "the Court should reject Defendant's invitation to hold an impermissible summary judgment proceeding." [Doc. 530 at 8]. This is not, however, a summary judgment proceeding; it is a *James* proceeding at which the Government has to meet its burden to show that certain statements are admissible. While the Government is correct that the rules do not permit a pretrial determination of the sufficiency of the evidence, Rule 801(d)(2)(E) *requires* that, before co-conspirator statements are admitted into evidence, the Government has to make an evidentiary showing that there was, in fact, a conspiracy to violate the law.

Also in its reply, the Government changes course and argues that this Court cannot consider Defendants' affirmative defenses of advice of counsel and the AKS

safe harbor. The Government relies on *United States v. Vernon*, 723 F.3d 1234, 1269 (11th Cir. 2013), for the proposition that only a jury is permitted to consider "whether a defendant relied in good faith on advice of counsel and therefore did not act willfully." But the Government once again takes the Eleventh Circuit's statement completely out of context, as the Court went on to state that its role in the appeal was "to view the evidence in the light most favorable to the government," leaving credibility determinations to the jury. The Eleventh Circuit's statement would apply equally to a determination that an AKS violation occurred or that a conspiracy existed. Under Rule 801(d)(2)(E), this Court *must* make these determinations before admitting co-conspirator statements that the Government wants to use at trial, and the Court does not usurp the province of the jury by doing so. To the degree that the Government did not want this Court evaluating the strength of its evidence, it should not have sought admission of the co-conspirator statements.

Further, where willfulness is an element that this Court must find in order to admit the co-conspirator statements, advice of counsel and the safe harbor are clearly relevant. *United States v. Petrie*, 302 F.3d 1280, 1287 n.6 (11th Cir. 2002) (noting that good faith reliance on counsel's advice can "negate[] the mens rea element of willfulness"). To admit the co-conspirator statement under Rule 801(d)(2)(E), the Government must prove the conspiracy by a preponderance of the evidence, and this

Court is aware of no reason that Defendants would be prevented from producing their own evidence.

This Court is further unconvinced by the Government's contention that the [redacted] a former Tenet attorney who approved numerous contracts between Tenet and Clinica, demonstrates that Defendants cannot rely on the advice of counsel. [redacted] was shown apparent *post hoc* communications and other documents[17] shared among Tenet employees and was asked what she would have done if she had been aware of them at the time. In response, [redacted] states that the communications were concerning and that she would have investigated them. However, the fact that Tenet employees may have made statements after the contracts were executed that caused concern by a healthcare attorney falls significantly short of establishing that the employees failed to make a full and complete good faith report of all material facts to an attorney.

The apparent facts are that attorneys for both Tenet and Clinica vetted the contracts to ensure that they would not violate the law. Accordingly, when the contracts were executed, Defendants had a reasonable basis to believe that the contractual arrangements under the terms of the contracts were legal. That a party

[17] While is not evident from the testimony precisely when the documents and communications were created, it was clearly *after* the contracts had been approved by counsel and executed.

or Tenet employee later made a comment about referrals or volume does not suddenly render the contractual relationship illegal. In the absence of evidence that the terms of the contracts were not executed faithfully, that Clinica was paid for services that were not rendered, that the payments under the contract were in excess of fair market value, or that some other form of nefarious conduct (other than discussions of volume) occurred, this Court cannot find that any of the involved individuals had reason to believe that they were violating the law.

The typical AKS case involves facts such as physicians being paid for jobs that they did not perform, receiving speaking fees for speeches not given, ordering unnecessary tests, prescribing unnecessary drugs, using medical devices from companies in which they have an ownership interest, or simply receiving direct payments for referrals. In such cases, willfulness is evident because, for example, a doctor who is paid for a job that she does not perform obviously knows that she is doing something wrong. Here, the Government has provided neither direct evidence of willfulness nor a sufficient basis for this Court to infer willfulness beyond the arguments discussed and discounted above.

IV. Conclusion

In the absence of evidence of willfulness, this Court finds that the Government has failed to establish by a preponderance of the evidence that Defendants conspired to violate the AKS. In the absence of a conspiracy, the Government's motion to

admit statements under Rule 801(d)(2)(E), [Doc. 507], fails and is thus **DENIED**. Defendant's motions to adopt each other's responses, [Docs. 523, 524, 527], and Cota's and Holland's motions to seal, [Doc. 525, 529], are **GRANTED** as unopposed. As this Court did not rely on the Declaration of Thomas S. Crane, [Doc. 537-1], Defendants' joint motion to supplement their responses, [Doc. 537], is **DENIED** as moot.

It is **SO ORDERED** this 15th day of November, 2022.

HONORABLE AMY TOTENBERG
UNITED STATES DISTRICT JUDGE