APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 21a0275n.06

Case No. 20-2128

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES	)	
OF AMERICA and	)	ON APPEAL
STATE OF MICHIGAN,	)	FROM THE
ex rel.,	)	UNITED
Plaintiffs-Relators,	)	STATES
	)	DISTRICT
ASHWANI SHEORAN, RPh,	)	COURT
Plaintiff-Relator/	)	FOR THE
Appellant,	)	EASTERN
	)	DISTRICT
v.	)	OF MICHIGAN
	)	
WAL-MART STORES	)	
EAST, LP, TOI WALKER;	)	
DOUG HENGER;	)	**O P I N I O N**
ALFRED RODRIGUEZ;	)	
RICHARD LOCKARD, M.D.,	)	
Defendants-Appellees.	)	

BEFORE: CLAY, McKEAGUE, and LARSEN, Circuit Judges.

McKEAGUE, Circuit Judge. In 2013, Ashwani Sheoran filed a sealed complaint under the False Claims Act and the Michigan Medicaid False Claims Act alleging that a doctor was writing improper prescriptions for high dosages of opiates and that Walmart was filling those prescriptions. After five years, the United States and State of Michigan declined to intervene and prosecute the case on Sheoran's behalf, and the district court unsealed the complaint. The district court granted the defendants' motions to dismiss and denied Sheoran's motion for reconsideration. Sheoran challenges the district court's grant of the motions to dismiss, its alleged failure to address claims under the Michigan Medicaid False Claims Act, and its decision not to hold oral argument for the motions.

We find Sheoran's arguments to be without merit and **AFFIRM** the judgment of the district court.

I

In April 2012, Sheoran began working as a full-time floater pharmacist for Walmart in Michigan, which meant that he would work at different pharmacies around the state. In July 2012, Sheoran arrived to work at a Walmart in Bad Axe, Michigan and observed a line of roughly ten customers waiting for the pharmacy to open, all of

whom were patients of Dr. Richard Lockard. Sheoran claims that they all presented prescriptions for very high doses of opiates, so high that one patient would have died had he or she "actually taken" the prescription.

Then, in August 2012, while working at the same Walmart, Sheoran claims he received large numbers of opiate prescriptions from Dr. Lockard's office and declined to fill them due to their high doses. Sometime afterwards, Sheoran obtained one unidentified patient's "Medical Expenses Summary," which listed that patient's prescriptions and costs over a five-year period. Sheoran concluded that because the cost to the patient was $1-2 for many of the prescriptions, they must have been submitted to Medicare or Medicaid for payment, which would potentially trigger liability under the False Claims Act. Claiming that this Medical Expenses Summary was one example of thousands, he brought his concerns to his supervisor. Walmart investigated and found that the pharmacy was not following Walmart's internal procedures for filling faxed prescriptions but did not conclude that any laws or regulations were violated. After a meeting where Sheoran was reprimanded for stealing the Medical Expenses Summary (later attached to his complaint) in violation of Walmart's policies, he was fired on January 21, 2013.

On February 11, 2013, about a month after he was terminated, Sheoran filed a complaint under

seal alleging False Claims Act ("FCA") violations against Walmart, three individual employees of Walmart, and three doctors. After amending his complaint, Sheoran alleged (1) presentation of false claims under the FCA and Michigan Medicaid False Claims [*sic*] Act ("MMFCA"); (2) use of false records under the FCA and MMFCA; (3) conspiracy to violate the FCA; and (4) retaliation under the FCA by Walmart. After five years, the United States and State of Michigan declined to intervene in the case, so the district court unsealed the complaint on March 7, 2018. The Walmart defendants and one of the doctors, Dr. Lockard, moved to dismiss, and the district court granted their motions on August 20, 2019. Sheoran moved for reconsideration, which the district court denied on September 28, 2020. This appeal followed.

II

Sheoran challenges the decisions below in three ways. The bulk of his briefing focuses on whether the district court was incorrect in granting the motions to dismiss. He also argues that that the district court erred by failing to include his MMFCA claims in its summary of claims in the orders and that the district court abused its discretion by waiving oral argument on the motions. We address each argument in turn.[1]

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[1] Sheoran's statement of issues does not address whether the district court correctly granted the motions to dismiss, and instead addresses only his MMFCA and oral argument claims.

A. Dismissal for failure to state a claim

We review a district court's dismissal for failure to state a claim de novo. *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 562 (6th Cir. 2003). To survive a motion to dismiss, a complaint must contain more than "labels and conclusions," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and we may reject "mere assertions and unsupported or unsupportable conclusions." *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 876 (6th Cir. 2006). Complaints brought under the FCA require plaintiffs to satisfy the particularity requirements of Federal Rule of Civil Procedure 9(b). *Yuhasz*, 341 F.3d at 563. This heightened standard requires that the plaintiff "allege the time, place, and content of the alleged misrepresentation . . . [;] the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *United States ex rel.*

Therefore, we could restrict our analysis to those two claims alone because Federal Rule of Appellate Procedure 28(a)(5) specifies that "[t]he appellant's brief must contain" the issues presented in the statement of issues; therefore, issues not included may be dismissed as forfeited. *See United States v. Calvetti*, 836 F.3d 654, 664 (6th Cir. 2016). Nonetheless, given its importance on appeal, we will address whether the district court correctly granted the motions to dismiss. To the extent that Sheoran's briefing raises other arguments, many of which are undeveloped and presented in only a paragraph or two, we deem them forfeited because of Sheoran's perfunctory treatment of them and because they were not included in Sheoran's statement of issues. See *id.*; *United States v. Johnson*, 430 F.3d 383, 397 (6th Cir. 2005); *United States v. Burton*, 828 F. App'x 290, 293 n.1 (6th Cir. 2020); *Barrett v. Detroit Heading, LLC*, 311 F. App'x 779, 796 (6th Cir. 2009).

Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 643 (6th Cir. 2003) (quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 161–62 (6th Cir. 1993)).

1. False claims and false records

Sheoran's first two counts allege that the defendants knowingly presented false claims to the government and knowingly made false records for use in those claims. To establish a claim under the FCA, a plaintiff must allege that (i) the defendant presented a claim of payment to the government, (ii) the claim was false or fraudulent, (iii) the defendant knew it was false or fraudulent, and (iv) the false claim was material to the government's payment. *See United States ex rel. Sheldon v. Kettering Health Network*, 816 F.3d 399, 408 (6th Cir. 2016). Sheoran's complaint falls short on all four elements.

a. *Presentment*

A critical component of an FCA complaint is the allegation that a claim for payment was presented to a government entity. *See Sanderson*, 447 F.3d at 878 (describing presentment as the "*sine qua non* of a False Claims Act violation"). Under Rule 9(b), specifics on presentment are required, such as the types of employees involved and the "specific dates" underlying the claims. *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 515 (6th Cir. 2007); *Sanderson*, 447 F.3d at 877–78.

Sheoran claims that Exhibit A of the complaint, the Medical Expenses Summary, establishes presentment, but that exhibit is simply a summary of one unidentified patient's prescriptions and expenses. Nothing about the document indicates that any of the entries were presented to a government agency. Sheoran argues that because some of the payments were for $1-2, the patient must have received government reimbursement through Medicare or Medicaid. But Rule 9(b) requires far more than mere speculation. *See Sanderson*, 447 F.3d at 877 (noting that plaintiffs cannot simply allege that claims "must have been submitted, were likely submitted, or should have been submitted to the Government") (quoting *United States ex rel. Clausen v. Lab'y Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002)). As the district court noted, many reasons could exist for the low costs to the patient, such as subsidizing by private insurance companies. Because this bare-bones assertion must be rejected, Sheoran cannot satisfy the presentment element of his FCA claims.

b. *Falsity*

The second element of an FCA claim is that the claim submitted must be "false or fraudulent." 31 U.S.C. § 3729(a)(1)(A), (B). Again, Sheoran relies solely on Exhibit A to satisfy this element, claiming that the "high doses" listed "would kill the person" if taken as prescribed. But we must reject mere "conclusions" and "naked assertions" in a complaint.

See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Exhibit A simply lists one patient's prescriptions and expenses and contains no other medical information, and Sheoran offers none in his complaint. It is impossible to evaluate whether the doses were too high without more information regarding the patient's medical history or needs. Therefore, there is no way to conclude that Exhibit A establishes falsity.

c. *Knowledge*

Next, Sheoran must sufficiently allege that the defendants "knowingly" presented false claims or "knowingly" created false records for false claims. 31 U.S.C. § 3729(a)(1)(A), (B); *see id.* § 3729(b)(1). This is a high bar, requiring "that a defendant knows of, or 'acts in deliberate ignorance' or 'reckless disregard' of, the fact that he is involved in conduct that violates a legal obligation to the United States." *United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 842 F.3d 430, 437 (6th Cir. 2016) (quoting 31 U.S.C. § 3729(b)). Once again, even assuming that the prescriptions in Exhibit A were submitted to the government, nothing in those prescriptions would indicate to Walmart that they were illegal, false, or fraudulent. Sheoran's complaint does not describe how Walmart could have concluded the prescriptions were false or fraudulent in some way, so he fails to satisfy this element.

d. *Materiality*

Finally, Sheoran must show that the alleged misrepresentation made to the government was "material" to the government's decision to reimburse the claim. *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2001 (2016). This "demanding" standard should go "to the very essence of the bargain," as the FCA was not enacted to punish "garden-variety" violations. *Id.* at 2001–03 & n.5. Assuming that Walmart actually submitted the claims in Exhibit A to the government, the government would have had access to the same knowledge that Walmart had regarding the allegedly "high doses" of controlled substances prescribed. Even if we accept as true Sheoran's representation that the prescriptions in Exhibit A were submitted to the government and that the exhibit, on its face, shows false or fraudulent claims, then the government's decision to pay those claims despite that knowledge "is very strong evidence that those requirements are not material." *Id.* at 2003. Therefore, Sheoran fails to satisfy this element.

2. *Conspiracy*

Sheoran's third count of FCA conspiracy against Walmart falls with the two preceding substantive claims. Conspiracy under the FCA is derivative of the substantive claims of submitting a false claim to the government or creating a false record. See 31 U.S.C. § 3729(a)(1)(C); *United States ex rel. Crockett v. Complete Fitness Rehab., Inc.*, 721 F. App'x 451, 459 (6th Cir. 2018). As we have

concluded in the preceding section, Sheoran's first two counts failed to meet the pleading standards of Rules 12(b)(6) and 9(b), which means his conspiracy claim fails as well. See *Crockett*, 721 F. App'x at 459 (holding that the plaintiff's "inability to show that false claims were actually submitted to the government means that her . . . false-claims-conspiracy counts are likewise subject to dismissal, because the existence of such false claims is a precondition to [this] theory").

3. *Retaliation*

Finally, the district court correctly dismissed Sheoran's retaliation claim. FCA retaliation claims are not subject to Rule 9(b)'s heightened standards, see *id.* at 460, but "a plaintiff must show: (1) he engaged in a protected activity; (2) his employer knew that he engaged in the protected activity; and (3) his employer discharged or otherwise discriminated against the employee as a result of the protected activity." *Yuhasz*, 341 F.3d at 566. Sheoran's retaliation claim fails because he failed to plead that Walmart knew he was pursuing an FCA action. Employees "must make clear their intentions of bringing or assisting in an FCA action" to show retaliation. *Id.* at 568. Sheoran claims that he told his superiors about the allegedly false prescriptions, but that is not enough. Even when an employee tells their employer that they have witnessed illegal conduct and that other companies have incurred FCA liability for similar conduct, that fails to

establish that an employee is pursuing an FCA action. *Id.* at 567; *McKenzie v. BellSouth Telecomms., Inc.*, 219 F.3d 508, 518 (6th Cir. 2000) (noting that telling an employer about their alleged regulatory violations was not sufficient to satisfy this requirement). Therefore, Sheoran's retaliation claim was properly dismissed.

B. *Michigan Medicaid False Claims Act*

Next, Sheoran claims that the district court erred by failing to address his MMFCA claims when it summarized Sheoran's claims in its order. But first, contrary to Sheoran's assertions on appeal, two of the four claims in his complaint were not brought under the MMFCA at all. Sheoran's conspiracy and retaliation claims referenced only federal FCA provisions. There can be no error in the district court's failure to discuss claims that did not exist.

Second, the district court addressed the other two claims, recognizing that Sheoran brought them under "the Michigan Medicaid False Claims Act" as well as the federal FCA. The district court's analysis applied to both sets of claims, and it dismissed the state law claims along with the federal ones.

To the extent Sheoran argues that the MMFCA claims should have been analyzed differently than the federal FCA claims, that argument is contradicted by both the proceedings below as well as precedent. Neither the complaint nor the motion to dismiss briefing identified any

distinctions between the FCA and MMFCA in this case. And that makes sense, because the FCA and MMFCA are identical in every relevant respect here and are frequently analyzed in tandem. *See, e.g.*, *Hendricks v. Bronson Methodist Hosp., Inc.*, No. 1:13–CV–294, 2014 WL 3752917, at *2–7 (W.D. Mich. July 30, 2014) (analyzing FCA and MMFCA claims together). The federal FCA prohibits "knowingly present[ing]" a "false or fraudulent claim" as well as "knowingly mak[ing]" a "false record" "material" to such a claim, 31 U.S.C. § 3729(a)(1), and the MMFCA contains two substantially similar provisions, see Mich. Comp. Laws § 400.607(1), (2); *Hendricks*, 2014 WL 3752917, at *2. Therefore, there was no error in the district court analyzing both sets of claims the same way.

C. *Oral argument*

Sheoran suggests that the district court issued "confusing" orders, dismissed his claims "without a hearing or clear understanding of the factual and legal issues," and thereby erred in waiving oral argument for the motions. We review whether a district court impermissibly decided a motion without oral argument for an abuse of discretion. *Mann v. Conlin*, 22 F.3d 100, 103 (6th Cir. 1994).

We see no abuse of discretion here. The Federal Rules of Civil Procedure and the district court's local rules expressly permit deciding motions without oral argument. Fed. R. Civ. P. 78(b); E.D.

Mich. Loc. R. 7.1(f). And doing so serves many valuable functions for the judiciary, such as allowing district courts to "effectively manage very crowded case dockets," especially in instances where "the legal issues are abundantly clear and . . . firmly settled." *Yamaha Corp of Am. v. Stonecipher's Baldwin Pianos & Organs, Inc.*, 975 F.2d 300, 301 n.1 (6th Cir. 1992). Deciding motions on the briefs also "encourages improved brief writing" and "forces the parties to thoroughly research the legal basis on which their positions rest." *Id.* We routinely approve of a district court's decision to decide motions without oral argument and see no reason to reject the court's decision to do so here.

In response, Sheoran claims the orders were "very confusing" and that the district court failed to "understand the complex issues in this case." But as the analysis above demonstrates, this was a straightforward FCA case that was properly decided on the briefs. And the specific claims that Sheoran makes regarding the district court's allegedly "confusing" analysis do not show an abuse of discretion. For example, Sheoran claims that the district court failed to note that FCA liability can be established if claims are submitted "to certain third parties acting on the Government's behalf" and not just to the government itself. Sheoran's statement of the law is accurate, see *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1510 (2010), but irrelevant. Sheoran did not claim that the

payments were submitted to third parties, so the district court had no reason to discuss that aspect of the law. Later, Sheoran claims that the district court's use of the phrase "appears to allege" was an "admission" that confirmed "the district court was not confident" about what Sheoran's complaint was alleging and that oral argument was necessary "to clear up the court's confusion." We reject Sheoran's invitation to parse the words of the district court so finely or conclude that the district court was confused based on its use of that phrase. In sum, Sheoran's arguments have no merit and fail to show an abuse of discretion in the district court's decision to decide the motions without oral argument.

III

We **AFFIRM** the judgment of the district court.

APPENDIX B

Case No. 20-2128

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA and STATE OF MICHIGAN, ex rel., Plaintiffs-Relators,	)	**O R D E R**
ASHWANI SHEORAN, RPh, Plaintiff-Relator/ Appellant,	)	
v.	)	
WAL-MART STORES EAST, LP, TOI WALKER; DOUG HENGER; ALFRED RODRIGUEZ; RICHARD LOCKARD, M.D., Defendants-Appellees.	)	

BEFORE: CLAY, McKEAGUE, and LARSEN, Circuit Judges.

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

Therefore, the petition is denied.

The petition, brought by Plaintiff-Appellant, included multiple specious allegations of judicial corruption. Plaintiff-Appellant's counsel cites to no evidence to substantiate these inappropriate allegations. Plaintiff-Appellant's counsel is ORDERED to show cause as to why she should not be sanctioned for violating Federal Rule of Civil Procedure 11(b) within twenty-one (21) days following the filing of this order. *See* Fed. R. Civ. P. 11(c)(1), (3).

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt

Deborah S. Hunt, Clerk

*Judges White, Readler, and Murphy, recused themselves from participation in this ruling.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA and the STATE OF MICHIGAN, ex rel., ASHWANI SHEORAN, RPh, Plaintiff-Relator,	Civil Case No. 13-10568 Hon. Linda V. Parker

v.

WAL-MART STORES EAST, LP, d/b/a WALMART, a foreign corporation, TOI WALKER, DOUG HENGER, ALFRED RODRIGUEZ, RICHARD LOCKARD, M.D., NAVEED MAHFOOZ, M.D., and TAREK EZZEDDINE, M.D., Defendants.

_____/

OPINION AND ORDER (1) GRANTING DEFENDANT LOCKARD'S MOTION TO DISMISS SECOND AMENDED COMPLAINT (ECF NO. 58) AND (2) GRANTING WALMART DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT (ECF NO. 61)

Plaintiff-Relator ("Relator"), Ashwani Sheoran, RPh, on behalf of himself, the United States and the State of Michigan, initiated this lawsuit on February 11, 2013, filing a *qui tam* complaint under seal against Defendants (1) Walmart, (2) Toi Walker, (3) Doug Henger, (4) Alfred Rodriguez, (5) Richard Lockard, M.D., (6) Naveed Mahfooz, M.D., and (7) Tarek Ezzeddine, M.D. (Compl., ECF No. 1.) As a matter of course, on April 16, 2013, Relator filed his First Amended Complaint ("FAC") against the same Defendants and alleging the same claims. (Am. Compl., ECF No. 3.)

On December 7, 2018, Relator filed his Second Amended Complaint ("SAC") alleging violations of (1) the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq., (2) the Fraud Enforcement Recovery Act of 2009 ("FERA"), 31 U.S.C. §§ 3729–3733, (3) the Michigan Medicaid False Claims [*sic*] Act ("MMFCA"), MICH. COMP. LAWS § 400.601 et seq., and (4) the retaliation provisions of 31 U.S.C. § 3730(h). (Sec. Am. Compl., ECF No. 57.) The federal and state FCA claims are against all Defendants, Sec. Am. Compl. at 25–28, Pg. ID 589–592, while the FCA retaliation claim is only against Walmart, *id.* at 28, Pg. ID 592. On March 8, 2018, this Court unsealed the complaints after the United States and the State of Michigan declined to intervene. (ECF Nos. 24, 25.)

Presently before the Court are Defendant Lockard's and Defendants Wal-Mart Stores East, LP,

Toi Walker, Doug Henger, and Alfred Rodriguez's (the "Walmart Defendants") respective Motions to Dismiss[1] pursuant to Federal Rule of Civil Procedure 12(b)(6). (Lockard Dismiss Mot., ECF No. 58; Walmart Dismiss Mot., ECF No. 61.) The Motions have been fully briefed. (ECF Nos. 58, 61, 62, 63, 64, 65.) Finding the facts and legal arguments sufficiently presented in the parties' briefs, the Court is dispensing with oral argument pursuant to Local Rule 7.1(f). For the reasons that follow, the Court grants both motions and dismisses all claims against Defendant Lockard and the Walmart Defendants[2].

I. Legal Standard

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." To survive a motion to dismiss, a complaint need not contain "detailed factual allegations," but it must contain more than

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[1] Defendants Tarek Ezzeddine and Naveed Mahfooz did not file motions to dismiss but answered the complaint. (Ezzeddine Answer, ECF No. 59; Mahfooz Answer, ECF No. 60.)

[2] Any dismissal of Relator's SAC shall be without prejudice as to the United States. (U.S. Renewed Statement of Interest, ECF No. 66 (citing *United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 455-56 (5th Cir. 2005) (holding that it is improper to dismiss claims with prejudice as to the United States in a declined qui tam case)).

"labels and conclusions" or "a formulaic recitation of the elements of a cause of action . . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not "suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557). As the Supreme Court provided in *Iqbal* and *Twombly*, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *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." *Id.* (citing *Twombly*, 550 U.S. at 556). The plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Twombly*, 550 U.S. at 556. In deciding whether the plaintiff has set forth a "plausible" claim, the court must accept the factual allegations in the complaint as true. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). This presumption is not applicable to legal conclusions, however. *Iqbal*, 556 U.S. at 668. Therefore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555).

Additionally, claims brought under the FCA have a heightened standard and must also comply with Federal Rule of Civil Procedure 9(b). When alleging fraud, "a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b)[3].

II. Factual and Procedural Background

On or about May 2012 to January 2013, Relator worked for Walmart as a "full-time floater pharmacist." (SAC ¶¶ 7, 36–37, 166.) This lawsuit concerns observations that Relator made at various Walmart pharmacies between July 14 and August 30, 2012. (*Id.* ¶¶ 41–125.)

Allegations Related to Defendant Lockard

On or about July 31, 2012, Relator was assigned to work at a Walmart store in Bad Axe, Michigan. (*Id.* ¶ 73.) Upon arriving that day before 8 a.m., he observed a line of roughly ten customers waiting for the pharmacy to open—each one a patient of Defendant Lockard's. (*Id.* ¶¶ 74, 75.) Relator alleges that each of these patients was prescribed "high doses" of controlled substances—methadone, morphine sulfate, and/or oxycodone—and that Medicare or Medicaid was used in paying for them. (*Id.* ¶¶ 76–78.)

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[3] "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

On or about August 6, 2012, while working at the same Walmart in Bad Axe, Relator observed "large numbers of controlled substances" prescribed from Defendant Lockard's office being presented to the pharmacy, and he declined to fulfill them. (*Id.* ¶¶ 97, 100.) Relator contends that Defendant Lockard's prescriptions were either false, fraudulent or submitted to the Walmart pharmacy in violation of state and federal healthcare law. (*Id.* ¶¶ 168, 172, 176.)

Allegations Related to Walmart Defendants

Relator also alleged that, while working at various Walmart pharmacies, he observed a customer attempting to refill prescriptions prematurely, customers presenting allegedly "high dose[ ]" prescriptions, a customer attempting to use a stolen prescription pad, and customers presenting out-of-area prescriptions. (See *id.* ¶¶ 68, 73–81, 87, 97, 114.)

Relator further alleged that he shared his observations and suspicions with his direct supervisor, Defendant Toi Walker, and with other members of Walmart management, including Defendant Doug Henger. (*Id.* ¶¶ 119–21.) Walmart investigated, and on September 12, 2012, Relator received an email stating that the investigation had been closed. (*Id.* ¶¶ 130–131, 146.) Defendant Alfred Rodriguez, a Walmart Human Resources Director, sent Relator an email stating that the investigation

found "that the defined practice of filling prescriptions that are received via fax or e-scribe were not being completed properly." (*Id.* ¶ 153.)

On January 21, 2013, Relator was terminated. (*Id.* ¶ 166.)

III. Applicable Law and Analysis

To sufficiently plead a claim under the FCA, a plaintiff must allege that:

> [1] that the defendant [made] a false statement or create[d] a false record [2] with actual knowledge, deliberate ignorance, or reckless disregard of the truth or falsity of the information; [3] that the defendant ... submitted a claim for payment to the federal government; ... and [4] that the false statement or record [was] material to the Government's decision to make the payment sought in the defendant's claim.

U.S. ex rel. Sheldon v. Kettering Health Network, 816 F.3d 399, 408 (6th Cir. 2016) (quoting *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 618 F.3d 505, 509 (6th Cir.2010) ("SNAPP II")); see also *United States ex rel. Campie v. Gilead Sciences,Inc.*, 862 F.3d 890, 902 (9th Cir. 2017).

Relator alleges that on two occasions while working in the Bad Axe Walmart, he observed patients of Defendant Lockard's present allegedly false or fraudulent prescriptions. His only evidence that the prescriptions were in fact false or fraudulent is his characterization that "these customers presented controlled substances prescriptions for high doses (ranging from 450, 600, 800 and 1200[4]) of methadone, morphine sulfate and/or oxycodone." Also, he provided one example of one of Defendant Lockard's patient's "Medical Expenses Summary." (Exh. A, ECF 57 at 32–37, Pg. ID 596–601.) This document lists the patient's prescriptions over five years and details the date filled, drug name, quantity, number of days' supply, and cost paid by the patient—along with some other information not relevant here. (*Id.*) Relator argues that this exhibit is representative "of thousands of Dr. Lockard's alleged patients," and that each entry "can be considered a separate FCA violation . . . because if the combination of drugs prescribed in Exhibit A were actually taken, they would kill a person." (SAC ¶ 77 (emphasis added).)

Defendant Lockard

The Court concludes that Relator has failed to sufficiently plead a FCA claim against Defendant Lockard. There is an absence of facts and evidentiary

[4] The Court notes that a dosage refers to the total amount of milligrams (mg) contained within one tablet.

support to conclude that any of Defendant Lockard's prescriptions were false or fraudulent. Relator's allegations are based on his own speculations as to Defendant Lockard's prescribing practices with *all* his patients, the proper medication dosages necessary to treat *varying* patients, and the proper administration or combination of medications for *differing* patients. Accepting Relator's claims requires this Court to make a series of unwarranted and wholly unsupported inferences.

First, Relator only observed a handful of Defendant Lockard's patients on two occasions but argues that the customers he observed represents all of Defendant's Lockard's patients. Relator alleges this without verifying or supporting that any of Defendant Lockard's prescriptions exceeded that of any particular patient's medical needs.

Second, Relator's only evidence to support an inference of falsity or fraud is his characterization that Defendant Lockard's prescriptions were "high doses" of controlled substances. Relator alleged Defendant Lockard prescribed doses of methadone, morphine sulfate and/or oxycodone from "450–1200" mg. However, Relator's supporting evidence—one patient's Medical Expenses Summary—directly contradicts that allegation. It showed that not one prescription for methadone, morphine sulfate and/or

oxycodone exceeded 30 mg[5] over the course of five years. (ECF No. 57 at 32–37, Pg. ID 596–601.)

Third, Relator seeks to establish that false claims were submitted to the government because one patient was charged between $1-2 (also shown in Exhibit A), which demonstrates that Medicaid or Medicare must have been used. (*Id.* ¶ 78.) This is not a specific allegation of a false claim being submitted to the government but rather a transitive inference without the supporting links.

Finally, the Court would need to infer that the government relied on Defendant Lockard's allegedly false prescriptions in making a payment to Defendant Lockard. But Relator has not alleged that the government made any payments to Defendant Lockard—nor is the Court able to infer the same.

Consequently, there are neither facts nor evidence from which this Court could conclude or infer that: (1) a false record was in fact made or created, (2) Defendant Lockard submitted to the government a false claim for payment, and (3) the government relied on Defendant Lockard's submission to make a payment to him. Concluding

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[5] Assuming—for arguments [*sic*] sake—that Relator was not referencing the concentrate (mg) but the quantity (#) of tablets, his allegation is still rebutted by Exhibit A which shows no prescription having a quantity over 480. (ECF No. 57 at 32–37, Pg. ID 596–601.) This quantity was prescribed only in a few instances, was the highest quantity of any medication prescribed, and was always noted as a 30-days' supply. (*Id.*)

such would require this Court to make "unwarranted factual inferences." See *Sheldon*, 816 F.3d at 409 (quoting *Debevec v. Gen. Elec. Co.*, 121 F.3d 707, 1997 WL 461486, at *2 (6th Cir.1997) (table)). Having failed to satisfy the first, third, and fourth elements of a FCA claim, Relator fails to sufficiently plead a claim upon which relief could be granted. Because Relator's remaining claims are derivative or in conjunction with his FCA claim, as discussed in further detail below, they too fail.

Walmart Defendants

The Court concludes that Relator has failed to sufficiently plead a FCA claim against the Walmart Defendants. Relator wholly fails to identify any claims that any Walmart Defendant presented to the government, let alone sufficiently provide any factual or evidentiary support to infer that any claim was in fact false. Relator relies on his exhibit to demonstrate "specific claims" that were presented to the government. However, Exhibit A is no more than a summary of one unidentified patient's prescriptions and expenses. As discussed earlier, this cannot serve to establish a false claim because there is no factual or evidentiary support for the Court to conclude that any of the entries listed demonstrate a fraudulent prescription with an incorrect and/or improper dosage in relation to that particular patient's needs. This Court cannot accept Relator's unsupported assertions of fraud or falsity because it cannot accept his speculations, as a pharmacist, as to what

constitutes "high doses" for unidentified patients from whom he had no other medical information. Neither can it accept Relator's bare-bone assertion that each entry shows the patient used Medicare or Medicaid funds.

Having failed to satisfy the first, third, and fourth elements of the FCA claim, Relator again fails to sufficiently plead a claim upon which relief could be granted.

Conspiracy and Retaliation

Relator's remaining conspiracy and retaliation claims must also fail because they are derivative of his FCA claim.

The FCA's conspiracy provision establishes liability for those who "conspire[ ] to commit a violation" of § 3729(a)(1)(A) or (B) of the Act. 31 U.S.C. § 3729(a)(1)(C). Relator's conspiracy claim fails simply because this Court has concluded that Relator failed to sufficiently allege any underlying violations of the FCA that would support it. A claim of conspiracy to present false claims to the government cannot survive dismissal when the allegations are insufficient to show a false claim even existed. *See United States ex rel. Crockett v. Complete Fitness Rehab., Inc.*, 721 F. App'x 451, 459 (6th Cir. 2018) ("[Plaintiff's] lack of specification as to the existence of any false claim also precludes her false-claims conspiracy count."); *see also U.S. ex rel.*

Winkler v. BAE Sys., Inc., 957 F. Supp. 2d 856, 876 (E.D. Mich. 2013).

Additionally, Relator did not allege that Walmart found any violation of any law or regulation during the course of their investigation. And Walmart's own investigatory finding that "the defined practice of filling prescriptions that are received via fax or e-scribe were not being completed properly" says nothing regarding the falsity of such prescriptions or their knowingly fraudulent presentation to the government for payment. Regardless, Relator attempts to assign knowledge of and compliance with the alleged scheme to the Individual Walmart Defendants[6] as a result of the "multiple meetings and discussions each had with Relator" about his suspicions and their choice to not act on them. (ECF No. 63 at 14, Pg. ID 766.) However, Relator's bare-bones allegation of a conspiracy also finds no support.

Finally, Relator's retaliation claim fails because he pleads no facts showing that Walmart knew that he was pursuing an FCA claim at the time of his discharge.

To establish a claim for retaliatory discharge under 31 U.S.C. § 3730(h), a plaintiff must show, among other things, that his employer knew that he engaged in a protected activity and that his employer discharged or otherwise discriminated against him

[6] Toi Walker, Doug Henger, and Alfred Rodriguez.

as a result of the protected activity." *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. 2003). Relator plead neither facts establishing that Walmart had knowledge of his intent to file an FCA claim nor that he was discharged as a result of his FCA claim (filed almost a month after his discharge). Indeed, Relator relayed his suspicions concerning the presentation of false prescriptions to the Individual Walmart Defendants, but this does not constitute notice of an intent to file an FCA claim. As such, the Court concludes that Relator has failed to sufficiently state his retaliation claim.

For the foregoing reasons, Defendant Lockard's Motion to Dismiss and the Walmart Defendants' Motion to Dismiss are granted. Relator's causes of action against Defendant Lockard—Counts I–III—are dismissed, and Relator's causes of action against the Walmart Defendants—Counts I–IV—are dismissed.

IV. Conclusion

Accordingly,

IT IS ORDERED, that Defendant Lockard's Motion to Dismiss (ECF No. 58) is **GRANTED**; and

IT IS FURTHER ORDERED, that the Walmart Defendants' Motion to Dismiss (ECF No. 61) is **GRANTED**; and

IT IS FURTHER ORDERED, that Counts I–III of Relator's Second Amended Complaint (ECF No. 57) is **DISMISSED WITH PREJUDICE**[7] against Defendant Lockard; and

IT IS FURTHER ORDERED, that Counts I–IV of Relator's Second Amended Complaint (ECF No. 57) is **DISMISSED WITH PREJUDICE**[8] against the Walmart Defendants.

IT IS SO ORDERED.

s/ Linda V. Parker

LINDA V. PARKER

U.S. DISTRICT JUDGE

Dated: August 20, 2019

[7] Any dismissal of Relator's SAC shall be without prejudice as to the United States. (See U.S. Renewed Statement of Interest, ECF No. 66; see also supra n. 2.)

[8] Supra n. 7.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA and the STATE OF MICHIGAN, ex rel., ASHWANI SHEORAN, RPh, Plaintiff-Relator,	Civil Case No. 13-10568
	Hon. Linda V. Parker

v.

WAL-MART STORES EAST, LP, d/b/a WALMART, a foreign corporation, TOI WALKER, DOUG HENGER, ALFRED RODRIGUEZ, RICHARD LOCKARD, M.D., NAVEED MAHFOOZ, M.D., and TAREK EZZEDDINE, M.D., Defendants.

_____/

OPINION AND ORDER DENYING PLAINTIFF-RELATOR'S MOTION FOR RECONSIDERATION (ECF NO. 70)

Plaintiff-Relator Ashwani Sheoran, RPh ("Relator"), on behalf of himself, the United States and the State of Michigan, initiated this lawsuit on February 11, 2013, by filing a *qui tam* complaint under seal against Defendants Walmart, Toi Walker, Doug Henger, and Alfred Rodriguez (collectively "Walmart Defendants"), as well as Defendants Richard Lockard, M.D., Naveed Mahfooz, M.D., and Tarek Ezzeddine, M.D. (ECF No. 1.) On December 7, 2018, Relator filed his Second Amended Complaint ("SAC"), alleging (i) presentation of false claims in violation of the False Claims Act ("FCA") (31 U.S.C. § 3729(a)(1)(A)), Fraud Enforcement Recovery Act of 2009 ("FERA"), and Michigan Medicaid False Claims Act ("MMFCA"); (ii) a false record or statement material to a false claim in violation of the FCA (31 U.S.C. § 3729(a)(1)(B)), FERA, and MMFCA; (iii) conspiracy to defraud in violation of the FCA (31 U.S.C. § 3729(a)(1)(C)); and (iv) retaliation in violation of the FCA (31 U.S.C. § 3730(h)). (ECF No. 57.) The first three claims are against the Walmart Defendants, while the fourth claim is against Walmart only. (*Id.* at Pg. ID 589-92.) On March 8, 2018, the Court unsealed the complaints after the United States and the State of Michigan declined to intervene. (ECF Nos. 24, 25.) Dr. Lockard and the Walmart Defendants subsequently filed motions to dismiss. (ECF Nos. 58, 61.) In an Opinion and Order

entered on August 20, 2019, the Court granted both motions. (ECF No. 68.)

Presently before the Court is Relator's Motion for Reconsideration, in which Relator contends the Court committed palpable error when analyzing his 3729(a)(1) claims. (ECF No. 70.) The motion has been briefed. (ECF Nos. 72, 73.) For the reasons that follow, the Court denies the motion.

LEGAL STANDARD

Local Rule 7.1 provides the following standard of review for motions for reconsideration:

> Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties and other persons entitled to be heard on the motion have been misled but also show that correcting the defect will result in a different disposition of the case.

E.D. Mich. LR 7.1(h)(3). Palpable defects are those which are "obvious, clear, unmistakable, manifest or plain." *Mich. Dep't of Treasury v. Michalec*, 181 F. Supp. 2d 731, 734 (E.D. Mich. 2002). "It is an

exception to the norm for the Court to grant a motion for reconsideration." *Maiberger v. City of Livonia*, 724 F. Supp. 2d 759, 780 (E.D. Mich. 2010). "[A] motion for reconsideration is not properly used as a vehicle to re-hash old arguments or to advance positions that could have been argued earlier but were not." *Smith ex rel. Smith v. Mount Pleasant Pub. Sch.*, 298 F. Supp. 2d 636, 637 (E.D. Mich. 2003) (citing *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)).

ANALYSIS

In his SAC, Relator alleges three causes of action pursuant to 31 U.S.C. § 3729(a)(1) et seq. The applicable provisions impose liability on 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; [or]
>
> (C) conspires to commit a violation of subparagraph (A) [or] (B) . . . .

31 U.S.C. § 3729(a)(1).[1]

[1] In 2009, Congress passed the FERA, which amended and renumbered the liability provisions of the FCA. Because Relator's claims in this case involve conduct that occurred after

(i) Did Defendants Violate §§ 3729(a)(1)(A) or (B)?

In his SAC, Relator appears to allege that the Walmart Defendants and Dr. Lockard are liable under §§ 3729(a)(1)(A) or (B) for four reasons: the relevant claims involved (i) "out-of-the-area prescriptions for controlled substances" that were not properly verified; (ii) unauthorized entry of non-pharmacy [Walmart] employees in the Pharmacy; (iii) faxed prescriptions bearing a physician's unverified electronic signature, which the law prohibits as it concerns controlled substances found on Schedules III-V; and (iv) prescriptions that contained a [*sic*] "excessively high" quantity of controlled substances, which "if actually taken would kill the person" and "indicat[ed] illegal diversion activities." (ECF No. 57 at Pg. ID 574, 577, 582, 590.)

Regarding the first two allegations, even assuming they are true, Plaintiff does not allege that the conduct led to the submission of requests for anticipated payment to the government. *See* 31 U.S.C. § 3729(a)(1)(A)-(B) (requiring a "false or fraudulent claim"); *see also U.S. ex rel. Marlar v. BWXT Y-12, L.L.C.*, 525 F.3d 439, 447 (6th Cir. 2008) ("While [Relator] is correct that we have previously held that proof of 'presentment' is not required for actions under subsections [(a)(1)(B)] and [(a)(1)(C)], . . . we have repeatedly held that proof of a false claim

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the 2009 amendments, the post-2009 version of the FCA (quoted above) applies.

is required.") For this reason, the conduct outlined in the first two allegations do not make out claims under §§ 3729(a)(1)(A) or (B) as to the Walmart Defendants or Dr. Lockard.

Regarding the third allegation, the Court accepts as true that, in an email from Rodriguez to Henger, Rodriguez conceded "that the investigation into Relator's concerns about 'the validity of prescriptions that appeared to not have an original signature' was validated" and that Walmart "did find that the defined practice of filling prescriptions that are received via fax or e-scribe were not being completed properly."[2] (ECF No. 57 at Pg. ID 587.) Still, Relator does not allege that the conduct led to claims for payment that were actually submitted to the government and Relator has not identified a characteristic example of such a claim submitted to the government.[3] *See* 31 U.S.C. § 3729 (a)(1)(A)-(B) (requiring a "false or fraudulent claim"); *see also*

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[2] Plaintiff relies on a theory of FCA liability commonly referred to as "implied false certification." (See ECF No. 57 at Pg. ID 591.) Under this theory, "when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement, . . . the defendant has made a misrepresentation that renders the claim 'false or fraudulent.'" *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1995 (2016).

[3] According to the SAC, Exhibit A "contains a list of filled prescriptions for one person over the course of five (5) years that if actually taken would kill the person." (ECF No. 57 at Pg. ID 577.) Notably, Relator does not allege that Exhibit A lists prescriptions for which Walmart received faxed prescriptions with unverified electronic signatures.

Chesbrough v. VPA, P.C., 655 F.3d 461, 470 (6th Cir. 2011) ("Where a relator alleges a 'complex and far-reaching fraudulent scheme,' in violation of § 3729(a)(1), it is insufficient to simply plead the scheme; he must also identify a representative false claim that was actually submitted.").

Regarding the fourth allegation, Relator argues in his Motion for Reconsideration that the Court overlooked his allegation that the claims associated with the prescriptions detailed in Exhibit A were "false" because the prescriptions contained an "excessively high" quantity of controlled substances, which "if actually taken would kill the person." (ECF No. 70 at Pg. ID 821; see also ECF No. 56 at Pg. ID 577.) Even assuming that this allegation is true, Relator's claim fails because he has not plead with particularity a "key fact": "[t]he actual submission of a specific request for anticipated payment *to the government*." *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750, 768-69 (6th Cir. 2016) (emphasis added). Relator argues that Exhibit A contains a list of filled prescriptions, for which the patient paid only $1 to $2. (ECF No. 70 at Pg. ID 823.) Relator contends that an affidavit attached to his Motion for Reconsideration shows that the $1 to $2 charges "mean that Medicare or Medicaid was used." (*Id.*) The affidavit of Amrinder Thind, a pharmacist, states that "[t]he reason [he] know[s] that Medicare or Medicaid was used is because the prices being

charged to the allege patients were around $1-$2" and "[he is] not aware of any other reason for a patient's co-pay to be around $1-$2 except for Medicare or Medicaid usage." (*Id.* at Pg. ID 827.)

Even if the Court were to consider the Thind Affidavit, while the fact that the patient associated with Exhibit A paid $1 to $2 dollars for each filled prescription may suggest that the prescriptions were subsidized, it does not suggest that Medicare or Medicaid—as opposed to, for example, a private insurance company—did the subsidizing. In addition, though Relator may have "observed a log book kept by Walmart that contained over 5,000 records of people who were overprescribed by Dr. Lockard," (*id.* at Pg. ID 821), Relator again fails to allege that any of these 5,000 records are related to submissions of specific requests for anticipated payment *to the government.*

The Sixth Circuit has hypothesized that "the requirement that a relator identify an actual false claim may be relaxed when, even though the relator is unable to produce an actual billing or invoice, he or she has pled facts which support a strong inference that a claim was submitted." *Chesbrough,* 655 F.3d at 471 (citations omitted). As the Sixth Circuit has further explained:

> These cases have suggested that the exception could be applied when a relator alleges specific personal

> knowledge that relates directly to billing practices. See Chesbrough, 655 F.3d at 471. This could include "personal knowledge that the claims were submitted by Defendants . . . for payment" or other "personal knowledge of billing practices or contracts with the government," *id.* at 471–72 (internal quotation marks omitted), as well as "'personal knowledge' that was based either on working in the defendants' billing departments, or on discussions with employees directly responsible for submitting claims to the government," *United States ex rel. Sheldon v. Kettering Health Network*, 816 F.3d 399, 413 (6th Cir. 2016).

Prather, 838 F.3d at 769. Relator does not allege to have personal knowledge of Walmart's billing practices. Thus, Relator's allegations do not meet the requirements of this exception and his claims under §§ 3729(a)(1)(A) and (B) as to Walmart Defendants and Dr. Lockard fail.

(ii) Did Defendants Violate § 3729(a)(1)(C)?

To establish a conspiracy under § 3729(a)(1)(C), the plaintiff must show that the defendant "conspi [sic] Amrinder Thind [*sic*] re[d] to commit a violation of subparagraph (A) [or] (B)." Because Relator failed to make out claims under

subsections (A) or (B), Relator has failed to plead a conspiracy in violation of § 3729(a)(1)(C) as to Dr. Lockard and the Walmart Defendants. *United States ex rel. Crockett v. Complete Fitness Rehab., Inc.*, 721 F. App'x 451, 459 (6th Cir. 2018) (explaining that the plaintiff's "inability to show that false claims were actually submitted to the government means that her . . . false-claims-conspiracy counts are likewise subject to dismissal, because the existence of such false claims is a precondition to [this] theory").

CONCLUSION

Because Relator fails to demonstrate palpable defects the correction of which would result in a different disposition of the case, the Court denies the Motion for Reconsideration.

Accordingly,

IT IS ORDERED that Plaintiff-Relator's Motion for Reconsideration (ECF No. 70) is **DENIED**.

IT IS SO ORDERED.

s/ Linda V. Parker

LINDA V. PARKER

U.S. DISTRICT JUDGE

Dated: September 28, 2020