21-1366

No. _____

In The
Supreme Court of the United States





Ashwani Sheoran, RPh

*Petitioner,*

v.

Wal-Mart Stores East, LP, et al.

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court of Appeals**
**for the Sixth Circuit**

# PETITION FOR WRIT OF CERTIORARI

Ashwani Sheoran, RPh
462 Jacobsen Drive
Newark, DE 19702
(419) 285-6552
*Petitioner*

## QUESTIONS PRESENTED

1. Whether Fed. R. Civ. P. 11 requires the specific offending statements, if applicable, to be listed in the show cause order to satisfy proper notice requirements under the Due Process Clause.

2. Whether federal appellate courts can use the federal district courts' Fed. R. Civ. P. 11 to discipline attorneys when the U. S. Supreme Court holds otherwise.

3. Whether the U. S. Supreme Court should reconcile the circuit split on how attorneys are disciplined at the federal appellate level to provide consistency and fairness across the circuits.

## LIST OF PARTIES

Petitioner Ashwani Sheoran, RPh was the plaintiff-relator in the district court, appellant in the court of appeals, and petitioner in this Court.

The United States of America, although the real party in interest in a *qui tam* action, is not a party to this litigation.

The State of Michigan, although the real party in interest in a *qui tam* action, is not a party to this litigation.

Respondents listed below were defendants in the district court, appellees in the court of appeals, and respondents in this Court:

Wal-Mart Stores East, LP
Richard Lockard, M.D.
Toi Walker
Alfred Rodriguez
Doug Henger

## RELATED PROCEEDINGS

*Sheoran v. Wal-Mart Stores East, LP, et al.* No. 21-1025 (U. S. Supreme Ct. filed November 8, 2021).

*Sheoran v. Wal-Mart Stores East, LP, et al.* No. 20-2128 (6th Cir. filed November 16, 2020); opinion entered June 4, 2021 (Appx. A); petition for rehearing *en banc* denied and show cause order issued on August 9, 2021 (Appx. B). Sanctions order entered on September 24, 2021 (Appx. C).

*Sheoran, et al., v. Wal-Mart Stores East, LP, et al.* No. 4:13-cv-10568, (E. D. Mich. filed February 11, 2013); judgment entered October 19, 2020 (Appx. D).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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## PETITION FOR WRIT OF CERTIORARI

Ashwani Sheoran, RPh, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The Sixth Circuit entered its opinion on June 4, 2021 (Appx. A), which is not published in the Federal Reporter. The Sixth Circuit's order denying the petition for rehearing *en banc* and to show cause under Fed. R. Civ. P. 11 was entered on August 9, 2021 (Appx. B). The Sixth Circuit issued its sanctions order on September 24, 2021 (Appx. C). The district court's opinion and order issued on August 20, 2019. The district court's opinion and order denying Sheoran's motion for reconsideration was entered on September 28, 2020, and judgment was entered on October 19, 2020 (Appx. D).

## STATEMENT OF JURISDICTION

The Sixth Circuit entered its sanctions order on September 24, 2021 (Appx. C). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part: "No person shall...be deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use, without just compensation."

The Rules Enabling Act, 28 U. S. C. § 2072 provides in relevant part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right.

## STATEMENT OF THE CASE

Petitioner and pharmacist Ashwani Sheoran brought this opioid whistleblower case under the False Claims Act, 31 U.S.C. § 3729(a)(1) *et seq.*, and the Michigan Medicaid False Claim Act, MCL 400.601 *et seq.*, against Walmart for using government funds to fill illegal opioid prescriptions and for firing him in retaliation for his efforts to stop the illegal activity.

On June 21, 2021, Sheoran filed a petition for rehearing *en banc* (Appx. E) in the Sixth Circuit, which identified numerous mistakes in the panel's opinion.

The Sixth Circuit denied the petition for rehearing *en banc* on August 9, 2021, and issued a

show cause order under Fed. R. Civ. P. 11 (Appx. B) for "multiple specious allegations of judicial corruption." Sheoran did not respond to the improper order issued under Rule 11. On September 24, 2021, the Sixth Circuit issued a sanctions order, which states in relevant part (Appx. C):

> Ann Marie Stinnett and The Stinnett Law Group, PLC are thus ORDERED to pay $2,500 to this Court within sixty (60) days of this Order. See Fed. R. Civ. P. 11 (c)(4). Ann Marie Stinnett is further hereby SUSPENDED from the rolls [*sic*] of counsel of this Court for a period of one year.
>
> JOAN L. LARSEN, Circuit Judge, concurring in part and dissenting in part. I concur in the monetary sanctions pursuant to the Fed. R. Civ. P. 11 only.
>
> Sanctions Order, Appx. C, p. 18a.

This petition for writ of certiorari focuses on the Sixth Circuit's improper imposition of sanctions under Fed. R. Civ. P. 11 entered on September 24, 2021. Sheoran filed a separate petition for writ of certiorari for other errors on November 8, 2021.

## REASONS FOR GRANTING THE PETITION

### I. The Sixth Circuit's sanctions order is invalid because it does not give proper notice under Fed. R. Civ. P. 11.

On August 9, 2021, the Sixth Circuit denied the petition for rehearing *en banc* and issued the following show cause order (Appx. B):

> 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).
>
> Show Cause Order, Appx. B, p. 16a.

The 5th Amendment of the U. S. Constitution guarantees the right to due process. Sufficient notice is a bedrock of this constitutional guarantee. Fed. R. Civ. P. 11 requires specificity to ensure sufficient notice is given before issuing sanctions. *See* Fed. R. Civ. P. 11(c)(3) (requiring "**conduct specifically described in the order**," *emphasis added*).

In addition, Sixth Circuit case law echoes Rule 11's specificity requirement:

> The identification of the **specific conduct** that is allegedly sanctionable is critical to a finding of a Rule 11 violation.... where a court acts *sua sponte*, it must first issue a show-cause order requiring the alleged violator "to show cause why conduct **specifically described** in the order has not violated Rule 11(b)." FED. R. CIV. P. 11(c)(3).
>
> *Indah v. USSEC*, 661 F. 3d 914, 926 (6th Cir. 2011), *emphasis added.*

In this case, the alleged offending conduct was not specifically described in the order because "multiple specious allegations of judicial corruption" is not specific. It is general, and, frankly, unclear. Which statements are causing the issue? The actual offending statements must be included in the show cause order to satisfy the specificity requirements of Rule 11, assuming, *arguendo*, that an appellate court can even invoke Rule 11. *Indah v. USSEC*, 661 F. 3d 914, 926 (6th Cir. 2011); Fed. R. Civ. P. 11(c)(3).

Further, Sheoran's counsel, Ann Marie Stinnett, took steps to ensure that the filing was appropriate by calling the Michigan Ethics hotline before filing the petition for rehearing *en banc*. She was told that her writing style can be blunt and direct. With this guidance, she removed a portion of the

petition.[1] What was left was blunt, direct, and did not deserve sanctions.[2] *See* Appx. E.

In this case, the Sixth Circuit did not give Sheoran proper notice in its show cause order because it did not list which statements it found to be "specious." Black's Law Dictionary, 10th ed., defines "specious" as "(f)alsely appearing to be true, accurate, or just <specious argument>." There is nothing specific about what constitutes "specious" by its definition, and the Sixth Circuit did not cite what it determined to be specious in its order. Specificity is required by case law and Rule 11 itself. *Indah v. USSEC*, 661 F. 3d 914, 926 (6th Cir. 2011); Fed. R. Civ. P. 11(c)(3). By not being specific in its order, the Sixth Circuit is breaking the very rule it seeks to enforce.

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[1] Stinnett will identify what was removed from the petition for rehearing if the Court desires.

[2] Judge McKeague (author), Judge Clay, and Judge Larsen were the 3-judge panel in this case. In 2017, Judge McKeague authored the unpublished opinion in *Fakorede v. Mid-South Heart Center, P.C.*, No. 16-5722 (6th Cir. 2017) and used the updated post-2010 amendment law for a retaliation claim under the False Claims Act. In 2018, Judge McKeague was part of the three-judge panel in *Crockett v. Complete Fitness Rehab., Inc.*, No. 16-2544 (6th Cir. 2018) (unpublished), which also used the updated post-2010 amendment law. Thus, Judge McKeague used the updated law in 2017, 2018, but not in this case in 2021. As stated in the petition for rehearing that garnered sanctions: "Judicial integrity requires that this Court address all the relevant facts...." As the author of the opinion in this case, using outdated law to deny Sheoran's claim (when Judge McKeague undeniably used the updated law in the past) strikes at the heart of justice.

No burden-shifting local rule or operating procedure can overcome this lack of sufficient notice.[3]

For these reasons, the Sixth Circuit's sanctions order under Fed. R. Civ. P. 11 is invalid for lack of proper notice, assuming *arguendo*, that Rule 11 even applies.

## II. The Sixth Circuit's sanctions order is invalid because the Federal Rules of Civil Procedure apply to district courts not appellate courts under U. S. Supreme Court precedent.

Most attorneys familiar with federal court litigation, and especially federal judges, know that the Federal Rules of Civil Procedure only apply to district courts and not appellate courts. *See,* Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States **district courts**....") (*emphasis added*). Thus, Fed. R. Civ. P. 11 only applies to district courts. *Id.* The federal appellate courts, like the Sixth Circuit, have their own rules called the Federal Rules of Appellate Procedure. *See,* Fed. R. App. P. 1(a)(1) ("These rules govern procedure in the United States courts of appeals"). Thus, the Federal Rules of Appellate Procedure govern the Sixth Circuit, not the Federal Rules of Civil Procedure, and specifically not Fed. R. Civ. P. 11.

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[3] The Rules Enabling Act, 28 U. S. C. § 2072(b) states the Court has no authority to enact rules that "abridge, enlarge or modify any substantive right." This includes the constitutional rights to due process and sufficient notice.

The U.S. Supreme Court makes this distinction clear:

> On its face, Rule 11 does not apply to appellate proceedings. Its provision allowing the court to include "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee" must be interpreted in light of Federal Rule of Civil Procedure 1, which indicates that the Rules only "govern the procedure in the United States district courts." Neither the language of Rule 11 nor the Advisory Committee Note suggests that the Rule could require payment for any activities outside the context of district court proceedings.
>
> *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990).

It naturally follows that if Rule 11 does not apply to appellate courts, then the sanctions against Stinnett and The Stinnett Law Firm, PLC are invalid. *Id.* Specifically, the $2,500 payment to the Court is invalid. *Id.* (there is no "payment for any activities outside the context of district court proceedings," and "We believe Rule 11 is more sensibly understood as permitting an award only of those expenses directly

caused by the filing, logically, those at the trial level"). Further, the one-year suspension from the role of counsel in the Sixth Circuit is also invalid. *Id.* ("Rule 11 does not apply to appellate proceedings").

Thus, the Sixth Circuit defied U. S. Supreme Court precedent by issuing sanctions under Fed. R. Civ. P. 11 and should be reversed.

## III. There is a circuit split on how to discipline attorneys at the appellate level. Clarification must come from the U.S. Supreme Court to provide consistency and fairness across the circuits.

It is unsettling that the same 3-judge panel who issued the Sixth Circuit's faulty opinion can then sanction the attorney who pointed out their faults without any apparent oversight whatsoever. Further, they used a rule that does not apply to appellate courts. This judicial behavior affects Sheoran's attorney-client contractual relationship in terms of who is responsible for paying the assessed fee under the contract, wasted precious resources and time that should have been devoted to the main appeal, and left Sheoran without counsel of record for this appeal.[4]

If the Sixth Circuit's procedure for issuing sanctions appears unfair, that is because it is

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[4] Unlike the 6th Circuit Bar, in order to represent a litigant at the U.S. Supreme Court level, an attorney must be a member of the Supreme Court Bar, which prohibits attorneys who have been sanctioned from becoming a bar member until three (3) years after the date of the sanction.

compared to some other circuits. For example, the Second Circuit forms a Committee to address attorney discipline. The Committee consists not only of judges but also members of the bar. It decides whether to bring charges against an attorney and brings those charges against the attorney personally. This procedure makes sense given the attorney is the named party in the sanctions order and not the litigant. The attorney is allowed to be represented by counsel throughout the entire proceeding, and a finding of misconduct must be made by clear and convincing evidence. The Second Circuit's procedure sounds more appropriate than what the Sixth Circuit has done in this case.

The First Circuit has Local Rule 38.0, which is similar to Fed. R. Civ. P. 11 but does not provide for the law firm to be sanctioned. It allows just fourteen (14) days to respond to a show cause order. The Sixth Circuit allowed twenty-one (21) days. Even though the First Circuit allows a shorter time to respond than the Sixth Circuit, the First Circuit and Sixth Circuit both use provisions that are similar to Fed. R. Civ. P. 11, if not Fed. R. Civ. P. 11 itself.

The Third Circuit has a dedicated section on attorney discipline. When suspension is considered, it has a Standing Committee, consisting of three (3) circuit judges at least two (2) of whom are active. The Chief Judge appoints the circuit judges for three-year terms. The Standing Committee creates a Report and Recommendation that it gives to the attorney prior to sanctioning, and the attorney has the opportunity to

respond. This also sounds much fairer than what the Sixth Circuit has done.

Granting this petition will allow the Supreme Court to resolve the circuit split on how to handle attorney discipline at the appellate level, so that what occurred to Sheoran in the Sixth Circuit does not happen to future litigants and attorneys.

## CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,
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March 16, 2022

**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 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. 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

*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. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 643 (6th Cir.

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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).

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.

Dated: June 4, 2021

## 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, | ) | **ORDER** |
| 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**

Dated: August 9, 2021

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

## APPENDIX C

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, | ) | **ORDER** |
| 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.

In denying Plaintiff-Appellant's petition for rehearing en banc, we ordered Plaintiff-Appellant's counsel to show cause as to why she should not be sanctioned for violating Federal Rule of Civil Procedure 11(b). Order Denying Reh'g En Banc 1, *United States ex rel. v. Wal-Mart Stores East, LP*, No. 20-2128 (6th Cir. June 4, 2021). We noted that the petition brought by Plaintiff-Appellant's counsel included "multiple specious allegations of judicial corruption" for which she cited no evidence. *Id.*

Having received no response from Plaintiff-Appellant's counsel to our show cause order, we confirm our imposition of sanctions. *See* Fed. R. Civ. P. 11(c)(1) ("If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.") *See also* Fed. R. App. P. 46(b)(1); 6 Cir. R. 46(c)(3).

Ann Marie Stinnett and The Stinnett Law Group, PLC are thus ORDERED to pay $2,500 to this Court within sixty (60) days of this order. *See* Fed. R. Civ. P. 11(c)(4). Ann Marie Stinnett is further hereby SUSPENDED from the rolls of counsel of this Court for a period of one year.

JOAN L. LARSEN, Circuit Judge, concurring in part and dissenting in part. I concur in the monetary sanctions pursuant to Federal Rule of Civil Procedure 11 only.

**ENTERED BY ORDER**
**OF THE COURT**

s/Deborah S. Hunt

**Deborah S. Hunt, Clerk**

Dated: September 24, 2021

## 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.
_____/

**JUDGMENT**

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 two claims are against the Walmart Defendants. (*Id.* at Pg. ID 589-92.) The third claim is against the Walmart Defendants and Dr. Lockard. (*Id.*) The fourth claim is against Walmart only. (*Id.*)

Dr. Lockard and the Walmart Defendants subsequently filed motions to dismiss all counts against them. (ECF Nos. 58, 61.) In an Opinion and Order entered on August 20, 2019, the Court granted both motions, dismissing Dr. Lockard and the

Walmart Defendants from this suit with prejudice.[1] (ECF No. 68.) On October 15, 2020, Relator filed a Joint Motion to Dismiss Mahfooz and Ezzeddine Under Rule 21. (ECF No. 78.) The Court granted the motion, dismissing Drs. Naveed Mahfooz and Tarek Ezzeddine from this suit without prejudice. (ECF No. 79.)

Accordingly,

**IT IS ORDERED, ADJUDGED, AND DECREED** that Relator's SAC is **DISMISSED**.

s/ Linda V. Parker

LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: October 19, 2020

[1] The Court also noted that any dismissal of Relator's SAC shall be without prejudice as to the United States. (ECF No. 68 at Pg. ID 814.)

## APPENDIX E

No. 20-2128

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Appeal from the |
| STATE OF MICHIGAN, ex rel. | ) | United States |
| Plaintiffs-Relators, | ) | District Court |
| ASHWANI SHEORAN, RPh | ) | for the Eastern |
| Plaintiff-Relator-Appellant, | ) | District of |
| | ) | Michigan |
| v. | ) | (Flint) |
| | ) | |
| WAL-MART STORES | ) | Case No. |
| EAST, LP, dba Walmart, | ) | 4:13-cv-10568 |
| a foreign corporation; | ) | |
| TOI WALKER; | ) | Hon. Linda. V. |
| DOUG HENGER; | ) | Parker |
| ALFRED RODRIGUEZ; | ) | |
| RICHARD LOCKARD, M.D. | ) | |
| Defendants-Appellees. | ) | |

## APPELLANT'S PETITION FOR REHEARING *EN BANC*

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Attorney for Appellant

## I. INTRODUCTION

When can a party, who did not file an appeal, get to choose the issues for the appeal? When does the Sixth Circuit rule on issues brought by the wrong party? Answer: When it is Walmart. Appellant Sheoran did not address the noise introduced by Walmart's response brief. Sheoran's two issues were clear. This Court, on the other hand, not only entertained Walmart's noise but also addressed Walmart's issues at length while glossing over Sheoran's issues—the proper party to identify the issues in this appeal.

This opioid whistleblower case has been pending since 2013. It was brought by registered pharmacist Ashwani Sheoran, a former Walmart employee on behalf of the United States of America and the State of Michigan. Since this case was filed, laws have changed, counsel have come and gone, even the Assistant U.S. Attorney assigned to this case, Ms. Dodge, has retired. The Sixth Circuit itself has evolved and now issues more unpublished opinions, which sometimes contain confusing law, like the False Claims Act and its various interpretations in the Sixth Circuit.

As discussed below, the district court erred when it decided not to have oral argument in this case. Many facts that Sheoran identified on this issue were not addressed or even acknowledged by this Court in its opinion. Justice suffers when judges look the other

way and ignore facts that harm their desired conclusions.

When the district court and the appellate court both refuse to address or even acknowledge the fact that the district court confused milligrams with the number of tablets in its analysis, there is no judicial integrity. When the Sixth Circuit refuses to address or even acknowledge the fact that the district court used the wrong legal standard for a 12(b)(6) motion by requiring evidence six (6) times, there is no judicial integrity. When the Sixth Circuit rules that Sheoran's claims under the Michigan Medicaid False Claim Act, MCL 400.601 et seq., which Walmart forgot to include in its motion to dismiss, can now magically be dismissed at the appellate level, there is no judicial integrity—nor is there notice or an opportunity to be heard—the bedrock of our judicial system.

The right thing to do in this case would be to address the facts that have been ignored, rule that the district court erred by not having oral argument because it did, and remand this case to the district court for oral argument and a determination of Sheoran's state law claims. At that time, any procedural pleading concerns can be addressed based upon the proper law.

Judicial integrity demands accountability by its very nature. The district court should be held accountable for the numerous mistakes it made by issuing error-filled opinions without a hearing.

Accountability also includes correcting errors that are brought to the court's attention. In this case, the district court waited over a year before ruling on Sheoran's motion for reconsideration. The resulting second opinion conveniently ignores the mistakes in its first opinion, introduces new errors, and thwarts accountability of any kind. How is that justice? Correcting errors—not covering them up—restores justice to the affected party while removing bad law from the pool of federal case law.

What is worse than a court that does not address or correct its own mistakes? A higher court that tries to cover them up. When judicial integrity is compromised, it opens up all possibilities as to the reasons why. Federal court judges are appointed for life to avoid the perception of improper influence. Then why did the federal judges in this case ignore so many facts that support Sheoran? Did Walmart pay off the Attorney General or the judges? Is Walmart threatening them or their families? Is there a political motive? A self-serving motive? Are federal courts biased against foreign-born citizens? Was Walmart clairvoyant when it hired Justice McKeague's former law clerk, now an attorney at a prominent law firm, before anyone publicly knew that Justice McKeague would write this Court's opinion? Are the federal courts working with the Attorney General to bring its own case against Walmart under the Controlled Substances Act to prevent Sheoran from sharing in the proceeds?[1] None of these may be true, and the

hope is that none of them are true, but compromising judicial integrity leaves the door open for these conclusions.

Unfortunately, this case has turned into a case study for law students to learn how the Sixth Circuit ignored facts to subvert justice when the subject matter is opioid abuse, the defendant is Walmart, and the year is 2021.

Opioid abuse is at the highest level it has ever been in this country, according to the U.S. Centers for Disease Control and Prevention.[2] If the federal courts are going to foreclose a first line of defense—the pharmacist—from bringing opioid abuse cases under the False Claims Act,[3] then they should do so on the merits with judicial integrity.

[1] See the nationwide lawsuit that contains similar accusations of pharmacist-driven opioid concerns against Walmart in *United States of America v. Walmart*, Case No. 1:20-cv-01744-CFC, filed on December 22, 2020 in the District of Delaware.

2 Opioids are behind about ¾ of the overdose cases currently. *Opioids Rip Through U.S. Workforce, With Deaths at Record Levels*, Katia Dmitrieva and Reade Pickert, Bloomberg News, June 17, 2021.

[3] Walmart acknowledges that False Claims Act violations exist in the opioid industry and is trying to seek nationwide declaratory relief from "alleged violations of the CSA [Controlled Substances Act] and the False Claims Act," which would most likely include this case. *Walmart v. U.S. Dept. of*

Anything less compromises the very judicial system that judges, attorneys, and other legal professionals strive to uphold.

## II. STATEMENT PURSUANT TO FED. R. APP. P. 35(b)(1)

The panel decision conflicts with a decision of the United States Supreme Court and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. Namely, the panel dismissed a state law claim without due process of law as described in Section III(B) of this petition.

## III. ARGUMENT

### A. The District Court Abused Its Discretion By Deciding Not To Have Oral Argument.

Sections II and III of the Appellant's Brief detail numerous mistakes of fact and law from the district court's opinions. This Court did not address any of these mistakes of fact and law in its analysis of this issue. Justice requires that these facts are addressed before this Court rules that the district court did not abuse its discretion when it decided not to have oral argument.

[3] Cont... *Justice, et al.*, Case No. 4:20-cv-00817, Complaint for Declaratory Relief, Document 1, p. 52, ¶ 174, filed on October 22, 2020. The Eastern District of Texas denied Walmart's request for declaratory judgment, and Walmart is appealing the decision to the Fifth Circuit.

An abuse of discretion requires just one of the four events below. In reality, more than one of these events occurred in this case.

> An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment.

*In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 678 F.3d 409, 416 (6th Cir. 2012).

**1. The District Court Relied Upon Clearly Erroneous Findings of Fact.**

Sections II(B) and II(C) of the Appellant's Brief address the district court's mistake when it confused the number of milligrams with the number of tablets in its analysis. Corrected Appellant Brief, R. 21, Page ID ## 12-14. This resulted in an incorrect conclusion that there were no over prescriptions in this case, which permeated the court's opinion. As explained in the Appellant's Brief, the facts show that over prescriptions did occur but for the district court's mix-up of milligrams vs. the number of tablets. Unfortunately, this opinion is still good law in the Eastern District of Michigan when it is clearly erroneous. Neither this Court nor the district court addressed this factual mix-up in any of their opinions. This factual issue needs to be addressed by this Court

before concluding that no abuse of discretion occurred. *In re Whirlpool Corp.*, 678 F.3d 409, 416.

### 2. The District Court Used the Wrong Legal Standard By Confusing Summary Judgment Law with Rule 12(b)(6) Law.

Section II(G) of the Appellant's Brief discusses the district court's mistake by requiring evidence for a Rule 12(b)(6) motion. Corrected Appellant Brief, R. 21, Page ID ## 19-20. Neither this Court nor the district court addressed this factual issue in any of their opinions. As explained in the Appellant's Brief, the district court asked for "evidence," "evidentiary support," or "evidence to support" six (6) times throughout its opinion. Sheoran even responded with an affidavit from another pharmacist to satisfy the Court's improper evidence requirements. The district court used an incorrect and more stringent legal standard in this case, and that mistake permeated the court's opinion. Unfortunately, this opinion is still good law in the Eastern District of Michigan, citable by other cases, but blatantly incorrect.

In this case, the district court did not apply the correct legal standard for a 12(b)(6) motion. This court ignored this fact in its opinion by not addressing it at all. This fact should be considered in this Court's analysis as to whether the district court abused its discretion by not hearing oral argument. *In re Whirlpool Corp.*, 678 F.3d 409, 416.

### 3. The District Court and This Court Used the Wrong Legal Standard by Relying on *Sheldon*.

Section II(E) of the Appellant's Brief discusses the district court's mistake by relying on *United States ex rel. Sheldon v. Kettering Health Network*, 816 F. 3d 399 (6th Cir. 2016) for the elements of an FCA claim. Corrected Appellant Brief, R. 21, Page ID ## 10-12. *Sheldon* is the wrong legal standard to use in this case for two reasons.

First, *Sheldon* was decided three (3) years after this complaint was filed. A plaintiff cannot be expected to plead the elements of a claim based on a future case that occurs three (3) years after the plaintiff filed its case. *Sheldon* was decided in 2016. This case was filed in 2013. For this reason, both the district court and this Court used the wrong legal standard in this case to define the elements of an FCA claim. This fact is one of the four reasons for this Court to conclude that an abuse of discretion occurred when the district court decided not to have oral argument. *In re Whirlpool Corp.*, 678 F.3d 409, 416.

The second reason that *Sheldon* is the wrong legal standard is because it only represents one of the two prongs for an FCA claim. An FCA violation can be a false or fraudulent claim under 31 U.S.C. § 3729(a)(1)(A) or a false record or statement under 31 U.S.C. § 3729(a)(1)(B). Sheldon lays out the elements of an FCA claim, but it does not clearly indicate which

prong it is for—(a)(1)(A) false claim or (a)(1)(B) false record or statement. The district court and this Court wrongly assumed that *Sheldon* applies to both prongs. It does not.

*Sheldon* relies upon *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 618 F.3d 505, 509 (6th Cir.2010) ("SNAPP II") for the elements of an FCA claim. SNAP II defined the elements of an FCA claim as it relates to today's version of 31 U.S.C. § 3729(a)(1)(B). It does not define the elements of an FCA claim under 31 U.S.C. § 3729(a)(1)(A).

Sheoran sued under both prongs. Relying on *Sheldon* to dismiss all of Sheoran's claims is error because *Sheldon* does not list the elements for a false claim under 31 U.S.C. § (a)(1)(A). For these reasons, the district court and this Court used the wrong legal standard to deny Sheoran's FCA claims. Using the wrong legal standard is one of the four reasons to find an abuse of discretion for not having a hearing before issuing a ruling. *In re Whirlpool Corp.*, 678 F.3d 409, 416.

#### 4. The District Court Misapplied the Correct Legal Standard By Not Considering Facts Argued by Sheoran for His Retaliation Claim.

Section II(F) of the Appellant's Brief addresses the district court's analysis of Sheoran's retaliation claim. Corrected Appellant Brief, R. 21, Page ID ## 17-19. Both the district court and this Court are correct

in holding that *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559 (6th Cir. 2003) is the controlling law to determine when an FCA retaliation claim exists. Both courts, however, reached the wrong conclusion in applying *Yuhasz* because they did not consider all the facts offered by Sheoran in his Appellant's Brief. Briefly, both courts ignored the following:

a. Both Courts did not address the fact that Sheoran told his supervisor and upper management personnel to contact the Drug Enforcement Agency about Walmart filling illegal narcotics prescriptions.

b. Both Courts did not address the fact that Sheoran contacted the Taylor Police Department and filed a police report for Walmart's illegal narcotics prescriptions then notified his supervisor of the police report.

c. Lastly, although this was not included in the Appellant's Brief, this Court made a factual finding—without a hearing—that included the word "stealing."

"After a meeting where Sheoran was reprimanded for stealing the Medical Expenses Summary (later attached to his complaint) ... he was fired."

Opinion, p. 2.

Such an accusation never appeared in the district court record. If this Court chooses to make these crude accusations against Sheoran, without a hearing, then this Court can include this accusation in its analysis of whether Walmart was put on notice that Sheoran would file an FCA claim. In other words, because this Court held that Walmart was concerned that Sheoran was taking documents to support an FCA claim, then Walmart was put on notice that Sheoran would be filing an FCA claim under *Yuhasz*.

For these reasons, the district court and this Court misapplied *Yuhasz* by failing to address all the facts set forth by Sheoran in this fact-driven analysis. Once this Court considers all the facts together, then this Court can make a valid determination as to whether Walmart was put on notice under *Yuhasz*. At a minimum, this Court needs to address the facts in (a), (b), and (c) above in order to make a fair decision. For these reasons, the district court and this Court misapplied the correct legal standard, which is a basis for this Court to find an abuse of discretion for not having oral argument. *In re Whirlpool Corp.*, 678 F.3d 409, 416.

**5. The District Court Made a Clear Error of Judgment by Making Factual Findings About Sheoran's Knowledge Without a Hearing.**

Section II(H) of the Appellant's Brief discusses the district court's clear error of judgment when

making conclusions about Sheoran's knowledge. Corrected Appellant Brief, R. 21, Page ID ## 20-23. Again, neither this Court nor the district court addressed this factual issue in any of their opinions.

The district court apparently used its own judgment for the benefit of Walmart when it made three (3) incorrect factual determinations about Sheoran's knowledge, without a hearing, as described in the Appellant's Brief. These three (3) factual determinations were ignored in this Court's opinion.

As a registered pharmacist, Sheoran must take continuing education classes every two (2) years in Michigan. Continuing education includes identifying when narcotics are being overprescribed. Pharmacists are trained to identify the illegal diversion of narcotics and are the first line of defense against the opioid crisis as a gatekeeper for the public's safety. Pharmacists cannot fill prescriptions they believe were written for illegal purposes. In addition, Sheoran is a licensed pharmacist in ten (10) states, unlike most pharmacists, and took a separate examination for all ten (10) states. Each examination required him to identify when narcotics are being overprescribed. A pharmacist can get into trouble with the police, the Drug Enforcement Agency, and/or the State Board of Pharmacy if he or she filled prescriptions that they were trained to know are illegal. Thus, the district court made a clear error of judgment when it ruled that Sheoran does not know when narcotics are being

overprescribed. Further, the district court made this factual determination without a hearing.

In addition, the district court used its own judgment for the benefit of Walmart when it ruled that Sheoran cannot possibly know how billing works for Medicare and Medicaid. This is another impermissible finding of fact without a hearing. As a pharmacist, Sheoran's pharmaceutical responsibility is to make sure patients pay by Medicare or Medicaid, if eligible, before releasing medication to them. Further, unlike most pharmacists, Sheoran was a Pharmacy Manager at two locations and even owned a pharmacy. He has knowledge about billing Medicare and Medicaid from all his experiences. Thus, the district court made a clear error of judgment by ruling that Sheoran did not have the knowledge to know when Medicare or Medicaid was being used or when patients are being overprescribed. These facts are clear errors of judgment, which is a basis for this Court to find an abuse of discretion for not having a hearing. *In re Whirlpool Corp.*, 678 F.3d 409, 416.

Further, Walmart has the data for the individual in the Medical Expenses Summary. Walmart never argued that Medicare or Medicaid was not being used. Rule 9(b) should not be read to "reintroduce formalities to pleading... A complaint sufficiently pleads the time, place, and content of the alleged misrepresentation so long as it ensures that the defendant possesses sufficient information to

respond to an allegation of fraud." *Sheldon*, 816 F. 3d 399, 408 citations and quotations omitted.

**B. This Court Wrongfully Denied Sheoran's State Law Claims.**

The most egregious action by this Court is to choose carefully parsed words to describe what occurred when Walmart forgot to include the Michigan Medicaid False Claim Act (hereinafter, "MMFCA") in its motion to dismiss. See Walmart's Motion to Dismiss the Second Amended Complaint, R. 61, Page ID ## 704-734.

The parties never briefed Sheoran's MMFCA claims because they were never brought up. This Court affirmed the judgment against Sheoran on his MMFCA claims when he was not provided any notice or an opportunity to be heard.

Notice and an opportunity to be heard have been the bedrock principles of our judicial system for over a hundred years.

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice

> detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

*Goldberg v. Kelly, et al.*, 397 U.S. 254, pp. 267-268 (1970).

This Court's treatment of this issue, which protects Walmart, is alarming. It is the main reason that Sheoran decided to file this motion for reconsideration *en banc*.

Further, the one case relied upon by this Court to deny Sheoran his due process rights actually did provide notice and an opportunity to be heard. The second issue in that motion to dismiss was for MMFCA claims. Walmart's motion to dismiss did not include MMFCA claims at all.

For these reasons, this Court should remand this case to the district court for a proper determination of Sheoran's MMFCA claims.

## IV. CONCLUSION

For all these reasons, the district court abused its discretion when it decided not to have oral argument before issuing its opinions. *In re Whirlpool Corp.*, 678 F.3d 409, 416. Judicial integrity requires that this Court address all the relevant facts identified above in order to reach a just result and treat Sheoran fairly.

By ignoring the facts favorable to Sheoran, this Court fails to hold the district court accountable for its mistakes, jeopardizes judicial integrity, muddies the body of law other courts rely upon, and rubber stamps improper judicial behavior.

Sheoran asks this Court to vacate the judgment and all the opinions in this case and remand this case to the district court for a hearing on the Rule 12(b)(6) motions and for a proper determination of Sheoran's state law claims.

Respectfully submitted,

/s/ Ann Marie Stinnett

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Dated: June 21, 2021