

APPENDIX A

IN THE COURT OF APPEALS FOR THE FIFTH CIRCUIT OF LOUISIANA NEW ORLEANS, LOUISIANA

**UNITED STATES OF AMERICA, EX REL,
BRIDGETTE JACOBS,
Appellants**

v.

**WALGREEN COMPANY,
Appellee**

**On Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-19-5021
March 2, 2022**

Before Clement, Ho, and Oldham, Circuit Judges.

**United States Court of Appeals
for the Fifth Circuit**

No. 21-20463
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
March 2, 2022
Lyle W. Cayce
Clerk

United States of America, ex rel, Bridgette Jacobs,
Plaintiff—Appellant,

versus

Walgreen Company,
Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-5021

Before Clement, Ho, and Oldham, *Circuit Judges.*

Per Curiam:^{*}

^{*} Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th

Plaintiff-Relator Bridgette Jacobs is a pharmacist licensed in Texas who has been employed by Defendant Walgreen Company (Walgreens) since 2002. In 2019, Jacobs filed a qui tam suit against Walgreens under the False Claims Act (FCA) and the Texas Medicaid Fraud Prevention Act (TMFPA). Her complaint generally alleges that, throughout her employment, Walgreens has repeatedly submitted incorrect and false claims for reimbursement to Medicare and Medicaid. The United States and the State of Texas declined to intervene.

After giving Jacobs a chance to amend her complaint, the district court ultimately dismissed her FCA claims on the ground that she failed to plead them with sufficient particularity. It then declined to exercise supplemental jurisdiction over her TMFPA claim. Jacobs timely appealed. We AFFIRM.

The FCA imposes liability on any person who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval[]” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” 31 U.S.C. § 3729(a)(1)(A)–(B). To state a claim under the FCA, a relator must plead: “(1) a false statement or fraudulent course of conduct; (2) that was made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money (i.e., that involved a claim).” *United States ex rel. Spicer v. Westbrook*, 751

Circuit Rule 47.5.4.

F.3d 354, 365 (5th Cir. 2014) (citing *United States ex rel. Longhi v. United States*, 575 F.3d 458, 467 (5th Cir. 2009)). A complaint filed under the FCA is subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b). *Id.* at 365.

Jacobs' amended complaint provided ten "examples" of Walgreens' allegedly fraudulent billing practices, none of which pleaded facts supporting an inference that the allegedly fraudulent conduct amounted to anything more than innocent mistake or negligence. Our precedent is clear: "th[e] mens rea requirement [of an FCA claim] is not met by mere negligence or even gross negligence." *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 338 (5th Cir. 2008); *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 681 (5th Cir. 2003) (en banc) (Jones, J., concurring) ("On the other hand, the statute's definition of 'knowingly' excludes liability for innocent mistakes or negligence." (citations omitted)). Indeed, on multiple occasions throughout the amended complaint, Jacobs *herself* characterized Walgreens' actions as "mistakes."

The balance of Jacobs' amended complaint pleaded that Walgreens failed to correct certain billing mistakes once it discovered them. These allegations also fail; conclusory allegations that do not provide specifics as to the "who, what, when, where, and how of the alleged fraud" are insufficient under Rule 9(b). *United States ex rel. Colquitt v. Abbott Labs.*, 858 F.3d 365, 371 (5th Cir. 2017) (internal quotation marks and citation omitted).

The district court gave Jacobs a chance to amend her complaint to address the pleading deficiencies in her original complaint. Its order on Walgreens' motion to dismiss the original complaint specifically instructed her that her amended complaint should be "responsive to the issues raised by Walgreens' motion to dismiss." But Jacobs' amended complaint suffers from the same deficiencies as her original complaint. Accordingly, the district court properly dismissed her amended complaint with prejudice and without leave to amend.

Moreover, the district court was within its discretion to decline to exercise supplemental jurisdiction over Jacobs' TMFPA claim. "District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state claim once all federal claims are dismissed." *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993) (per curiam). Not only did the district court dismiss all federal claims over which it had original jurisdiction, but TMFPA claims differ in scope from FCA claims, making dismissal without prejudice of Jacobs' TMFPA claim even more appropriate. *See, e.g., United States v. Cath. Health Initiatives*, 312 F. Supp. 3d 584, 607 (S.D. Tex. 2018), *aff'd sub nom. United States ex rel. Patel v. Cath. Health Initiatives*, 792 F. App'x 296 (5th Cir. 2019) (unpublished).

The judgment is AFFIRMED.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES *and* THE STATE OF TEXAS,
ex rel, BRIDGETTE JACOBS,
Plaintiff

v.

WALGREEN COMPANY,
Defendant

On Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-19-5021
July 29, 2021

Before Judge David Hittner.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

United States District Court
Southern District of Texas
ENTERED
July 29, 2021
Nathan Ochsner, Clerk

UNITED STATES *and* THE STATE OF
TEXAS *ex rel.* BRIDGETTE JACOBS
Plaintiffs,

v. Civil Action No. H-19-5021

WALGREEN COMPANY,
Defendant.

ORDER

Pending before the Court is Defendant Walgreen Co.'s Motion to Dismiss Relator's Amended Complaint Under Rules 12(b)(6), 8(a), and 9(b), and Memorandum in Support (Document No. 28). Having considered the motion, submissions, and applicable law, the Court determines the motion should be granted.

I. BACKGROUND

This is a *qui tam* suit involving alleged

Medicare and Medicaid fraud. Plaintiff-Relator Bridgette Jacobs ("Jacobs") is a pharmacist licensed to practice in Texas. Jacobs alleges she has been employed by Defendant Walgreen Co. ("Walgreens")¹ since 2002. Jacobs alleges, during her employment with Walgreens, Walgreens submitted claims to Medicare and Medicaid for medication that was not prescribed, for medication in incorrect dosages, and for incorrect medications. Jacobs also alleges when these errors were discovered, Walgreens did not report to or correct the errors with Medicare or Medicaid. Jacob further alleges she reported the alleged misconduct and it was not corrected.

Based on the foregoing, on December 30, 2019, Jacobs commenced this lawsuit against Walgreens under seal. Jacobs asserts claims for violations of the False Claims Act (the "FCA"), 31 U.S.C. § 3729 *et seq.*, and the Texas Medicaid Fraud Prevention Act (the "TMFPA"), Tex. Hum. Res. Code § 36.002. On March 16, 2020, the United States and the State of Texas declined to intervene and the Court subsequently

¹ The Court notes the docket lists the defendant as Walgreen Company based on Jacobs's complaint. However, the defendant indicated its correct legal name is Walgreen Co. and that it was improperly named. *See Defendant Walgreen Co.'s Motion to Dismiss Relator's Amended Complaint Under Rules 12(b)(6), 8(a), and 9(b), and Memorandum in Support*, Document No. 28 at 6 n.1. Jacobs does not dispute the error and refers to the defendant as Walgreen Co. in parts of her response to the motion to dismiss. *Relator's Response to Defendant's Motion to Dismiss Relator's Amended Complaint*, Document No. 29 at 3. As such, the Court refers to the defendant by its proper name, Walgreen Co.

unsealed the case. On May 13, 2020, Walgreens moved to dismiss. On December 21, 2020, the Court denied without prejudice Walgreens's motion to dismiss and required Jacobs file an amended complaint. On January 11, 2021, Jacobs filed an amended complaint, asserting the same claims. On January 25, 2021, Walgreens moved to dismiss Jacobs's claims.

II. STANDARD OF REVIEW

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' ... it demands more than ... 'labels and conclusions.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555).

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, "[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breeches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). To survive the motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."

Twombly, 550 U.S. at 570. "Conversely, 'when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.' " *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 558).

III. LAW & ANALYSIS

Walgreens moves to dismiss, contending, *inter alia*, Jacobs's amended complaint fails to state with particularity the circumstances constituting the alleged fraud, as required by Federal Rule of Civil Procedure 9(b). Jacobs contends the amended complaint contains sufficient factual allegations to survive the motion to dismiss. The Court addresses the FCA claims before turning to the TMFPA claim.

A. *The FCA*

The FCA "provides for civil suits brought by both the Attorney General and by private persons, termed relators, who serve as a 'posse of *ad hoc* deputies to uncover and prosecute frauds against the government.' " *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 184 (5th Cir. 2009) (quoting *United States ex rel. Milam v. Univ. of Tex. MD. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992)). Whether prosecuted by the government or by relators in a *qui tam* capacity, a person is liable under the FCA if that person "knowingly presents, or causes to be

presented, a false or fraudulent claim for payment or approval[]" or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim[.]" 31 U.S.C. § 3729(a)(1)(A)-(B). To establish either type of claim under the FCA, "a plaintiff must plead the following four elements: (1) a false statement or fraudulent course of conduct; (2) that was made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." *United States ex rel. Integra Med Analytics, L.L.C. v. Baylor Scott & White Health*, 816 F. App'x 892, 896 (5th Cir. 2020) (per curiam) (quoting *United States ex rel. King v. Solvay Pharm., Inc.*, 871 F.3d 318, 324 (5th Cir. 2017)).

In alleging facts to support a false statement or fraudulent course of conduct, "a complaint filed under the [FCA] must meet the heightened pleading standard of Rule 9(b)." *Id.* (quoting *Grubbs*, 565 F.3d at 185). Relators must therefore "state with particularity the circumstances constituting fraud or mistake:" Fed. R. Civ. P. 9(b). "This requires, at a minimum, that a plaintiff plead the 'who, what, when, where, and how' of the alleged fraud." *United States ex rel. Colquitt v. Abbott Laboratories*, 858 F.3d 365, 371 (5th Cir. 2017) (quoting *Williams v. WMX Tech., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997)). Thus, "a relator's complaint may survive a motion to dismiss by alleging either 'the details of an actually submitted false claim' or 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong

inference that claims were actually submitted." *United States ex rel. Headen v. Abundant Life Therapeutic Servs. Tex., LLC*, No. CV H-18-773, 2019 WL 1930274, at *3 (S.D. Tex. Apr. 30, 2019) (Rosenthal, C.J.) (quoting *Grubbs*, 565 F.3d at 190).

Here, Jacobs alleges "Walgreens has been repeatedly, persistently, and openly submitting incorrect and fraudulent requests for reimbursement to Medicare and Medicaid programs "² Jacobs also alleges Walgreens would mistakenly bill charges to Medicare and Medicaid and would later fail to reverse the charges and maintain the claims based on the incorrect bills.³ Jacobs goes on to allege ten examples of Walgreens filling prescriptions and allegedly billing Medicare and Medicaid.⁴ Five of the examples involve Walgreens making an error or mistake when dispensing medications to customers.⁵ For example, in June 2019, Jacobs alleges she noticed a prescription "was incorrectly typed and dispensed" for Hydralazine

² *Plaintiffs' First Amended Complaint*, Document No. 27, ¶ 12.

³ *Plaintiffs' First Amended Complaint*, Document No. 27, ¶¶ 14-15.

⁴ *Plaintiffs' First Amended Complaint*, Document No. 27, ¶¶ 18-46.

⁵ *Plaintiffs' First Amended Complaint*, Document No. 27, ¶¶ 18-31, 41-42, 45-46.

25mg tablets, instead of HCTZ 25mg tablets.⁶ Jacobs further alleges the error went unnoticed for five months, and once noted, Walgreens contacted the physician, was instructed to dispense the drug as prescribed, and Walgreens closed the mistake on their internal system, but never reported it to Medicare or Medicaid.⁷ Another example describes an event in October 2019, when Jacobs alleges Walgreens store No. 3198 incorrectly dispensed a Flexhaler 90 mcg, rather than a Flexhaler 180 mcg, and the error was allegedly never reported to Medicare insurance.⁸

Three of the other five examples alleged by Jacobs involve medications with valid prescriptions that were dispensed to customers without Walgreens verifying the prescription with the physicians.⁹ For example, Jacobs alleges while working on December 29, 2019, she saw a prescription get faxed to the pharmacy that was not signed by a physician.¹⁰ Jacobs further alleges an unnamed pharmacists filled the

⁶ *Plaintiffs' First Amended Complaint*, Document No. 27, ¶ 18.

⁷ *Plaintiffs' First Amended Complaint*, Document No. 27, ¶¶ 18, 20, 23.

⁸ *Plaintiffs' First Amended Complaint*, Document No. 27, ¶ 42.

⁹ *Plaintiffs' First Amended Complaint*, Document No. 27, ¶¶ 34, 35, 38-40, 44.

¹⁰ *Plaintiffs' First Amended Complaint*, Document No. 27, ¶ 44.

prescription without checking with the physician and billed Medicare.¹¹ Jacobs claims these allegations rise to the level of a "nationwide and entrenched scheme to defraud" Medicare and Medicaid.¹²

However, Jacobs does not specifically allege who at Walgreens submitted the claims or who failed to correct the allegedly fraudulent claims that were submitted. Rather, she generally alleges "Walgreens" or Walgreens's pharmacists incorrectly dispensed medication and billed Medicare or Medicaid.¹³ In the one example she alleges a specific individual-a pharmacy manager-told technicians to provide mosquito repellent to pregnant women, she states that Medicaid "foot[ed] the bill *in most cases*, without any justification or need."¹⁴ Such allegations fail to plead that a false claim was actually submitted to Medicaid.

Jacobs also does not identify any statute or regulation that would lead to the conclusion that Walgreens's alleged actions were fraudulent. Further, Jacobs allegations are corroborated only by bare

¹¹ *Plaintiffs' First Amended Complaint*, Document No. 27, ¶ 44.

¹² *Plaintiffs' First Amended Complaint*, Document No. 27, ¶ 47.

¹³ *Plaintiffs' First Amended Complaint*, Document No. 27, ¶¶ 21, 31, 34, 44, 46.

¹⁴ *Plaintiffs' First Amended Complaint*, Document No. 27, ¶¶ 36-37 (emphasis added).

examples of instances in which Walgreens made "mistakes" or "errors" in filling prescriptions and conclusory allegations that unnamed representatives of unspecified Walgreens locations¹⁵ failed to report the errors to Medicare or Medicaid. Having carefully reviewed the allegations in Jacobs's amended complaint and the applicable law, the Court finds Jacobs's allegations are not sufficient, under Rule 9(b), to support the inference that Walgreens's actions constituted fraud, rather than innocent mistake, negligence, or a regulatory violation. *See United States ex rel. Hendrickson v. Bank of Am., NA.*, 343 F. Supp. 3d 610, 634-35 (N.D. Tex. 2018), *aff'd*, 779 F. App'x 250 (5th Cir. 2019). Thus, the Court finds Jacobs fails to state a claim for relief under the FCA. Accordingly, the motion to dismiss is granted as to the FCA claims. The Court next turns to the TMFPA claim.

B. The TMFPA

Walgreens contends Jacobs's allegations are insufficient to plead a claim under the TMFPA. Alternatively, Walgreens contends the Court should decline to exercise supplemental jurisdiction over the TMFPA claim. Jacobs contends the TMFPA claim should not be dismissed because the amended complaint meets the pleading requirements and that the Court should not decline supplemental jurisdiction.

¹⁵ Jacobs does specify store numbers for Walgreens on two occasions. *See Plaintiffs' First Amended Complaint*, Document No. 27, ¶¶ 41-42, 44.

The TMFPA is "similar in aim and tactic" to the FCA and has been described by Texas law as "analogous" to the FCA. *See In re Xerox Corp.*, 555 S.W.3d 518, 535 (Tex. 2018). However, as pointed out by the State of Texas in its Statement of Interest,¹⁶ the two statutes "employ materially different language" and therefore courts are required to look to the plain language when analyzing claims brought under the TMFPA. *Id.* The textual differences in the TMFPA require a separate interpretation from the FCA that may capture a greater scope of misconduct. *See United States ex rel. Patel v. Catholic Health Initiatives*, 312 F. Supp. 2d 584, 607 (S.D. Tex. 2018) (Ellison, J.), *aff'd* 792 F. App'x 296 (5th Cir. 2019) (per curiam). Given the differing interpretations of the statutes, and in light of the Court's holding as to the FCA claims, the Court declines to exercise supplemental jurisdiction over Jacobs's claim under the TMFPA. *See* 28 U.S.C. § 1337(c)(3) (providing the Court may decline supplemental jurisdiction over a claim after it "has dismissed all claims over which it has original jurisdiction"); *Abundant Life Therapeutic Servs.*, 2019 WL 1930274, at *10 (citing *Parker & Parsley Petro. Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992)). Accordingly, the motion is granted as to the request to

¹⁶ The State of Texas filed a Statement of Interest contending the scope of activity prohibited by the TMFPA is broader than that prohibited by the FCA. Specifically, the State of Texas asserts the TMFPA does not require presentment of a false claim, nor does it require a showing that the unlawful act was material to payment to impose liability. *State of Texas's Second Statement of Interest in Response to Defendant's Motion to Dismiss Relator's Amended Complaint*, Document No. 30.

decline supplemental jurisdiction over Jacobs's TMFPA claim.¹⁷

IV. CONCLUSION

Based on the foregoing, the Court hereby

ORDERS that Defendant Walgreen Co.'s Motion to Dismiss Relator's Amended Complaint Under Rules 12(b)(6), 8(a), and 9(b), and Memorandum in Support (Document No. 28) is **GRANTED**. The FCA claims are dismissed with prejudice and without leave to amend. The TMFPA claim -is dismissed without prejudice.

¹⁷ In her response to the motion to dismiss, Jacobs states she is willing to amend the amended complaint to name the employees who engaged in false statements and fraudulent practices and identify the federal and state laws Walgreens is allegedly violating. Jacobs goes on to identify the names of the people and certain laws. *Relator's Response to Defendant's Motion to Dismiss Relator's Amended Complaint*, Document No. 29 at 7-8. The Court did not consider these allegations, as "[f]actual allegations first asserted in a response to a motion to dismiss are not appropriately reviewed in a Rule 12(b)(6) motion." *Edgar v. Anadarko Petroleum Corp.*, No. CV H-17-1372, 2019 WL 1167786, at *11 (S.D. Tex. Mar. 13, 2019) (Rosenthal, C.J.). Moreover, on December 21, 2020, the Court ordered Jacobs to amend her original complaint to address issues raised in Walgreens' s first motion to dismiss and to ensure the complaint complied with the federal pleading rules. *Order*, Document No. 26. Because the deficiencies as to these allegations were previously raised by Walgreens and not corrected by Jacobs when given the opportunity by the Court, the Court denies Jacobs another opportunity to further amend her complaint.

The Court will issue a separate order of dismissal.

SIGNED at Houston, Texas, on this 28 day of July, 2021.

/s/
DAVID HITTNER
United States District Judge

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES *and* THE STATE OF TEXAS,
ex rel, BRIDGETTE JACOBS,
Plaintiff

v.

WALGREEN COMPANY,
Defendant

On Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-19-5021
January 11, 2021

Before Judge David Hittner.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES,
STATE OF TEXAS, *et al*

ex rel. BRIDGETTE JACOBS,
Plaintiffs,

v.

WALGREEN COMPANY,
Defendant.

CIVIL ACTION NO. 19CV5021
JURY DEMANDED
IN CAMERA

**PLAINTIFFS' FIRST AMENDED COMPLAINT
TO THE HONORABLE U.S. DISTRICT COURT
JUDGE:**

Relator Bridgette Jacobs (“Relator”), for and in the name of the United States, the State of Texas, and similarly situated States, complains of and about Defendant Walgreen Company (hereinafter referred to as “Walgreens” or “Defendant”), files this First Amended Complaint, and will show onto the Court as follows:

I. PARTIES

1. Relator Bridgette Jacobs is an individual residing in Fort Bend County, Texas.

2. The United States, Plaintiff, prior to the intervention of the United States Attorney, is represented by Relator, pursuant to 31 U.S.C. § 3730(b)(1) (2012).

3. The State of Texas and similarly situated States are represented by Relator, prior to the intervention of the Texas Attorney General or any counsel of the States' choosing, pursuant to Section 36.101 of the Texas Human Resources Code and similar State statutes prohibiting fraud on State Medicaid and similar programs. TEX. HUM. RES. CODE § 36.101 (West 2019).

4. Defendant Walgreen Company is a foreign for-profit corporation incorporated in the State of Delaware and headquartered in the State of Illinois. Walgreens regularly conducts business in Harris County, Texas. Walgreens may be served with process by serving its registered agent, Corporate Service Company, at 251 Little Falls Drive, Wilmington, DE, 19808.

II. JURISDICTION

5. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as Plaintiffs' causes of action arise under federal statutes, namely the False Claims Act,

31 U.S.C. §§ 3729-3733, as amended.

6. Additionally, this Court has supplemental jurisdiction over Plaintiffs' similar state law claims, pursuant to 28 U.S.C. § 1337, because such claims are so related to the claims within the Court's original jurisdiction that they form part of the same case or controversy, under Article 3 of the United States Constitution.

7. Venue is proper in the Southern District of Texas – Houston Division, pursuant to 28 U.S.C. § 1331(a), because this is the judicial district where a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred.

III. NATURE OF THE ACTION

8. This action is brought pursuant to the False Claims Act, the Texas Medicaid Fraud Prevention Act, and similar legislation of the other States, on the grounds that Defendant unlawfully and knowingly presented, or caused to be presented, false or fraudulent claims for payment to the United States, the State of Texas, under the Texas Medicaid program, and similarly situated States, under their respective Medicaid programs, in violation of said statutes. 31 U.S.C. § 3729(a)(1)(A), TEX. HUM. RES. CODE § 36.002. Defendant further knowingly made, used, and caused to be made or used, false records or statements material to its false or fraudulent claim. 31 U.S.C. § 3729(a)(1)(B), TEX HUM. RES. CODE § 36.002(1)-(2).

IV. FACTS

9. Relator is a licensed pharmacist and has been licensed in the State of Texas for over twenty-nine (29) years.

10. Relator has been in the employ of Walgreens since November 2002.

11. All statements of fact contained in this Complaint are within Relator's personal and direct knowledge.

12. Throughout Relator's tenure, Walgreens has been repeatedly, persistently, and openly submitting incorrect and fraudulent requests for reimbursement to Medicare and Medicaid programs ("Programs"), from requesting that the Programs pay for the prescription medication under the name of a physician that was not treating the patient requesting a prescription to be filled, to seeking reimbursement from the Programs for medications that were not prescribed but wrongly dispensed to the patients, to dispensing the amounts and quantities of drugs that were below the amounts billed in the reimbursement claims submitted to the Programs, to never reversing the charges to the Programs for wrongly dispensed prescription drugs.

13. Walgreens uses an electronic system to manage the incoming prescriptions from licensed physicians. When a prescription is filled by Walgreens wrongly, a mistake is entered manually or

automatically into the system. For internal reporting purposes, a mistake on Walgreens electronic systems needs to be resolved or “closed” within the prescribed timeframe.

14. Federal and State law also requires that Walgreens reverse the mistakenly billed charges to the Programs and resubmit requests for reimbursement with the correct medication name, correct medication amount and quantity, and correct physician’s name.

15. While Walgreens would, in most cases, eventually dispense correct medications to the patients, Walgreens would habitually not reverse the charges to the Programs and maintain the claims on the basis of the incorrect bills.

16. Walgreens would further “close” the mistakes on its internal systems, after the mistakes are discovered, but never make those “closed” mistakes known to the Programs’ administrator.

17. Moreover, Walgreens would regularly, persistently, and habitually *delete* wrongly dispensed prescriptions from patients’ profiles on its internal systems, without reporting a correction of its own errors to the Programs.

18. In June 2019, while reviewing a refill request, Relator noticed that the prescription on the request was incorrectly typed and dispensed. HCTZ 25mg tablets (diuretic) were prescribed by the doctor, but Hydralazine 25mg tablets (vasodilator) was listed

on the Walgreens systems and dispensed to the patient. The initial prescription for the patient was dispensed in January 2019 and refilled each month for the next four months incorrectly, to a total of 5 months, without any pharmacist noticing the medication error.

19. The doctor had clearly typed that HCTZ 25mg was to be dispensed.

20. When the mistake was discovered, the patient was contacted by the pharmacy, but did not seem to have understood that he had been taking the wrong medication for five months, because he barely spoke English and was elderly.

21. The Walgreens pharmacy in question informed the prescribing physician of the dispensing error, and the physician instructed to re-dispense the drug as prescribed, which was eventually done.

22. Hydralazine 25mg was billed to and paid for by Medicare and is not, to Relator's knowledge, a generic or other substitute for HCTZ.

23. The mistake was "closed" on Walgreens' internal systems after the conversation with the prescribing physician, but never reported to the Programs.

24. No reversal was done by Walgreens of prior charges to the Programs.

25. On September 5, 2019, Relator received a call from a very upset nurse, asking Relator to look at a patient's medication order from August 2019 and to tell the nurse what the order was written for. Relator, having reviewed the prescription, immediately told the nurse that the order was for Luvox 150mg, which is a medication that treats major depressive disorders.

26. The nurse confirmed that the prescription was correct.

27. The nurse, however, asked Relator why the pharmacist at Walgreens dispensed Levothyroxine 150mg, which is a thyroid medication, to the patient.

28. The nurse informed Relator that the patient was new to the nurse's facility and was in a desperate need to be timely put on Luvox. When the patient was admitted to the nurse's facility, he was told to bring all his new medications for a check, which uncovered the incorrect prescription. The nurse said she obtained permission from her supervisor to take the patient back to the Walgreens pharmacy, because she thought the medication quantity was incorrect.

29. The nurse asked the pharmacist on duty to check the original order and make sure everything was correct. Instead of verifying the prescription, the pharmacist loaned the patient more Levothyroxine 150mg and requested a refill approval for more Levothyroxine 150mg.

30. Relator's review of patient's file at

Walgreens revealed that the patient took Levothyroxine, one tablet twice a day, for a month, instead of Luvox.

31. Levothyroxine was billed to the Programs, and Walgreens failed to reverse the charges following the discovery of the mistake.

32. In August 2019, Relator noticed that Walgreens was habitually dispensing Fluticasone Nasal Spray (Rx), qty size 16 (cost \$76.99), a medication that is covered by Medicaid, instead of the Flonase Allergy Spray, qty size 6.6 or 15.8 (both being over-the-counter and not covered by Medicaid), without contacting the prescribing physicians for approval to dispense a different quantity of the medication or a substitute medication, as required by the Programs.

33. Relator reported the substitution practices to the Medicare Fraud Hotline, with Relator's report being assigned a reference no. 2019-271906.

34. There is an ongoing fraud on the Programs, with Walgreens wrongly dispensing Diclofenac 1% topical gel to the Medicare age group for joint pain relief. One tube of 100gm costs \$59.99. Relator noticed that prescribing physicians would habitually write only the frequency of application of Diclofenac, but not the correct quantity to be dispensed and applied. It is the pharmacist's duty to verify the correct number of tubes of the medication to be dispensed to patients.

35. Walgreens would habitually dispense a number of tubes the specific pharmacist would deem fit to patients, without verifications, and fraudulently bill the number dispensed to the Programs.

36. Relator witnessed Walgreens pharmacy manager instruct technicians under their supervision to add mosquito repellants to the patients' medicine bags when patients would be getting prenatal vitamins, on the premise that the prescription count was down.

37. The manager also instructed technicians to remind patients that the repellent spray was free and that they could get a new can every 15 days. In fact, the mosquito repellent spray in question is not free, but simply free to the patients, with Medicaid footing the bill in most cases, without any justification or need.

38. Relator also noticed an ongoing issue with Walgreens wrongly dispensing Pedialyte Liquid. Referring physicians would routinely send e-prescriptions saying "Dispense Pedialyte x2ml," without specifying the volume of the bottle or the correct quantity of medication to dispense.

39. In order to correctly bill the Programs, Walgreens pharmacists would have to call the physicians and verify the quantity of the medication.

40. Instead, pharmacists would routinely dispense two 1000ml bottles to patients and bill the

Programs for them, without contacting physicians first.

41. On October 3, 2019, a patient called Walgreens store no. 3198 to have his cholesterol medication transferred from CVS to Walgreens. When transferred, Walgreens incorrectly typed and dispensed the wrong strength of Cholesterol medication. Patient called Walgreens the next day and informed the pharmacy that he received the incorrect medication strength.

42. The next day on October 4, 2019, the same store (no. 3198) was contacted by a patient verifying that she received the correct prescription for her Pulmicort Flexhaler 90mcg because she had discussed with her doctor an increase in strength. After examining the prescription, Relator found that the patient was correct. The prescription was written for Pulmicort Flexhaler 180 mcg but instead the store typed/dispensed 90 mcg. The cost for this medicine to Medicare was \$248.99. The error was never reported or corrected to her Medicare Insurance.

43. Relator called Walgreens Loss Prevention Hotline to report seeing too many medication mistakes (Report Reference No. 130013070) and included details of the mistakes were covered up by pharmacists by deleting the errors.

44. On December 29, 2019, while working at Walgreen store no. 4328, relator saw that prescription #2442947-4328 was faxed to pharmacy and not signed

by the doctor. The pharmacist filled the prescription without the doctor's signature and billed Medicare Insurance.

45. Earlier this year, an infant patient was prescribed a certain quantity of antibiotics by their physician. Walgreens dispensed the amount that did not match the prescription and billed the Programs for the price of the amount dispensed.

46. When the infant patient's parents came into the Walgreens pharmacy to receive the correct amount of the prescribed medicine, the pharmacist on duty simply created a new prescription and dispensed the full amount matching the prescription, with Walgreens again billing the Programs for the medicine.

47. The above are just very few examples of a nationwide and entrenched scheme to defraud the Programs. Relator brought all of the above and many other matters to the attention of Walgreens, but nothing was done.

48. To the opposite, Walgreens attempted and attempts to cover up every single statutory violation and gets rid of the inconvenient employees that comply with the statute and report the errors and billing deficiencies.

49. Relator's colleagues were threatened by Walgreens with termination if they made or reported errors with dispensing or accounting for medications that are billed to the Programs.

50. A pharmacy manager at one of the Walgreens locations was terminated by Walgreens after she reported all mistakes uncovered in the store under her supervision.

51. The terminated pharmacy manager uncovered a total of 50 mistakes in a matter of weeks.

V. SECTION 3729(a)(1)(A) FRAUD ON MEDICARE

52. Relator incorporates all of the foregoing paragraphs as if stated herein by reference

53. Under the False Claims Act, a person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment to the United States government, including the agency administering the Programs, is liable to the United States government. 31 U.S.C. § 3729(a)(1)(A), *see United States ex rel. Lemon v. Nurses To Go, Inc.*, 924 F.3d 155, 159 (5th Cir. 2019).

54. Walgreens has systematically been and still is presenting claims for payment to the Programs that are false and fraudulent.

55. Walgreens knew and currently knows of the errors on the claims it submits to the Programs, but elects not to report them, maintaining erroneous and excessive claims for reimbursement from the Programs.

56. As such, Walgreens knowingly and habitually presents false and fraudulent claims and commits an offense under the False Claims Act. Detailed information is not necessary. *United States ex rel. King v. Solvay S.A.*, 823 F. Supp. 2d 472, 491 (S.D. Tex. 2011) (“The Fifth Circuit held that “to plead with particularity the circumstances constituting fraud for a False Claims Act § 3729(a)(1) claim, a relator’s complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.”).

57. Relator has first hand knowledge of Walgreen actively covering up the known errors on its claims for reimbursement presented to the Programs, without reversing or correcting the claims.

VI. SECTION 3729(a)(1)(B) MEDICARE FRAUD

58. Relator incorporates all of the foregoing paragraphs as if fully stated herein by reference.

59. Under the False Claims Act, a person who knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim is liable to the United States government. 31 U.S.C. § 3729(a)(1)(B).

60. Walgreens used false and fraudulent records to submit claims for reimbursement to the Programs. Walgreens knew and knows that the records were false

and incorrect.

61. Instead of correcting the errors, reversing the charges, and resubmitting correct claims, Walgreens covers up the errors on its records and maintains the claims on the basis of the false records.

62. The records reflecting what medication, the quantity, and to whom the medications were dispensed form the basis of Walgreens' claims for reimbursement. Even without specific account numbers, the court may rule that it is a logical conclusion that incorrect records lead to fraudulent billing to the Government. *United States ex rel. King v. Solvay S.A.*, 823 F. Supp. 2d 472, 491 (S.D. Tex. 2011) ('That the fraudulent bills were presented to the Government is the logical conclusion of the particular allegations in...complaint even though it does not include exact billing numbers or amounts.')

63. As such, Walgreens is in violation of Section 3729(a)(1)(B).

VI. MEDICAID FRAUD

64. Relator incorporates all of the foregoing paragraphs as if fully stated herein by reference.

65. Under Texas Medicaid Fraud Prevention Act and similar statutes of the other States, a person who knowingly makes or causes to be made a false statement or misrepresentation of a material fact to permit a person to receive a benefit or payment under

the Medicaid program that is not authorized or that is greater than the benefit or payment that is authorized commits an unlawful act. TEX. HUM. RES. CODE § 36.002(1).

66. Walgreens made representations and statements to the Texas Medicaid program and Medicaid programs of the other States to receive reimbursement for the disbursement of prescription medications to Medicaid patients. As it was abundantly demonstrated above, many of those representations and statements are known to Walgreens to be incorrect and false.

67. The said statements and representations form the basis of Walgreens' Medicaid reimbursement claims.

68. The statements and representations allowed and still allow Walgreens to receive payments and benefits that are not authorized or that are significantly in excess of what is authorized by the programs.

69. Relator has direct knowledge of this, as she was discovering Walgreen's refusal to correct mistaken prescriptions and medicinal quantities while working at Walgreen. ("[D]irect knowledge is obtained first hand, by the relator's own efforts rather than by the labor of others, and not derivative of the information of others.' *U.S. ex rel. Lam v. Tenet Healthcare Corp.*, 287 F. App'x 396, 400 (5th Cir. 2008).

70. Therefore, Walgreens is committing fraud on the Texas Medicaid program and similar Medicaid programs of other States.

VII. PRAYER

In the light of everything set forth above, Relator respectfully asks that Defendant be cited to appear and answer herein and that, at final trial, Plaintiffs have judgment against Defendant for:

- a. All damages to which Plaintiffs may be entitled pursuant to this Original Complaint or any amendments hereto;
- b. A civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, per each violation of the False Claims Act;
- c. Three times the amount of damages that the federal government has sustained because of the unlawful acts of Defendant;
- d. Reasonable attorneys' fees, as allowed by applicable law (with conditional awards in the event of appeal);
- e. Pre-judgment and post-judgment interest until paid at the highest rate permitted by law;
- g. Costs of court; and
- h. Such other and further relief, at law, whether State

or federal, or in equity, to which Plaintiffs may be justly entitled.

Relator further respectfully requests that Relator be granted an award within the limits and as permitted under 31 U.S.C. §3730(d), Section 360.110 of the Texas Human Resources Code, and the laws of the similarly situated States on whose Medicaid programs Defendant committed fraud.

Respectfully submitted,
kennard law pc

/s/

Alfonso Kennard, Jr.
Texas Bar No.: 24036888
Southern District No: 713316
2603 Augusta Dr., Suite 1450
Houston, TX 77057
Telephone No.: (713) 742-0900
Fax No.: (713) 742-0951
E-Mail: Alfonso.Kennard@kennardlaw.com
ATTORNEY-IN-CHARGE FOR RELATOR

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2021, a true and correct copy of the foregoing instrument has been served electronically through the Court's CM/ECF system on all participants in this case and the following counsel of record:

Jeff Layne
Attorney-in-Charge
Texas Bar No. TX 00791083
Southern District Texas Bar No. 743086
REED SMITH LLP
401 Congress Avenue
Suite 1800
Austin, TX, 78701
Telephone: (512) 623-1821
Fax: (512) 623-1808
Email: jlayne@reedsSmith.com

Sara A. Brinkmann
Texas Bar No. TX 24069919
Southern District Texas Bar No. 1287802
REED SMITH LLP
811 Main Street
Houston, TX, 77002
Telephone: (713) 469-3800
Fax: (713) 469-3899
Email: sbrinkmann@reedsSmith.com

Counsel for Defendant Walgreen Co.

/s/
Alfonso Kennard, Jr