IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

UNITED STATES OF AMERICA and STATE OF TENNESSEE, Plaintiffs, v. WALGREEN COMPANY, Defendant.	)	Case No. 2:21-CV-00080-JRG-CRW

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNTS I-VI OF PLAINTIFFS' COMPLAINT

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**Pro hac vice application forthcoming*

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Civil Procedure 7.1, the Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

False Claims Act cases touch on nearly every sector of the economy, including defense, education, banking, technology, and healthcare, and exact a substantial toll on the economy. Companies can spend hundreds of thousands or even millions of dollars fielding discovery demands in a single case. Given the combination of the Act's draconian liability provisions—treble damages plus per-claim penalties—and enormous litigation costs, even meritless cases can be used to extract substantial settlements. As a result, cases involving the proper application of the False Claims Act are of particular concern to the Chamber and its members.[1]

INTRODUCTION

The complaint reflects a novel and dangerous theory of reverse false-claims liability. According to the United States and Tennessee, Walgreen Co. ("Walgreens") owes treble the amount of the alleged overpayments plus penalties merely because the government put Walgreens "on notice" that it may have received overpayments as a result of fraud by Ms. Reilly. Compl.

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

¶¶ 81, 83, 84.[2] But the complaint does not allege that there has been any judicial—or even administrative—determination that Walgreens in fact received any overpayment. And the complaint conspicuously does not allege (let alone with the particularity required by the Federal Rules of Civil Procedure) that *Walgreens concluded* that it had received any overpayment. To the contrary, Walgreens has made clear that it "disputed" the alleged overpayments "in good faith." Walgreens' Memorandum of Law (Doc. 17) at 25.

As pleaded, the government's "on notice" theory amounts to the assertion that if the government tells a company that *the government believes* it is owed money, the company is required to take the government's word for it and immediately meet the government's payment demand or face crushing treble damages and penalties for violating the False Claims Act. This "notice of an allegation creates FCA liability" theory is fundamentally mistaken. It ignores the statutory requirement that a defendant know *both* that it has an *obligation* to pay the government *and* that its conduct constitutes *improper avoidance* of that obligation. *See U.S. ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 842 F.3d 430, 436 (6th Cir. 2016) (False Claims Act's scienter "requirement should be interpreted to apply to both the existence of a relevant obligation and the defendant's own avoidance of that obligation").

Engaging with the government and disputing in good faith the government's allegation of a payment obligation—or merely taking the time to investigate the government's allegation—is entirely proper and within a company's rights. Such conduct does not constitute "improper" avoidance of anything, even if it is ultimately determined that the company in fact does owe the government money. To the contrary, it is in the public interest for companies to engage in internal

[2] Because the United States and Tennessee filed a joint complaint and have pleaded very similar claims, this brief refers to them collectively as "the government" for simplicity.

investigations when allegations of misconduct are raised and to engage in candid discussions with the government. Chilling such conduct would be harmful and raise due process concerns—and it is not at all required by the FCA.

Rejecting the government's aggressive theory of reverse-FCA liability does not leave the government without a remedy for any monies it may be owed. Walgreens acknowledges that "[i]f Walgreens actually received money to which it was not entitled because of Reilly's conduct (which is in dispute), it would need to repay those amounts under the common-law theories Plaintiffs plead in Counts VII and VIII." Doc. 17 at 2. The Court should reject the government's attempt to transform a recoupment dispute into an opportunity to extract treble damages plus penalties.[3]

ARGUMENT

I. The Government Fails to Allege That Walgreens Had the Required Scienter.

The government alleges that Walgreens violated 31 U.S.C. § 3729(a)(1)(G) by "knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government." Compl. ¶ 96. The Sixth Circuit has emphasized that this reverse false-claim provision requires double scienter: the defendant knew (or recklessly disregarded) *both* (1) that it owed an obligation to pay money to the government *and* (2) that its conduct constituted "improperly" avoiding that obligation. *Harper*, 842 F.3d at 436–37. That double scienter requirement is dictated not only by how section 3729(a)(1)(G) is written, but also by common sense: The False Claims Act is a fraud statute. It is not a contract-dispute-resolution statute, and it does not change the requirements of contract law. The FCA is not intended to punish well-

[3] While the Chamber shares Walgreens' concerns regarding the imposition of punitive FCA liability on a purely vicarious basis, the Chamber addresses only the reverse false-claims issues raised by the complaint in an effort to avoid duplication and to keep this brief under half the length of Walgreens' motion to dismiss. *Cf.* Fed. R. App. P. 29(a)(5) (*amicus* brief is limited to no more than half the length of the principal brief of the party the *amicus* supports).

meaning businesses that have a good-faith disagreement with the government or make an honest mistake. *See Harper*, 842 F.3d at 436–37; *U.S. ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497, 500 (3d Cir. 2017) (reverse false-claim liability "arises from *fraudulent* efforts to reduce or avoid an obligation to pay the Government" (emphasis added)); *United States v. Life Care Ctrs. of Am., Inc.*, 114 F. Supp. 3d 549, 567 (E.D. Tenn. 2014) ("[N]egligent actions or innocent mistakes do not satisfy the knowledge element of a FCA claim."). Here, the government has failed to plead facts that satisfy either scienter element.

The False Claims Act's unusually draconian remedies—treble damages plus per-claim penalties—make it an extraordinarily powerful hammer in the government's hands. The resulting temptation for the government to view everything as a nail, and to use the FCA as leverage to obtain money for the government whenever the opportunity presents itself, may be understandable. But the government's reverse false-claim theory here stretches the FCA in unprecedented and dangerous ways. The Chamber, as an *amicus curiae*, does not know how the parties' dispute should be resolved regarding whether or to what extent Walgreens received overpayments. But the proper way to resolve that dispute, if negotiation is unsuccessful, would be an administrative recoupment action by the federal Centers for Medicare and Medicaid Services ("CMS") or by TennCare. *See* Doc. 17 at 17–18; *see also Harper*, 842 F.3d at 437 (FCA's "punitive" treble damages are not interchangeable with remedies for ordinary breach of contract). The Court should reject the government's effort to deploy the FCA against Walgreens for not yet having paid an alleged obligation that Walgreens disputes.

A. The government fails to allege that Walgreens knew it had an obligation to pay money to the government.

The government's case puts the cart before the horse by accusing Walgreens of knowingly and improperly avoiding an obligation, when the existence of such an obligation remains disputed.

The statutory definition of "obligation" reinforces the common-sense point that establishing that one *has* an obligation to pay the government must precede any *knowing and improper avoidance* of such an obligation. Under the statute, "the term 'obligation' means *an established duty*, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." 31 U.S.C. § 3729(b)(3) (emphasis added). The government's "notice" of an alleged overpayment does not "establish" a "duty" to pay anything; at most, it can give rise to a duty to investigate in order to *determine whether* a payment obligation exists.

CMS's pronouncements confirm this point in the specific context of the alleged government healthcare program overpayments at issue here. The Affordable Care Act requires an entity that receives an overpayment from Medicare or Medicaid to return the overpayment within 60 days of when the overpayment is "identified," 42 U.S.C. § 1320a-7k(d), and the complaint depends on the notion that Walgreens breached this obligation. *See* Compl. ¶ 87. But CMS, the federal agency charged with implementing Medicare and Medicaid, has explained that "reasonable diligence might require an investigation conducted in good faith and in a timely manner by qualified individuals in response to credible information of a potential overpayment." Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg. 29,844, 29,844–01, 29,923–24 (May 23, 2014); *see id*. at 29,924 (making clear that this statement is an interpretation of 42 U.S.C. § 1320a-7k). In short, if a party has *notice* of a *potential* overpayment, that does not mean that the party has identified an overpayment. A diligent investigation may need to occur first.

Through its allegations and information concerning Ms. Reilly's guilty plea, the government may have put Walgreens "on notice," Compl. ¶ 81, of "credible information of a

potential overpayment." But putting a company on notice of a potential overpayment is the beginning, not the end, of the process. It may require the company to conduct an internal investigation to determine whether or to what extent it received overpayments, but such notice by itself does not establish that the company has any duty to pay the government.

The government's complaint, however, seemingly contends that Walgreens was required to take the government's word for it and to pay what the government claimed it was owed regardless of what Walgreens' investigation revealed, and seemingly without even conducting such an investigation. That cannot be right. Citizens are not required to simply accept as true whatever the government says. Yet that appears to be the import of the government's complaint. The government does not allege, for example, that Walgreens itself concluded, after investigating the issue, that it had received overpayments. In fact, the government does not even allege that Walgreens has completed its investigation of that question. And the existence of an overpayment has not been decided through an administrative recoupment proceeding. The government's contention that Walgreens knew it had an obligation to pay the government thus appears to be based on nothing more than the government's having told Walgreens that *the government believed* Walgreens had received overpayments. *Id*. ¶¶ 81–85.

That legal position is of great concern to the Chamber. The Court should reject the notion that the government can establish a duty to pay the government—enforceable through treble damages and penalties under the False Claims Act—merely by asserting that such a duty exists.

B. The government fails to allege that Walgreens knowingly and improperly avoided an obligation to pay the government.

One cannot knowingly and improperly avoid an obligation that one does not know exists in the first place. Not surprisingly, therefore, the government fails to plead facts showing that Walgreens did anything that constitutes knowing and improper avoidance of an obligation.

As the Sixth Circuit held in *Harper*, the scienter requirement and the requirement of improper conduct are necessary to ensure that "'the punitive treble damages and penalties afforded by civil FCA actions" do not become "interchangeable with remedies for ordinary breaches of contract or property-law obligations." 842 F.3d at 437 (quotation omitted). It is thus not enough for the government to allege that a company did not repay amounts the government contends are due. That might state a recoupment or breach of contract claim, but not an FCA claim. Instead, the government must show *both* (1) that the company engaged in improper behavior to avoid paying and (2) that it did so with the required scienter (*i.e.*, that it knew or recklessly disregarded that its conduct constituted improper avoidance). *See id.*; *Petras*, 857 F.3d at 500.[4]

First, the government has not pleaded any conduct by Walgreens that qualifies as "improper." It is not improper to investigate allegations raised by the government to determine whether one received an overpayment. Being "on notice" of a potential overpayment means that one should investigate the relevant allegations—not that one must assume the correctness of the allegations before one has had an opportunity to investigate them. After all, the term 'obligation' means an "established duty," not an allegation. *See* 31 U.S.C. § 3729(b)(3). And the Medicare and Medicaid statute on which the government relies requires that the obligation be "identified," 42 U.S.C. § 1320a-7k(d), which CMS agrees may require an investigation in order to determine whether there was an overpayment, 79 Fed. Reg. at 29,844–01, 29,923. CMS's publicly stated

[4] The Sixth Circuit's unadorned statement in *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.* that "the knowing retention of an overpayment is enough," 838 F.3d 750, 774 (6th Cir. 2016), is not to the contrary. The court made that passing comment in dicta and in the context of pointing out that amendments to the reverse false-claim provision meant that "there is no longer a need to show the affirmative use of a false record or statement in connection to the avoidance of an obligation to pay money to the United States." *Id*. (quotes omitted). That imprecise shorthand for "knowing[] and improper[] avoid[ance]" could not have been intended to write the impropriety requirement out of the statute. The court's holding on this issue in *Harper* is squarely on point.

position on this issue, on which businesses are entitled to rely, is inconsistent with the notion that a mere *allegation* of an overpayment can amount to an "identification" of an overpayment that triggers an immediate duty to repay on pain of incurring FCA liability.

In the healthcare context in particular, government reimbursement issues are often technical and complex and as a result may take time to consider and resolve. *See, e.g., UnitedHealthcare Ins. Co. v. Azar*, 330 F. Supp. 3d 173, 178–81 (D.D.C. 2018) (discussing complex regression model used to calculate Medicare reimbursements). And even apart from the due process right to defend oneself, investigating before voluntarily repaying an alleged overpayment may be the only tenable approach for a company as a practical matter. When the agency has not reached a "final decision" about an overpayment, there may be no mechanism for a company to get its money back from the government if it repays what it thinks may be an overpayment but later determines was not an overpayment. *See Cplace Springhill SNF, LLC v. Burwell*, No. CIV.A. 14-3139, 2015 WL 1849499, at *4 (W.D. La. Apr. 22, 2015) (recognizing a limited waiver of sovereign immunity only if there is a "final decision" by the agency).

Nor is it improper to disagree with the government. Engaging openly with the government and discussing potential disagreements and areas for further investigation is within a private party's rights. That kind of engagement is in the public interest as well; the government is sometimes mistaken and should want to know when a company believes that allegations warrant further investigation or are incorrect. The Chamber's members frequently engage in constructive dialogue with the government when allegations are raised regarding potential regulatory violations or other compliance issues. The U.S. Department of Justice's Justice Manual recognizes both the desirability of compromising some civil cases, Justice Manual § 4-3.200, and the potential value of information discovered in internal investigations, *id.* § 9-28.900. The government's theory in

this case, however, will chill internal investigations and settlement discussions. *See* Doc. 17 at 20 n.9.

For all these reasons, a company does not do anything "improper" when it receives allegations from the government, conducts an internal investigation of the matter, and engages in a dialogue with the government about those issues. But that is all that the well-pleaded factual allegations in the complaint show. *See, e.g.,* Compl. ¶ 83 (indicating that Walgreens investigated allegations regarding Ms. Reilly). The government makes much of the fact that Walgreens has not returned the disputed funds, *id.* ¶ 84, but the obvious explanation from the face of the complaint is that there is a dispute between the parties based on the outcome of the very investigation identified by the complaint. And in relying on contractual and legal requirements, *id.* ¶ 87, that an overpayment be repaid within 60 days of being identified—but without showing the requisite FCA scienter—the government is committing precisely the error that the Sixth Circuit admonished against in *Harper*: trying to make "the punitive treble damages and penalties afforded by civil FCA actions ... interchangeable with remedies for ordinary breaches of contract or property-law obligations." *Harper,* 842 F.3d at 437. Because the complaint does not identify—let alone with particularity—anything "improper" that Walgreens did, the Court should dismiss the reverse false-claims counts.[5]

[5] In addition to failing to allege the necessary facts to support a contention that Walgreens knew it had a payment obligation and knowingly and improperly avoided it, the government's reverse-false claim theory, as set forth in the complaint, also fails *Twombly*'s plausibility test. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007); Doc. 17 at 6. As is well known, the industry in which Walgreens operates is heavily dependent on government healthcare program reimbursement. If Walgreens really did determine that it had received overpayments and that it incontestably owed the government the amounts in dispute, why would it refuse in bad faith to repay the government? After all, CMS and TennCare have avenues to recoup overpayments. *See* Doc. 17 at 17–18. Based on the bare allegations in the complaint, it is far more plausible that Walgreens "dispute[s] in good faith" (*id.* at 25) the existence and extent of any overpayments.

Second, the government has failed to allege the required scienter as to whether the conduct at issue constituted improper avoidance. The government bore the burden of pleading facts showing that Walgreens knew or recklessly disregarded that its conduct was improper, but the novelty of the government's "notice of an allegation equals FCA liability" legal theory precludes such a finding. No precedent of which the Chamber's counsel is aware suggests that the kind of routine back-and-forth alleged here between a company and the government is improper. Reasonable mistakes do not equal scienter; when a company acts based on "reasonable but erroneous interpretations of [its] legal obligations," it is not liable under the FCA. *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 288 (D.C. Cir. 2015); *see also U.S. ex rel. Miller v. Weston Educ., Inc.,* 840 F.3d 494, 500 (8th Cir. 2016) ("A defendant's 'reasonable interpretation of any ambiguity inherent in the regulations belies the scienter necessary to establish a claim of fraud.'"); *U.S. ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 460 (9th Cir. 1999) ("A contractor relying on a good faith interpretation of a regulation is not subject to liability, not because his or her interpretation was correct or 'reasonable' but because the good faith nature of his or her action forecloses the possibility that the scienter requirement is met."); *Harper*, 842 F.3d at 437 ("mistakenly interpreting a legal obligation" is insufficient for reverse-FCA scienter).[6]

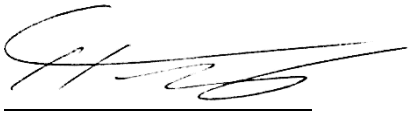
[6] The Sixth Circuit has stated that FCA scienter may exist if "interpretive guidance . . . warned the defendant away from the view it took." *Hamilton City Emergency Commc'ns Dist. v. BellSouth Telecomms. LLC*, 852 F.3d 521, 539 n.15 (6th Cir. 2017) (discussing *Purcell*, 807 F.3d at 288). But here, far from warning Walgreens away from the view that it was entitled to investigate the government's allegations, CMS stated that investigating was appropriate. 79 Fed. Reg. at 29,844–01, 29,923; *see supra* at 5; *see also U.S. ex rel. Complin v. N.C. Baptist Hosp.*, 818 F. App'x 179, 184 n.6 (4th Cir. 2020) (affirming dismissal for lack of scienter because the "complex and highly technical regulatory regime at issue" resulted in a "lack of clarity" as to the application of the rule at issue, notwithstanding a non-binding regulatory interpretation relied on by relator); *U.S. ex rel. Streck v. Allergan, Inc.*, 746 F. App'x 101, 110 (3d Cir. 2018) (affirming dismissal where guidance had created "confusion" on calculation of price number; confusion meant that defendants were not warned away from their interpretation).

The government does not even allege that Walgreens lacked a reasonable belief that its course of conduct with the government was proper, let alone plead meaningful facts supporting such a conclusion. The complaint thus would fail to state a reverse false-claim violation even if the Court were to hold, after the fact and in the first holding of its kind, that investigating or disputing a government allegation of a repayment obligation—rather than immediately repaying the government—constitutes improper avoidance. *See Harper*, 842 F.3d at 437; *see also Baar v. Jefferson Cty. Bd. of Educ.*, 476 F. App'x 621, 634 (6th Cir. 2012) (holding in the qualified immunity context that a reasonable person would not be expected to know that he violated an established right where "reasonably competent officials could disagree" on the state of the law at the time, even if the law was later clarified).

CONCLUSION

For the foregoing reasons, the Court should hold that (1) an allegation by the government that a company received an overpayment does not by itself establish that the company has a duty to repay the government and (2) investigating such an allegation or disputing it in good faith does not constitute knowing and improper avoidance of a repayment obligation. Based on those holdings, the Court should dismiss Counts III and VI of the complaint.

Respectfully submitted,



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