

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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: UNITED STATES OF AMERICA, et al., :
: ex rel. FOX RX, INC., : 12 Civ. 7382 (DLC)
: :
: Plaintiffs, : MEMORANDUM OPINION
: : & ORDER
: -v- :
: :
: WALGREEN COMPANY, :
: Defendant. :
: :
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APPEARANCES:

For relator Fox Rx, Inc.:

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For defendant Walgreen Co.:

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DENISE COTE, District Judge:

Fox Rx, Inc., the corporate parent of Fox Insurance, Inc.
(together, "Fox"), has brought this qui tam action under the

federal False Claims Act, 31 U.S.C. § 3729 et seq. ("FCA"), and twenty-six states' and the District of Columbia's false claims statutes against Walgreen Co., a major nationwide pharmacy ("Walgreens").

Fox filed this action on October 1, 2012 on behalf of the United States, the District of Columbia and twenty-six states. A Pretrial Scheduling Order of March 25, 2014 required that any amended complaint be filed by April 14, 2014, and provided that plaintiff would have no further opportunity to amend. Fox filed the Amended Complaint ("AC") on April 25. The United States and the other government jurisdictions have declined to intervene in this action.¹

The AC contains thirty counts. Counts I and II allege false claims for payment to Medicare Part D and Medicaid, respectively, pursuant to 31 U.S.C. § 3729(a)(1)(A). Count III alleges a violation of § 3729(a)(1)(B). The remaining counts in the thirty-count complaint plead violations of state law. All claims asserted on behalf of the State of Maryland were voluntarily dismissed on May 1, 2014.

The defendant moved to dismiss the AC on May 9, 2014. The motion was fully submitted on June 27.

¹ The Government submitted express notice that it and all other jurisdictions but the State of Indiana had elected not to intervene in this action. The State of Indiana has not advised the Court that it wishes to intervene in this action.

The AC in this action mirrors, in all material respects, the Second Amended Complaint Fox filed against Omnicare, Inc., NeighborCare, Inc., PharMerica Corp., and MHA Long Term Care Network in an action filed February 10, 2014. United States v. Omnicare, Inc., 12cv275 (S.D.N.Y.) (DLC) ("Omnicare"). In particular, both the AC in this action and the SAC in Omnicare allege substantially identical conduct: (1) defendants failed to substitute generic drugs for brand-name drugs in states that have laws mandating such substitution yet submitted, or caused to be submitted, claims with a certain code in the "Dispense as Written/Product Selection" field; and (2) defendants dispensed drugs after the termination date of a national drug code in states that have laws prohibiting pharmacies from dispensing drugs beyond their shelf-life expiration dates.


On August 12, 2014, this Court granted the defendants' motions to dismiss in Omnicare, holding that Fox failed to adequately allege that any claim made, or caused to be made, by defendants was false, or that defendants made, or caused to be made, any false records or statements material to a false or fraudulent claim. See Omnicare, 2014 WL 3928780 (S.D.N.Y. Aug. 12, 2014) ("August 12 Opinion"). The August 12 Opinion is hereby incorporated by reference. For the same reasons, Fox has failed to state a claim under the FCA or analogous D.C. and state statutes in this action.

CONCLUSION

Defendant Walgreens's May 9, 2014 motion to dismiss the Amended Complaint is granted. The Clerk of Court shall enter judgment for defendant and close the case.

SO ORDERED:

Dated: New York, New York
August 18, 2014



DENISE COTE
United States District Judge