**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA and COMMONWEALTH OF VIRGINIA, Plaintiffs, v. WALGREEN COMPANY, Defendant.	)	Case No. 1:21-cv-00032-JPJ-PMS

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

The Chamber of Commerce of the United States of America ("Chamber"), a non-party to this action, respectfully requests leave to file the attached brief as *amicus curiae* in support of Walgreen Co. ("Walgreens"). A proposed order granting this motion is also attached. Walgreens has consented to the filing of this brief; counsel for the United States and Virginia take no position on the motion, meaning they "neither object nor consent."

No Federal Rule of Civil Procedure or Local Rule governs *amicus* participation in this Court. *Amicus* participation, therefore, is within this court's discretion, *see In re Bowman*, No. 7:08CV00339, 2010 WL 2521441, at *7 (W.D. Va. June 21, 2010), and judges in this District have previously granted leave for the filing of amicus briefs where appropriate, *see Va. Uranium, Inc. v. McAuliffe*, No. 4:15-CV-00031, 2015 WL 6143105, at *4 (W.D. Va. Oct. 19, 2015) ("I will, however, grant the basin associations leave to file briefs, as amicus curiae, in further proceedings.").

Leave is appropriate here because the proposed brief, informed by the Chamber's unique perspective, will assist the Court's decisionmaking process, underscoring the broader implications of the issues raised by this case. The Chamber 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* 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 can exact a substantial economic toll. 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 unusually draconian liability provisions—treble damages plus per-claim penalties—and enormous litigation costs, even meritless cases can be used to extract substantial settlements, particularly if the statutory and constitutional boundaries of liability under the Act are not properly enforced. As a result, cases involving the proper application of the Act are of particular concern to the Chamber and its members.

As explained in the attached brief, the complaint in this case reflects a novel and dangerous theory of reverse false-claims liability that, if accepted, would unjustifiably transform many bona-fide recoupment disputes into claims for treble damages plus penalties. Plaintiffs' theory also would chill businesses from engaging in appropriate and beneficial conduct in response to allegations of potential overpayments, such as conducting internal investigations and engaging

with the government to discuss the issues. The attached brief argues that this theory is not supported by the terms of the False Claims Act or by governing precedent.

In the absence of a rule governing the length of an *amicus* brief in federal district court, the Chamber has limited its brief to less than half the length of Walgreens' memorandum of law in support of its motion to dismiss, *cf.* Fed. R. App. P. 29(a)(5) (*amicus* brief in court of appeals is limited to no more than half the length of the principal brief of the party the *amicus* supports), and has addressed only the reverse false-claim issues raised by the complaint in an effort to avoid duplication. Moreover, the Chamber is filing this motion two weeks before Plaintiffs' opposition to Walgreens' motion to dismiss is due to be filed, ensuring that Plaintiffs will have adequate time to respond to the Chamber's brief. The Chamber therefore respectfully submits that allowing its brief to be filed would not burden or prejudice any party.

For these reasons, the Court should accept the attached *amicus* brief for filing.

Date: September 3, 2021

Respectfully submitted,

/s/ Jonathan A. Henry

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**Pro hac vice application forthcoming*

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.

/s/ Jonathan A. Henry
Jonathan A. Henry

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record who have consented to electronic notification.

/s/ Jonathan A. Henry
Jonathan A. Henry

Counsel for Amicus Curiae

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FOR THE WESTERN DISTRICT OF VIRGINIA
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UNITED STATES OF AMERICA and COMMONWEALTH OF VIRGINIA,	)	
Plaintiffs,	)	
v.	)	Case No. 1:21-cv-00032-JPJ-PMS
WALGREEN COMPANY,	)	
Defendant.	)	

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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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 Virginia, Walgreen Co. ("Walgreens") owes treble the amount of the alleged overpayments plus penalties merely because the government says so. Compl. ¶¶ 261–73, 283–85.[2] But the complaint does not allege that there has been any judicial—

[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.

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

or even administrative—determination that Walgreens in fact received any overpayment. And the complaint does not allege with particularity, as required by the Federal Rules of Civil Procedure, that *Walgreens concluded* that it had received any overpayment and that it *improperly avoided* repaying.

As pleaded, the government's 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. The government's 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 United States 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"); *see generally United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 380 (4th Cir. 2015) ("The purpose of the FCA's scienter requirement is to avoid punishing 'honest mistakes.'" (quoting *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 (4th Cir. 2010))).

Here, for the reasons explained in Walgreens' motion to dismiss, the company disputes whether there was any overpayment. Under the government's new twist on reverse false-claims liability, this dispute amounts to Walgreens' knowing identification of a payment obligation and improper avoidance of the same. But 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 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.

And 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. 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] an obligation to pay money to the Government." Compl. ¶¶ 283–85. 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. *See Harper*, 842 F.3d at 436–37. That double scienter requirement is dictated not only by how that section of the statute is written, *see id.*, but also by common sense: the False Claims Act is a fraud statute. It is not a contract-dispute-resolution or recoupment statute, and it does not change the requirements of contract law. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 383 (4th Cir. 2008)

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[3] While the Chamber shares Walgreens' concerns regarding the other issues raised in its motion to dismiss, 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).

("[T]he normal run of contractual disputes are not cognizable under the False Claims Act."). The FCA is not intended to punish well-meaning businesses that have a good-faith disagreement with the government or make an honest mistake. *See Drakeford*, 792 F.3d at 380; *see also United States 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)). Here, the government has failed to plead with particularity 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 the Virginia Department of Medical Assistance Services ("DMAS"). *See* Doc. 9 at 30; *see also Wilson*, 525 F.3d at 383; *Harper*, 842 F.3d at 437 (FCA's "punitive" treble damages are not interchangeable with remedies for ordinary breach of contract (internal quotation marks omitted)). 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 with particularity that Walgreens knew that 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, without pleading with particularity that Walgreens actually knew that it had such an obligation. 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).

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)(2)(A), and the complaint depends on the notion that Walgreens breached this obligation. *See* Compl. ¶ 23–24, 261–73, 283–85. 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, 29,923–24 (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 *information about a potential* overpayment, *see* Compl. ¶¶ 120–21, 174, 261–69, that does not mean that the party has *identified*

an overpayment under the terms of the statute. Under CMS's own guidance—on which Walgreens was entitled to rely—parties are first permitted to investigate whether there in fact was an overpayment.

The government has alleged that Walgreens heeded this advice and, after being put on notice through a Tennessee Bureau of Investigation subpoena, conducted an investigation in order to determine whether any payment obligation existed. Compl. ¶¶ 261–63, 267–68. Investigating is exactly what a company should do. But then the government tacks on conclusory statements that Walgreens "identified" an overpayment. Compl. ¶¶ 31, 262, 297. The government's contention that Walgreens "identified" an obligation to pay the government appears to be based on nothing more than the government's belief that Walgreens *should have identified* a payment obligation. Compl. ¶ 297 (stating that Walgreens "identified or *should have identified* those claims as false" (emphasis added)). Even if that inference were drawn in the government's favor, the FCA does not penalize conduct that is merely negligent. *Owens*, 612 F.3d at 728 ("honest mistakes or incorrect claims submitted through mere negligence" are not enough for FCA liability (quoting *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir. 1998))).

Like any other claim under the FCA, reverse false-claim allegations must be pleaded with particularity in accordance with Federal Rule of Civil Procedure 9(b). *See United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 328–29 (5th Cir. 2003) (affirming district court's dismissal of reverse FCA claim under Rule 9(b)); *Phipps v. Agape Counseling & Therapeutic Servs., Inc.*, No. 13-CV-166, 2015 WL 2452448, at *6 (E.D. Va. May 21, 2015). The government was therefore required to allege with particularity that Walgreens either knew that it had a payment obligation or recklessly disregarded the risk that it had such an obligation. *See Harper*, 842 F.3dat 434. The Complaint does neither, relying in many instances merely "[u]pon information and

belief." Compl. ¶¶ 261–72. Such pleading is insufficient under Rule 9(b). *Sestra Sys., Inc. v. BarTrack, Inc.*, No. 5:20-CV-17, 2020 WL 7212581, at *7 (W.D. Va. Dec. 7, 2020) (citing authority for the proposition that pleading based on "information and belief" is generally insufficient under Rule 9(b)). As a result, the government's reverse FCA claim could succeed only if the Court "make[s] inference upon inferences to provide" these missing facts. *Mitchell v. Procter & Gamble*, No. 2:09-CV-426, 2010 WL 728222, at *5 (S.D. Ohio Mar. 1, 2010). But a claim that requires such speculation cannot clear even Rule 8's plausibility standard, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009), let alone the particularity requirement of Rule 9(b).

The absence of well-pleaded factual allegations that Walgreens knew it had a payment obligation suggests that the government's legal position is an extremely broad and concerning one: namely, that it can sue under a reverse false-claims theory anytime a company does not roll over and pony up whatever sum of money the government contends it is owed, regardless of the company's good-faith belief *that it does not owe that money*. 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, even when a company disputes in good faith the existence of any overpayment.

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, given the above, the government fails to plead facts showing that Walgreens did anything that constitutes knowing and improper avoidance of an obligation.

As the Fourth Circuit emphasized in *Wilson*, "the normal run of contractual disputes are not cognizable under the False Claims Act." 525 F.3d at 383. "To hold otherwise would render meaningless the fundamental distinction between actions for fraud and breach of contract." *Id.* at

378. As the Sixth Circuit observed, 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." *Harper*, 842 F.3d at 437 (internal quotation marks 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. *See United States v. Sci. Applications Int'l Corp*., 626 F.3d 1257, 1271 (D.C. Cir. 2010) (explaining that "[s]trict enforcement of the FCA's scienter requirement" is necessary to "ensure that ordinary breaches of contract are not converted into FCA liability"). 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 Harper,* 842 F.3d at 437; *Petras*, 857 F.3d at 500.

First, the government has not pleaded any conduct by Walgreens that qualifies as "improper." The government appears to believe that Walgreens' investigation and dispute regarding whether it even has a payment obligation is the same thing as knowing avoidance of a payment obligation. But again, there is nothing improper about a company's investigating allegations raised by the government to determine whether it received an overpayment. Walgreens was entitled to investigate the relevant allegations. After all, the FCA defines the term "obligation" as an "*established* duty," not an allegation. 31 U.S.C. § 3729(b)(3) (emphasis added). 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 29,923. CMS's publicly stated 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 establishes 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), *rev'd on other grounds sub nom. UnitedHealthcare Ins. Co. v. Becerra*, --- F.4th ----, 2021 WL 3573766 (D.C. Cir. Aug. 13, 2021). 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 federal government's sovereign immunity only if there is a "final decision" by the agency).

Nor is it improper to disagree with the government. *See Wilson*, 525 F.3d at 377 ("[D]ifferences in interpretation growing out of a disputed legal question are similarly not false under the FCA." (quoting *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999))). 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. 9 at 30 n.14.

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, disagrees with the government's conclusion, and engages in a dialogue with the government about those issues. That is all that the well-pleaded factual allegations in the complaint show. *See, e.g.*, Compl. ¶¶ 261–69 (alleging that Walgreens investigated allegations regarding Ms. Reilly). The government makes much of the fact that Walgreens has not returned the disputed funds, *id.* ¶¶ 270–73, 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 simply on contractual and legal requirements, *id.* ¶¶ 23–24, that an overpayment be repaid within 60 days of being identified—but without showing the requisite FCA scienter and without alleging specific facts adequate to plead any such identification—the government is impermissibly 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 (internal quotation marks omitted). Because the complaint does not identify—let alone with particularity—anything "improper" that Walgreens did, the Court should dismiss the reverse false-claims counts.[4]

[4] 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

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 "disagreeing with the government equals FCA liability" legal theory precludes such a finding. No precedent of which the Chamber's counsel is aware suggests that a routine back-and-forth 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. *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 288 (D.C. Cir. 2015); *see also Wilson*, 525 F.3d at 377; *United States 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.'" (quoting *United States ex rel. Ketroser v. Mayo Found.*, 729 F.3d 825, 832 (8th Cir. 2013))); *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 460 (9th Cir. 1999), *as amended* (Oct. 22, 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 interpret[ing] a legal obligation" is insufficient for reverse-

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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. 9 at 33–35. 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 DMAS have avenues to recoup overpayments. *See* Doc. 9 at 30. Based on the bare allegations in the complaint, it is far more plausible that Walgreens disputes in good faith the existence and extent of any overpayments.

FCA scienter).[5] Indeed, even "[t]he *disregard* of a federal regulation, by itself, does not create liability under the [FCA]," unless the defendant disregards the regulation knowingly or recklessly. *United States ex rel. Complin v. N.C. Baptist Hosp.*, 818 F. App'x 179, 183 (4th Cir. 2020) (per curiam) (emphasis added). Walgreens' good-faith belief that its conduct was proper means that it could not have improperly avoided a payment obligation at all, let alone do so knowingly or recklessly. *See Olson v. Fairview Health Servs. of Minn.*, 831 F.3d 1063, 1074 (8th Cir. 2016) (FCA's "mandatory penalty of up to $10,000 for each claim and treble damages—would seem an unreasonable levy" for parties liable "only [for] 'knowingly' receiving an overpayment from the government. ... If there is no allegation of fraudulent conduct under the FCA, then there can be no reverse liability under § 3729(a)(1)(G).").

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 Wilson*, 525 F.3d at 377.

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[5] To be clear, Walgreens did not *mistakenly* determine that it had a right to investigate the overpayment allegations; indeed, far from warning Walgreens away from the view that it was entitled to investigate the government's allegations, CMS indicated that investigating was appropriate and could be required. 79 Fed. Reg. at 29,923; *see also United States ex rel. Complin v. N.C. Baptist Hosp.*, 818 F. App'x 179, 184 n.6 (4th Cir. 2020) (per curiam) (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 (internal quotation marks omitted)); *United States 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).

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.

Date: September 3, 2021

Respectfully submitted,

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**Pro hac vice application forthcoming*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA and COMMONWEALTH OF VIRGINIA, Plaintiffs,	)	
v.	)	Case No. 1:21-cv-00032-JPJ-PMS
WALGREEN COMPANY, Defendant.	)	

[PROPOSED] ORDER

Before the Court is the motion of the Chamber of Commerce of the United States of America ("Chamber") for leave to file an *amicus curiae* brief in support of Defendant Walgreen Co.'s motion to dismiss Plaintiffs' complaint. *Amicus* participation is within this court's discretion. *See In re Bowman*, No. 7:08CV00339, 2010 WL 2521441, at *7 (W.D. Va. June 21, 2010). For good cause shown, including the reasons stated in the Chamber's motion, the motion is well-taken and is hereby **GRANTED**. The Clerk is **DIRECTED** to docket the Chamber's *amicus curiae* brief, attached to its motion, as a separate entry.

IT IS SO ORDERED.

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Hon. James Parker Jones
Senior United States District Judge