STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN *ex rel.* MARCIA GURGANUS,

Plaintiff/Appellee,

v

CVS CAREMARK CORPORATION; CVS PHARMACY INC.; CAREMARK, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY HOLDING, LLC; CVS MICHIGAN, LLC; WOODWARD DETROIT CVS, LLC; REVCO DISCOUNT DRUG CENTERS, INC.; KMART HOLDING CORPORATION; SEARS HOLDINGS CORPORATION; SEARS HOLDINGS MANAGEMENT CORPORATION; SEARS, ROEBUCK AND CO.; RITE AID OF MICHIGAN INC.; PERRY DRUG STORES, INC.; TARGET CORPORATION; THE KROGER CO. OF MICHIGAN; THE KROGER CO.; WALGREEN CO.; and WAL-MART STORES INC.,

Defendants/Appellants.

Case Nos. 146791, 146792, 146793

Lower Court Case No. 09-03411-CZ
Honorable James R. Redford

Michigan Court of Appeals #299997

PLAINTIFFS/APPELLEES' OPPOSITION BRIEF

ORAL ARGUMENT REQUESTED

REDACTED FOR PUBLIC FILING

CITY OF LANSING; and DICKINSON PRESS INC., individually and on behalf of all others similarly situated,

Plaintiffs/Appellees/Cross-Appellants,

v

RITE AID OF MICHIGAN, INC.; and PERRY DRUG STORES, INC.,

Defendants/Appellants/Cross-Appellees.

Lower Court Case No. 09-07827-CZ
Honorable James R. Redford

Court of Appeals # 299998

CITY OF LANSING; DICKINSON PRESS INC.; and SCOTT MURPHY, individually and on behalf of all others similarly situated,

Plaintiffs/Appellees/Cross-Appellants,

v

CVS CAREMARK CORPORATION; CVS PHARMACY INC.; CAREMARK, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY HOLDING, LLC; CVS MICHIGAN, LLC; WOODWARD DETROIT CVS, LLC; REVCO DISCOUNT DRUG CENTERS, INC.; KMART HOLDING CORPORATION; SEARS HOLDINGS CORPORATION; SEARS HOLDINGS MANAGEMENT CORPORATION; SEARS, ROEBUCK AND CO.; TARGET CORPORATION; THE KROGER CO. OF MICHIGAN; THE KROGER CO.; WALGREEN CO.; and WAL-MART STORES INC.,

Defendants/Appellants/Cross-Appellees.

Lower Court Case No. 10-00619-CZ
Hon. James R. Redford

Court of Appeals #299999

VARNUM LLP
Perrin Rynders (P38221)
Bryan R. Walters (P58050)
Attorneys for Plaintiffs/Appellees/Cross-Appellants
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

FOLEY & LARDNER LLP
Jeffrey Scott Kopp (P59485)
Larry S. Perlman (P71698)
Attorneys for Defendants/Appellants CVS
500 Woodward Avenue, Suite 2700
Detroit, MI 48226-3489
(313) 234-7100

FOLEY & LARDNER LLP
Robert H. Griffith
David B. Goroff
Attorneys for Defendants/Appellants CVS
321 North Clark Street, Suite 2800
Chicago, IL 60654
(312) 832-4500

HONIGMAN MILLER SCHWARTZ AND COHN
Eric J. Eggan (P32368)
Attorneys for Defendants/Appellants Kroger and Walgreens
222 North Washington Square, Suite 400
Lansing, MI 48933-1800
(517) 377-0726

HONIGMAN MILLER SCHWARTZ AND COHN
Norman Ankers (P30533)
Arthur T. O'Reilly (P70406)
Attorneys for Defendants/Appellants Kroger and Walgreens
660 Woodward Avenue, Suite 2290
Detroit, MI 48226
(313) 465-7306

DYKEMA GOSSETT PLLC
Jill M. Wheaton (P49921)
Attorneys for Defendants/Appellants Kmart and Sears
2723 South State Street, Suite 400
Ann Arbor, MI 48104
(734) 214-7629

DYKEMA GOSSETT PLLC
Todd Grant Gattoni (P47843)
Attorneys for Defendants/Appellants Kmart and Sears
400 Renaissance Center
Detroit, MI 48243
(313) 568-6943

MILLER CANFIELD PADDOCK & STONE PLC
Robert L. DeJong (P12693)
Joseph M. Infante (P68719)
Attorneys for Defendants/Appellants Rite Aid and Perry Drug
1200 Campau Square Plaza
99 Monroe Avenue, NW
Grand Rapids, MI 49503
(616) 454-8656

MILLER CANFIELD PADDOCK & STONE PLC
Todd Alan Holleman (P57699)
Attorneys for Defendants/Appellants Rite Aid and Perry Drug
150 West Jefferson Avenue, Suite 2500
Detroit, MI 48226-4415
(313) 496-7668

FAEGRE & BENSON LLP
Wendy J. Wildung
Craig S Coleman
Attorneys for Defendant/Appellants Target
220 Wells Fargo Center
Minneapolis, MN 55402
(612) 766-6981

DICKINSON WRIGHT PLLC
Edward P. Perdue (P55888)
Dennis C. Kolenda (P16129)
Scott R. Knapp (P61041)
Attorneys for Defendant/Appellants Target
200 Ottawa Avenue, NW, Suite 900
Grand Rapids, MI 49503
(616) 458-1300

MILLER JOHNSON PLC
Matthew L. Vicari (P44049)
Joseph J. Gavin (P69529)
Attorneys for Defendant/Appellants Wal-Mart
250 Monroe Avenue, NW, Suite 800
P.O. Box 306
Grand Rapids, MI 49501-0306
(616) 831-1700

JONES DAY
Tina M. Tabacchi
Brian J. Murray
Dennis Murashko
Attorneys for Defendant/Appellants Wal-Mart
77 West Wacker Drive, Suite 3500
Chicago, IL 60601
(312) 269-4078

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

Cases

Other Authorities

Rules

Statutes

STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to MCR 7.302(D)(2). Defendants/Appellants filed their application for leave to appeal on March 5, 2013. Plaintiffs/Cross-Appellants filed their cross-application for leave to appeal on April 2, 2013. This Court granted both applications by order dated September 18, 2013.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW ON APPEAL

1. Did the Michigan Court of Appeals properly conclude that the presentment of prescription drug claims that failed to pass on the savings in cost, required under MCL 333.17755(2), under circumstances where the purchasers had no way of determining that the claims failed to pass on the required savings in cost, is actionable under the Health Care False Claims Act ("HCFCA"), MCL 752.1001 *et seq.*, and the Medicaid False Claims Act ("MFCA"), MCL 400.601 *et seq.*?

Plaintiffs/Cross-Appellants say: "Yes."
Defendants/Cross-Appellees say: "No."
The Michigan Court of Appeals said: "Yes."

2. Did the Michigan Court of Appeals properly conclude that the Health Care False Claims Act, MCL 752.1001 *et seq.*, and the Medicaid False Claims Act, MCL 400.601 *et seq.*, provide Plaintiffs with independent causes of action, separate and distinct from the administrative scheme for disciplining pharmacists who violate the Public Health Code?

Plaintiffs/Cross-Appellants say: "Yes."
Defendants/Cross-Appellees say: "No."
The Michigan Court of Appeals said: "Yes."

3. Did the Michigan Court of Appeals properly conclude that the requirement in MCL 333.17755(2) that "if a pharmacist dispenses a generically equivalent drug product, the pharmacist shall pass on the savings in cost to the purchaser . . . " applies in all instances in which the pharmacy dispenses a generic prescription drug?

Plaintiffs/Cross-Appellants say: "Yes."
Defendants/Cross-Appellees say: "No."
The Michigan Court of Appeals said: "Yes."

4. Did the Michigan Court of Appeals properly conclude that the requirement in MCL 333.17755(2) that a pharmacy shall "pass on the savings in cost" when dispensing a generically equivalent drug product means that the difference between the wholesale cost to the

pharmacy of the brand-name drug and its generic equivalent drug must be passed on to the purchaser?

Plaintiffs/Cross-Appellants say: "Yes."
Defendants/Cross-Appellees say: "No."
The Michigan Court of Appeals said: "Yes."

5. Did the Michigan Court of Appeals properly conclude that the Plaintiffs' Complaints satisfied the pleading requirements in the Michigan Court Rules?

Plaintiffs/Cross-Appellants say: "Yes."
Defendants/Cross-Appellees say: "No."
The Michigan Court of Appeals said: "Yes."

6. Did the Michigan Court of Appeals properly conclude that Plaintiff Marcia Gurganus may bring an action on behalf of the State of Michigan under the Medicaid False Claims Act, MCL 400.601 *et seq.*?

Plaintiffs/Cross-Appellants say: "Yes."
Defendants/Cross-Appellees say: "No."
The Michigan Court of Appeals said: "Yes."

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The legislature granted purchasers of generic prescription drugs the right to receive the money a pharmacy saves by dispensing a generic prescription drug in lieu of its brand-name equivalent:

> If a pharmacist dispenses a generically equivalent drug product, the pharmacist shall pass on the savings in cost to the purchaser or to the third-party payment source if the prescription purchase is covered by a third-party payee contract. The savings in cost is the difference between the wholesale cost to the pharmacist of the two drug products.

MCL 333.17755(2)(the "Generic Drug Pricing Law").

The Generic Drug Pricing Law is straightforward. For example, if a pharmacy dispenses a generically equivalent prescription drug with a wholesale cost[1] of $10 and the pharmacy's wholesale cost for the corresponding brand-name version of the drug is $50, the pharmacy must pass on to the purchaser this $40 difference between the wholesale cost of the two drug products by selling the generic drug to the purchaser for at least $40 less than the pharmacy would have sold the brand-name drug to the purchaser.

So, in the example above, if the pharmacy's retail sales price for the brand-name drug was $70, the pharmacy would be required to sell the generic equivalent drug at retail for no more than $30 ($70 brand drug retail price – $40 savings in cost from dispensing generic drug = $30 maximum generic drug retail price). The result of the statute is that the pharmacy cannot make a greater profit on the sale of the generic drug than it makes on the sale of the brand-name equivalent drug.

---

[1] The term "wholesale cost" is used interchangeably with the term "acquisition cost" throughout the Complaints. Both phrases refer to how much the pharmacy pays to obtain a prescription drug for resale.

THE CLASS ACTION COMPLAINTS

Plaintiffs City of Lansing and Dickinson Press are two employers who sponsor self-funded employee benefits plans. Plaintiffs City of Lansing and Dickinson Press did not receive these savings in cost when paying health care claims for generic prescription drugs submitted by the Defendants (the "Defendant Pharmacies"). Plaintiff Murphy is an uninsured individual who did not receive these savings in cost when he purchased generic prescription drugs from Defendant Target.

Plaintiffs are suing individually and on behalf of a putative class of purchasers and third-party payment sources throughout Michigan to recover these overcharges from the Defendant Pharmacies. Potential class members include self-insured businesses and municipalities that pay health care claims for generic prescription drugs on behalf of their employees; insurance companies that pay health care claims for generic prescription drugs on behalf of their insureds; and uninsured individuals who pay for generic prescription drugs directly out of their own pockets.

Plaintiffs City of Lansing, Dickinson Press, and Murphy filed a 47-page, 170-paragraph Second Amended Complaint ("Class Action Complaint") setting forth the basis for their claims.[2] In 2008 alone, over 113 million retail prescriptions were filled in Michigan pharmacies, with total sales of almost $6.8 billion. Class Action Compl. ¶ 32, Joint App. 321a. Most of these sales were of generic prescription drugs. *Id.* ¶ 33, Joint App. 322a. Since 2003, Plaintiffs alone

[2] There are two class action lawsuits: one against Defendants Rite Aid of Michigan Inc. and Perry Drug Stores Inc. (Docket No. 146792) and a second against all of the other Defendant Pharmacies (Docket No. 146793). For all relevant purposes, the issues in the two class action lawsuits are identical. For ease of the Court, when referring to the specific allegations in the class action lawsuits, Plaintiffs will refer to the Second Amended Complaint in *City of Lansing v CVS Caremark Corp*, Docket No. 146793 ("Class Action Complaint"), unless otherwise noted.

have purchased or been the third-party payment source for over 150,000 prescription drugs from the Defendant Pharmacies. *Id.* ¶¶ 40, 62, Joint App. 322a, 323a, 328a.

The Defendant Pharmacies keep secret from the public their wholesale costs for prescription drugs.[3] However, based in part on prescription drug wholesale cost information obtained by Plaintiff Marcia Gurganus (a pharmacist for Defendant Kroger), the Complaint alleges the Defendant Pharmacies' wholesale costs for six brand-name prescription drugs and their generic equivalents. The Complaint also alleges the retail prices at which the Defendant Pharmacies sold these drugs to Plaintiffs. Plaintiffs then allege hundreds of generic prescription drug claims for which the Defendant Pharmacies failed to pass on to Plaintiffs the difference between the wholesale cost to the pharmacy of the brand-name drug and its generic equivalent. *Id.* ¶¶ 63–144, Joint App. 328a–356a.

For example, consider just one of the hundreds of specific examples of overcharges by the Defendant Pharmacies alleged in the Complaint. On January 5, 2008, Plaintiff City of Lansing purchased from Defendant CVS Caremark Corp. ("CVS") the generic drug Fluticasone Propionate ("Fluticasone"), a prescription drug used for the treatment of allergic rhinitis. *Id.* ¶¶ 109, 119, Joint App. 340a–344a. Fluticasone is marketed by GlaxoSmithKline under the brand name Flonase. *Id.* ¶ 109.

[3] Indeed, the Defendant Pharmacies maintain that their wholesale costs for prescription drugs in 2008 are *still confidential today* and have sought to keep the wholesale cost information alleged in these lawsuits under seal and out of the public record. It is undisputed that the Defendant Pharmacies' prescription drug wholesale costs are not available to the public.

REDACTED FOR PUBLIC FILING[4]

Plaintiffs have no reason to believe that the Defendant Pharmacies' failure to pass on these savings has been limited to them. Nor do Plaintiffs have any reason to believe that the overcharges by the Defendant Pharmacies relate only to the six generic drugs used as examples

[4] The section of the Statement of Facts highlighted in yellow contains information that the Defendant Pharmacies deem confidential. As such, this information has been redacted from the public record in these lawsuits and is included only in the sealed version of this brief and the sealed Plaintiffs' Supplemental Appendix.

in the Complaint. Rather, Plaintiffs believe that every Michigan business or governmental unit that pays for prescription drug benefits for its employees, every Michigan insurance company that pays for prescription drug benefits for its insureds, and every individual in Michigan who pays for prescription drugs out of his/her own pocket may have been subject to similar overcharges without their knowledge.

Accordingly, Plaintiffs brought their lawsuits both on their own behalf and as putative class actions on behalf of purchasers of generic prescription drugs throughout the state. *Id.* ¶¶ 152–154, Joint App. 358a–359a. Plaintiffs have pleaded four counts for relief: (1) violation of MCL 333.17755(2); (2) violation of the Michigan Consumer Protection Act; (3) unjust enrichment; and (4) violation of the Health Care False Claims Act, MCL 752.1009. *Id.* ¶¶ 155–170, Joint App. 359a–362a.

THE QUI TAM COMPLAINT

A third complaint against the Defendant Pharmacies was brought by Marcia Gurganus, a pharmacist employed by Defendant Kroger. Plaintiff Gurganus seeks to recover on behalf of the State of Michigan for false health care claims submitted by the Defendant Pharmacies to the State of Michigan's Medicaid program pursuant to the Medicaid False Claims Act, MCL 400.601, *et seq.*

As a pharmacist for Defendant Kroger, Plaintiff Gurganus had access to Defendant Kroger's prescription drug wholesale cost information for a variety of generic prescription drugs and their brand-name counterparts. Plaintiff Gurganus shared that prescription drug wholesale cost information with the Michigan Attorney General's office before filing her complaint. See *Gurganus v CVS Caremark Corp*, 1st Am. Compl., Joint App. 57a (example price sheet showing Defendant Kroger's wholesale cost and retail list price for the brand drug Cefzil and its generic equivalent Cefprozil).

Plaintiff Gurganus filed a 77-page, 138-paragraph Second Amended Complaint ("Qui Tam Complaint") setting forth the basis for her lawsuit on behalf of the State of Michigan. In 2007 alone, it is estimated that the State of Michigan paid over $398 million for prescription drugs dispensed to Medicaid beneficiaries. Qui Tam Compl. ¶ 35, Joint App. 193a. Most of the drugs for which the Defendant Pharmacies submitted claims to the State of Michigan's Medicaid program were generic prescription drugs. *Id.* ¶ 36.

Similar to the Class Action Complaints, the Qui Tam Complaint alleges the Defendant Pharmacies' wholesale cost for five brand-name prescription drugs and their generic equivalents. The Qui Tam Complaint also alleges the amount paid by the State of Michigan's Medicaid program for generic prescription drug claims submitted by the Defendant Pharmacies. Based on this information, Plaintiff Gurganus alleges over 2,000 claims submitted by the Defendant Pharmacies to the State of Michigan's Medicaid program in the fourth quarter of 2008 for which the Defendant Pharmacies failed to pass on to the State of Michigan the savings in cost between the wholesale cost of the brand-name drug and its generic equivalent. *Id.* ¶¶ 75–123, Joint App. 201a–259a.

Plaintiff Gurganus has no reason to believe that the false claims submitted by the Defendant Pharmacies to the State of Michigan are limited to only these five generic drugs. Nor does Plaintiff Gurganus have any reason to believe the false claims submitted by the Defendant Pharmacies were limited to the fourth quarter of 2008. Instead, Plaintiff Gurganus pled these 2,000-plus transactions as *examples* of prescription drug claims submitted by the Defendant Pharmacies to the State of Michigan that failed to pass on the required savings in cost to the State. Plaintiff Gurganus filed her lawsuit under the Medicaid False Claims Act, MCL 400.601 *et seq.*

THE COURT OF APPEALS UNANIMOUSLY CONCLUDED THAT THE COMPLAINTS SHOULD NOT BE DISMISSED.

In a unanimous *per curiam* opinion dated January 22, 2013, the Michigan Court of Appeals held that Plaintiffs had sufficiently pled their Complaints:

> Here, the circumstances constituting fraud in all three complaints are the instances when defendants allegedly sold generic prescription drugs without passing on the savings in cost in violation of § 17755(2). The complaints state these circumstances with sufficient particularity because they identify the date, brand sales price, brand acquisition cost, brand profit, generic acquisition cost, maximum generic price, actual generic sales price, and overcharge amount for each of the drugs used as examples regarding each defendant. The complaints contain these specific allegations for hundreds of different dates in 2008. Cumulatively, these allegations sufficiently apprise defendants of what plaintiffs will attempt to prove, and leave no doubt concerning what defendants will be required to defend against. *Kassab*, 185 Mich App at 213. Further, plaintiffs allegations, if true, demonstrate that defendants violated § 17755(2). Therefore, we conclude that summary disposition pursuant to MCR 2.116(C)(8) is not appropriate because further factual development could show that plaintiffs are entitled to recovery. *Feyz*, 475 Mich at 672. Further, we conclude that the pleadings meet the heightened pleading standards for allegations of fraud because the complaints particularly state the circumstances constituting the alleged fraud, and there can be no doubt that the complaints sufficiently apprise defendants of the nature of the case that they must prepare to defend.

Gurganus v CVS Corp, unpublished opinion *per curium* of the Court of Appeals dated January 22, 2013 (Dkt. Nos. 299997–299999), at 18, Joint App. 565a.

The Michigan Court of Appeals further concluded that the Defendant Pharmacies' presentment of health care claims that failed to pass on the required savings in cost under MCL 333.17755(2) was actionable under both the Health Care False Claims Act and, for Plaintiff Gurganus on behalf of the State of Michigan, under the Medicaid False Claims Act:

> Material to a pharmacist's entitlement to payment for generic drugs that are dispensed is that the amount charged complies with § 17755(2). Here, defendants' presentation of claims for payment impliedly represents to purchasers and payees that defendants are passing on the savings in cost, if any, when generic drugs are dispensed. However, if plaintiffs' allegations are true, defendants are not actually passing on the savings in cost by concealing material facts regarding the profits that they are realizing from the sale. We conclude that this alleged mechanism for violating § 17755(2) meets the definition of "deceptive" under the

> plain language of both statutes. More specifically, because the alleged violation of § 17755(2) entails omission of a material fact leading purchasers and payees to believe the state of affair is something other than it actually is, defendants are engaging in deceptive, and therefore false, conduct. Moreover, we reject defendants' argument that an affirmative act or misrepresentation is required to constitute a false claim because neither the HCFCA's nor the MFCA's definition of false claim requires an affirmative act. We do not read requirements into plain statutory language. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

Id. at 20, Joint App. 567a.

However, the Michigan Court of Appeals affirmed the circuit court's determination that Plaintiffs may not maintain an implied right of action under MCL 333.17755(2). *Id.* at 10–11, Joint App. 557a–558a. This holding is the subject of Plaintiffs' cross-appeal.

STANDARD OF REVIEW

A motion for summary disposition pursuant to MCR 2.116(C)(8) is reviewed *de novo* on appeal. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Id.* In reviewing a motion under MCR 2.116(C)(8), the court must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from those allegations. *Wade v Dep't Corr*, 439 Mich 158, 162–63; 483 NW2d 26 (1992). "A motion under MCR 2.116(C)(8) may be granted only when the plaintiff's claims are so clearly unenforceable as a matter of law that *no* factual development could *possibly* justify recovery." *Maiden*, 461 Mich at 119 (citation omitted)(emphasis added).

ARGUMENT

This appeal can be resolved by applying the plain language of the Generic Drug Pricing Law, Medicaid False Claims Act, and Health Care False Claims Act to the allegations in the Complaints. The issues before the Court are narrow and relate to a unique statute—the Generic

Drug Pricing Law. Nothing in this appeal requires the Court to pronounce any new rule of law or overrule any prior decision of this Court.

As discussed further below, the plain language of the statutes cited by Plaintiffs unequivocally supports Plaintiffs' position. The Michigan Court of Appeals unanimously concluded that the Complaints stated legally valid claims under the plain language of the Medicaid False Claims Act and the Health Care False Claims Act. Any factual questions about whether there were overcharges for generic prescription drugs, or the exact mechanics of how the overcharges occurred, are issues to be resolved during discovery and at trial. The Michigan Court of Appeals' unanimous opinion should be affirmed.

I. THE PRESCRIPTION DRUG CLAIMS SUBMITTED BY THE DEFENDANT PHARMACIES ARE ACTIONABLE UNDER BOTH THE MEDICAID FALSE CLAIMS ACT AND THE HEALTH CARE FALSE CLAIMS ACT.

A. THE MEDICAID FALSE CLAIMS ACT PROVIDES AN EXPRESS CAUSE OF ACTION TO RECOVER DAMAGES ON BEHALF OF THE STATE FOR THE SUBMISSION OF CLAIMS FOR PAYMENT TO WHICH THE DEFENDANT PHARMACIES WERE NOT ENTITLED TO RECEIVE.

The Medicaid False Claims Act ("MFCA") provides an express cause of action for the State of Michigan to sue to recover damages where a person[5] submits a claim for Medicaid payments to which the person is not entitled to receive:

> (1) A person who receives a benefit that the person is not entitled to receive by reason of fraud or making a fraudulent statement or knowingly concealing a material fact, or who engages in any conduct prohibited by this statute, shall forfeit and pay to the state the full amount received, and for each claim a civil penalty of not less than $5,000.00 or more than $10,000.00 plus triple the amount of damages suffered by the state as a result of the conduct by the person.
>
> (2) A criminal action need not be brought against the person for that person to be civilly liable under this section.

MCL 400.612.

[5] A *person* "means an individual, corporation, association, partnership, or other legal entity" and therefore includes the Defendant Pharmacies. MCL 400.602(h).

The MFCA also expressly provides that any person may bring suit on behalf of the State of Michigan for violations of the MFCA:

> Any person may bring a civil action in the name of this statue under this section to recover losses that this state suffers from a violation of this act. A suit filed under this section shall not be dismissed unless the attorney general has been notified and had an opportunity to appear and oppose the dismissal. The attorney general waives the opportunity to oppose the dismissal if it is not exercised within 28 days of receiving notice.

MCL 400.610a(1).

Protecting the State's Medicaid funds, the MFCA broadly prohibits—and imposes liability for—the submission of false claims to the State for Medicaid payments. See MCL 400.607(1)("A person shall not make or present or cause to be made or presented to an employee or officer of this state a claim under the social welfare act . . . upon or against the state, knowing the claim to be false"). The MFCA broadly defines a claim[6] as *false* if it is "wholly or partially untrue or deceptive." MCL 400.602(d).

The MFCA does not define *untrue*, but its commonly understood meaning is "not true to fact; incorrect." See *Random House Webster's College Dictionary* (2001), 2d Supp. App. 0166.[7] The word *deceptive*, in turn, is defined as:

> [M]aking a claim or causing a claim to be made under the social welfare act that contains a statement of fact or that fails to reveal a fact, which statement or failure leads the department to believe the represented or suggested state of affair to be other than it actually is.

MCL 400.602(c).

---

[6] A *claim* is "any attempt to cause the department of community health to pay out sums of money under the social welfare act." MCL 400.602(b).

[7] Where a statute does not define a word, that word must be given its ordinary meaning, and that meaning can be discerned from a dictionary. See MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language"); *People v Hardy*, 494 Mich 430, 440; 835 NW2d 340 (2013)("we turn to the dictionary for guidance in interpreting the terms used in [a statute]").

Finally, a person "knowingly" submits a false claim where the person's "conduct is substantially certain to cause the payment of a Medicaid benefit." MCL 400.602(f). No specific intent to defraud is required:

> "Knowing" and "knowingly" means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a Medicaid benefit. Knowing or knowingly includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of specific intent to defraud is not required.

Id.

By presenting claims for payments to which they are not entitled to receive, the Defendant Pharmacies submitted claims that are both untrue and deceptive, under the plain language of the MFCA. The claims for payment overstate the amount owed: they are "not true to fact," they are "incorrect." As such, the claims submitted by the Defendant Pharmacies to the State of Michigan were "untrue" and, therefore, false under the MFCA.

Likewise, the Defendant Pharmacies' submission of claims for payment for more than the amount owed is deceptive, particularly where the State does not know it is being overcharged and where the Defendant Pharmacies keep secret the information from which the overcharges could be determined (wholesale cost information). When a claim is submitted for an amount owed, the suggested state of affairs is that the amount stated is actually owed. But by failing to disclose the material fact that the full savings in cost are not being passed to the purchaser, the Defendant Pharmacies' submission of claims that overstate the amount owed is clearly deceptive. The Defendant Pharmacies submitted false claims to the State for which they are liable under the MFCA.

B. THE HEALTH CARE FALSE CLAIM ACT PROVIDES AN EXPRESS CAUSE OF ACTION FOR PLAINTIFFS DICKINSON PRESS AND THE CITY OF LANSING FOR THE DEFENDANT PHARMACIES' SUBMISSION OF CLAIMS FOR PAYMENTS TO WHICH THEY WERE NOT ENTITLED TO RECEIVE.

Extending the protections afforded by the MFCA to health care insurers, the Michigan legislature enacted the Health Care False Claims Act ("HCFCA"). The HCFCA creates an express cause of action for health care insurers, including sponsors of self-insured health care plans such as Plaintiffs City of Lansing and Dickinson Press,[8] where a person submits a claim to a health care insurer for payment to which he is not entitled to receive. Specifically, MCL 752.1009 provides:

> A person who receives a health care benefit from a health care corporation or health care insurer which the person knows he or she is not entitled to receive or be paid; or a person who knowingly presents or causes to be presented a claim which contains a false statement, *shall be liable to the health care corporation or health care insurer for the full amount of the benefit or payment made.*

MCL 752.1009 (emphasis added).[9]

Tellingly, the Defendant Pharmacies ignore this statute, failing to cite it even once in their entire 43-page brief. That is not surprising, for the statute makes the Defendant Pharmacies liable for their systematic overcharges for generic prescription drugs. The statute cannot be any clearer: a person "*shall be liable* to . . . [a] health care insurer for the full amount of the benefit or payment made" if that person either (a) knowingly presents a claim that contains a false statement to a health care insurer or (b) receives a payment from a health care insurer that he knows he is not entitled to receive. MCL 752.1009 (emphasis added).

---

[8] As sponsors of self-insured health care plans, Plaintiffs City of Lansing and Dickinson Press are *health care insurers* under the HCFCA. MCL 752.1002(f).

[9] The HCFCA's definitions of the terms *claim*, *deceptive*, *false*, *knowing*, and *person* are identical to the definition of those terms in the MFCA. See MCL 752.1002.

The Defendant Pharmacies are liable under both prongs of this statute, though either is sufficient. First, by submitting claims seeking payment for more than to which they were entitled to receive, the Defendant Pharmacies submitted claims containing a false (*i.e.*, untrue or deceptive) statement as to the amount owed. Additionally, the Defendant Pharmacies are liable under the HCFCA because they received a payment from a health care insurer that they knew they were not entitled to receive. See MCL 752.1009 ("a person who receives a health care benefit or payment . . . which the person knows that he or she is not entitled to receive . . . shall be liable . . . to the health care insurer for the full amount of the benefit or payment made"). Conceding this point, the Defendant Pharmacies do not challenge this argument in their brief.[10]

C. THE COURT OF APPEALS UNANIMOUSLY CONCLUDED THAT THE COMPLAINTS ALLEGED ACTIONABLE CLAIMS UNDER THE MFCA AND HCFCA.

The Michigan Court of Appeals easily reached the unanimous conclusion that, under the plain language of these statutes, the Defendant Pharmacies' failure to pass on the savings in cost required under MCL 333.17755(2) when presenting generic prescription drug claims for payment, under circumstances where the Plaintiffs had no way of knowing they were being overcharged, was actionable under both the MFCA and HCFCA:

> Material to a pharmacist's entitlement to payment for generic drugs that are dispensed is that the amount charged complies with §17755(2). Here, defendants' presentation of claims for payment impliedly represents to purchasers and payees that defendants are passing on the savings in cost, if any, when generic drugs are

[10] The Defendant Pharmacies may argue that the provision imposing liability where a person "receives a health care benefit from a . . . health care insurer which the person knows that he or she is not entitled to receive or be paid" applies only where "*the entire payment*" is improper. See Defs' Reply Supp. App. Leave Appeal at 4 (emphasis in original). The Defendant Pharmacies suggest that they can avoid liability under the HCFCA where they charge more than the amount they are entitled to receive, so long as they were entitled to receive a *portion* of the payment. That tortured interpretation is not only inconsistent with the plain language of the HCFCA (providing that "[a] person who receives a health care . . . payment from a . . . health care insurer which the person knows that he . . . is not entitled to . . . be paid"), but it would also largely eviscerate the HCFCA, essentially encouraging unscrupulous service providers to overbill insurers by submitting claims in excess of the amount they are entitled to receive.

> dispensed. However, if plaintiffs' allegations are true, defendants are not actually passing on the savings in cost by concealing material facts regarding the profits that they are realizing from the sale. **We conclude that this alleged mechanism for violating § 17755(2) meets the definition of "deceptive" under the plain language of both statutes. More specifically, because the alleged violation of §17755(2) entails omission of a material fact leading purchasers and payees to believe the state of affair is something other than it actually is, defendants are engaging in deceptive, and therefore false, conduct.** Moreover, we reject defendants' argument that an affirmative act or misrepresentation is required to constitute a false claim because neither the HCFCA's nor the MFCA's definition of false claim requires an affirmative act. We do not read requirements into plain statutory language.

Gurganus, slip op. at 20 (citation omitted, emphasis added), Joint App. 567a.

Applying the plain language of the statutes, the Michigan Court of Appeals' decision was correct. The Defendant Pharmacies' failure to pass on the savings in cost from generic prescription drugs in violation of MCL 333.17755(2)—a failure that only the Defendant Pharmacies could know about—was deceptive to Plaintiffs. The Defendant Pharmacies presented their claims for payment under false pretenses, representing to the Plaintiffs the amount due and owing for the prescriptions they dispensed. The representation of the amount due and owing did not include the savings in cost that the Defendant Pharmacies were required to pass on to the Plaintiffs under MCL 333.17755(2), leading Plaintiffs to believe the represented or suggested state of affairs was other than it actually was. MCL 400.602(c). Not only were the claims deceptive, but they were untrue as they overstated the amount actually owed. See MCL 400.602(d); MCL 752.1002(c).

The circuit court reached a similar conclusion at oral argument on the Defendant Pharmacies' motions for summary disposition:

> [DEFENSE COUNSEL]: That takes us to the second point for me to address, your Honor, which is that as phrased in our papers, that an alleged violation of section 1775 subsection 2 does not *ipso facto* constitute a false claim under the Michigan False Claims Act. And again, Gurganus—

> THE COURT: That dog won't hunt. You're wrong. There's a matter of law on that, so move on. You really don't have to spend any time, [because] I utterly and completely disagree with your proposition, so you don't need to waste everybody's time on that. Anything else?

5/11/10 Hr'g Tr 44:12–22, Joint App. 467a.

In a similar case against many of the Defendant Pharmacies currently pending in Minnesota, the Minnesota Court of Appeals also concluded that the alleged conduct of the Defendants was fraudulent, misleading, or deceptive:

> [B]ecause [defendants] neither disclosed their acquisition costs, nor ceased selling the generic prescription drugs at inflated prices, [plaintiffs] continued to pay inflated prices for generic prescription drugs without knowing they were being overcharged in violation of Minnesota law.

Graphic Comm'nc Local 1B Health & Welfare Fund "A" v CVS Caremark Corp, 833 NW2d 403, 412–13 (Minn App 2013).[11]

D. THE DEFENDANT PHARMACIES' "IMPLIED CERTIFICATION" ARGUMENT MUST BE REJECTED.

Rather than address the Michigan Court of Appeals' conclusion that the Defendant Pharmacies' submission of claims seeking more than they were entitled to receive was deceptive and false, the Defendant Pharmacies instead construct a straw man argument. Specifically, the Defendant Pharmacies argue that the Michigan Court of Appeals adopted an "implied certification theory" whereby the violation of "any" statute or regulation, "standing alone," is sufficient to give rise to a false claim. See Defs' Br. at 16–22. The Defendant Pharmacies claim the Michigan Court of Appeals' decision "permits *any* mistake, no matter how innocent and no matter how inconsequential to the government or insurer's decision to pay, to be fodder for a false claims suit." *Id.* at 16. They are wrong.

[11] This case is on appeal to the Minnesota Supreme Court.

The Michigan Court of Appeals did not adopt an "implied certification" theory, nor did it need to. The Michigan Court of Appeals did not even *mention* implied certification in its opinion. Under the theory of implied certification, a defendant is liable, not because (like here) he submitted a claim that "overstate[d] an amount otherwise due," but because the defendant violated a condition of his continuing participation with the government program to which the claim was submitted. See *Ab-Tech Constr Inc v United States*, 31 Fed Cl 429, 433 (1994)(adopting the implied certification theory by explaining that "the False Claims Act reaches beyond demands for money that fraudulently overstate an amount otherwise due; it extends 'to all fraudulent attempts to cause the Government to pay out sums of money'")(quoting *United States v Neifert-White Co*, 390 US 228, 233 (1968)). In other words, the implied certification theory provides for liability *beyond* the traditional False Claims Act liability for submitting a claim that overstates the amount due.[12]

In *Ab-Tech*, for example, the defendant entered into a contract with the Small Business Administration ("SBA") to develop a data processing facility. As part of the contract, the defendant promised to comply with certain requirements for continuing eligibility, including a provision requiring the defendant to obtain approval from the SBA prior to entering into any

[12] None of the implied certification cases involved statutes like that at issue here. See *Mikes v Straus*, 274 F3d 687 (CA 2, 2001)(improperly calibrated medical equipment); see also *United States ex rel Hobbs v Medquest Assocs Inc*, 711 F3d 707 (CA 6, 2013)(use of non-approved supervising physicians for contrast procedures conducted by licensed physicians); *United States ex rel Ebeid v Lungwitz*, 616 F3d 993 (CA 9, 2010)(improper corporate structure of a medical practice); *United States ex rel Siewick v Jamieson Sci & Eng'g Inc*, 214 F2d 1372 (CA DC, 2000)(violation of criminal statute aimed at preventing "revolving door" abuses by former government employees); *Rodriguez v Our Lady of Lourdes Med Ctr*, 552 F3d 297 (CA 3, 2008)(filling of prescriptions by ineligible pharmacy employees); *United States ex rel Willard v Humana Health Plan of Texas Inc*, 336 F3d 375 (CA 5, 2003)(discriminatory Medicare enrolment practices); *Harrison v Westinghouse Savannah River Co*, 176 F3d 776 (CA 4, 1999)(violation of government contractor conflict of interest regulations). Unlike those cases, the underlying statutory violation in this case relates to the amount the Defendant Pharmacies are lawfully entitled to receive in payment.

subcontract. The defendant violated this provision. When the defendant submitted claims for the SBA, those claims did not seek more money than was actually owed, but nonetheless constituted "false claims" because the request for payment represented an implicit certification of the defendant's "continuing adherence to the requirements for participation." *Id.* at 433. That is not what Plaintiffs allege here.

This is a straightforward False Claims Act case. The Defendant Pharmacies submitted claims that overstated the amount that was owed by the Plaintiffs. By submitting claims that overstated the amount that was owed, the Defendant Pharmacies submitted false claims under the MFCA and the HCFCA. The Defendant Pharmacies also knowingly received payments to which they were not entitled under Michigan law. Applying the definitions of *false* and *deceptive* as found in the acts, the Michigan Court of Appeals correctly concluded that the Defendant Pharmacies' claims were false and deceptive, especially where the Defendant Pharmacies are in exclusive possession of the information (prescription drug wholesale costs) from which the Plaintiffs could determine they had been overcharged.

The Defendant Pharmacies' argument that the Michigan Court of Appeals' opinion permits the filing of a false claim for the violation of "any statute or regulation" is nonsensical. The Defendant Pharmacies did not violate a statute that has no bearing on the claims for payment they submit. *They violated a statute that governs the amount of money to which they are entitled for their claims.* Where a defendant violates a statute by charging more than he is entitled to receive, he submits a false claim. See *Sanderson v HCA-The Healthcare Co*, 447 F3d 873 (CA 6, 2006)("[T]he False Claims Act does not create liability merely for a health care provider's disregard of Government regulations or improper internal policies *unless, as a result of such*

acts, the provider knowingly asks the Government to pay amounts it does not owe" (emphasis added)). The Defendant Pharmacies' argument should be rejected.

II. THE MEDICAID FALSE CLAIMS ACT AND HEALTH CARE FALSE CLAIMS ACT BOTH PROVIDE INDEPENDENT CAUSES OF ACTION WITHOUT REGARD TO THE ADMINISTRATIVE SCHEME FOR DISCIPLINING PHARMACISTS WHO VIOLATE THE PUBLIC HEALTH CODE.

The Defendant Pharmacies also argue that the purported lack of an *implied* cause of action under the Generic Drug Pricing Law, due to the ability of the Board of Pharmacy to discipline pharmacists who violate the Public Health Code, somehow divests Plaintiffs of the *express* causes of action provided under the MFCA and HCFCA. There is no legal principle that supports this position.

That an implied right of action may not exist for violation of one statute does not preclude a plaintiff from suing under another statute where the defendant's conduct violates that other statute. The Michigan legislature provided express causes of action for violations of the MFCA and HCFCA. The Defendant Pharmacies' conduct violates these statutes.[13]

Nothing in the plain language of the statutes supports the exception that the Defendant Pharmacies request. Recognizing as much, the Defendant Pharmacies request that this Court engraft a judicial exception onto the plain language of the MFCA and HCFCA. But doing so would negate and undermine the legislature's intent. The Defendant Pharmacies' argument must be rejected. See *People v Lown*, 488 Mich 242, 263; 794 NW2d 9 (2011)(refusing "to create an exception that has no basis in the statutory text"); *Potter v McLeary*, 484 Mich 397, 421; 774

[13] Many of these same Defendants—represented by many of the same attorneys—recently conceded this point in briefing before the Minnesota Supreme Court in the *Graphic Communication* case: "Defendants do not maintain that conduct in violation of the Pharmacy Statute could not theoretically also violate some other statute, such as the [Minnesota Consumer Fraud Act]. *If the conduct independently meets the elements of liability under both statutes, a pharmacy could be held liable under both statutes.*" See *Graphic Comm'nc*, Defs/App's/Cross-Resp's Resp. & Reply Br. at 12, Pls' 2d Supp. App. 0189.

NW2d 1 (2009)("We cannot add a requirement that is not contained in the statute's plain language").

A. THE PLAIN LANGUAGE OF THE MFCA AND HCFCA PROVIDES INDEPENDENT STATUTORY CAUSES OF ACTION.

As with all questions regarding statutory interpretation, the Court's analysis begins with the language of the statutes—language that the Defendant Pharmacies conspicuously ignore. See *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013)("When construing a statute, we consider the statute's plain language and we enforce clear and unambiguous language as written"); *Petipren v Jaskowski*, 494 Mich 190, 201–02; 833 NW2d 247 (2013)("If the language is clear and unambiguous, the statute must be enforced as written without judicial construction").

The MFCA and HCFCA create express statutory causes of action allowing Plaintiffs to recover the Defendant Pharmacies' unlawful overcharges. MCL 400.610a(1)("*any person may bring a civil action* in the name of this state under this section to recover losses that this state suffers from a violation of the MFCA" (emphasis added)); MCL 752.1009 ("A person who [violates the HCFCA] *shall be liable to the health care corporation or health care insurer* for the full amount of the benefit or payment made" (emphasis added)). The plain language of the MFCA and HCFCA establishes that civil liability for violation of the statutes exists, regardless of whether a plaintiff has any other remedies and regardless of whether another statute does or does not provide an implied right of action.

Had the legislature intended to limit claims for generic prescription drugs from the scope of the MFCA and HCFCA, it could have done so. It has included such limitations in other contexts. See, e.g., MCL 418.354(14)("This section does not apply to any payments received or to be received under a disability pension plan provided by the same employer"); see also MCL 712A.23 ("This section does not apply to a criminal conviction under this chapter"); MCL

432.203(3)("Any other law that is inconsistent with this act does not apply to casino gaming as provided for by this act"). Neither the MFCA nor the HCFCA contains any such limitation.

Moreover, both the MFCA (enacted in 1977) and the HCFCA (enacted in 1984) were enacted after the Generic Drug Pricing Law (enacted in 1974). Had it so intended, the legislature could have expressly excluded claims for generic prescription drugs from the MFCA and HCFCA. It did not.

B. THE DEFENDANT PHARMACIES WAIVED THEIR RIGHT TO CHALLENGE WHETHER THE MCFCA AND THE HCFCA PROVIDE AN EXPRESS RIGHT OF ACTION.

Prior to submitting their appellate brief to this Court, the Defendant Pharmacies never challenged whether there was an express cause of action for violation of the MFCA. Having failed to raise this argument in either the circuit court, the Michigan Court of Appeals, or even in their application for leave to appeal, the Defendant Pharmacies have waived their right to challenge whether there is an express cause of action for violation of the MFCA. See *Butcher v Dep't Treasury*, 425 Mich 262, 276; 389 NW2d 412 (1986)("Plaintiffs' due process and equal protection arguments were not raised in the Court of Appeals, and we therefore decline to consider them").

As to the HCFCA, before both the circuit court and the Michigan Court of Appeals, the Defendant Pharmacies argued only that the HCFCA was a criminal statute for which only criminal restitution was available. The Michigan Court of Appeals had no difficulty rejecting this argument, concluding that the plain language of the HCFCA grants Plaintiffs City of Lansing and Dickinson Press an express cause of action to sue the Defendant Pharmacies:

> Application of the plain meaning of these words reveals the Legislature's intent that MCL 752.1009 make one who presented a claim that he or she knew they were not entitled to receive, or who presented a claim that contained a false statement, legally responsible to health care corporations or health care insurers for the full amount of the overpayment of the benefit or payment. Because of the

> broad and mandatory statement of civil liability in MCL 752.1009, we reject defendants' argument that this is a penal statute, and a health care insurer's only recourse is to recover restitution after a criminal conviction under MCL 752.1010. The plain language of MCL 752.1009 provides that a person who violates the statute "*shall be liable*" to the health care insurer "for the full amount of the benefit or payment made." MCL 752.1009. Therefore, we conclude that the HCFCA, pursuant to MCL 752.1009, creates a private cause of action for health care corporations and health care insurers, and we reverse the trial court's holding to the contrary.

Gurganus, slip op. at 12 (emphasis in original), Joint App. 559a.

The Defendant Pharmacies have jettisoned their specious argument that the HCFCA is only a penal statute. Instead, they now argue—for the first time—that the alleged lack of an *implied* right of action directly under MCL 333.17755(2) somehow implicitly rescinds Plaintiffs' *express* causes of action under the MFCA and HCFCA. The Defendant Pharmacies failed to even make this argument to the Michigan Court of Appeals. This Court should therefore refuse to consider it. See *Butcher*, 425 Mich at 276.

C. THE ALLEGED LACK OF AN IMPLIED RIGHT OF ACTION UNDER THE GENERIC DRUG PRICING LAW DOES NOT RESCIND THE EXPRESS CAUSES OF ACTION UNDER THE MFCA AND HCFCA.

The Defendant Pharmacies' "implicit rescission" theory is meritless in any event. The Michigan legislature provided an express cause of action for violation of the MFCA and HCFCA. By submitting false claims (and receiving payment) for generic prescription drugs to which they are not entitled under the law, the Defendant Pharmacies have violated the MFCA and HCFCA and are directly liable under those statutes. Whether there is an implied right of action under a statute is irrelevant to whether a party can bring a cause of action for violation of *another* statute providing an express cause of action where the defendant's conduct violates that other statute. That the Michigan Court of Appeals believed there to be no implied right of action for violation of MCL 333.17755(2) does not foreclose Plaintiffs from bringing claims for

violation of the MFCA and the HCFCA where the Defendant Pharmacies' conduct violates these statutes.

The Defendant Pharmacies' efforts to read an implied limitation into the express causes of action provided by the legislature in the MFCA and HCFCA is contrary to this Court's well-established approach to statutory interpretation. See, e.g., *Roberts v Mecosta County Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002)("An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature . . . a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself"). If the Defendant Pharmacies' argument were adopted, the applicability of the MFCA and HCFCA would be limited to situations where there is already an express cause of action, such as a health care claim that is also actionable as common law fraud or a breach of contract. There is no principled legal basis for that position, and it ignores the plain language of the statutes. The Defendant Pharmacies are asking this Court to impose limitations on this plain language of the statutes through judicial fiat. This Court must decline to do so.

None of the cases upon which the Defendant Pharmacies rely support their novel theory that the lack of an implied right of action under one statute somehow negates a separate express cause of action under a different statute. The cases cited by the Defendant Pharmacies did not involve a situation where the defendant's conduct violated a separate, independent statute for which there is an express cause of action. Rather, they considered the narrow question of whether a particular statute provided an implied cause of action for violation *of that statute*. Those cases stand for the limited proposition that where a "party seek[s] a remedy under . . . [an] act, [that party] is confined to the remedy conferred thereby." *City of South Haven v Van Buren*

County Bd of Comm'rs, 478 Mich 518, 529; 734 NW2d 533 (2007). This principle is inapplicable here. Plaintiffs' MFCA and HCFCA claims do not seek a remedy under the Generic Drug Pricing Law; *they seek a remedy under the MFCA and HCFCA for violations of the MFCA and HCFCA.*

Defendants' reliance on *Conboy v AT&T Corp*, 241 F3d 242 (CA 2, 2001), is similarly misplaced. The issue in *Conboy* was whether the defendant's conduct violated New York General Business Law § 349, which prohibits "deceptive acts or practices in the conduct of any business trade or commerce or in the furnishing of any service." See *Conboy*, 241 F3d at 259. The plaintiff alleged that the defendant's practice of calling the plaintiff's unlisted number numerous times throughout the day, and at unusual hours, violated New York General Business Law § 601, which prohibited a creditor from communicating with "the debtor . . . with such frequency or at such unusual hours or in such a manner as can reasonably be expected to abuse or harass the debtor." *Id.* at 257–58 (quoting NY Gen Bus Law § 601). The plaintiff argued that this violation of Section 601 *necessarily* constituted a *per se* deceptive practice in violation of Section 349. See *id.* at 258. The court rejected this argument, observing, "there is no indication that the telephone calls were for any purpose other than what they purported to be" (*i.e.*, collection calls). *Id.* The court further observed, "Because a Section 349 violation requires a defendant to mislead the plaintiff in some material way, *and plaintiffs have not alleged any type of deception here,* the District Court correctly dismissed their claim under [Section 349]." *Id.* (emphasis added). In other words, the plaintiff in *Conboy* failed to allege a violation of the relevant anti-deception statute. That is not the case here.

The MFCA provides the express cause of action established by the legislature to allow redress for the State of Michigan's Medicaid program when it is overcharged on claims for health

care provided to Medicaid beneficiaries. For private insurers and health care corporations, the HCFCA provides the express cause of action established by the legislature to allow redress for being overcharged on health care claims, as the legislature "enacted the HCFCA to extend to private insurers and health care corporations the same protections . . . it afforded the [State of Michigan] in the [Medicaid False Claims Act]." *People v Motor City & Surgical Supply Inc*, 227 Mich App 209, 213; 575 NW2d 95 (1997).

The Defendant Pharmacies received payments for generic prescription drugs to which they were not entitled under the law. They are therefore expressly and independently liable under the MFCA and HCFCA. See MCL 400.610a(1)(expressly establishing a civil cause of action to recover losses suffered by the state); see also MCL 752.1009 (expressly establishing a civil cause of action to recover "the full amount of the benefit or payment made"). To conclude otherwise would fail to give effect to the plain language of the statutes and disregard the legislature's intent.

Having applied the plain language of the statutes to the specific facts in this case, the Michigan Court of Appeals properly concluded that Plaintiffs have an independent, express cause of action under the MFCA and HCFCA based on the Defendant Pharmacies' practice of secretly and systematically overcharging Plaintiffs for generic prescription drugs. This Court should affirm.

D. THE DOCTRINE OF PRIMARY JURISDICTION DOES NOT APPLY.

At the core of the Defendant Pharmacies' and related *amici*'s argument is that the Board of Pharmacy has specialized expertise over the underlying issues implicated by the Plaintiffs' Complaints and that the Complaints should be dismissed as a result. This argument is totally inapposite. As this Court has explained:

> "Primary jurisdiction" . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim *requires* the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is *suspended* pending referral of such issues to the administrative body for its views.

Travelers Ins Co v Detroit Edison Co, 465 Mich 185, 197–98; 631 NW2d 733 (2001)(quoting *United States v Western P R Co*, 352 US 59, 63–64 (1956)(emphasis added)). The doctrine of primary jurisdiction "does not deprive [a] court of jurisdiction." *Reiter v Cooper*, 507 US 258, 268 (1993). Rather, it is a doctrine by which a court may refer a question to the agency that has special expertise over an issue. The assertion that the Board of Pharmacy has primary jurisdiction says nothing about whether these Complaints state claims for relief under the law.

Moreover, nothing in Plaintiffs' Complaints "requires the resolution of issues which . . . have been placed within the special competence of an administrative body." Courts consider three factors in deciding whether to *suspend* a lawsuit pending referral of such issues to an administrative body for review: "(1) whether the matter falls within the agency's specialized knowledge, (2) whether the court would interfere with the uniform resolution of similar issues, and (3) whether the court would upset the regulatory scheme of the agency." *City of Taylor v Detroit Edison Co*, 475 Mich 109, 121–22; 715 NW2d 28 (2006).

None of these factors weighs in favor of the Defendant Pharmacies' argument here. First, the issues raised by the Complaints are not "of a type to require agency expertise to evaluate." *Rinaldo's Constr Corp v Michigan Bell Tele Co*, 454 Mich 65, 72; 559 NW2d 647 (1997). The determination that will need to be made—the price difference between the pharmacy's wholesale cost of the brand-name drug and generic equivalent, along with the actual price paid by Plaintiffs—is a straightforward accounting determination and requires no special expertise from the Board of Pharmacy. Second, there is no risk of the court interfering with the uniform

resolution of similar issues by the Board of Pharmacy, as the Board of Pharmacy has *never* acted on an issue involving the Generic Drug Pricing Law. Finally, there is no regulatory scheme to upset here, as the Board of Pharmacy has not issued any regulations purporting to interpret the Generic Drug Pricing Law. Accordingly, even under the considerations of the primary jurisdiction doctrine, there is no reason for Michigan courts to suspend these Complaints pending referral of such issues to the Board of Pharmacy.

III. PLAINTIFFS' INTERPRETATION OF THE GENERIC DRUG PRICING LAW HONORS THE PLAIN LANGUAGE OF THE STATUTE.

The Defendant Pharmacies go to great lengths to contort the plain language of the Generic Drug Pricing Law beyond recognition. A simple review of the statutory language shows the numerous fallacies in the Defendant Pharmacies' proposed interpretation.

A. THE GENERIC DRUG PRICING LAW APPLIES WHENEVER A GENERIC DRUG IS DISPENSED.

Defendants argue that the Generic Drug Pricing Law applies only when a doctor writes the prescription using the brand name and a generic drug is dispensed in substitution for a prescribed brand-name drug. However, the Defendant Pharmacies' interpretation is completely contrary to the plain language of the statute. The first sentence of the statute clearly states that it applies in *all* circumstances in which a generic drug is dispensed:

> ***If a pharmacist dispenses a generically equivalent drug product***, the pharmacist shall pass on the savings in cost to the purchaser or to the third-party payment source if the prescription purchase is covered by a third-party payee contract. The savings in cost is the difference between the wholesale cost to the pharmacist of the two drug products.

MCL 333.17755(2)(emphasis added).

The statute is clear: "If a pharmacist dispenses a generically equivalent drug product, the pharmacist shall pass on the savings in cost to the purchaser or to the third-party payment source . . . ." *Id.* The statute does not say, "If a pharmacist dispenses a generically equivalent

drug product *in substitution for a prescribed brand-name drug product*, the pharmacist shall pass on the savings in cost to the purchaser or third-party payment source . . . ." Defendants' argument would add language to the statute that the legislature did not include and is without merit under the plain language of MCL 333.17755(2).

Defendants' proposed interpretation would also undermine the legislature's efforts. The obvious purpose of the statute is to pass on the savings in cost of lower-cost generic prescription drugs on to purchasers and insurers, rather than allowing pharmacies to make additional profits when dispensing lower-cost generic drugs. This purpose applies equally regardless of whether the prescription is written by the doctor using the brand name or generic name. Under Defendants' strained reading of the statute, Plaintiffs (including the State of Michigan) could be charged different prices for *the same generic drug dispensed by the same pharmacy at the same time* based solely on whether the prescribing doctor wrote out the prescription using the brand name or the generic name. This is a nonsensical result.[14]

The Michigan Court of Appeals had no difficulty unanimously concluding that under the plain language of the Generic Drug Pricing Law, the statute applies whenever a generically equivalent drug product is dispensed, regardless of whether a substitution occurred:

> Next, defendants argue the complaints needed to pled facts demonstrating that a substitution transaction occurred. According to defendants, a substitution transaction occurs within the meaning of the statute when a pharmacist dispenses a generic drug when a brand name drug was prescribed. Thus, defendants argue that § 17755(2) applies only when a brand name drug is prescribed and a pharmacist dispenses a generic drug.

---

[14] Because pharmacies are required to substitute a generic drug under most circumstances, doctors do not worry about whether to write out the prescription using the brand name or the generic name. Defendants' statutory construction would have the absurd result of providing *less* price protection to Plaintiffs if the doctor wrote the prescription using the generic name and would require prescribing doctors to write prescriptions using the brand name in order to ensure purchasers pay the lowest price. This absurd result cannot be what the legislature intended.

> This Court will not read words into the plain language of a statute. *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 411; 809 NW2d 669 (2011). There is no express language in MCL 333.17755(2) that limits a pharmacist's obligation to pass on the savings in cost to the purchaser or the third party payment source to those situations when a pharmacist dispenses a generic drug after receiving a prescription for a brand name drug. Had the Legislature intended that § 17755(2) only apply in situations when a pharmacist substitutes a generic drug for a prescribed brand name drug, it could have included such language in § 17755(2). Under defendants' interpretation of the statute, the application of § 17755(2) is informed by the other sections of the statute. However, we reject defendants' interpretation because there is no indication in the language of the statute that the provisions limit each other. Rather, the plain language of § 17755(2) makes clear that the Legislature's intent was to make § 17755(2) applicable to instances when a generic drug is dispensed, regardless of whether a brand name drug was prescribed. Thus, because we conclude that § 17755(2) applies whenever a pharmacist dispenses a generic drug, Gurganus and the class action plaintiffs were not required to plead transactions that involved "substitutions" as defined by defendants.

Gurganus, slip op. at 20–21, Joint App. 567a, 568a. The Defendant Pharmacies' argument should be rejected.[15]

B. THE GENERIC DRUG PRICING LAW REQUIRES THE DIFFERENCE BETWEEN THE WHOLESALE COST OF THE BRAND-NAME DRUG PRODUCT AND THE GENERIC EQUIVALENT DRUG PRODUCT TO BE PASSED ON TO THE PURCHASER.

The second sentence of the Generic Drug Pricing Statute is also straightforward:

> If a pharmacist dispenses a generically equivalent drug product, the pharmacist shall pass on the savings in cost to the purchaser or to the third-party payment source if the prescription purchase is covered by a third-party payee contract. ***The savings in cost is the difference between the wholesale cost to the pharmacist of the two drug products.***

MCL 333.17755(2)(emphasis added).

---

[15] Even if the statute is interpreted to apply only when a substitution takes place, this does not mean that the Complaints should be dismissed. Widespread substitution can be reasonably inferred from studies provided to the circuit court showing over 79 percent of prescriptions are written using the brand name, even when a generic is available. "What's In a Name? Use of Brand Versus Generic Drug Names in United States Outpatient Practice," 22 *Journal of Generic Internal Medicine* 645, 646 (2007), Pls' Supp. App. 0225–0226. Moreover, information on whether a substitution took place for any particular prescription drug transaction is in the sole possession of Defendants. Plaintiffs are not required to plead facts in the sole possession of Defendants. *Spelman v Addison*, 300 Mich 690, 702–03; 2 NW2d 883 (1942).

The second sentence of the statute defines what "the savings in cost" to be passed on to the purchaser is. *The savings in cost* is defined as "the difference between the wholesale cost to the pharmacist of the two drug products." *Id.*

There are only two types of prescription drug products that have been identified and defined by the legislature: (1) the brand-name version of a prescription drug product and, (2) for drugs whose patent protection has expired, the generically equivalent prescription drug product. See MCL 333.17702(2) (defining *brand name* as "the registered trademark name given to a drug product by its manufacturer"); MCL 333.17704(2) (defining *generic name* as "the established or official name of a drug or drug product"). When MCL 333.17755(2) refers to the savings in cost to be passed on upon the dispensing of a *generically equivalent drug product*, the legislature obviously indicated that the drug product is "generically equivalent" to the other type of drug product defined by the legislature—the brand-name version of the drug product.

The Defendant Pharmacies argue for the first time that the statute only requires the pharmacy to sell a substituted generic drug at the same price the pharmacy would have charged if the generic drug had been prescribed in the first instance. If that were the case, there would be no reason for the statute to define *the savings in cost* as "the difference in the wholesale cost of the two drug products," since a generic drug has the same wholesale cost regardless of whether the doctor writes the prescription using the brand or generic name.

Moreover, under the Defendant Pharmacies' proposed interpretation, there would be no reason for the statute to make any reference to wholesale drug costs at all. Instead, the legislature would simply have said that pharmacies are required to sell substituted generic drugs as the same price that they sell prescribed generic drugs. Of course, that is not what the statute says. The Defendant Pharmacies' proposed interpretation of the statute has no basis in the

statutory language and would completely eviscerate the second sentence of the Generic Drug Pricing Law.

Each of the Defendant Pharmacies' four arguments in support of their statutory interpretation are completely nonsensical when examined closely. The Defendant Pharmacies first argue that because the statute requires the pharmacies to pass on "*the* savings," not "*any* savings," this somehow supports their interpretation. However, a pharmacy can easily calculate at the point of sale *the* savings in cost the pharmacy recognized by dispensing a generic drug product compared to its brand-name equivalent. The Defendant Pharmacies stand prepared to dispense either the brand or the generic version of prescription drugs and have acquired both the brand and generic versions of the prescription drugs they dispense on countless occasions. As such, at the point of sale, the Defendant Pharmacies already know their wholesale costs for both the brand and generic version of the drugs and can *easily* calculate the savings in cost (the difference in wholesale cost between the brand drug and its generic equivalent) at the time the generic drug is dispensed. No "recalculation" is required.

The Defendant Pharmacies' second argument, that the Defendant Pharmacies negotiate prescription drug prices with most purchasers in advance and that the pre-negotiated prices would have to be re-priced at the point of sale, is entirely consistent with Plaintiffs' plain language interpretation of the statute. For example, if the Defendant Pharmacies had pre-negotiated with Plaintiffs a retail sales price of $80 for the brand-name drug, and the difference between the wholesale cost to the pharmacy of the brand-name and its generic equivalent was $70, then the statute requires that the Defendant Pharmacies sell the generic equivalent for no more than $10—regardless of the price the Defendant Pharmacies pre-negotiated with Plaintiffs for the generic. A failure by the Defendant Pharmacies to adjust their pre-negotiated prices for

generic prescription drugs to ensure that the final price charged passes on the statutorily required savings in cost can result in unlawful overcharges.[16]

The Defendant Pharmacies' third argument, that MCL 333.17755(4) is somehow inconsistent with the plain language interpretation of the Generic Drug Pricing Law, is incorrect. MCL 333.17755(4) is a catch-all provision that ensures a substitution does not result in an increase in the price paid by the purchaser, unless the purchaser consents. Plaintiffs agree with the Defendant Pharmacies that this provision "speaks to such uncommon situations where, for one reason or another, the generic to be substituted resulted in a higher cost to the purchaser" than the brand-name version of the drug. This statutory provision has nothing to do with MCL 333.17755(2) and can easily be read as completely independent of MCL 333.17755(2).

Finally, the Defendant Pharmacies suggest that the plain language interpretation of the Generic Drug Pricing Law advanced by Plaintiffs somehow would render other sections of MCL 333.17755 surplusage. That is not the case. For example, MCL 333.17755(1) primarily describes when a pharmacist may (and when a pharmacist must) substitute a generically equivalent drug product for a brand-name drug product. MCL 333.17755(1) also states that, in the event of substitution, "the pharmacist shall dispense a lower cost but not higher cost generically equivalent drug product."

MCL 333.17755(4) reiterates the requirement that "a pharmacist may not dispense a drug product with a total charge that exceeds the total charge of the drug product originally

[16] The same is true for uninsured individuals. Each of the Defendant Pharmacies has a retail list price that is created prior to the time of sale that determines the amount they charge uninsured individuals for prescription drugs. See Class Action Compl. ¶¶ 135–144, Joint App. 352a–356a. For example, if the Defendant Pharmacies' retail list price for the brand-name drug was $100, and the savings in cost to the pharmacy of dispensing the generic equivalent was $70, then the retail sales price of the generic could be no more than $30 ($100 brand sales price – $70 savings in cost = $30 maximum generic price), regardless of what the Defendant Pharmacies' retail list price was for the generic.

prescribed," but also adds the caveat "unless agreed to by the purchaser," thus clarifying that in the rare case where the generic costs more than the brand-name version of the drug, the purchaser retains the right to agree to buy the generic. Although there is certainly overlap between a portion of MCL 333.17755(1) and MCL 333.17755(4), neither of those provisions becomes surplusage under a plain language reading of MCL 333.17755(2). More importantly, neither of those provisions has anything to do with the requirement that the pharmacy pass on to purchasers the difference in the wholesale cost of the brand-name drug and its generic equivalent.

It is telling that, in their desperation to have the unanimous decision of the Michigan Court of Appeals reversed, the Defendant Pharmacies are offering this strained interpretation of the Generic Drug Pricing Law for the first time on appeal to this Court. The Defendant Pharmacies balked at offering any interpretation of the Generic Drug Pricing Law when asked to do so by the circuit court below:

> THE COURT: Mr. Vicari, ***what if anything do you think 17755 prescribes to, sub two***?
>
> MR. VICARI: I think the genesis of it is to get generics off the marketplace back in 1974, and then to pass savings on.
>
> THE COURT: Okay.
>
> MR. VICARI: I speak for Wal-Mart. I think they're doing that, so—
>
> THE COURT: How do you compute that?
>
> MR. VICARI: ***I don't know how you compute it,*** but I don't see this formula that they pull out of there set forth in the statute, and it is their burden.
>
> THE COURT: It is their burden. ***They have alleged a specific mechanism by which they believe it should be calculated. Do you wish to posit one on behalf of defendants?***
>
> MR. VICARI: ***Not our burden,*** and I think if you look at the statute and you look at the legislative history, it's getting generics in the marketplace and having a sub field, and having them be more prevalent in passing on savings to our customers, and I think that's been done.

5/11/10 Tr. 14:1–21, Joint App. 458a–459a (emphasis added).

Plaintiffs offer a plain language reading of the Generic Drug Pricing Law that honors the language adopted by the legislature. The novel statutory interpretation proposed by the Defendant Pharmacies, in contrast, completely ignores the plain language of MCL 333.17755(2) and would amount to a judicial amendment of the statute enacted by the legislature. Plaintiffs' plain language reading of the Generic Drug Pricing Law should be adopted by this Court.

IV. THE PLAINTIFFS' COMPLAINTS SATISFY THE APPLICABLE PLEADING REQUIREMENTS UNDER THE MICHIGAN COURT RULES.

A. THE PLAINTIFFS' COMPLAINTS CLEARLY PLEAD BOTH THE FACTS AND THE LEGAL GROUNDS ON WHICH THEY SEEK RELIEF.

In evaluating the sufficiency of a complaint, the Court does not consider whether the facts alleged demonstrate that the claims are likely to succeed. Rather, the Court considers whether the claims alleged are "so clearly unenforceable as a matter of law that *no* factual development could *possibly* justify recovery." *Maiden*, 461 Mich at 119 (emphasis added).

Plaintiffs acknowledge that it is not enough to file "ambiguous and uninformative pleadings . . . [l]eaving a defendant to guess upon what grounds plaintiff believes recovery is justified." *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). Of course, that is not what has happened here. The Defendant Pharmacies understand *exactly* what Plaintiffs allege; namely (1) when dispensing generic prescription drugs, the Defendant Pharmacies have routinely failed to pass on to Plaintiffs the savings in cost between the wholesale cost of the generic drug and the brand-name drug as required by MCL 333.17755(2); (2) that Plaintiffs had no way of knowing they were not receiving these savings in cost because the Defendant Pharmacies keep their wholesale costs confidential; and (3) by doing so, the Defendant Pharmacies violated numerous statutes and were unjustly enriched.

Plaintiffs went much further than what is required under the Michigan Court Rules, alleging the factual details of thousands of generic prescription drug transactions in which the

Defendant Pharmacies failed to pass on the savings in cost required by the Generic Drug Pricing Law. Knowing that, the Defendant Pharmacies cannot credibly argue that the pleading standard has not been satisfied.

The Michigan Court of Appeals easily and unanimously concluded that the Complaints were sufficiently pled:

> Here, the circumstances constituting fraud in all three complaints are the instances when defendants allegedly sold generic prescription drugs without passing on the savings in cost in violation of § 17755(2). The complaints state these circumstances with sufficient particularity because they identify the date, brand sales price, brand acquisition cost, brand profit, generic acquisition cost, maximum generic price, actual generic sales price, and overcharge amount for each of the drugs used as examples regarding each defendant. The complaints contain these specific allegations for hundreds of different dates in 2008. Cumulatively, these allegations sufficiently apprise defendants of what plaintiffs will attempt to prove, and leave no doubt concerning what defendants will be required to defend against. *Kassab*, 185 Mich App at 213. Further, plaintiffs allegations, if true, demonstrate that defendants violated § 17755(2). Therefore, we conclude that summary disposition pursuant to MCR 2.116(C)(8) is not appropriate because further factual development could show that plaintiffs are entitled to recovery. *Feyz*, 475 Mich at 672. Further, we conclude that the pleadings meet the heightened pleading standards for allegations of fraud because the complaints particularly state the circumstances constituting the alleged fraud, and there can be no doubt that the complaints sufficiently apprise defendants of the nature of the case that they must prepare to defend.

Gurganus, slip op. at 18, Joint App. 565a.

B. THE KROGER AFFIDAVIT ATTACHED TO THE COMPLAINTS DOES NOT "FLATLY CONTRADICT" THE ALLEGATIONS IN THE COMPLAINTS.

The Defendant Pharmacies argue that an affidavit attached to the Complaints "flatly contradicts" the allegations in the Complaints and somehow requires dismissal. Plaintiffs attached to their Complaints an affidavit from Defendant Kroger's director of pharmacy procurement. The Kroger affidavit was attached and referenced in the Complaints for *only* one purpose: Kroger's admission concerning the accuracy of the prescription drug wholesale costs alleged in the Complaints. The only allegation in the Complaints that references the Kroger

affidavit simply states that "Kroger has confirmed under oath that its acquisition costs alleged by Plaintiff are accurate. Breetz Aff. ¶ 12, Ex. 3." Class Action Compl. ¶ 55, Joint App. 327a; Qui Tam Compl. ¶ 65, Joint App. 199a.

The Kroger affidavit includes numerous statements by Defendant Kroger that were *not* alleged as part of Plaintiffs' Complaints. Nowhere in the Complaints do Plaintiffs purport to adopt any other paragraph of the Kroger affidavit. MCR 2.113(E)(1)–(2)("all allegations must be made in numbered paragraphs . . . [and] must be limited as far as practicable to a single set of circumstances"). An exhibit attached to a complaint only becomes part of the pleading in an action on a written instrument. MCR 2.113(F)(2).[17]

Moreover, the facts alleged in the Kroger affidavit do not "flatly contradict" the allegations in the Complaints. Plaintiffs acknowledge that the Defendant Pharmacies attempt to negotiate the best wholesale price possible for the prescription drugs they sell and that wholesale costs for prescription drugs are not common knowledge, such that there *could* be *minor* differences between each of the Defendant Pharmacies' actual wholesale costs. However, this is not inconsistent with Plaintiffs' allegations that the wholesale costs paid by Defendants for prescription drugs are *materially the same* as Kroger's for purposes of alleging violations of Michigan's Generic Drug Pricing Law.

Put another way, Plaintiffs allege overcharges of $10, $20, even $50 or more by the Defendant Pharmacies for certain prescription drug claims. There is nothing in the Kroger affidavit suggesting that the Defendant Pharmacies' wholesale prices differ by anywhere near the

[17] Although no Michigan reported opinions specifically address the issue, federal courts have uniformly held that where a complaint attaches an affidavit or other document, only the portions of the affidavit or other document that are specifically pled in the enumerated allegations in the complaint become part of the complaint. See *Rose v Bartle*, 871 F2d 33, 340 n3 (CA 3, 1989); *In re Empyrean Biosciences Inc Sec Litig*, 219 FRD 408 (ND Ohio 2003).

$10, $20, or $50 that would be necessary for the claims submitted by the Defendant Pharmacies not to violate the Generic Drug Pricing Law, the HCFCA, and the MFCA.

Plaintiffs are entitled to the presumption that all inferences reasonably arising from the allegations in the Complaints are true. Thus, when the acquisition costs of one of the Defendant Pharmacies are known, it is reasonable to infer that the acquisition costs of the other Defendant Pharmacies are materially the same, particularly when Plaintiffs also allege that (1) the Defendant Pharmacies are all major pharmacies with locations across the country; (2) the Defendant Pharmacies all purchase their prescription drugs through centralized national corporate purchasing departments; and (3) that the Defendant Pharmacies all purchase prescription drugs through the same wholesale distributors. That the Defendant Pharmacies endeavor to keep their acquisition costs a secret in a competitive commodity market does not refute the inference that each Defendant's acquisition costs are materially the same for the purposes of these Complaints under MCR 2.116(C)(8).

In any event, determination of the Defendant Pharmacies' actual wholesale costs for prescription drugs is a *factual* issue to be determined at trial, not on a motion under MCR 2.116(C)(8) before discovery has occurred. The Defendant Pharmacies' attempt to challenge the factual allegations in the Complaints should not be countenanced by this Court.

V. PLAINTIFF MARCIA GURGANUS IS AN APPROPRIATE RELATOR TO BRING AN ACTION ON BEHALF OF THE STATE OF MICHIGAN UNDER THE MEDICAID FALSE CLAIMS ACT.

A plaintiff may not bring a claim on behalf of the State of Michigan under the Medicaid False Claims Act that is "based upon the public disclosure of allegations or transactions in a . . . hearing, in a state or federal [governmental] report . . . or from the news media" *unless* the plaintiff is the original source of the information. MCL 400.610a(13). Specifically, the MFCA provides, in relevant part:

> Unless the person is the original source of the information, a person, other than the attorney general, shall not initiate an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a state or federal legislative, investigative, or administrative report, hearing, audit, or investigation, or from the news media.

Id.[18]

Accordingly, *anyone* can bring a lawsuit under the MFCA if the lawsuit is *not* "based upon the public disclosure of allegations or transactions . . . ." *Id. Additionally*, an "original source" may still bring a claim under the MFCA even if the lawsuit is based upon a "public disclosure." *Id.*

A. THERE HAS BEEN NO PUBLIC DISCLOSURE THAT DEFENDANTS HAVE FAILED TO PASS ON TO THE STATE OF MICHIGAN THE ENTIRE SAVINGS IN COST REALIZED WHEN DISPENSING GENERIC DRUGS TO MEDICAID BENEFICIARIES.

"For a relator's *qui tam* action to be barred by a prior 'public disclosure' of the underlying fraud, the disclosure must have (1) been public, and (2) revealed the same kind of fraudulent activity against the government as alleged by the relator, such that the *qui tam* action is 'based upon' a public disclosure." *United States ex rel Poteet v Medtronic Inc*, 552 F3d 503, 511 (CA 6, 2009). Neither of these elements exists with regards to Plaintiff's action.

1. The Critical Facts Alleged by Plaintiff Gurganus Do Not Come From Public Sources.

A disclosure is "public" under the MFCA if the disclosure is "in a criminal, civil, or administrative hearing, in a state or federal legislative, investigative, or administrative report, hearing, audit, or investigation, or from the news media." MCL 400.610a(13); see also 31 USC 3730(e)(4)(A). The critical facts alleged in Plaintiffs' Complaints are not from such "public" sources.

---

[18] There are no reported cases interpreting MCL 400.610a(13). However, there are many cases interpreting the functionally identical provision in the federal False Claims Act, 31 USC 3729, *et seq.* ("FCA"), that are cited as persuasive authority in this brief.

The key factual basis for the Qui Tam Complaint is insider prescription drug wholesale cost information obtained by Plaintiff Gurganus in her role as a pharmacist at Defendant Kroger. Plaintiff Gurganus had access to Kroger's national prescription drug wholesale costs for a number of drugs. Plaintiff Gurganus provided this information to the Michigan Attorney General's office prior to the filing of her Complaint. Defendant Kroger has repeatedly stated that this wholesale cost information is highly confidential—and accurate. The Defendant Pharmacies have gone as far as to require that this information be filed under seal with the Court. The critical information that forms the key basis for the Qui Tam Complaint is clearly not "public."

2. The Qui Tam Complaint Is Not Based Upon the Public Disclosure of the False Claims Alleged by Plaintiff Gurganus.

Additionally, in order for Plaintiff Gurganus's claim to be barred under this section, the publicly disclosed facts must also have "revealed the same kind of fraudulent activity against the government as alleged by the relator." *Poteet*, 552 F3d at 511–12. "In making this determination of whether an action was 'based upon' a public disclosure, a court should look to whether substantial identity exists between the publicly disclosed allegations or transactions and the *qui tam* complaint." *United States ex rel Jones v Horizon Healthcare Corp*, 160 F3d 326, 332 (CA 6, 1998). "Many potentially valuable *qui tam* suits would be precluded if the bar applied even when the public disclosure was of innocuous information." *Id.* at 331. As such, a relator's action is only barred "when the allegations of fraud or the critical elements of the fraudulent transaction were publicly disclosed." *Id.*

Plaintiff Gurganus alleges that the Defendant Pharmacies submitted false Medicaid claims to the State of Michigan by failing to pass on to the State the savings in cost realized when dispensing generic prescription drugs to Medicaid beneficiaries, as required by MCL 333.17755(2). Therefore, in order to bar the Qui Tam Complaint under MCL 400.610a(13), the

Court must conclude that the Defendant Pharmacies' failure to pass on to the State of Michigan's Medicaid program the savings in cost realized when dispensing generic prescription drugs to Medicaid beneficiaries was publicly disclosed.

The Defendant Pharmacies argue that the references in the Qui Tam Complaint to the corporate reports of Defendants Walgreens, CVS, and Rite Aid and a *Wall Street Journal* article demonstrate that the Defendant Pharmacies' failure to pass on to the State the savings in cost realized when dispensing generic prescription drugs to Medicaid beneficiaries was publicly disclosed. However, none of these documents contain any discussion of (1) the Michigan Generic Drug Pricing Law, (2) prescription drug payments by the State of Michigan for Medicaid beneficiaries, or (3) whether the claims for generic prescription drugs submitted by the Defendant Pharmacies to the State of Michigan's Medicaid program failed to pass on the savings in cost the pharmacies realized from dispensing generic prescription drugs.[19]

As the Michigan Court of Appeals unanimously concluded:

> The public disclosures of "allegations or transactions" that defendants submit the qui tam complaint is based upon are general statements regarding the profitability of generic drug sales and statements that suggest generic drugs are more profitable than branded drugs. Standing alone, these statements do not constitute declarations of unlawful conduct on the part of defendants, i.e. it is not unlawful to make a profit on the sale of drugs. However, when the article is viewed through the lens of § 17755(2), one could conclude that the companies engaged in making larger profits on generic drugs are violating § 17755(2). Nevertheless, this fact does not mean that the public information itself contains an "allegation" of unlawful conduct under MCL 400.610a(13) because being able to deduce unlawful conduct from the public disclosures based on additional information or knowledge does not mean that the public disclosures themselves contain an "affirmation or assertion" as required by the plain language of the statute.

---

[19] Defendants' argument that their failure to pass on to the State of Michigan the savings in cost when dispensing generic prescription drugs to Medicaid beneficiaries was publicly disclosed in corporate reports and news articles also fundamentally contradicts their argument that these same corporate reports and news articles quoted in the allegations in the Complaints are not sufficient to state a claim under Michigan's pleading standards.

> Similarly, being able to conclude that a violation of § 17755(2) may be occurring does not constitute a public disclosure of any transaction on which the qui tam complaint is based. The *Wall Street Journal* article itself does not link the claimed greater profits on generic drugs to the submission of false claims for Medicaid benefits. Further, the article does not even suggest any wrongdoing on the part of defendants. Rather, the article merely discusses the fact that large corporations, such as defendants, find ways to maximize profits. It does not even suggest that the larger profits that representatives of Walgreens and CVS claimed were made on generic drugs were realized as the result of unethical or unlawful conduct. Accordingly, we hold that the public disclosures upon which defendants rely do not rise to the level of disclosing any transaction on which the qui tam complaint was based.

Gurganus, slip op. at 7, Joint App. 554a.

There was no prior public disclosure that the State of Michigan's Medicaid program was being overcharged for generic prescription drugs. Accordingly, there is no "public disclosure" ban to the Qui Tam Complaint.

B. PLAINTIFF GURGANUS IS AN ORIGINAL SOURCE OF THE INFORMATION ON WHICH THE ALLEGATIONS IN THE QUI TAM COMPLAINT ARE BASED.

Even if this Court finds there has been a public disclosure of the information upon which the lawsuit is based, Plaintiff Gurganus can still maintain the lawsuit because she is an original source of information on which the lawsuit is based. MCL 400.610a(13). "The person is the original source if he or she had direct and independent knowledge of the information on which the allegations are based and voluntarily provided the information to the attorney general before filing an action based on that information under this section." *Id.*

Under the plain language of MCL 400.610a(13), Plaintiff Gurganus is an original source. She had direct and independent knowledge of the information on which the allegations are based by virtue of the national prescription drug acquisition cost information she obtained through her employment as a pharmacist for Defendant Kroger. Plaintiff Gurganus provided this information to the attorney general before filing the Qui Tam Complaint based on that information. As such, both prongs of the original source requirement are met.

No court has held that a relator must have firsthand knowledge of every aspect of the false claim in order to be an original source. Federal courts have held that the analogous FCA "does not require that the qui tam relator possess direct and independent knowledge of all of the vital ingredients to a fraudulent transaction," but rather that the relator must have "direct and independent knowledge of *an essential element* of the underlying fraud transaction." *United States ex rel Springfield Terminal Ry v Quinn*, 14 F3d 645, 656–67 (Cir DC, 1994)(emphasis added). "Where only one element of the fraudulent transaction is in the public domain (e.g., X), the qui tam plaintiff may mount a case by coming forward with either the additional elements necessary to state a case of fraud (e.g., Y) or allegations of fraud itself (e.g., Z)[where X + Y = Z]." *Id.* at 655; see also *Poteet*, 552 F3d at 512.

Plaintiff Gurganus has detailed, firsthand knowledge of an essential element of the claim—the national wholesale cost for generic prescription drugs—that is not publicly available and was not available to the State of Michigan. This is sufficient grounds for Plaintiff Gurganus to be an original source for the Qui Tam Complaint.

RELIEF REQUESTED

Plaintiffs respectfully request that this Court reverse the Michigan Court of Appeals' determination that Plaintiffs lack an implied right of action under MCL 333.17755(2) and affirm the remainder of the Michigan Court of Appeals' opinion, such that Defendants' motions for summary disposition are denied for all counts other than Count II (Michigan Consumer

Protection Act). The cases should be remanded to the Kent County Circuit Court for further proceedings consistent with the relief requested.

Respectfully submitted,

VARNUM LLP
Attorneys for Plaintiffs/Appellees/Cross-Appellants

Dated: December 18, 2013

By: _____
Perrin Rynders (P38221)
Bryan R. Walters (P58050)
Business Address and Telephone:
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

6557391_3.DOC