STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
Hons. M. J. Kelly, P.J., and Hoekstra and Stephens, JJ.

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.

Docket No. 146791

CITY OF LANSING and DICKINSON PRESS INC.,

Plaintiffs-Appellees/
Cross-Appellants,

v.

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

Defendants-Appellants/
Cross-Appellees.

Docket No. 146792

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.

Docket No. 146793

COMBINED BRIEF ON APPEAL OF ALL DEFENDANTS-APPELLANTS IN DOCKET NOS. 146791, 146792 & 146793

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STATEMENT OF JURISDICTION

On January 22, 2013, the Court of Appeals issued a combined opinion in these three cases, affirming in part and reversing in part the circuit court's grants of summary disposition with prejudice in favor of defendants. On March 5, 2013, defendants timely applied to this Court for leave to appeal from those parts of the Court of Appeals' opinion that reversed the circuit court's ruling. In their petition, defendants raised several issues related to statutory interpretation and an individual's standing to sue on behalf of the State of Michigan, all of which the Court of Appeals resolved incorrectly and contrary to the Legislature's intent. Review was needed under MCR 7.302(B)(2)-(5). On September 18, 2013, the Court issued an order granting defendants' application (the Court also granted in part plaintiffs' application to cross-appeal). Therefore, this Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2).

QUESTIONS PRESENTED

These lawsuits center on alleged violations of a provision of the Michigan Public Health Code, MCL 333.17755 (the "Substitution Statute"), which governs pharmacists' substitution of generic drugs for prescribed brand name drugs. The Court of Appeals correctly held that the Substitution Statute does not provide a private right of action for its violation. But, instead of affirming the circuit court's dismissals in their entirety, the Court of Appeals adopted plaintiffs' erroneous interpretation of the Substitution Statute and permitted plaintiffs to proceed on several alternative causes of action—all premised on violations of the Substitution Statute—vastly expanding potential civil liability in this State beyond anything the Legislature intended. In light of these rulings and this Court's specific instruction that the parties address several issues, the following questions are presented for review:

1. Did the Court of Appeals err in expanding the scope of the Legislature's remedies for violations of the Substitution Statute, which are limited to administrative proceedings, by permitting plaintiffs to restyle such violations under the Health Care False Claim Act ("HCFCA"), MCL 752.1001 *et seq.*, and the Medicaid False Claims Act ("MFCA"), MCL 400.601 *et seq.*?

Defendants respond:	Yes
Plaintiffs respond:	No
The Court of Appeals responded:	No

2. Have plaintiffs stated a claim under either the HCFCA or MFCA, when their claims do not allege "false claims" but are instead premised solely on alleged violations of the Substitution Statute?

Defendants respond:	No
Plaintiffs respond:	Yes
The Court of Appeals responded:	Yes

3. The Substitution Statute, by its terms, addresses only pharmacists' actions at the point of sale, and does not mention pricing, inventory, or any other decisions that pharmacies make long before a customer has presented a prescription for filling. Does the requirement in the Substitution Statute that a pharmacist "pass on the savings in cost" mean simply that the pharmacist must dispense the substituted generic drug at a price no higher than it would have been dispensed had the generic drug been prescribed in the first place—prohibiting pharmacists from cutting into consumer savings by increasing prices of the substituted generics at the point of sale? Or, does that requirement reach further and instruct pharmacists to *recalculate* prices anew during each substitution transaction, to make sure that pharmacists' profits on generics do not exceed those on the corresponding brands?

Defendants respond:	The cost-savings provision requires pharmacists to dispense substituted generic drugs at the same price as if the generic drugs had been prescribed in the first place, thus ensuring savings to the consumer over the higher price of the prescribed brand drugs

Plaintiffs respond:	The cost-savings provision requires pharmacists to recalculate prices at the point of sale to ensure that pharmacists' profits on generics do not exceed those on the associated brand name drugs
The Court of Appeals responded:	Accepted plaintiffs' theory without any critical analysis

4. Does the plain language of the Substitution Statute ("the 2 drug products"), confirmed by its context, limit that statute to transactions that actually involve two drug products—i.e., the substitution of generic drugs for prescribed brand drugs?

Defendants respond:	Yes
Plaintiffs respond:	No
The Court of Appeals responded:	No

5. Do plaintiffs state a claim under the heightened pleading standard applicable to fraud claims when one of the critical inferences in their complaints is flatly contradicted by an affidavit plaintiffs attached to their complaints?

Defendants respond:	No
Plaintiffs respond:	Yes
The Court of Appeals responded:	Yes

6. Has Plaintiff Gurganus, a West Virginia pharmacist, satisfied the MFCA's requirement that she be an "original source," when her complaint relies on public information of which she does not have direct and independent knowledge?

Defendants respond:	No
Plaintiffs respond:	Yes
The Court of Appeals responded:	Yes

INTRODUCTION

In these three cases, plaintiffs are trying to turn the Substitution Statute, a law regulating pharmacists, into a vehicle to pursue civil suits against essentially the State's entire retail pharmacy industry regarding the pricing of certain generic drugs. The Substitution Statute addresses, among other things, the substitution of generic drugs for prescribed brand name drugs. It is part of a carefully designed regulatory framework set forth in Michigan's Public Health Code and administered by the Michigan board of pharmacy. But rather than pursue their complaints before that agency—which was created to use its special expertise and familiarity with Michigan's pharmacy industry to shape the industry incrementally, prospectively, and with careful attention to potential consequences—plaintiffs are attempting to misuse the Substitution Statute to impose massive retroactive liability in a way that threatens the viability of the entire industry in this State. Their attempt was soundly rebuffed by the circuit court, which dismissed all three cases with prejudice.

However, the Court of Appeals—even though it correctly recognized that plaintiffs lack a private right of action under the Substitution Statute itself—reversed in part and remanded. Misapplying fundamental principles of statutory interpretation and parting ways with a series of persuasive federal court decisions, the Court of Appeals:

- ignored Michigan's doctrine of the exclusivity of legislatively prescribed remedies by allowing plaintiffs to accomplish indirectly through the HCFCA and MFCA what they cannot do directly through the Substitution Statute;
- misinterpreted the "false claim" requirement of the two false claim acts at issue by holding that an alleged violation of the Substitution Statute amounts to a "false claim," even though plaintiffs do not allege actual false statements and defendants are not required to certify compliance with that statute before receiving payment;
- incorrectly accepted plaintiffs' interpretation of the Substitution Statute as a price-setting directive, when the statute does not set forth plaintiffs' proffered formula, does not extend to pharmacists' pricing decisions, and only requires that consumers in substitution transactions receive the full price difference between prescribed brand

name drugs and the substituted generic equivalents (which is exactly what defendants do when they dispense generics at a lower price—plaintiffs do not dispute this or allege otherwise);

- abandoned the *sine qua non* of statutory interpretation, which calls for statutes to be interpreted according to their plain meaning and in the context of all related provisions, and treated one sub-section of the Substitution Statute as though it existed in a vacuum independent of the surrounding provisions—which in turn led to absurd results, such as the application of the Substitution Statute to transactions devoid of substitution;

- failed to recognize that the heightened fraud pleading standard, if it means anything at all, must mean that plaintiffs may not support their complaints with alleged inferences that are flatly contradicted by documents attached to their own complaints; and

- gutted the public disclosure bar to *qui tam* lawsuits by permitting an out-of-state relator to sue on behalf of the State of Michigan on the basis of out-of-state information publicly disclosed in a newspaper article and the financial reports of several defendants.

Defendants respectfully request that this Court reverse the Court of Appeals on these issues of first impression. Reversing the Court of Appeals would accord proper respect to separation of powers principles by leaving the regulation of pharmacy in the hands of an expert state regulatory agency, which is exactly what the Legislature intended and provided.

STATEMENT OF FACTS

A. MCL 333.17755 Is A Generic Substitution Statute, Enforced Against Pharmacists By The Michigan Board Of Pharmacy.

Every count in these three cases is based on alleged violations of MCL 333.17755. That section of the Michigan Public Health Code addresses prescription drug substitution and does not speak to pharmacists' or pharmacies' pricing decisions that take place long before the first customer presents a prescription for filling. Substitution occurs when a pharmacist is given a prescription written for a brand name drug and the pharmacist substitutes a generic equivalent version.

The Substitution Statute has four parts; plaintiffs focus on the first two. The first explains when a pharmacist may or must dispense a cheaper generic drug instead of a more expensive branded drug prescribed:

> When a pharmacist receives a prescription for a brand name drug product, the pharmacist may, or when a purchaser requests a lower cost generically equivalent drug product, the pharmacist shall dispense a lower cost but not higher cost generically equivalent drug product if available in the pharmacy. [MCL 333.17755(1).]

The second part addresses the handling of any benefit to the purchaser achieved by dispensing a lower cost generic in lieu of the prescribed brand:

> 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 pay contract. The savings in cost is the difference between the wholesale cost to the pharmacist of the 2 drug products. [MCL 333.17755(2).]

The two remaining provisions place additional limitations on substitution. MCL 333.17755(3) prohibits substitution in several instances when the prescriber has expressly indicated that the prescription is to be dispensed as written. And MCL 333.17755(4) limits pharmacists' ability to substitute "a drug product with a total charge that exceeds the total charge of the drug product originally prescribed, unless agreed to by the purchaser."

Like other statutes governing pharmacists, the Substitution Statute is enforced through the State's licensing framework, found in Part 177 of the Public Health Code. MCL 333.17711 provides that no one may lawfully "engage in the practice of pharmacy unless licensed or otherwise authorized by this article." Responsibility for licensing is vested in "the Michigan board of pharmacy," MCL 333.17721(1), which is authorized to "promulgate rules and make determinations necessary or appropriate to the licensing of pharmacists, drugs, dispensers, manufacturers, and wholesalers under this part," MCL 333.17767. The board is charged with enforcing the various requirements of Part 177, including the Substitution Statute. See MCL

333.17763, 333.17768. To that end, the law requires the board to "inspect the character and standard of pharmacy practice." MCL 333.17722(a). The board's disciplinary subcommittee may "fine, reprimand, or place on probation, a person licensed under this part, or deny, limit, suspend, or revoke a person's license or order restitution or community service for a violation of this part or rules promulgated under this part," including the Substitution Statute. MCL 333.17768(1); see also MCL 333.17763.

B. Plaintiffs' Theory Of Liability.

All three of plaintiffs' cases are based on alleged violations of the Substitution Statute, seeking damages from essentially all of the major pharmacy chains operating in Michigan. Plaintiffs maintain that, whenever a Michigan pharmacy dispenses a generic drug (whether or not it is a substitution), the pharmacy can make no more profit on the generic than it would have made on the corresponding brand name drug.[1] Based on this theory, plaintiffs' counsel filed two class actions and a *qui tam* complaint, in which the Michigan Attorney General declined to intervene.

C. The First Amended Complaints And Their Dismissal.

1. The Complaints.

The Class Actions. Other than the parties, the two class action complaints were virtually identical.[2] Each alleged four counts: (1) violation of the Substitution Statute; (2) violation of Michigan's Consumer Protection Act ("MCPA"), MCL 445.903; (3) unjust enrichment; and (4) violation of the HCFCA. (First Amended Complaints in *City of Lansing v CVS Caremark Corp*

[1] In each of the three lawsuits, plaintiffs filed three rounds of complaints. Because plaintiffs amended their original complaints before defendants moved for summary disposition, only the two most recent sets of complaints are relevant. The second complaints—each titled "First Amended Complaint"—were at issue in the first round of defendants' motions for summary disposition. The third complaints—each titled "Second Amended Complaint"—were at issue in the second round of defendants' motions for summary disposition.

("Lansing-CVS FAC") 10-12, JA 74a-76a, and *City of Lansing v Rite Aid of Mich, Inc* ("Lansing-Rite Aid FAC") 7-9, JA 112a-114a.) Although alleged separately, Counts II, III, and IV were derived completely from the same alleged violations of the Substitution Statute as Count I. (Lansing-CVS FAC 11-12, JA 75a-76a; Lansing-Rite Aid FAC 7-9, JA 112a-114a.)

Plaintiffs did not identify a single actual Michigan transaction that allegedly violated the Substitution Statute. Instead, they relied on a few annual reports from some defendants and one newspaper article to allege broadly that all defendants profit more from generic drugs than they do from branded drugs. (Lansing-CVS FAC ¶¶ 42-46, JA 71a-72a; Lansing-Rite Aid FAC ¶¶ 20-21, JA 110a.) From there, plaintiffs asserted, "[u]pon information and belief," that all defendants had violated the Substitution Statute. (Lansing-CVS FAC ¶¶ 48, 50, JA 72a-73a; Lansing-Rite Aid FAC ¶ 23, JA 111a.)

The *Qui Tam* Complaint. Marcia Gurganus, a West Virginia pharmacist, is the named plaintiff in the third complaint, a one-count *qui tam* action brought on behalf of the State of Michigan against all defendants. She alleged that defendants make greater profits on generic drug transactions in violation of the Substitution Statute, and in so doing purportedly presented false claims for reimbursement to Michigan's Medicaid program in violation of the MFCA. (First Amended Complaint in *Gurganus v CVS Caremark Corp* ("Gurganus FAC") 11-12, JA 15a-16a.)

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[2] In the first, plaintiffs City of Lansing, Dickinson Press, Inc. (both of which purportedly fund third-party payment sources for prescription drugs), and Scott Murphy (an alleged consumer of prescription medication) sued on behalf of themselves and all others similarly situated. (First Amended Complaint in *City of Lansing v CVS Caremark Corp* ¶¶ 51-52, JA 73a.) That case is against all defendants except Rite Aid of Michigan, Inc. and Perry Drug Stores, Inc. In the second, City of Lansing and Dickinson Press sued Rite Aid and Perry only. (First Amended Complaint in *City of Lansing v Rite Aid of Mich, Inc* ¶¶ 24-25, JA 111a.)

Like the class actions, the *qui tam* lawsuit relied largely on a few public annual reports, SEC Form 10-K filings, and a newspaper article. (*Id.* ¶¶ 44-50, JA 10a-13a.) In addition, through her job at one of defendant Kroger's West Virginia stores, Gurganus had access to certain Kroger prescription drug cost data. (*Id.* ¶¶ 51-55, JA 13a-14a.) She took a printout of that data, which included Kroger's then-current acquisition costs for several brand name and generic drugs. But that data belonged and related only to Kroger, not to any other defendant, and it was from West Virginia, not Michigan. Thus, like the class plaintiffs, Gurganus failed to identify any specific Michigan transaction that allegedly violated the Substitution Statute.

2. The Circuit Court Grants Defendants Summary Disposition.

Defendants moved for summary disposition on all counts of all three First Amended Complaints under MCR 2.116(C)(8). After a hearing on February 11, 2010, the circuit court dismissed all three cases without prejudice, holding that the complaints failed to plead sufficient facts and improperly relied on unsupported inferences. (Feb 11, 2010 Hearing Tr ("Feb Tr"), JA Tab 6; Feb 11, 2010 Opinions and Orders in *City of Lansing v Rite Aid of Mich, Inc* ("Feb Lansing Op"), JA Tab 5, and *Gurganus v CVS Caremark Corp* ("Feb Gurganus Op"), JA Tab 4.)

At the hearing on Defendants' motions, the court remarked: "[T]he record is devoid. There is nothing in the record which tells me what was prescribed, what was paid for, how much was the overcharge, what is the loss." (Feb Tr 23, JA 170a.) In its written orders, the court added that it was "perplexed on how a complaint which alleges no acts undertaken by the defendants at all during a six year period could possibly satisfy the pleading requirements." (Feb Lansing Op 5, JA 153a; Feb Gurganus Op 5, JA 139a.)[3]

[3] The circuit court did not issue a separate order in the *Lansing-CVS* case.

With respect to the *qui tam* lawsuit in particular, the court noted that Gurganus had not "given me one example in the reams of information that has been provided to me that says . . . , Judge, yes, they said this, and on this day, they sold it, and they ripped off the State of Michigan because they did x, y, or z." (Feb Tr 27, JA 171a; see also *id.* at 29, JA 171a ("[Defendants] don't know what drugs, they don't know when, they don't know where, they don't know how.").) In its order, the court added that although Gurganus "states [her allegations] 'based on insider pharmacy acquisition costs data in her possession,'" she "fails to provide any such data which sets forth a violation of Michigan law." (Feb Gurganus Op 6, JA 140a.) As the court noted, "[t]here is not a lawsuit here. There is not a claim. There is not an allegation. I've got words on a page." (*Id.* at 8, JA 142a (internal quotation marks omitted).)

D. The Second Amended Complaints And Their Dismissal.

1. The Second Amended Complaints.

On February 26, 2010, plaintiffs filed the Second Amended Complaints in each of the three lawsuits. (Second Amended Complaints in *City of Lansing v CVS Caremark Corp* ("Lansing-CVS SAC"), JA Tab 8; *City of Lansing v Rite Aid of Mich, Inc* ("Lansing-Rite Aid SAC"), JA Tab 9, and *Gurganus v CVS Caremark Corp* ("Gurganus SAC"), JA Tab 7.) The basic allegations, including plaintiffs' theory of liability, remained the same.

Plaintiffs did not attempt to identify transactions where a generic drug was substituted for the prescribed brand. Instead, they asked the court to assume that every time a generic was dispensed (regardless of what was prescribed), it qualified as a substitution transaction. (Lansing-CVS SAC ¶ 33, JA 322a; Lansing-Rite Aid SAC ¶ 17, JA 396a; Gurganus SAC ¶ 36, JA 193a.)

Nor did plaintiffs set forth actual acquisition cost data—what it cost any defendant to purchase any of the drugs prescribed or dispensed in Michigan. Rather, they set forth Kroger's

acquisition costs for a handful of drugs at one of its pharmacies in West Virginia from some time in 2008 and compared that limited acquisition cost information to data on branded drugs compiled by Medi-Span.[4] (Lansing-CVS SAC ¶¶ 54, 60, JA 326a-327a; Lansing-Rite Aid SAC ¶¶ 34, 39, JA 399a-400a; Gurganus SAC ¶¶ 64, 70, JA 198a, 200a.) From that limited data, plaintiffs then assumed:

- "Any differences between the Kroger data, the [Medi-Span] data, and the actual acquisition costs incurred by the other Defendants during 2008 are not material" (Lansing-CVS SAC ¶ 57, JA 327a; Lansing-Rite Aid SAC ¶ 37, JA 400a; Gurganus SAC ¶ 67, JA 199a);
- There is no material difference between acquisition costs for drugs sold in West Virginia and Michigan (Lansing-CVS SAC ¶ 48, JA 324a; Lansing-Rite Aid SAC ¶ 27, JA 398a; Gurganus SAC ¶ 58, JA 197a); and
- Acquisition cost data from one defendant in West Virginia from a very short time period in 2008 can be accurately extrapolated to cover all defendants in Michigan for the entire, multiyear relevant time period at issue in the complaints, spanning from 2003 to the present.

Plaintiffs' claims were also premised on the assumptions that (1) all defendants acquire drugs centrally, and not on a state-by-state basis (Lansing-CVS SAC ¶ 44, JA 324a; Lansing-Rite Aid SAC ¶ 23, JA 397a; Gurganus SAC ¶ 54, JA 196a); (2) three quarters of all prescription drugs sold to retail chain pharmacies in the United States come from one of three wholesalers (Lansing-CVS SAC ¶ 45, JA 324a; Lansing-Rite Aid SAC ¶ 24, JA 397a; Gurganus SAC ¶ 55, JA 197a); (3) all defendants acquire "the large majority of [their] prescription drugs" from one of these wholesalers (Lansing-CVS SAC ¶ 46, JA 324a; Lansing-Rite Aid SAC ¶ 25, JA 397a; Gurganus SAC ¶ 56, JA 197a); and (4) each defendant's prescription drug purchasing power is

[4] Medi-Span is an industry compendium of prescription drug pricing information. One of the data points that Medi-Span compiles is Wholesale Acquisition Cost ("WAC"). Plaintiffs alleged that all retail pharmacies acquire brand name drugs at 2-3% below WAC, irrespective of their individual market position or business strategy. (See Lansing-CVS SAC ¶ 49, JA 325a; Lansing-Rite Aid SAC ¶ 28, JA 398a; Gurganus SAC ¶ 59, JA 197a.)

materially the same and they, therefore, all pay essentially the same price to the same wholesalers (Lansing-CVS SAC ¶ 47, JA 324a; Lansing-Rite Aid SAC ¶ 26, JA 398a; Gurganus SAC ¶ 57, JA 197a).

Plaintiffs also added a new exhibit to all three complaints: an affidavit from Kroger's Manager of Pharmacy Procurement, Bob Breetz. (Lansing-CVS SAC ¶ 55 (citing Ex 3, Breetz Aff ¶ 12), JA 327a; Lansing-Rite Aid SAC ¶ 35, JA 400a & Ex 3; Gurganus SAC ¶ 65, JA 199a & Ex 4.) Mr. Breetz, who testified that he was knowledgeable about "general industry practices regarding prescription drug procurement," discussed the competitive nature of acquisition costs, explaining why acquisition cost data is a closely guarded secret for each retail pharmacy chain. (Lansing-CVS SAC Ex 3 ¶ 3.) Breetz explained that, "[t]o maintain prescription drug inventory, each retailer establishes *independent relationships* with drug manufacturers, *achieving a unique pricing structure* for the prescription drugs to be supplied." (*Id.* Ex 3 ¶ 5 (emphasis added).) Kroger, for example, "obtains favorable pricing agreements through the goodwill it has established with various drug manufacturers, its investment in researching and analyzing different pricing arrangements, and the negotiating skill it has developed among its procurement personnel." (*Id.* Ex 3 ¶ 6.) Mr. Breetz further explained that defendants' success as retail pharmacy chains depends on their "ability to achieve the best possible prescription drug pricing from the multitude of drug manufacturers within the parameters established by applicable law." (*Id.* Ex. 3 ¶ 4.)

2. The Circuit Court Again Grants Defendants Summary Disposition.

All defendants again moved for summary disposition under MCR 2.116(C)(8), and the circuit court dismissed each case, this time with prejudice. (Aug 30, 2010 Opinions and Orders in *City of Lansing v CVS Caremark Corp* ("Aug Lansing-CVS Op"), JA Tab 12, *City of Lansing*

v Rite Aid of Mich, Inc ("Aug Lansing-Rite Aid Op"), JA Tab 13, and *Gurganus v CVS Caremark Corp* ("Aug Gurganus Op"), JA Tab 11.)

The court dismissed the class action complaints for two reasons: (1) plaintiffs had no private right of action under the Substitution Statute or HCFCA; and (2) plaintiffs again failed to satisfy the pleading requirements. As to the lack of a private right of action, the court explained that the Substitution Statute itself does not expressly provide for a private right of action. Nor, the court reasoned, could a private right of action be inferred because the statute is a part of the pharmacy section of the Public Health Code, which vests the Michigan board of pharmacy, not consumers through a private lawsuit, with the power to enforce the Substitution Statute. (Aug Lansing-CVS Op 20-21, JA 516a-517a; Aug Lansing-Rite Aid Op 20-21, JA 542a-543a.) In addition, because the HCFCA imposes criminal, not civil, liability for its violations, it also cannot support a private right of action to enforce MCL 333.17755. (Aug Lansing-CVS Op 24, JA 520a; Aug Lansing-Rite Aid Op 24, JA 546a.)[5] Lastly, the court held that plaintiffs' multiple inferences regarding acquisition costs were not plausible, especially in light of plaintiffs' own affidavit establishing that each defendant tries to achieve a unique and highly confidential pricing structure in acquiring prescriptions drugs for its retail stores. (Aug Lansing-CVS Op 10, JA 506a; Aug Lansing-Rite Aid Op 9-10, JA 531a-532a.)

The court also dismissed the *qui tam* complaint, holding that Gurganus was not an appropriate relator to bring a civil action on behalf of the State of Michigan. (Aug Gurganus Op 8-9, JA 482a-483a.) Specifically, the court held:

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[5] The court also dismissed the unjust enrichment claim because, as a derivative claim based on violations of the Substitution Statute, it could not stand by itself. (Aug Lansing-CVS Op 25, JA 521a; Aug Lansing-Rite Aid Op 25, JA 547a.) The MCPA claim (Count II) was not at issue in the Second Amended Complaints because the court had dismissed it with prejudice in February 2010.

- Given that Gurganus's only actual facts came from a 2008 cost sheet from West Virginia, she had pled "no foundation for her conclusion that defendants are perpetuating Medicaid fraud in Michigan"; and

- "[A]llowing this action to proceed would require this Court to impermissibly allow plaintiff to engage in a fishing expedition in hope of obtaining facts to establish the elements of a" false claim under the MFCA. (*Id.*)

For all of these reasons, the court rejected the *qui tam* complaint as improperly "layer[ing] inference upon inference, and supposition upon supposition." (*Id.* at 18, JA 492a.)

E. The Court Of Appeals Decision.

Plaintiffs appealed, and on January 22, 2013, the Court of Appeals (Judges Michael Kelly, Hoekstra, and Stephens) issued a combined decision affirming in part and reversing and remanding in part the circuit court's orders dismissing these cases. (Jan 22, 2013 Opinion ("Op"), JA Tab 14.)

The Court of Appeals affirmed the circuit court's ruling that no private right of action exists under the Substitution Statute, pointing to the remedy already provided in the Public Health Code. (*Id.* at 8-11, JA 555a-556a.) "Any person, including generic drug purchasers or third party payment sources, may file a complaint with [Michigan's Department of Licensing and Regulatory Affairs,] LARA." (*Id.* at 10, JA 557a.) That the administrative remedy is inadequate in plaintiffs' eyes is of no moment, the court explained, because adequacy is a determination for the Legislature to make, not the courts. (*Id.*) Thus, plaintiffs' recourse for an alleged violation of the Substitution Statute is solely with the administrative process, not a civil lawsuit.

But the Court of Appeals then accepted, without adequate analysis, plaintiffs' interpretation of the Substitution Statute, and permitted plaintiffs to assert the very same theory of liability under the HCFCA and MFCA. The court held:

- Plaintiffs could make a claim for the same alleged violations under the HCFCA and MFCA despite the exclusively administrative remedies for violation of the Substitution Statute (*id.* at 6-7, 11-12, JA 553a-554a, 558a-559a);

- An alleged violation of the Substitution Statute qualifies as a "false claim" for purposes of the HCFCA and MFCA because each request for payment implicitly certifies compliance with the Substitution Statute, despite persuasive federal court authority to the contrary, and the express statutory requirement that a claim be "false" (*id.* at 19-20, JA 566a-567a);

- The Substitution Statute requires pharmacists to price prescription drugs according to a specific formula not expressed in the text of the statute: generic price – generic acquisition cost ≤ brand price – brand acquisition cost (*id.* at 16, JA 563a);

- The Substitution Statute does not actually require any substitution and applies equally to transactions where a generic is prescribed, despite its plain language calling for a comparison of two drug products (i.e., the dispensed generic and the prescribed brand) and all surrounding provisions explicitly referring to dispensing a generic in lieu of the prescribed brand (*id.* at 20-21, JA 567a-568a); and

- The *qui tam* lawsuit was not "based upon the public disclosure of allegations and transactions" contained in the newspaper article on which the *qui tam* plaintiff relied, and thus the public disclosure bar did not apply, even though the article permitted an inference of the alleged violations of the Substitution Statute (*id.* at 4-7, JA 551a-554a).

Defendants timely applied for leave to appeal to this Court, and the Court granted the application on September 18, 2013, instructing the parties to brief the six issues presented in this brief. The Court also granted plaintiffs' cross-application for leave, limited solely to the issue whether a private right of action exists under the Substitution Statute. That issue will be briefed in plaintiffs' cross-appeal.

STANDARD OF REVIEW

The Court reviews the Court of Appeals' ruling de novo, the standard of review for rulings on motions for summary disposition; issues of statutory interpretation; and questions of law. See, e.g., *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

ARGUMENT

Misinterpreting several statutes at issue in these cases, the Court of Appeals rewarded plaintiffs' attempt to embroil the State's largest retail pharmacy chains in private lawsuits based

on alleged violations of a statute by which the State of Michigan regulates the practice of pharmacy. In the course of so doing, the court: (1) sidestepped the exclusively administrative remedies for redressing any alleged violation of the Substitution Statute by permitting plaintiffs to raise identical claims under the HCFCA and MFCA, (2) ignored statutory text and persuasive federal court precedent to create a boundless definition of "false claim" that no longer requires any actual falsehood, (3) incorrectly accepted plaintiffs' misinterpretation of the Substitution Statute, (4) held that the Substitution Statute applied even where there is no substitution; (5) found the heightened pleading standard for fraud claims to be met even though plaintiffs' allegations were contradicted by a document attached to all three complaints; and (6) jettisoned the Michigan Legislature's careful limits on private lawsuits brought in the State's name and permitted an out-of-state individual to wield the power of the State based on public information about defendants available in newspapers and financial disclosure. This Court should reverse these parts of the Court of Appeals' decision and dismiss all three lawsuits with prejudice.

I. NONE OF THE PLAINTIFFS IN THESE THREE ACTIONS MAY PURSUE A CLAIM UNDER THE HCFCA OR MFCA WHEN THAT CLAIM IS PREDICATED SOLELY ON ALLEGED VIOLATIONS OF THE SUBSTITUTION STATUTE, FOR WHICH THE REMEDY IS EXCLUSIVELY ADMINISTRATIVE.

The Court of Appeals correctly affirmed the circuit court's decision that the Substitution Statute does not provide a private cause of action because the Legislature already adopted, within that statute, an exclusively administrative remedy for its violations. (Op 10, JA 557a.) That should have been the end of all three lawsuits, which are premised entirely on alleged violations of the Substitution Statute. However, the Court of Appeals then held that the class action plaintiffs may accomplish indirectly through the HCFCA, and likewise that Gurganus may accomplish through the MFCA, what they could not accomplish directly through the Substitution Statute, by alleging the Substitution Statute as the sole predicate for an HCFCA or MFCA

violation. Such an unprecedented end-run around the Legislature's clear intent that all alleged violations of the Substitution Statute be raised, if at all, only with the Michigan board of pharmacy should be rejected by this Court, resulting in the immediate dismissal of all three lawsuits.

This Court has uniformly held that, when provided, administrative remedies are exclusive. See *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 528-29; 734 NW2d 533 (2007) ("Where a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only."); *Pompey v Gen Motors Corp,* 385 Mich 537, 552; 189 NW2d 243 (1971) ("The general rule, in which Michigan is aligned with a majority of jurisdictions, is that where a new right is created or a new duty is imposed by statute, the remedy provided for its violation and nonperformance is exclusive."); *Int'l Bd of Electrical Workers v McNulty*, 214 Mich App 437, 445; 543 NW2d 25 (1995) ("[T]he remedies provided by statute for violation of a right having no common-law counterpart are exclusive.").

One federal court opinion is instructive in rejecting analogous attempts to overcome the lack of a private right of action. In *Conboy v AT&T Corp*, 241 F3d 242, 257 (CA 2, 2001), phone customers raised several claims against their long-distance carrier's formerly affiliated credit card company for, among other things, engaging in deceptive acts or practices in violation of New York General Business Law § 349. The predicate for the customers' claims under Section 349 was a different provision—New York General Business Law § 601—which prohibits a creditor from harassing the debtor or the debtor's household through repeated communications, especially at odd hours. *Id.* at 257-58. The trial court rejected the customers' claims because Section 601 does not supply a private right of action, and thus the private right of

action under Section 349 is likewise not available. See *id.* at 258. The Second Circuit affirmed, quoting the district court's explanation, which bears repeating here:

> Allowing plaintiffs to plead a cause of action under Section 601(6) by alleging that a violation of that statute necessarily constitutes a deceptive act under Section 349 appears contrary to the New York Legislature's intent and inconsistent with the statutory scheme. The Legislature, by creating a private right of action to enforce Section 349, clearly did not intend to authorize private enforcement of Section 601, especially where Section 601 contains its own enforcement provision which explicitly dictates who can enforce that section. [*Id.* (internal quotation omitted).]

The court thus rejected the consumers' attempt to "thwart legislative intent by couching a Section 601 claim as a Section 349 claim." *Id.*

The above authorities lead to one clear result. Where, as here, the Court of Appeals has correctly determined that plaintiffs have no private right of action under the Substitution Statute, plaintiffs have no standing to seek redress for a violation of that statute in a court of law. Consequently, they may not seek to enforce the Substitution Statute under the guise of another claim, be it a claim under the MFCA, HCFCA, or any other statute or label that plaintiffs might imagine. This makes sense as a policy matter, because the Legislature has many good reasons to prefer an administrative regime for dispute resolution:

> Subjection to private suit would be a major addition to the statute; its punitive effect would often exceed the governmental fine or sanction. Moreover, it would take responsibility for suit out of the hands of public officials, who will presumably exercise their discretion in the public interest, and place it in the hands of those who would use it for private gain. [Scalia & Garner, Reading Law: The Interpretation of Legal Texts, p 316.]

It would fly in the face of this Court's precedent, avoid the intent of the Legislature, and in general lead to an absurd result to allow plaintiffs to pursue a private cause of action under the MFCA or HCFCA when the sole basis for that claim is that defendants allegedly violated a statute for which any remedy is exclusively administrative. Put simply, *the exclusivity* of the administrative remedies provided in the Michigan Public Health Code (including the Substitution

Statute) would lose meaning if plaintiffs were allowed to thwart legislative intent by bringing causes of action for violations of the Substitution Statute under another name.

Accordingly, all three cases should be dismissed for lack of any remedy outside the carefully designed administrative procedures.

II. ALL THREE LAWSUITS MUST BE DISMISSED BECAUSE PLAINTIFFS' UNDERLYING THEORY OF LIABILITY DOES NOT MEET THE "FALSE CLAIM" REQUIREMENT OF THE HCFCA AND MFCA.

In permitting plaintiffs to proceed with three lawsuits on the basis of alleged violations of the HCFCA and MFCA, the Court of Appeals departed from the plain text of these two false claim acts and from Michigan and federal court precedent when it adopted a sweeping definition of the "false claim" requirement. On the Court of Appeals' reasoning, no longer does a plaintiff need to allege and prove actual falsity or deception as part of a "false claim" case. Instead, by relying on a so-called "implied certification" theory, the Court of Appeals replaced the requirement that a plaintiff prove that a defendant actually submitted a false (i.e. fraudulent) claim with a relaxed requirement that a plaintiff merely show that a defendant violated some—indeed, apparently any—statute or regulation before presenting a request for payment. No court in this State has previously adopted this implied certification theory. And federal courts outside of Michigan adopting such a theory were careful to include a critical limitation lacking in the Court of Appeals' decision: that in submitting the request for payment, the defendant impliedly certified compliance with a statute or regulation, where compliance with the statute or regulation was a prerequisite to obtaining payment. Such a limitation ensures that an alleged false claim under the implied certification theory is "legally false." The Court of Appeals' decision, on the contrary, 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. That is not and

cannot be what the Legislature intended. This Court should reverse the Court of Appeals' unprecedented and erroneous extension of liability under the MFCA and HCFCA.

A. Plain Statutory Text And Precedent Dictate That The Alleged Misconduct Does Not Amount To A "False Claim."

To state a valid claim under either of the false claim statutes at issue in these cases, a plaintiff must allege and prove that the defendant made or presented a claim for payment "knowing the claim to be false." MCL 752.1003(1); MCL 400.607(1). Plaintiffs were required to plead, among other things, that each defendant submitted a claim containing a factual falsehood (i.e., "a statement of fact" or omission of a "fact") that misrepresented the "state of affair[s]" related to that claim. MCL 752.1002(b); MCL 400.602(b). Although Michigan courts have not yet had an occasion to construe these terms in the HCFCA, in construing them under the MFCA, Michigan courts have concluded that a claim is "false" if it incorrectly describes the services provided or is submitted for services that are not compensable or that were not in fact provided. See, e.g., *In re Wayne County Prosecutor*, 121 Mich App 798, 802; 329 NW2d 510 (1983); *People v Williamson*, 205 Mich App 592, 593-95; 517 NW2d 846 (1994).

That *sine qua non* is absent here. Nowhere do plaintiffs allege that any defendant submitted a claim for a drug other than what was actually dispensed, misstated the amount actually charged, or anything similar. Plaintiffs have had ample opportunity to plead their case, having amended their complaints twice before they were dismissed with prejudice. Instead, plaintiffs merely allege that defendants failed to comply with the Substitution Statute and that this somehow translates into false claims under the HCFCA and MFCA. It does not.

No Michigan court has ever held that alleged violations of a law, rule, or regulation, standing alone, are sufficient to constitute a "false claim" under either the HCFCA or MFCA. This is not surprising, given that such a deviation from the statutes' plain meaning would have

reflected an impermissible substitution of the courts' policy preferences for those expressed by the Michigan Legislature. See *People v McIntire*, 461 Mich 147, 152-55; 599 NW2d 102 (1999).

Persuasive federal court decisions are consistent with the Michigan approach before the Court of Appeals' decision, and illustrate the error in the Court of Appeals' ruling. In interpreting the nearly identical provisions of the federal False Claims Act ("FCA"), 31 USC 3729 *et seq.*, federal courts have consistently rejected this theory of falsity. The Sixth Circuit, for example, has held that allegations of illegal accounting practices, standing alone, are insufficient to state a claim under the FCA when the plaintiff failed to explain how such practices caused falsified reimbursement claims to be submitted to the government. *Sanderson v HCA-The Healthcare Co*, 447 F3d 873, 877-78 (CA 6, 2006). The *Sanderson* court made clear that it is not an alleged wrongdoer's internal accounting or pricing mechanism, but rather the false claim itself, that represents "the *sine qua non* of a False Claims Act violation." *Id.* at 878 (internal quotation marks omitted). Accordingly, even though the circuit court did not rely on these grounds to rule for defendants, its judgments could and should have been affirmed on this basis alone. See, e.g., *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-09; 741 NW2d 539 (2007) (affirming on grounds not relied on by the trial court).

B. The Court Of Appeals Impermissibly Expanded The Statutory Scope Of The False Claim Acts By Replacing The "False Claim" Requirement With The "Implied Certification" Theory.

Instead of joining the weight of persuasive federal court decisions, the Court of Appeals charted its own course and injected a novel theory into Michigan jurisprudence. According to the court's newly-adopted approach, "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" under the Substitution Statute. (Op 20, JA 567a (emphasis

added).) However, as other courts to have adopted the implied certification theory have noted, implied certification of compliance alone does not create a violation—rather, that compliance must also be a prerequisite to payment. Here, that is not the case. Yet, the Court of Appeals still finds the claim "false."

No other Michigan case has so drastically expanded the definition of "false claims" as the Court of Appeals' decision. What the Legislature actually wrote when it enacted the MFCA and HCFCA does not support the decision. But the Court of Appeals' error runs much deeper and has such significant potential ramifications because it adopts an unprecedented implied certification theory that converts the two *false claims* acts into statutory vehicles for remedying an alleged violation of any other law, rule, or regulation in Michigan—even those for which, as here, there is no private right of action. Examining the relevant federal court decisions demonstrates why such an approach is unprecedented and unwise.

Some federal courts have chosen to apply the implied certification theory in cases brought under the federal FCA. But in every such instance, those courts held that, for a claim to be "legally false," two requirements must be met: (1) a party must impliedly certify compliance with the underlying statute or regulation by presenting a claim for payment, and (2) such compliance must be a condition to that payment. See, e.g., *Mikes v Straus*, 274 F3d 687, 697, 700 (CA 2, 2001). "Courts do not look to the claimant's actual statements; rather, the analysis focuses on the underlying contracts, statutes, or regulations themselves to ascertain whether they make compliance a prerequisite to the government's payment." *United States ex rel Hobbs v MedQuest Associates, Inc*, 711 F3d 707, 714 (CA 6, 2013) (internal citation omitted). In other words, "it is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit," and that prerequisite is satisfied "only where

compliance is a *sine qua non* of receipt of state funding." *United States ex rel Ebeid v Lungwitz*, 616 F3d 993, 998 (CA 9, 2010) (internal quotations and citation omitted); see also *United States ex rel Augustine v Century Health Svcs, Inc*, 289 F3d 409, 415 (CA 6, 2002); *United States ex rel Siewick v Jamieson Sci & Eng'g, Inc*, 214 F3d 1372, 1376 (CA DC, 2000) (holding that plaintiff's implied certification theory "is a non-starter" because it "is doomed by the rule, *adopted by all courts of appeals to have addressed the matter*, that a false certification of compliance with a statute or regulation cannot serve as the basis for a *qui tam* action under the FCA unless payment is conditioned on that certification" (emphasis added)). The implied certification theory is not applied anywhere in the country without first connecting the alleged violations with the government or insurer's decision to pay.

This limitation makes perfect sense in the context of false claims acts. A typical false claims act—be it the federal FCA or this State's MFCA and HCFCA—is "not designed for use as a blunt instrument to enforce compliance" with run-of-the-mill statutes or regulations. *Mikes*, *supra* at 699. What makes a false claims act's application appropriate in the implied certification context are allegations of defendants acting with the knowledge "that payment *expressly* is precluded because of some noncompliance by the defendant." *Id.* at 700 (emphasis added). As a result of the Court of Appeals' decision, the implied certification theory in Michigan contains no such limitation. That court held that a mere alleged violation of a statute or regulation could amount to a "false claim," without any need to allege or show that the defendant's compliance with that statute or regulation was expressly a condition of the government's payment on the claim. (Op 20, JA 567a.)

The Court of Appeals attempted to distinguish the numerous contrary federal decisions "because [they do] not address any statute, rule, or regulation that is analogous" to the

Substitution Statute. (Op 19 n20, JA 566a.) True enough, the underlying statutes or regulations in those federal cases differ from the Substitution Statute. But nothing of consequence flows from that premise. The focus under the implied certification theory is not on which particular statute or regulation serves as the basis for the alleged "false" claim. Rather, the sole focus is on whether the defendant, by submitting a claim for payment, impliedly certified compliance with that statute or regulation, and whether such compliance was a condition to receiving payment.

Far from making this case unique in any material way, the Substitution Statute fits comfortably under the relevant inquiry for the implied certification theory: did defendants impliedly certify compliance with the Substitution Statute where such compliance was a condition for payment? The answer is an unequivocal no. Not surprisingly, plaintiffs failed to allege that any defendant falsely certified compliance with the Substitution Statute as a precondition to receiving any payment from a plaintiff or the State. Plaintiffs could not so allege because neither the Substitution Statute nor any other statute or regulation at issue makes payment of healthcare benefits claims expressly contingent on providers' compliance with the Substitution Statute. Nor, for that matter, did plaintiffs allege that any supposed "implied false certifications" led them to make payments they or the State would not otherwise have made, or to pay different amounts than they otherwise would have paid (indeed, such an allegation would have been particularly far-fetched for the *qui tam* complaint, given that the State establishes a Maximum Allowable Cost, which limits the State's payments to retail pharmacies, see Gurganus SAC ¶ 87, JA 203a).

In every other jurisdiction in the United States, that would have been the end of the matter. See, e.g., *Rodriguez v Our Lady of Lourdes Med Ctr*, 552 F3d 297, 304 (CA 3, 2008) (affirming dismissal where plaintiffs failed to allege that defendant's receipt of government

funds was linked to compliance with New Jersey pharmacy law), abrogated in part on other grounds by *United States ex rel Eisenstein v City of New York*, 556 US 928 (2009); *United States ex rel Willard v Humana Health Plan of Texas, Inc*, 336 F3d 375, 382 (CA 5, 2003) (dismissing FCA claim under implied certification theory because relator "failed to allege facts that would show that HCFA *conditioned its payment* to Humana on any implied certification of compliance with the anti-discriminatory regulations"); *Harrison v Westinghouse Savannah River Co*, 176 F3d 776, 793 (CA 4, 1999) (the relator "has never asserted that such implied certifications were in any way related to, let alone prerequisites for, receiving continued funding"). Only in Michigan, after the Court of Appeals' decision, can a naked allegation that some statute or regulation was violated satisfy the "false claim" requirement.

This Court should reverse the Court of Appeals' decision because, solely as a result of that decision, Michigan now stands alone in dramatically increasing the scope of liability under the false claim acts, turning them into "blunt instrument[s] to enforce compliance with all . . . regulations." *Mikes*, *supra* at 697. The Court of Appeals has replaced the State's narrowly tailored false claim acts with a vehicle for attaching strict liability to violations of the Substitution Statute, and indeed violations of any number of other statutes one could name. The Court of Appeals' holding, if not reversed, would trap the unwary in other contexts as well, for nothing on the face of the court's opinion limits its holding to the Substitution Statute. Now an alleged error in *any* request for payment that falls within the purview of the HCFCA or MFCA exposes the requesting party to heightened penalties, possible criminal liability, and damage to reputation that frequently accompanies allegations of fraud under these false claim acts. This result is especially troubling given that it follows not because the Legislature so intended, but because the Court of Appeals so decreed.

This Court's reversal of the Court of Appeals' decision will steer Michigan's jurisprudence back onto the course that the Legislature intended in enacting the two false claim acts at issue in these cases.

III. ALL THREE LAWSUITS SHOULD BE DISMISSED BECAUSE PLAINTIFFS DID NOT AND CANNOT PLEAD A VIABLE THEORY OF VIOLATION UNDER THE SUBSTITUTION STATUTE.

Plaintiffs did not and cannot plead a violation of the Substitution Statute for three reasons: (1) the Substitution Statute does not support plaintiffs' theory of limiting profits that defendants earn on sales of generic prescription drugs, (2) the Substitution Statute is limited to substitution transactions, and (3) even if plaintiffs' theory of liability were correct, a key inference critical to the success of that theory is flatly contradicted by plaintiffs' own pleadings.

A. The Substitution Statute Does Not Prohibit Defendants' Alleged Conduct.

This Court asked the parties to address the question of "what is meant by the requirement that a pharmacist shall 'pass on the savings in cost' when the pharmacist dispenses a generically equivalent drug product and what constitutes a violation of that requirement." (Sept 18, 2013 Order 2 (quoting MCL 333.17755(2)).)

In answer to that, the Substitution Statute—when read fairly, and in the context of all surrounding provisions—requires pharmacists to pass on the *existing* savings that result from substitution. Contrary to plaintiffs' interpretation, the Substitution Statute does not require pharmacists to *recalculate* the cost to the purchaser of the substituted generic on a transaction-by-transaction basis to ensure that plaintiffs' invented profit-capping formula is met. In other words, pharmacists are only required to sell the substituted generic at the same price that a purchaser would pay had the generic been prescribed in the first instance—i.e., pharmacists are prohibited from *increasing*, at the point of sale, the customer's cost of the substituted generic. But pharmacists are not forced into any particular pricing metric when they determine, long

before a purchaser walks in with a prescription (and in the vast majority of instances as the result of vigorous negotiations with insurance companies, health plans, and pharmacy benefit managers representing those purchasers over exactly what reimbursement the pharmacy should receive), how much to charge for prescription drugs, whether they are brands or generics. All that the statute requires is that purchasers in the substitution transactions be no worse off than purchasers in transactions where a generic is prescribed in the first place, so that consumers enjoy the benefit of lower-priced generic drugs when they are dispensed in substitution for higher-priced prescribed brands.

Plaintiffs, on the other hand, interpret the Substitution Statute as requiring pharmacists to ensure that the following formula is met in each transaction: generic price – generic acquisition cost ≤ brand price – brand acquisition cost. (Op 16, JA 563a.) Plaintiffs' theory should be rejected because it contradicts fundamental principles of statutory interpretation.

Courts in Michigan are guided by familiar principles of statutory interpretation. "When considering the correct interpretation, the statute must be read as a whole, unless something different was clearly intended. Individual words and phrases, while important, should be read in the context of the entire legislative scheme." *Dep't of Envtl Quality v Worth Twp*, 491 Mich 227, 238; 814 NW2d 646 (2012). This well-known principle, referred to as *noscitur a sociis*, recognizes "that a word or phrase is given meaning by its context or setting." *Koontz v Ameritech Svcs, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002) (quotation omitted). "This doctrine is premised on the notion that 'the meaning of statutory language, *plain or not*, depends on context.'" *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005) (quoting *King v St Vincent's Hosp*, 502 US 215, 221 (1991)) (emphasis added). To that end, this Court has reversed the Court of Appeals when the latter has eschewed a contextual reading of a

statute. *SBC Michigan v Pub Svc Comm'n*, 482 Mich 90, 114; 754 NW2d 259 (2008) (reversing because "words and clauses will not be divorced from those which precede and those which follow"). To emphasize that every word be given meaning, this Court cautions to "avoid a construction that would render any part of the statute surplusage or nugatory." *Duffy v Michigan Dep't of Natural Resources*, 490 Mich 198, 215; 805 NW2d 399 (2011).

When read in the context of the entire legislative scheme set forth in the Substitution Statute, it becomes apparent that the requirement that a pharmacist "pass on the savings in cost" when substituting a generic for a prescribed brand is not meant to dictate the maximum prices a pharmacist may charge for generic drugs. Rather, it simply requires that where a lower cost generic drug is dispensed in lieu of a higher priced brand drug originally prescribed, the *existing* cost savings realized as a result of that substitution—in other words, the difference between what the customer pays for the brand name drug and its generic equivalent—must be passed on to the purchaser.

There are at least four reasons why the Substitution Statute requires only that. *First*, the critical language "shall pass on the savings in cost" contains the phrase "*the* savings," not "*any* savings." The difference is important because the definite article preceding "savings" points to "savings" that must exist and can be identified even before a customer walks up to the counter to fill a prescription. Such preexisting savings are reflected not only in the fact that the Substitution Statute is limited to instances where the substituted drug is a lower cost drug, but also by the fact that consumers generally pay much less for generics than they do for the corresponding brands. The pharmacist is not required to search for any other savings that might be identified by, for example, recalculating the generic equivalent drug's price to match plaintiffs' invented profit-limiting formula.

Second, the entire Substitution Statute is written in terms that specify what pharmacists may and may not do when presented with a prescription for a brand name drug. See MCL 333.17755(1)-(4). The statute does not speak to pharmacists' or pharmacies' decisions that take place long before this dispensing transaction—decisions such as, for example, which prescription drugs to have in stock and how much to charge for them. Nor does the Substitution Statute call for re-pricing, on a transaction-by-transaction basis, at the point of sale. That is not surprising, since retail pharmacies are not flea markets or car dealerships, where prices are reexamined anew in each transaction. Pharmacies set prices—frequently in negotiations with powerful organizations representing insurance companies and other third-party payors like plaintiffs in the two putative class actions here—long before they encounter a single customer. Further, legislatures know exactly how to write statutes that require that products or services be priced above some legislatively-determined floor or below a certain ceiling. See, e.g., 15 USC 3314 (part of the Natural Gas Policy Act of 1978, setting "maximum lawful price" for natural gas and identifying situations when "ceiling prices may be increased"); 56 Stat 23 (the Emergency Price Control Act of 1942, which gave the government official overseeing price controls the power to set up maximum prices but also specified a floor below which such maximum prices may not be set); *People v Sell*, 310 Mich 305, 310; 17 NW2d 193 (1945) (affirming conviction for selling a dressed chicken for 50 cents a pound, 6 cents above the ceiling price set by the district director of the Detroit district of the office of price administration). The Substitution Statue contains no language along these lines.

Indeed, because the Substitution Statute applies only to substitution transactions, see Argument Part III.B, *infra*, plaintiffs' contrary interpretation would require pharmacists to carry two sets of prices—one that applies to transactions where a generic is prescribed in the first place

and another that applies where a generic is substituted. That would be a strange way to set up a statutory scheme that mandates certain pricing outcomes. If it intended to instruct pharmacists on how to price their inventory, the Legislature would have written a different statute, one explicitly directed to pharmacists' pricing decisions. But the Legislature did not write such a statute, and the statute it wrote should not be twisted into something it is not.

Third, other provisions confirm that the Substitution Statute does not specify how prescription drugs must be priced. MCL 333.17755(4) provides that "[a] pharmacist may not dispense a drug product with a total charge that exceeds the total charge of the drug product originally prescribed, unless agreed to by the purchaser." This provision, like subsection (2), does not affect pricing decisions, but merely tells a pharmacist not to do something. If the Substitution Statute were meant to set up maximum prices as plaintiffs allege, subsection (4) would not have prevented pharmacists from dispensing drugs with total charges that exceed the total charge of the prescribed drug, but rather would have instructed pharmacists to lower the total charge of the offending drug product at the point of sale. Read together, subsections (2) and (4) are consistent in that they do not dictate pharmacists' pricing decisions, but merely take the result of those pricing decisions and specify what pharmacists may and may not do during substitution transactions.

Finally, various provisions of the Substitution Statute would be rendered surplusage if pharmacists were required under subsection (2) to recalculate the total charge of the substituted generic at the point of sale to satisfy plaintiffs' formula. If the cost savings in subsection (2) were meant to ensure that the pharmacist's profit on the generic were limited to that of the brand, and since the starting point in the calculation is a generic drug that carries a lower cost, see MCL 333.17755(1) (directing the substitution of "a lower cost but not higher cost generically

equivalent drug product"), then there would be no such thing as a substituted drug "with a total charge that exceeds the total charge of the drug product originally prescribed," MCL 333.17755(4). To avoid turning subsection (4) into surplusage requires one to recognize that the cost savings in subsection (2) refers to the cost-savings that exists in the difference between a prescribed brand and the substituted generic, the latter most often, *but not always*, cheaper to consumers. Subsection (4) then speaks to such uncommon situations where, for one reason or another the generic to be substituted results in a higher cost to the purchaser. Thus, plaintiffs' interpretation of the Substitution Statute produces a surplusage in subsection (4), which is reason enough to reject it. See *Duffy*, *supra* at 215. Defendants' interpretation, on the other hand, gives meaning to all provisions in the Substitution Statute.

To be sure, the Substitution Statute also states that "[t]he savings in cost is the difference between the wholesale cost to the pharmacist of the 2 drug products." MCL 333.17755(2). Although plaintiffs may rely on this sentence to conjure support for their preferred formula of liability in these cases—that profits on generic equivalent drugs not exceed profits on the corresponding brand name drugs—the sentence actually supports Defendants' interpretation given the context of prescription drug pricing in the 1970s, when the Substitution Statute was enacted. The prevalent mode of prescription drug price-setting at that time was pharmacists' actual acquisition cost plus a dispensing fee, which fee could be the same regardless of whether the prescribed brand name drug or the generic equivalent was dispensed. See, e.g., *Kenneth Cook Testifies on HB 4145*, Mich Pharmacist 9 (Sept 1974) (noting pharmacists being "reimbursed on our actual acquisition cost . . . plus a dispensing fee"); *Community Pharmacist Richard Coward Shares His Guidelines for Drug Product Selection*, Mich Pharmacist 16 (June 1976) (comparing pharmacists' profits on the basis of dispensing fees divided by acquisition

costs). The text of the statute is likely a result of this prevalent system of drug pricing with the Legislature using "the difference between the wholesale cost to the pharmacist of the 2 drug products" as a shorthand to specify that the *existing* (not newly calculated) savings to the purchaser would be captured by the difference in what pharmacists pay to acquire prescription drugs. After all, if the dispensing fee remained the same, then the cost savings would be the difference in pharmacists' acquisition costs. Thus, the Legislature used a common example of the acquisition-cost-plus-dispensing-fee pricing to ensure that pharmacists not inflate their dispensing fee during a substitution transaction to try to capture some of the savings that would otherwise go to the purchaser. But the use of that example does not limit pharmacists from using other pricing approaches. The only requirement is that pharmacists not manipulate the generic price upward to cut into the purchaser's savings as a result of substitution.

Accordingly, properly construed, the Substitution Statute does not support plaintiffs' complaints because it does not speak to price-setting decisions that pharmacists and pharmacies make long before a single customer presents a prescription for filling.

B. The Court Of Appeals Misinterpreted The Substitution Statute As Applying To Transactions Involving No Substitution.

Even if the Substitution Statute meant what plaintiffs argue it means, plaintiffs still have not pled violations of the statute because they have not alleged any substitution transactions. The Substitution Statute plainly applies only to transactions where the dispensing pharmacist substitutes a generic drug in place of the prescribed brand name drug. Surrounding statutory provisions remove any doubt on that score. Yet, the Court of Appeals not only came to the opposite conclusion, it defended that conclusion by refusing to consider the surrounding provisions. That is error because, as this Court frequently reminds all courts in Michigan, statutory interpretation should not be contextually agnostic. See *Griffith*, *supra* at 533 ("the

meaning of statutory language, plain or not, depends on context" (internal quotation omitted)); *SBC Michigan*, *supra* at 114 (reversing because "words and clauses will not be divorced from those which precede and those which follow").

Reading all subsections of the Substitution Statute together reveals an unambiguous legislative intent to limit the statute to substitution transactions—to exclude, in other words, transactions where a generic drug is prescribed in the first place, triggering no substitution. See *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 63; 718 NW2d 784 (2006) (reversing the Court of Appeals because "we must assume that the thing the Legislature wants is best understood by reading what it said").

MCL 333.17755(1) allows a pharmacist to dispense "a lower cost" generic drug instead of the prescribed brand. MCL 333.17755(2) speaks of "the 2 drug products," meaning the prescribed brand and the dispensed generic. If a generic is prescribed, however, there is only one drug product, not two—there is no difference between the drug prescribed and the drug dispensed, and thus there is no "substitution" and no "savings" to be passed on. MCL 333.17755(3), referencing subsection (1), likewise deals with substitutions, prohibiting them in certain instances. And, lastly, MCL 333.17755(4) also regulates when a pharmacist may dispense a different drug than "the drug product originally prescribed."

To read MCL 333.17755(2) as applying outside the substitution context would mean that the Legislature chose to sandwich a provision that applies to all transactions involving generic drugs in the middle of several provisions applying only to substitutions. Such a strange reading must yield to a far more straightforward interpretation of MCL 333.17755(2) as a substitution provision. Indeed, it is only in the context of the surrounding provisions—particularly MCL 333.17755(1)—that the meaning of the phrase "the 2 drug products" in subsection (2) is clear.

Without a contextual peek at subsection (1), a reader will have no clue what two drug products must be compared, and thus no clue how to calculate the "savings in cost" between the two. In other words, confined to subsection (2), the definite article in "the 2 drug products" makes no sense because that phrase is the sole mention of any "2 drug products" in subsection (2), contrary to what one would expect when encountering a definite article.

The Court of Appeals disagreed, instead construing "the plain language of § 17755(2)" as "mak[ing] 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." (Op 21, JA 268a.) That is wrong because no such plain language exists, since one must know what two drug products to compare. And in any event, refusing to undertake a contextual analysis and relying exclusively on a supposed plain meaning is precisely the type of error on which this Court has previously reversed the Court of Appeals. See *SBC Michigan*, *supra* at 114.

This Court should reverse the Court of Appeals' analysis and dismiss all three lawsuits for failure to allege a single substitution transaction.

C. Plaintiffs' Class Action And *Qui Tam* Complaints Fail To Satisfy The Heightened Pleading Requirement When A Critical Inference In Each Complaint Runs Contrary To An Affidavit Attached To Each Complaint.

Although the Court of Appeals correctly held that the heightened pleading standard of MCR 2.112(B)(1) applies to allegations of fraud under the MFCA and HCFCA, it misapplied that standard. Specifically, the court permitted plaintiffs in both class action lawsuits and in the *qui tam* action to make an inference that is not only incorrect on its face but, worse, contradicts an affidavit attached to all of the operative complaints in these cases. That is not, and cannot become, the law.

The heightened pleading standard for fraud requires "the circumstances constituting fraud" to be "stated with particularity." MCR 2.112(B)(1); see also (Op 13-14, JA 560a-561a (holding that the heightened standard applies to all remaining allegations in these case)). The standard amplifies the general pleading requirement, which in turn demands that allegations be made by *each* plaintiff against *each* defendant. Otherwise, plaintiffs would be allowed to introduce "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).

Plaintiffs have not met their burden under the heightened pleading standard. The alleged violations in all three cases are premised on the Substitution Statute. As a preliminary matter, the Substitution Statute, properly construed, does not support plaintiffs' theory. See Argument Part III.A, *supra*. And even if it did, plaintiffs failed to identify any actual substitution transactions, and thus their complaints fail for this reason as well. See Argument Part III.B, *supra*.

But even if plaintiffs could get past these initial hurdles, under their own theory of liability, they are required to compare the dispensing pharmacy's acquisition cost for the dispensed generic with its acquisition cost for the corresponding brand name drug. (See Op 17, JA 564a ("The critical number in plaintiffs' formula is the acquisition cost of the generic and brand name drugs.").) Plaintiffs' entire acquisition cost data is "derived from the known acquisition costs of [Defendant] Kroger in West Virginia" from 2008. (Op 15-16, 17, JA 562a-563a, 564a.) From that Kroger data, plaintiffs purport to extrapolate acquisition costs for all defendants by baldly "assert[ing] that like Kroger, all the other defendants operate retail pharmacies nationwide, acquire prescription drugs through central purchasing functions serving

all their pharmacy locations, and acquire the majority of their prescription drugs from wholesalers." (*Id.* at 17, JA 564a.) On plaintiffs' speculation, there is no material difference between Kroger's limited data from West Virginia in 2008 and all Defendants' actual acquisition costs in Michigan for a multi-year span.

Plaintiffs' multiple layers of inferences do not satisfy the heightened pleading standard. This should end the inquiry. But there is more: Plaintiffs' own affidavit, attached as an exhibit supporting complaints in each of the three lawsuits, flatly contradicts and defeats the plaintiffs' critical inference of industry-wide, country-wide, and temporal uniformity of acquisition costs. In the affidavit, Kroger's Manager of Pharmacy Procurement explained that, far from being uniform, defendants' acquisition costs are unique because they result from fierce competition on which defendants' success as retail pharmacy chains depends. (Lansing-CVS SAC Ex 3 ¶¶ 4-5; Lansing-Rite Aid SAC Ex 3 ¶¶ 4-5; Gurganus SAC Ex 4 ¶¶ 4-5.) In light of the affidavit, plaintiffs' inferences regarding defendants' acquisition costs must be rejected as "ludicrous." *Pryor v Sloan Valve Co*, 194 Mich App 556, 560; 487 NW2d 846 (1992). And without acquisition costs, plaintiffs have no particular basis to allege large-scale fraud in these three cases.

The Court of Appeals did not address this fatal flaw in plaintiffs' complaints. Instead, it concluded that plaintiffs' allegations and inferences suffice. (See Op 18, JA 565a.) That is not enough under any pleading standard, much less the heightened one that applies to plaintiffs' complaints asserting serious claims of fraud. This Court should reverse the Court of Appeals' decision finding plaintiffs' complaints to be sufficiently pled under MCR 2.112(B)(1).

IV. GURGANUS'S *QUI TAM* ACTION MUST BE DISMISSED BECAUSE SHE IS NOT AN ORIGINAL SOURCE OF THE PUBLICLY DISCLOSED INFORMATION ON WHICH HER COMPLAINT IS BASED.

The Court of Appeals held that Gurganus, a West Virginia resident who works for one pharmacy in West Virginia, and who has no Michigan-specific information, is a proper *qui tam* relator with standing to bring claims against numerous pharmacies in the name of the State of Michigan, all based on information disclosed in newspapers and public financial disclosures. That decision obliterated the Legislature's carefully crafted limitations on relator standing and should be reversed.

The Legislature provided that a relator may not initiate an action under the MFCA "based upon the public disclosure of allegations or transactions" unless the relator "is the original source of the information." MCL 400.610a(13). Before the Court of Appeals' decision, no Michigan court had interpreted this original source provision. But in cases arising under the nearly identical federal FCA, 31 USC 3730(e)(4)(a),[6] courts have repeatedly summarized the clear legislative intent as serving the dual purposes of "encourag[ing] private individuals who are aware of fraud being perpetrated against the government to bring such information forward" while also "prevent[ing] parasitic *qui tam* actions in which relators simply feed off of previous disclosures of government fraud." *United States ex rel Jones v Horizon Healthcare Corp*, 160 F3d 326, 335 (CA 6, 1998); see also *Sanderson*, *supra* at 876 (describing the FCA as "a congressional effort[] to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior"). Gurganus's action does not satisfy these dual purposes. On the

[6] Prior to the 2010 amendment, the FCA language read, "based upon the public disclosure of allegations or transactions." 31 USC 3730(e)(4)(a) (2006). The current version reads, "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." 31 USC 3730(e)(4)(a). The change in the FCA language is not material for purposes of this appeal.

contrary, it is part of a larger effort of plaintiffs' attorneys seeking to leverage publicly disclosed information about the greater profitability of generic drugs into a means by which to subject defendants to intrusive, burdensome, and unfair discovery and litigation. This Court should resurrect the careful statutory limitations that, standing as a bulwark, separate Gurganus's improper lawsuit from valuable private attorney general actions that actually advance the public interest in this State.

A. Gurganus's *Qui Tam* Complaint Is "Based Upon The Public Disclosure Of Allegations Or Transactions."

To have standing to bring a *qui tam* action on behalf of the State, a purported relator must meet the requirements of MCL 400.610a(13), which provides:

> 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. 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.

The critical part for purposes of this appeal is the phrase "based upon the public disclosure of allegations or transactions."

Here, too, familiar principles of statutory interpretation apply. The analysis begins with the plain and ordinary meaning of statutory language, taken in context. See *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503, 515; 821 NW2d 117 (2012). Constructions resulting in statutory surplusage are to be avoided. See *Duffy*, *supra* at 215. Further, in statutory interpretation, as in other areas of the law, federal court decisions addressing analogous (let alone identical) issues are persuasive. See *People v Nunley*, 491 Mich 686, 714-15; 821 NW2d 642 (2012).

The MFCA itself does not define the term "allegations or transactions" or explain when a *qui tam* action is "based upon" such public disclosures. But the very same phrase contained in the federal FCA has been construed by many federal courts across the country. 31 USC 3730(e)(4)(A). This Court may look to these relevant federal court decisions, which, although not binding, are persuasive. (Although here too the Court of Appeals expressly turned a blind eye to the federal cases. (Op 5 n3, JA 552a.))

Under these decisions, a public disclosure triggers the jurisdictional bar "if the information is sufficient to *put the government on notice* of the likelihood of related fraudulent activity." *United States ex rel Poteet v Medtronic, Inc*, 552 F3d 503, 512 (CA 6, 2009) (quotation omitted, emphasis added). "The 'allegations and transactions' forming the basis of a *qui tam* have been disclosed when enough information exists in the public domain to expose the fraudulent transaction or the allegation of fraud." *Walburn v Lockheed Martin Corp*, 431 F3d 966, 975 (CA 6, 2005) (quotation omitted). A public disclosure need not "use the word 'fraud' or provide a specific allegation of fraud." *Poteet, supra* at 512. "All that is required is that the public disclosures put the government on notice to the possibility of fraud." *Dingle v Bioport Corp*, 388 F3d 209, 214 (CA 6, 2004). They need merely to disclose information that "create[s] an inference of impropriety." *Jones, supra* at 332; see also *United States ex rel Gilligan v Medtronic, Inc*, 403 F3d 386, 389 (CA 6, 2005). All that is required, in other words, is that enough information be disclosed to enable the government to investigate further.

Other federal circuit courts agree.[7] One decision is especially instructive. In *United States ex rel Settlemire v District of Columbia*, 198 F3d 913, 918-19 (CA DC, 1999), the relator

[7] A majority of the federal circuits share the Sixth Circuit's view. See, e.g., *United States ex rel Kirk v Schindler Elevator Corp*, 437 Fed Appx 13, 17 (CA 2, 2011) (noting the "expansiveness of [the] statutory phrase ['allegations or transactions']," and holding that "it is

asserted that the District of Columbia's use of Expansion Act funds for purposes other than those set forth in the Act constituted a false claim. The "public disclosure of allegations or transactions" at issue was a government official's own public statement at a Congressional hearing that the District was using the funds for purposes beyond those listed in the Act. The statement contained no specific details as to the purposes to which the funds were being put, and there was no suggestion by the District official that the District had engaged in wrongful conduct or submitted false claims. Indeed, as the court noted, "[t]heir willingness to disclose this information makes it appear that they thought nothing was improper." *Id.* at 919. Nonetheless, the "disclosure that the District was using and planned to continue to use Expansion Act funds in ways outside the letter of the statute," constituted a public disclosure under the FCA because it "'enable[d] the government to adequately investigate the case and to make a decision whether to prosecute.'" *Id.* The disclosed statement need not contain specific details regarding any subsequently alleged fraud.

The same result should have followed here. As support for her *qui tam* claim, Gurganus attached various public disclosures as exhibits to her Second Amended Complaint and quoted liberally from them. These include a *Wall Street Journal* article (Gurganus SAC ¶¶ 126, 130 & Ex 7, JA 260a, 262a, 299a-303a), administrative filings with the United States Securities and Exchange Commission ("SEC"), including Form 10-K filings (*id.* ¶¶127-28 & Exs 8-9, JA 260a-

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sufficient for the public disclosure bar that the disclosed transaction 'creates an inference of impropriety'"); *United States ex rel Ondis v City of Woonsocket*, 587 F3d 49, 54 (CA 1, 2009) (holding that for the purpose of the FCA, public disclosure exists when "the disclosures together lead to a plausible inference of fraud"); *United States ex rel Reagan v E Tex Med Ctr Reg'l Healthcare Sys*, 384 F3d 168, 175 (CA 5, 2004); *United States ex rel Colquitt v Abbott Labs*, 864 F Supp 2d 499, 519 (ND Tex, 2012) ("[T]he main inquiry is 'if the disclosures, taken together, would enable the government to draw an inference of fraud.'"); *United States ex rel Mistick PBT v Hous Auth of City of Pittsburgh*, 186 F3d 376, 384 (CA 3, 1999); *United States v Alcan Elec and Eng'g, Inc*, 197 F3d 1014, 1018-19 (CA 9, 1999).

261a, 304a-312a), and corporate reports of some (not all) defendants (*id.* ¶¶124-125 & Exs 5-6, JA 259a-260a, 289a-298a). All of these public disclosures relate to pharmacies' alleged ability to realize greater profits on generic prescription drug transactions than on brand name equivalent transactions. And at the heart of Gurganus's *qui tam* complaint is precisely this theory of statutory violation—that making greater profit on generics violates the Substitution Statute, which, using another leap, Gurganus turns into the conclusion that defendants submitted false claims under the MFCA. To underscore, Gurganus's *qui tam* complaint is based on the same "allegations or transactions" that appear in these public disclosures—realizing greater profits on generic sales than brand name sales. The disclosures thus put the State of Michigan on notice of her theory of fraud, enabling the State to investigate on its own, and so trigger the public disclosure bar.

The Court of Appeals' contrary holding cannot stand. The court began by properly concluding that the *Wall Street Journal* article was "public" within the meaning of Section 610a(13),[8] but erred in determining that the article did not qualify as public disclosure. The court read Section 610a(13) as requiring that a public disclosure contain an *express* assertion of unlawful conduct with a *specific* link to Medicaid fraud. It then concluded that the *Wall Street Journal* article did not constitute an "allegation" because, "[s]tanding alone," its "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." (Op 7, JA 554a.) As a preliminary matter, this is not even an accurate description of the article, which did not speak to pharmacies making a profit in the abstract, but to pharmacies making *a comparatively higher* profit on the generics than they did

[8] The court found it unnecessary to address whether the other disclosures so qualified because they "convey[ed] basically the same information as the *Wall Street Journal* article." (Op 6, JA 553a.)

on the brands—exactly what lies at the heart of Gurganus's *qui tam* action. But more remarkably, the court reached its ultimate conclusion even as it acknowledged that the information disclosed in the article enabled the State "to deduce" the very same theory of "misconduct" that Gurganus formulated in her complaint. (*Id.* ("[O]ne could conclude that the companies engaged in making larger profits on generic drugs are violating § 177552(2).").)

The court further held that "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." (*Id.*) The court deemed the *Wall Street Journal* article insufficient to raise the public disclosure bar because it "does not link the claimed greater profits on generic drugs to the submission of false claims for Medicaid benefits," "does not even suggest any wrongdoing on the part of defendants," and does not necessarily disclose "unethical or unlawful conduct." (*Id.*)

In so holding, the court doubly erred. *First*, by requiring that the prior public disclosure of "transactions" contain an express suggestion of "wrongdoing" or "unethical or unlawful conduct," the court effectively read the broad term "transactions" out of the statute by collapsing the phrase "allegations or transactions" into the single, narrower term "allegations." Cf. *Schindler Elevator Corp v United States ex rel Kirk*, 131 S Ct 1885, 1891 (2011) ("The phrase 'allegations or transactions' in [the federal FCA] . . . suggests a wide-reaching public disclosure bar. Congress covered not only the disclosure of 'allegations' but also 'transactions,' a term that courts have recognized as having a broad meaning."). The result is an overly narrow, wooden, and divorced from context definition of the public disclosure bar that runs counter to the Legislature's intent of prohibiting parasitic *qui tam* lawsuits. See, e.g., *Jones*, *supra* at 335.

Second, despite recognizing that the *Wall Street Journal* article permitted an inference of the alleged violations of the Substitution Statute (indeed, the inference was quite strong, given the article's comparative description of profits from the generic drugs as exceeding those of the brands), which Gurganus directly links to the false claim requirement of the MFCA, the court thought that something more was needed when the article, "[s]tanding alone," did not disclose violations of the MFCA. (See Op 7, JA 554a.) The court erred because, as the above authorities all recognize, "[a]ll that is required is that the public disclosures put the government on notice to the *possibility* of fraud." *Dingle*, *supra* at 214 (emphasis added). Since the public sources attached to Gurganus's *qui tam* complaint disclosed a higher mark up on generic prescription drugs—which she alleges is, in and of itself, a clear violation of the Substitution Statute—the State of Michigan was on notice that the same alleged violation of the Substitution Statute could have been taking place under the State's Medicaid program. No more was needed.

B. Gurganus Cannot Meet Her Burden And Demonstrate That She Is An Original Source Of The Publicly Disclosed Information.

Because the Court of Appeals erroneously concluded that the public disclosure bar was not triggered, it did not decide whether Gurganus qualified as an "original source." No remand on that issue is necessary, however, because the original source argument is fully developed and does not require the Court of Appeals' input.

To be an "original source," Gurganus must establish, *as to each defendant*, that (1) "she had direct and independent knowledge of the information on which the allegations are based," and (2) she "voluntarily provided the information to the Attorney General before filing an action based on that information under this Section." MCL 400.610a(13). "Direct" means "first hand knowledge," and "independent" means "that the information known by the relator does not

depend or rely upon the public disclosures." *United States ex rel McKenzie v BellSouth Telecomms, Inc*, 123 F3d 935, 942 (CA 6, 1997).

Gurganus cannot meet her burden of establishing that she is an "original source" of the publicly disclosed information underlying her complaint. While she has certain limited confidential information from her employer, a Kroger West Virginia pharmacy, she admits to having no personal or specific information about any defendant's practices in Michigan or about any of the non-Kroger defendant's practices anywhere. (2/11/10 Tr 30, JA 172a; 5/11/10 Tr 62, JA 471a.) As Gurganus's counsel admitted, "we cannot sit here today and tell you to the penny what any of the Defendants other than Kroger paid to acquire the generic drugs. We can't do that. We acknowledge that." (5/11/10 Tr 62, JA 471a.) As to all other defendants but Kroger, this admission alone should end the inquiry, because the original source requirement must be satisfied as to each defendant. More generally, Gurganus has no *original*, Michigan-specific information to support her allegation of Medicaid fraud for any defendant in Michigan. She has no first-hand knowledge of any fraudulent transaction by any defendant in Michigan. As such, the circuit court correctly held that she does not qualify as an "original source" with standing to act as a *qui tam* relator.

In keeping with the Michigan Legislature's careful limits against parasitic, speculative, and wasteful *qui tam* lawsuits, Gurganus's lawsuit should be dismissed.

RELIEF REQUESTED

With respect to the questions addressed in this brief, the decision of the Court of Appeals should be reversed and the circuit court's judgments dismissing each of the three underlying lawsuits with prejudice should be reinstated.

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Respectfully submitted,

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