IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA *Ex Rel.* Linda Nicholson Plaintiffs, vs. Lilian Spigelman M.D., Hephzibah Children's Association, and Sears Pharmacy, Defendants.	)	Case No. 10 C 3361 The Honorable Gary Feinerman Magistrate Judge Sidney I. Schenkier

RESPONSE BY *RELATOR* NICHOLSON TO DEFENDANTS' CONSOLIDATED MOTION TO DISMISS PURSUANT TO F.R.CIV.P. 9(B)

Qui tam Relator Nicholson opposes defendants' Consolidated Motion to Dismiss Pursuant to F.R.Civ.P. 9(b).

I. FACTUAL CONTEXT

Relator's complaint alleges that on stated dates in 2004, five prescriptions of the psychotropic drug Celexa, were written *not for any medically accepted indication*, by defendant Spigelman for defendant Hephzibah to take to and have filled at defendant Sears Pharmacy. Sears submitted said prescriptions to Medicaid for reimbursement, as both Spigelman and Hephzibah certainly knew it would do. Prescriptions presented to Medicaid that are not for a medically accepted indication are not properly reimbursable

and therefore false claims. Surrounding these bare facts, there is of course a longer narrative perspective which relator will briefly summarize here.

Relator's child was taken from her at the age of three by the State of Illinois. During four years in foster care at various state licensed facilities, the child was given many psychiatric drugs, individually and in many combinations and cocktails. Relator, along with her adult daughter, was generally horrified at the results of this continued drugging. Aware of possible and apparent serious side effects outlined in published literature, and from their own continuing observation of the child, they repeatedly begged any and all authorities, doctors and foster care facilities whose attention they could garner, to stop drugging the child merely to suppress or disable her from behavior which was inconvenient for her keepers in an institutional setting. This was a long, heartbreaking and nearly hopeless struggle.

Eventually, within approximately a year after the Celexa prescriptions listed in the complaint in this case were filled, Relator won back full legal custody of her child. Bringing the child home from the final foster care facility, and ensuring that she was safely withdrawn from the neuroleptic drugs that never benefitted anyone but the intolerant and unhelpful "authorities" in charge of her, proved to be the correct solutions which finally resolved any remaining difficulties and enabled Relator's child to become the normal teenager that she is today.

Hephzibah was the final foster care facility where Relator's child was kept and medicated. Dr. Spigelman was the contracted psychiatrist right down the block, called in to write prescriptions to control the behavior of children at Hephzibah. Sears was the pharmacy a short distance away, where Hephzibah employees took prescriptions, often

walking with several children in line and holding hands, to pick up the dangerous and cruelly debilitating drugs Spigelman prescribed.

Relator elected to bring this lawsuit against Hephzibah, Spigelman and Sears, not directly over the severe existential damage done to her own child, but rather on behalf of the United States of America, whose people unwittingly paid taxes to partially finance this human tragedy in direct contravention of plain legal restrictions against it.

II. PARTICULARITY OF ALLEGATIONS

The *sine qua non* of Rule 9(b) in these types of cases is the identification of individual offending prescriptions. Most of the argument and discussion in case law has been over whether one can satisfy particularity *without* having identified offending prescriptions. See, e.g., Hopper v. Solvay Pharms., Inc., 588 F.3d 1318, (11th Cir. 2009); United States ex rel. Rost v. Pfizer, Inc., 507 F.3d 720 (1st Cir. 2007); United States ex rel. Polansky v. Pfizer, Inc., 2009 U.S. Dist. LEXIS 43438 (E.D.NY 2009); United States ex rel. Franklin v. Parke-Davis, 147 F. Supp. 2d 39 (D.Mass. 2001); United States ex rel. McDermott v. Genentech, Inc., 2006 U.S. Dist. LEXIS 90586 (D.Maine 2006); United States ex rel. Kennedy v. Aventis Pharms, 2008 U.S. Dist. LEXIS 100444 (N.D. Ill. 2008). "Typically, FCA claims fail because the plaintiffs can only point to a fraudulent scheme and are unable to present evidence at an individualized transactional level." U.S. ex rel Walner v. Northshore University Healthsystem, 660 F.Supp.2d 891, at 896 (N.D.Ill. 2009).

In this case, relator did not begin with any general fraudulent scheme and then attempt to allege false claims which should be presumed from those circumstances, but quite the opposite. The complaint identifies individual prescriptions, a specific patient,

the doctor who wrote the prescriptions, the facility which requested and administered the prescriptions, the pharmacy which filled them and submitted the claims to Medicaid, with precise dates and amounts of money. Relator alleges that causing or presenting claims to Medicaid for outpatient prescriptions that are not for medically accepted indications are false claims, and then identifies five such prescriptions. The particularity requirement of Rule 9(b) is therefore met.

"It is enough to show, in detail, the nature of the charge, so that vague and unsubstantiated accusations of fraud do not lead to costly discovery and public obloquy…. To say that fraud has been *pleaded* with particularity is not to say that it has been *proved* (nor is proof part of the pleading requirement)." U.S. ex rel Lusby v. Rolls Royce Corp., 570 F.3d 849, at 854-5 (7th Cir. 2009). Relator's allegations certainly show the nature of the charge in sufficient detail by identifying specific, individual prescriptions. In other words, the Complaint satisfies the "who, what, when, where, and how" requirements of Rule 9(b) as explicated in Lusby. It is just not very complicated: Relator alleges the defendants caused or presented identified prescriptions to Medicaid that were not for a medically accepted indication and therefore not covered under Medicaid. Defendants dispute that Medicaid coverage is limited to "covered outpatient drugs" as statutorily defined – i.e., drugs prescribed for "medically accepted indications" as statutorily defined. However, it is quite clear what is being alleged to constitute the false claims. There is no particularity problem with the Complaint.

Perhaps defendants can make claims or defenses, as may be implied by their Rule 9(b) motion, e.g., that Spigelman had no idea her prescriptions would ever be presented to Medicaid for reimbursement; or that despite the fact of Relator's seven-

year-old child being in the continuous custody and control of Hephzibah at the time, the foster care facility took no part at all in these five identified prescriptions being written and filled. Perhaps Sears will argue that it cannot know what Relator means in alleging that it presented claims for these five specifically identified prescriptions to "Medicaid", because there are so many different ways to present claims and so many different agencies called Medicaid; and perhaps Relator is wrong about there being *no* medically accepted indication *whatsoever*, for Celexa, for *a seven-year-old child*.

Nevertheless, these would all be factual issues. As far as pleadings are concerned, Relator has adequately alleged the elements of her FCA claim with sufficient particularity.

Should this Court determine, however, that more particulars are required, identifying the requirements, Relator expects to be able to amend the Complaint to include such additional specificity.

III. CONCLUSION

Wherefore, Relator Nicholson respectfully requests that this Honorable Court deny defendants' Consolidated Motion to Dismiss Pursuant to F.R.Civ.P. 9(b).

Respectfully submitted,

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