UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

United States ex rel. Reynold A. McClain, RPH, Plaintiff, v. Nutritional Support Services, L.P., Defendant.	Civil Action No. 6:17-cv-2608-BHH **Opinion and Order**

This matter is before the Court on Defendant Nutritional Support Services, L.P.'s March 27, 2019 motion to dismiss the Second Amended Complaint filed by Relator Reynold A. McClain. (ECF No. 54.) The United States of America filed a statement of interest in accordance with 28 U.S.C. § 517. (ECF No. 55.) Relator Reynold A. McClain filed a response in opposition on April 10, 2019. (ECF No. 56.) Defendant Nutritional Support Services, L.P. filed a reply on April 17, 2019. (ECF No. 57.) The relevant issues are fully briefed and the matter is ripe for disposition. For the reasons set forth in this Order, the motion to dismiss is granted.

BACKGROUND

This action is brought by Relator Reynold A. McClain ("Relator") on behalf of the United States of America ("Government") under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.* Relator, a former pharmacist at Nutritional Support Services, L.P. ("NSS"), generally alleges that NSS submitted or caused the submission of false claims to federal healthcare programs by misreporting the National Drug Codes ("NDCs") of medications dispensed by NSS for patients at nursing homes and assisted

living facilities. The Government investigated Relator's allegations and declined to intervene as a party in the lawsuit. (*See* ECF Nos. 16 & 17.) Individuals like Relator may pursue FCA actions following the Government's declination to intervene so long as they offer specific facts to support their allegations. The question before the Court is whether Relator's Second Amended Complaint ("SAC") fails to state an actionable FCA claim and must be dismissed as a matter of law.

NSS operates a wholesale pharmacy that dispenses prescription medications for use at nursing homes and assisted living facilities throughout South Carolina. (ECF No. 51 at 2.) Relator is a registered pharmacist who worked at NSS from approximately May 24, 2011, until August 23, 2016. (*Id.* ¶ 30.) While at NSS, Relator staffed the pharmacy and filled patients' medication prescriptions based on orders from nursing homes' and assisted living facilities' attending healthcare providers. (*Id.*)

NSS typically dispensed medications for such patients on a seven-day cycle using an automated packaging system known as the TCGRX. (*Id.* ¶¶ 22, 44.) The automated packaging system was configured to verify a match between the NDC of the medication prescribed and the NDC of the medication dispensed. (*Id.* ¶ 105.) The SAC alleges that in some instances, however, NSS dispensed medications without using its automated packaging system. (*Id.* ¶ 22.) This occurred when new nursing home or assisted living facility patients needed medication immediately, before the medication could be entered into the automated packaging system, and when changes were made to existing patients' prescriptions. (*Id.*) The SAC refers to medications dispensed in these instances as "transitional" medications. (*Id.* ¶ 62.) The use of such medications was temporary until the patients were set up to receive medication through the TCGRX system. (*Id.* ¶¶ 107, 130.)

The SAC alleges that NSS defrauded the federal government during "virtually all" transitional periods by reporting the NDC of the prescribed medication while dispensing a less expensive, generic version of the medication. (*Id.* ¶¶ 22–23, 107, 130.) That practice allegedly caused the government to overpay NSS for medications actually dispensed. (*Id.* ¶ 130.)

Paragraph 126 of the SAC purports to identity twelve "false claims" submitted pursuant to the alleged scheme. The alleged information derives from "photographs of the labels of approximately eleven of the fraudulently dispensed and claimed prescription[s] dispensed to federal payer insureds." (Mot. for Leave to File SAC, ECF No. 39 at 7.) The SAC does not provide details regarding the submission of specific false claims, but instead alleges generally that false claims were submitted to various federal payers including Medicare Part A, Medicare Part D plans, Medicaid, the Federal Employees Health Benefit Program ("FEHB"), and TriCare.[1] (*Id.* ¶¶ 40–53.)

The SAC alleges that "in 2014 and on multiple occasions into 2016," Relator complained to his supervisors that NSS "was involved in the submission of false claims, not generalized misconduct, all the time realizing based upon his knowledge of the scheme previously used by *Omnicare*, that a cause of action would lie in NSS' fraudulent activities." (*Id.* ¶ 159.) The SAC does not provide further factual detail about such

[1] The SAC also alleges, without factual support, that NSS provides prescription medications to residents of nursing facilities "reimbursed by way of Medicare Part B." (ECF No. 51 at 2, ¶ 42.) Medicare Part B provides only outpatient coverage and generally limits coverage of prescription drugs to treatments provided in a doctor's office or hospital outpatient setting such as those administered through infusion or injection. *See* Centers for Medicare and Medicaid Services ("CMS"), *Your Medicare Coverage: Prescription Drugs (Outpatient)*, https://www.medicare.gov/coverage/prescription-drugs-outpatient (stating, "Medicare Part B (Medical Insurance) covers a limited number of outpatient prescription drugs under limited conditions," and listing examples of drugs covered by Part B). The SAC provides no explanation of how prescriptions for any such services would have been dispensed by NSS. The two oblique references to Medicare Part B in the SAC are conclusory and do not warrant further discussion in this Order.

complaints, but avers that

> in response to his protected activity, expressed through these requests to correct the claims fraud and repeated notices of the fraud to management and in light of their being refused, Relator was chastised and subjected to an objectively hostile work environment, harassed, threatened and discriminated against in his attempt to simply accurately identify, understand and stop the fraudulent claims and certain practices jeopardizing proper patient care.

(*Id.* ¶ 163.) Relator was terminated for improperly obtaining for personal use prescription medication from another NSS employee, but the SAC alleges that this reason was pretextual and that Relator was terminated in retaliation based upon his knowledge of, refusal to participate in, and efforts to combat the alleged fraud. (*Id.* ¶¶ 14, 164–69.)

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) "challenges the legal sufficiency of a complaint, considered with the assumption that the facts alleged are true." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009) (internal citations omitted). The SAC asserts substantive FCA claims under 31 U.S.C. §§ 3729(a)(1)(A), (a)(1)(B), and (a)(1)(G). (ECF No. 51 ¶¶ 124–56.) Because FCA claims sound in fraud, FCA plaintiffs must satisfy both Rule 8(a)'s plausibility requirement and Rule 9(b)'s heightened standard to plead fraud with particularity. *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2004 n.6 (2016).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556)). Although the allegations in a complaint generally must be accepted as true, that principle "is inapplicable to legal conclusions," and the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (citations and quotation marks omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id*. at 678 (quoting *Twombly*, 550 U.S. at 557). Stated differently, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id*. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Still, Rule 12(b)(6) "does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013) (quoting *Neitzke v. Williams,* 490 U.S. 319, 327 (1989)). "A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss . . . ." *Sepulveda-Villarini v. Dep't of Educ. of Puerto Rico*, 628 F.3d 25, 30 (1st Cir. 2010).

Rule 9(b) imposes a heightened pleading standard on fraud claims, under which a plaintiff must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The purposes of Rule 9(b) include "providing notice to a defendant of its alleged misconduct," "preventing frivolous suits," "eliminating fraud actions in which all the facts are learned after discovery," and "protecting defendants from harm to their

good will and reputation." *U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456 (4th Cir. 2013) (quotation marks and modifications omitted). Rule 9(b)'s particularity requirement "serves as a necessary counterbalance to the gravity and quasi-criminal nature of FCA liability," and its purposes "apply with special force to FCA claims and the accompanying presentment requirement." *U.S. ex rel. Grant v. United Airlines, Inc.*, 912 F.3d 190, 197 (4th Cir. 2018) (citations and quotation marks omitted). Given that *qui tam* relators are eligible to receive between 25 and 30 percent of any FCA award or settlement in a non-intervened case, *see* 31 U.S.C. § 3730(d)(2), Rule 9(b) also checks "the *qui tam* plaintiff's particular incentive to file suit as a pretext for a fishing expedition." *U.S. ex rel. Campos v. Johns Hopkins Health Sys. Corp.*, No. 17-cv-2156-CCB, 2018 WL 1932680, at *8 (D. Md. Apr. 24, 2018).

DISCUSSION

I. Whether the SAC fails to plead the presentment of false claims with sufficient particularity to survive Rule 9(b) scrutiny

In the SAC, Relator alleges that NSS violated the FCA by, *inter alia*, knowingly presenting, or causing to be presented, false or fraudulent claims for payment or approval to various federal healthcare programs in violation of 31 U.S.C. § 3729(a)(1)(A). (ECF No. 51 ¶¶ 55–56, 124–37.) The Fourth Circuit Court of Appeals has described two ways in which a *qui tam* plaintiff may adequately plead the presentment requirement under Rule 9(b):

> First, a plaintiff can allege with particularity that specific false claims actually were presented to the government for payment. This standard requires the plaintiff to, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby. Alternatively, a plaintiff can allege a pattern of conduct that would *necessarily* have led to submission of false claims to the government for payment.

Grant, 912 F.3d at 197 (citations, quotation marks, and modifications omitted; emphasis in original).

A. Whether the SAC alleges with particularity that specific false claims actually were presented to the government for payment

In the Fourth Circuit, when a relator attempts to satisfy § 3729(a)(1)(A)'s presentment requirement by identifying representative false claims submitted to the government, the relator must describe with particularity (1) the time, place, and contents of the false representations, (2) the identity of the person making the misrepresentation, and (3) what he obtained thereby. *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008). The SAC does not satisfy these requirements and the Court finds that to the extent Relator's FCA claims attempt to show presentment by way of representative false claims, his FCA claims are subject to dismissal.

Paragraph 126 of the SAC identifies twelve "false claims" by recounting the label information from prescription medications allegedly dispensed by NSS. (*See* ECF No. 51 ¶ 126; ECF No. 39 at 7.) Simply put, this information is insufficient to satisfy pleading requirements to show presentment by way of claims that actually were presented to the government for payment. "A 'claim' is 'any request or demand, whether under a contract or otherwise, for money or property that . . . is presented to an officer, employee, or agent of the United States.'" *Grant*, 912 F.3d at 196 (quoting 31 U.S.C. § 3729(b)(2)(A) & (A)(i)). Prescription labels themselves plainly do not constitute "claims" and there is no allegation that the prescription labels in question were submitted to a government entity to induce payment. The SAC does not provide the date of the alleged claims, the entity or individual that submitted any claim, the amount of any claim, the amount of improper reimbursement obtained through any claim, or the federal payer from which reimbursement was sought

and obtained for any claim. Moreover, the SAC does not allege specific facts to show that the allegedly misreported drugs were in fact cheaper than the alternatives.

Rather, for each of the alleged "false claims" itemized in paragraph 126, Relator states in conclusory fashion that NSS dispensed to a federally-insured patient an order "having an NDC of [numeric code for putatively generic drug] when in reality NSS claimed, was reimbursed and overpaid under the fraudulently-submitted NDC [numeric code for putatively non-generic drug]." (*See* ECF No. 51 ¶ 126.) Yet, the Fourth Circuit has cautioned against presuming, from the mere existence of a fraudulent scheme, that false claims have been submitted:

> [W]e observe that Relator essentially has alleged that some claims must have been presented to the government for payment, because prescriptions of this kind frequently and routinely are obtained by persons who participate in health care programs sponsored by the federal government, or because federally insured patients received off-label prescriptions. As we have explained, *allegations of this type are insufficient because they are inherently speculative in nature*.

Nathan, 707 F.3d at 461 (emphasis added). Furthermore, Relator cannot claim to have personal knowledge about the specific medications identified in paragraph 126—which were allegedly dispensed between August 2017 and February 2018—because they were dispensed long after Relator's termination from NSS in August 2016 and in some instances even after the initial complaint was filed in this case. (*See* ECF No. 51 ¶¶ 30, 126; ECF No. 1 (filed September 27, 2017).) Merely pleading facts to show that two different NDCs were associated with the same dispensed medication(s) at different times during the cost reimbursement process falls short of the Rule 9(b) pleading standard for FCA claims, and Relator's § 3729(a)(1)(A) cause of action is subject to dismissal on this basis.

B. Whether the SAC alleges conduct that necessarily led to the submission of false claims

As an alternative to pleading representative false claims, a *qui tam* plaintiff in the Fourth Circuit "can allege a pattern of conduct that would '*necessarily* have led to submission of false claims' to the government for payment." *Grant*, 912 F.3d at 197 (quoting *Nathan*, 707 F.3d at 457) (emphasis in original, modification omitted). In *Grant*—a case alleging that United Airlines billed the federal government for fraudulent repairs pursuant to its maintenance service contract with the U.S. Air Force—the court held that the relator failed to state a claim under § 3729(a)(1)(A) because "while the allegations state with particularity that United engaged in at least some fraudulent conduct, the SAC fails to provide the last link which is critical for FCA liability to attach: namely, that this scheme necessarily led to the presentment of a false claim to the government for payment." *Id.* It was important to the *Grant* court's reasoning that "the SAC le[ft] open the possibility" that: (1) the government was not actually billed for the fraudulent repairs because intervening subcontractors declined to bill the government for all the repairs in question or because the government refused to pay the full invoiced amount; and (2) any fraudulent repairs were remedied prior to government payment. *Id.* at 198. The *Grant* court further held, "Rule 9(b)'s heightened pleading standard requires that plaintiffs connect the dots, even if unsupported by precise documentation, between the alleged false claims and government payment. This is especially so where, as here, the contractual relationship between the defendant and subcontractor is so attenuated." *Id.* at 199.

The holding in *Grant* demonstrates that the presence of intervening entities between the *qui tam* defendant and the federal payer in a billing and reimbursement

process make it harder, as a practical matter, for a FCA plaintiff to "connect the dots." In the instant case, the SAC alleges that "[i]n thousands of cases" false claims were submitted to multiple government healthcare programs, but does not describe the process of claim submission. (*See* ECF No. 51 at 2–12, 18–20.) The SAC acknowledges that the claim submission process varies for each healthcare program in question (*see id.* at 12–16, 18–24), and while it at times avers that NSS "directly" submitted "false claims" for reimbursement (*see id.* ¶¶ 12, 21, 28, 35, 49), it does nothing to describe NSS's supposed reimbursement process or the tendering of actual claims to any government entity. Rather, the SAC is silent on how or when the government was billed for the medications in question and "leaves open the possibility" that it was ultimately billed the proper amount, or that if it was overbilled the government declined to pay more than the proper value associated with each medication. Moreover, in his opposition to the motion to dismiss Relator does not contest that it was in fact intermediate entities—whether healthcare facilities whose patients were dispensed prescriptions or Medicare Part D plan sponsors—and *not* NSS that would have directly billed the government for the medications in question. (*See* ECF No. 56 at 22 ("NSS had no choice but to use intermediaries . . . .").)

The closest the SAC comes to discussing the mechanics of submitting supposedly fraudulent claims is when it states that NSS generated requests for payment on "CMS 1500 forms," or their electronic equivalent, which allegedly displayed the NDC of a medication different than the medication dispensed in a particular case. (*See id.* ¶¶ 23, 54, 67a., 140.) The SAC further states that this alleged discrepancy between the NDC of the drug dispensed during "transition" and the NDC of the drug submitted for payment

resolved each time "that latter medication [was] dispensed by the TCGRX when the medication later went into maintenance use no less than one week later, but frequently significantly later." (*Id.* ¶ 23.) Importantly, the SAC alleges that the medications dispensed by NSS bore labels containing *both* the NDC of the medication dispensed to the patient *and* the NDC of the medication allegedly misreported to federal payers. (*Id.* ¶ 67.) In its memorandum in support of the motion to dismiss, NSS persuasively argues:

> The SAC pleads no facts to exclude the possibility that the intervening entity, which was in possession [of] both NDCs, billed the government under the correct NDC, if it would have billed the government at all for those medications. The nursing facilities or Part D plan sponsors, after all, would have their own obligation to bill the government accurately. Because the SAC provides no allegations about how any other parties processed information provided by NSS or submitted claims to the government based on that information, the Court cannot conclude that those parties *necessarily* billed the government using incorrect NDCs.

(ECF No. 54-1 at 23 (emphasis in original).) The Court agrees with this analysis and finds that Relator's § 3729(a)(1)(A) cause of action fails to plead conduct that necessarily led to the submission of false claims. Accordingly, the § 3729(a)(1)(A) claim is subject to dismissal for failure to satisfy the strictures of Rule 9(b) in the FCA context.

II. Whether the SAC fails to plead specific facts to support each of the alleged FCA claims as required by Rule 9(b)

In the first three causes of action, Relator alleges violations of 31 U.S.C. §§ 3729(a)(1)(A), 3729(a)(1)(B), and 3729(a)(1)(G) respectively. Subsection (A) imposes liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). Subsection (B) imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). To establish a violation of Subsection (A) or Subsection (B), a relator must

allege: "(1) that [the defendant] made a false statement or engaged in a fraudulent course of conduct; (2) that such statement or conduct was made or carried out with the requisite scienter; (3) that the statement or conduct was material; and (4) that the statement or conduct caused the government to pay out money or to forfeit money due." *U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 729 (4th Cir. 2010). Subsection (G), dubbed the FCA's "reverse false claims" provision, imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G). The Court finds that, in addition to inadequately pleading the presentment of false claims, the SAC also lacks other facts necessary to state viable FCA claims under the liability theories alleged.

A. Subsections (A) and (B) – False Claims and False Statements

Having already discussed the deficiencies in the SAC's false claims allegations, the Court will not belabor the point here. Suffice it to say, Rule 9(b) requires a relator to plead the *details* of the underlying fraudulent conduct in order to state a claim pursuant to § 3729(a)(1)(A). "These facts are often referred to as the 'who, what, when, where, and how' of the alleged fraud." *Wilson*, 525 F.3d at 379 (citations and quotation marks omitted). The failure to allege these specifics renders a § 3729(a)(1)(A) claim subject to dismissal. *See, e.g.*, *U.S. ex rel. Elms v. Accenture LLP*, 341 F. App'x 869, 873 (4th Cir. 2009). Relator's allegations baldly assert "by information and belief, . . . that the fraud as pled is being perpetrated at all NSS locations in multiple jurisdictions in the United States

of America, through NHC's various service areas." (ECF No. 51 at 3.) But one searches the SAC in vain for any details as to the identity of the person(s) making the alleged misrepresentations, any specifics regarding their intent, or any description of what additional monies NSS allegedly obtained as a result of claiming reimbursement for more expensive drugs. The § 3729(a)(1)(A) cause of action fails to state a claim and is dismissed.

The second cause of action in the SAC alleges that NSS knowingly made false records or statements in order to get its "false claims" paid or approved by the government in violation of 31 U.S.C. § 3729(a)(1)(B). (ECF No. 51 ¶¶ 138–47.) However, the SAC's failure to adequately plead presentment of false claims (*see supra* at 6–10) invalidates the § 3729(a)(1)(B) allegations along with the § 3729(a)(1)(A) allegations. In order to successfully plead a § 3729(a)(1)(B) claim, a relator must, *inter alia*, "show that a false claim was submitted to the government." *Grant*, 912 F.3d at 200. Relator has not done that in the SAC and the § 3729(a)(1)(B) claim fails for that reason. Additionally, although the SAC cursorily references various types of documents connected to the drug reimbursement process employed by the payment systems at issue—e.g., "CMS 1500 forms" (*see* ECF No. 51 ¶ 140) and "Prescription Drug Event ('PDE') Records" (*see id.* ¶¶ 20–21)—it lacks any particularity regarding the supposed false records or statements that NSS allegedly created, and any specificity regarding their submission to federal payers by NSS or the intervening entities involved. Essentially, the § 3729(a)(1)(B) claim is just a rehashed version of the § 3729(a)(1)(A) claim. The § 3729(a)(1)(B) cause of action fails to state a claim and is dismissed.

B. Subsection (G) – Reverse False Claims

The SAC's allegations pursuant to § 3729(a)(1)(G) are that NSS falsely certified the claims data it submitted was accurate and complete, and by "certifying compliance . . . NSS used those false records or statements in order to conceal, avoid and/or decrease its obligation to pay or transmit monies to offer reimbursement and a reason for same to the Federal Healthcare Programs . . . ." (ECF No. 51 ¶¶ 150–51.) With risk of sounding repetitive, the Court notes that Relator's § 3729(a)(1)(G) claim is simply a rehashed version of his § 3729(a)(1)(A) claim. Like its counterpart, the § 3729(a)(1)(G) claim lacks the particularity and specificity necessary to satisfy Rule 9(b). (*See id.* ¶¶ 77–79, 148–56.) Moreover, courts have held that a relator may not successfully recast the conduct giving rise to a false presentment claim as a reverse false claim. *See, e.g.*, *U.S. ex rel. Lutz v. Berkeley Heartlab, Inc.*, 247 F. Supp. 3d 724, 733 (D.S.C. 2017) ("[I]f the conduct that gives rise to a traditional presentment or false statement action also satisfies the demands of section 3729(a)(1)(G), then there would be nothing 'reverse' about an action brought under that latter section of the FCA." (citation and quotation marks omitted)). Accordingly, the § 3729(a)(1)(G) cause of action fails to state a claim and is dismissed.

III. Whether the SAC fails to plead any alleged misstatement that was material to payment

In its memorandum, NSS makes extensive argument regarding its assertion that the SAC fails to sufficiently plead that NSS' alleged conduct was material to the government's payment of claims. (*See* ECF No. 54-1 at 30–36.) The Government filed a second statement of interest specifically to contest NSS' argument that the Court may consider the United States' decision not to intervene in this *qui tam* case as evidence that the Government deems Relator's allegations insufficient to meet the materiality

requirement of the FCA. (*See* ECF No. 55 at 2; *see also* ECF No. 54-1 at 36 (arguing, "[U]nder Fourth Circuit precedent, the government's decision to decline to intervene in this action weighs against finding that the accuracy of NDS is material to the government's payment of claims.").) Given that that the Court has already found that Relator's § 3729 allegations fail to state a valid FCA claim, the discussion of materiality is moot and the Court declines to comment on it further. Accordingly, the Court takes no position on whether the Government's declination to intervene in an FCA action may be considered as relevant to the question of materiality in any particular case.

IV. Whether the SAC fails to plead an FCA retaliation claim

Relator's retaliation cause of action avers that he was terminated from his position as a pharmacist at NSS in violation of 31 U.S.C. § 3730(h) because he discovered the alleged fraudulent scheme regarding substitution of improper NDCs and confronted his employer, demanding that the practice be remediated. (*See* ECF No. 51 ¶¶ 157–72.) "[T]o sufficiently plead a § 3730(h) retaliation claim and thus survive a motion to dismiss, a plaintiff must allege facts sufficient to support a 'reasonable inference' of three elements: (1) he engaged in protected activity; (2) his employer knew about the protected activity; and (3) his employer took adverse action against him as a result." *Grant*, 912 F.3d at 200 (citations omitted).

With respect to the first element, a FCA plaintiff may show he engaged in protected activity by demonstrating either: (1) conduct "in furtherance of an [FCA] action," or (2) "other efforts to stop 1 or more violations of [the FCA]." 31 U.S.C. § 3730(h)(1). An employee displays conduct in furtherance of an FCA action when that conduct involves "a distinct possibility" of litigation. *Mann v. Heckler & Koch Def., Inc.*, 630 F.3d 338, 344 (4th Cir. 2010). An employee displays other efforts to stop FCA violations when he

demonstrates that "he believed his employer was violating the FCA, that this belief was reasonable, that he took action based on that belief, and that his actions were designed to stop one or more violations of the FCA." *Grant*, 912 F.3d at 201–02.

The Court finds that Relator has not sufficiently plead either prong of the first element of his retaliation claim. The SAC states that "in 2014 and on multiple occasions into 2016, Relator specifically alleged to [his supervisors] that NSS was involved in the submission of false claims, not generalized misconduct, all the time realizing based upon his knowledge of the scheme previously used by *Omnicare*, that a cause of action would lie in NSS' fraudulent activities." (*Id.* ¶ 159.) Here, Relator reframes an allegation that he previously admitted was "mispled" (*see* ECF No. 41 at 20), which is premised on the notion that he relied on the development of FCA claims in *U.S. ex rel. Corsi v. Omnicare, Inc.*, No. 1:14-cv-01136 (D.N.J.) to know that FCA claims would lie against NSS. However, the *Omnicare* case, which settled early in its procedural history, remained under seal until after Relator was terminated from NSS, and therefore could not have influenced Relator's knowledge regarding the supposed merit of FCA claims in the instant matter. *See Omnicare*, No. 1:14-cv-01136 (D.N.J.), ECF No. 9 (order to unseal filed May 16, 2017). Moreover, the fact that Relator was employed at Omnicare prior to his employment at NSS and was supposedly "aware of its illegal practices through first-hand experience and other Omnicare personnel's personal experience relayed to him" (*see* ECF No. 56 at 36) is completely irrelevant to whether his conduct in the instant matter involved a "distinct possibility" of litigation. The Court finds that the SAC does not plead conduct substantiating such a "distinct possibility."

Furthermore, while Relator may indeed have believed that NSS was violating the

FCA during the stated time period, the SAC simply does not include *facts* about actions he took to stop the alleged FCA violations. Relator states, without factual support, that he expressed concerns to his supervisors "on multiple occasions" over a two year period, and claims that one supervisor "admitted the scheme as pled and perpetrated, acknowledging erroneous NDC, submission of same reduced to claims that were subsequently paid, yet did not specifically term the claims false or fraudulent." (ECF No. 51 ¶ 162.) In *Grant*, the Fourth Circuit held that the relator sufficiently alleged protected activity because his pleading described the contents of an email he sent to the defendant's manager. 912 F.3d at 202. Relator's SAC, on the other hand, includes no such detail. Rather, it reads like a threadbare recitation of the elements of an FCA retaliation cause of action. (*See* ECF No. 51 ¶¶ 157–72.) In this way, Relator's retaliation claim fails Rule 8's plausibility requirement because it has alleged, but not shown, that he engaged in protected activity. *See Iqbal*, 556 U.S. at 678.

Regarding the second element, the Court finds that the SAC does not sufficiently allege that NSS was on notice of protected activity. First, this conclusion follows directly from the Court's prior finding that Relator has not adequately pled he engaged in protected activity. Second, for the reasons already explained, Relator's bald allegation that he "confronted his employer, demanding that said practices, and other areas of concern be addressed in that they represented illegal, fraudulent claims potentially leading to liability [on] behalf of NSS," simply does not provide the factual detail necessary to plausibly show NSS was on notice of "protected activity" by Relator. Accordingly, the second element of a FCA retaliation claim is not satisfied.

Finally, with respect to the third element, the Court finds that the SAC fails to allege

sufficient facts to show that Relator expressing his concerns to supervisors was the true cause of his termination. Even if the first two elements of a retaliation claim were satisfied here, and even putting aside the fact that Relator—a licensed pharmacist—admits to improperly obtaining prescription medication belonging to another NSS employee (*see* ECF No. 51 ¶¶ 14, 164), the length of time between Relator's supposed "protected activity" and his termination weighs against any inference of a causal connection. *See, e.g.*, *Allen v. Rumsfeld*, 273 F. Supp. 2d 695, 708 (D. Md. 2003) ("[A] lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action negates any inference that a causal connection exists between the two."). Accordingly, the third element of a FCA retaliation claim is not satisfied and the claim is subject to dismissal under Rules 8(a) and 12(b)(6).

CONCLUSION

For the reasons set forth above, Defendant Nutritional Support Services, L.P.'s motion to dismiss the Second Amended Complaint pursuant to Rules 8(a), 9(b) and 12(b)(6) (ECF No. 54) is GRANTED.

IT IS SO ORDERED.

/s/ Bruce Howe Hendricks
United States District Judge

March 14, 2020
Greenville, South Carolina