IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JUSTIN PACULT, MELISSA BARGFREDE, JR TOLEDO, NEIL THOMPSON and DANIEL BIEURANCE, individually and as *qui tam* relators for UNITED STATES OF AMERICA, STATE OF CALIFORNIA, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF ILLINOIS, STATE OF INDIANA, STATE OF LOUISIANA, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MONTANA, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF NEVADA, STATE OF OKLAHOMA, STATE OF RHODE ISLAND, STATE OF TENNESSEE, STATE OF TEXAS, COMMONWEALTH OF VIRGINIA and STATE OF WISCONSIN,

Plaintiffs,

v.

WALGREEN CO.,

Defendant.

OPINION AND ORDER

08-cv-542-slc

In this *qui tam* lawsuit under the False Claims Act, 31 U.S.C. § 3729-32, and analogous state false claims statutes, plaintiffs have alleged that defendant Walgreen Co. overcharged Medicaid programs for co-payments on prescription medications ("overbilling") and billed the same services for the same patient to both Medicaid and the patient's private insurance ("double billing"). Second Am. Compl., dkt. 70. Walgreen has moved to dismiss the second amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6), asserting that it is preempted by an earlier *qui tam* lawsuit filed by plaintiffs Thompson and Bieurance against Walgreen in the U.S. District Court for the District of Minnesota, *United States ex rel. v. Walgreen Co. et al.*, D. Minn. Case No. 05-cv-759. Dkt. 74. Specifically, Walgreen contends that this court lacks subject matter jurisdiction over the current action under the "first-to-file" and "government action" bars of the False Claims Act (FCA), §§ 3730(b)(5) and (e)(3), and that *res judicata* precludes plaintiffs' claims. Walgreen also seeks sanctions pursuant to § 3730(d)(4) for what it terms a needless second round of litigation. Three days after filing its motion to dismiss, Walgreen filed a motion for supplemental relief, asking that the court either decline to exercise supplemental jurisdiction over plaintiffs' state law claims or dismiss them under substantively similar state jurisdictional bars. Dkt. 75. A separate briefing schedule was not set for that motion and plaintiffs did not address it in their response to the motion to dismiss.

I conclude that plaintiffs' claims of overbilling must be dismissed for lack of subject matter jurisdiction pursuant to the first-to-file bar because those claims are based on the same material facts underlying the Minnesota case, which was pending at the time plaintiffs filed this lawsuit. The bar does not deprive this court of jurisdiction over plaintiffs' claims of double billing because those claims relate to distinct conduct resulting in a separate injury from that alleged in the previous lawsuit.

I find that the government action bar is not applicable to the remaining double billing claims because at the time that plaintiffs filed their complaint, the federal government had not yet intervened in the Minnesota action. Further, for reasons similar to those stated above, *res judicata* also does not preclude plaintiffs from bringing these claims.

Because the first-to-file bar applies only while the initial lawsuit is pending, and the first-filed Minnesota action has since concluded, plaintiffs theoretically could refile their overbilling claims, unless some other jurisdictional bar or *res judicata* prevents this. Although the court does not currently have subject matter jurisdiction over the overbilling claims, I note that plaintiffs would face a difficult hurdle in refiling them given that they were based on the material and essential facts underlying the Minnesota action. Nonetheless, on the record submitted by the parties, I cannot conclude that plaintiffs' filing of a second action alleging overbilling was clearly frivolous, vexatious or harassing. Therefore, I am denying Walgreen's request for sanctions.

Finally, because this court has retained original jurisdiction over some of plaintiffs' claims, Walgreen's request that this court decline to exercise supplemental jurisdiction over their state law claims is moot. Although it appears that plaintiffs' state claims of overbilling are barred under the state equivalents to the federal first-to-file and government action bars, the court needs additional information before it can rule on the matter. Therefore, I am staying a decision on Walgreen's motion for supplemental relief pending further briefing.

Before setting forth the jurisdictional facts and allegations of fact relating to *res judicata*, the court must address several procedural punctilios:

PRELIMINARY MATTERS

Walgreen has raised its *res judicata* defense in the context of a Rule 12(b)(6) motion (failure to state a claim). As Walgreen notes, the Court of Appeals for the Seventh Circuit has affirmed Rule 12(b)(6) dismissals on the ground of *res judicata*. *See, e.g.*, *Czarniecki v. City of Chicago*, 633 F.3d 545 (7th Cir. 2011); *Arlin-Golf, LLC v. Village of Arlington Heights*, 631 F.3d 818 (7th Cir. 2011). However, in *Carr v. Tillery*, 591 F.3d 909, 913 (7th Cir. 2010), the court explained that "[s]ince res judicata is an affirmative defense, the defendant should raise it and then move for judgment on the pleadings under Rule 12(c)." *Id.* (although district court "jumped the gun" in dismissing case under 12(b)(6), error was harmless because record already contained all information necessary to rule on defense). Therefore, it appears that with respect to *res judicata*, Walgreen should have filed a Rule 12(c) motion.

Walgreen's error is of little consequence because the same legal standard applies under Rule 12(c) and 12(b)(6). *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). Therefore, rather than require Walgreen to resubmit its motion, I will treat its Rule 12(b)(6) motion on *res judicata* grounds as a Rule 12(c) motion for judgment on the pleadings. *See Harmon v. Gordon*, 2011 WL 290432, *4 n. 3 (N.D. Ill. Jan. 27, 2011) (doing same).

Next, with its motion, Walgreen has submitted several court documents from the Minnesota lawsuit, including the docket sheet, second amended complaint, notice to intervene and settlement agreement. With their response, plaintiffs also filed a copy of the corporate integrity agreement between the U.S. Department of Health and Human Services and Walgreen from the Minnesota action. Generally, a court may not consider any facts outside the complaint in resolving a motion to dismiss or a motion for judgment on the pleadings unless it treats the motion as a motion for summary judgment pursuant to Rule 56. Fed. R. Civ. P. 12(d); *Doss v. Clearwater Title Co.*, 551 F.3d 634, 639-40 (7th Cir. 2008). However, there are a few exceptions.

In deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), this court has "not only the right, but the duty to look beyond the allegations of the complaint," *Hay v. Indiana State Board of Tax Commissioners*, 312 F.3d 876, 879 (7th Cir. 2002), and should consider "evidence that calls the court's jurisdiction into doubt," *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 990 (7th Cir. 2000). Further, on a Rule 12(b)(6) or 12(c) motion, a court may take judicial notice of documents in the public record without converting the motion into one for summary judgment. *Pugh v. Tribune Co.*, 521 F.3d 686, 691 (7th Cir.

2008); *General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080-82 (7th Cir. 1997) (noting judicial notice of prior court records is appropriate provided that finding from prior proceeding is not subject to reasonable dispute).

Accordingly, for the sole purpose of deciding this motion, I draw the following facts from plaintiffs' second amended complaint and the court record in the Minnesota case:

ALLEGATIONS OF FACT

I. The Parties and Background

Plaintiff Justin Pacult is a former Walgreen pharmacy manager and staff pharmacist for Walgreen in Minnesota. For a few years, he also worked as a Walgreen pharmacy intern in Wisconsin. Plaintiff Dan Bieurance is a licensed pharmacist who worked for many years as a Walgreen pharmacy manager in Minnesota until he resigned in 2006. Plaintiff Neil Thompson is a licensed pharmacist and attorney who currently works as a Walgreen staff pharmacist in Minnesota. Plaintiff Melissa Bargfrede is a senior Walgreen pharmacy technician in Minnesota. Plaintiff JR Toledo is a part-time Walgreen pharmacy technician and former Walgreen senior pharmacy technician in Minnesota. All five individuals are U.S. citizens and are bringing this action on their own behalf and on behalf of the U.S. government as relators.

Defendant Walgreen Co. is a nationwide retail pharmacy corporation headquartered in Deerfield, Illinois. Walgreen has at least 6,252 retail pharmacy stores in 49 states, Puerto Rico and the District of Columbia. It provides prescriptions to thousands of poor, disabled and elderly persons under the federal Medicaid program, which is administered by state agencies under agreements with the U.S. government. As a participating provider under the federal

Medicaid program, Walgreen must comply with all federal and state statutes, codes, rules and regulations relating to the Medicaid program. (Funding for federal Medicaid programs usually is shared equally between the federal government and the states, although the percentage can vary from state to state based on economic conditions within the state.)

II. The Dual-Eligible Assignment System

Every Walgreen pharmacy participates in the federal Medicaid program in the state in which the Walgreen pharmacy is located. In addition to federal Medicaid patients, Walgreen provides prescription service to patients who have private health insurance. Some customers with private health insurance also may be eligible for Medicaid. These patients are referred to as "dual-eligible" patients or customers. When dual-eligible patients apply for benefits to the state agency that administers Medicaid, they are required under 42 U.S.C. § 1396k(a)(1)(A) and 42 C.F.R. § 433.145 to assign any rights they have under their private insurance plan to the state.

One of the important rights an individual has under his or her private insurance plan is the right to buy prescription medications at a discounted, lower price. In most cases, those medications are paid for by the private insurance company, less a small deductible amount per prescription that is paid by the patient. Private insurance companies hire pharmacy benefit management companies ("PBMs") to manage and administer the prescription drug benefit under their policies. PBMs are very efficient and effective at obtaining discounts and purchasing benefits for the customers of the private insurance companies. This results in better pricing of prescriptions for the insured patients.

In all states in which Walgreen provides prescription services, PBMs are able to obtain better pricing on prescription medications than the state agency obtains when it buys drugs for Medicaid-eligible patients without private insurance (non dual-eligible). Stated another way, private health insurance companies usually purchase prescriptions at lower prices than state Medicaid agencies. In all provider contracts that Walgreen enters into with private insurance companies and PBMs, it agrees to accept as payment in full these lesser amounts agreed upon with the private insurance company. Billing for more than this amount is contrary to the private insurance contract and the assignment of that contracted rate to Medicaid. This is one of the rights and benefits assigned to Medicaid under federal statute and regulations, and the assignment documents that dual-eligible patients are required to execute. Because neither dual-eligible patients nor state Medicaid agencies are parties to Walgreen's contracts with private health insurance companies or PBMs, state government officials do not know the price benefit that the dual-eligible patients assign to Medicaid. The state Medicaid agency is at the mercy of Walgreen to calculate accurately the assigned benefit of the drug pricing.

In all of the states named as plaintiffs in this lawsuit, Medicaid is the payor of last resort, meaning that Medicaid will pay for the covered medical or pharmacy service only after all other sources of payment have paid their required amount. In the case of prescription medications, this amount is the co-payor deductible (or copayment) remaining after the private insurance company (or its connected PBM) has priced the prescription and paid its required amount.

III. Overbilling

All Walgreen pharmacy stores nationwide use a computer system called "Intercom Plus" to fill and to bill prescriptions. Intercom Plus was programmed under the control and direction of Walgreen and it is Walgreen's exclusive property. Walgreen has used a portion of an online intranet tutorial called "People's Plus" to instruct pharmacy personnel in the use of Intercom Plus and its billing systems, including the billing of dual-eligible claims. The billing of dual-eligible claims involves the use of a sub-program of Intercom Plus called "Submit Direct Link" (SDL). The SDL billing system is used in 31 states.

The People's Plus intranet tutorials instruct pharmacy personnel (pharmacists, technicians and interns) in a billing method that obtained more in Medicaid reimbursement for dual-eligible patients than was allowed under the assignment of rights and benefits provisions of federal law and contract provisions of private insurance companies. For example, when a dual-eligible patient's private insurance required the patient to pay a $10.00 co-pay for a prescription, the Intercom Plus and SDL software system billed and caused receipt of a higher amount from Medicaid. The plaintiff relators personally witnessed and used Intercom Plus and SDL software, performed the People's Plus intranet tutorials, and were directed by Walgreen management and co-employees to use the procedures taught in the tutorials. Given Walgreen's electronic training instructions and the directives of their employees, Walgreen has submitted many thousands of false claims for Medicaid payment from 1998 to the present.

A specific example of a fraudulent submission involved prescription no. 1354188 for 60 pills filled on March 28, 2005 at Walgreen store #4119 in Minnesota. In that transaction, Walgreen charged $729.99 with a $55 submission to and payment by Medicaid and a $3 co-payment by the client. The correct price should have been $641.74, which would have resulted in a $27 submission to Medicaid.

The plaintiff relators observed the overcharging of Medicaid in various Walgreen stores in which they worked. In September 2001, Pacult started as a pharmacy technician at Walgreen store #6132 in Madison, Wisconsin. At that time, store employees were performing the dual-eligible billing with the SDL program properly by changing the cash price to match that reimbursed by the patient's private insurance. The store manager also reviewed the SDLs nightly for accuracy. When the pharmacy and store managers were transferred a year later, the new managers referred to People's Plus in order to learn how to use SDL according to Walgreen's policy. Pacult recalls some debate in the pharmacy as to whether the People's Plus training was correct, but the Walgreen district office resolved the debate, telling store employees to follow the People's Plus training. Between 2003 and 2007, Pacult observed Walgreen employees following the People's Plus method for SDL billings at several stores in Wisconsin and Minnesota. Similarly, at various points between 2000 and 2007, Toledo, Bargfrede, Thompson and Bieurance observed Walgreen employees at numerous stores throughout Minnesota using the People's Plus method for SDL dual-eligible billings, which resulted in wrongful overcharges to Medicaid.

IV. Double Billing

In addition to overbilling for co-payments and deductibles, some claims have been completely double billed to both the private health insurance and Medicaid. The relator plaintiffs have seen SDL sheets showing that Walgreen has billed complete full claims to both the private health insurance and Medicaid. Intercom Plus requires time-consuming data entry using multiple computer programs and manual note-taking by the pharmacist before the prescription can be filled and delivered to the customer. Walgreen pharmacy staff are under constant pressure from management to expedite prescription delivery to the customer. As such, they often skip or ignore all of the steps required to bill properly. This results in dual-eligible prescriptions being billed in to both the private insurance company and to Medicaid without crediting Medicaid for the insurance company payment.

V. Evidence of Larger Scheme

Many management level employees of Walgreen were aware of the fraud involving dual-eligible claims. On March 8, 2005, Anne Shillock reviewed paperwork for several SDL claims at the Walgreen store in south Minneapolis where Thompson was working. She advised Thompson that the claims were being submitted incorrectly. Thompson disagreed and showed Shillock specific examples of how SDLs were submitted without changing the "cash price" and how this resulted in overpayments to Walgreen. In response, Shillock told Thompson that the online tutorial for SDL did not instruct the operator to change the cash price. On March 14, 2005, she sent an e-mail to Walgreen pharmacists and technicians in Minnesota, stating that "We never, ever adjust the cash price on an SDL!!!!!!!!!!!" Because Thompson and Bieurance refused to follow the tutorial procedures, Shillock sent another email dated March 28, 2005 to Bieurance and the pharmacy supervisor for the East District of Minnesota, in which she stated that "Reminder: Never change the cash price!!!"

On April 18, 2005, Greg Boll, Walgreen's pharmacy supervisor, e-mailed a newsletter entitled "Minnesota Monthly" to all Walgreen pharmacy staff in Minnesota; David Lovejoy, the Regional Vice President of Store Operations; and Kelly Beaudoin, the Regional Supervisor of Pharmacy Operations. Lovejoy and Beaudoin were located at Walgreen's national headquarters in Illinois and both supervised stores and pharmacies in multiple states. The newsletter discussed SDL billing and stated "NEVER change the cash price. We used to do this, but the system (SDL) has been corrected so that it is no longer necessary."

After January 1, 2006, Walgreen continued wrongfully billing the federal government and the states of Florida, Massachusetts, Michigan and Minnesota for Medicaid funding by wrongfully and fraudulently billing and receiving amounts in excess of those required to be paid pursuant to the private insurance contract rights assigned to the government by dual-eligible patients. In February 2006, Walgreen offered a change to its billing software for dual-eligible customers in the states of Florida, Massachusetts, Michigan and Minnesota, ostensibly to fix the wrongful overbilling. However, the procedural change was not mandatory and it took longer for the pharmacy employee to perform it. Walgreen did not offer a new tutorial program to assist with the change and left the old tutorial in place until at least the middle of July 2007. The plaintiff relators saw that most pharmacy employees they worked with did not use the new procedure. Walgreen attempted another software fix in October 2007, this time making it mandatory.

VI. Previous Minnesota Lawsuit

On April 14, 2005, plaintiffs Thompson and Bieurance filed a *qui tam* complaint in the U.S. District Court for the District of Minnesota, alleging that Walgreen overcharged Medicaid agencies in Minnesota and 30 other states for prescription medications provided to dual-eligible patients. *See United States ex rel. v. Walgreen Co. et al.*, D. Minn. Case No. 05-cv-759. With respect to Minnesota, plaintiffs explained the dual-eligible system and alleged that beginning in 1998, Walgreen officers and employees knowingly submitted prescription drug claims through the SDL program for Medicaid payment that were higher than the co-pay that the patient would have had to pay under private coverage. As in the instant lawsuit, plaintiffs cited the representative example of prescription no. 1354188 at store #4119 in Minnesota.

Plaintiffs also alleged more broadly that "the electronic training instructions of Walgreen Co., and oral directives of other Walgreen Co. employees, many thousands of these false claims have been submitted by Walgreen Co. stores for MA payment from 1998 to the present and continuing." They further alleged that "[b]ased upon information and belief of relators, and electronic communicated instructions of Walgreen Co. to them, such MA claims . . . are also being submitted in the following 30 other states."

The federal government intervened on September 29, 2008 for the purpose of settlement. The United States, Florida, Michigan, Minnesota, Massachusetts, Thompson, Bieurance and Walgreen entered into a settlement agreement in which the parties agreed that Walgreen was released from "any and all civil or administrative monetary claims the United States has or may have for the Covered Conduct." The agreement stated that plaintiffs had engaged "in the following conduct in the Participating States during the period from January 1, 1999 to December 31, 2005 (hereinafter referred to as the "Covered Conduct"):"

> Walgreens submitted claims to Medicaid agencies in the Participating States for prescription drugs dispensed to persons covered for such claims both by Medicaid and by private third-party insurance ("the Claims"). Walgreens was reimbursed by Medicaid in an amount equal to the difference between what the third-party insurance paid when the Claims were submitted and what the Participating States' Medicaid programs would have paid in the absence of third-party insurance. The Claims were false because Walgreens was entitled to reimbursement in an amount equal only to the amount the insured would have been obligated to pay had the Claims been submitted solely to the third party insurer providing coverage, i.e. the co-payment amount, yet it knowingly submitted claims in excess of that amount. As a result of this improper billing, Walgreens received reimbursement amounts from the Participating States Medicaid programs that were higher than it was entitled to receive.

The case was dismissed with prejudice in a judgment entered on September 30, 2008.

OPINION

I. Standard of Review

Motions to dismiss require the court to accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Reger Development, LLC v. National City Bank*, 592 F.3d 759, 763 (7th Cir. 2010); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007); *Christensen v. County of Boone, Illinois*, 483 F.3d 454, 457 (7th Cir. 2007). On a Rule 12(b)(1) motion, the court "may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *St. John's*, 502 F.3d at 625. A motion for judgment on the pleadings "is designed to provide a means of disposing of cases when the material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court may take judicial notice." *Archer Daniels Midland Co. v. Burlington Ins. Co. Grp., Inc.*, no. 10–cv–1533, 2011 WL 1196894, at *2 (N.D. Ill. Mar. 29, 2011). As previously noted, the legal standard for a Rule 12(c) motion is the same as that for a motion brought under Rule 12(b)(6): the court must determine whether the complaint contains sufficient facts which, if accepted as true, state a claim that is plausible on its face. *Reger*, 592 F.3d at 764 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)); *see also Riley v. Vilsack*, 665 F. Supp. 2d 994, 1004 (W.D. Wis. 2009) (factual allegations must be sufficient to raise possibility of relief above speculative level).

II. False Claims Act

The False Claims Act prohibits and sets stiff civil penalties for the submission of false and fraudulent claims for payment to the government. 31 U.S.C. § 3729(a). "It also authorizes private citizens (called 'relators') to file civil actions on behalf of the government (called '*qui tam*' actions) to recover money that the government paid on account of false or fraudulent claims." *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 912 (7th Cir. 2009) (citing § 3730(b)(1)). To encourage private citizens to come forward, the FCA entitles prevailing relators to collect a substantial share of the funds they recover. *Id.* (citing § 3730(d)(1)-(2)).

However, as the Seventh Circuit has explained, "'*[q]ui tam* litigation surged as opportunistic private litigants chased after generous cash bounties and, unhindered by any effective restrictions under the Act, often brought parasitic lawsuits copied from preexisting indictments or based upon congressional investigations.'" *Wisconsin v. Amgen, Inc.*, 516 F.3d 530, 532-33 (7th Cir. 2008). Therefore, "[i]n response, Congress amended the False Claims Act . . . 'to do away with [such] parasitic suits.'" *Id.* at 533 (quoting *United States ex rel. LaCorte v. SmithKline Beecham Clinical Laboratories, Inc.*, 149 F.3d 227, 233 (3d Cir. 1998), and also citing *United States ex rel. La Corte v. Wagner*, 185 F.3d 188, 191-92 (4th Cir. 1999)). The amendments included provisions limiting the court's jurisdiction over *qui tam* actions. *Glaser*, 570 F.3d at 912; *U.S. ex rel. Batty v. Amerigroup Illinois, Inc.*, 528 F. Supp. 2d 861, 872 (N.D. Ill. 2007). Applicable in this case are the "first-to-file" bar, § 3730(b)(5), and the "government-action" bar, § 3730(e)(3).

A. First-to-File

Under 31 U.S.C. § 3730(b)(5), "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." In other words, if one person brings an action then no one other than the government may bring a related action while the first is pending. *U.S. ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 362 (7th Cir. 2010). The provision "essentially creates a 'race to the courthouse' among eligible relators" and "spurs the prompt reporting of fraud." *Batty*, 528 F. Supp. at 872. The reason for the bar is that "secondary suits that do no more than remind the United States of what it has learned from the initial suit [and] deflect recoveries from the Treasury to rewards under § 3730(d)." *Chovanec*, 606 F.3d at 364. "The author of the fraud won't escape when the first suit (or the ensuing federal investigation) tells the agency everything it needs to know. . ." *Id.*

In this case, plaintiffs filed suit on September 17, 2008, 13 days before the Minnesota action was dismissed with prejudice pursuant to the parties' settlement agreement. Because plaintiffs filed this lawsuit while the Minnesota action was pending, the next question is whether the instant suit is "related" to "the facts underlying" the Minnesota action. In *Chovanec,* the Court of Appeals for the Seventh Circuit noted that "[i]t is not enough that claims be related in the loose sense that they arise out of the same general kind of wrongdoing; they must also have facts in common." 606 F.3d at 363. Following the lead of other circuits addressing the issue, the Seventh Circuit interpreted § 3730(b)(5) as barring subsequent cases involving the same "material" or "essential" facts as a pending action. *Id.* (citing with approval *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13, 32-34 (1st Cir. 2009); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Laboratories, Inc.*, 149 F.3d 227, 232-34 (3d Cir. 1998); *United States ex rel. Branch Consultants v. Allstate Insurance Co.*, 560 F.3d 371, 377-80 (5th Cir. 2009); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 971 (6th Cir. 2005); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187-89 (9th Cir. 2001); *United States ex rel. Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279-80 (10th Cir. 2004); *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217-18 (D.C. Cir. 2003)).

Generally, courts have understood "'material' or 'essential' facts to be those on which the original relator is entitled to compensation if the suit prevails," *id.*, and have held that the bar does not require that the two suits rely on identical facts, *see U.S. ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009); *Grynberg*, 390 F.3d at 1279; *Hampton*, 318 F.3d at 218; *Lujan*, 243 F.3d at 1183; *LaCorte*, 149 F.3d at 232. "[S]o long as a subsequent complaint raises the same or a related claim based in a significant measure on the core fact or general conduct relied upon in the first *qui tam* action, § 3730(b)(5)'s first-to-file bar applies." *Grynberg*, 390 F.3d at 1279.

To determine whether a relator's complaint runs afoul of § 3730(b)(5)'s first-to-file bar, a court must compare it with the earlier-filed complaint. *Poteet*, 552 F.3d at 516. The allegations in the complaints filed in the instant case and the earlier Minnesota action significantly overlap. They both allege that Walgreen stores in numerous states billed Medicaid too much for prescription co-pays for dual-eligible patients starting in 1998 and use much of the same language and representative examples to describe the alleged fraud.

However, plaintiffs argue that their complaint is distinct because it alleges a *nationwide* scheme perpetuated by Walgreen's SDL billing program, online tutorial and management directives and also encompasses the practice of double billing. According to plaintiffs, the prior Minnesota case alleged limited acts of overbilling by "rogue personnel" in only some of Walgreen's stores.

In support of their assertions, plaintiffs rely on two recent cases in which courts allowed *qui tam* actions because the later-filed complaints, and not the original complaints, alleged a nationwide scheme to defraud. *Duxbury,* 579 F.3d 13 (finding no jurisdictional bar where later complaint alleged entire promotion scheme for off label drugs and original complaint alleged only one promotional method), and *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 694 F. Supp. 2d 48 (D. Mass. 2010) (finding no bar where prior action made passing reference that illegal kickback arrangement between defendant and doctors was matter of national corporate policy, while the subsequent complaint set forth nationwide scheme by identifying 91 doctors and alleging details of VIP travel, stock payments, royalties and sham grants and research studies).

Walgreen disagrees and argues that the instant case is more analogous to *Chovanec*. In that case, Chovanec accused Apria Healthcare of fraudulently billing Medicare and Medicaid in Illinois from 2002 through 2004 for medical devices and services that were unnecessary ("miscoding") or should have been recorded under less expensive reimbursement codes ("upcoding"). 606 F.3d at 361. When Chovanec filed her suit, *qui tam* actions for miscoding and upcoding were pending against Apria in California and Kansas. *Id.* at 361-62. The court of appeals found that all 3 actions were related in that they alleged the same illegal conduct, but that they were distinct in that Chovanec's claim only concerned conduct in only one Illinois office. *Id.* at 363. To determine whether the suits materially overlapped, the court questioned whether the initial suits alleged fraud by "rogue personnel at scattered offices or instead alleged a scheme orchestrated by Apria's national management." *Id.* at 364. It reasoned that "allegations about a scam in California or Kansas in the 1990s would not [necessarily] reveal to the United States any risk of a scam in Illinois in 2003—beyond the obvious fact that any medical provider can engage in upcoding, and that sort of generic knowledge differs from 'the facts underlying the pending action.'" *Id.* After comparing the 3 complaints, the court in *Chovanec* found that the following allegations in the original complaints were sufficient to alert the federal government to a "scheme orchestrated by national management": modifying the computer system to make it possible for workers to engage in upcoding without personal risk, telling customer service representatives to use company-provided "cheat sheets" rather than information provided by physicians, pressuring employees to bill Medicare without proper documentation and coaching physicians to record their work in categories that could support higher bills. *Id.* at 364.

I agree with Walgreen that the situation here is like that presented in *Chovanec:* the earlier-filed complaint in the Minnesota lawsuit alleged a national scheme to overbill Medicaid. The Minnesota plaintiffs alleged that Walgreen officers and employees knowingly submitted prescription drug claims through the SDL program for Medicaid payment that were higher than the co-pay that the patient would have had to pay under private coverage. They also alleged that Walgreen perpetuated false claims through "electronic training instructions" and "oral directives" in 31 states.[1] Contrary to plaintiffs' assertions, these allegations are indicative of a national scheme and not just random acts by rogue pharmacy personnel in Minnesota.

Plaintiffs point to several details in their complaint that did not appear in the Minnesota complaint, including: (1) the People's Plus tutorial used to train employees in false billing; (2) the SDL program caused false claims when used as directed by the tutorial (versus just being used to submit them); (3) Walgreen managers in Minnesota and Wisconsin purposefully "compelled false billing;" (4) false representations in 2005 that the system was corrected; (5) an optional change in the SDL software that employees ignored because it was too cumbersome; (6) the assignment of Medicaid recipients' rights to the states; and (7) double billing. However, as the Tenth Circuit has noted, "[t]here is a difference between a relator who simply tacks on an additional piece of evidence (a secret memo admitting to the fraudulent scheme, for instance)

[1] I note that although plaintiffs' complaint alleges that fraudulent billing practices occurred in the 49 states in which Walgreen does business, it also alleges that Walgreen only uses the SDL billing system for dual-eligible claims in 31 states. This is further indication that the scope of the instant complaint and the Minnesota complaint are substantially similar.

and a relator who alleges" a completely different scheme. *In re Natural Gas Royalties Qui Tam Litigation (CO2 Appeals)*, 566 F.3d 956, 962 (10th Cir. 2009). "The former might make it easier to prove a material element of the fraud and might even be the difference between success at trial or failure, but the latter asserts a different claim, seeking distinct damages arising out of a separate injury. . ." *Id.*

Although the Minnesota complaint did not identify the "electronic training" by name (*i.e.*, the People's Plus tutorial), did not allege that the SDL program *caused* false claims, did not provide examples of specific directives from management and did not explain how dual-eligible patients assigned their rights to Medicaid, those details do not constitute new material facts showing a separate injury. Similarly, even though the false representations that Walgreen allegedly made in 2005 and the resulting "optional" change in the SDL software occurred after the Minnesota complaint was filed, they merely constitute further evidence of the same national scheme.

Plaintiffs also assert that the current lawsuit differs in that it alleges false claims after December 2005, which was the conclusion of the covered period in the Minnesota action. However, the Minnesota complaint alleged ongoing false claims and did not state that the conduct stopped in December 2005; that date was picked during settlement discussions between the parties. Although the earlier Minnesota complaint could not allege that Walgreen's conduct "was certain to continue" past 2005, it also did not allege that the conduct had stopped. *Chovanec*, 606 F.3d at 364-65. Rejecting a similar argument raised by the plaintiff in *Chovanec*, the court of appeals found that "§ 3730(b)(5) refers to the 'facts underlying the pending action' (that is, to the complaint and potentially the record compiled in the suit) rather than to the parties' later choices." *Id.* at 363. "Identification of a 'related' action must depend on the claim made in the initial suit and not the terms of the settlement, for it is the suit rather than the settlement that activates § 3730(b)(5)." *Id.* Just because the United States "apparently did not conduct the sort of follow-up investigation and prosecution that would have prevented" Walgreen from conducting a similar overbilling scam in even more states does not mean that plaintiffs get to bring another lawsuit. "Section 3730(b)(5) . . . does not make anything turn on whether the United States puts those facts [alleged in the original complaint] to their best use." *Id.* at 365.

Nonetheless, plaintiffs are not completely foreclosed from bringing a *qui tam* suit against Walgreen: their allegations of *double* billing are new and appear to involve different conduct causing a separate injury. Walgreen asserts that double billing is merely an extension of the same conduct that allegedly results in overbilling, but it involves billing full claims to both the private health insurance and Medicaid, whereas overbilling involves charging Medicaid for a higher co-pay than the patient would have had to pay under private insurance. Further, although the two practices require pharmacy staff to use the same billing software, they appear to involve distinct steps. Overbilling results when pharmacy staff neglect to edit manually the SDL to reflect the correct co-pay amount. On the other hand, double billing occurs when staff skip or ignore time-consuming data entry using multiple computer programs and manual note-taking.[2] Given

[2] From plaintiffs' description of how the double-billing occurs, *see* Complaint, dkt. 2, at ¶ 63, Walgreen's *scienter* seems to consist of knowing that its cumbersome billing system sometimes causes harried employees inadvertently to double-bill a prescription, yet Walgreen has not simplified its procedures to reduce or eliminate these mistakes. I infer that this alleged double billing is less prevalent than the alleged overbilling.

these differences, I cannot conclude that allegations of overbilling necessarily would alert the federal government to the alleged practice of double billing.

Accordingly, plaintiffs may bring their claims of double billing. Their claims related to overbilling must be dismissed pursuant to the first-to-file bar. However, the court in *Chovanec* made clear that the first-to-file bar applies only while the initial complaint is "pending." *Id.* at 365. Because the Minnesota action is no longer pending, plaintiffs now would be entitled to refile a new *qui tam* complaint alleging overbilling. *See id.* (noting same and finding that district court erred in dismissing the later-filed suit with prejudice because § 3730(b)(5) does not prevent filing of new case). "Only when the initial action concludes without prejudice (or covers a different transaction) will a later suit—by the original relator, a different relator, or the Department of Justice—be permissible." *Id.* at 362. In other words, plaintiffs still have a shot at this in a new lawsuit, unless another jurisdictional bar or *res judicata* precludes them from pursuing their allegations of overbilling.

B. Government Action Bar

Section 3730(e)(3) provides that "[i]n no event may a person bring an action under subsection (b) [the *qui tam* provisions] which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." This provision was intended to prevent parasitic *qui tam* lawsuits that receive support from an earlier case without giving the government any useful return, other than the potential for additional monetary recovery. *Batty*, 528 F. Supp. at 876 (citing *U.S. ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d 320, 327-28 (1st Cir. 1994);

U.S. ex rel. Alexander v. Dyncorp, Inc., 924 F. Supp. 292, 303 (D.D.C. 1996) (finding "no useful return to the government" under § 3730(e) where government declined to intervene in second *qui tam* action)).

There is no dispute that the United States became a party in the Minnesota case when it intervened in that action in 2008. *See U.S. ex rel. Eisenstein v. City of New York*, __ U.S. __, 129 S. Ct. 2230, 2234 (2009) (discussing party status in *qui tam* actions). The problem is that the government did not formally intervene until September 29, 2008, 12 days *after* plaintiffs filed their complaint in the instant case (and a mere one day before the case was dismissed pursuant to the settlement agreement). Section 3730(e)(3) plainly requires the government to be a party in the prior action in order to trigger the jurisdictional bar. In *Eisenstein*, the Supreme Court stated that the United States "is a 'party' to a privately filed FCA action *only* if it intervenes in accordance with the procedures established by federal law." *Id.* (emphasis added). Although this was dicta, it comports with a plain reading of the statute. Because the government was not "already" a party to the Minnesota case when plaintiffs filed the current suit, the bar does not apply.[3]

In any event, this bar would not apply to plaintiffs' double billing claims for the same reasons that the first-to-file bar does not apply. Although the Seventh Circuit has not yet defined "based upon allegations or transactions," the court in *Batty*, 528 F. Supp. 2d at 876, assumed that the phrase had a similar meaning to "based on the facts" in the first-to-file bar. Although

[3] In the for-what-it's-worth category, I note that the federal government *now* has party status in the Minnesota action and the overbilling claims in the instant lawsuit undoubtably are "based upon allegations or transactions" that were the subject of the Minnesota case. Unlike the first-to-file bar, the government action bar does not appear to have a pendency requirement; therefore, it likely is irrelevant whether the previous suit to which the government was a party is pending or not.

double billing and overbilling are both forms of Medicaid fraud, the practices involve distinct acts and resulting injuries. *See Prawer*, 24 F.3d at 329 (finding later-filed action not parasitic of earlier action because it sought recovery for a type of fraud not yet subject to a government claim and with potential to restore money that could not have been restored in prior case).

Because this court has jurisdiction over plaintiffs' *qui tam* claims of double billing, Walgreen's alternative argument that those claims are precluded by *res judicata* must be addressed:

III. *Res Judicata*

"In general, the doctrine of claim preclusion or *res judicata* bars a party from asserting a claim that has already been resolved in another lawsuit between the same parties or those in privity with them, and the doctrine reaches both claims that were actually asserted in an earlier lawsuit and those that could have been asserted but were not." *Russian Media Group, LLC v. Cable America, Inc.*, 598 F.3d 302, 310 (7th Cir. 2010). The three requirements of claim preclusion under federal law are: (1) an identity of parties or their privies; (2) an identity of causes of action; and (3) a final judgment on the merits. *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 296 F.3d 624, 628 (7th Cir. 2002). When these elements are satisfied, the judgment in the earlier suit bars further litigation of issues that were either raised or could have been raised therein. *Kratville v. Runyon*, 90 F.3d 195, 197-98 (7th Cir. 1996).

Walgreen has little trouble showing that the first and third requirements are met. The Minnesota case resulted in a final judgment as a result of the settlement agreement. The parties agree that although the United States has not intervened in the current action and relators Pacult, Bargfrede and Toledo were not plaintiffs in the Minnesota action, all are in privity with Thompson and Bieurance, who are named plaintiffs in both actions. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774 n.4 (2000) (relators are partial assignees of the United States in *qui tam* suit); *Chovanec*, 606 F.3d at 362 (United States is true plaintiff in *qui tam* action); *U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 851 (7th Cir. 2009) (even when government does not intervene, it is "real party in interest—which is to say that its financial interests are at stake").

As with the jurisdictional bars, the crux of the *res judicata* dispute is whether the two actions have identity. A claim has identity with a previously litigated matter if it emerges from the same core of operative facts as the earlier action. *Brzostowski v. Laidlaw Waste Sys., Inc.*, 49 F.3d 337, 339 (7th Cir. 1995). In other words, "a subsequent suit is barred if the claim on which it is based arises from the same incident, events, transaction, circumstances, or other factual nebula as a prior suit that had gone to final judgment." *Okoro v. Bohman*, 164 F.3d 1059, 1062 (7th Cir. 1999). As described above, the alleged incidents, events and transactions that resulted in double billing were very similar to but ultimately distinct from those involving overbilling, which was the only fraud alleged in the Minnesota complaint and the only action constituting the covered conduct addressed by the settlement agreement in that case. Because Walgreen has not shown that plaintiffs are asserting a claim that already has been resolved or could have been raised in an earlier action, their motion to dismiss plaintiffs' double billing claims on the ground of *res judicata* will be denied.

IV. Sanctions

Section 3730(d)(4) provides

> If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

Walgreen cursorily asserts that "[t]his needless second round of litigation is exactly the conduct that 31 U.S.C. § 3730(d)(4) was designed to prevent." Dkt. 74 at 23. Although plaintiffs' overbilling claims have failed, absent a more vigorous presentation on this point by Walgreen, the court is not prepared to conclude that plaintiffs' failed claims are so lacking in arguable merit as to be clearly frivolous, or that plaintiffs acted in a clearly vexatious or harassing manner by bringing what they believed to be a meritorious second suit. Without more, I am denying Walgreen's request for fees and costs.

V. State Claims

Because this court has original jurisdiction over some of plaintiffs' FCA claims, Walgreen's request that this court decline to exercise supplemental jurisdiction over their state law claims is moot. In the alternative, Walgreen moved to dismiss the state claims under what it terms "substantively similar" state jurisdictional bars. Dkt. 75. In support it cites first-to-file and government action bars from the states of Florida, Illinois and New Jersey as examples. Although it appears that Walgreen is correct that plaintiffs' state overbilling claims are barred under state equivalents to the federal first-to-file bar, and in a few cases, the government action bar, Walgreen has provided only minimal information and plaintiffs have not responded. Therefore, I will allow additional briefing on the limited issue of whether and which state jurisdictional bars apply to plaintiffs' state claims of overbilling. Walgreen will have 14 days after this order is docketed to submit additional facts and argument on this point, with plaintiffs's response due 14 days later. At this time the court does not want a reply.

ORDER

IT IS ORDERED that:

(1) Defendant Walgreen Co.'s motion to dismiss (dkt. 74) is GRANTED IN PART, and plaintiffs' federal *qui tam* claims of overbilling in counts 1 and 3 of the second amended complaint are dismissed pursuant to 31 U.S.C. §§ 3730(b)(5);

(2) Walgreen's motion to dismiss is DENIED IN ALL OTHER PARTS;

(3) A decision on Walgreen's motion for supplemental relief (dkt. 75) is STAYED pending further briefing in the manner and at the times directed above; and

(4) The June 17, 2011 telephonic preliminary pretrial conference is kicked back five days to June 22, 2011 at 11:00 a.m. to give the parties slightly more time to determine how they would like to calendar this case in light of this order.

Entered this 13th day of June, 2011.

BY THE COURT:

/s

STEPHEN L. CROCKER
Magistrate Judge