No. _____

In The

Supreme Court of the United States

PHARMERICA CORPORATION,

Petitioner,

v.

UNITED STATES EX REL. ROBERT GADBOIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The first-to-file bar of the False Claims Act states that "when a person brings a [*qui tam*] action . . . no person other than the Government may intervene or *bring* a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5) (emphasis added). Respondent brought this *qui tam* action while a prior action based on the same facts was pending. The district court correctly dismissed the case, but the First Circuit vacated and remanded because the earlier-filed case settled during the pendency of the appeal.

The question presented is whether, as the Fourth, Seventh, and Tenth Circuits have held, courts must apply the first-to-file bar as of the time the follow-on case is filed and dismiss a copycat *qui tam* action brought when a related action is pending; or whether, as the First Circuit held, subsequent events can cure the first-to-file defect, such that a follow-on case may avoid the statutory bar simply by remaining on the docket until the first-filed action inevitably ends.

PARTIES TO THE PROCEEDING

Petitioner PharMerica Corporation ("PharMerica") was the defendant-appellee in the United States Court of Appeals for the First Circuit. Respondent is *qui tam* relator Robert Gadbois, who was the plaintiff-appellant in the First Circuit and who brought suit in the United States District Court for the District of Rhode Island on behalf of the United States and the states of California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin. Neither the United States nor any state elected to intervene. CVS/Caremark Corporation, Walgreen Company, MedCall, LLC, and Rite Aid Corporation were also defendants in the proceedings in the district court, but were voluntarily dismissed by Gadbois.

RULE 29.6 STATEMENT

PharMerica has no corporate parent and no publicly traded corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner PharMerica Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1) is reported at 809 F.3d 1. The opinion of the district court (App. 18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2015. App. 16. PharMerica's timely petition for rehearing and rehearing *en banc* was denied on January 25, 2016. App. 43. By order dated February 12, 2016, the First Circuit stayed the issuance of its mandate pending the outcome of this petition. App. 40. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The first-to-file bar of the False Claims Act, 31 U.S.C. § 3730(b)(5), states: "When 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."

INTRODUCTION

This case presents a straightforward, important, and frequently recurring question at the heart of the FCA: may a relator circumvent the plain terms of the first-to-file bar by bringing an otherwise prohibited action and waiting until the first-filed action is inevitably resolved? The First Circuit answered this question in the affirmative, creating a split between itself and the Fourth, Seventh, and Tenth Circuits. In so holding, the First Circuit diverged from the plain text of the statute and the other courts of appeals on whether the dispositive date for the first-to-file analysis is the day on which the follow-on case was brought. This Court should grant review to (1) resolve this circuit split and (2) prevent the effective neutering of the first-to-file bar that results from the First Circuit's misapplication of this Court's recent decision in *Kellogg Brown & Root Services v. United States ex rel. Carter*, 575 U.S. ___, 135 S.Ct. 1970 (2015) ("*Carter*").

Despite the unambiguous language of the FCA, 31 U.S.C. § 3730(b)(5) ("no person other than the Government may intervene or bring a related action based on the facts underlying the pending [previously-filed] action"), and the fact that this case was brought when a related action was pending, the First Circuit remanded this case to proceed on the grounds that the first-filed action happened to be resolved during the pendency of the appeal. App. 5-15.

In reaching this conclusion, the First Circuit contravened the plain meaning of the statute. Gadbois brought his action during the pendency of a related action: *United States ex rel. Denk v. PharMerica Corp*., C.A. No. 09-720 (E.D. Wis. July 23, 2009) ("*Denk*"). Consistent with the unmistakably clear statutory language, the District of Rhode Island concluded that his action was barred. The inevitable resolution of *Denk*, almost half a decade after Gadbois brought his claim, should not give life to Gadbois's prohibited case simply because he managed to keep it on a court's docket until *Denk* was dismissed. The discrepancy between the plain statutory command and the decision below is stark and unavoidable. In the short time since the First Circuit issued its opinion in this case, it has already been criticized for having failed to "give sufficient weight to the plain language of 31 U.S.C. § 3730(b)(5)." *United States ex rel. Carter v. Halliburton Co*., No. 11-CV-0602, 2016 WL 634656, at *2 (E.D. Va. Feb. 17, 2016).

The First Circuit's approach side-stepped the first-to-file analysis, which the District of Rhode Island correctly applied as of the time that Gadbois brought his claims, and replaced it with a free-floating standard determined by external events. By remanding the case, rather than ordering it dismissed without prejudice to refiling (as even Gadbois initially argued would be the appropriate relief), the First Circuit invited copycat relators to get in line by bringing placeholder suits, certain in the knowledge

that earlier-filed actions will one day conclude. As the Seventh Circuit explained, if read to permit relators to file follow-on actions and simply wait for the first-filed case to end, the first-to-file bar "would do nothing to block an infinite series of claims; me-too actions would proliferate, provided only that the copycat asked for a stay until the action ahead of it in the queue has been resolved." *United States ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 362 (7th Cir. 2010). Further amplifying the adverse consequences of the decision below, the First Circuit's approach allows me-too litigants to circumvent the applicable statute of limitations by filing suit years earlier (five years in this case) than the first-to-file bar would permit. By conferring this unwarranted benefit on copycat relators, the First Circuit's approach encourages new cases to be filed at precisely the time Congress has said no such case should be brought. That practical impact on courts and the administration of justice is a powerful factor favoring this Court's review.

The First Circuit's holding is incompatible not only with the express statutory language, but also with the policies that animate the first-to-file bar. The FCA is designed to protect the government by providing a mechanism for bringing alleged fraud to the government's attention, facilitating recovery by the government of amounts wrongfully obtained, and rewarding whistleblowers who brought the wrongdoing to light. Those objectives are not advanced by docket-clogging me-too cases because the first-filed case

informs the government of a potential claim, provides the government an opportunity to intervene, and creates a remedy for the government's benefit in which the original whistleblower shares. Me-too cases serve none of these purposes. Under the statute, they are barred during the pendency of the first-filed case.

Similarly barred, by precisely the same statutory provision, is intervention by follow-on relators. Instead of prohibiting such intervention, as the statute so clearly provides, the judgment below would subject parties and courts to pointless – and statutorily forbidden – attempts at intervention. Had Congress intended to impose on the judiciary the administrative quagmire of dormant me-too cases, then surely the statute would not have been written to flatly bar follow-on suits and redundant intervention.

In addition to creating an incentive for relators to race to be next in line, the First Circuit approach creates an incentive for relators to protract the duration of their follow-on cases and for courts to let follow-on cases remain on judicial dockets indefinitely. The First Circuit also creates a counter-productive incentive for defendants to delay settling meritorious cases, lest the resolution of one case immediately give a green light for the next in line to proceed.

A further practical nationwide consequence of the First Circuit's approach is the adverse impact on finality and settlement of first-filed cases. No matter where the first-filed case is litigated, the potential

finality of a settlement is far less certain when follow-on cases remain pending in any district court. No sound policy goal is advanced by a rule that will both delay and diminish government recoveries in FCA cases.

Review is therefore warranted to resolve an existing circuit conflict on a frequently recurring issue with far-reaching practical consequences; to promote fidelity to the legislative choices embodied in the statute; and to prevent the detrimental consequences that will flow from the decision below. Indeed, because the First Circuit judgment is so flatly inconsistent with the statute and incompatible with this Court's decision in *Carter*, there is ample basis for summary reversal. Even if the First Circuit's error were not so transparently clear, certiorari would still be warranted to restore nationwide uniformity on a critical issue on which the lower courts are sharply divided.

STATEMENT OF THE CASE

Relator Robert Gadbois filed this follow-on *qui tam* case under the FCA alleging that PharMerica overbilled the Medicare Part D and Medicaid programs by seeking payment for medications dispensed without legally valid prescriptions. JA 11, ¶ 2.[1] His

[1] "JA" refers to the joint appendix in the First Circuit.

was not the first case to make these allegations. When Gadbois filed his complaint in the District of Rhode Island (November 19, 2010), a related action was already pending in the Eastern District of Wisconsin, *United States ex rel. Denk v. PharMerica Corp*., C.A. No. 09-720 (E.D. Wis., filed July 23, 2009). JA 1. Neither the United States, nor any state, elected to intervene in Gadbois's case. JA 77-78, 83-88.

The District of Rhode Island dismissed Gadbois's Second Amended Complaint on first-to-file grounds. App. 18-39. As the court explained, the "essential facts" alleged by Gadbois were previously alleged in *Denk*, which was still pending and in which the United States did intervene.[2] JA 353-55. Accordingly, the district court concluded that it lacked subject matter jurisdiction over Gadbois's FCA claims and dismissed the complaint without indicating whether that dismissal was with or without prejudice. App. 18-39. Gadbois appealed to the First Circuit while *Denk* was still pending. JA 355, 357-58.

Two events occurred during Gadbois's First Circuit appeal that had a pivotal role in the outcome:

(1) This Court held in *Carter* that the first-to-file bar prohibits a relator from bringing a *qui tam*

[2] *Denk* was a consolidation of two separate actions brought by two different relators, each of whom made allegations practically identical to those made by Gadbois. *See* App. 18-39, 50-55, 88-92.

action only so long as the first-filed action is still pending. 135 S.Ct. at 1979.

(2) *Denk* was dismissed on June 15, 2015 following a settlement between PharMerica and the United States.

Gadbois's opening brief to the First Circuit was filed before either of these events occurred, but it anticipated them both and squarely addressed their implications. App. 50, 59, 77-78. Correctly predicting that *Carter* would read the term "pending" literally, Gadbois argued that the First Circuit "should direct that the district court's dismissal should be without prejudice to refiling." *See Carter*, 135 S.Ct. at 1979 ("We hold that a *qui tam* suit under the FCA ceases to be 'pending' once it is dismissed. We therefore agree with the Fourth Circuit that the dismissal *with prejudice* of respondent's one live claim was error." (emphasis added)). And anticipating that *Denk*, like all cases, would one day end, Gadbois specifically urged the First Circuit to instruct the district court that its dismissal is "without prejudice to [Gadbois] *refiling*" another action in the district court. App. 77-78 (emphasis added). PharMerica did not contest this point.

Subsequent to the filing of Gadbois's opening brief in the First Circuit, this Court decided *Carter* (May 26, 2015) and *Denk* was dismissed post-settlement (June 15, 2015). App. 103-113. Gadbois responded to these expected events by changing positions and filing a "Motion for Remand" in which he argued for the first time that he "may now proceed with his case" in

the district court. *Id.* He contended that supplementing his complaint to plead the recent dismissal of *Denk* would somehow cure the first-to-file defect that had existed when he initially brought his case and that continued to exist for the ensuing five years. *Id.* PharMerica opposed that motion, urging the First Circuit to do precisely what the Fourth Circuit had done in *Carter* (a disposition affirmed by this Court), *viz.*, to rule that the case should be dismissed without prejudice. App. 116-126.

Despite the fact that it contradicted his initial position on appeal and despite the fact that his me-too case had been pending for more than five years, the First Circuit granted Gadbois's request. App. 1-17. It remanded to the district court because *Denk* is no longer pending and, thus, no longer bars Gadbois's claim. *Id.*

In reaching this conclusion, the First Circuit addressed whether the district court's power to entertain Gadbois's suit must be analyzed only as of the date his complaint was filed, or whether subsequent events could "cure" the original threshold defect. The court proceeded to answer that question by focusing exclusively on the flexibility that some courts have found to cure certain *other* jurisdictional defects by way of the supplementation provision of Fed. R. Civ. P. 15(d). App. 7-9. None of the authorities cited by the First Circuit involved the FCA, much less the first-to-file bar. App. 8.

Having framed the question in those terms, the First Circuit did not explain how its conclusion that

Gadbois's case should proceed could be squared with the statutory language that no one can "bring a related action based on the same facts underlying the pending action." 31 U.S.C. § 3730(b)(5).[3] Nor did the First Circuit explain how its decision to vacate and remand the district court's dismissal could be squared with the action this Court took in *Carter*, or with the contrary holdings of the Fourth, Seventh and Tenth Circuits.

In recognition of the importance of the issue presented, the First Circuit stayed the issuance of its mandate pending this Court's resolution of this petition. App. 40-41.

REASONS FOR GRANTING THE PETITION

The decision below is contrary to this Court's decision in *Carter* and conflicts with the decisions of every other circuit that considered the issue. Review is necessary to resolve this circuit split, to correct the First Circuit's misreading of an important federal

[3] The First Circuit stated that "PharMerica suggests that the fact that the relator's claim was barred when brought prevents him from using Rule 15(d) to cure the jurisdictional defect. This suggestion is bolstered, PharMerica says, by the FCA itself, which provides that no one can 'bring' an action based on the same facts as those undergirding a pending action. After careful consideration, we find PharMerica's position untenable." App. 7. Other than this conclusory remark, the First Circuit did not address the import of the word "bring" in the text of the first-to-file bar. App. 1-17.

statute, and to promote the fair, efficient, and consistent adjudication of *qui tam* cases.

I. REVIEW IS NEEDED TO RESOLVE A CIRCUIT SPLIT CONCERNING THE APPLICATION OF THE FIRST-TO-FILE BAR.

In *Carter*, this Court assessed "whether the FCA's first-to-file bar keeps new claims out of court only while related claims are still alive or whether it may bar those claims in perpetuity." *Carter*, 135 S.Ct. at 1973. It concluded that the first-to-file bar "keeps new claims out of court," only while the related claims still are "pending." *Id.* at 1978. Although the first-filed action in *Carter* had been resolved, this Court *affirmed the dismissal of the second-filed action*, holding only that "dismissal *with prejudice* was not called for." *Id.* (emphasis added). Thus, the teaching of *Carter* is that the first-to-file bar prohibits a follow-on *qui tam* action from being brought while a related, earlier-flied claim is pending. The case does not remotely stand for the proposition that *qui tam* actions brought when an earlier-filed, related action is pending nonetheless escape the application of the first-to-file bar so long as the later-filed action happens to outlast the first-filed one.

In this critical respect, the First Circuit's decision plainly deviates from *Carter*. In both cases, the first-filed *qui tam* case was resolved during the pendency of the later action. Whereas this Court read the statute to require dismissal of the follow-on action

without prejudice, the First Circuit permitted Gadbois's initial follow-on suit to proceed. Whereas *Carter* read the statute to say the follow-on action must be "kept out of court" during the pendency of the first case, the First Circuit permits a follow-on case to be *in court* at precisely that time.[4]

Moreover, *Carter* teaches that each word in the first-to-file bar must be given meaning. 135 S.Ct. at 1979. Courts may no sooner disregard the word "bring" in the statute than the word "pending." Together, these two terms prevent multiple relators from pursuing related cases at the same time. It is a one-at-a-time rule that the First Circuit's decision effectively neuters by giving no meaning to the word "bring." The natural reading of the statutory language – indeed, the only reasonable reading – is that no more than one case can be pending. Had Congress intended follow-on cases to remain pending in deep somnolence until all prior cases were terminated, the statute would not have said follow-on cases could not be brought. In short, no conceivable reading of the actual statutory language produces the conclusion that the First Circuit reached.

In addition to misconstruing the key statutory terms and contravening the result in *Carter*, the First

[4] In fact, the adverse consequences of the decision below are even greater because the same statutory prohibition bars intervention in first-filed cases by non-governmental parties. That broader practical impact provides additional powerful support for this Court's review.

Circuit's decision conflicts with the decisions of every circuit court to consider the issue. As the Fourth Circuit held and this Court affirmed in *Carter*, "[f]ollowing the plain language of the first-to-file bar . . . [courts] look at the facts as they existed *when the claim was brought* to determine whether an action is barred." *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 183 (4th Cir. 2013) (emphasis added), *aff'd in relevant part by Carter*, 135 S. Ct. 1970.

Similarly, the Seventh Circuit observed that "[s]tatutes of this form are understood to forbid the commencement of a suit; an action (or a given claim within a larger action) brought while the condition precedent is unsatisfied." *United States ex rel. Chovanec*, 606 F.3d at 362. In *Chovanec*, the relator asked the Seventh Circuit to read the word "bring" out of the first-to-file bar, just as the First Circuit did below. In a decision written by Chief Judge Easterbrook, the Seventh Circuit refused, explaining that (*id.*):

> [relator] treats § 3730(b)(5) as if it read something like "While another action under this section is pending, no person other than the Government may continue to prosecute a related action." Then § 3730(b)(5) would do nothing to block an infinite series of claims; me-too actions could proliferate, provided only that the copycat asked for a stay until the action ahead of it in the queue had been resolved. That's not at all what the actual statute says, however. It provides that if one

> person "brings an action" then no one other than the Government may "bring a related action" while the first is pending. . . . Statutes of this form are understood to forbid the commencement of a suit; an action (or a given claim within a larger action) "brought" while the condition precedent is unsatisfied must be dismissed rather than left on ice.

Likewise, the Tenth Circuit held that "we judge whether § 3730(b)(5) bar[s] [a] . . . qui tam action by looking at the facts as they existed *at the time that action was brought*." *United States ex rel. Grynberg v. Koch Gateway Pipeline Co*., 390 F.3d 1276, 1279 (10th Cir. 2004) (emphasis added) (citing *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957) ("[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought.")).

There is no reason to think *Carter* eroded these earlier circuit court decisions on this point, especially since this Court's opinion expressly agreed with the Fourth Circuit's disposition. And, consistent with that view, two district courts recently held that a second-filed related action must be dismissed without prejudice despite the resolution of the first-filed action. *United States ex rel. Carter v. Halliburton Co*., ___ F. Supp. 3d ___, 2015 WL 7012542, at *13 (E.D. Va. Nov. 12, 2015) (the remanded *Carter* action); *United States ex rel. Shea v. Verizon Commc'ns, Inc*., ___ F. Supp. 3d ___, 2015 WL 7769624, at *11 (D.D.C. Oct. 6, 2015). The district court in the remanded *Carter* case correctly reasoned that an amended

complaint (submitted after the first case terminated) is not "the relevant point of focus for the first-to-file bar." 2015 WL 7012542, at *12-13. Courts can never acquire jurisdiction over such an amended complaint because the original complaint will have always been filed at a time when a related action was "pending." *Id.* Likewise, *Shea* explained: "Although no related action is currently pending . . . the Court [must] nonetheless dismiss Plaintiff's action because a related action was pending when he filed his initial 2009 Complaint[.]" 2015 WL 7769624, at *9.

In sum, the decision below misconstrues the statutory language, misperceives the significance of this Court's disposition in *Carter*, and reaches a plainly incorrect result. Certiorari should be granted to resolve the conflict between the First Circuit, on the one hand, and the Fourth, Seventh, and Tenth Circuits, on the other, regarding the important practical question of whether *qui tam* relators may circumvent the first-to-file bar by bringing otherwise barred claims and stalling until the first-filed claim is inevitably resolved.

II. REVIEW IS NEEDED TO PROMOTE THE EFFICIENT RESOLUTION OF *QUI TAM* CASES.

As the courts that disagree with the First Circuit have discerned, a rule that permits follow-on cases to linger on the docket until the first-filed case ends will have serious deleterious consequences. In *Carter*, this

Court acknowledged one of the potential detriments, recognizing that its literal construction of the word "pending" "would produce practical problems." 135 S.Ct. at 1979. As the Court observed, "if the first-to-file bar is lifted once the first-filed action ends, defendants may be reluctant to settle such actions for the full amount that they would accept if there were no prospect of subsequent suits asserting the same claims." *Id*. Nevertheless, the Court's fidelity to the express statutory language informed the result in *Carter*. *Id.* But, *Carter* surely did not contemplate that federal courts would, as the First Circuit did here, create new real-world difficulties that have no basis or support in the statutory language.

In this case, the correct literal meaning of "bring" would reduce – indeed, essentially eliminate – many of the practical problems acknowledged in *Carter*. For one thing, a dismissal without prejudice (rather than a remand) will, in many instances, mean that the second-filed relator's claim is time-barred. That is the necessary result of a statute that expressly precludes me-too litigants and intervenors from being in court while the first-filed case is pending. The statute cannot be read any other way.

In contrast to the actual language and purpose of the statutory bar, the First Circuit's decision creates powerful incentives for defendants to delay settling first-filed cases when me-too cases are pending: at the same time, it creates harmful incentives for relators to file docket-clogging placeholder lawsuits and to challenge existing judgments of dismissal. If

resolving one *qui tam* action enables an otherwise barred suit to proceed, defendants will be reluctant to settle even the most meritorious claims and would have a strong incentive to delay resolution as long as possible. Indeed, if PharMerica had settled *Denk* only a few weeks later, the First Circuit would not have been presented with Gadbois's incorrect request to vacate and remand.

The first-to-file rule was "crafted in the interest of judicial economy." *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1156 (9th Cir. 2007). Contrary to that goal, the First Circuit decision opens the door for follow-on relators to file opportunistic suits in the hope that, through inertia, inactivity, and delay, they might outlast the first-filed actions. It is inevitable, after all, that earlier-filed actions will eventually conclude and no longer be "pending." It is not in the interests of judicial economy to create an incentive for relators to file cases simply to get in line. The filing of such placeholder lawsuits only serves to squander judicial resources and defeats the salutary purpose of the first-to-file bar. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2531-32 (2013) (recognizing the strong public policy against encouraging the filing of frivolous lawsuits).

The First Circuit's decision also leaves district courts without guidance on how to address future follow-on *qui tam* actions, thereby inviting inconsistency. As Judge Easterbrook cautioned in *Chovanec*, district courts will have little choice but to stay follow-on actions pending the resolution of the

first-filed case, instead of dismissing them. *See United States ex rel. Chovanec*, 606 F.3d at 362. Indeed, even if a follow-on case is dismissed, the relator might later challenge the judgment pursuant to Fed. R. Civ. P. 59 or 60 when the first-filed action ends. This Court has often recognized "the law's important interest in the finality of judgments" and should grant review to prevent relators from using *Gadbois* to reopen already decided *qui tam* cases. *See, e.g.*, *Massaro v. United States*, 538 U.S. 500, 504 (2003).

These are not idle or hypothetical concerns. In fact, the relator in *Carter* recently sought to challenge the dismissal without prejudice of his action – a dismissal expressly affirmed by this Court – on the ground that the First Circuit's decision in *Gadbois* allowed him to do so. *United States ex rel. Carter*, 2016 WL 634656; *see also Carter*, 135 S.Ct. at 1978 (affirming dismissal without prejudice). The district court correctly rejected the *Carter* relator's challenge because, fortunately, *Gadbois* is not binding authority in the Eastern District of Virginia. *United States ex rel. Carter*, 2016 WL 634656, at *2 ("*Gadbois* is not 'controlling law' for this Court."). But, no matter where the original first-filed case was litigated, copycat cases in the district courts of the First Circuit would be governed by *Gadbois*. For that reason, the circuit split that the decision below created poses a serious threat to national uniformity in the application of this important law.

The recent criticism of the First Circuit decision in *Gadbois* by the Eastern District of Virginia is

particularly compelling because it is in federal trial courts where the detrimental impact of the decision below will be felt most directly. Specifically criticized were the First Circuit's failure to give any meaning to the statutory word "bring" and its failure to appreciate the important practical difference – with respect to the impact of the statute of limitations – between a dismissal without prejudice and a remand that allows the follow-on relator's case to proceed. *Id*. at *2 (observing that "*Gadbois* did not give sufficient weight to the plain language of 31 U.S.C. § 3730(b)(5)" and rejecting the First Circuit's premise that it would be a "pointless formality" to require dismissal and refiling).

Another negative consequence of the First Circuit's decision concerns situations where there are multiple follow-on relators. Consider what would happen if two copycat relators each filed their own cases while the first-filed action was pending. The copycat who filed earlier would, paradoxically, be the one most likely to see his or her claim dismissed because there would be a longer period of overlapping pendency and, thus, more time for the defendant to prevail on a first-to-file defense. In contrast, the later copycat relator, having brought suit closer to the end of the first-filed case, would be more likely to escape the application of the first-to-file bar because his or her case stands a better chance of outlasting the first-filed action. In this respect, the First Circuit's ruling turns a one-at-a-time rule into a lottery.

This case is, at once, a stark example of the adverse consequences that the decision below will have on the judicial system and is an ideal vehicle for this Court to restore a correct, uniform understanding of the first-to-file bar. Five years after relator Gadbois commenced his me-too case, the First Circuit permitted it to proceed, as of the date it was filed (a date on which it was statutorily barred), because the first-filed case is no longer pending. It is no answer to say, as the First Circuit suggests (App. 12-15), that PharMerica can litigate other defenses that may result in dismissal; that is precisely the sort of expense and needless litigation that the statutory bar against such cases being brought was designed to prevent.

The federal government intervened in the earlier-filed case (*Denk*) and obtained a settlement; the government did not intervene in this case. Under these circumstances, it is well to bear in mind the Seventh Circuit's comment in *Chovanec* that "[t]he plaintiff in a qui tam action, after all, is the United States rather than the relator; whether the United States wins or loses in the initial action, that is the end of the dispute." 606 F.3d at 362. The decision below would divert resources from first-filed cases to follow-on cases and thwart the objectives Congress sought to promote. This Court should grant review, read "bring" to mean "bring," and thereby resolve a circuit split and prevent the practical problems that will necessarily flow from allowing relators to circumvent the first-to-file bar.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 22, 2016

United States Court of Appeals
For the First Circuit

No. 14-2164

UNITED STATES ex rel. ROBERT GADBOIS,

Plaintiff, Appellant,

STATES OF CA, CO, DE, FL, GA, HI, IL, IN, LA, MA, MI, MN, MT, NV, NH, NM, NC, RI, TN, TX, VA, WI, ex rel. ROBERT GADBOIS,

Plaintiffs, Appellants,

STATE OF MARYLAND ex rel. ROBERT GADBOIS,

Plaintiff,

v.

PHARMERICA CORPORATION,

Defendant, Appellee,

CVS/CAREMARK CORPORATION; WALGREEN COMPANY; MEDCALL, LLC; AND RITE AID CORPORATION,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Mary M. Lisi, *U.S. District Judge*]

Before

Howard, *Chief Judge*,
Selya and Stahl, *Circuit Judges*.

Robert L. Vogel, with whom *Shelley R. Slade*, *Vogel, Slade & Goldstein, LLP*, *Amato A. DeLuca*, *DeLuca & Weizenbaum, Ltd.*, *Louise A. Herman*, and *Law Offices of Louise A. Herman* were on brief, for appellants.

Jeremy M. Sternberg, with whom *Ralph T. Lepore, III*, *Michael R. Manthei*, *Robert M. Shaw*, *Nathaniel F. Hulme*, and *Holland & Knight LLP* were on brief, for appellee.

December 16, 2015

SELYA, *Circuit Judge*. In this qui tam action, the district court dismissed the claims of the relator, Robert Gadbois, for lack of subject matter jurisdiction. While his appeal of that order was pending, subsequent events coalesced to dissolve the jurisdictional impediment to the relator's action. He responded to this development by broadening his appeal to include the possibility of supplementing his pleadings. We conclude, as a matter of first impression in this court, that Federal Rule of Civil Procedure 15(d) is available to cure most kinds of defects in subject matter jurisdiction. For prudential reasons, however, we decline to order such supplementation here but, rather, vacate the judgment below to allow the district court to consider the relator's request for supplementation under Rule 15(d).

I. BACKGROUND

The relator formerly worked as a pharmacist for PharMerica Corp. (PharMerica). In November of 2010, he filed this qui tam action under seal in the District of Rhode Island. His complaint alleged that PharMerica had committed numerous infractions related to its distribution of prescription drugs to long-term care facilities in violation of the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, and several parallel state statutes.

The relator filed an amended complaint as of right in May of 2011. More than two years elapsed before the United States elected not to intervene in the case. In short order, the affected states took a similar stance.

The pleadings were unsealed and, in February of 2014, the relator filed a second amended complaint with leave of court. In due course, PharMerica moved to dismiss, asserting both lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(1), (6). PharMerica contended, inter alia, that the district court lacked jurisdiction by virtue of the FCA's first-to-file bar, which provides that if an action involving the same subject matter is already pending, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). In support of this contention, PharMerica highlighted similarities between the relator's action and an

earlier-filed action that was pending in the United States District Court for the Eastern District of Wisconsin.

The district court, addressing only PharMerica's request for dismissal under Rule 12(b)(1) and the first-to-file bar, laid the allegations contained in the relator's second amended complaint alongside the allegations contained in the Wisconsin pleadings. It concluded that the two actions were based on substantially the same facts and conduct. *See United States ex rel. Gadbois v. PharMerica Corp.*, No. 10-471, slip op. at 22-23 (D.R.I. Oct. 3, 2014) (unpublished). Consequently, the court – citing the first-to-file bar – dismissed the relator's FCA claim for want of subject matter jurisdiction. *See id.* at 23. It then declined to exercise supplemental jurisdiction over the relator's state-law claims and dismissed those claims as well. *See id.*

The relator timely appealed. During the course of briefing, the tectonic plates shifted. First, the Supreme Court handed down its decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), which construed the phrase "pending action" as used in 31 U.S.C. § 3730(b)(5). The Court held that, under the wording of the statute, "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed." *Id.* at 1978. Accordingly, the dismissal of a section 3730(b)(5) claim ordinarily should be without prejudice, because the claim

could be refiled once the first-filed action is no longer pending. *See id.* at 1979.

Less than a month after the Court decided *Carter*, a second development occurred: the Wisconsin action was settled and dismissed. By then, the relator's appeal was already partially briefed. Positing that these two developments – the *Carter* decision and the dismissal of the Wisconsin action – had significantly affected his case, the relator, in his reply brief and by a separate motion to remand, sought to reformulate his complaint on the fly. He requested, in the alternative, that we either deem his complaint supplemented with the additional fact that the Wisconsin action was no longer pending or remand to the district court with instructions to permit him to supplement his complaint under Rule 15(d). In an opposition to the relator's remand motion and at oral argument, PharMerica argued that neither of these alternatives was appropriate.

II. ANALYSIS

The peculiar posture of this case makes it advisable for us to consider the relator's procedural arguments first. If the relator's second amended complaint is a legitimate candidate for supplementation, that would obviate any need to address the degree of similarity between that complaint and the pleadings in the Wisconsin action. Thus, our starting point is the relator's request for relief under Rule 15(d).

Rule 15(d) affords litigants a pathway for pleading "any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." The rule shares the core objective of the Civil Rules: "to make pleadings a means to achieve an orderly and fair administration of justice." *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 227 (1964); *see* Fed. R. Civ. P. 1. Rule 15(d) facilitates this objective by "promot[ing] as complete an adjudication of the dispute between the parties as is possible." 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1504, at 245 (3d ed. 2010); *see LaSalvia v. United Dairymen of Ariz.*, 804 F.2d 1113, 1119 (9th Cir. 1986). By the same token, the Rule helps courts and litigants to avoid pointless formality: although causes of action accruing after the institution of a lawsuit usually can be filed as separate actions, supplementation under Rule 15(d) is often a more efficient mechanism for litigating such claims. *See Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1186-87 (10th Cir. 2015). It follows that supplementation of pleadings is encouraged "when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action." 6A Wright et al., *Federal Practice and Procedure* § 1504, at 258-59.

PharMerica acknowledges these principles but insists that they are trumped in this instance by the venerable rule that "[j]urisdiction is determined

based on whether it existed at the time the plaintiff filed the original complaint." *United States ex rel. Estate of Cunningham v. Millennium Labs. of Cal., Inc.*, 713 F.3d 662, 664 (1st Cir. 2013). Noting that we have described the first-to-file bar as jurisdictional, *see, e.g.*, *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014), PharMerica suggests that the fact that the relator's claim was barred when brought prevents him from using Rule 15(d) to cure the jurisdictional defect. This suggestion is bolstered, PharMerica says, by the FCA itself, which provides that no one can "bring" an action based on the same facts as those undergirding a pending action. 31 U.S.C. § 3730(b)(5).

After careful consideration, we find PharMerica's position untenable. We explain briefly.

Rule 15(d) prescribes that "[t]he court may permit supplementation even though the original pleading is defective in stating a claim or defense." This sentence was added to the rule in 1963. It was designed to combat "the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied." Fed. R. Civ. P. 15(d) advisory committee's note to 1963 amendment. The new language was designed to ensure that the amended rule would "give the court broad discretion in allowing a supplemental pleading" so that plaintiffs would not be "needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of

the original action have made clear the right to relief." *Id.*

In keeping with this spirit of flexibility, courts generally have read Rule 15(d) to include defects in subject matter jurisdiction among the deficiencies that may be corrected through a supplemental pleading. The Supreme Court has signaled its approval of this praxis. *See Mathews v. Diaz*, 426 U.S. 67, 75 & n.8 (1976) (recognizing that plaintiff had not satisfied "a nonwaivable condition of jurisdiction" before filing suit, but noting that plaintiff had subsequently satisfied the condition so "[a] supplemental complaint in the District Court would have eliminated this jurisdictional issue"). The decision in *Mathews* plainly implies that subject matter jurisdiction falls within the cluster of defects that may be cured by a supplemental pleading under Rule 15(d).

Our sister circuits have not hesitated to make this implication explicit. *See, e.g.*, *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008); *Franks v. Ross*, 313 F.3d 184, 198 (4th Cir. 2002); *see also Hertz Corp. v. Enterprise Rent-a-Car Co.*, 557 F. Supp. 2d 185, 191-92 (D. Mass. 2008). A few illustrations suffice to make the point. For example, the expiration of a jurisdictional waiting period can be shown through a supplemental pleading in order to salvage an otherwise premature complaint. *See Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 345, 347-48 (4th Cir. 2014); *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 290 (8th Cir. 1988). So, too, Rule 15(d) has been viewed as an

appropriate mechanism for pleading newly arising facts necessary to demonstrate standing. *See Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 779 F.3d 1036, 1044-45 (9th Cir.), *cert. denied*, 136 S. Ct. 240 (2015).

The weight and consistency of these authorities undermines PharMerica's attempt to elongate the reach of the familiar rule that jurisdiction is determined by the facts existing at the time of filing an original complaint. As we previously have explained, "[t]he letter and spirit of the [time-of-filing] rule apply most obviously in diversity cases, where the rule originated, and where heightened concerns about forum-shopping and strategic behavior offer special justifications for it." *ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 92 (1st Cir. 2008) (citation omitted). In federal question cases, however, "courts have been careful not to import the time-of-filing rule indiscriminately." *Id.* Where, as here, there are no allegations of manipulative abuse of the rule, the time-of-filing rule is inapposite to the federal question context.[1] *See id.* at 92 & n.8.

Viewed against this backdrop, we think it manifest that the relator's case is well suited to a motion

[1] Though we have at times referenced the time-of-filing rule in federal question cases, *see, e.g.*, *Sallen v. Corinthians Licenciamentos LTDA*, 273 F.3d 14, 23 (1st Cir. 2001), those references have invariably been in dictum. They are, therefore, without any binding effect. *See Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 459 (1st Cir. 1992).

for leave to supplement. Developments occurring after the filing of the second amended complaint – the *Carter* decision and the dismissal of the Wisconsin action – have dissolved the jurisdictional bar that the court below found dispositive. Although the order of dismissal may have been proper at the time it was entered, the relator timely appealed and the critical developments occurred during the pendency of that appeal. Consequently, this case is analogous to the cases in which a jurisdictional prerequisite (such as an exhaustion requirement) is satisfied only after suit is commenced. Under the circumstances, it would be a pointless formality to let the dismissal of the second amended complaint stand – and doing so would needlessly expose the relator to the vagaries of filing a new action. We hold, therefore, that the relator's second amended complaint is eligible for the proposed supplementation.[2]

This holding does not end our odyssey. Even though the relator's second amended complaint is eligible for the proposed supplementation, a question remains as to whether such supplementation should be allowed. This question comes before us in a curious posture. Typically, a motion for supplementation will

[2] Because we conclude that a supplemental pleading can be used to cure a jurisdictional defect, we have no need to consider the relator's back-up argument that the first-to-file bar is not jurisdictional in light of *Carter* and the recent decision in *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 119-21, 121 n.4 (D.C. Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3179 (U.S. Sept. 21, 2015) (No. 15-363).

be proffered in the district court, and an appellate court's role will be limited to examining whether the district court abused its discretion in granting or denying the motion. *See, e.g.*, *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1211 (11th Cir. 2008); *Twin Disc, Inc. v. Big Bud Tractor, Inc.*, 772 F.2d 1329, 1338 (7th Cir. 1985). Here, however, the timing of the new developments was such that the district court did not have an opportunity to pass upon a motion to supplement.

The relator requests supplementation for the first time on appeal, and he phrases his request in the alternative: he asks that we either deem his second amended complaint supplemented instanter or remand the case to the district court with instructions to permit supplementation.

We reject the relator's first alternative out of hand. Under Rule 15(d), the filing of a supplemental pleading is not available to the pleader as a matter of right but, rather, is subject to the court's discretion. *See ConnectU*, 522 F.3d at 90.

That discretion should normally be exercised in the first instance by the district court, not by the court of appeals. For this reason, we reject the relator's alternative request as framed. It would completely frustrate the district court's ability to exercise its discretion were we to remand with instructions to permit supplementation. A remand makes sense here only if it is for the purpose of allowing the district court to exercise its discretion.

In the closely analogous circumstances of discretionary amendments under Rule 15(a), we have emphasized the desirability of allowing the district court to exercise discretion in the first instance. *See United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 733-34 (1st Cir. 2007). Requests for supplementation under Rule 15(d) are no different. Where, as here, the pleader is not entitled to supplementation as a matter of right and we have no firm indication as to how the district court would exercise its discretion with respect to a Rule 15(d) motion, allowing the district court to make the initial determination is the proper course.

This conclusion is reinforced by the breadth of the discretion inherent in Rule 15(d). As written, Rule 15(d) contains no standards at all to guide the district court's analysis; it merely authorizes the district court to permit service of a supplemental pleading "on just terms." In an effort to fill this vacuum and in keeping with the overarching flexibility of Rule 15, courts customarily have treated requests to supplement under Rule 15(d) liberally. *See, e.g.*, *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1278 (10th Cir. 2001). This liberality is reminiscent of the way in which courts have treated requests to amend under Rule 15(a)'s leave "freely give[n]" standard. *See, e.g.*, *Glatt v. Chi. Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996); *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir. 1995); *Mueller Co. v. U.S. Pipe & Foundry Co.*, 351 F. Supp. 2d 1, 2 (D.N.H. 2005).

This does not mean, however, that motions for supplementation should be granted automatically. For one thing, it is implicit in the logic of Rule 15(d) that a motion to supplement may be denied where the referenced events occurred before the filing of the original complaint.[3] *See Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874-75 (9th Cir. 2010). For another thing, leave to supplement may be withheld when the request would "unduly delay resolution of the case." *Hall v. CIA*, 437 F.3d 94, 101 (D.C. Cir. 2006); *accord Schwarz*, 544 F.3d at 1229; *Weeks v. N.Y. State (Div. of Parole)*, 273 F.3d 76, 88 (2d Cir. 2001); *Twin Disc*, 772 F.2d at 1338. In the last analysis, a district court faced with a Rule 15(d) motion must weigh the totality of the circumstances, just as it would under Rule 15(a). *See Palmer v. Champion Mortg.*, 465 F.3d 24, 30-31 (1st Cir. 2006). Idiosyncratic factors – say, the futility of supplementation, *see Haggard v. Bank of the Ozarks, Inc.*, 668 F.3d 196, 202 (5th Cir. 2012) (per curiam); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 65 (2d Cir. 2004), prejudice to the opposing party, *see Walker*, 240 F.3d at 1278-79, and unreasonable delay in attempting to supplement, *see Glatt*, 87 F.3d at 194 – may suffice to ground a denial of a Rule 15(d) motion. Everything depends on context.

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[3] For the sake of completeness, we note that a motion to supplement that is in fact a motion to amend will ordinarily be recharacterized and addressed under the correct rubric. *See McDonald v. Hall*, 579 F.2d 120, 120 n.1, 121-22 (1st Cir. 1978) (per curiam).

We recognize that a district court has a hands-on familiarity with a case – a familiarity that an appellate court cannot hope to replicate. Given this special coign of vantage, it will almost always be advisable for the district court, not the court of appeals, to pass judgment in the first instance on a request for supplementation. *See United States ex rel. D'Agostino v. ev3, Inc.*, 802 F.3d 188, 195 (1st Cir. 2015) (expressing a similar view with respect to Rule 15(a) motions). Rule 15(d)'s unique mandate that supplementation of pleadings shall only be allowed "on just terms" points us in the same direction.

Of course, vacating the judgment and remanding to the district court to allow consideration of a motion to supplement leaves the merits issues unresolved. But under the circumstances, it would be imprudent to attempt to resolve them here. After all, the case will change materially if the district court permits supplementation of the second amended complaint. Consequently, any disposition of the substantive issues raised in this appeal would run the risk of being wholly advisory – and federal courts are prohibited from rendering advisory opinions. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Osediacz v. City of Cranston*, 414 F.3d 136, 139 (1st Cir. 2005).

III. CONCLUSION

We need go no further. For the reasons elucidated above, we vacate the judgment of the district court and remand the case so that the relator may file,

within such time parameters as the district court may set, a motion to supplement his second amended complaint. The district court shall pass upon that motion in due season and, in the event that the court denies the motion, it may reenter a judgment of dismissal.[4] If, however, the court grants the motion for supplementation, the case will proceed in the ordinary course.

Vacated and remanded. No costs.

[4] Although there may no longer be a barrier to the relator's suit under the first-to-file bar, PharMerica may assert any number of other defenses to the relator's proposed supplementation. For example, PharMerica may argue that such supplementation would be futile in light of the settlement in the Wisconsin action. *See United States ex rel. Chovanec v. Apria Healthcare Grp., Inc.*, 606 F.3d 361, 362, 365 (7th Cir. 2010) (noting that the circumstances surrounding a lifting of the first-to-file bar may sometimes give rise to other defenses to the action).

United States Court of Appeals
For the First Circuit

No. 14-2164

UNITED STATES ex rel. ROBERT GADBOIS,

Plaintiff, Appellant,

STATES OF CA, CO, DE, FL, GA, HI, IL, IN, LA, MA, MI, MN, MT, NV, NH, NM, NC, RI, TN, TX, VA, WI, ex rel. ROBERT GADBOIS,

Plaintiffs, Appellants,

STATE OF MARYLAND ex rel. ROBERT GADBOIS,

Plaintiff,

v.

PHARMERICA CORPORATION,

Defendant, Appellee,

CVS/CAREMARK CORPORATION; WALGREEN COMPANY; MEDCALL, LLC; AND RITE AID CORPORATION,

Defendants.

JUDGMENT

Entered: December 16, 2015

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment

of the district court is vacated, and the matter is remanded for further proceedings consistent with the opinion issued this day. No costs are awarded.

By the Court:
/s/ Margaret Carter, Clerk

cc: Hon. Mary M. Lisi, Mr. David Dimarzio, Clerk, United States District Court for the District of Rhode Island, Mr. DeLuca, Ms. Donovan, Rm Dube, Mr. Glynn, Ms. Hermna, Mr. Hulme, Mr. Lepore, Mr. Manthei, Mr. Shaw, Ms. Slade, Mr. Sternberg, Mr. Vogel & Ms. Weizenbaum.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA, et al. *ex rel.* ROBERT GADBOIS

Plaintiffs,

v. C.A. No. 10-471-ML

PHARMERICA CORPORATION,

Defendant.

MEMORANDUM AND ORDER

(Filed Oct. 3, 2014)

The plaintiff in this *qui tam* action, Robert Gadbois ("Gadbois") has brought claims on behalf of the United States and twenty-two states[1] against his employer, PharMerica Corporation ("PharMerica), alleging that PharMerica has engaged in conduct that violates the False Claims Act ("FCA") and corresponding false claims acts of the named states. The United States has declined to intervene in this action, as have the individual states.

The case is before the Court on the Defendant's motion to dismiss the complaint pursuant to Fed. R.

[1] California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin.

Civ. P. 12(b)(1) for lack of subject-matter jurisdiction, on the ground that the action is barred under first-to-file and pending-government-action principles of Sections 3730(b)(5) and 3730(e)(3) of the FCA.

I. Factual Background

PharMerica owns and operates approximately 91 pharmacies in 45 states; the pharmacies dispense medications for residents in long-term care and assisted living facilities. Complaint ¶ 23. Gadbois is a pharmacist employed by PharMerica in its Warwick, Rhode Island, pharmacy. Complaint ¶ 11. As staff pharmacist, Gadbois has been responsible for dispensing prescription medications, including controlled and non-controlled substances, to residents at Rhode Island nursing homes and other long-term facilities serviced by PharMerica. Complaint ¶ 18.

In his Complaint, Gadbois alleges that PharMerica engages in two schemes – one related to non-controlled medications, one related to controlled medications – that result in overbilling Medicaid and Medicare Part D[2] and in providing undue profit to PharMerica. With respect to the first scheme, Gadbois contends that PharMerica's Warwick pharmacy has been dispensing

[2] **Medicare** is a federal health insurance program for people who are 65 or older or who suffer from certain disabilities. The Medicare Part D program relates to prescription drug coverage. **Medicaid** is a joint federal and state program that helps pay health care costs for people with limited income and resources.

and billing for non-controlled substances without valid prescriptions. Complaint ¶ 85. Gadbois describes dispensing practices at the Warwick pharmacy in some detail, *see* Complaint ¶¶ 85-99, including the pharmacy's use of PharMerica's LTC400 computer software system. *Inter alia*, Gadbois alleges that the Warwick pharmacy accepts orders from LTCF (long-term care facility) staff although the orders lack required prescription elements, such as quantity and number of refills and although the orders are not transmitted by a physician. Complaint ¶ 85. Gadbois also alleges that the Warwick pharmacy's general manager has repeatedly instructed staff pharmacists and technicians to dispense the maximum quantity of non-controlled medication allowed by insurance, regardless of whether they had received a prescription authorizing the dispensing of such quantities. Complaint ¶ 91. According to Gadbois, once an initial supply of non-controlled medication has been provided, LTCF staff request a resupply of the prior LTCF drug order by referencing the prior Rx number, often years after the initial request. Complaint ¶ 92. Gadbois alleges that the LTC400 program facilitated the Warwick pharmacy's ability to dispense, and bill for, the resupply of medication even if the program reflected zero refills. Complaint ¶ 93. In addition, Gadbois contends that the Warwick pharmacy unlawfully dispenses medication without complying with federal and state prescription requirements by delivering bulk quantities of medication to LTCFs for later use by stocking emergency kits and RxNow vending machines. Complaint ¶¶ 95-97.

Gadbois alleges that such practices are not limited to the Warwick PharMerica pharmacy, but that he learned, through communications with colleagues at other PharMerica pharmacies, that such practices are prevalent elsewhere. Gadbois also states that, based on his understanding of the LTC400 software, he concluded that PharMerica corporate headquarters has programmed the software, which permits pharmacies to dispense and conceal unauthorized refills of non-controlled medication. Complaint ¶ 100. Gadbois acknowledges that PharMerica implemented a number of updates to the LTC400 software that resulted in rejecting or suspending incomplete or improper refill requests; he maintains, however, that the Warwick PharMerica pharmacy continues to fill LTCF requests for a resupply of medication even if the original request is more than a year old. Complaint ¶¶ 101-107. Gadbois also contends that the Warwick pharmacy continues to dispense and bill for non-controlled prescription medication in the maximum amount covered by a patient's insurance, even in the absence of a written prescription authorizing such quantities and without requesting an oral prescription. Complaint ¶ 108.

Gadbois's claim against PharMerica is based on the contention that PharMerica submits false claims to taxpayers by billing Medicare Part D or Medicaid for illegal refills of non-controlled drugs PharMerica dispenses. Complaint ¶ 112. Specifically, Gadbois states that "by seeking payment for drugs dispensed in violation of state law, including Medicaid payment rules,

[PharMerica] seek[s] payment for non-covered services." Complaint ¶ 113. According to Gadbois, PharMerica profits each time a PharMerica pharmacy bills a government health care program for a refill that exceeds the maximum number of refills permitted by law. Complaint ¶ 116. As a result of PharMerica's practices, government health care programs have paid for medications that were not medically necessary; put patients at risk; and "locked in" LTCF residents (without a valid prescription) as perpetual purchasers from PharMerica. Complaint ¶ 116. In support of his contentions, Gadbois provides a number of example cases[3] in which, he alleges, PharMerica dispensed illegal refills for which it subsequently billed Medicaid and Medicare Part D. Complaint ¶ 119.

Gadbois also asserts that PharMerica bills Medicare Part D and Medicaid for dispensing unauthorized quantities of non-controlled drugs without a valid prescription. Complaint ¶ 120-123. Gadbois provides an example for repeated re-supplies over a period of six weeks of a non-controlled anti-inflammatory agent that contains a warning against use beyond five days due to serious side effects. Complaint ¶ 126.

Regarding the scheme involving controlled medications, Gadbois acknowledges that, for at least twenty years, PharMerica has been following special procedures for the handling of controlled drugs, including locking up its inventory, preparing yearly logs

[3] Patients are identified only by initials.

of such inventory, delivering the drugs to LTCFs, and using different software programs for processing and billing. Complaint ¶ 130. Gadbois alleges, however, that PharMerica routinely disregards CSA (Controlled Substances Act) requirements such as receipt of a valid prescription prior to dispensing and, in case of Schedule II drugs, receipt of a prescription in written form (except in emergencies). Complaint ¶ 131. Gadbois also asserts that PharMerica routinely violates the CSA's prohibition against more than five refills of Schedule III and IV drugs or issued more than six months after the original prescription. *Id.* According to Gadbois, until changes were made to PharMerica's LTC400 billing software in 2010 and 2011, pharmacists were able to dispense and refill controlled substances without entering information regarding properly authorized quantities and/or refills of the medication. In addition, the earlier software automatically designated quantities in the maximum amount that would be reimbursed by insurance, for an indefinite number of refills. *Id.* Gadbois recounts that he observed such practices while working at the Warwick PharMerica pharmacy and that he was specifically trained and instructed in those practices by the pharmacy's general manager. Complaint ¶¶ 133-136. Gadbois also contends that he learned from communication with other colleagues, through corporate e-mails, and from the Warwick pharmacy's general manager, that PharMerica's alleged misconduct has taken place nationwide. Complaint ¶¶ 137-138. According to Gadbois, PharMercia did not attempt to correct its illegal practices until after the DEA began

a criminal investigation, in the course of which the DEA executed a search warrant at a Wisconsin PharMerica pharmacy in late 2009. Complaint ¶ 139. Gadbois provides a number of examples from the Warwick PharMerica pharmacy in which Medicaid was billed for illegally dispensed or refilled controlled medications. Complaint ¶¶ 143-145.

II. Procedural History

A. This Case

On November 19, 2010, Gadbois commenced litigation against PharMerica and a number of other pharmacy corporations in this Court; he filed an amended complaint (the "Complaint") on May 6, 2011 (Dkt. No. 13). COUNT ONE of the Complaint alleges that (1) PharMerica presented, or caused to be presented, false or fraudulent claims for non-controlled medication, in violation of 31 U.S.C. § 3729(a)(1)(A) and 31 U.S.C. § 3729(a)(1)[4]; (2) PharMerica made or used, or caused to be made or used, false records or statements to get false or fraudulent claims for non-controlled medication paid or approved by the United States, in violation of 31 U.S.C. § 3729(a)(1)(B) and 31 U.S.C. § 3729(a)(2); and (3) PharMerica has avoided its obligation to pay or transmit money to the Government arising from its claims for non-controlled

[4] The two cited subdivisions reflect clarification and amendment of the FCA on May 20, 2009. Pub.L. 11-21, § 4(a), May 20, 2009, 123 Stat. 1621.

medication, in violation of 31 U.S.C. § 3729(a)(1)(G). Complaint ¶¶ 150-155. COUNTS TWO through TWENTY-THREE assert state law violations related to claims for controlled and non-controlled medication. Complaint ¶¶ 156-199.

On November 19, 2013, the United States filed a notice of election to decline intervention. (Dkt. No. 20), after which the amended complaint was unsealed and ordered to be served on PharMerica. (Dkt. No. 30). On December 9, 2013, the State of Rhode Island filed, on behalf of the State of Rhode Island and the other named states, a notice of election to decline intervention in the case. (Dkt. No. 31). On January 24, 2014, Gadbois dismissed his claims against all defendants except PharMerica, as well as a number of other claims he had previously asserted against PharMerica. (Dkt. No. 35). At the same time, Gadbois sought to file a second complaint to "add[ ] detail to the claims on which [Gadbois] was proceeding independently so as to further clarify the factual and legal bases for [his] claims." Gadbois Mem. at 3 (Dkt. No. 34-1). Gadbois second amended complaint (the "Amended Complaint") was filed on February 25, 2014. On May 27, 2014, PharMerica filed a motion to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b) for failure to state a claim upon which relief can be granted. PharMerica also requested that, in the event the FCA claims were dismissed, the Court decline supplemental

jurisdiction and dismiss the Amended Complaint in its entirety. Mot. Dismiss at 1 (Dkt. No. 48).

B. The Wisconsin Action

On July 23, 2009, more than sixteen months before Gadbois commenced litigation in this Court, Jennifer Denk ("Denk"), a pharmacist previously employed by PharMerica in Pewaukee, Wisconsin, filed a *qui tam* action against PharMerica in the United States District Court of the Eastern District of Wisconsin. Complaint (Dkt. No. 1, *United States of America et al v. PharMerica Corporation*, C.A. No. 9-720 (E.D. Wis. July 23, 2009)). On January 15, 2010, Denk filed a first amended complaint (Dkt. No. 10, C.A. No. 9-720). According to Denk's complaint, prior to commencing litigation, she met with DEA investigators and DOJ (Department of Justice) attorneys to provide information and inform them of her intent to file suit. Denk Complaint ¶ 7. In her complaint, Denk alleges that PharMerica committed violations of 31 U.S.C. §3729 of the FCA by submitting "false and fraudulent claims for monetary payment for the sale of prescription drugs and other pharmaceutical products which PharMerica represented it sold to individuals entitled to payment through the Medicare and Medicaid programs." Denk Complaint ¶ 9. According to Denk, "[s]uch claims were not eligible for payment due to PharMerica's noncompliance with Medicare, Medicaid, and other laws and regulations relating to the dispensing, control, sale, billing, and disbursement of pharmaceutical products, including Schedule

II, III, IV and V controlled substances." *Id.* In addition, Denk alleged that PharMerica engaged in kickbacks to its vendors and that it terminated Denk's employment in retaliation for her whistleblowing activities. *Id.*

Specifically, Denk alleged that PharMerica presented claims for payment for controlled narcotic substances based on orders that were not valid for a number of reasons, including the complete absence of a prescription in a non-emergency situation or the failure to obtain a prescription within seven days of dispensing a controlled substance in an actual emergency situation. Denk Complaint ¶ 46. Denk further alleged that controlled medications were dispensed (and billed to the United States) in response to phone orders, faxed discharge orders, or physician orders in the absence of a documented or claimed emergency. Denk Complaint ¶ 48. According to Denk, based on her personal experience at the PharMerica pharmacy where she was employed, Schedule II, III, IV and V narcotics were regularly dispensed without a written prescription. Denk Complaint ¶¶ 48-56, 74-77. In addition, the Pewaukee pharmacy regularly failed to verify that an emergency situation did exist for which such medication was dispensed or to follow up with the prescribing physician to obtain a written prescription as required. Denk also alleged that non-prescription orders were refilled three or four times without regard to whether a signed prescription had been received. Denk Complaint ¶ 50. Denk supported her contentions with specific examples in which

PharMerica billed Medicare for, *inter alia*, (1) dispensing Schedule II narcotics when less expensive and more appropriate emergency medications were available; (2) dispensing medication to a patient without obtaining a written or oral prescription from the patient's physician; (3) dispensing medication in emergency situations without obtaining physician signatures within the required seven-day time frame; and (4) unsigned orders for prescription medications. Denk Complaint ¶¶ 53, 56, 60, 66. Denk's complaint also described the AS 400 software application used by PharMerica employees to enter order information for controlled substances. Denk Complaint ¶¶ 21, 22, 85.

On May 28, 2013, the United States advised the Wisconsin district court that it elected to intervene, in part, and to decline to intervene, in part. (Dkt. No. 40). On August 9, 2013, the Government filed a complaint in that action, alleging violations of the CSA (Counts One and Two), violations of the FCA (Counts Three and Four), and unjust enrichment (Count Five). (Dkt. No. 44). In its complaint, the Government alleged, *inter alia*, that PharMerica submitted false claims to Medicare for Schedule II drugs that were dispensed without a valid prescription; that PharMerica filled prescriptions for LTCF residents on order forms received from staff (instead of valid prescriptions from practitioners); and that such orders frequently lacked the practitioner's signature and the quantity of the requested medication. Gov. Complaint ¶¶ 2, 5, 7, 77-80.

The action was consolidated with another FCA case filed on May 26, 2010 in the Middle District of Florida by Eric Beeders and Lesa Martino, pharmacists employed by Integrity Pharmacy Services, an entity that had been acquired by PharMerica in late 2009. Beeders and Martino alleged, *inter alia*, that Integrity Pharmacy Services (of which PharMerica is the successor-in-interest) routinely billed Medicare and Medicaid programs of Florida, Massachusetts and Pennsylvania for "orders of Schedule II controlled substances called in by telephone by nurses working at nursing homes for quantities exceeding a 72-hour emergency supply without obtaining written prescriptions signed by the prescribing physician." Beeders/Martino Complaint ¶ 27 (*United States v. Pharmerica Corp.*, C.A. 10-1208, M.D. Fla. May 26, 2010).

On November 15, 2013, PharMerica filed a motion to dismiss Counts Three, Four, and Five of the Government's complaint. On December 31, 2013, PharMerica filed a motion to dismiss Benk's claim for retaliation. Both of PharMerica's motions were denied on September 3, 2014.[5]

III. Standard of Review

The dismissal of a complaint is governed by Rule 12 of the Federal Rules of Civil Procedure. The Court

[5] The Court takes judicial notice of this development, which occurred after the parties had submitted their briefs in the instant case.

may dismiss a case, *inter alia*, for lack of subject-matter jurisdiction, Fed. R. Civ. P. 12(b)(1), or for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). It is well established that the "standard of review is the same for failure to state a claim and for lack of jurisdiction." *Puerto Rico Tel. Co. v. Telecomm. Regulatory Bd. of Puerto Rico*, 189 F.3d 1, 14 n. 10 (1st Cir.1999).

A Court ruling on a motion to dismiss under Rule 12(b)(1) must construe the allegations in the complaint liberally in favor of the plaintiff. *Aversa v. United States*, 99 F.3d 1200, 1209-10 (1st Cir.1996). Therefore, the Court accepts the plaintiff's well-pleaded facts as true and draws all reasonable inferences in the plaintiff's favor. *McCloskey v. Mueller*, 446 F.3d 262, 266 (1st Cir.2006). It is noted that, although a complaint need not contain "detailed factual allegations;" it is subject to dismissal if it fails to state facts sufficient to establish "a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 555, 570, 127 S.Ct. 1955, 1965, 1974, 167 L.Ed.2d 929 (2007); *S.E.C. v. Tambone*, 597 F.3d 436, 442 (1st Cir.2010). Accordingly, the Court ignores "conclusory allegations, improbable inferences, and unsupported speculation." *Hostar Marine Transp. Sys., Inc., v. United States*, 592 F.3d 202, 207 (1st Cir.2010).

Moreover, the Court may consider extrinsic materials without converting a motion to dismiss to a motion for summary judgment. *Dynamic Image Tech., Inc. v. United States*, 221 F.3d 34, 37-38 (1st Cir.2000)

(citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 890-91 (1st Cir.1977)). If jurisdiction is challenged, the party invoking jurisdiction carries the burden of proving it. *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir.1995).

If the Court determines that it lacks subject matter jurisdiction, analysis of the movant's 12(b)(6) argument is neither necessary nor appropriate. *Christopher v. Stanley-Bostitch, Inc.*, 240 F.3d 95, 100 (1st Cir.2001) (*per curiam*) ("When a federal court concludes that it lacks subject matter jurisdiction over a case, it is precluded from rendering any judgments on the merits of the case").

IV. Discussion

1. The FCA

Under the FCA, any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the federal government, or 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 federal government, is subject to a civil penalty and treble damages. 31 U.S.C. § 3729(a). To "supplement federal law enforcement resources by encouraging private citizens to uncover fraud on the government," the FCA includes *qui tam* provisions that permit private persons to bring certain fraud claims on behalf of the United States Government. *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720,

727 (1st Cir.2007); *overruled on other grounds by Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 128 S.Ct. 1223, 170 L.Ed.2d 1030 (2008). 31 U.S.C. § 3730(b). Pursuant to Section 3730(b)(2), such actions are filed and remain under seal for at least 60 days to afford the government an opportunity to assess the charges and to intervene in the action. 31 U.S.C. § 3730(b) (2), (b)(3). *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 30 (1st Cir.2013). Persons who file a fraud claim on behalf of the government may receive a percentage of the proceeds of the action or settlement of such claims, depending on their contribution to the prosecution of the case. 31 U.S.C. § 3730(d). Such an award may be applicable even if the government elects not to intervene in the suit. *Id.; United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d at 30.

2. First-to-File

The FCA's *qui tam* provision "attempts to reconcile two conflicting goals, specifically, preventing opportunistic suits, on the one hand, while encouraging citizens to act as whistleblowers, on the other." *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 233 (3d Cir.1998). Section 3730(b)(5) provides "incentives to relators to 'promptly alert[ ] the government to the *essential* facts of a fraudulent scheme.'" *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13, 24 (1st Cir. 2013) (quoting *United States ex rel. Lujan v. Hughes*

Aircraft Co., 243 F.3d 1181, 1187 (9th Cir.2001)) (emphasis added).

The first-to-file rule precludes a plaintiff from bringing "a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5) ("When 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."); *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d at 34. The prohibition against later filed related actions is "exception-free." *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F3d. at 33 (quoting *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d at 1187). It is well established that "[t]he FCA first-to-file rule is jurisdictional." *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014).

The First Circuit has interpreted § 3730(b)(5) to bar "'a later allegation [if it] states all the *essential facts* of a previously-filed claim'" or 'the same elements of a fraud described in an earlier suit.'" *Id.* at 117-118(quoting *Duxbury*, 579 F.3d at 32 (quoting *LaCorte*, 149 F.3d at 232-33). As the First Circuit noted in *Wilson*, this "essential facts" or "material elements" test is "in line with all the circuit courts which have considered this section." *Wilson v. Bristol-Meyers Squibb, Inc.*, 750 F.3d at 117-118. Because, "once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds," a later claim is barred "'even if that claim

incorporates somewhat different details.'" *Id.* at 118 (quoting *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009) (quoting *United States ex rel. LaCorte v. SmithKline Beecham Clinical Laboratories*, 149 F.3d 227, 234 (3rd Cir. 1998)) (internal quotation marks omitted). Accordingly, "an action is barred if it is a 'related action' that is 'based on the facts underlying the *pending* action.'" *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d at 35 (quoting 31 U.S.C. § 3730(b)(5). "[I]f the first-filed complaint contains enough material information (the essential facts) about the potential fraud, the government has sufficient notice to launch its investigation" and any later-filed action that "offers merely additional facts and details about the scheme" is barred as duplicative of the initial suit. *Id.* at 36.

3. Pending Government Action

Pursuant to 31 U.S.C. § 3730(e)(3), "[i]n no event may a person bring [a *qui tam* action] 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." 31 U.S.C. § 3730(e)(3); *United States ex rel. S. Prawer and Co. v. Fleet Bank of Maine*, 24 F.3d at 322 n. 3, "Allegations or transactions" refers to allegations or transactions of fraudulent conduct. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 653-54 (D.C.Cir.1994). The intended purpose of the provision is to avoid parasitic

qui tam lawsuits that receive "'support, advantage, or the like' from the 'host' case (in which the government is a party) 'without giving any useful or proper return' to the government (or at least having the potential to do so).'" *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 676 (8th Cir. 1998) (quoting *United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d at 327-328); *see also United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F.Supp. 292, 303 (D.D.C.1996) (finding "no useful return to the government" under Section 3730(e) where government declined to intervene in second *qui tam* action).

4. The Parties' Positions

Pharmerica seeks dismissal of Gadbois's Complaint on the grounds that (1) the Complaint is barred by sections 3730(b)(5) and 3730(e)(3); and (2) Gadbois fails to state a claim under Rule 12(b)(6) because, *inter alia*, the Complaint fails to comply with the heightened pleading requirements of rule 9(b).

Gadbois's objection to PharMerica's motion to dismiss is based on the assertion that his claims "concern the 90% of PharMerica's sales that are not being redressed in the Wisconsin proceedings." Pltf.'s Mem. Obj. at 1 (Dkt. No. 50-1). Gadbois contends that the Wisconsin complaints are limited to *controlled* drugs and do not assert any state law claims alleging damage to Medicaid, whereas Gadbois has asserted two separate schemes perpetuated by PharMerica: (1) the illegal dispensing of *non-controlled* substances that

are billed to federal Medicare and state Medicaid programs; and (2) the illegal dispensing of *controlled* substances that are billed to state Medicaid programs.[6]

In its reply, PharMerica points out that the fraudulent scheme alleged by Gadbois is the same as alleged by the three pharmacists in the Wisconsin action and that Gadbois's addition of claims regarding *non-controlled* substances does not change the nature and the revelation of the scheme itself.

5. This Case

The essence of relator Jennifer Denk's complaint in the Wisconsin action (subsequently consolidated with the Beeders/Martino action) is that PharMerica defrauded the United States government by billing Medicare and Medicaid programs for dispensing medications that were not eligible for reimbursement because of PharMerica's non-compliance with Medicare, Medicaid, and other laws and regulations relating to the dispensing of pharmaceutical products, including controlled substances. Original Denk Complaint ¶ 9. Denk specifically alleged that PharMerica dispensed (and sought reimbursement for) medications based on

[6] In the alternative, Gadbois seeks to amend his complaint in the event the Wisconsin court dismisses the case against PharMerica. As noted *supra*, PharMerica's motions to dismiss the claims against it by the United States and Jennifer Denk were denied on September 3, 2014.

phone orders without a signed prescription, on faxed discharge orders, and on physician orders in the absence of any actual or claimed emergency. Denk Amended Complaint ¶ 48. Denk also alleged that some of the prescriptions lacked the prescribing physician's signature; that they were non-specific as to quantity; and that some of the prescriptions were refilled repeatedly, even when a signed prescription had not been received. *Id.* at ¶¶ 48-51. Not only did Denk's complaint put the government on notice, it is uncontroverted that Denk met with DEA investigators and DOJ attorneys before she ever filed suit.

By the time Gadbois filed his initial complaint in this Court, the United States Government had already been alerted to Pharmerica's alleged fraudulent scheme on three occasions: Denk's meeting with government officials and Denk's filing of her original and first amended complaints. Although Gadbois seeks to distinguish his case from the Wisconsin action by including in his claims the dispensing of, and billing for, non-controlled medications, he has not established that such a distinction is material to the alleged fraudulent scheme. Whether the medications in question were controlled or non-controlled, the prescription information required prior to their dispensing was the same, and dispensing either category of medication without a proper prescription disqualified it from reimbursement by Medicare and/or Medicaid.

Because in this Circuit (and in those circuits that have addressed the issue), an asserted first-to-file bar is considered under the "essential facts" or "material

facts" test, a later claim is barred "'even if that claim incorporates somewhat different details.'" *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d at 118 (quoting *Duxbury*, 579 F.3d at 32). Once Denk alerted the government (both in person and in her complaints) to the "essential facts of [the] fraudulent scheme" allegedly perpetrated by PharMerica, the government had "enough information to discover related frauds." *Wilson*, 750 F.3d at 118. In sum, by the time Gadbois filed his first complaint in this Court, information regarding PharMerica's alleged scheme of defrauding Medicare and Medicaid by billing for inadequately supported prescriptions had been revealed to the government sixteen months earlier (which eventually led to the government's election to intervene). Because the first-to-file rule bars Gadbois's later filed claim, the Court holds no jurisdiction over this case.

Conclusion

For the reasons stated herein, PharMerica's motion to dismiss Gadbois's FCA claims against it is GRANTED. The Court declines to exercise its supplemental jurisdiction over Gadbois's FCA claims brought on the various states' behalf, and DISMISSES the case in its entirety.

SO ORDERED.

/s/ Mary M. Lisi
Mary M. Lisi
United States
District Judge

October 3, 2014

United States Court of Appeals
For the First Circuit

No. 14-2164

UNITED STATES ex rel. ROBERT GADBOIS;
STATES OF CA, CO, DE, FL, GA, HI, IL, IN,
LA, MA, MI, MN, MT, NV, NH, NM, NC, RI, TN,
TX, VA, WI, ex rel. ROBERT GADBOIS

Plaintiffs-Appellants

STATE OF MARYLAND ex rel. ROBERT GADBOIS

Plaintiff

v.

PHARMERICA CORPORATION

Defendant-Appellee

CVS/CAREMARK CORPORATION;
WALGREEN COMPANY; MEDCALL, LLC;
RITE AID CORPORATION

Defendants

ORDER OF COURT

Entered: February 12, 2016

Upon consideration of the defendant-appellee's opposed motion to stay the mandate, the motion is granted. The issuance of the mandate is hereby stayed for 90 days and, if within that period a timely petition for writ of certiorari is filed, the stay shall continue until final disposition of such petition by the

United States Supreme Court. Should any petition for a writ of certiorari be denied, mandate shall issue forthwith. Counsel for the defendant-appellee are directed to notify promptly the Clerk of this court of both the filing and the disposition of any such petition for writ of certiorari.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Dulce Donovan
Louise A. Herman
Shelley Rodes Slade
Amato A. DeLuca
Robert Lawrence Vogel
Miriam Weizenbaum
James Francis Dube
David M. Glynn
Jeremy Michael Sternberg
Ralph T. Lepore
Robert Michael Shaw
Nathaniel F. Hulme
Michael R. Manthei

United States Court of Appeals
For the First Circuit

No. 14-2164

UNITED STATES ex rel. ROBERT GADBOIS;
STATES OF CA, CO, DE, FL, GA, HI, IL, IN,
LA, MA, MI, MN, MT, NV, NH, NM, NC, RI, TN,
TX, VA, WI, ex rel. ROBERT GADBOIS

Plaintiffs-Appellants

STATE OF MARYLAND ex rel. ROBERT GADBOIS

Plaintiff

v.

PHARMERICA CORPORATION

Defendant-Appellee

CVS/CAREMARK CORPORATION;
WALGREEN COMPANY; MEDCALL, LLC;
RITE AID CORPORATION

Defendants

Before

Howard, *Chief Judge*,
Torruella, Selya, Stahl, Lynch,
Thompson, Kayatta and Barron,

Circuit Judges.

ORDER OF COURT

Entered: January 25, 2016

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submittal to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Dulce Donovan
Louise A. Herman
Shelley Rodes Slade
Amato A. DeLuca
Robert Lawrence Vogel
Miriam Weizenbaum
James Francis Dube
David M. Glynn
Jeremy Michael Sternberg
Ralph T. Lepore
Robert Michael Shaw
Nathaniel F. Hulme
Michael R. Manthei

No. 14-2164

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBERT GADBOIS, States of CA, CO, DE, FL, GA, HI, IL, IN, LA, MD, MA, MI, MN, MT, NV, NH, NM, NC, RI, TN, TX, VA, WI,

Plaintiffs-Appellants,

UNITED STATES, ex rel. Robert Gadbois; STATE OF RI

Plaintiffs

v.

PHARMERICA CORPORATION,

Defendant-Appellee

CVS/CAREMARK; WALGREEN CO.; MEDCALL, LLC; RITE AID CORPORATION

Defendants.

Appeal from the United States District Court for the District of Rhode Island Case No. CA10-471-ML, the Honorable Mary M. Lisi presiding

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APPELLANT'S BRIEF

(Filed Mar. 23, 2015)

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Gadbois respectfully requests an opportunity for oral argument. The issues before the Court are significant ones pertaining to the jurisdiction of the district courts over *qui tam* filings. Because *qui tam* plaintiffs

bring suit on behalf of the United States to recover funds improperly taken from the taxpayers, district court jurisdiction over *qui tam* filings is a matter of significant, public interest.

JURISDICTIONAL STATEMENT

This case, *United States ex rel. Robert Gadbois et al. v. PharMerica Corporation*, No. CA10-471-ML (D.R.I.), was filed under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq., and analogous false claims provisions of various states.* The district court had subject matter jurisdiction over the action pursuant to 28 U.S.C. § 1331 and the FCA. The United States District Court for the District of Rhode Island entered final judgment on October 3, 2014, holding that it lacked jurisdiction over the FCA claims of Appellant Robert Gadbois ("Gadbois" or "Appellant") under 31 U.S.C. § 3730(b)(5), and, because the court found that it lacked jurisdiction over the federal claim, also declining to exercise supplemental jurisdiction over his claims under state false claims laws.

On October 31, 2014, Gadbois timely filed a Notice of Appeal in the district court. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Gadbois' federal claims, which allege that Appellee PharMerica ("PharMerica" or "Appellee") violated the FCA with regard

to claims to federal government health programs for prescription medication that is not subject to the federal Controlled Substances Act, 21 U.S.C. § 801 et *seq.*, ("non-controlled medication"), are barred under 31 U.S.C. § 3730(b)(5) by the allegations in two earlier-filed complaints.

2. Whether, assuming that the district court erred in dismissing Gadbois' federal claims, the district court also erred in dismissing Gadbois' state law claims.

3. Whether any dismissal should be without prejudice to refiling in the event the two earlier-filed complaints are dismissed and consequently no longer are "pending" within the meaning of 31 U.S.C. § 3730(b)(5).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Appellant's Complaint

Appellant Gadbois is a Rhode Island pharmacist who was employed by Defendant PharMerica for over twenty-five years. In the federal FCA claims set forth in his Second Amended Complaint[1] he alleged that for many years, PharMerica, a longterm care pharmacy provider with stores throughout the nation, routinely

[1] Appellant's Second Amended Complaint also brought claims under state law based on the practices described herein as well as practices relating to controlled medications.

dispensed non-controlled medications in violation of state and federal law. Joint Appendix ("J.A.") at 8. Through this scheme, PharMerica has placed elderly, vulnerable residents of nursing homes in Rhode Island and throughout the country at significant risk of being kept on unnecessary and harmful medications, without proper physician oversight. PharMerica's misconduct has damaged the Treasury because neither Medicare nor Medicaid cover medication dispensed in violation of federal and state law.

In his federal claims, Gadbois alleged, first, that PharMerica billed Medicare and Medicaid for non-controlled medications dispensed in violation of state limits on refills. This unlawful practice enabled nursing homes to keep patients on medications for years without a physician verifying to the pharmacy the appropriateness of the medication it continued to dispense. Second, Gadbois alleged that PharMerica routinely billed Medicare and Medicaid for medication dispensed in quantities that PharMerica, not a medical practitioner, assigned. This practice enabled nursing homes to dispense doses of medications that were unnecessary, contraindicated, and often harmful.

Non-controlled medications constitute approximately 88 percent of the prescription medication that PharMerica dispenses to residents of long term care facilities, J.A. at 59, ¶ 130, with the remaining 12 percent being "controlled" medications that are governed by different laws and regulations, including

the stringent prescribing and dispensing requirements of the federal Controlled Substances Act, 21 U.S.C. § 801 et *seq*. ("CSA").

Gadbois alleged that PharMerica's corporate headquarters designed and implemented a billing and dispensing software program to encourage and enable pharmacists to dispense and bill for non-controlled medications without regard to legal limits on refills, and regardless of whether or not a physician had prescribed the quantity dispensed. Gadbois further alleged that, consequently, pharmacists in his store and other PharMerica stores dispensed and billed for non-controlled medication in violation of state prescription requirements.

Because government health care programs only pay for medication dispensed upon a valid prescription, Gadbois alleged that PharMerica violated the FCA and state false claims laws.

B. The Wisconsin Proceeding

The Wisconsin proceeding includes two consolidated civil actions: *U.S. ex rel. Buth f/k/a Denk v. PharMerica Corp.*, Case No. 09-CV-720, ("the *Denk* action") filed under seal in the Eastern District of Wisconsin on July 23, 2009; and *U.S. ex rel. Beeders and Martino, et al. v. PharMerica Corp.*, Case No. 11-CV-706 (the "*Beeders* action"), which was transferred to the Eastern District of Wisconsin from the Middle District of Florida, where it was filed under seal on May 26, 2010.

The *Denk* action, filed by a PharMerica pharmacist, alleged that five out of PharMerica's 95 pharmacies frequently violated the FCA by ignoring the CSA's prescription requirements on controlled drug transactions, as well as various other claims. *See* at 139-51, ¶¶ 38-68. While Denk alleged that she had been informed by a PharMerica employee that these illegal, controlled drug practices were found in other PharMerica pharmacies as well, she alleged no specifics about this, and she alleged neither a corporate-wide policy nor uniform practices affecting all controlled drug transactions. In her complaint, Denk did *not* allege that PharMerica was dispensing non-controlled medications without a valid prescription.

On May 28, 2013, after a four-year investigation, the United States intervened in Denk's claims relating to the dispensing of certain controlled (specifically, Schedule II) medications in violation of the CSA, and the case came out from under seal. *See* J.A. at 296-98. In the same Notice, the United States notified the Court that it had elected *not* to intervene in Denk's claims that alleged that PharMerica: "(1) submitted false claims to Medicare for Schedule III, IV and V controlled narcotic substances; (2) caused false claims to be submitted by accepting, offering, or giving kickbacks; and (3) caused false claims to Medicare by failing to credit payments for returned medications." J.A at 297. Denk voluntarily dismissed these claims on November 15, 2013. J.A. at 301-02.

The *Beeders* action was filed by two pharmacists who worked at Integrated Pharmacy Services of

Largo, Florida in 2008 and 2009; they sued PharMerica only as a successor-in-interest to Integrated Pharmacy Services. J.A. at 201-02, ¶¶ 1, 5-6. They alleged that Integrated Pharmacy Services, which was acquired by PharMerica on or about December 31, 2009, dispensed Schedule II controlled substances in violation of the prescription requirements in the CSA and state laws pertaining to controlled substances. J.A. at 205-06, ¶¶ 26-30. They did not make any allegations as to PharMerica's own conduct in dispensing medications. The United States has not intervened in the *Beeders* action.

On September 26, 2014, the district court administratively closed both the *Denk* and the *Beeders* actions to permit the parties an opportunity to discuss settlement. On December 12, 2014, the Department of Justice notified the district court that it had reached an agreement in principle with PharMerica and the relator to resolve the FCA allegations in the Denk action. *U.S. ex rel. Buth f/k/a Denk*, Case No. 09-CV-720 (E.D. Wi.), ECF No. 76. The United States recently asked the court to administratively reopen the case so that litigation can proceed while settlement talks continue, referencing delays in efforts to finalize aspects of the deal. *Id.* ECF No. 77. PharMerica then asked the court to keep the case administratively closed while talks continue. *Id.* ECF No. 78.

Neither the Denk claims in which the Government intervened, nor the Denk and Beeders claims in which the Government declined to intervene, alleged

the misconduct involving PharMerica's other drug lines, the non-controlled medication at issue in Appellant's case.

II. PROCEDURAL HISTORY

Gadbois filed his action under seal in the United States District Court for the District of Rhode Island on November 19, 2010, pursuant to the *qui tam* provisions of the FCA, 31 U.S.C. § 3730(b). J.A. at 1. He amended his complaint on May 6, 2011. J.A. at 3. The United States and the state plaintiffs declined to intervene in his claims on November 19, 2013 and December 9, 2013, respectively. J.A. at 81-91. On February 25, 2014, Appellant filed a second amended complaint that dismissed certain defendants and dropped certain claims. J.A. at 8.

On May 27, 2014, Appellee PharMerica filed a motion to dismiss Gadbois' Second Amended Complaint, arguing, among other things, that Gadbois' federal claims were barred under the FCA's "first-to-file" provision, 31 U.S.C. § 3730(b)(5), by the claims in the Wisconsin proceeding. at 102. The district court granted the motion to dismiss, ruling that Gadbois' federal claims were barred by 31 U.S.C. § 3730(b)(5) and, in the absence of any remaining federal claims, declining to exercise supplemental jurisdiction over the claims Gadbois had asserted on behalf of the states. J.A. at 333. The court entered judgment against Gadbois on October 3, 2014, dismissing the case in its entirety. J.A. at 356.

On October 31, 2014, Gadbois filed a notice of appeal on behalf of the federal government and all the state plaintiffs in the district court lawsuit. J.A. at 357.

SUMMARY OF ARGUMENT

Pursuant to the *qui tam* provisions of the FCA, "when a person brings an action under [the *qui tam* provisions], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). This Court has held that this provision, known as the "first-to-file bar," removes district court jurisdiction over a claim brought under the *qui tam* provisions of the FCA, 31 U.S.C. § 3730(b), only when an earlier-filed, pending *qui tam* action alleged "all the essential facts" and "suffice[d]" to put the Government "on notice" of the wrongdoing alleged in the later-filed action. *U.S. ex rel. Ven-A-Care of the Florida Keys v. Baxter Healthcare Corp.*, 772 F.3d 932, 937 (1st Cir. 2014).

Because the claims in the Wisconsin proceeding involved only controlled medication and not non-controlled medication, and, even then, identified only a subset of controlled drug transactions at just six of PharMerica's 95 pharmacies, they did not allege (1) the same essential elements, nor did their claims (2) suffice to put the Government on notice of the wrongdoing involving non-controlled drugs alleged by Gadbois. Controlled medication is a "different animal"

from non-controlled medication and the differences are material to the question of whether the Wisconsin claims sufficed to put the Government on notice that PharMerica was evading prescription requirements with respect to non-controlled medication.

The unique chemical properties of controlled medications and stringent legal regime governing them, with penalties up to life in prison for CSA violations, affect the behavior of patients as well as those in the drug supply chain. It has been determined that doctors tend to under-prescribe controlled drugs. Patients, who may develop addiction or dependence or find themselves undertreated, are consequently motivated to pressure pharmacies to deliver the drugs without regard to the CSA's prescription requirements; and, pertinent here, pharmacists sometimes acquiesce. These pressures are not present where non-controlled drugs are concerned.

Because distinct pressures, not present in non-controlled drug transactions, may lead pharmacists to improperly dispense controlled drugs, alerting the Government to improper dispensing practices for controlled drugs does not put the Government on notice that there may be other improper dispensing practices for non-controlled drugs.

Moreover, contrary to the statement of the District Court in its opinion dismissing Gadbois' case in its entirety, the allegations in the Wisconsin proceeding did *not* characterize PharMerica's wrongful, controlled drug practices as part of a "scheme." *See*

J.A at 353-55. Rather, the claims in the Wisconsin proceeding identified only six of PharMerica's 95-some stores that were engaged in the wrongdoing, and, even then, they did not allege that the pharmacists in those six stores always ignored controlled drug prescription requirements. The relators in the Wisconsin proceeding did not allege a corporate policy affecting all controlled drugs; nor did they allege uniform practices affecting all controlled drug transactions. In short, the Government investigators had no reason to suspect that PharMerica was engaged in a "scheme" or also evading prescription requirements with regard to non-controlled medication. Likewise, the Government would have had no reason to expend its resources randomly investigating different classes of drugs at PharMerica's 95 pharmacies without any evidence that PharMerica was a more massive wrongdoer than the Government had reason to suspect.

Finally, the Drug Enforcement Agency ("DEA") would have been tasked with investigating the allegations in the Wisconsin proceeding involving controlled medications. The DEA has jurisdiction over controlled drug transactions but not non-controlled transactions. The DEA would have had no reason or authority to investigate PharMerica's practices with respect to non-controlled medications.

In the event this Court reverses the dismissal of Gadbois' federal claims, this Court should also reverse the lower court's dismissal of Gadbois' state law

claims, over which the lower court would also have jurisdiction.

Should this Court decide to uphold the district court's decision in this case, the Court should direct the lower court to dismiss Gadbois' claims without prejudice. The United States and PharMerica have informed the court that they have reached an agreement in principle to resolve the claims involving controlled drugs in the Wisconsin proceeding. If and when that settlement is finalized, the actions will be dismissed and will no longer be "pending" within the meaning of the first-to-file bar.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for all issues is "de novo." *E.g.*, *U.S. ex rel. Ven-A-Care*, 772 F.3d at 938.

II. APPELLANT'S FEDERAL CLAIMS SHOULD NOT HAVE BEEN DISMISSED

The FCA's "first-to-file" provision, 31 U.S.C. § 3730(b)(5), is designed not only to deter opportunistic relators who add nothing substantial to what is already known to the Government, but also to incentivize individuals with important new information about fraud to promptly come forward and report the wrongdoing to the Government. As stated by this Court:

> In amending the FCA in 1986 to add § 3730(b)(5), Congress sought to strike the appropriate balance "between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own."

U.S. ex rel. Heineman-Guta v. Guidant Corp., 718 F.3d 28, 35 (1st Cir. 2013) (citation omitted); *see also U.S. ex rel. Duxbury v. Ortho Biotech Prods.*, 579 F.3d 13, 15 (1st Cir. 2009), *cert. denied*, 561 U.S. 1005 (2010). In interpreting and applying the first-to-file provision, the courts seek to balance these two, competing objectives of the *qui tam* provisions.

Accordingly, under the law of this Circuit, to determine whether a *qui tam* relator is barred by an earlier-filed complaint, a district court should inquire into whether the first case included "all the essential facts" of the second scheme such that the first case "suffice[d]" to put the Government on "notice" of the wrongdoing alleged in the second case. *U.S. ex rel. Ven-A-Care*, 772 F.3d at 937; *accord U.S. ex rel. Wilson v. Bristol-Myers Squibb*, 750 F.3d 111, 118 (1st Cir. 2014). As stated by this Court in its recent decision in *U.S. ex rel. Ven-A-Care:*

> [W]hat matters, given this statutory language and the Act's underlying purposes, are two things: (1) the relationship between the fraud alleged in the two *qui tam* actions, and (2) the extent to which the facts alleged in

> the first-filed *qui tam* action suffice to provide the government with notice of the fraud that has been alleged by the second.

772 F.3d at 932.

This Court has emphasized that the "sufficient notice" test does not supplant but rather informs the "all the essential facts" test, and that it is not enough that the first case provides evidence that could tip off a Government investigator to a related fraud:

> Before barring a second complaint, we must ask not merely whether the first-filed complaint provides some evidence from which an astute government official could arguably have been put "on notice," but also whether the first complaint contained "all the essential facts" of the fraud it alleges.

Id. at 938 (citation omitted).

In conducting the "all the essential facts" and "sufficient notice" inquiries in a health fraud case such as this one, one important factor to be considered is whether the same medical products are involved in both cases. *See, e.g.*, *U.S. ex rel. Wilson*, 750 F.3d at 118 (it was significant that the two complaints involved the same drugs); *U.S. ex rel. Heineman-Guta*, 718 F.3d at 37 (barring *qui tam* action where the earlier action involved kickbacks paid to promote "the same cardiac rhythm management devices"). As stated by this Court:

> [O]nce the government is equipped with allegations that detail the drugs and mechanisms of wrongdoing as to those particular medications, it is able to "initiate an investigation."

U.S. ex rel. Wilson, 750 F.3d at 120 (citation omitted); *see also U.S. ex rel. Banignan v. Organon USA, Inc.*, 883 F. Supp. 2d 277, 291 (D. Mass. 2012) ("Omnicare fails to appreciate that the drug itself is an essential element of the fraudulent scheme alleged against it. Its prior involvement in a scheme involving specific pharmaceutical manufacturers and drugs does not mean that it necessarily engaged in such fraudulent conduct with other manufacturers or drugs.").

Moreover, in applying the first-to-file provision so as to best promote the dual purposes of the FCA's *qui tam* provision – encouraging the prompt reporting of frauds, while discouraging parasitic relators who raise allegations about which the Government is already on notice – it is critical that courts closely examine the factual allegations in both cases and avoid using a broad brush that might miss important distinctions between the allegations, thus, as is the case here, enabling massive fraud to continue unchecked. As the Seventh Circuit has opined, when courts assess their jurisdiction over FCA complaints, it is important that they carefully analyze the details of the whistleblower's allegations, because "viewing FCA claims at the highest level of generality in order to wipe out *qui tam* suits that rest on genuinely new and material information is not sound." *Leveski v.*

ITT Educational Services, 719 F.3d 818, 831 (7th Cir. 2013) (reversing district court's dismissal of case under the FCA's "public disclosure" provision, 31 U.S.C. § 3730(e)(4)). The *Leveski* Court noted that cases that at "first blush" might appear similar are often revealed to rest on distinct information when one studies the details. *Id.* at 832.[2]

The Seventh Circuit has repeatedly declined the invitation by an entity accused of fraud to bar a subsequently-filed action simply because there are similarities between alleged frauds. Thus, in *U.S. ex*

[2] While the *Leveski* case was decided under a different jurisdictional provision of the FCA, the public policy goals behind that provision are exactly the same as the goals behind the first-to-file provision: striking the golden mean between encouraging insiders to come forward with valuable new information and deterring opportunistic lawsuits that add nothing of any substance. *Cf. Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (noting that Congress' enactment of the public disclosure bar was "an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits"); *U.S. ex rel. Wilson*, 750 F.3d at 117 (1st Cir. 2014) (noting that the "first-to-file" jurisdictional bar "is part of the larger balancing act of the FCA's *qui tam* provision, which attempts to reconcile two conflicting goals, specifically, preventing opportunistic suits, on the one hand, while encouraging citizens to act as whistleblowers, on the other") (quotation omitted); *U.S. ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (holding, in case involving public disclosure bar, that Congress has amended the FCA multiple times "[s]eeking the golden mean between adequate incentives for whistleblowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own").

rel. Goldberg v. Rush Univ. Med. Ctr., 680 F.3d 933 (7th Cir. 2012), another case arising under the public disclosure doctrine, the court found that a GAO report of teaching hospitals billing for work done by unsupervised residents was not 'substantially similar' and thus did not preclude a claim alleging inadequate supervision. *Id.* at 934. In his opinion, Chief Judge Easterbrook wrote:

> In other words, the court understood 'public disclosure of allegations or transactions' (the statutory language) at a high level of generality. This is where *Baltazar* becomes relevant. We held in *Baltazar* that a very high level of generality is inappropriate, because then disclosure of some frauds could end up blocking private challenges to many different kinds of fraud.

Id. at 935 (citing *U.S. ex rel. Baltazar v. Warden*, 635 F.3d 866 (7th Cir. 2011)).

The District Court's decision is based on conclusions unsupported by facts of record, such that its application of the "all the essential facts" test constitutes clear error. In order to reach the conclusion that the 'all the essential facts' had been alleged in the Wisconsin proceedings, the District Court had to overreach and conclude that a 'scheme' to dispense medication without a prescription had been alleged in that proceeding when, in fact, neither a scheme nor a policy nor even uniform practices were alleged. *See* J.A. at 353-54. Having concluded that a 'scheme' had been alleged, the District Court simply employed that

broad brush and failed to inquire into whether the actual allegations truly sufficed to put the Government on notice of Gadbois' allegations concerning non-controlled medication.

A review of the complaints in the Wisconsin proceeding reveals that the relators in those cases identified dispensing practices in only six out of 95 PharMerica stores that, while they were prevalent in those six stores, by no means were alleged to infect every drug transaction in those stores. Indeed, the internal reviews cited by Relator Denk as support for her allegations identified only a fraction of the controlled drug transactions as improper. *See* J.A at 143. No PharMerica illegal dispensing scheme, policy or even uniform practice was alleged in those stores or any other PharMerica stores.

Moreover, a comparison of the claims in the Wisconsin proceeding and Gadbois' federal claims reveals that they they involved drugs in entirely *different categories* that are associated with different characteristics, separate regulatory schemes, and different kinds of prescription requirements. The relevant claims in the earlier complaints involve *only* the opioids, narcotics and other addictive drugs that pose such a risk of physical and psychological dependence and abuse that their distribution is subject to the constraints of the CSA, oversight by the DEA, and criminal penalties for violations of the regulatory framework. *See* 21 U.S.C. § 812(b) (defining drug categories subject to the CSA); 21 U.S.C. § 841 (imposing criminal penalties for violations of the CSA).

Because the drugs in the two categories have materially different characteristics (controlled drugs can create addiction and dependence), and because they are subject to separate regulatory and enforcement regimes, the differences between the categories are so material that it cannot be fairly said that "all the essential facts" of Appellant's allegations were alleged by the preceding relators, or that the Government was put "on notice" of Appellant's allegations by the preceding complaints.

We discuss below the three chief reasons why the controlled drug claims in the Wisconsin proceeding did not include the same essential facts as Gadbois' claims, and did not suffice to alert the Government to PharMerica's practices with regard to non-controlled medication: i) there are distinct incentives and pressures affecting the dispensing of controlled drug medication that are not at play when non-controlled drugs are dispensed; ii) Denk and Beeders did not allege a corporate-wide scheme, policy or uniform practices affecting all PharMerica controlled drug transactions, let alone all drug transactions; and, iii) the lead government investigative agency with jurisdiction over violations of the CSA – the DEA – does not investigate non-controlled drug transactions.

A. Different Incentives and Pressures for Evading Prescription Requirements

Obtaining a prescription for a controlled substance, particularly the most highly regulated Schedule

II medications, is far more difficult than obtaining a prescription for a non-controlled medication. Among other things, DEA regulations require controlled medications to be prescribed, handled and dispensed only by persons registered with the DEA, 21 C.F.R. §§ 1301.11 and 1305.06, with only hard copy prescriptions sufficing (absent an emergency), and no refills permitted for the most highly addictive controlled substances listed in Schedule II of the Act, 21 C.F.R. § 1306.12(a). Even with regard to Schedule III and IV medications, a practitioner may not issue a prescription with more than five refills issued within six months of the prescription. 21 C.F.R. § 1306.22(a).

In light of the high risk of abuse and diversion arising from the addictive nature of these medications, controlled drugs must be stored in locked safes, steel cabinets or vaults with alarm systems, 21 C.F.R. §§ 1301.71-76; segregated from containers containing non-controlled medications unless the DEA provides advanced, written permission, 21 C.F.R. § 1301.72; accessed only by a minimum number of specifically authorized employees, *id.*; and packaged in sealed containers with symbols indicating the fact that they are a controlled drug and the schedule on which they have been placed, 21 C.F.R. §§ 1302.03 and 1302.06. They must be inventoried biannually, as well as every time a new drug is placed on one of the Controlled Drug schedules, 21 C.F.R. § 1304.11.

Physicians and pharmacists who violate the CSA's strict prescription and dispensing requirements face stiff criminal sanctions. For example, if a physician

or pharmacist violates the prescription or dispensing requirements relating to the most highly regulated controlled substances – Schedule II – medication, even as a first time offender, he or she could be sentenced to up to 20 years in prison, and, if death or serious injury resulted from their violation, up to life in prison. 21 U.S.C. § 841(b)(1)(C). Moreover, "state licensing boards may revoke a physician's medical license if they find overprescribed opioid painkillers." *United States v. Ilayayev*, 800 F. Supp. 2d 417, 434 (E.D.N.Y. 2011) (citation omitted.)

The different chemical properties and regulatory framework of controlled medications means that there is a significantly greater likelihood that pharmacists will be pressured to dispense such medication without waiting for a proper prescription. For example, as one would expect, many physicians exercise heightened scrutiny in prescribing painkillers and other controlled medication to avoid causing addiction or dependence or making missteps that could lead to severe criminal penalties or the loss of their license to practice medicine.[3] In discussing issues relating to

[3] See DEA *Policy Statement: Prescribing Controlled Substances for Pain*, 71 Fed. Reg. 52716, 52718-20 (Sept. 6, 2006) (referencing concerns that physicians under-prescribe pain medication due to concerns about addiction and regulatory scrutiny); L. Seng, *Legal & Regulatory Barriers to Adequate Pain Control for Elders in Long Term Care Facilities*, 6 N.Y. City L. Rev. 95, 101 (2003) ("The combination of medical practice restrictions and the threat of disciplinary sanctions and criminal prosecutions deter physicians from prescribing opioids for pain control.").

abuse and diversion of prescription painkillers, U.S. District Judge Jack Weinstein has stated:

> [s]uch severe consequences for a physician's career, or in the worst of circumstances, personal freedom, provide a significant incentive for physicians not to prescribe opiate painkillers, regardless of whether a particular patient would truly benefit from them.

Ilayayev, 800 F. Supp. 2d at 435 (citations omitted). Yet, at the same time that many physicians are gun-shy about prescribing controlled medication, nursing home patients and staff are particularly incentivized to seek such medication without a prescription when the medication is badly needed for legitimate pain[4] or one to which they[5] or the patients in their care are

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[4] *See Ilayayev*, 800 F. Supp. 2d at 435 ("Those patients who have legitimate need for the drugs but are denied them by their primary care physicians may seek them out through criminal means.").

[5] *See id.* at 433 ("NDIC reports that prescription opioid diversion, in which the drugs are diverted from their intended medical use and into recreational use, occurs at multiple points along the supply chain."). Indeed, the press has often reported instances of nursing home staff diverting painkillers and other controlled drugs from residents. *See, e.g.*, Brian D. Bridgefore, *Portage Woman Charged With a Drug Felony*, News Republic (Jan. 20, 2010) (Wisconsin worker criminally charged with removing painkilling patch containing fentanyl from resident), *available* at http://www.wiscnews.com/news/local/article.497364ac-ce5f-5f78-acae-3d838b246925.html (last visited March 23, 2015); *Burlington Nurse Loses License After Stealing Drugs*, The Journal Times (Jan. 20, 2010) (registered nurse in Wisconsin stole narcotic pain medicine Oxycodone from a resident, lost her

(Continued on following page)

addicted or dependent.[6] Factors such as patient need, addiction and/or dependence, and diversion, motivate patients and staff to attempt to circumvent prescription requirements.[7]

These distinctions are important to the first-to-file analysis because they heighten the likelihood that a patient or nursing home staff member will ask a pharmacist to ignore prescription requirements for controlled medication. When so requested, pharmacists face conflicting incentives. On the one hand, they are motivated to acquiesce to the pressure coming from nursing home staff and patients by the professional and natural human desire to alleviate what might well be legitimate pain, as well as the business goals of maintaining good customer relations and gaining additional revenue for their store.

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license), *available* at http://journaltimes.com/news/local/crime-and-courts/burlington-nurse-loses-license-after-stealing-drugs/article.51aedc30-0625-11df-8eb0-001cc4c002e0.html (last visited March 23, 2015).

[6] As confirmed by the National Drug Intelligence Center, "[p]rescription opioids have a high risk of dependence." U.S. Department of Justice, National Drug Intelligence Center, *National Drug Threat Assessment 2011*, at 37 (Aug. 2011) *available* at http://www.justice.gov/archive/ndic/pubs44/44849/44849p.pdf (last visited March 23, 2015). "Medical researchers and physicians have both recognized that an opioid abuse and addiction problem does in fact exist in the United States." *Ilayayev.* 800 F. Supp. 2d at 446. Indeed, "some studies have shown that oxycodone is twice as powerful as morphine." *Id.* at 427.

[7] *See generally Ilayayev*, 800 F. Supp. 2d 417.

On the other hand, however, they are wary of the criminal penalties imposed by the CSA and the risks of abuse and diversion. The former set of motivations will sometimes overcome their obligation to follow the law. *See Ilayayev*, 800 F. Supp. 2d at 444 ("There exists for pharmacists, in short, '[t]he therapeutic imperative to assure that patients who need pain medications get them.' This force acts as a counter-balance to the pressures of intense scrutiny from government agencies. . . ." (citation omitted))

Clearly, these ways in which a pharmacist is pressured to dispense controlled drugs without valid prescriptions simply do not apply to non-controlled medication. The Denk and Beeders allegations regarding illegal, controlled drug transactions by PharMerica pharmacists did not put the Government on notice that PharMerica might also be engaging in illegal dispensing practices for non-controlled drugs.

B. No Notice of Corporate-Wide Scheme, Policy or Practices Affecting all Drug Transactions

The Wisconsin proceeding could not reasonably have put the Government on notice that PharMerica was illegally dispensing non-controlled medication for a second reason: the earlier complaints failed to allege a corporate scheme or policy or corporate-wide practices infecting all controlled drug transactions, let alone all drug transactions. Together, the prior complaints alleged specific misconduct at only six of

the 96 PharMerica pharmacies in operation when Ms. Denk filed her complaint. And, even with regard to those six pharmacies, they did not allege that dispensing controlled medication without a valid prescription was a uniform practice for each and every controlled drug dispensed.

Thus, Ms. Denk did not allege, contrary to the conclusions of the District Court, that the wrongful practices were part of any "scheme" for dispensing controlled medications without prescriptions.[8] To the contrary, her complaint contained specific allegations of misconduct at *only five of the approximately 95* PharMerica pharmacies that were operating at the time. J.A. at 130, ¶ 11; *id.* at 147, ¶ 57. And, with regard to those five pharmacies, her allegations concerned only a small portion of those pharmacies' controlled drug transactions. *See* J.A. at 132, ¶ 17 (stating that Denk's Pewaukee, Wisconsin pharmacy filled about 240 controlled medication prescriptions each day); *id.* at 147, ¶ 57 (alleging, *inter alia*, that an internal audit had found just 171 outstanding controlled substance transactions lacking proper prescriptions at the Pewaukee, Wisconsin store). She

[8] *See* J.A. at 353-54 ("By the time Gadbois filed his complaint in this Court, the United States Government had already been alerted to PharMerica's alleged fraudulent *scheme* on three occasions. . . ."); *id.* at 354-55 ("[B]y the time Gadbois filed his complaint in this Court, information regarding PharMerica's alleged *scheme* of defrauding Medicare and Medicaid by billing for inadequately supported prescriptions had been revealed to the Government sixteen months earlier. . . .") (emphasis added).

alleged that PharMerica generally did not make its policies and procedures concerning the dispensing of controlled medications "available" to employees. J.A. at 131, ¶ 15. While she alleged on information and belief that other PharMerica stores engaged in similar illegal practices with regard to controlled medication, she alleged neither that this was the case on each and every controlled drug transaction, nor that the practices flowed from a corporate policy or scheme.

Mr. Beeders and Ms. Martino, who filed the second *qui tam* action that is part of the Wisconsin proceeding, were never employed by PharMerica and sued the company only in its role as successor-in-interest to Integrated Pharmacy Services of Largo, Florida, a pharmacy subsequently acquired by PharMerica. J.A. at 201-02, ¶¶ 1, 5-6. Like Ms. Denk, they did not allege an illegal policy, uniform illegal drug dispensing practices or a "scheme."

In the absence of allegations concerning a scheme, policy or uniform practice applicable to all prescription drug transactions, the complaints in the Wisconsin proceeding alerted the Government only to limited and particular controlled drug dispensing practices occurring at isolated PharMerica stores, certainly not a scheme, policy or practice affecting all medication dispensed by PharMerica. Indeed, the CSA's criminal penalties for violations, up to life in jail in certain cases, are likely to deter a pharmacy chain from creating corporate-wide, written policies or tolerating practices that ignore drug prescription

requirements across the board; accordingly, it would not have been reasonable for the Government, upon receiving the Denk and Beeders complaints, to have concluded that the controlled drug misconduct alleged at just six of the 95 PharMerica locations stemmed from a scheme, policy or uniform practices that affected both controlled and non-controlled medications at pharmacy locations in Rhode Island and elsewhere. In fact, the Government's subsequent investigatory actions indicate that it did not so conclude.[9]

C. DEA Oversight of Controlled Drugs

The differences in drug characteristics and regulatory regimes also means that the Government, when investigating a complaint involving illegal dispensing of controlled medications, relies primarily on the DEA. The DEA has jurisdiction only over controlled medications and focuses primarily on issues, such as the abuse or diversion of medications, not presented by the non-controlled medications at issue in Relator's complaint. An audit focused on

[9] Following the filing of the Denk and Beeders complaints, the U.S. Attorney for the Eastern District of Wisconsin launched investigations only of PharMerica's controlled drug transactions. *See* J.A. at 304, 306 (PharMerica filed a Form 10-K referring to an investigation by the U.S. Attorney for the Eastern District of Wisconsin into PharMerica's alleged failure to comply with "various laws and regulations relating to the control and dispensing of certain controlled substances").

violations of the CSA is not likely to uncover violations involving non-controlled medications.

* * *

In sum, it is not reasonable to conclude that complaints focused on illegal controlled drug dispensing practices by a handful of pharmacies within a nationwide chain would put the Government on notice that pharmacies within the chain were also illegally dispensing non-controlled medication. Contrary to the District Court's conclusion, the complaints in the Wisconsin proceeding did not allege a "scheme." Because of the material differences in their chemical properties, controlled drugs and non-controlled drugs are subject to different legal and regulatory schemes that create distinct needs and incentives for physicians, patients, nursing home staff, pharmacies and government investigators.

It is also important for this Court to bear in mind that the Government's declination to intervene in the Gadbois case does not mean that the Government concluded that Gadbois' claims lack merit. "The government's decision not to intervene in an FCA action does not mean that the government believes the claims are without merit. . . ." *U.S. ex rel. Ubl v. IIF Data Solutions*, 650 F.3d 445, 457 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 526 (2011). "Given it's limited time and resources, the government cannot intervene in every FCA action, nor can the government pursue every meritorious FCA claim." *Id.*

Allowing the decision of the District Court to stand would send a clear message to corporations who look to defraud the federal government; that is, once the Government has learned that the company is engaged in a type of wrongdoing affecting part of its business, whether it be kickbacks to promote a health care product, or padding costs on a government contract, then the company is protected from *qui tam* suits bringing forward new information about the company engaging in similar violations of law with regard to other products or contracts. Gadbois urges this Court to reject this approach, reverse the district court and permit Gadbois to seek to recover for the federal fisc the damages incurred by Medicare and Medicaid as a result of PharMerica's dispensing non-controlled medication – which constitute approximately 88 percent of its drug transactions – without legitimate prescriptions. If the lower court's decision is not reversed, PharMerica may evade responsibility for this misconduct.

III. THE LOWER COURT SHOULD REINSTATE THE STATE LAW CLAIMS.

Along with the federal claims, Gadbois alleged various claims under various state false claims laws. Provided that the court had jurisdiction over the federal claims, the district court also had supplemental jurisdiction over the state law claims.

In its Order dismissing the federal claims for lack of jurisdiction, the district court also dismissed the

state law claims, finding that it was inappropriate, in the absence of the federal claims, to exercise supplemental jurisdiction. Assuming that this Court finds that the district court erred in dismissing the federal claims, this Court should also find that the district court should exercise its supplemental jurisdiction over those claims.

IV. ANY DISMISSAL SHOULD BE WITHOUT PREJUDICE

The first-to-file bar describes the earlier-filed action that may bar a later case as a "pending" action. *See* 31 U.S.C. § 3730(b)(5). The most reasonable construction of the statutory provision consequently is that *qui tam* cases that are no longer pending may not bar later-filed *qui tam* cases. *See U.S. ex rel. Ven-A-Care*, 772 F.3d at 933 ("[t]he first-to-file rule is so named because it blocks *qui tam* suits that are filed while similar enough ones are already pending"). The U.S. Supreme Court this term heard oral argument on the question of whether an earlier-filed case that is *not* still pending may nonetheless bar a later case under the first-to-file bar; a decision is pending. *See Kellogg, Brown & Root Co. v. U.S. ex rel. Carter*, No. 12-1497 (U.S. argued Jan. 13, 2015).

In the event that this Court determines not to reverse the district court on its dismissal of the federal claims, the Court should direct that the district court's dismissal should be without prejudice to refiling. As discussed, *supra*, the United States and

PharMerica have reached a settlement in principle of the claims in the Wisconsin proceeding, and, if and when that settlement finalized, the actions will be dismissed and will no longer be "pending."

CONCLUSION

For the reasons set forth above, Appellant Robert Gadbois respectfully requests that this Court reverse the district court's decision dismissing his federal claims and direct the district court to reinstate his state law claims under the doctrine of supplemental jurisdiction. In the event the Court determines not to reverse the lower court, Gadbois respectfully requests that the Court direct the district court to dismiss Appellant's claims without prejudice to re-filing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,417 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Amato A. DeLuca
Attorney for Appellant
Robert Gadbois

Dated: March 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that the within document has been electronically filed with the Court on this 23rd day of March, 2015, and that it is available for viewing and downloading from the ECF system.

/s/ Amato A. DeLuca
Amato A. DeLuca, Esq.

ADDENDUM

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA, et al.
ex rel. ROBERT GADBOIS
Plaintiffs,

v. C.A. No. 10-471-ML

PHARMERICA CORPORATION,
Defendant.

MEMORANDUM AND ORDER

The plaintiff in this *qui tam* action, Robert Gadbois ("Gadbois") has brought claims on behalf of

the United States and twenty-two states[1] against his employer, PharMerica Corporation ("PharMerica), alleging that PharMerica has engaged in conduct that violates the False Claims Act ("FCA") and corresponding false claims acts of the named states. The United States has declined to intervene in this action, as have the individual states.

The case is before the Court on the Defendant's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction, on the ground that the action is barred under first-to-file and pending-government-action principles of Sections 3730(b)(5) and 3730(e)(3) of the FCA.

I. Factual Background

PharMerica owns and operates approximately 91 pharmacies in 45 states; the pharmacies dispense medications for residents in long-term care and assisted living facilities. Complaint ¶ 23. Gadbois is a pharmacist employed by PharMerica in its Warwick, Rhode Island, pharmacy. Complaint ¶ 11. As staff pharmacist, Gadbois has been responsible for dispensing prescription medications, including controlled and non-controlled substances, to residents at

[1] California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin.

Rhode Island nursing homes and other long-term facilities serviced by PharMerica. Complaint ¶ 18.

In his Complaint, Gadbois alleges that PharMerica engages in two schemes – one related to non-controlled medications, one related to controlled medications – that result in overbilling Medicaid and Medicare Part D[2] and in providing undue profit to PharMerica. With respect to the first scheme, Gadbois contends that PharMerica's Warwick pharmacy has been dispensing and billing for non-controlled substances without valid prescriptions. Complaint ¶ 85. Gadbois describes dispensing practices at the Warwick pharmacy in some detail, *see* Complaint ¶¶ 85-99, including the pharmacy's use of PharMerica's LTC400 computer software system. *Inter alia*, Gadbois alleges that the Warwick pharmacy accepts orders from LTCF (long-term care facility) staff although the orders lack required prescription elements, such as quantity and number of refills and although the orders are not transmitted by a physician. Complaint ¶ 85. Gadbois also alleges that the Warwick pharmacy's general manager has repeatedly instructed staff pharmacists and technicians to dispense the maximum quantity of non-controlled

[2] **Medicare** is a federal health insurance program for people who are 65 or older or who suffer from certain disabilities. The Medicare Part D program relates to prescription drug coverage. **Medicaid** is a joint federal and state program that helps pay health care costs for people with limited income and resources.

medication allowed by insurance, regardless of whether they had received a prescription authorizing the dispensing of such quantities. Complaint ¶ 91. According to Gadbois, once an initial supply of non-controlled medication has been provided, LTCF staff request a resupply of the prior LTCF drug order by referencing the prior Rx number, often years after the initial request. Complaint ¶ 92. Gadbois alleges that the LTC400 program facilitated the Warwick pharmacy's ability to dispense, and bill for, the resupply of medication even if the program reflected zero refills. Complaint ¶ 93. In addition, Gadbois contends that the Warwick pharmacy unlawfully dispenses medication without complying with federal and state prescription requirements by delivering bulk quantities of medication to LTCFs for later use by stocking emergency kits and RxNow vending machines. Complaint ¶¶ 95-97.

Gadbois alleges that such practices are not limited to the Warwick PharMerica pharmacy, but that he learned, through communications with colleagues at other PharMerica pharmacies, that such practices are prevalent elsewhere. Gadbois also states that, based on his understanding of the LTC400 software, he concluded that PharMerica corporate headquarters has programmed the software, which permits pharmacies to dispense and conceal unauthorized refills of non-controlled medication. Complaint ¶ 100. Gadbois acknowledges that PharMerica implemented a number of updates to the LTC400 software that resulted in rejecting or suspending

incomplete or improper refill requests; he maintains, however, that the Warwick PharMerica pharmacy continues to fill LTCF requests for a resupply of medication even if the original request is more than a year old. Complaint ¶¶ 101-107. Gadbois also contends that the Warwick pharmacy continues to dispense and bill for non-controlled prescription medication in the maximum amount covered by a patient's insurance, even in the absence of a written prescription authorizing such quantities and without requesting an oral prescription. Complaint ¶ 108.

Gadbois's claim against PharMerica is based on the contention that PharMerica submits false claims to taxpayers by billing Medicare Part D or Medicaid for illegal refills of non-controlled drugs PharMerica dispenses. Complaint ¶ 112.

Specifically, Gadbois states that "by seeking payment for drugs dispensed in violation of state law, including Medicaid payment rules, [PharMerica] seek[s] payment for non-covered services." Complaint ¶ 113. According to Gadbois, PharMerica profits each time a PharMerica pharmacy bills a government health care program for a refill that exceeds the maximum number of refills permitted by law. Complaint ¶ 116. As a result of PharMerica's practices, government health care programs have paid for medications that were not medically necessary; put patients at risk; and "locked in" LTCF residents (without a valid prescription) as perpetual purchasers from PharMerica. Complaint ¶ 116. In support of his contentions, Gadbois provides a number of example

cases[3] in which, he alleges, PharMerica dispensed illegal refills for which it subsequently billed Medicaid and Medicare Part D. Complaint ¶ 119.

Gadbois also asserts that PharMerica bills Medicare Part D and Medicaid for dispensing unauthorized quantities of non-controlled drugs without a valid prescription. Complaint ¶ 120-123. Gadbois provides an example for repeated re-supplies over a period of six weeks of a non-controlled anti-inflammatory agent that contains a warning against use beyond five days due to serious side effects. Complaint ¶ 126.

Regarding the scheme involving controlled medications, Gadbois acknowledges that, for at least twenty years, PharMerica has been following special procedures for the handling of controlled drugs, including locking up its inventory, preparing yearly logs of such inventory, delivering the drugs to LTCFs, and using different software programs for processing and billing. Complaint ¶ 130. Gadbois alleges, however, that PharMerica routinely disregards CSA (Controlled Substances Act) requirements such as receipt of a valid prescription prior to dispensing and, in case of Schedule II drugs, receipt of a prescription in written form (except in emergencies). Complaint ¶ 131. Gadbois also asserts that PharMerica routinely violates the CSA's prohibition against more than five refills of Schedule III and IV drugs or issued more

[3] Patients are identified only by initials.

than six months after the original prescription. Id. According to Gadbois, until changes were made to PharMerica's LTC400 billing software in 2010 and 2011, pharmacists were able to dispense and refill controlled substances without entering information regarding properly authorized quantities and/or refills of the medication. In addition, the earlier software automatically designated quantities in the maximum amount that would be reimbursed by insurance, for an indefinite number of refills. *Id.* Gadbois recounts that he observed such practices while working at the Warwick PharMerica pharmacy and that he was specifically trained and instructed in those practices by the pharmacy's general manager. Complaint ¶¶ 133-136. Gadbois also contends that he learned from communication with other colleagues, through corporate e-mails, and from the Warwick pharmacy's general manager, that PharMerica's alleged misconduct has taken place nationwide. Complaint ¶¶ 137-138. According to Gadbois, PharMercia did not attempt to correct its illegal practices until after the DEA began a criminal investigation, in the course of which the DEA executed a search warrant at a Wisconsin PharMerica pharmacy in late 2009. Complaint ¶ 139. Gadbois provides a number of examples from the Warwick PharMerica pharmacy in which Medicaid was billed for illegally dispensed or refilled controlled medications. Complaint ¶¶ 143-145.

II. Procedural History

A. This Case

On November 19, 2010, Gadbois commenced litigation against PharMerica and a number of other pharmacy corporations in this Court; he filed an amended complaint (the "Complaint") on May 6, 2011 (Dkt. No. 13). COUNT ONE of the Complaint alleges that (1) PharMerica presented, or caused to be presented, false or fraudulent claims for non-controlled medication, in violation of 31 U.S.C. § 3729(a)(1)(A) and 31 U.S.C. § 3729(a)(1)[4]; (2) PharMerica made or used, or caused to be made or used, false records or statements to get false or fraudulent claims for non-controlled medication paid or approved by the United States, in violation of 31 U.S.C. § 3729(a)(1)(B) and 31 U.S.C. § 3729(a)(2); and (3) PharMerica has avoided its obligation to pay or transmit money to the Government arising from its claims for non-controlled medication, in violation of 31 U.S.C. § 3729(a)(1)(G). Complaint ¶¶ 150-155. COUNTS TWO through TWENTY-THREE assert state law violations related to claims for controlled and non-controlled medication. Complaint ¶¶ 156-199.

On November 19, 2013, the United States filed a notice of election to decline intervention. (Dkt. No. 20), after which the amended complaint was unsealed

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[4] The two cited subdivisions reflect clarification and amendment of the FCA on May 20, 2009. Pub.L. 11-21, § 4(a), May 20, 2009, 123 Stat. 1621.

and ordered to be served on PharMerica. (Dkt. No. 30). On December 9, 2013, the State of Rhode Island filed, on behalf of the State of Rhode Island and the other named states, a notice of election to decline intervention in the case. (Dkt. No. 31). On January 24, 2014, Gadbois dismissed his claims against all defendants except PharMerica, as well as a number of other claims he had previously asserted against PharMerica. (Dkt. No. 35). At the same time, Gadbois sought to file a second complaint to "add[ ] detail to the claims on which [Gadbois] was proceeding independently so as to further clarify the factual and legal bases for [his] claims." Gadbois Mem. at 3 (Dkt. No. 34-1). Gadbois second amended complaint (the "Amended Complaint") was filed on February 25, 2014. On May 27, 2014, PharMerica filed a motion to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b) for failure to state a claim upon which relief can be granted. PharMerica also requested that, in the event the FCA claims were dismissed, the Court decline supplemental jurisdiction and dismiss the Amended Complaint in its entirety. Mot. Dismiss at 1 (Dkt. No. 48).

B. The Wisconsin Action

On July 23, 2009, more than sixteen months before Gadbois commenced litigation in this Court, Jennifer Denk ("Denk"), a pharmacist previously employed by PharMerica in Pewaukee, Wisconsin,

filed a *qui tam* action against PharMerica in the United States District Court of the Eastern District of Wisconsin. Complaint (Dkt. No. 1, *United States of America et al v. PharMerica Corporation*, C.A. No. 9-720 (E.D. Wis. July 23, 2009)). On January 15, 2010, Denk filed a first amended complaint (Dkt. No. 10, C.A. No. 9-720). According to Denk's complaint, prior to commencing litigation, she met with DEA investigators and DOJ (Department of Justice) attorneys to provide information and inform them of her intent to file suit. Denk Complaint ¶ 7. In her complaint, Denk alleges that PharMerica committed violations of 31 U.S.C. §3729 of the FCA by submitting "false and fraudulent claims for monetary payment for the sale of prescription drugs and other pharmaceutical products which PharMerica represented it sold to individuals entitled to payment through the Medicare and Medicaid programs." Denk Complaint ¶ 9. According to Denk, "[s]uch claims were not eligible for payment due to PharMerica's noncompliance with Medicare, Medicaid, and other laws and regulations relating to the dispensing, control, sale, billing, and disbursement of pharmaceutical products, including Schedule II, III, IV and V controlled substances." *Id*. In addition, Denk alleged that PharMerica engaged in kickbacks to its vendors and that it terminated Denk's employment in retaliation for her whistleblowing activities. *Id.*

Specifically, Denk alleged that PharMerica presented claims for payment for controlled narcotic substances based on orders that were not valid for a

number of reasons, including the complete absence of a prescription in a non-emergency situation or the failure to obtain a prescription within seven days of dispensing a controlled substance in an actual emergency situation. Denk Complaint ¶ 46. Denk further alleged that controlled medications were dispensed (and billed to the United States) in response to phone orders, faxed discharge orders, or physician orders in the absence of a documented or claimed emergency. Denk Complaint ¶ 48. According to Denk, based on her personal experience at the PharMerica pharmacy where she was employed, Schedule II, III, IV and V narcotics were regularly dispensed without a written prescription. Denk Complaint ¶¶ 48-56, 74-77. In addition, the Pewaukee pharmacy regularly failed to verify that an emergency situation did exist for which such medication was dispensed or to follow up with the prescribing physician to obtain a written prescription as required. Denk also alleged that non-prescription orders were refilled three or four times without regard to whether a signed prescription had been received. Denk Complaint ¶ 50. Denk supported her contentions with specific examples in which PharMerica billed Medicare for, *inter alia*, (1) dispensing Schedule II narcotics when less expensive and more appropriate emergency medications were available; (2) dispensing medication to a patient without obtaining a written or oral prescription from the patient's physician; (3) dispensing medication in emergency situations without obtaining physician signatures within the required seven-day time frame; and (4) unsigned orders for prescription medications.

Denk Complaint ¶¶ 53, 56, 60, 66. Denk's complaint also described the AS 400 software application used by PharMerica employees to enter order information for controlled substances. Denk Complaint ¶¶ 21, 22, 85.

On May 28, 2013, the United States advised the Wisconsin district court that it elected to intervene, in part, and to decline to intervene, in part. (Dkt. No. 40). On August 9, 2013, the Government filed a complaint in that action, alleging violations of the CSA (Counts One and Two), violations of the FCA (Counts Three and Four), and unjust enrichment (Count Five). (Dkt. No. 44). In its complaint, the Government alleged, *inter alia*, that PharMerica submitted false claims to Medicare for Schedule II drugs that were dispensed without a valid prescription; that PharMerica filled prescriptions for LTCF residents on order forms received from staff (instead of valid prescriptions from practitioners); and that such orders frequently lacked the practitioner's signature and the quantity of the requested medication. Gov. Complaint ¶¶ 2, 5, 7, 77-80.

The action was consolidated with another FCA case filed on May 26, 2010 in the Middle District of Florida by Eric Beeders and Lesa Martino, pharmacists employed by Integrity Pharmacy Services, an entity that had been acquired by PharMerica in late 2009. Beeders and Martino alleged, *inter alia*, that Integrity Pharmacy Services (of which PharMerica is the successor-in-interest) routinely billed Medicare and Medicaid programs of Florida, Massachusetts

and Pennsylvania for "orders of Schedule II controlled substances called in by telephone by nurses working at nursing homes for quantities exceeding a 72-hour emergency supply without obtaining written prescriptions signed by the prescribing physician." Beeders/ Martino Complaint ¶ 27 (*United States v. Pharmerica Corp.*, C.A. 10-1208, M.D. Fla. May 26, 2010).

On November 15, 2013, PharMerica filed a motion to dismiss Counts Three, Four, and Five of the Government's complaint. On December 31, 2013, PharMerica filed a motion to dismiss Denk's claim for retaliation. Both of PharMerica's motions were denied on September 3, 2014.[5]

II. Standard of Review

The dismissal of a complaint is governed by Rule 12 of the Federal Rules of Civil Procedure. The Court may dismiss a case, *inter alia*, for lack of subject-matter jurisdiction, Fed. R. Civ. P. 12(b)(1), or for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). It is well established that the "standard of review is the same for failure to state a claim and for lack of jurisdiction." *Puerto Rico Tel. Co. v. Telecomm. Regulatory Bd. of Puerto Rico*, 189 F.3d 1, 14 n. 10 (1st Cir.1999).

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[5] The Court takes judicial notice of this development, which occurred after the parties had submitted their briefs in the instant case.

A Court ruling on a motion to dismiss under Rule 12(b)(1) must construe the allegations in the complaint liberally in favor of the plaintiff. *Aversa v. United States*, 99 F.3d 1200, 1209-10 (1st Cir.1996). Therefore, the Court accepts the plaintiff's well-pleaded facts as true and draws all reasonable inferences in the plaintiff's favor. *McCloskey v. Mueller*, 446 F.3d 262, 266 (1st Cir.2006). It is noted that, although a complaint need not contain "detailed factual allegations;" it is subject to dismissal if it fails to state facts sufficient to establish "a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 555, 570, 127 S.Ct. 1955, 1965, 1974, 167 L.Ed.2d 929 (2007); *S.E.C. v. Tambone*, 597 F.3d 436, 442 (1st Cir.2010). Accordingly, the Court ignores "conclusory allegations, improbable inferences, and unsupported speculation." *Hostar Marine Transp. Sys., Inc., v. United States*, 592 F.3d 202, 207 (1st Cir.2010).

Moreover, the Court may consider extrinsic materials without converting a motion to dismiss to a motion for summary judgment. *Dynamic Image Tech., Inc. v. United States*, 221 F.3d 34, 37-38 (1st Cir.2000) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 890-91 (1st Cir.1977)). If jurisdiction is challenged, the party invoking jurisdiction carries the burden of proving it. *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir.1995).

If the Court determines that it lacks subject matter jurisdiction, analysis of the movant's 12(b)(6) argument is neither necessary nor appropriate.

Christopher v. Stanley-Bostitch, Inc., 240 F.3d 95, 100 (1st Cir.2001) (*per curiam*) ("When a federal court concludes that it lacks subject matter jurisdiction over a case, it is precluded from rendering any judgments on the merits of the case").

IV. Discussion

1. The FCA

Under the FCA, any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the federal government, or 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 federal government, is subject to a civil penalty and treble damages. 31 U.S.C. § 3729(a). To "supplement federal law enforcement resources by encouraging private citizens to uncover fraud on the government," the FCA includes *qui tam* provisions that permit private persons to bring certain fraud claims on behalf of the United States Government. *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 727 (1st Cir.2007); *overruled on other grounds by Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 128 S.Ct. 1223, 170 L.Ed.2d 1030 (2008). 31 U.S.C. § 3730(b). Pursuant to Section 3730(b)(2), such actions are filed and remain under seal for at least 60 days to afford the government an opportunity to assess the charges and to intervene in the action. 31 U.S.C. § 3730(b)(2), (b)(3). *United*

States ex rel. Heineman-Guta v. Guidant Corp., 718 F.3d 28, 30 (1st Cir.2013). Persons who file a fraud claim on behalf of the government may receive a percentage of the proceeds of the action or settlement of such claims, depending on their contribution to the prosecution of the case. 31 U.S.C. § 3730(d). Such an award may be applicable even if the government elects not to intervene in the suit. *Id.*; *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d at 30.

2. First-to-File

The FCA's *qui tam* provision "attempts to reconcile two conflicting goals, specifically, preventing opportunistic suits, on the one hand, while encouraging citizens to act as whistleblowers, on the other." *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 233 (3d Cir.1998). Section 3730(b)(5) provides "incentives to relators to 'promptly alert[ ] the government to the *essential* facts of a fraudulent scheme.'" *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13, 24 (1st Cir. 2013) (quoting *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir.2001)) (emphasis added).

The first-to-file rule precludes a plaintiff from bringing "a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5) ("When 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."); *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d at 34. The prohibition against later filed related actions is "exception-free." *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F3d. at 33 (quoting *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d at 1187). It is well established that "[t]he FCA first-to-file rule is jurisdictional." *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d 111, 117 (1st Cir. 2014).

The First Circuit has interpreted § 3730(b)(5) to bar "'a later allegation [if it] states all the *essential facts* of a previously-filed claim'" or 'the same elements of a fraud described in an earlier suit.'" *Id*. at 117-118 (quoting *Duxbury*, 579 F.3d at 32 (quoting *LaCorte*, 149 F.3d at 232-33). As the First Circuit noted in *Wilson*, this "essential facts" or "material elements" test is "in line with all the circuit courts which have considered this section." *Wilson v. Bristol-Meyers Squibb, Inc.*, 750 F.3d at 117-118. Because, "once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds," a later claim is barred "'even if that claim incorporates somewhat different details.'" *Id*. at 118 (quoting *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009) (quoting *United States ex rel. LaCorte v. SmithKline Beecham Clinical Laboratories*, 149 F.3d 227, 234 (3rd Cir. 1998)) (internal quotation marks omitted). Accordingly, "an action is barred if it is a 'related action' that is 'based on the

facts underlying the *pending* action.'" *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d at 35 (quoting 31 U.S.C. § 3730(b)(5). "[I]f the first-filed complaint contains enough material information (the essential facts) about the potential fraud, the government has sufficient notice to launch its investigation" and any later-filed action that "offers merely additional facts and details about the scheme" is barred as duplicative of the initial suit. *Id.* at 36.

3. Pending Government Action

Pursuant to 31 U.S.C. § 3730(e)(3), "(i]n no event may a person bring [a *qui tam* action] 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." 31 U.S.C. § 3730(e)(3); *United States ex rel. S. Prawer and Co. v. Fleet Bank of Maine*, 24 F.3d at 322 n. 3, "Allegations or transactions" refers to allegations or transactions of fraudulent conduct. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 653-54 (D.C.Cir.1994). The intended purpose of the provision is to avoid parasitic *qui tam* lawsuits that receive "'support, advantage, or the like' from the 'host' case (in which the government is a party) 'without giving any useful or proper return' to the government (or at least having the potential to do so).'" *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 676 (8th Cir. 1998) (quoting *United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d at 327-328); see *also United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F.Supp. 292, 303 (D.D.C.1996)

(finding "no useful return to the government" under Section 3730(e) where government declined to intervene in second *qui tam* action).

4. The Parties' Positions

Pharmerica seeks dismissal of Gadbois's Complaint on the grounds that (1) the Complaint is barred by sections 3730(b)(5) and 3730(e)(3); and (2) Gadbois fails to state a claim under Rule 12(b)(6) because, *inter alia*, the Complaint fails to comply with the heightened pleading requirements of rule 9(b).

Gadbois's objection to PharMerica's motion to dismiss is based on the assertion that his claims "concern the 90% of PharMerica's sales that are not being redressed in the Wisconsin proceedings." Pltf.'s Mem. Obj. at 1 (Dkt. No. 50-1). Gadbois contends that the Wisconsin complaints are limited to *controlled* drugs and do not assert any state law claims alleging damage to Medicaid, whereas Gadbois has asserted two separate schemes perpetuated by PharMerica: (1) the illegal dispensing of *non-controlled* substances that are billed to federal Medicare and state Medicaid programs; and (2) the illegal dispensing of *controlled* substances that are billed to state Medicaid programs.[6]

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[6] In the alternative, Gadbois seeks to amend his complaint in the event the Wisconsin court dismisses the case against PharMerica. As noted *supra*, PharMerica's motions to dismiss the claims against it by the United States and Jennifer Denk were denied on September 3, 2014.

In its reply, PharMerica points out that the fraudulent scheme alleged by Gadbois is the same as alleged by the three pharmacists in the Wisconsin action and that Gadbois's addition of claims regarding *non-controlled* substances does not change the nature and the revelation of the scheme itself.

5. This Case

The essence of relator Jennifer Denk's complaint in the Wisconsin action (subsequently consolidated with the Beeders/Martino action) is that PharMerica defrauded the United States government by billing Medicare and Medicaid programs for dispensing medications that were not eligible for reimbursement because of PharMerica's non-compliance with Medicare, Medicaid, and other laws and regulations relating to the dispensing of pharmaceutical products, including controlled substances. Original Denk Complaint ¶ 9. Denk specifically alleged that PharMerica dispensed (and sought reimbursement for) medications based on phone orders without a signed prescription, on faxed discharge orders, and on physician orders in the absence of any actual or claimed emergency. Denk Amended Complaint ¶ 48. Denk also alleged that some of the prescriptions lacked the prescribing physician's signature; that they were non-specific as to quantity; and that some of the prescriptions were re-filled repeatedly, even when a signed prescription had not been received. *Id.* at ¶¶ 48-51. Not only did Denk's complaint put the government on notice, it is uncontroverted that Denk

met with DEA investigators and DOJ attorneys before she ever filed suit.

By the time Gadbois filed his initial complaint in this Court, the United States Government had already been alerted to Pharmerica's alleged fraudulent scheme on three occasions: Denk's meeting with government officials and Denk's filing of her original and first amended complaints. Although Gadbois seeks to distinguish his case from the Wisconsin action by including in his claims the dispensing of, and billing for, non-controlled medications, he has not established that such a distinction is material to the alleged fraudulent scheme. Whether the medications in question were controlled or non-controlled, the prescription information required prior to their dispensing was the same, and dispensing either category of medication without a proper prescription disqualified it from reimbursement by Medicare and/or Medicaid.

Because in this Circuit (and in those circuits that have addressed the issue), an asserted first-to-file bar is considered under the "essential facts" or "material facts" test, a later claim is barred "'even if that claim incorporates somewhat different details.'" *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.*, 750 F.3d at 118 (quoting *Duxbury*, 579 F.3d at 32). Once Denk alerted the government (both in person and in her complaints) to the "essential facts of [the] fraudulent scheme" allegedly perpetrated by PharMerica, the government had "enough information to discover related frauds." *Wilson*, 750 F.3d at 118. In sum, by

the time Gadbois filed his first complaint in this Court, information regarding PharMerica's alleged scheme of defrauding Medicare and Medicaid by billing for inadequately supported prescriptions had been revealed to the government sixteen months earlier (which eventually led to the government's election to intervene). Because the first-to-file rule bars Gadbois's later filed claim, the Court holds no jurisdiction over this case.

Conclusion

For the reasons stated herein, PharMerica's motion to dismiss Gadbois's FCA claims against it is GRANTED. The Court declines to exercise its supplemental jurisdiction over Gadbois's FCA claims brought on the various states' behalf, and DISMISSES the case in its entirety.

SO ORDERED.

/s/ Mary M. Lisi

Mary M. Lisi
United States District Judge

October 3, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

United States of America, et al.
ex rel. Robert Gadbois

v. CA 10-471ML

PharMerica Corporation

JUDGMENT

IT IS ORDERED AND ADJUDGED:

Judgment shall enter for Defendant PharMerica Corporation against Plaintiff Robert Gadbois, pursuant to this Court's Memorandum and Order dated October 3, 2014, *granting* Defendant's Motion to Dismiss, and *dismissing* this case in its entirety.

Enter:

/s/John Duhamel
Deputy Clerk

DATED: October 3, 2014

No. 14-2164

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBERT GADBOIS, States of CA, CO, DE, FL, GA, HI, IL, IN, LA, MD, MA, MI, MN, MT, NV, NH, NM, NC, RI, TN, TX, VA, WI,

Plaintiff – Appellant,

UNITED STATES, ex rel. Robert Gadbois; STATE OF RI

Plaintiffs

v.

PHARMERICA CORPORATION,

Defendant – Appellee

CVS/CAREMARK; WALGREEN CO.; MEDCALL, LLC; RITE AID CORPORATION

Defendants.

Appeal from the United States District Court
for the District of Rhode Island
Case No. CA10-471-ML,
the Honorable Mary M. Lisi presiding

MOTION FOR REMAND AND MEMORANDUM IN SUPPORT

(Filed Jul. 9, 2015)

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Pursuant to Fed. R. App. P. 27, and based on the points and authorities set forth herein, Appellant Robert Gadbois hereby respectfully moves the Court to vacate the dismissal below and remand this action to the district court for further proceedings. At issue in this appeal is the lower court's dismissal of the action that Mr. Gadbois filed under the *qui tam* provisions of the federal False Claims Act, 31 U.S.C. § 3730(b). Relying upon 31 U.S.C. § 3730(b)(5), a provision that bars an individual from filing a *qui tam* action based on the facts underlying a related, pending *qui tam* case, the lower court dismissed his action after finding that two, earlier-filed *qui tam*

actions that were then pending in the Eastern District of Wisconsin involved the same essential facts. (J.A. at 348-350, 355, describing 31 U.S.C. § 3730(b)(5) as the "first to file rule," and dismissing case under that provision.) Appellant timely filed a notice of appeal on October 31, 2014. (J.A. at 357.)

Subsequent to the filing of Appellant's Brief herein, two material events have taken place that render the district court's order of dismissal subject to vacatur for reasons other than those set forth in Mr. Gadbois' opening brief:

1. On May 26, 2015, the U.S. Supreme Court has ruled that only a "pending" *qui tam* case may bar a subsequent *qui tam* action, *see Kellogg Brown & Root Services, Inc. et al. v. United States, ex rel. Carter*, 2015 WL 2456621 (May 26, 2015); and,

2. On June 15, 2015, the *qui tam* actions pending in the Eastern District of Wisconsin were dismissed and are no longer pending. (See Exhibit A).

Accordingly, as detailed below, there is now no bar to Mr. Gadbois proceeding with his action. The dismissal of the Wisconsin proceedings either cures any deficiency arising from his original complaint having been filed at a time when these earlier *tam* actions were pending, and/or permits his complaint to be supplemented so as to remove any bar presented by 31 U.S.C. § 3730(b)(5). Mr. Gadbois seeks an order from this Court so confirming, along with vacatur of

the dismissal and a remand to the district court for further proceedings.

Appellant has provided a copy of this Motion to Appellee PharMerica Corporation ("PharMerica"); PharMerica does not join in this motion. A proposed order is attached for the Court's consideration.

MEMORANDUM OF POINTS AND AUTHORITIES

As set forth in greater detail in Appellant's Brief herein, the district court dismissed Mr. Gadbois' action under the authority of 31 U.S.C. § 3730(b)(5), a provision that states:

> [W]hen a person brings an action under [the qui tam provisions], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(JA at 356.) The district court ruled that Mr. Gadbois' action was barred under 31 U.S.C. § 3730(b)(5) by two earlier filed *qui tam* cases, captioned *United States ex rel. Denk v. PharMerica Corporation*, Case No. 09-CV-920 (E.D. Wisc.) and *United States ex rel. Beeders, et al. v. PharMerica Corporation*, Case No. 10-CV-1208 (E.D. Wisc.) (collectively, "the Wisconsin proceeding"). (J.A. at 356.) In so doing, the district court rejected Mr. Gadbois' argument that his federal action was materially different from these earlier *qui tam* actions; Mr. Gadbois had argued that his federal allegations concerned PharMerica's corporate-wide

policy of dispensing *non-controlled* medication without valid prescriptions, while the earlier cases involved pharmacy-specific practices of dispensing opiates and other highly addictive, *controlled medication* in disregard of the strict regulatory regime implemented under the Controlled Substances Act, 21 U.S.C. § 801 et seq. Appellant noticed an appeal to this Court on October 31, 2014 (J.A. at 357.)

Two important, subsequent events now justify vacating the order of dismissal and remanding the action to the lower court for further proceedings. *First*, on May 26, 2015, the Supreme Court ruled that an earlier-filed FCA action does not operate to bar a later complaint under 31 U.S.C. § 3730(b)(5) unless it is still "pending." *Kellogg Brown & Root Services, Inc. et al. v. United States, ex rel. Carter* 2015 WL 2456621 (May 26, 2015) ("*Carter*"). *Then*, on June 15, 2015, the United States District Court for the Eastern District of Wisconsin entered an Order of Dismissal terminating all *qui tam* claims in the Wisconsin proceeding. (Exhibit A.) The dismissal was based on a settlement resolving for $23.5 million the claims that the United States and the *qui tam* relators in the Wisconsin proceeding had brought against PharMerica relating to PharMerica's billings for *controlled drug* medication. (The settlement is attached in Exhibit B.)[1]

[1] Corroborating Mr. Gadbois' arguments before the district court and on appeal that only controlled medications were at issue in that Wisconsin proceeding, the settlement contained no

(Continued on following page)

Accordingly, since June 15, 2015, the *qui tam* claims in the Wisconsin proceeding are no longer "pending" and cannot operate to bar Mr. Gadbois' complaint under 31 U.S.C. § 3730(b)(5).

The Supreme Court's decision and the dismissal of the Wisconsin proceeding mean that Mr. Gadbois may now proceed with his case. This Court should permit him to do so either: (i) by authorizing him to proceed with his second amended complaint, or (ii) by deeming his second amended complaint effectively supplemented[2] to allege the dismissal of the *qui tam* claims in the Wisconsin proceeding – an averment that cures any prior defect in the complaint. The Supreme Court's *Carter* decision provides the Court

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release or resolution of any claims concerning non-controlled medication.

[2] A supplemental complaint, which is filed under the authority of Fed. R. Civ. P. 15(d), typically allows the pleader to "set [ ] forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 90 (1st Cir. 2008). The "federal practice is to liberally allow supplemental pleadings." *Hertz Corp. v. Enter. Rent-A-Car*, 557 F. Supp. 2d 185, 192 (D. Mass. 2008). *See, e.g.*, *Quarentino v. Tiffany & Co.* 71 F.3d 58, 66 (2nd Cir. 1995) (When a party seeks to file a supplemental pleading under F. Rule Civ. P. 15(d), "leave should be freely granted"); *Camilla Cotton Oil Co. v. Spencer Kellogg & Sons, Inc.* 257 F.2d 162, 167 (5th Cir. 1958) (The federal practice under F.R.C.P. 15(d) makes liberal allowance for amending and supplemental pleadings). *See also Foman v. Davis*, 371 U.S. 178 (1962) (The Federal Rules of Civil Procedure "accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

with good cause to rule that the "pending case bar" found in 31 U.S.C. § 3730(b)(5)[3] is not jurisdictional, and that the dismissal below was without prejudice. Moreover, even if the bar were considered to be jurisdictional, courts can, and commonly do, permit plaintiffs to supplement their complaints to cure jurisdictional defects when jurisdiction is based on something other than diversity of citizenship.

1. The "Pending Case Bar" is not Jurisdictional

The question of whether the "pending case bar" is jurisdictional was answered in the negative by the D.C. Circuit in the recently-decided case of *United States ex rel. Heath v. AT&T, Inc.*, 2015 U.S. App. LEXIS 10547 (D.C. Cir. June 23, 2015). *Id.* at *12-*16. After analyzing the Supreme Court's recent decision in *Carter*, the D.C. Circuit concluded that the Supreme Court addressed the operation of the bar on "decidedly non-jurisdictional terms" by ruling on the question *after* deciding the other key issue in the case, which was a statute of limitations issue. *Id.* at *16, n. 4. This Court should follow the D.C. Circuit and rule that the pending claims bar of 31 U.S.C. § 3730(b)(5) is not jurisdictional. The Court should

[3] This bar previously has been referred to as the "first-to-file bar." The Supreme Court's *Carter* ruling exposes this shorthand phrase to be a malapropism; a *qui tam* claim not only must be filed first, but also must remain pending to bar a later-in-time *qui tam* complaint. "Pending claims bar" is a more accurate term to describe 31 U.S.C. § 3730(b)(5).

recognize that its earlier holding to the contrary in *United States ex rel. Ven-a-Care of the Florida Keys, Inc., v. Baxter Healthcare Corp.*, 772 F.3d 932, 936 (1st Cir. 2014), is no longer good law in light of the Supreme Court's superseding decision in *Carter*. Accordingly, the district court's dismissal should be construed to have been without prejudice, and with the bar to the instant case having been removed, Mr. Gadbois should now be permitted to proceed with his action.

2. A Supplemental Complaint Cures any Jurisdictional Deficit

In any event, even if the Court determines that the "pending case bar" is jurisdictional, Mr. Gadbois should be permitted to proceed with his action. Courts commonly permit plaintiffs who plead jurisdiction on a basis other than diversity to cure jurisdictional defects through supplemental complaints. As the Supreme Court ruled in *Rockwell Intern. Corp. v. U.S.*, 549 U.S. 457 (2007), "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Id.* at 473-74 (ruling in FCA action that jurisdiction under public disclosure bar should be determined based on assessment of most recently amended complaint); *see also Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 290 (8th Cir. 1988) ("[e]ven when the District Court lacks jurisdiction over a claim at the time of its original filing, a supplemental complaint may cure

the defect by alleging the subsequent fact which eliminates the jurisdictional bar.").

This Court has adopted the *Rockwell* rule in all cases except those in which jurisdiction is based on allegations regarding diversity of citizenship. Thus, one year after *Rockwell* was decided, this Court examined the question of whether a district court determining jurisdiction should apply the *Rockwell* rule or a different Supreme Court rule that looks only to the state of affairs when the original complaint was filed. *See ConnectULLC v. Zuckerberg*, 522 F.3d 82, 91 (1st Cir. 2008); *Grupo Dataflux v. Atlas Global Group L.P.*, 541 U.S. 567, 570-71 (2004). This Court held that district courts must apply the *Rockwell* rule permitting the curing of jurisdictional defects through the filing of a new complaint in all cases except those in which plaintiffs seek jurisdiction based on diversity of citizenship:

> In *Rockwell* [citation omitted] the Justices stated unequivocally that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Id.* at 1409. The case law in the courts of appeals is to the same effect. [Citations omitted].
>
> Notwithstanding the impressive pedigree of the time-of-filing rule, it is inapposite here. The letter and spirit of the rule apply most obviously in diversity cases, where the rule originated [citation omitted] and where

> heightened concerns about forum-shopping and strategic behavior offer special justifications for it. . . .

ConnectULLC, *supra*, 522 F.3d at 91.

Because Mr. Gadbois pled jurisdiction based on federal question, the *Rockwell* rule applies here. (*See* J.A. at 15, alleging jurisdiction under 28 U.S.C. §§ 1331 and 1345 and 31 U.S.C. 3723(a).)

To cure any jurisdictional deficit in his current complaint, the Court may deem Mr. Gadbois' complaint effectively supplemented by the matter of public record reflected in the dismissal order in Exhibit A. Appellate courts have the authority to deem complaints effectively supplemented to cure jurisdictional deficits. *Mathews v. Diaz*, 426 U.S. 67, 75 and n.9 (1976) (deeming complaint to be effectively supplemented in light of parties' stipulation to newly-arisen facts creating subject matter jurisdiction). This Court consequently may deem Mr. Gadbois' complaint to be effectively supplemented by the information concerning the dismissal of the Wisconsin proceedings, which is an uncontroverted fact and a matter of public record. "A district court's decision to grant a motion to dismiss for want of federal subject matter jurisdiction begets de novo review," *Viqueira v. First Bank*, 140 F.3d 12, 16 (1st Cir. 1998), and the Court of Appeals "independently determine[s] the existence of subject-matter jurisdiction." *Acosta-Ramirez v. Banco Popular de Puerto Rico*, 712 F.3d 14, 18(1st Cir. 2013). In deciding the question of jurisdiction, the Court of

Appeals may consider "documents the authenticity of which are not disputed by the parties," *Claudio-de León v. Sistema Universitario Ana G. Méndez*, 775 F.3d 41, 46 (1st Cir. 2014), "the complaint supplemented by undisputed facts," *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001), and "matters of public record." *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

CONCLUSION

Accordingly, for all the reasons set forth herein, as well as any others that may appear just to the Court, Mr. Gadbois respectfully requests that the Court: (i) hold that there is jurisdiction for the district court to hear his case; (ii) vacate the dismissal below; and, iii) remand the case for further proceedings in the district court, with Mr. Gadbois proceeding either on his Second Amended Complaint or, alternatively, on a supplemented complaint alleging the dismissal of the Wisconsin proceeding.

Respectfully submitted,

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Dated: ___, 2015

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This motion and memorandum complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,167 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word 2010, in Courier New font, with less than 10.5 characters per inch.

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Attorney for Appellant
Robert Gadbois

Dated: ___, 2015

CERTIFICATE OF SERVICE

I hereby certify that the within document has been electronically filed with the Court on this ___ day of ___, 2015, and that it is available for viewing and downloading from the ECF system.

/s/ Amato A. DeLuca
Amato A. DeLuca, Esq.

[**EXHIBIT A**]

[**EXHIBIT B**]

No. 14-2164

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBERT GADBOIS, STATES OF CA, CO, DE, FL, GA, HI, IL, IN, LA, MD, MA, MI, MN, MT, NV, NH, NM, NC, RI, TN, TX, VA, WI,

Plaintiffs – Appellants

UNITED STATES, EX REL. ROBERT GADBOIS; STATE OF RI,

Plaintiffs

v.

PHARMMERICA CORPORATION,

Defendant – Appellee,

CVS/CAREMARK; WALGREEN CO., MEDCALL, LLC; RITE AID CORPORATION,

Defendants.

On Appeal from the United States District Court
For the District of Rhode Island
Civil Action No. 10-471-ML

APPELLEE PHARMERICA CORPORATION'S OPPOSITION TO APPELLANT'S MOTION FOR REMAND

(Filed Jul. 20, 2015)

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July 20, 2015

Pursuant to Fed. R. App. P. 27(a)(3), appellee PharMerica Corporation ("PharMerica") respectfully submits this opposition to the July 9, 2015 Motion for Remand ("Motion") filed by appellant Robert Gadbois ("Gadbois"). This procedurally improper Motion asks for the ultimate relief sought in this appeal. In fact, its arguments are repeated word-for-word in Gadbois's July 10, 2015 Reply Brief ("Gadbois's Reply Br."). The Motion should be denied and the issues left to be addressed by the panel assigned to this case.

A panel familiar with all of the briefing will recognize that Gadbois's opening brief anticipated the outcome of the Supreme Court's recent decision in *Kellogg Brown & Root Services v. U.S. ex rel. Carter*, No. 12-1497, 575 U.S. ___, 135 S.Ct. 1970 (2015), slip. op. ("*Carter*"), but failed to make any of these new arguments. They have all been waived as a result.

The Motion should also be denied because Gadbois does not provide any legitimate basis for

reversal of the District Court. As explained below, *Carter* does nothing to disturb the judgment below and, indeed, has no application to this appeal. *Carter* simply made it clear that the first-to-file bar will not stand in the way of Gadbois pursuing a new lawsuit given the dismissal of the two earlier-filed actions that, until recently, barred his claims. *Carter* does not, however, provide Gadbois with grounds to reopen the case below. In it, the Supreme Court simply affirmed a relators right to "refile" a case upon the dismissal of first-filed action. This is not an instance where the governing law changed during the course of the appeal. To the contrary, the decision below is fully compatible with *Carter* and correctly decided. If this Court reaches the merits of Gadbois's arguments, it should reject his invitation to reverse no fewer than five First Circuit cases holding that the first-to-file bar is jurisdictional and should instead rule that the District Court[1] correctly assessed its jurisdiction based on the state of affairs as of the date that Gadbois filed his initial complaint.

I. GADBOIS CANNOT CIRCUMVENT APPELLATE REVIEW BY MAKING A MOTION SEEKING REVERSAL OF THE JUDGMENT BELOW.

The Motion asks this Court to give Gadbois the ultimate relief that he seeks in this appeal: a reversal

[1] The United States District Court for the District of Rhode Island (the "District Court").

of the judgment below with instructions to permit him to file an amended complaint. *Compare* Motion p. 10 *with* Appellant's Br. p. 31. The Court should not countenance this transparent attempt to sidestep the appropriate appellate process.

A single judge cannot provide the relief requested. Fed. R. App. P. 27 ("A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding."). Instead, the supposed import of the Supreme Court's recent decision in *Carter* should be assessed by the panel assigned to this case. Gadbois tacitly concedes this point by repeating verbatim *all* of the Motion's arguments in his reply brief. *Compare* Motion p. 5-10 *with* Gadbois's Reply Br. p. 4-9. Instead of needlessly taxing the resources of this Court by having both the motions panel and the panel assigned to this case redundantly assess the purported consequences of *Carter*, the Motion should simply be denied as procedurally improper. The panel assigned to this appeal will have the Motion's arguments before them in the usual course of this appeal.

II. ALL OF THE MOTION'S ARGUMENTS HAVE BEEN WAIVED.

In his opening brief, Gadbois squarely addressed the implications of the expected *Carter* decision in light of the recent settlements of the two earlier-filed actions that triggered the first-to-file bar. Gadbois's Opening Br., p. 2, 11, 30-31. Gadbois went so far in

his opening brief as to argue that *Carter* ought to be decided in precisely the way that it was ultimately decided. *Id.* at 30. He raised a specific appellate issue and made a specific prayer for relief predicated on his forecast for the outcome of the *Carter* case. *Id.* at 30-31. He prayed that this Court would instruct the District Court that its dismissal is "without prejudice to *refiling*" another action. Gadbois's Opening Br., p. 2, 11, 31 (emphasis added). This was *all* the relief that *Gadbois* requested in his opening brief in expectation of a *Carter* decision that came to fruition exactly as he expected, so it is all the relief that he can ask for now.

Carter was no surprise. The Motion, however, consists of surprising new arguments for reversal of the District Court that are supposedly – but not actually – premised on *Carter*. The *Carter* decision is *not* about whether the first-to-file bar is jurisdictional. In fact, the word jurisdiction does not appear anywhere in that opinion. Gadbois, however, is attempting to use the *Carter* decision in an effort to change course on his own argument on jurisdiction. As set forth below, such an effort is inappropriate both procedurally and substantively.

While this Court decides cases based on the state of the controlling law at the time the decision is entered, *Carter* does nothing to change the law governing this case. *See U.S. v Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir. 2005). The Motion's arguments are not actually grounded in *Carter* and they were not raised in Gadbois's opening brief. They have,

therefore, been waived. *Sparkle Hill, Inc. v. Interstate Mat Corp.*, 788 F.3d 25, 29 (1st Cir. 2015) ("Our precedent is clear: we do not consider arguments for reversing a decision of a district court when the argument is not raised in a party's opening brief."); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 299 (1st Cir. 2000) ("We have held, with a regularity bordering on the monotonous, that issues advanced for the first time in an appellant's reply brief are deemed waived."). Indeed, some of Gadbois's new arguments flatly contradict what he argued in his Opening Brief. *Compare, e.g.* Gadbois's Opening Brief, p. 17 ("it is well established that the FCA first-to-file rule ***is*** jurisdictional") (internal quotation omitted) *with* Motion, p. 6-7 ("31 U.S.C. § 3730(b)(5) [the first-to-file bar] ***is not*** jurisdictional.") (emphasis added).

As the Motion consists entirely of arguments that Gadbois failed to preserve, it should be denied.

III. *CARTER* HAS NO APPLICATION TO THIS APPEAL AND GADBOIS'S NEW ARGUMENTS FOR REVERSAL ALL FAIL.

The False Claim Act's first-to-file bar provides that "[w]hen a person brings an action . . . no person other than the Government may intervene or bring a related action based on the facts underlying the *pending* action." 31 U.S.C. § 3730(b)(5) (emphasis added). In *Carter*, the Supreme Court explained that the use of the word "pending" in this provision means

that the first-to-file bar only prohibits subsequent qui tam lawsuits from being brought while the first-filed action is still pending. *See Carter* at 1978-79.

Here, the first-filed *Denk* and *Beeders* cases were pending when Gadbois filed his complaint below and were still pending when the District Court entered its October 3, 2014 judgment dismissing the case. *See* PharMerica's Br., pp. 3-4, 35-36. While *Carter* may be read to permit Gadbois to file a *new* qui tam action following the June 15, 2015 dismissal of *Denk* and *Beeders*, the District Court's decision was correct when made and it is still correct today. The Complaint below is subject to the first-to-file bar because, on the date that Gadbois initially brought his claim in the District Court, *Denk* and *Beeders* were still pending. *See id.* The first-to file bar is jurisdictional and, in a False Claims Act case, a District Court must look to the facts as they existed at the time the plaintiff filed the original complaint in assessing its jurisdiction. *U.S. ex rel. Estate of Cunningham v. Millennium Labs. of Cal., Inc.*, 713 F.3d 662, 699 (1st Cir. 2013); *Sallen v Corinthians Licenciamentos LTDA*, 273 F.3d 14, 23 (1st Cir. 2001) ("Jurisdiction depends upon the facts as they existed when the complaint was brought.")

Gadbois contends that this Court should conclude that the first-to-file bar is not jurisdictional. Motion p. 6-7. This argument amounts to a frontal attack on no fewer than *five* recent First Circuit cases. *U.S. ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp.*, 772 F.3d 932, 936 (1st Cir. 2014);

U.S. ex rel. Wilson v. Bristol-Myers Squibb, Inc., 750 F.3d 111, 117 (1st Cir. 2014) ("The FCA first-to-file rule is jurisdictional. . . ."); *U.S. ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 30 (1st Cir. 2013) (identifying the first-to-file bar as a jurisdictional bar); *U.S. ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 382 (1st Cir. 2011) (noting that first-to-file rule can jurisdictionally bar case); *U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 16 (1st Cir. 2009) (identifying the first-to-file bar as a jurisdictional bar).

Contrary to what Gadbois implies, *Carter* does nothing to disturb this Circuit's well-established doctrine. *See Carter* at 1978-79. In fact, all that happened in *Carter* was that the Supreme Court affirmed the Fourth Circuit's decision that the plaintiff had a "right to *refile* his case." *Carter* at *1975 (setting forth Fourth Circuit's ruling on the first-to-file issue) (emphasis added), *1979 (affirming same). *Carter* does not address *any* jurisdictional issues and, indeed, the word "jurisdiction" does not appear anywhere in the Supreme Court's opinion. *Id.*[2] The word

[2] Interestingly, the Supreme Court in *Carter* agreed with the Fourth Circuit's view of the first-to-file issue. Carter at *1979 ("We therefore agree with the Fourth Circuit that the dismissal with prejudice of respondent's one live claim was error."). Moreover, the Fourth Circuit's view, which was unreservedly undisturbed by the Supreme Court, was that the first-to-file bar is jurisdictional. *U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 181 ("The FCA has placed jurisdictional limits on its qui tam provisions, including § 3730(b)(5)'s first-to-file bar . . . " and "Section 3730(b)(5) is jurisdictional . . . ").

does appear, however, in Gadbois's Opening Brief where he flatly admits that the first-to-file bar is jurisdictional. Gadbois's Opening Br. at 17.

Gadbois offers nothing besides a D.C. Circuit decision in support of his new jurisdictional argument, but this Court has long acknowledged disagreement among the circuits on the issue and has reaffirmed its position nonetheless. *See U.S. ex rel. Ven-A-Care*, 772 F.3d at 936 ("The 'first-to-file' rule is, at least in this Circuit, jurisdictional."). In fact, the D.C. Circuit case cited by Gadbois recognizes that the First Circuit, Fourth Circuit and other courts treat the first-to-file rule as a jurisdictional bar. *U.S. ex rel. Heath v. AT & T, Inc.*, No. 14-7094, 2015 WL 3852180, *5 (D.C. Cir. June 23, 2015) (slip op.). Contrary to what Gadbois and the *Heath* case suggest, the Supreme Court did not decide Carter on "decidedly nonjurisdictional" terms but, to the contrary, made it clear that Carter simply had a "right to refile" his action.[3]

The Court should also not credit Gadbois's second argument that the Supreme Court's 2007 *Rockwell* case somehow requires this Court to grant him leave to return to District Court and file an amended complaint or, in the alternative, simply deem his complaint to have been "effectively supplemented." Motion pp. 7-9 *citing Rockwell Intern. Corp. v. U.S.*, 549 U.S. 457 (2007). This argument is premised on the contention that courts are supposedly obligated to permit plaintiffs to re-plead their complaints to correct defects in jurisdiction. *Id.* The reality is that

this Court has made it clear as recently as 2013 – long after *Rockwell* – that in a False Claims Act case such as this, subject-matter jurisdiction "is determined based on whether it existed *at the time the plaintiff filed the original complaint*." *U.S. ex rel. Estate of Cunningham*, 713 F.3d at 699 (assessing application of False Claims Act's public disclosure bar) (emphasis added).

Indeed, this approach set forth in *Estate of Cunningham* is required by the text of the first-to-file bar, which states that "no person . . . may intervene or *bring* a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5) (emphasis added). Gadbois's lawsuit fails because he *brought* it while the *Denk* and *Beeders* actions were still pending. No amendment can change that essential fact. Now that *Denk* and *Beeders* are no longer pending, *Carter* holds that the first-to-file bar does not stand in the way of Gadbois bringing a *new* action, but *Carter* does not breathe life into Gadbois's stillborn lawsuit below.

CONCLUSION

For the reasons explained above, appellee PharMerica Corporation respectfully requests that this Honorable Court deny appellant Robert Gadbois's July 9, 2015 Motion for Remand.

Respectfully submitted,

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DATED: July 20, 2015

CERTIFICATE OF SERVICE

I certify that on July 20, 2015, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the First Circuit by using the CM/ECF system. All participants registered with CM/ECF will be served by operation of that system and any not listed as registered on the notice of electronic filing will be served this day by first-class mail.

/s/ Robert M. Shaw
Robert M. Shaw

DATED: July 20, 2015

No. 14-2164

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES ex rel. ROBERT GADBOIS;
STATES OF CA, CO, DE, FL, GA, HI, IL, IN,
LA, MA, MI, MN, MT, NV, NH, NM, NC, RI,
TN, TX, VA, WI, ex rel. ROBERT GADBOIS

Plaintiffs-Appellants

STATE OF MARYLAND
ex rel. ROBERT GADBOIS

Plaintiff

v.

PHARMERICA CORPORATION

Defendant-Appellee

CVS/CAREMARK CORPORATION;
WALGREEN COMPANY; MEDCALL, LLC;
RITE AID CORPORATION

Defendants

On Appeal from the United States District
Court For the District of Rhode Island
Civil Action No. 10-471-ML

PETITION FOR PANEL REHEARING OR REHEARING *EN BANC* OF PHARMERICA CORPORATION

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FED. R. APP. P. 35(b) STATEMENT

Defendant-Appellee PharMerica Corporation ("PharMerica") respectfully requests a panel rehearing or a rehearing *en banc* not only because the December 16, 2015 Opinion and Judgment entered by this Court (the "Panel Decision") involves a question of exceptional importance at the heart of the False Claims Act ("FCA"), but also because it conflicts with a decision of the Supreme Court of the United States (the "Supreme Court"), the prior decisions of this Court, and the decisions of every other court – including several circuit courts – to have considered the issue. *See* Fed. R. App. P. 35(b).

The first-to-file bar of the FCA states that "[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." 31 U.S.C. § 3730(b)(5) (emphasis added). The Panel Decision held that this Court need not decide whether the district court below (the "District Court") was correct to dismiss the case on first-to-file grounds. Instead, the Panel Decision ordered a remand because the first-filed action happened to be resolved during the pendency of this appeal, and thus, the first-filed action is no longer pending.

The Panel Decision's analysis did not address the plain text of the first-to-file bar. By its terms, the provision prevents anyone other than the government from "bring[ing]" a claim while a first-filed and related claim is pending. That is precisely what happened

here. Plaintiff-appellee Robert Gadbois ("Gadbois") brought his claim while a related action was pending. The subsequent resolution of that first-filed action *five years later* during this appeal did not cure the threshold jurisdictional infirmity. In holding otherwise, and by remanding for consideration of Gadbois's motion to supplement, the Panel Decision invites a conga line of putative relators to file claims otherwise barred by the first-to-file rule and then simply to stall – all the way through a meritless appeal if necessary – until the first-filed action inevitably is resolved. Whatever efficiency might be gained by allowing Gadbois to move for supplementation, as opposed simply to filing a new complaint, is more than outweighed by the inefficiencies visited on the system by inviting relators to line up and wait for the case in front of them to be dismissed.

The Panel Decision also conflicts with *Kellogg Brown & Root Services v. United States ex rel. Carter,* 575 U.S. ___, 135 S.Ct. 1970 (2015) ("*Carter*"). In *Carter*, the Supreme Court assessed "whether the False Claims Act first-to-file bar *keeps new claims out of court* only while related claims are still alive *or* whether it may bar those claims in perpetuity." *Carter*, 135 S.Ct. at 1973 (emphasis added). Focusing on the word "pending," the Supreme Court concluded that the first to file bar indeed "keeps new claims out of court," but only while the related claims still are pending. *Id.* at 1978. Indeed, the Supreme Court found no fault with the fact that the later-filed action had been dismissed below based on the Fourth Circuit's "time of filing"

jurisdictional analysis, holding only that "dismissal *with prejudice* was not called for." *Id.* (emphasis added).

Moreover, *Carter* teaches that each word in the first-to-file bar must be given meaning. *Id.* at 1979. Courts should no sooner disregard the word "bring" than the word "pending." These two terms operate together in a test that serves to prevent multiple relators from pursuing related cases at the same time. Under the plain text of the first-to-file bar, as well as under the Supreme Court's decision in *Carter*, and under the *qui tam* cases discussed in Sections I and II, *infra*, the dismissal of the first-filed action in this case did not breathe life into Gadbois's stillborn claim. In contrast, the Panel Decision did not identify *any qui tam* case from *any* jurisdiction in support of its ruling to the contrary. The Panel Decision is the sole outlier.

The Panel Decision also conflicts with this Court's prior decisions. While the specific question of how to deal with the dismissal of a first-filed action while a second-filed action is on appeal is a matter of first impression in this circuit, the First Circuit has held on numerous occasions that the first-to-file bar is jurisdictional and that jurisdiction is assessed as of the time that a case is initially filed. *See* Section III, *infra.* There is no dispute that the first-filed action was pending when Gadbois filed his case below, so the subsequent dismissal of the first-filed action during this appeal should not affect the jurisdictional analysis.

For all of the foregoing reasons, as well as for the additional reasons set forth below, PharMerica respectfully requests that the Panel Decision be vacated and the Court conduct a panel rehearing or a rehearing *en banc.*

STATEMENT OF THE CASE

This is an appeal from a *qui tam* action brought under the FCA, 31 U.S.C. §§ 3729-3733. Gadbois alleged that PharMerica overbilled the Medicare Part D and Medicaid programs by seeking payment for prescription drugs dispensed without legally valid prescriptions. JA 11, ¶ 2.[1] He brought his complaint in the United States District Court for the District of Rhode Island on November 19, 2010, more than five years ago. JA 1.

By Memorandum and Order issued October 3, 2014, the District Court dismissed Gadbois's Second Amended Complaint on first-to-file grounds. JA 333-55. In particular, it held that the "essential facts" alleged therein had been alleged in a previously filed complaint styled *United States ex rel. Jennifer Denk v. PharMerica Corp.*, C.A. No. 09-720 (E.D. Wis. July 23, 2009) ("*Denk*").[2] JA 353-55. As a result, the Dis-

[1] Citations to "JA" refer to the Joint Appendix on file in this case.

[2] As explained in detail in PharMerica's Opening Brief at 5-7, the *Denk* case was a consolidation of two separate actions brought by two different relators, each of whom made allegations nearly identical to those made by Gadbois.

trict Court concluded that it lacked subject matter jurisdiction over Gadbois's FCA claims and Gadbois appealed. JA 355, 357-58.

In his March 23, 2015 Opening Brief, Gadbois squarely addressed the implications of the expected *Carter* decision. Gadbois's Opening Br. at 2, 11, 30-31. Armed with the certainty that, as with all cases, the *Denk* case ultimately must be resolved through trial, summary judgment, or settlement, Gadbois specifically prayed that this Court instruct the District Court that its dismissal is "without prejudice to [his] *refiling*" another action in the District Court. *Id.* at 2, 11, 31 (emphasis added). This was *all* the relief that Gadbois sought in his Opening Brief in anticipation of *Carter*, which the Supreme Court decided exactly as he had predicted. *Compare id.* at 30-31 (noting that a decision in *Carter* was expected momentarily and arguing that, if the Supreme Court read the term "pending" literally, this Court "should direct that the district court's dismissal should be without prejudice to refiling"), *with Carter*, 135 S.Ct. at 1979 ("We hold that a *qui tam* suit under the FCA ceases to be 'pending' once it is dismissed. We therefore agree with the Fourth Circuit that the dismissal with prejudice of respondent's one live claim was error.").

Despite having taken a firm position with respect to the impact that *Carter* should have on his case, Gadbois adopted a contrary position after both parties filed their opening briefs. On July 9, 2015, Gadbois filed a Motion for Remand (the "Motion for Remand") in which he argued for the first time that

he "may now proceed with his case" in District Court. Motion for Remand at 5. His theory, which Gadbois repeated in his July 10, 2015 Reply Brief (the "Reply Brief") was that supplementing his Second Amended Complaint to plead the dismissal of the *Denk* case somehow could cure the jurisdictional defect that rendered his initial complaint a nullity.

Instead of asking for dismissal without prejudice, as he had done in his Opening Brief, Gadbois now asked the Court either (1) to determine that the first-to-file bar is not jurisdictional; or (2) to remand with instructions to allow him to file a supplemental complaint under Fed. R. Civ. P. 15(d) so that he could plead the settlement and dismissal of *Denk*.. *Id.* at 5-6.

The Panel Decision improperly considered Gadbois's supplementation argument and ultimately granted the requested relief despite the fact that Gadbois made this argument for the first time in his procedurally improper Motion for Remand and in his Reply Brief and despite the fact that this argument contradicted the position that Gadbois took in his Opening Brief. Panel Decision at 15-16. In reaching this conclusion, the Panel Decision focuses on the flexibility to cure certain jurisdictional defects that some courts *outside* the First Circuit have found in the supplementation provision of Fed. R. Rule 15(d). *Id.* at 9. Notably, none of these cases involve the FCA, much less the first to file bar.

Though the Panel Decision improperly reaches the supplementation issue, it does not address the only question properly before the Court. That is, was the District Court without jurisdiction to hear Gadbois's action when he brought it. Further, in giving short shrift to PharMerica's arguments, the Panel Decision does not address the meaning of the word "bring" as used in the first-to-file bar.[3]

The Panel Decision also fails to address the fact that, in *Carter*, when faced with facts identical to those presented in this case (the first-filed complaints were dismissed while the dismissal of Carter's later-filed complaint was on appeal), the Supreme Court affirmed the Fourth Circuit's holding that Carter's complaint must be dismissed without prejudice. In so doing, the Supreme Court reaffirmed widely acknowledged precedent from this and other Circuits that the first to file bar is jurisdictional and that courts must assess their jurisdiction at the time the second relator files his or her complaint. Finally, the Panel Decision does not address the enormous, but perhaps unintentional, consequences of its ruling.

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[3] The Panel Decision notes that "PharMerica suggests that the fact that the relator's claim was barred when brought prevents him from using Rule 15(d) to cure the jurisdictional defect. This suggestion is bolstered, PharMerica says, by the FCA itself, which provides that no one can 'bring' an action based on the same facts as those undergirding a pending action. After careful consideration, we find PharMerica's position untenable." Panel Decision at 7-8. The Panel Decision does not otherwise address the import of "bring" in the text of the first-to-file bar.

ARGUMENT

Pursuant to Fed. R. App. P. 35 and 40, PharMerica respectfully requests that this Court grant panel rehearing or rehearing *en banc* on the grounds that: (1) by its plain terms, the first-to-file bar does not allow a relator to "bring" a *qui tam* action when a related and first-filed action is pending, which is precisely what Gadbois did when he filed his complaint below; (2) the Supreme Court's decision in *Carter* requires that Gadbois's case be dismissed without prejudice, not remanded with instructions to consider a motion for leave to supplement the complaint; (3) this Court has long and repeatedly held that the first-to-file bar is jurisdictional and that district courts should assess their jurisdiction as of the date that complaints are initially filed; (4) Gadbois waived any right to remand when he specifically requested a dismissal without prejudice in his Opening Brief in light of the announced resolution of the first-filed *Denk* action; and (5) the Panel Decision would effectively neuter the first-to-file bar.

I. THE PLAIN TEXT OF FIRST-TO-FILE BAR REQUIRES DISMISSAL WITHOUT PREJUDICE.

The first-to-file bar states simply that "[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." 31 U.S.C. § 3730(b)(5) (emphasis added). In the legal context, the term "bring," as in to "bring an action," means to "institute legal

proceedings." Black's Law Dictionary (10th ed. 2014). Thus, the first-to-file bar, on its face, is designed to prevent the *filing* of a *qui tam* action when a prior related action is pending. For this reason, as the Fourth Circuit held and the Supreme Court affirmed in *Carter*, "[f]ollowing the plain language of the first-to-file bar . . . [courts] look at the facts as they existed *when the claim was brought* to determine whether an action is barred." *U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 183 (4th Cir. 2013), *aff'd relevant part by Carter*, 135 S. Ct. 1970. Likewise, the Tenth Circuit held that "we judge whether § 3730(b)(5) bar[s] [a] . . . *qui tam* action by looking at the facts as they existed *at the time that action was brought*." *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) (emphasis added). The Seventh Circuit reached the same result, observing of § 3730(b)(5) that "[s]tatutes of this form are understood to forbid the commencement of a suit; an action (or a given claim within a larger action) *brought* while the condition precedent is unsatisfied must me dismissed rather than left on ice." *U.S. ex rel. Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361, 362 (7th Cir. 2010) (emphasis added).

The Panel Decision does not address these circuit court *qui tam* authorities. In fact, the Panel Decision does not cite *any qui tam* case from *any* jurisdiction in support of its central ruling that Fed. R. Civ. P. 15(d) permits Gadbois to continue with this action even though he filed it when a previous, related case was pending. *See* Panel Decision at 8-10. The cases to

which the Panel Decision analogizes all are distinguishable because none of the jurisdictional provisions they analyze specifically include a temporal requirement like that in the FCA's first-to-file bar.

For example, the Panel Decision correctly cites the Fourth Circuit decision in *Franks v. Ross*, 313 F.3d 184, 198 (4th Cir. 2002) for the proposition that, under the law of a few circuits, Rule 15(d) can be used to correct a defect in subject-matter jurisdiction under certain circumstances. That case addresses the *Ex parte Young* doctrine, which authorizes federal suits against state officers for prospective equitable relief only while there are ongoing violations of federal law. The plaintiffs in that case needed to supplement their complaint in order to allege such an ongoing violation. *Id.* at 197-98.

Unlike the instant action, *Franks* does not involve a jurisdictional statute that specifically looks to the time when the action is brought. Lest there could be any doubt in the matter, the Fourth Circuit's *Franks* decision pre-dates its decision in *Carter*. As explained above, in *Carter*, the Fourth Circuit made it clear – under facts identical to those in this case – that the court must assess its jurisdiction under the first-to-file bar as of the time the relator filed his or her initial complaint and that the subsequent dismissal of the first-filed action does not change the analysis. The reason for this is because the plain language of the FCA requires it. The statute mandates that "no person . . . may intervene or ***bring*** a related action based on the facts underlying the pending action." 31

U.S.C. § 3730(b)(5). Thus, the dismissal of *Denk* does not cure the original lack of subject matter jurisdiction and Gadbois's complaint should be dismissed without prejudice.

II. AS TWO COURTS HAVE ALREADY HELD, THE SUPREME COURT'S DECISION IN *CARTER* REQUIRES DISMISSAL WITHOUT PREJUDICE.

The Panel Decision not only conflicts with the Supreme Court's decision in *Carter* but also with the only two cases to have considered *Carter's* application to the issue presented here. In *Carter*, the Supreme Court assessed the question of "whether the False Claims Act first-to-file bar *keeps new claims out of court* only while related claims are still alive *or* whether it may bar those claims in perpetuity." *Carter*, 135 S.Ct. at 1973 (emphasis added). The Supreme Court held that only a "pending" claim operates as a jurisdictional bar. *Id.* at 1978-79. Having reached this conclusion, and despite the dismissal of the first-filed action, the Supreme Court did not proceed to remand the case with instructions to permit the relator to bring a motion to supplement, as the Panel Decision did here. *Id.* Instead, the Supreme Court *affirmed* the Fourth Circuit's dismissal of the case without prejudice. *Id.* at 1979 ("We therefore agree with the Fourth Circuit that the dismissal with prejudice of respondent's one live claim was error.").

Indeed, on remand to the Eastern District of Virginia, the relator in Carter made a motion to supplement. *See U.S. ex rel. Carter v. Halliburton Co.*, Mem.

Op. [Dkt. No. 124], No. 11-cv-00602 (E.D. Va. Nov. 12, 2015), attached as *Exhibit A*. The Eastern District of Virginia denied the motion for leave to supplement and dismissed the action without prejudice, relying on the plain language of the first-to-file bar, the Supreme Court's decision in *Carter*, and numerous pre-existing authorities requiring that the first-to-file analysis be conducted as of the time the complaint was initially brought. *Id.* at 10-17. The same result should obtain here because the procedural posture of this case and of *Carter* were identical: the first-filed action had been dismissed while the appeal was pending.

Similarly, on remand from the Supreme Court to render proceedings consistent with *Carter*, the United States District Court for the District of Columbia considered the effect of *Carter* and concluded that "[a]lthough several aspects of the first-to-file bar have recently been clarified by the Supreme Court and our Court of Appeals, its essence remains well-defined: Plaintiffs, other than the Government, may not file FCA actions while a related action is pending." *U.S. ex rel Shea v. Cellco P'Ship*, Mem. Op. [Dkt. No. 87] at 25-26, No. 09-1050 (D.D.C. Oct 6, 2015), attached as *Exhibit B*. Keeping the temporal focus squarely on the date that the action was initially brought, the *Shea* court dismissed the relator's action without prejudice, even though the first-filed action had been dismissed. *Id.* at 25-29, 33. The *Shea* court stated squarely:

> The question before the Court is this: Although no related action is currently pending, must the Court nonetheless dismiss Plaintiff's action because a related action was pending when he filed his initial 2009 Complaint? The Court concludes that the answer is yes.

Id. at 25.

This Court should follow the Supreme Court's Decision in *Carter* and the two district court cases that have already applied *Carter* to the situation presented here.[4] Indeed, with the sole exception of the Panel Decision, *no court* has ever permitted a relator to proceed with *a qui tam* case otherwise barred by the first-to-file rule because the first-filed action was resolved during the course of the case.

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[4] There are also several, *pre-Carter* district court cases holding that, even if a first-file related action is no longer pending, a second-filed action must be dismissed if the first "*was pending* at the time that the [second-filer] filed her claims." *U.S. ex. rel Lujan v. Hughes Aircraft Co.*, No. CIV-92-1282 SVW, 2000 WL 33775399, at *3 (C.D. Cal. Jan. 20, 2000) *aff'd*, 243 F.3d 1181 (9th Cir. 2001); *see also U.S. ex. rel Harris v. Dialysis Corp. of Am.*, No. JKB-09-2457, 2013 WL 5505400, at *5 n.8 (D. Md. Oct. 1, 2013) ("The first-to-file bar does not stop a relator from filing a related case once the first case is no longer pending. Because the [related] case was dismissed on May 30, 2013, Relators conceivably could *refile* their [ ] claim.").

III. THIS COURT'S CASES REQUIRE A DISMISSAL WITHOUT PREJUDICE.

This Court has long and repeatedly held that the first-to-file bar is jurisdictional. *See, e.g.*, *U.S. ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp.*, 772 F.3d 932, 936 (1st Cir. 2014) ("The 'first-to-file' rule is, at least in this Circuit, jurisdictional."). Further, this Court has held that "a court must determine whether it has subject matter jurisdiction over an action based on the original complaint filed" and must look to "the time [the relator] filed the original complaint." *U.S. ex rel. Estate of Cunningham v. Millennium Labs. of Cal., Inc.*, 713 F.3d 662, 670 (1st Cir. 2013); *see also Sallen v Corinthians Licenciamentos LTDA*, 273 F.3d 14, 23 (1st Cir. 2001) (In a federal question case, "[j]urisdiction depends upon the facts as they existed when the complaint was brought."). The Panel Decision acknowledges that it is in conflict with such First Circuit authorities in a footnote. Panel Decision at 10 n.1. Respectfully, however, the Panel Decision is incorrect to state that these "references [to the time-of-filing rule in federal question cases] have invariably been in dictum" *Id.* In *Cunningham*, for example, the time-of-filing rule determined which complaint – the relator's original or amended complaint – controlled. The First Circuit's ruling that the original complaint controlled was the very foundation of its partial reversal. *Id* at 670 (holding that the "district court erred in the first instance when it did not consider all FCA counts of the original complaint").

IV. GADBOIS REQUESTED A DISMISSAL WITHOUT PREJUDICE IN HIS OPENING BRIEF, WAIVING ANY POSSIBLE RIGHT TO REMAND.

Gadbois did not request a remand with leave to file a motion to supplement in his Opening Brief. To the contrary, he specifically requested that – given the announced resolution of *Denk* and the anticipated outcome of *Carter* – his case should be dismissed without prejudice if this Court otherwise affirmed the District Court. It is well established that new arguments made for the first time in a reply brief are waived. *See, e.g.*, *Sparkle Hill, Inc. v. Interstate Mat Corp.*, 788 F.3d 25, 29 (1st Cir. 2015) ("Our precedent is clear: we do not consider arguments for reversing a decision of a district court when the argument is not raised in a party's opening brief."). Despite knowing that the *Denk* case had been resolved, Gadbois did not seek a reversal of the District Court in his Opening Brief on that grounds, and he therefore waived his right to a reversal on that basis.

V. THE PANEL DECISION MAKES BAD POLICY REGARDING AN IMPORTANT ISSUE BY NEUTERING THE FIRST-TO-FILE BAR.

This is the first case in this circuit to address the question of how to deal with the dismissal of a first-filed action while a second-filed action is in process. Respectfully, the Panel Decision would open the door to countless relators who will file opportunistic suits in the hopes that, through delay and groundless appeals, their suit might outlast the first-filed action.

The Panel Decision would also create a powerful incentive for defendants to refuse to settle claims, since the settlement of one action will breathe life into otherwise stillborn related actions. If the first-to-file bar means anything, it means that only one relator can bring the same or a related claim at the same time. To hold otherwise is to neuter the rule. *See United States ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 263-64 (E.D. La. 2011) (discussing policy justifications for applying jurisdictional bar at time the action is brought).

CONCLUSION

For all of the reasons set forth above, PharMerica Corporation respectfully requests that this Honorable Court vacate its December 16, 2015 Judgment and conduct a panel rehearing or rehearing *en banc*.

DATED:
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 30, 2015, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the First Circuit by using the CM/ECF system. All participants registered with CM/ECF will be served by operation of that system and any participants not listed as registered on the notice of electronic filing will be served this day by first-class mail.

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