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

UNITED STATES OF AMERICA and the STATES OF ILLINOIS, MINNESOTA, and WISCONSIN *ex rel.* JEFFERY S. KOTWICA,	)	
Plaintiffs,	)	Case No. 15-cv-5168
v.	)	Hon. Rebecca R. Pallmeyer
ROUNDY'S SUPERMARKETS, INC., a Wisconsin Corporation,	)	
Defendant.	)	

PLAINTIFF-RELATOR'S RESPONSE IN
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Plaintiff-Relator Jeffery S. Kotwica ("Relator") hereby responds to the Motion To Dismiss (the "Motion") filed by Defendant Roundy's Supermarkets, Inc. ("Defendant").

INTRODUCTION

Defendant submitted false claims to federal and state government healthcare programs ("GHPs") that were tainted by Defendant's violation of the Federal Anti-Kickback Statute ("Anti-Kickback Statute") and other state statutes prohibiting kickbacks. Defendant violated the Anti-Kickback statute by providing coupons and gift cards to GHP beneficiaries to induce them into patronizing Defendant's pharmacies, which led to Defendant receiving increased reimbursements from GHPs. Defendant also violated Wisconsin regulations prohibiting reimbursement for certain "diagnosis-restricted" drugs if the prescribing physician does not specify the proper diagnosis.

After the Relator, a pharmacist employed by Defendant, found out about Defendant's illegal activities and discussed it with his fellow pharmacy staff, Defendant retaliated against Relator to the point where Relator was forced to resign. Thereafter, Relator brought this False Claims Act Complaint (the "Complaint") against Defendant to recover the money that Defendant illegally claimed from the United States, Illinois, Minnesota and Wisconsin governments.

Defendant has moved to dismiss the Complaint, throwing a veritable "kitchen sink" of arguments into its Motion. All of Defendant's arguments fail. ***First***, Defendant says that its gift card programs were not illegal because they fit within the "nominal value" and "retailer rewards" exceptions to Anti-Kickback Statute violations. However, Defendant's gift card programs: (a) almost certainly exceed the $50-per-year upper limit of the "nominal value" exception; and (b) are not protected by the "retailer reward" exception because they are tied to items and services

that are reimbursable by GHPs and are meant to induce customers to transfer their prescriptions from other pharmacies.

Second, Defendant disregards numerous allegations in the Complaint and argues that Relator does not show that Defendant acted with the requisite *scienter* for False Claims Act liability. But the allegations that Defendant ignores describe how Defendant had actual knowledge that its gift card programs were illegal. ***Third***, Defendant argues that the Complaint does not contain a false or fraudulent claim or statement. The Complaint explains, however, that Defendant certified that it complied with the Anti-Kickback Statute and other state and federal laws, and that certification was rendered false by Defendant's noncompliance.

Fourth, Defendant contends that its violations of the Anti-Kickback Statute were not "material" to the government's decision to pay Defendant reimbursements. In reality, Defendant's compliance with the Anti-Kickback Statute was a *precondition of payment* by GHPs, and Defendant *actually knew* that such compliance was a material term of payment by the GHPs. ***Fifth***, Defendant argues that Relator's Complaint does not satisfy the pleading standards of Federal Rule of Civil Procedure 9(b). But Relator identifies the times, places, and individuals from which he learned of Defendant's fraud, which satisfies Rule 9(b)'s particularity standard.

Sixth, Defendant attempts to invoke the public disclosure bar, which it urges applies to Relator's claims here. But the public disclosure bar does not apply because the "essential element" of Defendant's fraud—that it knew its programs were illegal, but failed to stop them or conform them to the law—arose from Relator's *internal discussions* with fellow pharmacy staff that were ***not*** publicly disseminated.

Seventh, Defendant raises the statutes of limitations governing claims under the federal and state False Claims Acts. The statutes of limitations are affirmative defenses that do not

provide a proper basis for dismissal here. ***Eighth***, Defendant asserts that Relator has failed to set forth the elements of his retaliation claim. To the contrary, the Complaint demonstrates that Relator's internal discussions about the illegality of Defendant's conduct are protected activity, and form a proper basis for Relator's retaliation claim under the False Claims Act.

In sum, Relator has adequately set forth all of his claims in his Complaint. Defendant's Motion should be denied in its entirety.

ARGUMENT

I. Defendant's Rewards Programs Are Illegal.

Defendant contends that its reward program did not violate the law because the gift card rewards supposedly do not exceed nominal value and fit within the retailer rewards exception of the anti-kickback statute. (Def. Br. 6.) However, Relator's Complaint makes clear that the gift card rewards *exceeded* nominal value. Furthermore, the gift card rewards do not fit within the retailer rewards exception because: (a) they are tied to items and services that are reimbursable by GHPs; and (b) they were implemented to induce customers to transfer their prescriptions to Defendant's pharmacies.

A. Defendant's Gift Cards Exceed Nominal Value.

Gift card rewards are of "nominal value" when they do not exceed $10 per item or $50 annually. 65 Fed. Reg. 24400, 24411 (Apr. 26, 2000). Defendant makes an improper factual assertion that its gift card programs do not exceed these values. (Def. Br. 6.) Defendant's argument fails on its own terms as to its Gift Card Program, which awarded gift cards worth ***$25***. (Compl. ¶¶29-32, 34.) And the use of $25 gift cards will easily exceed $50 annually when one needs to use the $25 gift card *only two times* in one year to meet the upper limit of the "nominal value" standard.

The Script Saver Program also exceeds "nominal value," as the $10 card need be used only five times to meet the ceiling of the "nominal value" standard. Furthermore, Relator sets forth in his Complaint how Defendant's customers often (*i.e.*, repeatedly) purchased prescriptions funded by GHPs in exchange for coupons. (Compl. ¶27.)

Defendant's reliance on *U.S. ex rel. Grenadyor v. Ukrainian Vill. Pharm., Inc.* (Def. Br. 6) is misplaced because the relator in that case did not identify any customer that received more than $50 worth of gifts from the defendant. 772 F.3d 1102, 1107 (7th Cir. 2014). Here, by contrast, Relator describes how he learned from a pharmacy technician that a *particular customer* often purchased prescriptions funded by GHPs in exchange for coupons—which almost certainly exceeded "nominal value." (Compl. ¶27.)[1]

Defendant's contention that its gift card programs did not exceed "nominal value" is a merits issue that requires evidence. Accordingly, it cannot lead to dismissal where Relator's Complaint plausibly establishes that the gift card programs *did* exceed "nominal value." Dismissal is not warranted.

B. Defendant's Gift Card Programs Are Not "Retailer Rewards."

Defendant argues that its gift card programs fit within the "retailer rewards" exception of the anti-kickback statute. (Def. Br. 6-7.) The retailer reward exception applies only when: "(i) the items or services consists of coupons, rebates, or other rewards from a retailer; (ii) the items or services are offered or transferred on equal terms available to the general public, regardless of health insurance status; and (iii) the offer or transfer of the items or services ***is not tied to the***

[1] Defendant's citation to *Osheroff v. Humana, Inc.* (Def. Br. 6) for the proposition that its gift cards program did not exceed nominal value is strange, given that *Osheroff* merely referenced nominal value in its analysis of the public disclosure bar and did not make any further determination regarding the concept. 776 F.3d 805, 815 (11th Cir. 2015). Consequently, it does not apply here.

provision of other items or services reimbursed in whole or in part" by GHPs. 42 U.S.C. § 1320a-7a(i)(6)(G) (emphasis added). Defendant's programs run afoul of element (iii) of the retailer rewards exception because GHP beneficiaries received coupons in exchange for purchasing GHP-funded medications. (Compl. ¶¶24-25, 29.) Accordingly, Defendant's offer and transfer of items and services is tied to items and services reimbursed by GHPs and, thus, illegal. 42 U.S.C. § 1320a-7a(i)(6)(G).

Defendant cites advisory opinions issued by the Department of Health and Human Services' Office of the Inspector General ("HHS OIG"). (Def. Br. 7) Defendant cannot rely on those opinions because they are expressly "limited in scope to the specific arrangement described in [the] letter[s] and ha[ve] no applicability to other arrangements, even those which appear similar in nature or scope." HHS OIG Advisory Op. 12-14 at 7; HHS OIG Advisory Op. 12-05 at 7. Moreover, the advisory opinions specifically state that "No opinion is expressed herein regarding the liability of any party under the False Claims Act[.]" *Id.*

Defendant cites a *proposed* rule issued *in 2014* for the proposition that if a coupon can be redeemed on anything purchased in the store, including for federally reimbursable items, the coupon meets the terms of the retailer rewards exception. (Def. Br. 7 (citing 79 Fed. Reg. 59717, 59727 (Oct. 3, 2014)).) The rule became final in December 2016, but does not take effect until *January 6, 2017*. 81 Fed. Reg. 88368, 88398-401 (Dec. 7, 2016). Because the rule does not apply retroactively, Defendant cannot rely on it to evade liability for its illegal conduct prior to the rule's issuance. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is

not favored in the law"); *Schaefer v. Walker Bros. Enterprises, Inc.*, 829 F.3d 551, 558 (7th Cir. 2016) ("regulatory changes are not retroactive").[2]

Even if the rule applied retroactively (it does not), the rule expressly places Defendant's conduct outside of the retailer rewards exception. The final rule states that "coupons to transfer prescriptions would not be protected under this exception" because such coupons "fail[ ] to meet the criteria that prohibits tying the remuneration to purchasing a reimbursable item or service." 81 Fed. Reg. at 88401. Here, Defendant issued coupons *to induce customers to transfer their prescriptions* to Defendant's stores. (Compl. ¶26.) Therefore, Defendant's coupons do not fit within the retailer rewards exception of the Anti-Kickback statute. Defendant's Motion should be denied.

C. Defendant's Gift Cards Are Cash Equivalents.

Defendant asserts, without explanation, that its gift cards are not "cash equivalents." (Def. Br. 7.) All that Defendant offers in support of this assertion is a citation to an HHS OIG advisory opinion that found that a gift card that was not redeemable for a health care provider's items or services was not "cash equivalent." HHS OIG Advisory Op. 08-07 at 4. Here, the coupons are redeemable for Defendant's items and services, so its gift cards are cash equivalents. (Compl. ¶¶24, 29, 34.)

[2] The rule does not apply retroactively because: (a) the rule contains no language making the rule retroactive; and (b) the rule is a substantive change in the law. *Bowen*, 488 U.S. at 208 ("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result"); *Middleton v. City of Chi.*, 578 F.3d 655, 662-63 (7th Cir. 2009) (where legislation alters existing law, rather than merely clarifying it, there is no retroactive effect). Indeed, even if the government attempted to apply the rule retroactively, it is doubtful it would succeed. *Bowen*, 488 U.S. at 209 (expressing doubt that the Medicare Act allows for retroactive rulemaking where "The structure and language of the statute require the conclusion that the retroactivity provision applies only to case-by-case adjudication, ***not to rulemaking***") (emphasis added).

D. Defendant Knew That Its Gift Cards Violated The Law.

Next, Defendant contends that it did not have the requisite *scienter* for False Claims Act liability because it did not act "knowingly and willfully." (Def. Br. 7-8.) Defendant's argument fails because it simply ignores allegations in Relator's Complaint that clearly establish Defendant knew its conduct was illegal. In particular, Relator describes how Defendant's corporate executives discussed excluding Medicare and Medicaid recipients from the Script Saver Program "***because they believed that reimbursing such individuals was illegal***." (Compl. ¶28 (emphasis added).) But despite this knowledge, Defendant failed to implement policies necessary to exclude GHP beneficiaries from receiving its gift cards. (*Id.* at ¶¶27-28.) Hence, Defendant acted knowingly because it was aware of the illegality of its gift card programs, but did nothing to prevent the illegal issuance of coupons to GHP beneficiaries. (*Id.*)

Defendant makes a similar argument that Relator does not demonstrate that Defendant's conduct was fraudulent. (Def. Br. 8-9.) Defendant points to Relator's "assertions of failures in compliance systems," which Defendant believes is merely negligence. (Def. Br. 8-9.) Again, Defendant simply ignores Relator's description of how Defendant: (i) ***knew that its gift card programs were illegal***; and (ii) ***purposefully*** did not implement policies and procedures that would have conformed the gift card programs to the law. (Compl. ¶¶25, 27-29, 33.) These allegations establishing Defendant's actual knowledge set this case apart from the cases cited by Defendant, wherein the relators did not include allegations demonstrating the defendant's actual knowledge of submitting false claims. (Def. Br. 9.) Accordingly, Relator's Complaint clearly shows that Defendant acted with actual knowledge that it was submitting false claims, thereby establishing the requisite *scienter* for False Claims Act liability.

II. Defendant Is Liable Under The False Claims Act Because It Certified Compliance With The Anti-Kickback Statute.

Defendant argues that Relator does not set forth a false claim, record or statement. (Def. Br. 9-11.) In truth, Relator describes how provider agreements, enrollment applications, pharmacy manuals, and claim forms require Defendant to *expressly* certify that it complied with the Anti-Kickback Statute and other laws governing health care services. (Compl. ¶21.)[3] This is enough to state a claim that Defendant violated the False Claim Act by expressly certifying that it was complying with the Anti-Kickback Statute when, in fact, Defendant was violating it. *U.S. ex rel. Cieszyski v. LifeWatch Servs., Inc.*, Case No. 13 CV 4052, 2015 WL 6153937, at *8 (N.D. Ill. Oct. 19, 2015) (denying dismissal and holding that a promise "to abide by all Medicare and Medicaid laws and regulations [ ] is specific enough to support an express false certification theory of liability"); *Mason v. Medline Indus., Inc.*, 731 F. Supp. 2d 730, 739 (N.D. Ill. 2010) (denying dismissal where the relator alleged "that government payment to healthcare providers is conditioned upon the express certifications in the cost reports, and that federal law prohibits the government from paying claims tainted by unlawful remuneration").

Defendant also argues that Relator fails to set forth an "implied certification" theory. (Def. Br. 10.) The Supreme Court recently endorsed the "implied certification" theory of False Claims Act liability:

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[3] In its brief, Defendant states that Relator alleged "on understanding and belief" that Defendant certified compliance with federal laws. (Def. Br. 10.) Relator's "understanding and belief" qualification is directed only to the allegation that the documents containing these certifications are in the custody and control of defendant. (Compl. ¶21.) Relator's allegation that Defendant certified it complied with federal law is ***not*** merely on "understanding and belief." (*Id.*) And even if Relator had made his allegations under "understanding and belief," such "information and belief" allegations are sufficient where the facts constituting the fraud are not accessible to the relator, and the relator provides the grounds for his suspicions—as occurred here. *U.S. v. Bd. of Educ. of City of Chi.*, 12 C 0622, 2015 WL 1911102, at *13 (N.D. Ill. Apr. 27, 2015).

> when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement . . . the defendant has made a misrepresentation that renders the claim 'false or fraudulent' under [the False Claims Act].

Univ. Health Servs., Inc. v. U.S., 136 S. Ct. 1989, 1995 (2016). Defendant's argument that the "implied certification" theory does not apply is based on Defendant's earlier argument that Relator did not allege that Defendant engaged in knowing or fraudulent conduct. (Def. Br. 10.) Hence, Defendant's "implied certification" argument fails for the same reason that its prior argument fails—namely, because Relator has established that Defendant acted knowingly and fraudulently. *See* Section I.D *supra*.

Defendant cannot rely on *Grenadyor* to save its argument. (Def. Br. 10.) In *Grenadyor*, the Seventh Circuit affirmed dismissal of a False Claims Act complaint because the relator in that case failed to satisfy the pleading standards of Fed. R. Civ. P. 9(b) (which Relator satisfies here, as explained *infra*). 772 F.3d at 1106-07. The Seventh Circuit did ***not*** base its decision on the relator's implied certification theory, so *Grenadyor* is irrelevant to Defendant's certification arguments. *See id.* Further, Defendant's citation to *Main v. Oakland City Univ.* (Def. Br. 10) is counterproductive, given that in *Main*, the Seventh Circuit *reversed dismissal* because the defendant falsely certified statutory and regulatory compliance when it knew it was violating the prohibition against paying contingent fees to student recruiters. 426 F.3d 914, 916-17 (7th Cir. 2005). Defendant's authority does not help it here, and its argument should be rejected.

III. Defendant's Violations Of The Anti-Kickback Statute Are Material.

Defendant claims that its violations of the Anti-Kickback Statute are not "material" because Relator has not stated that GHPs would not reimburse Defendant if the GHPs knew of Defendant's conduct. (Def. Br. 11-12.) To the contrary, Relator describes how GHPs mandate an

express certification of compliance with the Anti-Kickback Statute (among other federal laws) ***as a precondition to payment***. (Compl. ¶21.) Unfulfillment of a precondition to payment—including violation of the Anti-Kickback Statute—is material. *Mason*, 731 F. Supp. 2d at 739 (denying dismissal and finding materiality where relator alleged that "the cost report certifications are a required condition of government payment under federal healthcare programs"); *U.S. ex rel. Bidani v. Lewis*, 264 F. Supp. 2d 612, 616 (N.D. Ill. 2003) (holding that "the alleged [Anti-Kickback Statute] violation is material to the government's treatment of defendants' reimbursement claims"); *accord U.S. v. Rogan*, 459 F. Supp. 2d 692, 717 (N.D. Ill. 2006) ("Falsely certifying compliance with the Anti-Kickback Statute . . . in a Medicare cost report is actionable under the [False Claims Act]"), *aff'd* 517 F.3d 449 (7th Cir. 2008).

Defendant relies on the Supreme Court's opinion in *Univ. Health Servs.* to argue that its violation of the Anti-Kickback Statute is not material. (Def. Br. 11.) That case actually supports Relator here, as the Supreme Court held that the materiality inquiry turns on "whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." 136 S. Ct. at 1996. In his Complaint, Relator sets forth *Defendant's own statement* describing how Defendant knew that "[f]ailure to adhere" to Medicare and Medicaid regulations "could result in the imposition of civil, administrative and criminal penalties[,]" including "significant fines or monetary penalties for ***anti-kickback law violations***[.]" (Compl. ¶22 (emphasis added).) Defendant knew that its violations of the Anti-Kickback statute were material to GHPs' decisions to reimburse Defendant. Accordingly, Defendant's Motion should be denied.[4]

[4] Defendant proposes that its false claims are within "tolerable error rates," which Defendant appears to believe is an error rate between three and five percent. (*See* Def. Br. 11-12, n.5.) There is nothing in the Anti-Kickback Statute to suggest (and Defendant does not argue)

IV. Relator's Complaint Describes Defendant's Fraud With Particularity.

Once again, Defendant simply ignores allegations in Relator's Complaint when it argues that Relator does not plead his claims with particularity under Fed. R. Civ. P. 9(b). (Def. Br. 12-13.) Defendant's assertion that Relator does not allege a "specific, individualized transaction" contravenes Relator's description of witnessing a GHP beneficiary redeem pharmacy coupons for gift cards under the Script Saver Program at a pharmacy in Oak Creek, Wisconsin in March 2014. (Compl. ¶27.) Relator also identifies an instance at an Arlington Heights pharmacy in 2010 when Relator learned that GHP beneficiaries received Defendant's gift cards. (Compl. ¶30.) In addition, Relator describes how he has direct personal knowledge of Defendant's use of a "cheat sheet" of acceptable diagnostic codes for diagnosis-restricted drugs at the pharmacy located at 2355 North 35th Street in Milwaukee, Wisconsin. (Compl. ¶45.) Accordingly, Relator satisfies Rule 9(b)'s pleading requirements.

Even if Relator had not identified the foregoing specific instances of Defendant's fraud, Relator satisfies Rule 9(b) because he explains the general outline of Defendant's fraud scheme such that it sufficiently notifies Defendant of its role in the fraud. *U.S. v. Bd. of Educ. of City of Chi.*, No. 12 C 0622, 2015 WL 1911102, at *5 (N.D. Ill. Apr. 27, 2015) ("A plaintiff who provides a general outline of the fraud scheme sufficient to reasonably notify the defendants of their purported role in the fraud satisfies Rule 9(b)") (quotation omitted). Moreover, the details of the fraud that Defendant highlights are within Defendant's exclusive knowledge and control, which lowers Relator's burden of satisfying Rule 9(b). *Id.* ("When details of the fraud itself are within the defendant's exclusive knowledge, specificity requirements are less stringent")

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that the Anti-Kickback Statute demands anything less than *total* compliance. And even if the Anti-Kickback Statute did contemplate some sort of "tolerable error rate," that is a factual issue that needs to be developed in discovery.

(quotation omitted). Indeed, the Seventh Circuit recently cautioned courts and litigants against "tak[ing] an overly rigid view of the formulation" of Rule 9(b). *U.S. ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 776 (7th Cir. 2016).

Defendant's contention that Relator needs to identify a specific false claim for payment of specific false statements made in order to obtain payment is inaccurate. (Def. Br. 12.) The Seventh Circuit has held that "Our case law establishes that a plaintiff does not need to present, or even include allegations about, a specific document or bill that the defendants submitted to the Government." *Presser*, 836 F.3d at 777. In addition, Defendant argues that Relator must identify a specific individual who received a violative coupon, relying on *Grenadyor*, *Carmel v. CVS Caremark Corp.*, and *Stop Ill. Health Care Fraud, LLC v. Sayeed*. (Def. Br. 12-13.) Contrary to Defendant's suggestion (and the relators in *Grenadyor*, *Carmel*, and *Stop Ill. Health Care Fraud*), Relator ***does*** identify a specific individual—the individual referenced by technician Tyshieka Jones at the Oak Creek, Wisconsin pharmacy in March 2014. (Compl. ¶27.) Relator has satisfied Rule 9(b), and Defendant's arguments to the contrary should be rejected.

V. The Essential Elements Of Defendant's Fraud Are Not Publicly Disclosed.

Defendant avers that Relator's claims are barred by the False Claims Act's public disclosure bar. (Def. Br. 13.) Contrary to Defendant's position, the essential elements of Defendant's fraud were ***not*** publicly disclosed because they are based on private, *internal* conversations Relator had with Defendant's pharmacy staff.

Defendant appears to believe that the "essential elements" if its fraud are: (a) its offer of a reward; and (b) not having a disclaimer that the offer was unavailable to GHP beneficiaries. (Def. Br. 14.) However, the essential element of Defendant's fraud is Defendant's *fraudulent failure to implement policies and procedures* to exclude GHP beneficiaries from the gift card

programs because Defendant ***knew that not excluding GHP beneficiaries was illegal***. Defendant does not, and cannot, argue that this essential element has been publicly disclosed because it is entirely absent from the public domain.

Defendant's reliance on *Carmel v. CVS Caremark Corp.*, Case Nos. 13 C 5930, 13 C 7683, 2015 WL 3962532 (N.D. Ill. June 26, 2015), is unavailing. (Def. Br. 13-14.) In *Carmel*, the relator's allegations were grounded *solely* "in facts sourced from a brochure, two flyers, and a sales receipt" that were widely disseminated. 2015 WL 3962532, at *3, 5. Here, the basis for Relator's claims arose from Relator's *internal conversations* with Defendant's pharmacy staff. (Compl. ¶¶27, 28, 30, 47.) These internal conversations evidencing the essential elements of Defendant's fraud were the result of Relator's independent investigation and analysis, and were not publicly available. Therefore, the public disclosure bar does not apply to Relator's claims. *U.S. ex rel. Heath v. Wisconsin Bell, Inc.*, 760 F.3d 688, 691 (7th Cir. 2014) (reversing district court's application of the public disclosure bar where the relator's "allegations, though they may rely in part on [publicly disclosed information], required independent investigation and analysis to reveal any fraudulent behavior"); *U.S. ex rel. Kennedy v. Aventis Pharm., Inc.*, 512 F. Supp. 2d 1158, 1164-67 (N.D. Ill. 2007) (public disclosure bar did not apply where relator's complaint "undeniably includes a good deal of public information" but relator included allegations regarding defendant's internal communications).

Even if the essential elements of Defendant's fraud were publicly disclosed (they were not), Relator is an original source. Defendant contends that Relator does not allege that he voluntarily provided his information to the government before filing his Complaint. (Def. Br. 14.) On May 26, 2015, Relator contacted the Department of Justice and the Attorneys General for Illinois, Wisconsin, and Minnesota, voluntarily disclosing the facts underlying his potential

qui tam action. By doing so, Relator provided them with a chance to investigate his allegations before Relator filed a formal complaint and disclosure statement.[5] Accordingly, the public disclosure bar does not preclude Relator's claims here. 31 U.S.C. § 3730(e)(4)(B).

VI. Defendant's Statute Of Limitations Argument Is Improper On A Motion To Dismiss.

Defendant's argument that Relator's claims are barred in part by statutes of limitations is an affirmative defense that is improper for resolution on a 12(b)(6) motion to dismiss, and Defendant makes no argument that the affirmative defense is established on the face of Relator's Complaint. *Chester v. Tucker*, No. 15 C 5288, 2016 WL 6575149, at *2 (N.D. Ill. Nov. 7, 2016) ("The statute of limitations is an affirmative defense that need not be anticipated in the complaint in order to survive a motion to dismiss"); *Beauty of Flowers v. City of Des Plaines, Ill.*, No. 06 C 5567, 2007 WL 1521529, at *3 (N.D. Ill. May 22, 2007) ("Under Rule 12(b)(6) this Court cannot dismiss [plaintiff's] complaint on the basis of the statute of limitations"); *Walker v. Cnty. of Cook*, No. 05 C 5634, 2006 WL 2161829, at *4 (N.D. Ill. July 28, 2006) ("A plaintiff is not required to anticipate and respond to 'an affirmative defense, such as the statute of limitations, in his complaint'") (quoting *Clark v. City of Braidwood*, 318 F.3d 764, 767-68 (7th Cir. 2003)).

A statute of limitations cannot be a basis for complete dismissal. Rather, the statutes of limitations here address *damages*, an issue that is not yet ripe at this time. Accordingly, Defendant's argument based on the statutes of limitations should be rejected.

VII. Defendant Retaliated Against Relator.

Finally, Defendant assails Relator's retaliation claims on the supposed basis that Relator does not allege the requisite elements. (Def. Br. 15.) Incorrect. Defendant's argument is based

[5] Relator may assert provable facts in his opposition to a motion dismiss. *Geinosky v. City of Chi.*, 675 F.3d 743, 745 n.1 (7th Cir. 2012) (collecting cases).

entirely on the mistaken assumption that the e-mail Relator sent referencing the legal problems with Defendant's gift card programs is the *sole* basis for Relator's retaliation claim. (*See* Def. Br. 15.) However, Relator's retaliation claim encompasses his ***investigation and discussions with Defendant's pharmacy staff*** regarding the gift card program's legality. (Compl. ¶47.) Contrary to Defendant's assertion otherwise, internal discussions and complaints raising concerns about a defendant's conduct are protected activities under the False Claims Act that give rise to a retaliation claim. *Fanslow v. Chi. Mfg. Ctr., Inc.*, 384 F.3d 469, 481-82 (7th Cir. 2004); *Carnithan v. Cmty. Health Sys., Inc.*, Case No. 11-CV-312-NJR-DGW, 2015 WL 9258595, at *4 (S.D. Ill. Dec. 18, 2015); *Thomas v. EmCare, Inc.*, No. 4:14-cv-00130-SEB, 2015 WL 5022284, at *4 (S.D. Ind. Aug. 24, 2015); *U.S. ex rel. Geschrey v. Generations Healthcare, LLC*, 922 F. Supp. 2d 695, 706-07 (N.D. Ill. 2012).

Moreover, dismissal of Relator's retaliation claim would be improper because discovery is needed to develop the factual record and determine the nature of Relator's protected activity and the manifestation of Defendant's retaliation. *See Fanslow*, 384 F.3d at 479-82 (reversing summary judgment where the record was insufficient to determine whether relator engaged in protected activity); *U.S. ex rel. Howard v. Urban Inv. Trust, Inc.*, 2010 WL 832294, at *4 (N.D. Ill. Mar. 8, 2010) (denying summary judgment where there were material factual disputes over the three elements of the relator's retaliation claim).

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court deny Defendant's motion to dismiss in its entirety.

Dated: December 19, 2016

Respectfully submitted,

By: */s/ Joseph J. Siprut*

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing **Plaintiff-Relator's Response In Opposition To Defendant's Motion To Dismiss** was filed this 19th day of December 2016 via the electronic filing system of the Northern District of Illinois, which will automatically serve all counsel of record.

/s/ Joseph J. Siprut
Joseph J. Siprut