

**NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

BCBSM, INC, (d/b/a BLUE CROSS and)
 BLUE SHIELD of MINNESOTA), HEALTH)
 NEW YORK, INC, HORIZON)
 HEALTHCARE SERVICES, INC. (d/b/a)
 HORIZON BLUE CROSS BLUE SHIELD OF)
 NEW JERSEY), BLUE CROSS AND BLUE)
 SHIELD OF ARIZONA, INC. (d/b/a BLUE)
 CROSS BLUE SHIELD OF ARIZONA and)
 d/b/a AZBLUE), ASURIS NORTHWEST)
 HEALTH, *et al.*,)

No. 20 C 1853)
 No. 20 C 1929)
 No. 20 C 3332)
 No. 20 C 4940)
 No. 20 C 4738)

Plaintiffs,)

v.)

Judge Virginia M. Kendall)

WALGREEN CO. and WALGREENS BOOTS)
 ALLIANCE, INC.,)

Defendants.)

MEMORANDUM OPINION AND ORDER

The Plaintiffs in this case are health care plans offering comprehensive health care services and coverage, including prescription drug coverage, to their members in locations across the United States. Defendants are Walgreen Co. and Walgreens Boots Alliance, Inc. (together “Walgreens”) who allegedly engaged in a fraudulent scheme to overcharge Plaintiffs for prescription drugs by submitting claims for payment at artificially inflated prices. Plaintiffs filed five separate cases, which were consolidated on September 18, 2020 before this Court. Walgreens filed Motions to Dismiss [Dkts. 47, 57, 64, 87]¹ the Complaints, arguing Plaintiffs failed to join a

¹ The Motion to Dismiss Case No. 20-cv-04738 was filed before Judge Rowland at Dkt. No. 24 prior to being consolidated with Case No. 20-cv-1853 before this Court.

required party under Fed. R. Civ. P. 12(b)(7). Walgreens additionally asserts Plaintiffs failed to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) for common law fraud, fraudulent concealment, negligent misrepresentation, unjust enrichment, and statutory consumer protection claims under the laws of various states. Walgreens also moves for sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 claiming that the Complaints are frivolous and without legal merit.

For the foregoing reasons, the Court dismisses without prejudice Plaintiffs' negligent misrepresentation claim, Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505, et seq.) and Illinois Uniform Deceptive Trade Practices Act (815 ILCS 510, et seq) claims. The Court denies Walgreens' Motions to Dismiss the remaining claims. The Court denies Walgreens' Motion for Sanctions. [Dkts. 99, 101].

BACKGROUND

On a motion to dismiss under Rule 12(b)(6), the Court accepts the Complaint's well-pleaded factual allegations and draws all reasonable inferences in the non-moving party's favor, but not its legal conclusions. *See Smoke Shop, LLC v. United States*, 761 F.3d 779, 785 (7th Cir. 2014). The facts below come from Plaintiffs' Complaints² and the Court accepts them as true for purposes of reviewing this Motion. *See Vinson v. Vermillion Cty., Ill.*, 776 F.3d 924, 925 (7th Cir. 2015).

Defendant Walgreen Co. is an Illinois corporation with its principal place of business and corporate headquarters in Deerfield, Illinois. On December 31, 2014, Walgreen Co. became a wholly owned subsidiary of Defendant Walgreens Boots Alliance, Inc. ("WBA") pursuant to a merger to effect a reorganization of Walgreen Co. into a holding company structure. (Dkt. 1 ¶ 24).

² The cases discussed in this motion were consolidated on July 8, 2020 (Dkt. 46) and September 18, 2020 (Dkt. 87). Because of the overlap of the material facts in the Complaints, the Court will cite to the Complaint in Case No. 1:20-cv-1853, which the other cases have been consolidated under, while acknowledging that paragraph numbers containing the cited facts are different in each complaint.

Defendant WBA is a Delaware corporation with its principal place of business and corporate headquarters in Deerfield, Illinois. (*Id.* ¶ 24). Because of their integrated operations, allegations as to Walgreen Co. and WBA pertain to both parties. (*Id.* ¶ 26).

Walgreens is and has been a network pharmacy for every Plaintiff, meaning that Plaintiffs' Members can use their prescription drug benefit to fill their prescriptions at Walgreens pharmacy locations at in-network pricing. (Dkt. 1 ¶ 32). When a Walgreens pharmacy dispenses a prescription to a Member, Walgreens causes an electronic claim for reimbursement to be sent to Plaintiffs' pharmacy benefit managers ("PBMs"), which then submits a claim for payment to Plaintiffs. (*Id.*). During the relevant time period, Plaintiffs have paid Walgreens through PBMs. (*Id.*). Plaintiffs employed Medco Health Solutions, Inc.; Catalyst Rx; Catamaran Corp.; CVS Caremark; Express Scripts, Inc.; MedImpact Healthcare Systems, Inc.; Preferred Care Services, Inc.; Prime Therapeutics LLC; and RegenceRx as their PBM agents. (*Id.* ¶ 56; Case No. 20-cv-4940 (hereinafter "Asuris") ¶ 29).

Walgreens reports a "usual and customary price" ("U&C price") on every reimbursement claim, which the PBMs directly pass on to the Plans. (*Id.* ¶ 55). U&C price is the price customers without insurance pay a given pharmacy for prescription drugs, i.e., the cash or uninsured price, and federal health programs have consistently required Walgreens and other pharmacies to report the cash prices offered by pharmacy discount programs to be reported as a pharmacy's U&C price. (*Id.* ¶¶ 37–39). The U&C price also serves as a ceiling to how much a pharmacy can charge a health plan for the drug. (*Id.* ¶ 37).

For more than a decade, Walgreens knowingly and intentionally submitted inflated U&C prices for brand and generic drugs purchased by Plaintiffs' members. (*Id.* ¶ 49). Walgreens submitted U&C prices paid by few—if any—actual cash customers (i.e. customers who paid for

drugs without insurance) and were regularly five, ten, or even twenty times higher than what Walgreens actually charged cash customers. (*Id.* ¶ 7). Walgreens has been able to continue this scheme through its Prescription Savings Club (“PSC”), which offers cash customers steeply discounted prices on up to 8,000 brand and generic drugs in exchange for a small enrollment fee. (*Id.* ¶¶ 63–70). In its recent settlement with the Department of Justice, Walgreens admitted that it regularly returned “enrollment fees” to its PSC Program enrollees through store credits.³ (*Id.* ¶ 67). Walgreens additionally offers a similar “Rx savings program” called the JustRx Program to customers who pay without using insurance at more than 1,900 Walgreens-owned Rite Aid stores, as well as Duane Reade-branded Walgreens pharmacies, which provides discounts on all prescription drugs with no annual or up-front membership fee to participate. (*Id.* ¶ 71). Walgreens inflated the U&C prices that it reported to Plaintiffs and their PBMs by pegging Walgreens’ reported U&C prices to higher prices that did not reflect the cash prices offered to PSC Program enrollees, JustRx Program participants, or third-party discount program cardholders. (*Id.* ¶ 72). Since 2007, the Plans paid Walgreens more than \$18 billion to reimburse more than 264 million claims.⁴ (*Id.* ¶ 76). Through its fraudulent scheme, Walgreens overcharged Plaintiffs hundreds of millions of dollars for prescription drug. (*Id.* ¶ 1).

DISCUSSION

Walgreens moves to dismiss the Complaints pursuant to Rule 12(b)(7) because Plaintiffs’ have not joined the PBMs, a required party under Fed. R. Civ. P. 19 according to Walgreens.

³ On January 15, 2019, Walgreens settled claims brought by the United States, 39 states, and the District of Columbia alleging that, from January 2008 through December 2017, Walgreens violated the False Claims Act, 31 U.S.C. § 3729 *et seq.*, by submitting false U&C prices that were higher than the prices it charged for the same drugs sold through its Prescription Savings Club cash discount program (“PSC Program”), thereby obtaining more money in reimbursements for Medicaid fee-for-service claims than it was entitled to receive. *Id.* ¶ 2.

⁴ In the Complaints for Case No. 1:20-cv-4738 (BCBSAZ) and Asuris (defined above), the Plaintiffs state that since 2007, the Plans have paid Walgreens more than \$3.4 billion to reimburse more than 60.5 million claims. *See* BCBSAZ ¶ 65; Asuris ¶ 74.

Walgreens additionally moves under 12(b)(6) for failure to state a claim for common law fraud, fraudulent concealment, negligent misrepresentation, unjust enrichment, and statutory consumer protection claims under the laws of various states. Walgreens also moves for sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 claiming the Complaints are frivolous and without legal merit.

I. Motion to Dismiss for Failure to Join a Necessary Party

Walgreens first argues the Court should dismiss the suit because Plaintiffs failed to join the PBMs, allegedly the conduit between Plaintiffs and Walgreens and purportedly indispensable parties. “The purpose of Rule 19 is to permit joinder of all materially interested parties to a single lawsuit so as to protect interested parties and avoid waste of judicial resources.” *Askew v. Sheriff of Cook Cty.*, 568 F.3d 632, 634 (7th Cir. 2009). When evaluating a Rule 12(b)(7) motion, the Court accepts all well-pleaded allegations in the complaint as true and may consider extrinsic evidence. *Davis Cos. v. Emerald Casino, Inc.*, 268 F.3d 477, 480 n. 4 (7th Cir. 2001). Dismissal for failure to join a party “is not the preferred outcome under the Rules.” *Askew*, 568 F.3d at 634.

Analysis of a Rule 12(b)(7) motion proceeds in two steps. First, the Court determines whether a party is one that should be joined, if feasible, under Rule 19(a). *Askew*, 568 F.3d at 635; *Davis Cos.*, 268 F.3d at 481 (citing *Thomas v. United States*, 189 F.3d 662, 667 (7th Cir. 1999)).

A party is necessary if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

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