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IN THE COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

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THE STATE OF FLORIDA)
ex rel.)
VEN-A-CARE OF THE)
FLORIDA KEYS, INC.,)
a Florida Corporation, by and)
through its principal)
officers and directors,)
ZACHARY T. BENTLEY and)
T. MARK JONES,)
Plaintiffs)
v.)
BOEHRINGER INGELHEIM)
CORPORATION; DEY, INC.;)
DEY, L.P.; EMD)
PHARMACEUTICALS INC.;)
LIPHA, S.A.; MERCK, KGaA;)
MERCK-LIPHA, S.A.;)
SCHERING CORPORATION;)
SCHERING-PLOUGH CORPORATION;)
ROXANE LABORATORIES, INC.; and)
WARRICK PHARMACEUTICALS)
CORPORATION,)
Defendants.)

CIVIL ACTION NO. 98-3032A

PLAINTIFFS' RESPONSE TO DEFENDANT DEY, INC., DEY, L.P., AND EMD PHARMACEUTICALS, INC.'S MOTION TO DISMISS

Plaintiffs The State of Florida, Office of the Attorney General, Department of Legal Affairs ("the Attorney General"), and Ven-A-Care of the Florida Keys, Inc. ("the Relator"),

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file this Response to Defendant Dey, Inc.; Dey, L.P.; and EMD Pharmaceuticals, Inc.'s (hereinafter "the Defendants") Motion to Dismiss pursuant to Rules 1.100 and 1.140, Fla. R. Civ. P., and say:

1. This is the Plaintiffs' Response to the Defendant's Motion to Dismiss.

STANDARD OF REVIEW ON MOTION TO DISMISS

2. On a Motion to Dismiss contending that the Complaint fails to plead fraud with specificity, the court must take all of the well-pleaded allegations in the Complaint as true. *Bankers Mutual Capital Corp v. U.S. Fidelity & Guar. Co.*, 784 So. 2d 485 (Fla. 4th DCA 2001). Generally, all reasonable inferences arising from the facts alleged in the complaint must also be taken as true. *Palumbo v. Moore*, 777 So. 2d 1177 (Fla. 4th DCA 2001); *Salit v. Ruden, McClosky, Smith, Schuster, & Russell, P.A.*, 742 So. 2d 381 (Fla. 4th DCA 1999); *Hitt v. N. Broward Hosp. Dist.*, 387 So. 2d 482 (Fla. 4th DCA 1980); *Berke Displays, inc. v. Greater Miami Hotel Ass'n*, 168 So. 2d 692 (Fla. 3d DCA 1964). The allegations in the complaint must be considered in a light most favorable to the plaintiff. *Palm Beach-Broward Med. Imaging Center, Inc., v. Continental Grain Co.*, 715 So. 2d 343 (Fla. 4th DCA 1998); *Hitt v. N. Broward Hosp. Dist.*, 387 So. 2d 482 (Fla. 4th DCA 1980). The court's evaluation of the complaint is limited to the four corners of the complaint and any exhibits attached to and incorporated into the complaint. *Hitt v. N. Broward Hosp. Dist.*, 387 So. 2d 482 (Fla. 4th DCA 1980).

3. Generally, the remedy for alleged failure to plead fraud with particularity is not dismissal of the action. *Jana, Inc. v. U.S.*, 41 Fed. Cl. 735 (Fed. Cl. Ct. 1998). The

preferred remedy is an order directing the Plaintiff to provide more detail in the complaint.

Id.

BACKGROUND

4. A qui tam action was filed by the Relator in 1998 in the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida. The Attorney General filed its Complaint in Intervention on July 9, 2003 under the Florida False Claims Act, §§ 68.082 - 68.091, Florida Statutes and common law fraud.

5. The Complaint in this action sets forth in detail the specific manner in which Defendants, including the moving Dey defendants, manipulated the Florida Medicaid Program to divert funds set aside for the poor in order to enhance the market positions of their pharmaceutical products. The Complaint alleges that the Defendants knew that Medicaid recipients obtain prescription medications directly from "providers" such as pharmacies, hospitals and physicians. See, ¶ 16, *Complaint*. The Complaint further alleges that Defendants knew that these providers were reimbursed for such medications through state Medicaid agencies, see ¶¶ 15, 17 and 22, *Complaint*, and that in Florida the amount of such reimbursement was based upon prices reported by the Defendants to a third party reporting company known as First DataBank. See, ¶¶ 23, 24, 35, 37-39, *Complaint*. The Complaint sets forth how, by knowingly reporting false and inflated prices to First DataBank, Defendants established a system whereby providers would be reimbursed far more than they actually paid for the medications. See, ¶¶ 27, 31, 33, 37-39, *Complaint*. The Complaint alleges that this enabled Defendants to sell their products by

promoting the reimbursement "spread" to providers. See, ¶¶28-30, *Complaint*. In this manner, Defendants manipulated the system by providing false information that caused taxpayer money, set aside to provide healthcare to the poor, to instead be diverted to providers in a scheme intended to increase the market share for Defendants' products. The *Complaint* alleges in Count I that this activity constituted direct and egregious violations of the Florida False Claims Act, and in Count II that such actions constitute common law fraud.

6. Paragraph 7 of the *Complaint* alleges that Dey, Inc., is a Delaware Corporation with its principle offices in Napa, California. Paragraph 7 of the *Complaint* further alleges that Dey, Inc., transacted business in Florida during the relevant time period by selling and distributing its pharmaceuticals in Florida, to Florida residents, either directly or through wholesalers and/or distributors. Paragraphs 23 - 28, 30 - 38, 40 - 50 of the *Complaint* alleges that the Florida Medicaid Program reimbursed pharmacies for Dey, Inc.'s pharmaceutical products based on artificially inflated prices during the relevant time period. These allegations establish that Dey, Inc., is a foreign corporation transacting business in Florida.

7. Paragraph 7 of the *Complaint* further alleges that Dey, L.P. is a limited partnership organized under Delaware law which also maintains its principle offices in Napa, California. Paragraph 7 of the *Complaint* also alleges that Dey, L.P., transacted business in Florida through its general partner, Dey, Inc. during the relevant time period. These allegations establish that Dey, L.P., is a foreign corporation transacting business in Florida.

8. Paragraph 7 of the Complaint also alleges that EMD Pharmaceuticals, Inc. is a corporation with its principle offices in Durham, North Carolina. Paragraph 7 of the Complaint further alleges that EMD Pharmaceuticals, Inc., is the sole shareholder of Dey and that, to the extent the acts of Dey at issue were performed by or are otherwise attributable to EMD, then judgment should be entered against EMD.

LAW AND ARGUMENT

A. Failure to Plead Fraud With Particularity

9. Rule 1.120(b), Fla. R. Civ. P. provides:

Fraud, Mistake, Condition of Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit. Malice, intent, knowledge, mental attitude, and other condition of mind of a person may be averred generally.

R. 1.120(b), Fla. R. Civ. P.

10. There are no reported cases construing the Florida False Claims Act. There are no reported cases determining how, if at all, Rule 1.120(b), Fla. R. Civ. P. applies actions arising under the Florida False Claims Act. However, the Florida False Claims Act is modeled after the federal false claims act. §§ 68.082, Fla. Stat.; 37 U.S.C. § 3729 - 3733.

11. Like the federal false claims act, liability arises under the Florida False Claims Act when one of the acts identified in the act occurs. §§ 68.082 - 68.091, Fla. Stat.; U.S. *ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. Tex. 1998) (construing federal false claims act). Both the Florida and federal false claims acts impose liability for

knowing submission of claims or causing such claims to be submitted to the government for payment of sums the government does not owe. §§ 68.082 - 68.091, Fla. Stat.; U.S. ex. rel. *Clausen v. Lab Corp. of America, Inc.*, 290 F.3d 1301 (11th Cir. 2002); cert. denied, 537 U.S. 1105 (2003).

12. Liability under the false claims act is statutory. §§ 68.082 - 68.091, Fla. Stat.; U.S. ex. rel. *Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. Tex. 1998). The false claims act is a false claim or false statement statute. *Id.* Common law principles of fraud do not necessarily apply to statutory false claims act actions. *Id.* Therefore, it is not necessary to plead fraud, much less plead fraud with particularity, only that the defendants acted "knowingly." *Id.* For the purposes of the false claims act, "knowingly" requires that a person either has actual knowledge, or acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of its truth or falsity. *Id.* Allegations in a complaint demonstrating a knowing submission of or knowingly causing the submission of a false claim to the government for payment sufficiently state a cause of action. §§ 68.082 - 68.091, Fla. Stat.; U.S. ex. rel. *Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. Tx. 1998). Therefore, Rule 1.120(b), Fla. R. Civ P does not apply to Florida False Claims Act cases. *Id.*

13. The Complaint in the present action specifically alleges that the Defendants knowingly caused false claims for payment to be submitted to the Florida Medicaid Program. See, ¶ 23 - 28, 30 - 35, 37 - 40, 43 - 46, *Complaint*. These allegations clearly demonstrate that the Defendants knowingly caused the Florida Medicaid Program to pay

inflated sums which were not owed for the Defendants' products. See, ¶ 23 - 28, 30 - 35, 37 - 40, 43 - 46, *Complaint*. Therefore, the Complaint states a cause of action under the Florida False Claims Act and survives the Defendants' Motion to Dismiss. §§ 68.082 - 68.091, *Fla. Stat.*; *U.S. ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. TX 1998); *U.S. v. Kennsington Hosp. et. al.*, 760 F. Supp. 1120 (E.D. Pa 1991).

14. Although the United States 11th Circuit Court of Appeals has ruled that Rule 9(b), Fed. R. Civ. P. applies to cases arising under the federal false claims act (*U.S. ex. rel. Clausen v. Lab. Corp. of America, Inc.*, 290 F. 3d 1301 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003)), Federal Rule 9(b) and Florida Rule 1.120(b) are not identical. *R. 9(b), Fed. R. Civ. P.; R. 1.120(b), Fla. R. Civ. P.* According to the 11th Circuit, Rule 9(b) is satisfied if a Complaint alleges what statements were made, the time and place of the statements, who made the statements, the contents of the statements, and what the defendant obtained from the statements. *U.S. ex. rel. Clausen v. Lab. Corp. of America, Inc.*, 290 F. 3d 1301 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003). However, Rule 9(b), Fed. R. Civ. P. does not require the plaintiff to prove alleged fraud on the face of the complaint. *Id.*

15. Even if Rule 1.120(b), Fla. R. Civ. P. or Rule 9(b), Fed. R. Civ. P. applies to Florida False Claims Act actions such as the present action against the Defendants, the Complaint herein satisfies the specificity requirements of both rules. This action involves numerous complex transactions over an extended time period. *U.S. ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. TX 1998). A rule requiring parties to plead fraud with

specificity does not require plaintiffs to know every detail before pleading fraud in complex cases or prove fraud on the Complaint's face. *U.S. ex. rel. Clausen v. Lab. Corp. of America, Inc.*, 290 F. 3d 1301 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *U.S. v. Kennsington Hosp. et. al.*, 760 F Supp 1120 (E.D. Pa. 1991). Lack of particularity may be cured in a fraud complaint either by a later disclosure or by providing the defendant with other means of substantiating the claims. *Jana, Inc. v. U.S.*, 41 Fed. Cl. 735 (Fed. Cl. Ct. 1998); *U.S. v. Kennsington Hosp. et. al.*, 760 F. Supp. 1120 (E.D. Pa. 1991).

16. The Complaint in this action alleges the who, what, where, when and how of the false claims and common law fraud with sufficient particularity to satisfy the requirements of Rule 1.120(b), Fla. R. Civ. P. R. 1.120(b), Fla. R. Civ. P.; *U.S. ex. rel. Clausen v. Lab. Corp. of America, Inc.*, 290 F. 3d 1301 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *U.S. ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. TX 1998). The corporate Defendants are the "who". See, ¶ 9 and 10, *Complaint*. Neither the Attorney General nor the Relator can be expected to know the intimate details of the Defendants' daily activities such as which clerical employees were responsible for completing pricing forms and submitting them to data reporting services at this phase of the proceedings. *U.S. ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. TX 1998).

17. The false WAC prices reported by the Defendants to the data reporting services which were then used to set an artificially inflated Medicaid reimbursement rate for the Defendants' products is "what" is alleged. See ¶ 23 - 28, 33, 34, 37 - 39, 43 - 46, *Complaint*; *U.S. ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. TX 1998). July 1,

1994 through the present is "when" the false claims and common law fraud occurred. See, ¶ 1, *Complaint; U.S. ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. TX 1998).

The statements submitted to the data reporting services containing the false WAC pricing information is "where" the false claims and common law fraud occurred for purposes of Rule 1.120(b), Fla. R. Civ. P. See, ¶ 23 - 28, 33, 34, 37 - 39, 43 - 50, *Complaint; U.S. ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. TX 1998).

18. Plaintiffs have alleged "how" the statements were false by detailing the Defendants' price manipulation scheme to increase the spread between the Medicaid reimbursement rate for their products and the actual selling price for those same products in order to increase the Defendants' market share. See, ¶ 23 - 28, 30 - 39, 43 - 46

Complaint; U.S. ex. rel. Johnson v. Shell Oil Co., 183 F.R.D. 204 (E.D. TX 1998).

Plaintiffs have further alleged how the Defendants' price manipulation caused false claims for payment to be submitted to the Florida Medicaid Program. See, ¶ 23 - 39, 43 - 46, *Complaint*.

19. As for Count II of the Complaint sounding in common law fraud, date, time, and place allegations are not required in the Complaint for each transaction if the alleged fraud is complex and occurred over an extended time period. *U.S. ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. Tx. 1998); *U.S. v. Kennsington Hosp. et. al.*, 760 F. Supp 1120 (E.D. Pa. 1991). A plaintiff is not required to know every detail of his case before he is allowed to plead fraud or false claims. *Id.* Sufficiency of a complaint's allegations depends on the nature of the case, the complexity of the transactions, and how much

circumstantial detail is necessary to inform the defendant of the charges against him and enable him to prepare a response. *U.S. ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. Tx. 1998). If the plaintiff provides the defendant with alternate means of substantiating allegations of fraud it is unnecessary to include time, date, and place allegations for each and every alleged fraudulent transaction in the complaint. *U.S. v. Kennsington Hosp. et. al.*, 760 F. Supp 1120 (E.D. Pa. 1991).

20. Fraud allegations satisfy the requirements of Rule 1.120(b), Fla. R. Civ. P. if they identify the alleged misrepresentation and the party making the alleged misrepresentation. *Williams v. Bear Stearns & Co.*, 725 So. 2d 397 (Fla. 5th DCA 1998). A complaint alleges a cause of action for fraud and survives a Rule 1.120(b) challenge if it contains a short and plain statement alleging there was a knowingly false statement of material fact designed to induce reliance made by the defendant which caused actual harm. *Water Internat'l Network, U.S.A., Inc. v. East*, 892 F. Supp 1477 (M.D. Fla. 1995). Generally, the complaint must also identify who made the statement, the time frame in which it was made, and the context in which it was made to survive a Rule 1.120(b) challenge. *Bankers Mutual Capital Corp. v. U.S. Fidelity & Guar. Co.*, 784 So. 2d 485 (Fla. 4th DCA 2001).

21. Count II of the Complaint in this action satisfies Rule 1.120(b), Fla. R. Civ. P.'s specificity requirements. The Complaint alleges that the Defendants intentionally misrepresented their WAC prices from July 1, 1994 through the present. See, ¶ 1, 23 - 36, 47 - 50, Complaint; *Williams v. Bear Stearns & Co.*, 725 So. 2d 397 (Fla. 5th DCA 1998);

Water Internat'l Network U.S.A. v. East, 892 F. Supp 1477 (M.D. Fla. 1995). Plaintiffs have clearly alleged that the Defendants' intentional misrepresentation of WAC prices to the data reporting services was designed to cause the Florida Medicaid Program to rely on these artificially inflated WAC prices to set the Medicaid reimbursement rate for the Defendants' products in Florida. See, ¶ 23 - 36, 47 - 50, *Complaint; Water Internat'l Network U.S.A. v. East*, 892 F. Supp 1477 (M.D. Fla. 1995). Plaintiffs have further alleged that the Florida Medicaid Program relied on these fictitious WAC prices when setting the Medicaid reimbursement rate for the Defendants' products, causing the Florida Medicaid Program to pay more money than it actually owed for these products. See, ¶ 23 - 36, 47 - 50, *Complaint; Water Internat'l Network U.S.A. v. East*, 892 F. Supp 1477 (M.D. Fla. 1995).

B. Government Knowledge

22. Government knowledge of a claim's falsity is not an automatic bar to false claims or common law fraud actions. *Kreindler v. United Technologies Corp.*, 985 F. 2d 1148 (2d Cir. 1993), *cert. denied*, 508 U.S. 113 (1993); *U.S. ex. rel. Hagood v. Sonoma County Water Agency*, 929 F. 2d 1416 (9th Cir. 1991). Far more than mere knowledge on the part of the government is required. As the Eleventh Circuit has stated: "Nor is it important whether the government believes the statement to be true or false. It is only the defendants' scienter that is relevant." *U.S. v. White*, 765 F.2d 1469, 1482 (11th Cir. 1985). In order to establish a defense, Defendants would have to establish by adequate proof that the government actually gave "affirmative assurance that punishment will not

attach" to the proscribed activity. *Id.* ("Government silence [in the face of prolonged, widespread proscribed activity] is not "affirmative assurance that punishment will not attach . . .") *Id.*, quoting *U.S. v. Lichtenstein*, 610 F.2d 1272, 1279 (5th Cir. 1980).

23. Government awareness of problems with the truthfulness of claims does not immunize a defendant from liability under the False Claims Act. In fact, the government cannot even consent to fraud against itself. *United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F. Supp. 218, 223 (D. Md. 1995) ("Even assuming that Martin Marietta did inform the government of its precise actions, a government officer cannot authorize a contractor to violate federal regulations"). "[A] contractor who tells a government contracting officer that a claim is false still violates the statute when the false claim is submitted." *Id.* at 223. Accord, *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991), cert. denied, 519 U.S. 865 (1996) ("That the relevant government officials know of the falsity is not in itself a defense"). Nor does government silence or the absence of prior prosecutions rise to the level of active misleading by the government, as would be necessary to defeat a false claims case on grounds of "government knowledge." *U.S. v. White*, 765 F.2d 1469, 1482 (11th Cir. 1985).

24. Even where the government is fully aware that it is being defrauded, it can continue to accrue damages if it is unfeasible for the government to correct the situation. See *U.S. v. Ehrlich*, 643 F.2d 634639 (9th Cir. 1981) (HUD's knowledge that cost figures

had been falsely inflated did not render ongoing damages not sustained "by reason of" falsity where HUD was contractually bound to third party).

25. The Defendants in the present action assert that Florida "knew" about the fraud because some studies performed by the federal government concerning AWP were published and because the Relator filed its original complaint in 1998. Therefore, the Defendants contend, all claims following the publication of these studies and/or the filing of that original complaint should be dismissed. However, the Defendants' Motion is fatally flawed because it fails to demonstrate how, if at all, the Florida Medicaid Program engaged in conduct constituting the "active misleading" of defendants or "affirmative assurance that punishment will not attach." Any such showing would necessarily require the submission of proofs beyond the four corners of the Complaint, and so is not appropriate or permissible for consideration on Defendants' motion to dismiss.

26. Generalized, sporadic awareness of inflated prices falls far below the level of active and open collaboration with the government to qualify for this defense. *Kreindler v. United Technologies Corp.*, 985 F. 2d 1148 (2d Cir. 1993), *cert. denied*, 508 U.S. 113 (1993); *U.S. ex. rel. Hagood v. Sonoma County Water Agency*, 929 F. 2d 1416 (9th Cir. 1991). The mere existence of studies regarding AWP pricing is insufficient to establish "knowledge" on the part of the Florida Medicaid Program, especially where the Florida Medicaid Program is under contractual obligations and statutory and regulatory requirements to pay Medicaid providers for the Defendants' products based upon Defendants' inflated price representations. *U.S. v. Incorporated Village of Island Park*, 888 F. Supp 919 (E.D. N.Y. 1995). *Kreindler v. United Technologies Corp.*, 985 F. 2d

1148 (2d Cir. 1993), *cert. denied*, 508 U.S. 113 (1993); *U.S. ex. rel. Hagood v. Sonoma County Water Agency*, 929 F. 2d 1416 (9th Cir. 1991). Indeed, Florida was required by law to pay Medicaid providers based upon reported AWP's or WAC's, or by set MAC's or FUL's. See, ¶19, *Complaint*. If the government knows that Defendants' AWP and WAC representations are false, it can find no respite in changing its reimbursement for Defendants' drugs to a formula based upon MAC's or FUL's, because those government imposed reimbursement caps are themselves derived in part from the inflated reported price representations of the Defendants. Moreover, the government cannot easily change the entire reimbursement scheme without lengthy and complex legislative and/or administrative action, in essence changing the entire formula for reimbursement on tens of thousands of drugs because of Defendants' fraudulent conduct with respect to a handful of their drugs. Indeed, the law does not permit the government to reimburse for Defendants' drugs using a different formula separate and apart from that which it is required to employ when reimbursing for all other Medicaid drugs. Florida's only logical recourse is an enforcement action such as this, during which its damages only continue to accrue by reason of Defendants' ongoing conduct. In view of this, the Defendants' motion to dismiss on this basis is fatally flawed and should be denied.

C. Long Arm Jurisdiction

27. The Defendants' Motion to Dismiss asserts lack of personal jurisdiction over EMD Pharmaceuticals, Inc. This argument, however, is fatally flawed because it fails to raise sufficient facts to challenge the basis for jurisdiction alleged in the Complaint.

Northwest Aircraft Capital Corp. v. Stewart, 842 So. 2d 190, 193 (Fla. 5th DCA 2003). The proper procedure to raise jurisdictional issues is to file a motion challenging the jurisdictional allegations in the complaint and claim insufficient minimum contacts with the forum state. *Northwest Aircraft Capital Corp. v. Stewart*, 842 So. 2d 190, 193 (Fla. 5th DCA 2003). Generally, affidavits supporting these challenges are required because the motion by itself merely tests the legal sufficiency of the pleadings but cannot, absent accompanying affidavits, introduce factual assertions of record. *Id.*

28. Despite the imprecise pleading in the Defendants' Motion to Dismiss, the Complaint in this action alleges sufficient facts to establish personal jurisdiction over EMD Pharmaceuticals, Inc. Paragraph 7 of the Attorney General's Complaint clearly alleges that EMD is the sole shareholder of Dey and conducted business in Florida by selling and/or distributing pharmaceuticals in Florida either directly or through wholesalers and/or distributors or through its ownership and control of Dey. See, ¶ 7, *Complaint*. The Complaint further alleges that the Defendants' products were used by Florida residents and paid for by the Florida Medicaid Program and that Defendants, including EMD, misrepresented the prices of their drugs to the State. ¶ 7, 23 - 28, 30 - 50, *Complaint*.

29. These allegations satisfy the requirements of § 48.193, Florida Statutes. *Northwest Aircraft Capital Corp. v. Stewart*, 842 So. 2d 190, 193 (Fla. 5th DCA 2003). EMD failed to submit any affidavits or other evidence challenging the jurisdictional allegations in the Complaint. EMD's bare assertion that it does not transact business in Florida, without more, wholly fails defeat the jurisdictional allegations contained in the

Complaint with respect to EMD. *Id.* Therefore, EMD's Motion to Dismiss on this basis should be denied. *Id.*

D. Compliance with Rule 1.130, Florida Rules of Civil Procedure

30. Rule 1.130(a), Florida Rules of Civil Procedure provides:

Instruments Attached. All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of portions thereof material to the pleadings, shall be incorporated or attached to the pleading. No papers shall be unnecessarily annexed as exhibits. The pleadings shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments.

R. 1.130(a), Fla. R. Civ. P. Generally, this rule applies to traditional commercial litigation or contract actions.

31. The Defendants contend the Complaint in this action is based upon certain provisions of the Prescribed Drug Services Coverage, Limitations and Reimbursement Handbook. The Defendants further contend the Complaint should be dismissed because the relevant portions of the handbook were not attached to the Complaint. Contrary to the Defendants' assertions, this action is not based upon the Prescribed Drug Services Coverage, Limitations and Reimbursement Handbook. This action arises under the Florida False Claims Act and common law fraud. *See, Complaint; §§ 68.082 - 68.092, Fla. Stat.; Tucker v. Mariani, 655 So. 2d 221 (Fla. 1st DCA 1995); Lance v. Wade, 457 So. 2d 1008 (Fla. 1984).*

32. Rule 1.130(a), Florida Rules of Civil Procedure does not apply to this action. This action is a statutory cause of action under the Florida False Claims Act and an action for common law fraud. *§§ 68.082 - 68.092, Fla. Stat.; Tucker v. Mariani, 655 So. 2d 221.*

(Fla. 1st DCA 1995); *Lance v. Wade*, 457 So. 2d 1008 (Fla. 1984). Plaintiffs were not required to attach portions of the Prescribed Drug Services Coverage Limitations and Reimbursement Handbook to the Complaint. Therefore, the Defendants' Motion to Dismiss on this basis fails and should be denied.

CONCLUSION

33. The Defendants' Motion to Dismiss should be denied. Rule 1.120(b), Fla. R. Civ. P. does not apply to statutory causes of action such as this action arising under the Florida False Claims Act. *U.S. ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. Tex. 1998). Even if Rule 1.120(b), Fla. R. Civ. P. applies to statutory actions arising under the Florida False Claims Act, the Complaint in this action satisfies the rule's specificity requirements. The Complaint alleges the who, what, where, when, and how of the false claims and common law fraud with sufficient detail to alert the Defendants to the nature of the claims against them and allows them to intelligently respond to those claims. *U.S. ex. rel. Clausen v. Lab Corp. of America, Inc.*, 290 F. 3d 1301 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); *U.S. ex. rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. Tex. 1998); *U.S. v. Kennsington Hosp. et. al.*, 760 F. Supp. 1120 (E.D. Pa. 1991). The Complaint also contains a short and plain statement that there was a knowingly false statement of material fact designed to induce the Florida Medicaid Program to pay more for the Defendants' products than the State owed from July 1, 1994 through the present. *Bankers Mutual Capital Corp. v. U.S. Fidelity & Guar. Co.*, 784 So. 2d 485 (Fla. 4th DCA

2001); *Williams v. Bear Stearns & Co.*, 725 So. 2d 397 (Fla. 5th DCA 1998); *Water Internat'l Network, U.S.A. Inc. v. East*, 892 F. Supp. 1477 (M.D. Fla. 1995).

34. The Defendants' assertions that all claims occurring after the Florida Medicaid Program "knew" about the false claims fail. Sporadic knowledge of inflated prices following publication of government studies on AWP and the bare allegations in a qui tam complaint do not arise to the level of government collusion to qualify for this defense. *Kreidler v. United Technologies Corp.*, 985 F. Supp. 1148 (2d Cir. 1993), *cert. denied*, 508 U.S. 113 (1993); *U.S. ex. rel Hagood v. Sonoma County Water Agency*, 929 F. 2d 1416 (9th Cir. 1991). The mere existence of government studies on AWP and a qui tam complaint is insufficient to establish that the Florida Medicaid Program actively misled the Defendants into believing that punishment would not attach to their false statements and fraud concerning WAC prices. *U.S. v. Incorporated Village of Island Park*, 888 F. Supp. 919 (E.D. N.Y. 1995). Further, the existence of these studies and the allegations in the qui tam complaint do not permit the Florida Medicaid Program to ignore its legal obligation to third parties to pay them based upon the Defendants' grossly inflated products. *Id.* Therefore, the Defendants' Motion to Dismiss fails on this basis and should be denied. *U.S. v. Incorporated Village of Island Park*, 888 F. Supp. 919 (E.D. N.Y. 1995); *Kreindler v. United Technologies Corp.*, 985 F. Supp. 1148 (2d Cir. 1993), *cert. denied*, 508 U.S. 113 (1993); *U.S. ex. rel. Hagood v. Sonoma County Water Agency*, 929 F. 2d 1416 (9th Cir. 1991).

35. The Complaint in this action alleges sufficient facts to demonstrate that this

Court has personal jurisdiction over EMD Pharmaceuticals, Inc. pursuant to § 48.193, Florida Statutes. The Complaint establishes that EMD Pharmaceuticals, Inc. sold or distributed pharmaceutical products in Florida through wholesalers and distributors or through its wholly owned subsidiary, Dey. These allegations satisfy the requirements of § 48.193, Florida Statutes. *Northwest Airline Capital Corp. v. Stewart*, 842 So. 2d 190, 193 (Fla. 5th DCA 2003). Since EMD failed to submit affidavits or other evidence challenging the jurisdictional allegations contained in the Attorney General's Complaint, its motion to dismiss on this basis should be denied. *Id.*

36. Rule 1.130(a), Florida Rules of Civil Procedure does not apply to this action. Plaintiffs are not required to attach portions of the Prescribed Drug Services Coverage, Limitations and Reimbursement Handbook to the Complaint because this action is not traditional commercial litigation or a breach of contract action.

Respectfully submitted this 15th day of March, 2004.

CHARLES J. CRIST, JR.
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