

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA <i>et al.</i> ,)	
<i>ex rel.</i> BERNARD LISITZA,)	
)	
Plaintiffs,)	No. 03 C 744
)	
v.)	Chief Judge Holderman
)	
WALGREEN CO. (d/b/a WALGREENS))	
)	
Defendant.)	
)	

SETTLEMENT AGREEMENT

I. Parties

This Settlement Agreement (Agreement) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General (OIG-HHS) of the Department of Health and Human Services (HHS) (collectively the “United States”); Walgreen Co. and its affiliates, divisions and subsidiaries (Exhibit A attached) (“Walgreens”); Bernard Lisitza (“Relator”); through their authorized representatives (hereafter referred to as “the Parties”).

II. Preamble

As a preamble to this Agreement, the Parties agree to the following:

A. Walgreen Co. is an Illinois corporation with its principal place of business in Deerfield, Illinois. Walgreens operates a nationwide retail pharmacy chain with over 5,000 stores in 48 states and Puerto Rico.

B. Relator Bernard Lisitza is an individual resident of the State of Illinois. On January 31, 2003, Relator filed a *qui tam* action in the United States District Court for Northern District of

Illinois captioned *United States et al. ex rel. Bernard Lisitza., v. Walgreens Co.*, No. 03 C 744 (hereinafter “the Civil Action”). Simultaneous with the entry of this Agreement, the United States has intervened in the federal claim in this Civil Action, which claim is the subject of this Agreement.

C. The United States contends that Walgreens submitted or caused to be submitted claims for payment to the Medicaid Program (Medicaid), 42 U.S.C. §§ 1396-1396v.

D. The United States contends that it has certain civil claims, as specified in Paragraphs 2 and 3, below, against Walgreens for engaging in the following conduct (hereinafter referred to as the “Covered Conduct”):

i. From July 1, 2001 through December 31, 2005, Walgreens improperly switched its Medicaid patients who were prescribed Ranitidine (generic Zantac) 150 mg or 300 mg tablets or a prescription for those drugs that did not specify a dosage form, to the capsule form of the drug. This switch occurred because of Federal Upper Limits (“FULs”) that had been placed on the tablet form of Ranitidine by the Centers for Medicare and Medicaid Services (“CMS”). As a result of engaging in this switching behavior, Walgreens received reimbursement amounts from state Medicaid programs that were higher than it was entitled to receive.

ii. From August 1, 2001 through December 31, 2005, Walgreens improperly switched its Medicaid patients who were prescribed Fluoxetine (generic Prozac) 10 mg or 20 mg capsules or a prescription for those drugs that did not specify the dosage form, to the tablet form of the drug. As a result of engaging in this switching behavior, Walgreens received reimbursement amounts from state Medicaid programs that were higher than it was entitled to receive.

iii. From July 1, 2001 through December 31, 2005, Walgreens improperly switched its Medicaid patients who were prescribed Eldepryl or Selegiline (generic Eldepryl) 5 mg tablets or a prescription for those drugs that did not specify the dosage form to the capsule form of the drug.

As a result of engaging in this switching behavior, Walgreens received reimbursement amounts from various state Medicaid programs that were higher than it was entitled to receive.

E. The United States also contends that it has certain administrative claims, as specified in Paragraph 2 and 4, below, against Walgreens for engaging in the Covered Conduct.

F. This Agreement is not an admission of liability by Walgreens, nor is it evidence of any valid claim. Walgreens denies the United States' contentions, including the contentions that it dispensed improper dosage forms of any prescription drug and that it did so because of the existence of a FUL for any drug product. The Parties agree that no provision of this Agreement nor any consideration exchanged pursuant to this Agreement shall be construed as an admission or finding of liability or wrongdoing by Walgreens in connection with the Covered Conduct described above or otherwise.

G. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties reach a full and final settlement pursuant to the Terms and Conditions below.

H. This Preamble is an integral part of this Agreement and binds the parties in the same way as the remainder of this Agreement.

III. Terms and Conditions

1. Walgreens agrees to pay to the United States and the Participating States collectively \$35 million (the "Settlement Amount"). The Settlement Amount is to be paid to the United States and the Participating States as follows:

a. Walgreens and the United States agree that the sum of \$18,584,972.62 represents the Federal Share (the "Federal Settlement Amount"). Walgreens agrees to pay the Federal Settlement Amount to the United States by electronic funds transfer pursuant to written instructions to be

provided by the U.S. Attorney's Office for the Northern District of Illinois. Walgreens agrees to make this electronic funds transfer no later than 10 business days from the Effective Date of this Agreement.

b. Walgreens and the Participating State Medicaid programs agree that the sum of \$16,415,027.37 represents the Participating States' share (the "State Settlement Amount") under terms and conditions agreed upon by Walgreens and the Participating States (the "State Settlement Agreements"). The State Settlement Amount shall be paid to an escrow account pursuant to the State Settlement Agreement no later than 10 business days from the Effective Date of this Agreement.

c. Contingent upon the United States receiving the Federal Settlement Amount from Walgreens and as soon as feasible after receipt, the United States agrees to pay \$3,159,445 to Relator by electronic funds transfer pursuant to instructions provided by Michael I. Behn of Behn & Wyetzner, Chartered, ("Counsel for Relator").

d. Contingent upon the States receiving the State Settlement Amount from Walgreens and as soon as feasible after receipt, the States agree to pay \$1,844,377.28 to Relator by electronic funds transfer pursuant to instructions provided by Counsel for Relator.

e. Walgreens will pay reasonable expenses and fees of Relator's counsel pursuant to 31 U.S.C. section 3730(d), as determined by agreement or by the Court hearing the Civil Action. In the joint motion to dismiss to be filed by the parties pursuant to paragraph 21 below, Relator and Walgreens shall request the Court to enter an order allowing Relator to file a motion for attorney's fees and related nontaxable expenses no later than 90 days after the order of dismissal is entered, and requiring Relator and Walgreens to follow the procedures of Local Rule 54.3 of the Northern District of Illinois prior to and in connection with the filing of such motion.

f. Walgreens further agrees to pay investigative costs of \$80,259.25 to HHS-OIG pursuant to instructions provided by HHS-OIG. Payment shall be made within 10 business days from the Effective Date of this Agreement.

2. Subject to the exceptions in Paragraph 5, below, in consideration of the obligations of Walgreens in this Agreement, conditioned upon Walgreens' full payment of the Federal and State Settlement Amounts, the United States (on behalf of itself, its officers, agents, agencies, and departments) agrees to release Walgreens, and its current and former directors, officers, employees and agents ("Walgreens Released Parties"), from any and all civil or administrative monetary claims the United States has or may have for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of payment by mistake, unjust enrichment, and fraud.

3. Subject to the exceptions in Paragraph 5, below, in consideration of the obligations of Walgreens in this Agreement, conditioned upon Walgreens' full payment of the Federal and State Settlement Amounts, and the amounts referenced in paragraph 1.e above, the Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, agrees to release the Walgreens Released Parties from any and all civil monetary claims the United States has or may have for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733.

4. In consideration of the obligations of Walgreens in this Agreement and the Corporate Integrity Agreement (CIA) entered into between OIG-HHS and Walgreens, conditioned upon Walgreens' full payment of the Federal and State Settlement Amounts, the OIG-HHS agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from Medicare, Medicaid, and other Federal health care programs (as defined in 42 U.S.C.

§ 1320a-7b(f)) against Walgreens under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law) or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities) for the Covered Conduct, except as reserved in Paragraph 5, below, and as reserved in this Paragraph. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude Walgreens from Medicare, Medicaid, and other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes the OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 5, below.

5. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including Walgreens and Relator) are the following claims of the United States:

a. Any civil, criminal, or administrative liability arising under Title 26, U.S. Code (Internal Revenue Code);

b. Any criminal liability;

c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care programs;

d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;

e. Any liability based upon such obligations as are created by this Agreement;

f. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services; and

g. Any liability for failure to deliver goods or services due.

6. Relator and his heirs, successors, attorneys, agents, and assigns agree not to object to this Agreement and agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B) and, conditioned upon receipt of Relator's share, Relator, for himself individually, and for his heirs, successors, agents, and assigns, fully and finally releases, waives, and forever discharges the United States, its officers, agents, and employees, from any claims arising from or relating to 31 U.S.C. § 3730 in the Civil Action; from any claims arising from the filing of the Civil Action; and from any other claims for a share of the Federal Settlement Amount; and in full settlement of any claims Relator may have under this Agreement against the United States. This Agreement does not resolve or in any manner affect any claims the United States has or may have against Relator arising under Title 26, U.S. Code (Internal Revenue Code), or any claims arising under this Agreement.

7. a. Conditioned upon receipt of all payments described in Paragraph 1, Relator, for himself, and for his heirs, successors, attorneys, agents, and assigns, agrees to release Walgreens from any and all liability arising from the Covered Conduct, and under 31 U.S.C. § 3730(d) for expenses or attorney's fees and costs.

b. Walgreens, its current and former officers, directors, agents, and employees, agree to release Relator, his heirs, successors, attorneys, agents, and assigns, from any liability arising from the Covered Conduct, and under 31 U.S.C. § 3730(d) for expenses or attorney's fees and costs.

8. Walgreens waives and shall not assert any defenses Walgreens may have to any criminal prosecution or administrative action relating to the Covered Conduct that is based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this

Agreement bars a remedy sought in such criminal prosecution or administrative action. Walgreens is specifically not waiving any other defenses it may have. Nothing in this Paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

9. Walgreens fully and finally releases the United States, its agencies, employees, servants, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Walgreens has asserted, could have asserted, or may assert in the future against the United States, its agencies, employees, servants, and agents, related to the Covered Conduct and the United States' investigation and prosecution of the Covered Conduct.

10. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare carrier or intermediary, or any state payer, related to the Covered Conduct; and Walgreens shall not resubmit to any Medicare carrier or intermediary, or any state payer any previously denied claims related to the Covered Conduct, and shall not appeal any such denials of claims.

11. Walgreens agrees to the following:

a. Unallowable Costs Defined: That all costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47; and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg and 1396-1396v; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Walgreens, its present or former officers, directors, employees, shareholders, and agents in connection with the following shall be

“unallowable costs” on government contracts and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP):

- (1) the matters covered by this Agreement;
- (2) the United States’ audit(s) and civil and/or criminal investigation(s) of the matters covered by this Agreement;
- (3) Walgreens’ investigation, defense, and corrective actions undertaken in response to the United States’ audit(s) and civil and/or any criminal investigation(s) in connection with the matters covered by this Agreement (including attorney’s fees);
- (4) the negotiation and performance of this Agreement;
- (5) the payment Walgreens makes to the United States pursuant to this Agreement and any payments that Walgreens may make to Relator, including costs and attorneys fees; and
- (6) the negotiation of, and obligations undertaken pursuant to the CIA to:
 - (I) retain an independent review organization to perform annual reviews as described in Section III of the CIA; and
 - (ii) prepare and submit reports to the OIG-HHS.

However, nothing in this Paragraph 11.a.(6) that may apply to the obligations undertaken pursuant to the CIA affects the status of costs that are not allowable based on any other authority applicable to Walgreens. (All costs described or set forth in this Paragraph 11.a. are hereafter “unallowable costs.”)

b. Future Treatment of Unallowable Costs: If applicable, these unallowable costs shall be separately determined and accounted for by Walgreens, and Walgreens shall not charge such unallowable costs directly or indirectly to any contracts with the United States or any State Medicaid

program, or seek payment for such unallowable costs through any cost report, cost statement, information statement, or payment request submitted by Walgreens or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: If applicable, Walgreens further agrees that within 90 days of the Effective Date of this Agreement it shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid and FEHBP fiscal agents, any unallowable costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by Walgreens or any of its subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the unallowable costs. Walgreens agrees that the United States, at a minimum, shall be entitled to recoup from Walgreens any overpayment plus applicable interest and penalties as a result of the inclusion of such unallowable costs on previously-submitted cost reports, information reports, cost statements, or requests for payment.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by Walgreens or any of its subsidiaries or affiliates on the effect of inclusion of unallowable costs (as defined in this Paragraph) on Walgreens or any of its subsidiaries or affiliates' cost reports, cost statements, or information reports.

d. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or re-examine Walgreens' books and records to determine that no unallowable costs have been claimed in accordance with the provisions of this Paragraph.

12. Walgreens agrees to cooperate fully and truthfully with the United States' investigation related to the Covered Conduct of individuals and entities not released in this Agreement. Upon reasonable notice, Walgreens shall encourage and agrees not to impair the cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and encourage the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. Upon reasonable request, Walgreens agrees to furnish to the United States complete and unredacted copies of all documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by its counsel or other agent, unless such material is covered by a valid claim of privilege.

13. Except as provided herein, this Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity, except to the extent provided for in Paragraphs 2, 3, 4, and 14, below.

14. Walgreens waives and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

15. Walgreens warrants that it has reviewed its financial situation and that it currently is solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following payment to the United States of the Settlement Amount. Further, the Parties

warrant that, in evaluating whether to execute this Agreement, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Walgreens, within the meaning of 11 U.S.C. § 547(c)(1); and (b) conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to that Walgreens was or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

16. Except as expressly provided to the contrary in this Agreement, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

17. Walgreens represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

18. Relator represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

19. This Agreement is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement is the United States District Court for the Northern District of Illinois, except that disputes arising under the CIA shall be resolved exclusively under the dispute resolution provisions in the CIA.

20. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

21. Upon receipt of all payments described in Paragraph 1(a) through 1(d) above, the United States, Relator, and Walgreens shall promptly file a joint motion asking the Court hearing the Civil Action (1) to dismiss with prejudice the Covered Conduct counts in the Civil Action pursuant to the terms of the Agreement, (2) to dismiss with prejudice any remaining claims in the Civil Action not addressed in this Agreement, (3) to retain jurisdiction of the Civil Action solely for purposes of deciding any motion for attorney's fees and related nontaxable expenses that may be filed pursuant to paragraph 1(e) above, and (4) to set a schedule for the filing of any such motion as described in paragraph 1(e) above.

22. The individuals signing this Agreement on behalf of Walgreens represent and warrant that they are authorized by Walgreens to execute this Agreement. The individual signing this Agreement on behalf of Relator represents and warrants that he is authorized by the Relator to execute this Agreement. The United States signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

23. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

24. This Agreement is binding on and inures to the benefit of Walgreens' successors, transferees, heirs, and assigns.

25. This Agreement is binding on Relator's respective successors, transferees, heirs, and assigns.

26. All Parties consent to the disclosure of this Agreement, and information about this Agreement, to the public.

27. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

EXHIBIT A

Walgreen Co.

Walgreen Arizona Drug Co.

Bond Drug Co. Of Illinois, LLC

Happy Harry's, Inc.

Walgreen Hastings Co.

Walgreen of Puerto Rico, Inc.

Walgreen Eastern Co.

Walgreen of San Patricio, Inc.

Walgreen Louisiana Co.

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____
LINDA A. WAWZENSKI
Assistant United States Attorney
Northern District of Illinois

DATED: _____

BY: _____
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health
and Human Services

Walgreen Co. - DEFENDANT

DATED: _____

BY: _____

DANA I. GREEN
Senior Vice President
General Counsel and Corporate Secretary
Walgreen Co.

DATED: _____

BY: _____

FREDERICK ROBINSON
Fulbright & Jaworski L.L.P.

Bernard Lisitza - RELATOR

DATED: _____

BY: _____
BERNARD LISITZA

DATED: _____

BY: _____
MICHAEL I. BEHN
Counsel for Bernard Lisitza
Behn & Wyetzner, Chartered
55 W. Wacker Drive
Suite 950
Chicago, Illinois 60601
(312) 629-0000