IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, *ex rel.* SARAH BEHNKE, Plaintiffs, v. CVS CAREMARK CORP. (n/k/a CVS HEALTH CORP.); CAREMARKPCS HEALTH LLC; CVS CAREMARK PART D SERVICES, LLC; and CAREMARK RX, LLC (f/k/a CAREMARK RX, INC.), Defendants.	Civil Action No. 14-cv-824 (MSG)

DEFENDANTS' OPENING BRIEF ON PENALTIES AND TREBLING

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INTRODUCTION

The Court's assessment of penalties under the FCA should be limited to the draft DIR submissions sent from Caremark to its plan customers, Aetna and SilverScript. The Court has already determined that "[t]here was no failure to report pharmacy GER guarantees unless and until the DIR reports did not reflect those guarantees." Op. 99 (citation omitted). Using the number of PDEs (some 43 million records) as the basis for counting civil penalties, rather than DIR reports, would be inconsistent with the evidence at trial and the Court's opinion. The Court should award no more than $5,500 in penalties for each of the ***four*** draft DIR submissions Caremark sent to Aetna and SilverScript in 2013 and 2014. Any greater number of DIR "false claims" would not be based on Caremark's specific conduct and would also run afoul of Supreme Court precedent concerning aggregate submissions.

Given the facts of this case, the Court should decline to award treble damages. The FCA's treble damages provision, as applied in this case, would run afoul of constitutional limits under the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fifth Amendment. Instead, the Court should follow the Supreme Court's guidance in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), to award punitive damages of no more than a 1:1 ratio with compensatory damages ($95 million). In this case, a 1:1 ratio between punitive damages and compensatory damages "reach[es] the outermost limit of the due process guarantee." *Id.* at 425. The constitutional prohibition on excessive punitive damages also requires that the false claims be measured based on DIR reports, rather than PDE submissions, which could create a ratio of punitive damages to compensatory damages exceeding 2,000:1.

I. Penalties Should Be Based on DIR "False Claims"

A. At Most, Relator Proved Four DIR-Based "False Claims" for Penalties

Penalties under the FCA are based on the number of false claims. 31 U.S.C. § 3729(a); *see also United States v. Bornstein*, 423 U.S. 303, 309–12 (1976). Determining the number of false claims for the purpose of penalties "is a fact-bound inquiry that focuses on the specific conduct of the defendant." *United States v. Krizek*, 111 F.3d 934, 939 (D.C. Cir. 1997); *see also United States ex rel. Bahnsen v. Bos. Sci. Neuromodulation Corp.*, 2018 WL 4604307, at *4 (D.N.J. Sept. 24, 2018) ("The focus in determining a claim under the FCA is on Defendant's actions."). The exact number of penalties depends on "the commission of acts which cause false claims to be presented." *United States ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98 v. Farfield Co.*, 438 F. Supp. 3d 348, 389 (E.D. Pa. 2020), aff'd, 5 F.4th 315 (3d Cir. 2021) (quotation marks omitted).

The Court has determined that "the DIR reports" are the "false" claims at issue. Op. 100. Specifically, Aetna and SilverScript each submitted a summary DIR report at the end of the year based on the previous year's claims. Op. 34; Stip. ¶¶ 130–31; *see also, e.g.*, PTX-0427 (SilverScript 2013 DIR report). Each of those end-of-year reports was required to reflect the DIR the plan sponsors received, which the Court held includes amounts associated with Caremark's GER guarantees with Rite Aid and Walgreens. SJ 15; *see also* Stip. ¶¶ 130–31; DX220.008 ("DIR is any and all rebates, subsidies, or other price concessions from any source (including manufacturers, pharmacies, enrollees, or any other person) that serve to decrease the costs incurred by the Part D sponsor (whether directly or indirectly) for the Part D drug.").

Where, as here, the defendants did not submit a claim for payment to the government directly, the FCA requires "focus . . . upon the specific conduct" of the defendant, not the intermediary or the government. *Bornstein*, 423 U.S. at 313; *see also Bahnsen*, 2018 WL

4604307, at *4. For instance, in *Bornstein*, the defendant subcontractor's "three separately invoiced shipments" caused a contractor to submit 35 false claims to the government. *Id.* at 312. Despite the higher number of claims submitted to the government, the Court still assessed ***three*** penalties claims because that was the number of acts committed by the defendant. *Id.* at 312–13.

Here, the acts by Caremark that caused the submission of false claims were Caremark's submission of draft or template DIR reports to Aetna and SilverScript, which caused the plan sponsors to submit false DIR reports—the false claims—to CMS in 2013 and 2014. Op. 62–64; SJ 83. Because Caremark's draft DIR reports or templates caused the submission of the false claims, those draft reports are the relevant "acts" committed by Caremark to be counted for the purposes of determining statutory penalties.

The Court therefore should award ***four*** penalties because that is the number of draft DIR reports and Excel templates Caremark submitted to Aetna and SilverScript. For each year at issue, Caremark provided a draft report to SilverScript, "which SilverScript would review and submit" to CMS to meet the plan's reporting requirements. SJ 40; Stip. ¶¶ 130–31 ("Part D sponsors do not report DIR for every dispensing event. Sponsors instead submit DIR reports at the end of each year."). As for Aetna, Caremark likewise provided "DIR amounts to Aetna in the form of . . . an Excel spreadsheet based on the CMS template for DIR reports" each year. Op. 35. Caremark only had overall pharmacy GER guarantees with Walgreens and Rite Aid covering Aetna and SilverScript in 2013 and 2014, meaning there are only two relevant years of draft DIR reports. Op. 24, 45–46; Stip. ¶¶ 162, 166. In short, in 2013 and 2014 Caremark provided one draft DIR report to SilverScript per year and one draft excel template to Aetna per year reflecting DIR for all pharmacies, for a total of four relevant acts.

Relator may argue that there are 513 DIR-based false claims submitted by Aetna and SilverScript on which penalties should be assessed. That number vastly overstates the number of acts subject to penalties for two reasons. First, the number does not accurately reflect *Caremark's* actions as required when assessing penalties. To be sure, Relator introduced at trial summary charts her expert prepared that included the header, "DIR Reports That Included Transactions For Walgreens or Rite Aid" submitted in 2013 and 2014, totaling 513. PTX-0570; PTX-0571. But the 513 number included on those charts is drawn from the final DIR reports Aetna and SilverScript submitted to CMS each year, and not from Caremark's drafts or templates. *Id.*; Stip. ¶¶ 130–31. The number thus does not reflect the acts *Caremark* committed to cause the false claims. Because her 513 number does not address Caremark's "specific conduct," Supreme Court precedent prohibits attributing that number of penalties to Caremark. *Bornstein*, 423 U.S. at 313 (determining that prior version of the FCA "requires, rather, that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures").

Second, Relator's 513 number would be incorrect even if Caremark had submitted the final DIR reports to the government itself because, in essence, it counts each line item on a single document as a separate claim. Specifically, the 513 number is the total of the individual plan and year combinations extracted from the handful of summary DIR reports submitted by the plan sponsors; it is not a count of the plan sponsors' summary DIR reports that were submitted to CMS. *Id.*; Smith, 3/17/25 Tr. 184:7–10 (describing PTX-0571); Defs. Damages Fact 9. "When a fraudulent claim consists of multiple components, the submission of an aggregate claim, rather than its individual components, is the act that creates liability under the False Claims Act." *Oasis Int'l Waters, Inc. v. United States*, 134 Fed. Cl. 405, 453 (Fed. Cl. 2016). *United States v.*

Krizek shows why. There, following precedent from *Bornstein*, the D.C. Circuit determined that a final form submitted to Medicare and Medicaid determined the number of claims to be counted as penalties. 111 F.3d at 939–40. The court refused to count each of the individual false billing codes included in a form as a separate false claim because those individual charges were "totaled to produce one request or demand." *Id.* Because the defendant had only committed one false act in preparing the form, there could be only one claim per form. *Id.* So too here.

In sum, Caremark only provided ***four*** excel templates or draft DIR reports to plan sponsors (two plan sponsors over two years) that did not include the effect of overall pharmacy GER guarantees, so there can only be four false claims for the purposes of statutory penalties.

Relator may also argue that the Court should look beyond the DIR reports to determine the number of penalties. Given the Court's ruling on which claims are false, other claims unrelated to the DIR reports (such as PDEs) are irrelevant. At summary judgment, the Court defined the relevant false claims, explaining that because "Aetna and SilverScript were required to submit PDE records and DIR reports that, *collectively,* reflected" Caremark's pharmacy GER guarantees and did not do so, Op. 99 (quoting SJ 63 (emphasis added)), those reports were collectively false, SJ 68. The evidence demonstrated that the PDEs needed to and did report *point-of-sale* prices. Defs.' Damages Facts 1–4; Defs.' COL at 16; *see also* Op. 99 (PDE "reported point of sale prices"). And, because the DIR reports were submitted later, "[t]here was no failure to report pharmacy GER guarantees unless and until the DIR reports did not reflect those guarantees." Op. 99 (citation omitted). Because "the DIR reports are a better indicator of Caremark's false claims in this case," Op. 103, penalties should be determined based Caremark's behavior causing the submission of the false DIR reports.

B. The Court Should Award $5,500 in Penalties Per False Claim

Caremark's four draft reports or Excel templates were submitted before November 2015. *See* PTX-0163 at 6 (establishing deadline of June 30, 2014 for 2013 DIR reports); PTX-0164 at 1 (establishing deadline of June 30, 2015 for 2014 DIR reports); L. Norwalk 3/18/25 Tr. 144:7–12. Thus, the relevant statutory penalty range is $5,500 to $11,000. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9) (Adjustments to penalties for violations occurring on or before November 2, 2015; min. $5,500 and max. $11,000).

Courts have discretion to assess penalties within the applicable range based on the totality of the circumstances. *United States ex rel. Tyson v. Amerigroup Ill., Inc.*, 488 F. Supp. 2d 719, 741 (N.D. Ill. 2007). The mere fact that Defendants violated the FCA does not support a higher degree of penalties, because penalties only apply once a fact-finder has already determined that a defendant committed fraud. *See id.* at 742 (imposing minimum penalties despite "egregious and calculated" Medicare fraud). Critically, a lesser degree of scienter supports a lower level of penalties. Within the Third Circuit, district courts "consider[] 'fairness' when awarding the minimum civil penalties." *United States ex rel. V.I Hous. Auth. v. Coastal Gen. Const. Servs. Corp.*, 299 F. Supp. 2d 483, 489 (D.V.I. 2004) (citation omitted).

Here, the totality of the circumstances counsels in favor of per-claim penalties at the low end of the available range. Significantly, the Court found "that Caremark acted 'recklessly or with deliberate ignorance of the truth,'" Op. 68 (citation omitted), but not with actual knowledge. This lower level of intent warrants a lower penalty. *See U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc.*, 501 F. Supp. 2d 51, 56 (D.D.C. 2007) (assessing penalties based, in part, on the "seriousness of the misconduct, [and] the scienter of the defendants," and finding that the defendants' actual knowledge counseled in favor of maximum penalties); *U.S. v. Speqtrum, Inc.*, 2016 WL 5349196, at *4 (D.D.C. Sept. 23, 2016), dismissed, 2017 WL 11776155 (D.C. Cir.

May 5, 2017) (awarding maximum penalty because the defendant's conduct was "egregious and willful" including forging signatures and billing for hours not worked). Even in cases where courts left open the possibility that the wrongdoer acted "knowingly," courts have awarded minimum damages because "the facts [were] not so egregious as to warrant the maximum." *Lamb Engr. & Const. Co. v. U.S.*, 58 Fed. Cl. 106, 112 n.4 (Fed. Cl. 2003) (finding that Lamb acted "either knowingly or with reckless disregard of the truth or falsity of the claims submitted" yet awarding minimum penalties).

Here, while the Court found Caremark acted with scienter, the Court observed "there is no evidence that the pharmacies 'sent' a payment back to Caremark," Op. 72, and numerous Caremark witnesses testified that they believed this feature meant that the guarantees did not need to be reported as DIR. Op. 82. Caremark employees acted without the benefit of any previous ruling or agency guidance that applied the reporting regulations to pharmacy GER guarantees generally or to overall pharmacy GER guarantees specifically. This Court was the first to apply these highly complex regulations to pharmacy GER guarantees.

Additionally, the trial record and the Court's findings reflect that Caremark did not consistently or pervasively violate the False Claims Act. Caremark contracts with more than 65,000 pharmacies nationwide, yet the false reporting the Court found implicated only Walgreens and Rite Aid. *See* D. Gugliuzza, 3/14/25 Tr. 51:20–22. The Court's Opinion found that Caremark profited from its overall pharmacy GER guarantees with Walgreens and Rite Aid, Op. 84–87, but Caremark did not insist on overall Pharmacy GER guarantees with the thousands of small, independent pharmacies over which Caremark had significant leverage. And even as to Walgreens and Rite Aid, Caremark's conduct was limited to certain years. *See* Dkt. No. 463-1 at

DD11.3, DD11.4, DD11.5 (pages 117–19 of PDF) (Defendants' demonstratives) (showing plan, year, and pharmacy combinations).

When the totality of the circumstances is considered, this Court should exercise its discretion to award $5,500 in penalty per false claim, for a total of $22,000.

II. Punitive Damages—Inclusive of the Statutory Multiplier and Per-Claim Penalties—Must Be No More than an Amount Equal to Compensatory Damages

The Court must analyze whether the punitive damages under the FCA—including per-claim penalties and statutory treble damages—would run afoul of established constitutional limits. The combination of a substantial compensatory damages award ($95 million), plus potential trebling and per-claim penalties, creates significant constitutional problems.

The Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fifth Amendment limit punitive damages and penalties. Awarding per-claim penalties based on the number of PDEs would not only contravene the statute and the Court's opinion, but would plainly violate the Excessive Fines Clause and Due Process Clause.

Given the facts of this case, the maximum punitive award that should be awarded—inclusive of both the statutory multiplier and the per-claim penalty based on DIR—is $95 million, or a 1:1 ratio with compensatory damages.

A. The Constitution Sets Strict Limits on Punitive Damages, Including FCA Sanctions

In *State Farm*, the Supreme Court imposed significant due process limitations on punitive damages. 538 U.S. 408. Courts since *State Farm* have developed a body of law restricting the ratio of punitive to actual damages. "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. Enhanced ratios are constitutional only when the underlying conduct was "egregious." *Id.*

Courts apply these constitutional limitations to False Claims Act penalties awards through the Excessive Fines Clause of the Eighth Amendment or the Due Process Clause of the Fifth Amendment. *See, e.g.*, *United States ex rel. Grant v. Zorn*, 107 F.4th 782, 797–800 (8th Cir. 2024) (holding that the FCA punitive sanctions imposed by the district court violated the Excessive Fines Clause); *United States ex rel. Taylor v. Healthcare Assocs. of Tex., LLC*, 2025 WL 624493, at *8 (N.D. Tex. Feb. 26, 2025) (holding that the FCA's "minimum civil penalty is unconstitutionally excessive as applied in this case"); *United States ex rel. Fesenmaier v. Cameron-Ehlen Grp., Inc.*, 715 F. Supp. 3d 1133, 1158 (D. Minn. 2024) (holding that the Excessive Fines Clause "precludes the imposition of such a massive imposition of penalties").

B. Per-Claim Penalties Based on PDE Submissions Would Plainly Violate the Excessive Fines Clause and Due Process Clause

As discussed in Section I, *supra*, per-claim penalties must be based on DIR reports. Awarding per-claim penalties based on the number of PDEs would not only contravene the statute and the Court's opinion, *supra* p. 2–5, but would plainly violate the Excessive Fines Clause and Due Process Clause. Relator's summary exhibit at trial represented that her allegations concerned 43,668,182 PDEs. PTX-0570. Applying the low-end of the penalty range of $5,500 per PDE would result in an award of more than $***240 billion***—or a staggering ratio of 2,528:1 compared to compensatory damages.

Courts consistently hold that ratios of punitive damages to compensatory far less than 2,528:1 are unconstitutional. Even in "egregious" cases—which this is not—a 4:1 ratio is the maximum. *See, e.g., Grant*, 107 F.4th at 797–800 (holding that a 75:1 ratio of penalties to compensatory damages was unconstitutional, and remanding for a ruling consistent with *State Farm*); *Taylor*, 2025 WL 624493, at *7 (condemning greater-than-100:1 ratio of penalties to damages, which was "vastly out of alignment with the harm to the government in this case");

Fesenmaier, 715 F. Supp. 3d at 1157–60 (holding that a ratio of approximately 8:1 of punitive damages to compensatory damages was unconstitutional under the Excessive Fines Clause).

C. Constitutional Punitive Damage Limitations Apply to FCA's Statutory Treble Damages

FCA's statutory treble damages are also subject to constitutional challenges. While most FCA cases that analyze the constitutional limits on punitive damages do so in the context of per-claim penalties, the same constitutional analysis applies to the FCA's statutory treble damages. "The FCA's combination of treble damages with per-claim penalties constitutes a punitive sanction that falls within the reach of the Excessive Fines Clause." *Grant*, 107 F.4th at 797. And "the FCA's treble damages provision, at least in combination with the Act's statutory penalty provision, is not solely remedial and therefore is subject to an Excessive Fines Clause analysis under the Eighth Amendment." *United States v. Mackby*, 261 F.3d 821, 831 (9th Cir. 2001); *see also United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014) ("The FCA's treble damages in combination with the per-claim penalties are punitive for purposes of the Excessive Fines Clause.").

The reason most FCA cases analyze this issue in the context of the per-claim penalties (rather than statutory treble damages) is that cases with relatively low compensatory damages can include a large number of false claims. *See, e.g.*, *Grant*, 107 F.4th at 797–99 (applying constitutional limits to reduce damages award that consisted of $86,332 in compensatory damages and more than $6 million in per-claim penalties under the FCA); *Taylor*, 2025 WL 624493, at *7–8 (exercising discretion to reduce a damages award that otherwise consisted of $2.75 million in compensatory damages and nearly $300 million in per-claim penalties under the FCA).

Here, compensatory damages are substantial ($95 million), yet the number of false claims is relatively low. But under either scenario—low compensatory damages and a large number of false claims or substantial compensatory damages and a small number of false claims—the overriding constitutional concern is the same. To comply with the constitutional limits on punitive damages described in *State Farm*, the Court must consider both potential treble damages and per-claim penalties.

D. Punitive Damages Should Be Limited to 1:1 Compensatory Damages

Rather than trebling compensatory damages and imposing per-claim penalties, Caremark's total punitive damages should be capped at $95 million (in addition to the substantial $95 million in compensatory damages). In *State Farm*, the Supreme Court emphasized that where compensatory damages are "substantial," a ratio "perhaps only equal to compensatory damages . . . can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425. The key considerations are the "reprehensibility" of the defendant's conduct and the ratio of punitive to compensatory damages. *Id.* at 419, 425.

Under these principles and the facts of this case, a 1:1 ratio of penalties to actual damages is all the Constitution allows. Start with the reprehensibility of Caremark's conduct. As discussed in I.B, *supra*, Caremark did not act with "actual knowledge." Nor did Caremark consistently or pervasively violate the False Claims Act. Nor did Caremark exercise its significant leverage over smaller pharmacies to impose overall pharmacy GER guarantees to its benefit.

The Court's compensatory damages award of $95 million is undoubtedly "substantial" under *State Farm*. Indeed, in punitive damages cases when compensatory damages are hundreds of thousands of dollars—orders of magnitude less than the $95 million award here—courts have applied *State Farm*'s 1:1 ratio.

- *Bouveng v. NYG Capital LLC*, 175 F. Supp. 3d 280, 346–50 (S.D.N.Y. 2016) (reducing punitive damages to a 1:1 ratio to actual damages of $1.5 million despite "malicious, calculated, and repeated" defamation).

- *Saccameno v. U.S. Bank Nat'l Assoc.*, 943 F.3d 1071, 1091–92 (7th Cir. 2019) (reducing punitive damages from $3 million to $582,000, or 1:1 ratio of damages awarded across all claims in Fair Debt Collection Practices Act, Real Estate Settlement Procedures Act, and Illinois Consumer Fraud and Deceptive Business Practices Act case).

- *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1073–75 (10th Cir. 2016) (reducing punitive damages of $22,500,000 to $1,950,000, or 1:1 ratio in personal-injury action).

- *Dawe v. Corrections USA*, 506 Fed. Appx. 657, 658–60 (9th Cir. 2013) (reducing punitive damages below 1:1 ratio, from $10,085,000 to $2,368,406, where compensatory damages were $2,591,409 for defamation, tortious interference, and false imprisonment claims).

- *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1207–08 (10th Cir. 2012) (reducing punitive damages from $2 million to $630,307, or 1:1 with compensatory damages, in retaliatory-discharge case).

- *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 56 (1st Cir. 2009) (reducing punitive damages from $350,000 to $35,000, or 1:1 with compensatory damages, in illegal arrest § 1983 suit).

- *Morgan v. N.Y. Life Ins. Co.*, 559 F.3d 425, 443 (6th Cir. 2009) (vacating $10 million punitive damages award and remanding for district court to enter remittitur in an amount not to exceed compensatory damages, or a maximum 1:1 ratio).

- *Jurinko v. Medical Protective Co.*, 305 Fed. Appx. 13, 15, 30 (3d Cir. 2008) (reducing punitive damages from $6,250,000 to $1,658,345, or 1:1 with compensatory damages, in insurance bad-faith case).

- *Bach v. First Union Nat. Bank*, 486 F.3d 150, 156–57 (6th Cir. 2007) (reducing punitive damages from $2.2 million to $400,000, or 1:1 with compensatory damages for Fair Credit Reporting Act violations).

To be sure, the above cases are not specific to reducing treble damages in the FCA context. But given the facts of this case and the substantial compensatory damages award, this is a case where punitive damages "only equal to compensatory damages . . . can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425.

Accordingly, the Court should decline to award full treble damages and instead should award $95 million total in punitive damages (including $22,000 in per-claim penalties across the four draft DIR reports).

CONCLUSION

The Court should award no more than $5,500 in penalties for each of the four draft DIR reports that Caremark submitted—a total of $22,000. The Court should decline to treble compensatory damages and instead award a total punitive damages figure of $95 million (inclusive of the $22,000 in per-claim penalties).

Dated: July 9, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2025, a true and correct copy of the foregoing document was filed electronically through the ECF system and counsel of record received notification via ECF.

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