No. 20-1767

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

J.R., individually and on behalf of her minor children A.R. and H.K., B.Y., J.H., and J.S., individually, and on behalf of all others similarly situated,
Plaintiffs-Appellants,
vs.
WALGREENS BOOTS ALLIANCE, INC. and WALGREEN CO.,
Defendants-Appellees.

On Appeal from
United States District Court For the District of South Carolina, Charleston Division

Honorable David C. Norton

BRIEF OF DEFENDANTS-APPELLEES

NELSON MULLINS RILEY & SCARBOROUGH LLP
David E. Dukes (Fed. ID 00635)
david.dukes@nelsonmullins.com
Amanda S. Kitts (Fed. ID 9005)
amanda.kitts@nelsonmullins.com
Adam J. Hegler (Fed. ID 11401)
adam.hegler@nelsonmullins.com
Post Office Box 11070
Columbia, SC 29211

SIDLEY AUSTIN LLP
Robert N. Hochman
rhochman@sidley.com
Scott D. Stein
sstein@sidley.com
Matthew C. Bergs
mbergs@sidley.com
Ross O. Kloeber
rkloeber@sidley.com
One South Dearborn St.
Chicago, IL 60603

Attorneys for Defendants-Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Walgreens participates in a federal program—the 340B Drug Pricing Program—which provides significant discounts on drugs to certain hospitals, clinics, and other health care providers that serve large numbers of low-income patients who often have limited access to health care. Through contractual arrangements with such providers, Walgreens dispenses medications purchased through the 340B Program and implements processes designed to help achieve the Program's goals and ensure compliance with its strict requirements.

Appellants allege that the way Walgreens administers this Program violates their privacy rights under South Carolina law. They do not allege Walgreens improperly discloses their data to any third party. Rather, Appellants contend Walgreens' internal data processing related to the Program violates South Carolina privacy laws.

After full briefing and oral argument, the district court dismissed all of Appellants' claims. The district court recognized allowing Appellants' claims to proceed would require novel and unfounded expansions of South Carolina law. Walgreens is not alleged to have exposed any personal information to anyone not authorized to see it, and its handling of such information is consistent with its obligations as a matter of both state and federal law. This Court should affirm.

STATEMENT OF CASE

A. The Federal 340B Drug Pricing Program

Congress enacted the 340B Program in 1992 to enable health care providers "to stretch scarce Federal resources as far as possible, reaching more eligible patients, and providing more comprehensive services." 340B Drug Pricing Program Ceiling Price and Manufacturer Civil Monetary Penalties Regulation, 82 Fed. Reg. 1210, 1210 (Jan. 5, 2017). Under the Program, participating drug manufacturers must provide certain eligible prescription drugs at significantly discounted prices to eligible health care providers that enroll in the Program. *See* 42 U.S.C. § 256b. These providers are referred to as "covered entities." *Id.* Covered entities include health care providers, many of which are nonprofits, that often reach especially needy patients or those with limited access to health care, such as rural hospitals that serve low-income communities. *See* 42 U.S.C. § 256b(a)(4). Covered entities may pass the savings generated through the Program on to their patients or use them to defray the costs of providing needed health care services.

Given the steep savings the Program provides, the statute prohibits covered entities from "resell[ing] or otherwise transfer[ing] [a 340B-discounted] drug to a person who is not" eligible. 42 U.S.C. § 256b(a)(5)(B). This is often referred to as the prohibition on "diversion." *Id.* Diversion carries the potential for significant penalties. 42 U.S.C. § 256b(d)(2)(B)(v).

Determining a prescription's eligibility for the 340B Program discount is complex. For each prescription, all of the following must be considered: (1) the health care provider that is requesting the 340B discount (and whether that provider is a covered entity enrolled in the 340B Program); (2) the type of covered entity; (3) the prescribing doctor; (4) the nature of the relationship between the prescribing doctor and the 340B covered entity; (5) the drug prescribed; and (6) the nature of the relationship between the covered entity and the patient for whom the drug is prescribed. *See* 42 U.S.C. § 256b; Notice Regarding Section 602 of the Veterans Health Care Act of 1992; Patient and Entity Eligibility, 61 Fed. Reg. 55,156, 55,157-58 (Oct. 24, 1996).

Due to the diversion prohibition, it is critical for covered entities to accurately determine and document a prescription's eligibility for the Program discount. Accordingly, the 340B Program imposes record-keeping requirements on covered entities and requires that they submit to audits by the Department of Health and Human Services ("HHS") and participating drug manufacturers. 42 U.S.C. § 256b(a)(5)(C); Notice Regarding 340B Drug Pricing Program—Contract Pharmacy Services, 75 Fed. Reg. 10,272, 10,275 (Mar. 5, 2010); Manufacturer Audit Guidelines and Dispute Resolution Process 0905-ZA-19, 61 Fed. Reg. 65,406 (Dec. 12, 1996).

B. 340B Program Contract Pharmacies

To use the 340B Program, covered entities must have a means of dispensing 340B-eligible drugs to 340B-eligible patients. As the federal government has recognized since the Program's early years, many covered entities lack the necessary infrastructure and financial resources to operate in-house pharmacies. *See* Notice Regarding Section 602 of the Veterans Health Care Act of 1992; Contract Pharmacy Services, 61 Fed. Reg. 43,549, 43,550 (Aug. 23, 1996) (noting, without contract pharmacies, covered entities "would be faced with the untenable dilemma of having either to expend precious resources to develop their own in-house pharmacies (which for many would be impossible) or forego participation in the program altogether"); JAMTD 0544-46.

In 1996, the agency within HHS that administers the 340B Program—the U.S. Health Resources and Services Administration ("HRSA")—issued guidelines making clear covered entities may engage a retail pharmacy ("contract pharmacy") to dispense 340B-eligible drugs purchased by the covered entity rather than having to rely on an in-house pharmacy. *See* 61 Fed. Reg. at 43,549. When a covered entity writes a prescription for a patient, the patient chooses where to fill that prescription; patients are not required to fill their prescription at a contract pharmacy. *See* 61 Fed. Reg. at 43,552. When patients visit contract pharmacies though, they may receive medication that is purchased by the covered entity through the Program. In 2010,

HRSA expanded covered entities' ability to use contract pharmacies to help increase access to medications discounted under the Program. *See* 75 Fed. Reg. at 10,273 (noting expansion would have "significant benefit to patients"). Importantly, regardless of whether covered entities operate an in-house pharmacy or engage contract pharmacies, covered entities remain responsible for compliance with 340B Program requirements, including the prohibition on diversion. JAMTD 0545.

Contract pharmacies must register with HRSA and enter into contracts with the covered entities they serve. 75 Fed. Reg. at 10,277; HRSA, Contract Pharmacy Services, Oct. 2018, https://www.hrsa.gov/opa/implementation/contract/index.html. HRSA has identified twelve "essential elements" to ensure covered entities meet compliance obligations under the 340B Program when they engage contract pharmacies. *See* 75 Fed. Reg. at 10,277-79. These essential elements provide, among other things, that contract pharmacies shall "maintain a tracking system suitable to prevent diversion," "develop a system to verify patient eligibility," permit "periodic comparison of [the covered entity's] prescribing records with the contract pharmacy's dispensing records," supply reports such as "status reports of collections and receiving and dispensing records" to the covered entity, and establish "mechanisms to ensure availability of . . . information for periodic independent audits performed by the covered entity." *Id.* at 10,277-78. The essential elements also direct contract pharmacies to "assure that all pertinent reimbursement accounts

and dispensing records, maintained by the pharmacy, will be accessible *separately from the pharmacy's own operations* and will be made available to the covered entity, HRSA, and the [drug] manufacturer in the case of an audit." *Id.* at 10,278 (emphasis added). Put simply, HRSA requires covered entities and contract pharmacies to implement systems separate from the pharmacy's operations to facilitate auditing compliance with the 340B Program's detailed requirements to prevent diversion.

C. Filling a 340B Program Prescription at Walgreens

The dispensing, purchasing, and stocking of 340B Program drugs often follows what is called the "replenishment model." *See, e.g.*, 340B Drug Pricing Program Omnibus Guidance, 80 Fed. Reg. 52,300, 52,305 (Aug. 28, 2015) (describing replenishment model); *see also* 75 Fed. Reg. at 10,277 (similar); 61 Fed. Reg. at 43,549, 43,552. Under a replenishment model, pharmacies dispense 340B-eligible drugs to eligible patients from existing stock, and, if the prescription is confirmed to be 340B-eligible, pharmacies then replenish a corresponding amount of inventory with 340B-discounted medications. *Id.*; *see also* JAMTD 0102-03. Because the 340B Program allows only covered entities (*i.e.*, not contract pharmacies) to purchase drugs at discounted prices, contract pharmacies send purchase orders for replenishment stock to covered entities' wholesalers on the covered entities' behalves. 80 Fed. Reg. at 52,305. The wholesalers then ship the

drugs to the pharmacies, but bill covered entities for the drugs at the discounted prices. This portion is referred to as a "ship to, bill to" arrangement. *Id*. 75 Fed. Reg. at 10,277.

In the usual course of Walgreens' pharmacy operations, its payment for pharmacy services is the difference between the retail or insurance reimbursement price of a given prescription, and the commercial wholesale price at which Walgreens purchased it. In contrast, when prescriptions are filled under the 340B Program, the retail or insurance reimbursements are remitted by Walgreens to the covered entities, and the covered entities pay Walgreens administrative and dispensing fees. JAMTD 0102-03.

When Walgreens receives a prescription, the prescription information is entered into Walgreens' electronic database system called IntercomPlus. JAMTD 0036 ¶ 42. Each day, Walgreens electronically transfers the information within IntercomPlus to a central database called Enterprise Data Warehouse ("EDW"). JAMTD 0041 ¶ 68. Walgreens employs proprietary software called 340B Complete®, which extracts from EDW targeted data fields needed to assess 340B-eligibility and matches these data fields to verification data supplied by the covered entity, to identify 340B-eligible prescriptions and ensure that diversion does not occur. JAMTD 0092-95. This process permits restocking of prescription drugs through the replenishment model, creates records that confirm compliance with

Program requirements, and "assure[s] that all pertinent reimbursement accounts and dispensing records [are] . . . accessible separately from the pharmacy's own operations." 75 Fed. Reg. at 10,278. Through the 340B Complete® software's provider-facing portal, covered entities can access auditable records regarding their 340B-eligible prescriptions. JAMTD 0093-94.

D. The Complaint

Appellants are six Walgreens' customers (including two minor children of one Appellant) who allege they obtained prescriptions from Walgreens pharmacy locations in South Carolina. JAMTD 0030-31 ¶¶ 7-10. Appellants allege, as a part of the pharmacy services they procured, they were aware Walgreens appropriately uses personal information about pharmacy customers "to ensure the proper standard of care in dispensing pharmaceuticals to its customers," for "payment processing," and to "facilitate third-party payment to Walgreens," all of which is consistent with Walgreens' Notice of Privacy Practices ("NPP"). JAMTD 0035-36 ¶¶ 30, 39. Notwithstanding these proper uses, Appellants contend Walgreens improperly uses and "transfers" their "Personally Identifiable Information," or "PII," in connection with Walgreens' 340B contract pharmacy services. JAMTD 0029 ¶ 4, 0044 ¶¶ 83-86. Appellants define "PII" broadly to include virtually any element of information associated with a prescription, "including, but not limited to": "address; date of birth; payment information;" and other data. JAMTD 0029 ¶ 4. According to Appellants,

the manner by which Walgreens' software operates to ensure compliance with 340B Program obligations violates both federal and South Carolina law designed to protect the privacy of PII.

Appellants do not allege their PII is disseminated to any person outside of Walgreens. JAMTD 0561-62. Instead, Appellants attack Walgreens' wholly internal data analysis process, which is required to comply with the 340B program. First, Appellants allege Walgreens collects pharmacy customers' PII and enters the PII into the internal IntercomPlus database when prescriptions are submitted to Walgreens. JAMTD 0036 ¶ 42. Second, Appellants allege Walgreens "transfers, on a daily basis, all of its pharmacy customers' PII within IntercomPlus to" EDW, another internal Walgreens database. JAMTD 0041 ¶ 68. Third, Appellants allege Walgreens uses 340B Complete® to search data in EDW to identify prescriptions eligible for replenishment under the 340B Program. JAMTD 0041-42 ¶¶ 70-74.

In addition to ensuring 340B Program drugs are dispensed only for eligible patients, Appellants allege 340B Complete® performs a "secondary financial analysis," Br. at 5, that compares Walgreens' "profit margin" for dispensing the drug through the 340B Program and the "profit margin" for dispensing it outside the Program. JAMTD 0042-43 ¶¶ 74-75; JAMTD 0102. This allegation appears to characterize a portion of a 340B agreement with a covered entity that is attached to Appellants' Amended Complaint. The agreement states Walgreens will not use

340B Program inventory for an eligible prescription if doing so would result in a loss to the covered entity (*i.e.*, if the revenue to the 340B covered entity minus the fees owed to Walgreens would result in a negative balance on the transaction), which would be inconsistent with the goals of the 340B Program. *See* JAMTD 0102. That is, if the patient's insurance reimbursement amount would not cover the covered entity's cost for that particular prescription (*i.e.*, the 340B drug cost plus Walgreens' fees), then Walgreens supplies the prescription from its commercial inventory, and the prescription is not treated as a 340B prescription. Appellants allege that Walgreens considers its profit margin when determining whether to fulfill an eligible prescription through the 340B Program. JAMTD 0042 ¶ 74. But the contract between Walgreens and the covered entity makes clear that Walgreens' contractual obligation to protect the covered entity from having to pay more for a 340B eligible drug than it would pay if the drug were not 340B eligible applies regardless of whether Walgreens profits more or less from treating the drug as having been purchased outside the Program. JAMTD 0102.[1]

E. Procedural History and the District Court's Ruling

Appellants filed their initial Complaint and Motion for a Preliminary Injunction on February 14, 2019. Following briefing, pre-hearing discovery, and a

[1]Appellants have never alleged, nor could they, that the 340B program mandates 340B-eligible prescriptions be filled using drugs purchased at 340B prices even where doing so would be economically disadvantageous to the covered entity.

two-day hearing with live testimony from six witnesses, the district court, on October 4, 2019, denied the motion for a preliminary injunction because, among other reasons, Appellants had not shown a likelihood of success on the merits of any of their claims. ECF No. 114. [2]

Shortly thereafter, on October 18, 2019, Walgreens moved to dismiss the original complaint, ECF No. 117, and Appellants filed an amended complaint. JAMTD 0028. Walgreens again moved to dismiss on January 9, 2020, arguing, as it had previously, the district court lacked personal jurisdiction over Walgreens Boots Alliance, Inc. ("WBA") and Appellants failed to state a claim for relief as to any of their causes of action. JAMTD 0131-70. The district court heard argument, and, on July 2, 2020, dismissed the Amended Complaint in its entirety. JAMTD 0543-84.

The district court determined WBA had not waived its jurisdictional challenges by joining in Walgreen Co.'s opposition to Appellants' request for a preliminary injunction because its objection was timely pursuant to Federal Rule 12(h)(1) and because no practical purpose would have been served by forcing WBA to move sooner. JAMTD 0549-51. Further, the only theory Appellants proposed to establish personal jurisdiction over WBA in South Carolina was that Walgreen Co.

[2] All references to "ECF" are to the corresponding docket entries in *J.R., et al. v. Walgreens Boots Alliance, Inc., et al.*, Case No. 19-cv-00446.

is the alter ego of WBA, and the district court found Appellants failed to allege sufficient facts to pierce the corporate veil separating the entities. *Id.* at 0551-56.

Turning to the merits, the district court ruled Appellants failed to state any valid claim against Walgreen Co. The district court began with Appellants' common law invasion of privacy claim. The court concluded that, in South Carolina, any claim for invasion of privacy requires that the defendant has publicized plaintiff's private information, *see Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 684 S.E.2d 756, 759 (S.C. 2009), a requirement consistently confirmed by South Carolina case law. JAMTD 0558-61. As noted above, Appellants' theory of liability is that Walgreens transfers and analyzes their information *internally* only; they do not claim Walgreens has disclosed their information to anyone outside of Walgreens. Because Appellants did not allege Walgreens publicizes their PII, Appellants' claim failed. JAMTD 0559-62.

The district court next dismissed Appellants' claims for negligence per se based on alleged violations of the Health Insurance Portability and Accountability Act ("HIPAA") and the Federal Trade Commission Act ("FTCA"). HIPAA does not provide a private right of action, and therefore cannot be the basis of a negligence per se claim in South Carolina. JAMTD 0565. The court further ruled that, to the extent the FTCA provides a private right of action, Appellants did not allege conduct stating a valid FTCA claim. *Id.* at 0566-67. The district court also dismissed

Appellants' claims for negligence per se based on South Carolina's Prescription Information Privacy Act ("PIPA") because PIPA applies to external transfers of data only. *Id.* at 0572. The balance of Appellants' negligence claims, based on South Carolina's Pharmacy Practice Act ("PPA") and a pharmacist's professional standard of care, were similarly dismissed because none of those sources establish a duty that requires Walgreens to do more than it was alleged to have done to protect Appellants' PII. *Id.* at 0575-78. Appellants' cause of action for breach of contract was dismissed because the district court found Appellants did not identify any relevant agreement. Appellants' negligent training and supervision claim was also dismissed because Appellants did not allege intentional misconduct by the relevant Walgreens employees. *Id.* at 0573-74; 0578-79. Next, the district court determined Appellants' claim for unjust enrichment failed because they did not allege Walgreens retained a benefit conferred by Appellants under circumstances that would be unjust. *Id.* at 0581-82. Finally, the district court dismissed Appellants' declaratory judgment claim because it does not provide an independent basis for relief. *Id.* at 0582-83.

STANDARD OF REVIEW

Although this Court reviews a district court's dismissal for lack of personal jurisdiction de novo, underlying factual findings supporting the dismissal are reviewed for clear error. *Consulting Eng'rs Corp. v. Geometric, Ltd.*, 561 F.3d 273,

276 (4th Cir. 2009). "Where, as here, the district court addresses the question of personal jurisdiction on the basis of motion papers, supporting legal memoranda, and the allegations in the complaint, the [appellant] bears the burden [of] making a prima facie showing of a sufficient jurisdictional basis to survive the jurisdictional challenge." *Id.*

This Court reviews a district court's grant of a motion to dismiss for failure to state a claim de novo. To survive a motion to dismiss, "a complaint must contain sufficient 'facts to state a claim to relief that is plausible on its face.'" *Washington v. Wilson*, 697 F. App'x 241, 242 (4th Cir. 2017). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While this Court must construe the facts in the "light most favorable" to Appellants, it need not "credit allegations that offer only 'naked assertions devoid of further factual enhancement.'" *U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014). Nor must it "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Id.*

SUMMARY OF THE ARGUMENT

The district court rightly concluded that it lacked personal jurisdiction with respect to WBA, and Appellants have failed to allege any plausible claim for which relief can be granted. This Court should affirm.

With regard to personal jurisdiction, the sole basis Appellants presented for asserting jurisdiction over WBA in South Carolina is that WBA is the mere "alter ego" of Walgreen Co. However, as the district court held, even taking the Amended Complaint's factual allegations as true, Appellants fail to present a prima facie claim that WBA is the mere alter ego of Walgreen Co. Moreover, Appellants' argument that WBA waived its objection to personal jurisdiction by nominally participating in the defenses raised by Walgreen Co. at the preliminary injunction stage is baseless. The text of Federal Rule of Civil Procedure 12(h)(1), which permits a defendant to raise a jurisdictional defense in its motion to dismiss, belies Appellants' argument, and no useful purpose would have been served by requiring WBA to insist on a dismissal for lack of personal jurisdiction sooner.

In any event, as the district court held, Appellants have failed to state any plausible claim for relief against Walgreen Co. First, the common law torts of wrongful appropriation (Count I) and wrongful publicizing of private facts (Count II) do not apply in the absence of any publicity of Appellants' information. Second, Appellants' negligence and negligence per se claims (Counts IV, V, VIII, and IX), and negligent training and supervision claim (Count XI) fail to identify an applicable legal duty, much less a breach of such duty or cognizable injury. Appellants' breach of contract claim (Count VI) fails because they do not sufficiently allege the existence of a contract that bars Walgreens from using their information.

Appellants' unjust enrichment claim (Count XII), which is premised on the above claims, fails along with them. Finally, their claim for declaratory relief (Count VII) does not state an independent claim to relief.

ARGUMENT

I. THE DISTRICT COURT LACKED PERSONAL JURISDICTION WITH RESPECT TO WBA.

Appellants argue the district court should have asserted personal jurisdiction over WBA because: (1) WBA waived any challenge to personal jurisdiction by participating in the preliminary injunction proceedings; and (2) WBA was the alter ego of Walgreen Co. The district court properly rejected both arguments.

A. WBA Did Not Waive Its Challenge to the District Court's Jurisdiction.

The district court rightly recognized that requiring WBA to assert lack of personal jurisdiction prior to filing its motion to dismiss "is contrary to the plain language of Rule 12 of the Federal Rules of Civil Procedure." JAMTD 0550. Federal Rule 12(h)(1) plainly states that, to timely raise a jurisdictional defense, a party must do so in its first responsive pleading or defensive Rule 12 motion. Fed. R. Civ. P. 12(h)(1). That is precisely what WBA did. ECF Nos. 117, 135.

Moreover, WBA expressly reserved its right to raise available jurisdictional defenses beginning with its first filing prior to filing its Rule 12 motions. *See* ECF No. 18. Although WBA nominally "participated" in the preliminary injunction proceedings, that participation was limited to joining Walgreen Co. in its defenses,

defenses that the district court was going to have to consider whether WBA joined in them or not. *See, e.g., KDH Elec. Sys., Inc. v. Curtis Tech, Ltd.*, No. 08-2201, 2010 WL 1047807, at *5 (E.D. Pa. Mar. 19, 2010) ("No time or effort was wasted" considering preliminary issues relevant to multiple defendants before hearing jurisdictional objection from one defendant and "no interest would have been served by forcing the defendants to move earlier"). As the district court noted, adopting Appellants' position and requiring WBA to assert lack of personal jurisdiction even before filing a responsive pleading or motion when the only question before the court was the propriety of preliminary relief would have placed WBA in the untenable position of having either to decline to defend itself from a preliminary injunction or forego its jurisdictional defense. JAMTD 0550-51. Indeed, forcing WBA to litigate its personal jurisdiction defense sooner would have delayed adjudication of Appellants' motion for preliminary injunction, thereby contradicting "[t]he spirit of the rule [which] is 'to expedite and simplify proceedings in the Federal Courts.'" Br. at 13 (quoting C. Wright & A. Miller, 5A *Federal Practice & Procedures*, § 1342 (2d ed. 1990)).

Appellants cite no relevant authority for their inefficient and counter-textual proposition. Br. at 11-12. In *Maybin v. Northside Correctional Center*, 891 F.2d 72, 74-75 (4th Cir. 1989), the court rejected an argument that a defendant waived its objection to personal jurisdiction when, in conjunction with its jurisdictional

challenge, it raised defenses that did not go to the final merits of the case. *Maybin* does not stand for the proposition that Appellants need here: that, even when a party expressly preserves the jurisdictional argument for later adjudication, failing to assert lack of personal jurisdiction at the time the party opposes preliminary relief concedes personal jurisdiction. Likewise, *Smalls v. Weed*, 353 S.E.2d 154, 155-56 (S.C. Ct. App. 1987), which applied South Carolina's rules of civil procedure, determined that a single defendant waived its challenge to personal jurisdiction by also asserting the claim was barred by another state court's injunction. Such an effort to obtain a final ruling on the merits or some form of binding, affirmative relief from the court, is wholly different from opposing preliminary relief, which would not result in an adjudication of the merits or aid from the court.

B. Appellants Did Not Allege a Prima Facie Claim that WBA is the "Alter Ego" of Walgreen Co.

Appellants concede that WBA is incorporated in Delaware, headquartered in Illinois, and does not operate pharmacies in South Carolina. Br. at 1; JAMTD 0453-54. Nonetheless, Appellants assert that WBA is the "alter ego" of its subsidiary Walgreen Co., providing a basis for personal jurisdiction here. Br. at 14-18. However, as the district court found, Appellants did not present a prima facie case sufficient to pierce the corporate veil between WBA and Walgreen Co. JAMTD 0551-56.

"[T]o subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate . . . would sweep beyond even the 'sprawling view of general jurisdiction' [the Supreme Court previously] rejected." *Daimler AG v. Bauman*, 571 U.S. 117, 136 (2014). Accordingly, only limited circumstances will permit a corporate parent to be subject to personal jurisdiction on the theory that it is the alter ego of its subsidiary.

Courts require that *each* of the following four factors weigh in favor of alter ego status: (1) whether there is common ownership; (2) whether the entities are financially independent of one another; (3) the degree of the parent's selection of the subsidiary's executive personnel and whether there are failures to observe corporate formalities; and (4) the degree of control the parent exercises over the subsidiary's marketing and operational polices. *Wright v. Waste Pro USA, Inc.*, No. 2:17-cv-02654, 2019 WL 3344040, at *5 (D.S.C. July 25, 2019); *Scansource, Inc. v. Mitel Networks Corp.*, No. 6:11-cv-00382, 2011 WL 2550719, at *6 (D.S.C. June 24, 2011); *see also Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 390-92 (4th Cir. 2018) (noting alter ego theory of personal jurisdiction requires "cumulative evidence" indicating a "single economic entity"). The facts supporting corporate veil-piercing must be alleged with specificity. *Wright*, 2019 WL 3344040, at *5.

Appellants have not met their burden. As the district court found, Appellants failed to allege WBA and Walgreen Co. did not observe the corporate formalities.

For this reason alone, Appellants' alter ego argument fails. JAMTD 0555 (citing *Builder Mart of Am., Inc. v. First Union Corp.*, 563 S.E.2d 352, 358 (S.C. Ct. App. 2002)).

Appellants did allege WBA refers to Walgreen Co. as a "division," that WBA and Walgreen Co. share the same principal place of business, and that WBA guarantees some of Walgreen Co.'s debt and matches employee contributions to Walgreen Co.'s profit-sharing retirement plan. Br. at 14-16. But the district court rightly concluded these allegations do not suffice to support alter ego status. JAMTD 0553-54. A parent corporation referring "to its subsidiary companies by the informal title of 'division' rather than emphasizing the[y] are distinct corporate entities does not give rise to jurisdiction." *Wright*, 2019 WL 3344040, at *7. Likewise, the fact that WBA guarantees some of Walgreen Co.'s debt and matches contributions to the profit-sharing retirement plan is not significant because "little if any control" is manifested by such arms-length arrangements between a corporate parent and subsidiary. *Scansource*, 2011 WL 2550719, at *6. The fact that WBA and Walgreen Co. both conduct business under the "Walgreens" trade name also does not warrant a finding of alter ego status because "unified marketing and advertising and holding out to the public as a single entity, without more, [is] insufficient to confer jurisdiction." *Builder Mart*, 563 S.E.2d at 358-59; *see also Wright*, 2019 WL 3344040, at *6.

In short, even taking Appellants' allegations as true, they cannot sustain a finding that Walgreen Co. is the alter ego of WBA. Accordingly, this Court should affirm the district court's dismissal of WBA for lack of personal jurisdiction.

II. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

A. The District Court Properly Dismissed Appellants' Common Law Invasion of Privacy Claims.

South Carolina recognizes three causes of action "under the rubric of invasion of privacy," two of which Appellants asserted in their Amended Complaint: wrongful appropriation of personality and wrongful publicizing of private facts. *Gignilliat*, 684 S.E.2d at 759. As the district court correctly recognized, both theories fail because Appellants did not allege that their private information was publicized. JAMTD 0557-62. Even if publicity is not a necessary element, however, Appellants also did not allege interference with their privacy under either theory of invasion of privacy.

1. Appellants' South Carolina Common Law Invasion of Privacy Claims Require Allegations of Publicity.

Under South Carolina law, to state a claim for either wrongful appropriation of their personalities or wrongful publicizing of their private facts, Appellants had to allege, among other things, that Walgreens "publicized" their names, identities, or private facts. *Gignilliat*, 684 S.E.2d at 759 (explaining the "gist of [wrongful appropriation] is the violation of the plaintiff's exclusive right at common law to

publicize and profit from his name, likeness, and other aspects of personal identity." (emphasis added)); *Snakenberg v. Hartfod Cas. Ins. Co.*, 383 S.E.2d 2, 6 (S.C. Ct. App. 1989) (noting wrongful publicizing of private facts requires an intentional disclosure of "facts in which there is no legitimate public interest"); *see also Gignilliat*, 684 S.E.2d at 760 ("Encompassed in these three recognized torts is the infringement on the right of publicity."). The degree of publicity required may vary in South Carolina, depending on which invasion of privacy tort a plaintiff asserts. *See Snakenberg*, 383 S.E.2d at 6 (noting "[t]he gravamen of the [tort of wrongful publicizing of private fact] is publicity as opposed to mere publication."). But any such difference is irrelevant here. As the district court correctly found, Appellants alleged *no* publicity.

Appellants concede that wrongful publicizing of private facts requires publicity, Br. at 23, but ask this Court to rewrite South Carolina law to allow wrongful appropriation claims even when a defendant has not publicized any personal information or likeness of the plaintiff. They argue that Walgreens' use of their PII is a "changing condition" that justifies *this* Court's elimination of the requirement. Br. at 21. It is not the role, however, of federal courts sitting in diversity to adopt novel or expansive views of state common law. *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 783 (4th Cir. 1995) ("[F]ederal courts sitting in diversity rule upon state law as it exists and do not surmise or suggest its

expansion."); *see also Graham v. Sears, Roebuck & Co.*, No. 4:07-cv-00632-RBH, 2010 WL 1052219, at *5 (D.S.C. Mar. 19, 2010) (same).

To do so would be especially inappropriate in this case when South Carolina courts have, for eighty years, made clear that wrongful appropriation requires a defendant to have publicized the plaintiff's information or likeness. In 1940, the South Carolina Supreme Court held that a claim of wrongful appropriation cannot stand absent "unwarranted publicity, or indeed publicity of any kind." *Holloman v. Life Ins. Co. of Va.*, 7 S.E.2d 169, 171 (S.C. 1940). And, every South Carolina case since *Holloman* has underscored that the tort protects against *publicizing* the plaintiff's likeness or personal information for defendant's own benefit. *See, e.g.*, *Gignilliat*, 684 S.E.2d at 759; *Sloan v. S.C. Dep't of Pub. Safety*, 586 S.E.2d 108, 110 (S.C. 2003); *Snakenberg*, 383 S.E.2d at 5-6; *In re Wiser*, No. 08-02592-JW, 2010 WL 5437241, at *7 (Bankr. D.S.C. June 21, 2010). Though Appellants assert otherwise, Br. at 20-21, the cases they cite also recognize publicity is necessary. *Ins. Prod. Mktg., Inc. v. Conseco Life Ins. Co.*, No. 9:11-cv-01269-PMD, 2011 WL 3841269, at *10 (D.S.C. Aug. 29, 2011) (denying motion to dismiss wrongful appropriation claim where defendant was alleged to have distributed documents containing the plaintiffs' names to customers); *Uhlig LLC v. Shirley*, No. 6:08-cv-01208-JMC, 2011 WL 1119548, at *7 (D.S.C. Mar. 25, 2011) (noting "'wrongful

appropriation of personality' and 'infringement on the right of publicity' are the same claim under the rubric of 'invasion of privacy'").

Appellants suggest that the South Carolina Supreme Court in *Gignilliat* relieved plaintiffs of the requirement to allege publicity. They rip a sentence from its context and argue that *Gignilliat* holds that wrongful appropriation requires only "(1) unconsented use of the plaintiff's name, likeness, or identity; (2) by the defendant; (3) for the defendant's own benefit," as if that were a comprehensive statement of the law. Br. at 18. However, *Gignilliat* did not stop where Appellants would have this Court stop; the South Carolina Supreme Court continued and explained that the "gist of the action is the violation of the plaintiff's exclusive right at common law to *publicize* and profit from his name, likeness, and other aspects of personal identity." 684 S.E.2d at 759 (emphasis added). Appellants' attempt to dismiss this statement as a "colloquial" description of the law, Br. at 20, is belied by the string of cases cited above.

With no South Carolina case law to support their view, Appellants urge this Court to expand South Carolina law based on a law review article written in 1960 that states the tort of wrongful appropriation does not "depend upon" publicity, "although it usually involves it." Br. at 19-20 (quoting William L. Prosser, *Privacy*,

48 Cal. L. Rev. 383, 407 (1960)).[3] But Professor Prosser used "publicity" specifically to refer to widespread dissemination such as publishing in a newspaper or "cry[ing] it aloud in the highway." Prosser, 48 Cal. L. Rev. at 393. What Appellants need to sustain their theory of wrongful appropriation is something even Professor Prosser has not advocated: that a claim for wrongful appropriation is valid without *any* public disclosure. Regardless, such "authority" is not binding on this Court.

Finally, Appellants claim to have alleged "publicity," relying on the assertion that their PII is transferred to and stored in a database that *can be* accessed by authorized persons *within* Walgreens. Br. at 22. But, as the district court recognized, "[t]he fact that Walgreen Co. employees can access plaintiffs' PII does not mean that plaintiffs' PII is being communicated to the public at large," JAMTD 0560, and "just because plaintiffs' PII may be accessed within Walgreen Co. by Walgreen Co. employees does not mean it is distributed or made available to the public," JAMTD 0562. Ultimately, Appellants do not allege that any unauthorized access to their PII actually occurred, and they do not allege how the internal transfer of PII within Walgreens' database systems will lead to their PII becoming "disclos[ed] to the

[3] Although Appellants characterize wrongful appropriation of name or likeness and infringement on the "right of publicity" as two distinct torts in South Carolina, Br. at 19; JAMTD 0181-82, the district court correctly noted courts refer to the wrongful appropriation as both wrongful appropriation of "name or likeness" and infringement on the "right of publicity." *Gignilliat*, 684 S.E.2d at 759.

public." *McCormick v. England*, 494 S.E.2d 431, 438 (S.C. Ct. App. 1997). Put simply, they have not alleged publicity.

Frasier v. Verizon Wireless, No. 8:08-356-HMH, 2008 WL 724037 (D.S.C. Mar. 17, 2008), relied upon by Appellants, Br. at 23, illustrates what is *missing* from Appellants' allegations of "publicity" here. That case involved the defendant's disclosure of sensitive information to the plaintiff's co-workers, along with the defendant's suggestion that the plaintiff had engaged in misconduct at work. *Frasier*, 2008 WL 724037, at *4. It stands for the uncontroversial proposition that coworkers can be members of the public with respect to an individual to whom the wrongful disclosure of personal information may be actionable. It does not stand for the proposition Appellants need: that housing data in a database allegedly *accessible* to some company employees but not wrongfully accessed can be a "public" disclosure. The district court rightly determined that there is no basis in South Carolina law, or in common sense, for treating the storage of data within a company's database systems as disclosure of that data to the public. To find otherwise would rob the publicity requirement of any meaning.

At bottom, Appellants' allegations that Walgreens *internally* transfers their PII to a database where employees who administer 340B Complete have access to their PII, absent any allegation that unauthorized access has occurred, are

insufficient to sustain any cause of action for invasion of privacy under South Carolina law.

2. Even if Appellants Adequately Allege Publicity, Their Invasion of Privacy Claims Still Fail.

Appellants' invasion of privacy actions each fail for reasons distinct from the failure to allege publicity. Each version of the tort addresses specific harms resulting from unwarranted publicity. *Gignilliat*, 684 S.E.2d at 759. Wrongful appropriation addresses the harm arising from *unconsented* appropriation of *commercial value* attributable to one's name or likeness. *Id.* at 759-60. Wrongful publicizing of private facts, on the other hand, addresses the harm resulting from public disclosure of personal information that is "highly offensive and likely to cause serious mental injury to a person of ordinary sensibilities." *Snakenberg*, 383 S.E.2d at 6. Appellants' invasion of privacy claims fail in the absence of allegations implicating these underlying harms.

a. Appellants Fail to Allege that Walgreens Appropriated the Commercial Value of Appellants' Identities Without Consent.

Appellants do not claim that their names or personalities have any particular commercial value, such as goodwill, notoriety, or prestige, much less that Walgreens profited from any such value by appropriating Appellants' identities to itself, as South Carolina law requires. *See Gignilliat*, 684 S.E.2d at 759-60. Appellants also do not allege that Walgreens diminished any value in their identities. Instead, they

once again ask this Court to expand South Carolina law and declare that because Walgreens profits from providing 340B Program services to covered entities, those profits are therefore attributable to Appellants' PII. *See, e.g.*, JAMTD 0056-57 ¶¶ 145-46. This is wordplay.

Wrongful appropriation involves appropriating the *value* that someone has created in their identities or public personalities. REST. (2D) TORTS § 652C cmt. c (1977) (noting "the defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness"); *see also id.* at cmt. d ("[Appellants'] likeness [is not] appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him."). As the South Carolina Supreme Court explained in the very case on which Appellants rely, "[t]he gist of the action [for wrongful appropriation] is the violation of the plaintiff's exclusive right at common law to publicize and profit from his name, likeness, and other aspects of personal identity." *Gignilliat*, 684 S.E.2d at 759.

Walgreens profits from providing covered entities 340B Program services because those covered entities value being able to participate in the 340B Program through the establishment of a contract pharmacy arrangement and the assistance Walgreens provides in ensuring compliance and proper recordkeeping. JAMTD 0093-94 ("Walgreens will maintain an electronic tracking system that is capable of

tracking 340B Drugs received from the [covered entity], preventing the diversion of 340B Drugs to individuals who are not Eligible Patients and verifying that such diversion has not occurred."). Walgreens does not profit by selling any value that inheres in Appellants' PII to covered entities, who already possess patients' PII. And courts not just in South Carolina but across the country have routinely dismissed appropriation claims that, like this one, fail to allege that a defendant's action usurps the specific value of a plaintiff's identity. [4]

[4] *See, e.g.*, *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007) ("Meadows does not contend that the [alleged appropriation] reduced the value of his identity."); *Budik v. Howard Univ. Hosp.*, 986 F. Supp. 2d 1, 12 (D.D.C. 2013) ("[T]he complaint here includes only conclusory allegations concerning the . . . value to the defendant of the plaintiff's likeness and name, and the Court must therefore dismiss the plaintiff's claim . . . ."); *Barnhart v. Paisano Publ'ns, LLC*, 457 F. Supp. 2d 590, 596 (D. Md. 2006) ("The record does not establish that . . . there is any special value associated with [plaintiff's] likeness."); *Dempsey v. Nat'l Enquirer*, 702 F. Supp. 934, 938 (D. Me. 1989) ("A claim based on commercial appropriation must allege that a name or likeness has been used for purposes of taking advantage of that individual's reputation, prestige or other value for purposes of publicity."); *Garner v. Sawgrass Mills Ltd. P'ship*, No. CIV. 3-94-307, 1994 WL 829978, at *10 (D. Minn. Dec. 22, 1994) ("Under the common law, [i]t is the plaintiff's name as a symbol of his identity that is important, not the mere name . . . it is only when [a defendant] makes use of the name to pirate the plaintiff's identity for some advantage of his own . . . that [a defendant] becomes liable."); *Schifano v. Greene Cty. Greyhound Park, Inc.*, 624 So.2d 178, 181 (Ala. 1993) ("There is no unique quality or value in [plaintiffs'] likenesses that would result in commercial profit to the [defendant] simply from using a photograph that included them . . ."); *Cox v. Hatch*, 761 P.2d 556, 564 (Utah 1988) ("[T]he complaint fails because . . . plaintiffs do not allege that their appearances have any intrinsic value or that they enjoy any particular fame or notoriety . . . . Nor can intrinsic value be shown just because the defendants may have obtained some benefit by using the plaintiffs' likenesses when the benefit is the same as defendants would have had from using the likeness of a number of other [persons]."); *Dwyer v. Am. Express Co.*, 652 N.E.2d

In addition, Appellants do not allege that Walgreens' internal processing of their PII occurred without their consent. *See Gignilliat*, 684 S.E.2d at 759 (noting the tort requires "unconsented use"). Appellants voluntarily provided their PII to Walgreens, which disclosed in its NPP that providing PII to Walgreens authorized Walgreens to "obtain[], and . . . seek third-party payment for, their individual prescriptions." JAMTD 0036 ¶ 40. Moreover, Appellants concede that Walgreens appropriately uses Appellants' PII for various purposes, including "payment processing of their prescriptions" and "facilitat[ing] third-party payment to Walgreens." *Id.* at ¶ 39. "Payment processing" and "facilitating third-party payment to Walgreens" is an apt description of the process Appellants describe, which is the process for determining from which third-party Walgreens will obtain payment for its services.[5]

b. Appellants Do Not Allege Walgreens' Use of their PII is "Highly Offensive" or "Likely to Cause Serious Mental Injury."

Appellants' similarly fail to allege the harm required for wrongful publicizing

---

1351, 1356 (Ill. App. Ct. 1995) ("[D]efendants' practices do not deprive any of the cardholders of any value their individual names may possess.").

[5] Appellants' counsel conceded as much during the district court's hearing on Walgreens' motion to dismiss. JAMTD 0511-12 ("Ms. Hall: Your Honor, the 340B Complete program and the contracts that corporation has with covered entities, through these contracts they set up as part of their agreement an insurance *payment system* for uninsured.") (emphasis added); *id.* at 0513 ("So I will retract -- if I called it an insurance payment system, Your Honor. It's a pay . . . it's a process to allow insured -- uninsureds [to] receive medications through the covered entity.").

of private facts. Under South Carolina law, Appellants must allege that the publication of their private information "would be highly offensive, and likely to cause serious mental injury to a person of ordinary sensibilities." *Snakenberg*, 383 S.E.2d at 6.

Appellants allege no harm to their reputation. *See Snakenberg*, 383 S.E.2d at 6 (finding allegation of reputational harm could support a finding that public disclosure was "highly offensive"). Here, Appellants do not explain how technical access to their data by employees responsible for administering Walgreens' 340B Complete services and ensuring compliance with the 340B Program rises to the level of "highly offensive" or how they are likely to suffer "serious mental injury" as a result. Indeed, Appellants do not allege they will suffer any mental injury at all. JAMTD 0057-58 ¶¶ 149-54. For this additional reason, their wrongful publicizing of private facts claim fails.

B. The District Court Properly Dismissed Appellants' Claims for Negligence Per Se Premised on PIPA and Federal Law.

To establish negligence per se based on the violation of a statute, Appellants must first show that the statute permits a private cause of action. *Salley v. Heartland-Charleston of Hanahan, SC, LLC*, No. 2:10-cv-00791, 2011 WL 2728051, at *3 (D.S.C. July 12, 2011). To do so, Appellants must show (1) that the "essential purpose" of the statute is to protect them from the "kind of harm" they have allegedly suffered, and (2) that they are members of the "class of persons" the statute is

"intended to protect." *Wogan v. Kunze*, 623 S.E.2d 107, 117-18 (S.C. Ct. App. 2005). "In determining whether a statute creates a private cause of action, the main factor is legislative intent." *Doe v. Marion*, 645 S.E.2d 245, 248 (S.C. 2007); *see also Stewart v. Parkview Hosp.*, 940 F.3d 1013, 1015 (7th Cir. 2019) ("Congress's choices about enforcement authority have consequences: 'The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'").

1. Prescription Information Privacy Act.

a. Appellants Did Not Allege that Walgreens Violated the Substantive Requirements of PIPA.

PIPA states that "[n]o patient prescription drug information may be transferred or received by a person without the written consent of the patient or a person authorized by law to act on behalf of the patient." S.C. Code Ann. § 44-117-30. The initial question, then, is whether the way Walgreens allegedly handled Appellants' PII, including logging it in IntercomPlus, storing it in EDW, and analyzing it in the 340B Complete® systems, amounts to a "transfer" of the information within the meaning of the statute. *See* Br. at 28 n.8 (arguing PIPA prohibits the "transfer of prescription drug information from the pharmacy operating system to Appellees' corporate EDW database"). As the district court rightly concluded, it does not. JAMTD 0568-72.

1. Reading PIPA as a whole makes clear that the statute does not apply to internal transfers. First, the statute envisions that the relevant "person," or holder of data, can be an entity. *See* S.C. Code Ann. § 44-117-20 (noting "[p]atient prescription drug information" includes data "concerning the dispensing of a drug . . . whether this data is held by a practitioner, pharmacy, or another *entity*" (emphasis added)); *id.* § 44-117-30(13) (exempting information disclosed by a "health plan" to third parties); *id.* § 44-117-40 (imposing penalties on "[a]n individual or *entity*, *corporate or otherwise*, who knowingly violates a provision of this chapter" (emphasis added)); *see also* Br. at 26 n.7. The fact that Walgreens, as a corporate entity, can be a holder of information under PIPA suggests the statute's prohibition on transfers does not apply to Walgreens' internal database management processes or its use of Appellants' PII to facilitate compliance with the 340B Program.

For example, when a pharmacist receives a written prescription from a customer, the pharmacist holds it. If the pharmacist thereafter inputs the information into a computer system, no plausible reading of the statute would treat that as a "transfer" of the prescription information. The statute does not target efforts to store information by a holder of information; the statute targets efforts to move information from one holder to another; that is why it targets "transfer" and "receipt" of information. For the same reason, the district court correctly concluded that PIPA

applies only to external transfers of data outside of Walgreens' systems, not the internal transfer of data that Appellants allege is at issue here. JAMTD 0572.

Second, throughout the statute, the term "transfer" refers to certain external actions while other terms, like "use," describe internal action. *See, e.g.*, S.C. Code Ann. § 44-117-30(6) (distinguishing "use" and "further disclosure"); *id.* § 44-117-30(11) (same); *id.* § 44-117-30(13) (same). Other data privacy statutes similarly distinguish between uses and disclosures. *See, e.g.*, 45 C.F.R. § 164.502 (discussing "uses" and "disclosures" of protected health information under HIPAA); S.C. Code Ann. § 19-11-95(B)(2) (prohibiting "use [of] a confidence of [a] patient to the disadvantage of the patient"); S.C. Code Ann. § 39-1-90 (distinguishing "acquir[ing]" information and "illegal use of the information").

Third, several of PIPA's exceptions further confirm that "transfer" refers only to external transfers. For example, the transmission of a drug order is excepted from PIPA, S.C. Code Ann. § 44-117-30(1), as are communications among professionals who provide or have provided medical treatment to the person who received the drug, *id.* § 44-117-30(2), and information necessary to effect recalls or facilitate studies, *id.* § 44-117-30(4), (9). PIPA provides exceptions only for external transfers because it applies only to external transfers. As the district court found, none of the other provisions of PIPA that Appellants cite, Br. at 30-31, counsel otherwise. JAMTD 0572 ("[T]he court finds no support in the language of PIPA for

[Appellants'] interpretation that PIPA prohibits data transfer outside of the pharmacy setting.").

Interpreting PIPA to bar internal transfers would lead to absurd results, contravening South Carolina rules of statutory construction. *See Hodges v. Rainey*, 533 S.E.2d 578, 584 (S.C. 2000) ("The goal of statutory construction is to . . . prevent an interpretation that would lead to a result that is plainly absurd."). It would prohibit the ordinary activities described above, where a pharmacist transfers the information contained in a paper prescription to the pharmacy's electronic database, as well as the transmission of information for purposes of legal, administrative, or information technology services that do not occur within the four walls of a pharmacy location. The only way to "escape" such absurdity is to read PIPA as applying to external, not internal, transfers. *See id*.

With no support in the text of the statute, the case law, or the basic realities of modern pharmacy operations, Appellants argue that the district court "enlarged PIPA's exceptions to allow the global transfer of prescription-PII throughout a corporate conglomerate's information systems." Br. at 26; *see also* Br. at 33. But this is no reason to overread the statute to cover internal transfers of patient information as Appellants urge. That is because PIPA does not need to comprehensively address *every* conceivable harm that follows from the improper handling of patient information.

Federal law, more specifically, HIPAA, regulates disclosures and internal uses of health data by entities like Walgreens. HIPAA has an intricate set of rules—codified in multiple rulemakings spanning hundreds of pages of the Federal Register—that govern how entities like Walgreens may use data internally. Among other things, HIPAA regulations permit entities like Walgreens to use covered data only in specified circumstances or for specified purposes like treatment, payment, and health care operations absent a patient authorization. Those regulations restrict uses of this data by non-health related divisions, and they require that access to such data be limited based on employees' job duties. *See* 45 C.F.R. § 164.502(a); *id.* § 164.512; *id.* § 164.514(d)(2); Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,490 (Dec. 28, 2000). HIPAA plainly prohibits Appellants' parade of horribles. Contrary to Appellants' suggestion then, Br. at 34, Walgreens' and the district court's interpretation of PIPA does not contradict HIPAA; rather, it complements HIPAA.

2. Even if the statutory term "transfer" were stretched to encompass internal transfers of data within a corporation's computer systems, PIPA's exceptions apply, providing an alternative ground on which to affirm the district court's dismissal of this claim. For example, PIPA's prohibitions do not apply to "information necessary to disclose to third parties in order to perform quality assurance programs, medical records review, internal audits, medical records

maintenance, or similar programs" when the third party "makes no other use or further disclosure." S.C. Code Ann. § 44-117-30(11). Walgreens' internal use of Appellants' PII falls within this exception because it must be available in an auditable format in order for covered entities, government agencies, and drug manufacturers to be able to assess compliance with the 340B Program. *See* 42 U.S.C. § 256b(a)(5)(C) (audit requirement); 75 Fed. Reg. at 10,275 ("[C]overed entities are required to have auditable records"); *id.* at 10,278 (covered entities and their contract pharmacies shall "establish mechanisms to ensure availability of [the information necessary for the covered entity to meet its ongoing responsibility] for periodic independent audits performed by the covered entity"); *id.* ("[A]ll pertinent reimbursement accounts and dispensing records, maintained by the pharmacy, will be accessible separately from the pharmacy's own operations and will be made available to the covered entity, HRSA, and the [drug] manufacturer in the case of an audit.").

Walgreens' internal use of Appellants' PII also falls within PIPA's exception for "information whereby the release or transfer is mandated by other state or federal laws," S.C. Code Ann. § 44-117-30(5), because state law requires pharmacies to use "backup systems" for pharmacy records, of which EDW is one, *id.* § 40-43-86(O)(4) ("Routine backup systems and procedures . . . must be in place and operational to ensure against loss of patient data."). Indeed, Appellants concede that this exception

applies: "Appellants do not object to the transfer of pharmacy information to EDW as a back-up repository, as required by" South Carolina law "and excepted from PIPA." Br. at 28 n.8.

After conceding away the issue, Appellants double back and argue that a *lawful* transfer of PII for backup purposes can later become unlawful if the information is used for "non-pharmacy" purposes. *Id.* But PIPA only prohibits certain "transfer[s]" of PII or "receipt[s]" of PII. S.C. Code Ann. § 44-117-30. Having conceded that the "transfer" to EDW is lawful, Appellants cannot use PIPA to investigate how Walgreens uses the "transferred" information. PIPA, unlike other privacy statutes, does not regulate "uses" of information. *See supra* II.B.1.a. In any event, Appellants do not allege any actual "non-pharmacy" use of their information. They allege only that 340B Complete® software scans the EDW data to determine whether a prescription should be purchased through the 340B Program. That is most certainly a pharmacy use. Indeed, PIPA expressly permits a pharmacy to transfer PII when "necessary to adjudicate or process payment claims for health care, whether under a health insurance benefits program or *other payment system*." S.C. Code Ann. § 44-117-30(6) (emphasis added). The 340B Program is, in part, a "payment system" for drugs.

b. PIPA Does Not Provide a Private Right of Action.

Though this Court need not reach the issue if it concludes that Appellants failed to allege a substantive violation of PIPA, the district court erroneously concluded that PIPA provides a private right of action. The district court accepted Appellants' argument that the purpose of PIPA is to protect individuals like Appellants from the unauthorized use of their PII. JAMTD 0567-68. However, those are legal conclusions, not factual allegations, and the district court should therefore have rejected them. *Kloth v. Microsoft Corp.*, 444 F.3d 312, 319 (4th Cir. 2006). PIPA, in fact, does not provide a private right of action.

"When legislation expressly provides a particular remedy or remedies, courts should not expand coverage of the statute to subsume other remedies." *Wogan*, 623 S.E.2d at 117. PIPA specifically establishes other remedies, not a private right of action, for breaches of its requirements. Pursuant to S.C. Code Ann. § 44-117-40, "[a]n individual or entity, corporate or otherwise, who knowingly violates a provision of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than ten thousand dollars per occurrence." In addition, S.C. Code Ann. § 44-117-360 provides certain administrative remedies, including the restriction, suspension, or revocation of pharmacy licenses. This Court should not allow Appellants to expand PIPA's statutory remedies.

2. Neither HIPAA Nor the FTCA Can Support a Negligence Per Se Claim Because Neither Statute Provides a Private Cause of Action and Appellants Have Not Alleged a Violation of Either Statute.

The district court rightly dismissed Appellants' negligence per se claims based on HIPAA and the FTCA.[6] Neither statute provides a private right of action for the wrongs they allege. *See Freier v. Colorado*, 804 F. App'x 890, 891-92 (10th Cir. 2020) (collecting cases and noting "[t]hose courts have reasoned that Congress, by delegating enforcement authority to the Secretary of Health and Human Services, did not intend for HIPAA to include or create a private remedy"); *Copeland v. Newfield Nat'l Bank*, No. CV 17-17, 2017 WL 6638202, at *3 (D.N.J. Dec. 29, 2017) (noting "[f]ederal courts across the country have consistently held that the FTCA does not permit a private cause of action" and collecting cases). Indeed, Appellants concede as much. Br. at 51 ("While neither statute provides a private right of action . . . .").

Despite this concession, Appellants cite a number of cases they claim stand for the proposition that HIPAA and the FTCA can be the basis of a negligence per

[6] Appellants attempt to blur the line between negligence per se and negligence and suggest that "[w]hether denominated negligence per se or negligence based on a standard of care set by statute, [they] have placed Appellees on notice of their claims based on violations of federal law . . . ." Br. at 55. But Appellants have not pled negligence based on federal law and cannot now "amend their complaint[] through briefing." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013).

se claim. With respect to Appellants' HIPAA cases, Br. at 51-52, however, the district court correctly observed that, at most, they establish HIPAA can be used as evidence of a duty of care under an ordinary negligence theory, which Appellants have not pled here. JAMTD 0564-65, 0564 n.5; *see, e.g.*, *Acosta v. Byrum*, 638 S.E.2d 246, 251 (N.C. Ct. App. 2006) ("Here, defendant has been placed on notice that plaintiff will use . . . HIPAA to establish the standard of care."). With respect to Appellants' FTCA cases, Br. at 54 n.13, Appellants cite only cases from other jurisdictions that, unlike South Carolina, allow negligence per se actions based on statutes that do not create a private right of action. *See, e.g.*, *In re: Cmty. Health Sys., Inc.*, No. 15-CV-222-KOB, 2016 WL 4732630, at *27 (N.D. Ala. Sept. 12, 2016) ("Defendants have cited the court to no law in Nebraska or Virginia prohibiting a claim for negligence *per se* using a standard of care based on a statute that does not provide a private right of action."); *Bans Pasta, LLC v. Mirko Franchising, LLC*, No. 7:13-cv-00360-JCT, 2014 WL 637762, at *12 (W.D. Va. Feb. 12, 2014) ("[B]oth Georgia (and Virginia) law expressly allow negligence per se claims to be premised on statutes and regulations that do not give rise to a private cause of action.").

Ultimately, even if HIPAA and the FTCA could serve as the basis of a negligence per se claim, Appellants' claims would still fail because Appellants do not allege that Walgreens violated either statute. Though the district court did not

reach this issue, it provides an alternative reason for this Court to affirm the district court's dismissal of these claims.

With regard to HIPAA, Appellants state that Walgreens failed to obtain HIPAA-compliant authorizations to use Appellants' PII in 340B Complete. Br. at 53. But HIPAA specifically provides that entities like Walgreens may use or disclose individually identifiable health information for payment and healthcare operations purposes without obtaining authorization. *See, e.g.*, 45 C.F.R. § 164.502(a)(1). They may also, without authorization, "disclose [information] to another covered entity . . . for the payment activities of the entity that receives the information" and for certain "health care operations activities" of that entity or for "health care fraud and abuse detection or compliance." *Id.* § 164.506(c)(3)–(4). HIPAA further authorizes Walgreens to act as a "business associate"[7] of another healthcare provider, such as a 340B covered entity, and offer services that involve handling personal information on that entity's behalf. *Id.* § 164.502(e)(1). Walgreens' use of Appellants' PII in its 340B Complete® systems facilitates payment for prescriptions as well as compliance with healthcare regulations and therefore meets these exceptions.

[7] Indeed, the contract attached to the Amended Complaint reflects that Walgreens is a "[b]usiness [a]ssociate" under HIPAA to the covered entity healthcare provider. *See* JAMTD 0113.

In an attempt to distinguish these exceptions, Appellants assert that they relate only to a "*direct treatment relationship* between a health care provider and an individual." Br. at 53. But that is a legal conclusion contrary to HIPAA regulations, which define "payment" and "health care operations" broadly. *See* 45 C.F.R. § 164.501. Payment, for example, covers activities undertaken by a covered entity "to obtain or provide reimbursement for the provision of health care," while "health care operations" covers six different categories of activities, including "[b]usiness management and general administrative activities." *Id.* Appellants further assert that 340B Complete is a "third-party business activit[y]" rather than a part of "normal" pharmacy operations. Br. at 4, 53. However, their effort to characterize Walgreens' 340B Program activities as distinct from "normal" pharmacy operations does not change the fact that the services Walgreens provides as a contract pharmacy to covered entities under the 340B Program are, clearly, pharmacy activities.

With regard to the FTCA, Appellants assert that they have pled a valid claim because Walgreens allegedly failed to employ "adequate data security and system safeguards in the pharmacy to ensure against unauthorized access." Br. at 55. But Appellants have not alleged that their PII was accessed by anyone who was not authorized by Walgreens to do so. Consequently, the FTCA cases they cite, Br. at 54-55, are inapposite as they all involve cases of actual data breaches, not the speculative prospect of unauthorized access. *See FTC v. Wyndham Worldwide*

Corp., 799 F.3d 236, 243 (3d Cir. 2015) (finding the failure to implement security measures to prevent unauthorized access by hackers constituted "unfair methods of competition"); *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 362 F. Supp. 3d 1295, 1327 (N.D. Ga. 2019) (same). Indeed, as the district court found, Appellants' allegations are entirely unrelated to these types of FTCA violations: "Plaintiffs do not allege that Walgreen Co.'s cybersecurity practices are inadequate nor do they allege any attempt by a third-party hacker to access plaintiffs' PII." JAMTD 0567.

C. Appellants' Negligence Claims Fail Because Appellants Have Not Alleged Any Injury or Applicable Duty, Much Less a Breach of Such Duty.

To establish negligence, Appellants must show "(1) [Walgreens] owe[d] a duty of care to [Appellants]; (2) [Walgreens] breached the duty by a negligent act or omission; (3) [Walgreens'] breach was the actual or proximate cause of [Appellants'] injury; and (4) [Appellants] suffered an injury or damages." *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 711 S.E.2d 908, 911 (S.C. 2011). The standard of care "may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." *Id.* at 912. However, "if no duty has been established, evidence as to the standard of care is irrelevant." *Id.*

Before turning to the reasons articulated by the district court, this Court may affirm the district court's dismissal of Appellants' negligence claims based on their failure to allege any legally cognizable *injury*. "Generally, under South Carolina law, the damages element [for a negligence claim] requires a plaintiff to establish physical injury or property damage." *Babb v. Lee Cnty. Landfill S.C., LLC*, 747 S.E.2d 468, 481 (S.C. 2013). Here, Appellants have not identified any specific property damage arising from the challenged conduct. Nor have they alleged physical injury or physical manifestations of emotional distress that could permit recovery for damages. *See id.* (noting "[d]amages for emotional or mental suffering are typically not recoverable" in negligence cases). Instead, Appellants asserted, in conclusory fashion, "[e]ach Plaintiff . . . suffered . . . a particular and concrete injury through Walgreens' repeated and continuing invasion of their legally protected right to privacy." JAMTD 0046 ¶ 100. Such legal conclusions are insufficient to survive a motion to dismiss. *Ashcroft*, 556 U.S. at 679. Regardless, as the district court recognized, Appellants fail to allege any breach of any legally cognizable duty by Walgreens.

1. Pharmacy Practice Act.

Citing various PPA provisions, Appellants allege Walgreens had a duty to "maintain a pharmacy patient record system that is statutorily defined to be held confidentially" and "to 'maintain the confidentiality' of Appellants' prescription-

PII." Br. at 40-41. But, the PPA does "not set forth, explicitly or implicitly, a duty of confidentiality." *Evans v. Rite Aid Corp.*, 478 S.E.2d 846, 847 (S.C. 1996). In addition, because this is not a negligence per se claim, Appellants may not rely on the PPA to establish Walgreens' alleged duties; rather, they may only use it to establish the relevant standard of care. *Doe*, 711 S.E.2d at 912. As the district court recognized, Appellants failed to identify any other source of the duties they allege. JAMTD 0577.

Though the district court did not go beyond Appellants' failure to identify any cognizable duties, Appellants also fail to allege that Walgreens breached any supposed duties. Again, Appellants do not allege that anyone improperly accessed their PII. Rather, their claim is that Walgreens employees access their PII to perform official duties related to payment for prescriptions and compliance with the 340B Program. Such access is authorized by law. *See, e.g.*, 45 C.F.R. § 164.506 (detailing permitted uses and disclosures of protected health information under HIPAA); Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182 at 53,197 (Aug. 14, 2002) (recognizing that employees can access PHI as needed to carry out job duties); *cf. WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012) ("[A]n employee is authorized to access a computer when his employer approves or sanctions his admission to that computer.").

Appellants suggest that EDW is not secure, but they allege no facts supporting that conclusion.

Appellants shift gears on appeal and attempt to overcome these failures by restyling their PPA-based count as a negligence per se claim. Br. at 39, 43-44. Again, however, Appellants "cannot amend their complaint[] through briefing." *S. Walk*, 713 F.3d at 184. And, in any event, Appellants do not plead the required elements of a negligence per se claim. Appellants do not allege, for example, that: (1) the "essential purpose" of the PPA is to protect them from the "kind of harm" they have allegedly suffered, or (2) they are members of the "class of persons" the PPA is "intended to protect." *Wogan*, 623 S.E.2d at 117-18. As the district court held, "[t]he problem with treating this cause of action as one for negligence per se is PPA does not provide an explicit private cause of action, and plaintiffs make no allegations or arguments that a cause of action is implied based on the two-prong test . . . ." JAMTD 0578.

2. Pharmacist Professional Standards of Care.

Similar to Appellants' negligence claim based on the PPA, Appellants' negligence claim based on professional standards fails because Appellants do not identify the source of Walgreens' supposedly "universally recognized" duty to "maintain[] customer's privacy." Br. at 44-45. Appellants allege that this duty is prescribed by the South Carolina Board of Pharmacy, the American Pharmaceutical

Association ("APhA") Code of Ethics, and PIPA, Br. at 45; JAMTD 0067 ¶ 209,[8] but do not identify any rule, regulation, or standard contained within these sources that would impose such a duty. Appellants' PIPA claims have already been addressed. *See supra* Section II.B. With respect to the South Carolina Board of Pharmacy, Appellants cite no standard promulgated by the Board, much less one with which Walgreens is not in compliance. To the extent their claim is based on the PPA, those claims have also already been addressed. *See supra* Section II.C.1. Appellants also fail to cite a relevant APhA provision and, in any event, the South Carolina Supreme Court has expressly held that the APhA Code of Ethics does not "give rise to a duty of confidentiality." *Evans*, 478 S.E.2d at 847. Further, to the extent that Appellants rely on the common law, the South Carolina Supreme Court has made clear that there is no "common law duty of confidentiality for pharmacists" in South Carolina. *Id.* at 848.

In support of their claim, Appellants once again point to a series of data breach cases. Br. at 45-46. But, as previously noted, this is not a data breach case. Because Appellants allege no breach of Walgreens' systems, these authorities establish no duty of care relevant to this case. *See, e.g., In re Sony Gaming Networks & Customer*

[8] On appeal, Appellants attempt to add HIPAA and Walgreens' "own privacy practices and business associate agreements" as sources of Walgreens' alleged duty. Once again, however, "parties cannot amend their complaint[] through briefing." *S. Walk*, 713 F.3d at 184.

Data Sec. Breach Litig., 996 F. Supp. 2d 942, 953 (S.D. Cal. 2014) (reviewing "fail[ure] to provide reasonable network security, including utilizing industry-standard encryption," in response to "criminal intrusion"); *In re Target Corp. Customer Data Sec. Breach Litig.*, 64 F. Supp. 3d 1304, 1308 (D. Minn. 2014) (similar).

3. Negligent Supervision and Training.

"An employer may be liable for negligent supervision when (1) his employee intentionally harms another when he is on the employer's premises . . .; (2) the employer knows or has reason to know he has the ability to control the employee; and (3) the employer knows or has reason to know of the necessity and opportunity to exercise such control." *Doe v. Bishop of Charleston*, 754 S.E.2d 494, 500 (S.C. 2014). South Carolina does not recognize a separate claim for negligent training, so courts have treated it as "merely a specific negligent supervision theory by another name." *Holcombe v. Helena Chem. Co.*, 238 F. Supp. 3d 767, 772 (D.S.C. 2017). "[T]he key question is whether the employer knew or should have known of the danger the employee posed to others." *Id.* at 773.

Whether intentional harm is required to state a claim for negligent supervision and training under South Carolina law is an open question. *See id.* at 772 (noting that "although some South Carolina cases mention intentional harm as an element of negligent supervision claims, others do not"). The district court concluded that

Appellants failed to state a claim for negligent supervision and training because they did not allege that Walgreens' employees intentionally harmed them. JAMTD 0579. Even assuming intentional harm is not required, however, Appellants do not, for the reasons explained above, sufficiently allege that Walgreens' employees posed any "danger" to Appellants of which Walgreens "knew or should have known." *Holcombe*, 238 F. Supp. 3d at 773.

D. The District Court Properly Dismissed Appellants' Breach of Contract Claim Because Appellants Fail to Identify any Agreement, Much Less a Breach.

"A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Stanley Smith & Sons v. Limestone Coll.*, 322 S.E.2d 474, 477 (S.C. Ct. App. 1984). If an agreement is manifested by conduct, then the contract is implied. *Id.* "An implied contract, like an express contract, rests on an actual agreement of the parties to be bound to a particular undertaking. The parties must manifest their mutual assent to all essential terms of the contract in order for an enforceable obligation to exist." *Id.*

Appellants maintain that Walgreens breached two different agreements to "properly maintain and store their PII and to not transfer, receive, and/or use, disclose, or disseminate it in furtherance of its 340B Complete® process(es)": (1) an implied contract and (2) and express contract contained in Walgreens' NPP. *See* Br. at 36-38. Each claim fails.

First, as the district court ruled, Appellants' own allegations belie the existence of any implied contract—"Walgreens pharmacy customers do not consent to, are unaware of, and have no reason to expect Walgreens' surreptitious transfer, receipt, and/or use, disclosure, or dissemination of their PII following the completion of their retail pharmacy transaction." JAMTD 0573 (quoting JAMTD 0043 ¶ 86). Appellants cannot have entered into an implied contract with Walgreens not to use their PII for "business activities, such as 340B Complete processes," Br. at 37, if they were not aware that 340B Complete® existed in the first place. In other words, there could not have been "an actual agreement of the parties to be bound to [that] particular undertaking." *Stanley*, 322 S.E.2d at 477.

Second, though Appellants assert otherwise, Br. at 37-38, Walgreens' NPP is not an express contract because NPPs are "not contractual in nature." *Brush v. Miami Beach Healthcare Grp. Ltd.*, 238 F. Supp. 3d 1359, 1367 (S.D. Fla. 2017). Rather, they simply "inform patients of their rights under federal law . . . and the duties imposed . . . by [HIPAA] statutory provisions." *Id.* As the district court explained, "NPPs cannot create contractual obligations because entities like Walgreen Co. are required by law to comply with HIPAA without receiving consideration from plaintiffs." JAMTD 0574; *see also Brush*, 238 F. Supp. 3d at 1367 ("Because the Defendants are required by law to adhere to HIPAA without receiving any consideration from the Plaintiff or any other patient, these provisions

cannot create contractual obligations."); *In re Banner Health Data Breach Litig.*, No. CV-16-02696-PHX-SRB, 2017 WL 6763548, at *4 (D. Ariz. Dec. 20, 2017) (finding NPPs "cannot be read as a promise to do anything above and beyond what is already required by law" and therefore the "promise is simply not supported by consideration"). To hold otherwise would create a private cause of action under HIPAA, which courts have repeatedly found provides no such right. *See supra* Section II.B.2; *Brush*, 238 F. Supp. 3d at 1367 ("Plaintiff cannot manipulate the common law to state a private, statutory cause of action where none exists.").

Even assuming NPPs are contractual, Walgreens' NPP expressly states Walgreens may use Appellants' PII "for treatment, payment and health care operations," including for use by "HIPAA covered entities" and "to obtain payment for the health care products and services that [Walgreens] provide[s] . . . and for other payment activities related to the services that [Walgreens] provide[s]." ECF No. 45-2, Meehan Decl. at Ex. A p.1.[9] As noted above, these are exactly the uses Appellants' allege are at issue here.

E. Appellants' Unjust Enrichment Claim Fails Because Appellants Do Not Allege Walgreens Unjustly Retained a Benefit.

[9] Walgreens' NPP is properly before the Court because Appellants refer to it in the Amended Complaint. *See, e.g.*, JAMTD 0034-35 ¶¶ 29–30, 0046 ¶¶ 96-97; *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016).

To prevail on their unjust enrichment claim, Appellants must show: "(1) a benefit conferred by [Appellants] upon [Walgreens]; (2) realization of that benefit by [Walgreens]; and (3) retention of the benefit by [Walgreens] under circumstances that make it inequitable for [Walgreens] to retain it without paying its value." *Gignilliat*, 684 S.E.2d at 764. "Benefits" are defined as "goods or services." *Quintech Sec. Consultants, Inc. v. Intralot USA, Inc.*, No. 2:11-cv-01689-PMD, 2011 WL 5105446, at *4 (D.S.C. Oct. 27, 2011).

Appellants' unjust enrichment claim proceeds as follows: (1) Appellants provided their PII to Walgreens; (2) Walgreens used their PII to determine whether a prescription should be filled as a 340B prescription; and (3) any increased compensation from that determination was inequitable for Walgreens to retain without paying Appellants its value. Br. at 50–51.

Appellants do not allege that a benefit was conferred to Walgreens unjustly at the "loss of another." *Player v. Chandler*, 382 S.E.2d 891, 895 (S.C. 1989); *see also Hill Holiday Connors Cosmopulos, Inc. v. Greenfield*, No. 6:08-cv-03980-GRA, 2010 WL 11530830, at *10 (D.S.C. Apr. 8, 2010) ("[C]ompensation for work performed does not constitute unjust enrichment."). Indeed, as the district court held, Appellants do not even allege that they expected that they would be compensated for Walgreens' use of their PII. JAMTD 0581. Moreover, Appellants agreed to have Walgreens use their information to obtain insurance reimbursement

as payment for medications Walgreens dispenses, JAMTD 0036 ¶ 39—a concession fatal to their contention that Walgreens' retention of some portion of this amount is unjust. In no event, even under Appellants' theory, is Walgreens retaining something that, in the absence of Walgreens' participation in the 340B Program, would inure to Appellants.

To avoid this reality, Appellants claim that they did not expect Walgreens to use their information as it did, *see* JAMTD 0078 ¶ 274, and, without citing any authority for the proposition, argue for the first time on appeal that their *lawsuit* demonstrates their expectation of payment. Br. at 51. Such unsupported legal conclusions fall far short of demonstrating any legally cognizable expectation of payment. What Appellants seek would be a novel right to some form of a profit-sharing rebate, above-and-beyond the price of goods or services Walgreens is able to offer customers, because Walgreens internally processes customer business records in obtaining and using prescription drug inventory in a legally compliant manner.

Moreover, although the district court did not address the issue in its ruling, Appellants' PII is not a "good" or "service" within the meaning of an unjust enrichment claim. *See Gignilliat*, 684 S.E.2d at 764 (determining use of the plaintiff's name in a law firm's name did not supply "any evidence of any goods or services bestowed upon [the firm]"). Even assuming it is, Appellants fail to allege

Walgreens "realized" any benefit. Indeed, any value Walgreens obtains from providing 340B contract pharmacy services to covered entities is derived not from Appellants' PII but rather from the data processing services Walgreens' systems enable it to provide. *Cf. Dwyer*, 652 N.E.2d at 1356 ("[A]n individual name has value only when it is associated with one of defendants' lists. Defendants create value by categorizing and aggregating these names.").

F. Appellants' Claim for Declaratory Relief is Derivative of Their Other Failed Claims.

As the district court found, Appellants' Declaratory Judgment Act claim is premised on Appellants' other failed claims, Br. at 56-57; JAMTD 0066 ¶¶ 200-01, which do not present an actual controversy. JAMTD 0583. Accordingly, Appellants' Declaratory Judgment Act claim must also be dismissed.

CONCLUSION

This Court should affirm the district court's dismissal of WBA for lack of personal jurisdiction and affirm the district court's dismissal of Appellants' Amended Complaint for failure to state a claim.

[SIGNATURE PAGE FOLLOWS]

November 6, 2020

/s/ Robert N. Hochman
Robert N. Hochman
Scott D. Stein
Matthew C. Bergs
Ross O. Kloeber
SIDLEY AUSTIN LLP
One South Dearborn St.
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com
sstein@sidley.com
mbergs@sidley.com
rkloeber@sidley.com

David E. Dukes
Amanda S. Kitts
Adam Hegler
NELSON MULLINS RILEY & SCARBOROUGH, LLP
P.O. Box 11070
Columbia, SC 29211
(803) 799-2000
david.dukes@nelsonmullins.com
amanda.kitts@nelsonmullins.com
adam.hegler@nelsonmullins.com

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Defendants-Appellees certifies that this document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,956 words; and this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word (version 2019) in 14-point Times New Roman font.

/s/ Robert N. Hochman

CERTIFICATE OF SERVICE

I certify that on November 6, 2020, the foregoing document was served on all parties or their counsel of record through the Court's electronic filing system:

Michael J. Moore
Charles W. Byrd
Aimee J. Hall
POPE MCGLAMRY, KILPATRICK, MORRISON & NORWOOD, P.C.
3391 Peachtree Road, NE, Suite 300
Atlanta, GA 30326
(404) 523-7706
michaelmoore@pmkm.com
chuckbyrd@pmkm.com
aimeehall@pmkm.com

William N. Nettles
LAW OFFICE OF BILL NETTLES
2008 Lincoln Street
Columbia, SC 29201
bill@billnettleslaw.com

/s/ Robert N. Hochman

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1767 Caption: J.R. et al., v. Walgreens Boots Alliance, Inc. and Walgreen Co.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Walgreen Co.
(name of party/amicus)

who is Defendant-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

Walgreens Boots Alliance, Inc. is the parent corporation of Walgreen Co.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:

Walgreens Boots Alliance, Inc. owns 10% or more of Walgreen Co.'s stock.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Robert N. Hochman Date: July 21, 2020

Counsel for: Defendant-Appellees

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1767 Caption: J.R. et al., v. Walgreens Boots Alliance, Inc. and Walgreen Co.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Walgreens Boots Alliance, Inc
(name of party/amicus)

who is Defendant-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☑ YES ☐ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Robert N. Hochman Date: July 21, 2020

Counsel for: Defendant-Appellees

Print to PDF for Filing