LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 13–08473 BRO (ASx)**	Date	March 17, 2015
Title	**UNITED STATES OF AMERICA ET AL. V. WALGREEN CO.**		

Present: The Honorable	**BEVERLY REID O'CONNELL, United States District Judge**	
Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: (IN CHAMBERS)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT [32]

I. INTRODUCTION

In this *qui tam* action, relator Michael Irwin ("Relator") seeks to recover on behalf of the United States of America and the State of California for allegedly false and fraudulent claims made by Defendant Walgreen Co. ("Walgreens") for prescription medication payments. Relator has alleged three claims under the federal False Claims Act, 31 U.S.C. §§ 3729 *et seq.* ("FCA"), as well as three claims under the California False Claims Act, California Government Code §§ 12650 *et seq.* ("CFCA"). In short, Relator alleges that Walgreens pharmacies employed three fraudulent schemes to collect false payments from Medicare, Medi-Cal, and other government programs.

Currently pending before the Court is Walgreens' Motion to Dismiss the First Amended Complaint. (Dkt. No. 32.) The Court previously dismissed Relator's Complaint for failure to plausibly allege falsity or scienter in connection with any one of the three allegedly fraudulent schemes. (Dkt. No. 26.) After considering the papers filed in support of and in opposition to the instant motion, the Court deems this matter appropriate for resolution without oral argument of counsel. *See* Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the following reasons, the Court concludes that Relator still fails to state a claim under the FCA or CFCA in connection with the third scheme, but that Relator's allegations are sufficient to sustain such claims in connection with the first and second schemes, at least to the extent Walgreens allegedly failed to reverse the charges for prescriptions that patients did not in fact receive. Accordingly, Walgreens' Motion to Dismiss is **GRANTED in part** and **DENIED in part**.

II. FACTUAL AND PROCEDURAL BACKGROUND

Qui tam relator and insider Michael Irwin is a licensed pharmacist who has worked at a Walgreens pharmacy in Huntington Beach, California (specifically, Store 5771) since 2000. (First Am. Compl. ("FAC") ¶ 14.) Walgreens is a retail pharmacy incorporated in Illinois with various locations throughout California. (FAC ¶ 15.) Relator seeks to recover treble damages and civil penalties under the FCA and the CFCA for allegedly false claims for payment for prescription drug medications submitted to various federal and state healthcare programs. (FAC ¶¶ 1–10, 16–18.) According to Relator, Walgreens employed three different schemes to submit false claims and defraud the federal and California governments. The Court begins with a brief overview of the healthcare programs at issue in this case, as well as some of the laws and regulations governing prescription drug benefits. The Court then sets forth the details of the three schemes.

A. The Federal Medicare System

Medicare is a federally funded health insurance program that provides coverage for persons with disabilities and individuals over age sixty-five. (FAC ¶¶ 19–20.) The Centers for Medicare and Medicaid Services ("CMS"), which operates under the Department of Health and Human Services ("HHS"), administers the Medicare program and provides reimbursement for Medicare claims. (FAC ¶ 21.) To do so, CMS contracts with Medicare Administrative Contractors ("MACs"), who review, approve, and pay Medicare claims received from healthcare providers.[1] (FAC ¶ 21.) The Medicare program includes four major parts. Part D, which governs prescription drug benefits, is particularly relevant to the instant dispute.

The Part D program consists of several layers of entities. (FAC ¶ 23.) The highest level entities are Part D sponsors, who are generally insurance companies. (FAC ¶ 23.) Part D sponsors often contract with "first tier entities," such as, in the context of prescription drugs, Pharmacy Benefits Managers ("PBMs"). (FAC ¶ 24.) PBMs, in turn, may contract with other "downstream" entities, including pharmacies dispersing prescription drugs to Medicare patients. (FAC ¶ 26.) Walgreens is such a downstream

[1] CMS generally pays healthcare providers directly rather than patients. (FAC ¶ 22.) This is because Medicare recipients typically assign their right to payment to the provider, who then submits its bill directly to CMS for payment. (FAC ¶ 22.)

entity which contracts with a PBM to submit Medicare claims and receive reimbursement for prescription drugs. (FAC ¶¶ 25–26.)

Whenever a Part D sponsor submits a claim to CMS, the sponsor must certify that the claim data is accurate, complete, and truthful, as well as acknowledge that the data will be used for obtaining reimbursement from the federal government. (FAC ¶ 23 (citing 42 C.F.R. § 423.505(k)(3)).) If a related entity, such as a contractor or subcontractor of a Plan D sponsor, generates the claim data, then the related entity must also certify that the data is accurate and acknowledge that the data will be used to receive reimbursement. (FAC ¶ 32 (citing the same).) Payment to Part D sponsors is conditioned upon "provision of information to CMS that is necessary to carry out [subpart g],[2] or as required by law." (FAC ¶ 30 (quoting 42 C.F.R. § 423.322(a)).)

A Part D sponsor "maintains ultimate responsibility for adhering to and otherwise fully complying with all terms and conditions of its contract with CMS," regardless of the contractual relationships the sponsor may have with first tier and downstream entities. 42 C.F.R. § 423.505(i)(1). Nevertheless, every contract between a Part D sponsor and first tier or downstream entity must specify that the related entity must comply with all applicable federal laws, regulations, and CMS instructions. (FAC ¶ 36 (citing 42 C.F.R. § 423.505(i)(3)(iv)).) Part D sponsors also agree to comply with applicable state laws. (FAC ¶ 36 (citing 42 C.F.R. § 423.505(b)(15)).)

B. Medicaid and California's Medi-Cal System

Medicaid is a healthcare insurance program for low-income individuals and families of all ages. (FAC ¶ 38.) Pursuant to federal law, each state creates its own Medicaid program, such as California's Medi-Cal. (FAC ¶ 38.) Medicaid programs are jointly funded by the federal and state governments, with the states providing up to half of the total funding. (FAC ¶¶ 38, 40.) California's Medi-Cal provides health care benefits for over 7.5 million residents. (FAC ¶ 41.) Included among Medi-Cal's various benefits is coverage for prescription drug medications, which account for yearly expenditures of up to $3 billion. (FAC ¶ 42.)

[2] Subpart g "sets forth rules for the calculation and payment of CMS direct and reinsurance subsidies for Part D plans." 42 C.F.R. § 423.301.

C. Other Government Healthcare Programs

In addition to Medicare, the United States funds other healthcare programs, such as TriCare. (FAC ¶ 37.) California also funds healthcare programs aside from Medi-Cal. (FAC ¶ 44.) Similar laws and regulations as those governing Medicare and Medi-Cal apply to these programs. (FAC ¶¶ 37, 44.)

D. Walgreens' Three Allegedly Fraudulent Schemes

Relator alleges that Walgreens has systematically filed false claims for payment for prescription drugs with Medicare, Medi-Cal, and other governmental healthcare plans, constituting fraud against the United States, California, and the public. According to Relator, Walgreens has defrauded the government and the public by employing three different schemes, each of which results in false claims for prescription drug payments. The first two schemes—the "mailing scheme" and "return to stock scheme"—involve unclaimed prescriptions and are factually related. The third scheme, the "controlled substance scheme," involves Schedule II controlled substances and is factually distinct.

1. The Mailing Scheme

The mailing scheme and return to stock scheme are factually similar and stem from the same triggering circumstance. The schemes begin as follows: when a patient or provider requests a new prescription or refill, or when an automatic refill notice is generated, Walgreens fills the order, notifies the patient that the medication is ready to be picked up, and bills the applicable payer, such as Medicare or Medi-Cal. (FAC ¶ 60.) If the patient does not pick up the medication within seven days, Walgreens sends an automated telephone message and also calls the patient to remind him or her that the prescription is ready to be picked up. (FAC ¶ 61.) Relator concedes that these procedures are typical and comply with standard industry practice. (FAC ¶ 42.) But Relator alleges that Walgreens' conduct after the seven-day waiting period does not comply with industry practice and results in numerous false claims.

Under the first allegedly fraudulent scheme—the mailing scheme—Relator asserts that once the seven-day waiting period has expired and a patient still has not retrieved the prescription medication, Walgreens mails the medication to the patient's last known address. (FAC ¶ 63.) Relator alleges that Walgreens does not verify that the patient

wants or needs the medication, and that, in all likelihood, the patient does not because the patient is no longer ill, the doctor has changed the prescription, or the patient has obtained the medication from a different pharmacy. (FAC ¶ 63.) Relator also alleges that the unclaimed zero co-payment prescriptions are not always mailed to a patient within seven days; Walgreens allegedly allows unclaimed prescriptions to remain at the pharmacy for an additional week until the pharmacy accumulates a large enough volume to take to the post office. (FAC ¶ 64.)

Relator alleges that the mailing scheme results in the distribution of prescriptions that are medically unnecessary.[3] (FAC ¶¶ 63, 66, 68.) Relator also asserts, as he did in the original Complaint, that the scheme violates Walgreens' internal policies, including those requiring patient counseling for new prescriptions. (FAC ¶ 68; Exs. A and B.) In addition to these allegations, Relator now asserts that the mailing scheme violates patient counseling laws. (FAC ¶ 68.)

As with the original Complaint, Relator alleges that Walgreens only mails unclaimed prescriptions to patients without a co-payment obligation. (FAC ¶ 63.) According to Relator, Walgreens knows that patients with a co-payment obligation would complain about the mailing practice because they would be billed for unwanted or unneeded medication. (FAC ¶¶ 63, 67.) Relator asserts that this practice results in numerous false claims, as most patients without a co-payment obligation are covered by Medicare, Medi-Cal, or another government healthcare plan. (FAC ¶ 67.) Although he did not include this allegation in the original Complaint, Relator now alleges that Walgreens designed the mailing scheme as part of an initiative to increase the profitability of its stores. (FAC ¶ 58.)

2. The Return to Stock Scheme

The second allegedly fraudulent scheme—the return to stock scheme—begins in the same manner as the first, but instead of mailing unclaimed prescriptions to patients, Walgreens allegedly returns the unclaimed medication to stock without reversing the

[3] For example, Relator asserts that some of the unclaimed prescriptions mailed to patients are for antibiotic medications which the patient needs to take immediately. (FAC ¶ 66.) Relator alleges that because these patients may receive the medications nearly three to four weeks after the prescription was written, the medication is no longer medically necessary. (FAC ¶ 66.)

charge to the applicable payer. (FAC ¶ 69; Ex. C.) This results in claims for payment for prescriptions that patients never receive. (FAC ¶ 69.) Relator alleges that, like the mailing scheme, Walgreens limits this practice to prescriptions for patients without a co-payment obligation. (FAC ¶ 69.)

Relator has included new allegations in the First Amended Complaint regarding Walgreens' knowledge of the return to stock scheme. First, Relator has attached a photograph to the First Amended Complaint that displays an envelope containing receipts for zero co-payment prescriptions that Walgreens billed for but never dispensed. (FAC ¶ 70; *see also* Ex. D.) The envelope states "scanned to sold but never p/u."[4] (FAC ¶ 70.) According to Relator, the photograph demonstrates Walgreens' knowledge that it billed for unclaimed prescriptions without reversing the charge. (FAC ¶ 70.)

Second, Relator alleges that a September 2013 audit of Store 5771 revealed $98,000 in excess drug inventory. (FAC ¶ 71.) Relator asserts that the excess inventory resulted "in large part" from prescriptions that Walgreens billed for but later returned to stock. (FAC ¶ 71.) Relator also alleges that Walgreens personnel manipulated the inventory numbers to avoid a second internal audit. (FAC ¶¶ 72–73.)

3. The Controlled Substance Scheme

The third allegedly fraudulent scheme involves controlled substances. Federal and California law regulate the manner in which pharmacies may dispense highly controlled substances subject to abuse. (FAC ¶¶ 75–76.) Such substances are known as "Schedule II" medications. (FAC ¶ 74.)

Under California law, a pharmacy may only fill a Schedule II prescription to the extent it has the medication in stock; a pharmacy generally may not fill the deficiency at a later date without a new prescription. *See* Cal. Health & Safety Code § 11200(c); *see also* Cal. Code Regs. tit. 16, § 1745.[5] Federal law also prohibits refilling Schedule II

[4] "P/u" presumably refers to "picked up."

[5] By statute, California prohibits refilling prescriptions for Schedule II substances. *See* Cal. Health & Safety Code § 11200(c). The California Code of Regulations provides that a pharmacy may only partially fill a prescription for a Schedule II substance if the patient is an inpatient of a skilled nursing facility or terminally ill. *See* Cal. Code Regs. tit. 16, § 1745(a).

prescriptions. *See* 21 U.S.C. § 829(a). So, for example, if a patient has a prescription for one hundred pills of a Schedule II medication and a pharmacy has only twenty pills in stock, the pharmacy may only dispense twenty pills. The pharmacy generally may not dispense the eighty pills remaining on the prescription at a later time unless the patient presents a new prescription.

There is one exception to this general prohibition. California law permits a pharmacy to fill an incomplete Schedule II prescription within seventy-two hours of initial disbursement. *See* Cal. Code Regs. tit. 16, § 1745(d). But a pharmacy may not fill an incomplete Schedule II prescription after the seventy-two hour period has expired without a new prescription. *Id.* Federal law accords with California law in this regard. *See* 21 C.F.R. § 1306.13.

Relator alleges that Walgreens has violated these federal and state laws and regulations governing Schedule II medications, resulting in various false claims. Similar to Relator's allegations in the original Complaint, Relator now alleges that Walgreens "routinely dispensed the amount [of a Schedule II medication] in stock, charged for the entire amount, and provided the patient with the remaining amount" if and when the patient returns. (FAC ¶¶ 77–79; *see also* Exs. E and F.) Relator alleges that some patients do not return to pick up the remainder, resulting in false claims to the extent Walgreens charges for but does not disburse Schedule II medications. (FAC ¶¶ 77–79.) Relator also alleges that some patients return for the remainder but do so after the lawful seventy-two hour period has expired. (FAC ¶¶ 77–79.) Relator asserts that Walgreens' practice of filling the deficiency after seventy-two hours have passed violates federal and state law, thereby resulting in false certification claims.

E. Procedural History

Relator initiated this *qui tam* action under seal on November 15, 2013. (Dkt. No. 1.) Relator invokes this Court's federal question jurisdiction and alleges three FCA claims under 31 U.S.C. § 3729.[6] (FAC ¶¶ 114–128.) Relator also brings three CFCA

[6] 31 U.S.C. § 3730 authorizes private persons, known as "relators" to bring a civil action, known as a "*qui tam* action," for violations of § 3729 on the person and the United States government's behalf. *See* 31 U.S.C. § 3730(b)(1).

state law claims under California Government Code section 12651.[7] (FAC ¶¶ 129–141.) All six claims relate to Walgreens' allegedly fraudulent schemes.

On September 19, 2014, the United States and State of California decided not to intervene in this action. (Dkt. No. 16.) Both reserved their right to intervene at a later time for good cause. (*Id.*) That same day, the Court unsealed the Complaint and ordered Relator to serve Walgreens. (Dkt. No. 17.)

On November 20, 2014, Walgreens filed the a motion to dismiss the Complaint in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b). The Court granted Walgreens' motion but permitted Relator leave to amend. (Dkt. No. 26.) Relator filed the First Amended Complaint on January 20, 2015. (Dkt. No. 27.) Walgreens now moves to dismiss the First Amended Complaint. (Dkt. No. 32.) Relator timely opposed the motion, (Dkt. No. 33), and Walgreens timely replied, (Dkt. No. 34).

III. LEGAL STANDARD

Under Rule 8(a), a complaint must contain a "short and plain statement of the claim showing that the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a). If a complaint fails to do this, the defendant may move to dismiss it under Rule 12(b)(6). Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, there must be "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility'" that the plaintiff is entitled to relief. *Id.*

[7] 31 U.S.C. § 3732 confers federal court jurisdiction over actions brought under state law to recover funds paid by state or local governments so long as the action "arises from the same transaction or occurrence as an action brought under section 3730." *See* 31 U.S.C. § 3732(b).

Where a district court grants a motion to dismiss, it should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment."). Leave to amend, however, "is properly denied . . . if amendment would be futile." *Carrico v. City & Cnty. of S.F.*, 656 F.3d 1002, 1008 (9th Cir. 2011).

IV. REQUEST FOR JUDICIAL NOTICE

When considering a motion to dismiss, a court typically does not look beyond the complaint in order to avoid converting a motion to dismiss into a motion for summary judgment. *See Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). Notwithstanding this precept, a court may properly take judicial notice of (1) material which is included as part of the complaint or relied upon by the complaint, and (2) matters in the public record. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001).

A court may also take judicial notice pursuant to Federal Rule of Evidence 201(b). Under the rule, a judicially noticed fact must be one that is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A court "must take judicial notice if a party requests it and the court is supplied with the necessary information." *See* Fed. R. Evid. 201(c)(2); *In re Icenhower*, 755 F.3d 1130, 1142 (9th Cir. 2014).

In connection with the instant Motion to Dismiss, both parties have requested that the Court take judicial notice of various documents. Plaintiff formally requests that the Court judicially notice three documents filed in a matter pending in the Eastern District of Pennsylvania, including the complaint, Walgreens' answer, and a memorandum denying Walgreens' motion to dismiss.[8] (*See* Request for Judicial Notice ("RJN") Exs. A, B, C.)

[8] The case is *Joseph Urban v. Walgreen Co.*, CV 14-01798 MMB, and involves a Walgreens pharmacist's claim for wrongful termination.

Because these are publicly filed documents, judicial notice of them is proper. *See Lee*, 250 F.3d at 688–89. Nevertheless, the Court may not take judicial notice of any facts within these documents that are subject to reasonable dispute. *Id.* at 689; *see also* Fed. R. Evid. 201(b). Thus, the Court may take judicial notice of these documents only for their existence and "not for the truth of the facts recited therein." *Lee*, 250 F.3d at 890 (internal citations omitted). Plaintiff's request is therefore **GRANTED in part** and **DENIED in part**.

Walgreens has not filed a formal request for judicial notice. Nevertheless, Walgreens has attached two exhibits to its motion and suggests that judicial notice of the documents is proper. (*See* Mot. to Dismiss at 11 n.4.) Exhibit A is a guidance letter issued by CMS on December 12, 2013 that clarifies a document attached to the First Amended Complaint. (*Id.* Ex. A.) Exhibit B appears to be a newsletter issued by Inside Washington Publishers regarding the December 12, 2013 guidance letter. (*Id.* Ex. B.) Because the Court has not relied upon these exhibits in considering the instant Motion to Dismiss, Walgreens' request for judicial notice is **DENIED as moot**.

V. DISCUSSION

Relator alleges three claims under the FCA and three claims under the CFCA's related provisions. All six claims rely on the central allegation that Walgreens submitted false and fraudulent claims for payment for prescription drug medications in connection with the mailing, return to stock, and controlled substance schemes. Walgreens seeks to dismiss these claims pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b).

In dismissing Relator's claims as alleged in the initial Complaint, the Court concluded that Relator had failed to adequately allege falsity in connection with the mailing scheme and one theory under the controlled substance scheme. (*See* Dkt. No. 26 at 7–16.) The Court also concluded that Relator failed to plausibly allege scienter, or knowledge of the claims' falsity, in connection with the return to stock scheme and remaining theory of liability under the controlled substance scheme. (*Id.* at 7, 16–19.)

Walgreens argues that the First Amended Complaint fails to cure these pleading deficiencies. Walgreens also argues that Relator's claims fail because they do not meet the heightened pleading requirements of Rule 9(b). The Court begins with an overview

of the necessary elements for a claim under the FCA. *See infra* Part V.A. The Court then discusses the viability of Relator's FCA claims in light of the new allegations. *See infra* Part V.B–D. The Court concludes by addressing the CFCA claims. *See infra* Part V.E.

A. The Necessary Elements for Relator's Claims Under the FCA

The FCA was originally enacted during the Civil War to punish and prevent fraud by government contractors. *See United States v. Bornstein*, 423 U.S. 303, 309 (1976). It is a remedial statute and is thus broadly construed to reach "beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968). The FCA imposes liability and provides for the recovery of civil penalties in situations where, *inter alia*, a person: (1) knowingly presents a false or fraudulent claim to the federal government for payment; (2) knowingly makes or uses "a false record or statement material to a false or fraudulent claim"; or (3) knowingly makes or uses a false record or statement to conceal or improperly avoid or decrease an obligation to the federal government. *See* 31 U.S.C. § 3729(a)(1)(A), (B), and (G).

To state a claim under § 3729(a)(1)(A), a relator must allege the following: "(1) a false or fraudulent claim (2) that was material to the decision-making process (3) which [the] defendant presented, or caused to be presented, to the United States for payment or approval (4) with knowledge that the claim was false or fraudulent." *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1047 (9th Cir. 2012). A claim under § 3729(a)(1)(B) requires a showing that the defendant "knowingly made, used, or caused to be made or used, a false record or statement material to a false or fraudulent claim." *Id.* at 1048. To state a claim under § 3729(a)(1)(G), the "reverse false claims" provision, a relator must allege facts showing that the defendant made, used, or caused to be made or used, a false record or statement to reduce the amount the defendant owes to the government. *See Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1056 (9th Cir. 2011). This last provision "does not eliminate or supplant the FCA's false claim requirement." *Id.* Rather, it "expands the meaning of a false claim to include statements to avoid paying a debt or returning property to the United States." *Id.*

Although the FCA defines a "claim," *see* 31 U.S.C. § 3729(b)(2), it does not define the term "false." To determine whether a claim is false or fraudulent, a court must

consider "whether a defendant's representations are accurate in light of applicable law." *United States v. Bourseau*, 531 F.3d 1159, 1164 (9th Cir. 2008). Ninth Circuit precedent identifies two categories of false claims: factually false claims and false certifications.

The "prototypical" false claim is a factually false claim, which involves an "explicit lie in [the] claim for payment, such as an overstatement of the amount due." *United States ex rel. Modglin v. DJO Global, Inc.*, No. CV 12-07152 MMM JCGX, 2014 WL 4783575, at *14 (C.D. Cal. Sept. 2, 2014). In such situations, "the claim for payment is itself literally false or fraudulent." *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006). The false nature of a factually false claim is therefore quite clear.

FCA liability, however, is not limited to factually false claims. *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996). A claim may be sustained under a different theory of falsity, such as where a defendant makes a false certification of compliance with the law. *Id.* Under a false certification theory, a claim is considered false because the defendant "falsely certifies compliance with a statute or regulation as a condition to government payment." *Hendow*, 461 F.3d at 1171.

The Ninth Circuit has recognized two kinds of false certification claims: express false certification and implied false certification. *See Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 996 (9th Cir. 2010) ("[W]e now join our sister circuits in recognizing a theory of implied false certification under the FCA."). An express false certification claim arises when "the entity seeking payment certifies compliance with a law, rule, or regulation as part of the process through which the claim for payment is submitted." *Id.* at 998. An implied false certification claim arises when "an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required" to submit the claim. *Id.*

With respect to both kinds of false certification claims, the Ninth Circuit has clarified that "[m]ere regulatory violations do not give rise to a viable FCA action." *Hendow*, 461 F.3d at 1171 (alteration in original) (quoting *Hopper*, 91 F.3d at 1267). Rather, "'[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit.'" *Ebeid*, 616 F.3d at 998

(alteration in original) (quoting *Hopper*, 91 F.3d at 1266). Thus, to establish falsity under a false certification theory, "the relevant certification of compliance must be both a 'prerequisite to obtaining a government benefit,' and a '*sine qua non* of receipt of [government] funding.'" *Hendow*, 461 F.3d at 1172 (alteration in original) (quoting *Hopper*, 91 F.3d at 1266–67).

The materiality element of an FCA claim overlaps with false certification. The FCA defines materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *See* 31 U.S.C. § 3729(b)(4). Thus, to establish materiality, the government funding "must be 'conditioned' upon certifications of compliance." *See Hendow*, 461 F.3d at 1172; *see also Ebeid*, 616 F.3d at 998 (explaining that the materiality element under a false certification theory is satisfied "only where compliance is a *sine qua non* of receipt of state funding" (internal quotation marks omitted)).

B. Whether the Mailing and Controlled Substance Schemes Demonstrate Falsity

In dismissing the Complaint, the Court concluded that Relator failed to adequately allege falsity in connection with the mailing scheme. (Dkt. No. 26 at 10–12.) The Court also concluded that the controlled substance scheme only demonstrated falsity in part. (*Id.* at 13–16.) The Court noted that the controlled substance scheme relies on two theories of falsity. (*Id.* at 13.) Under the first theory, Walgreens dispenses less than a full prescription of a Schedule II drug, charges for the full amount, and the patient never returns for the remainder. Under the second theory, the patient returns after the lawful seventy-two hour window to disburse the remaining medication has expired. The Court dismissed this second theory as alleged in the Complaint on the ground that Relator failed to establish factual falsity or false certification. (*Id.* at 16.)

1. Relator Still Fails to Establish Falsity In Connection With the Controlled Substance Scheme's Second Theory of FCA Liability

Relator's Opposition focuses on the mailing scheme and does not direct the Court to any new allegations demonstrating falsity with respect to the controlled substance scheme's second theory. (*See generally* Relator's Opp'n.) After reviewing the First

Amended Complaint, the Court concludes that Relator again fails to establish falsity in connection with this theory of FCA liability. Relator's only new allegations relate the scheme's first theory of liability—that is, Walgreens' practice of charging for a full Schedule II prescription and failing to reverse the charge when the patient does not return for the remainder. (*See* FAC ¶¶ 77–80.) The Court has already concluded that these allegations demonstrate falsity. (*See* Dkt. No. 26 at 13 ("Relator's first theory under the controlled substance scheme adequately alleges factual falsity. If Walgreens disburses less than a full prescription of a Schedule II drug, charges for the full amount, and the patient never receives the remainder, Walgreens effectively overcharges the applicable payer. This practice therefore demonstrates factual falsity.").)

Because Relator has not alleged any new facts or directed the Court to any applicable laws that could demonstrate falsity with respect to the controlled substance scheme's second theory of liability, the Court again concludes that the second theory fails to establish falsity. Given that the Court has already granted Relator the opportunity to cure this defect, and that Relator not even attempted to do so, further leave to amend would be futile. Thus, to the extent Relator bases his FCA claims on the allegation that Walgreens disburses Schedule II medications to patients after the lawful seventy-two hour window has expired, these claims are **DISMISSED with prejudice**.

2. Relator Adequately Alleges Falsity In Connection With the Mailing Scheme to the Extent Walgreens Failed to Reverse the Charges for Mailed Prescriptions That Patients Did Not Receive

In dismissing the Complaint, the Court concluded that Relator failed to adequately allege falsity in connection with the mailing scheme. (Dkt. No. 26 at 10–12.) The Court based its reasoning on Relator's failure to establish that the scheme resulted in factually false claims or false certifications. (*Id.*) Relator asserts that the First Amended Complaint has cured these deficiencies.

i. Factual Falsity

First, Relator alleges that the mailing scheme resulted in factually false claims because prescriptions Walgreens mailed to a patient were returned as undeliverable on at least two occasions. (FAC ¶ 91; *see also* Ex. L.) Relator further alleges that Walgreens

did not reverse the charges for these returned and undelivered prescriptions. (FAC ¶ 92.) Walgreens asserts that two instances of undelivered prescriptions are insufficient to demonstrate factual falsity. But to the extent Walgreens failed to reverse the charges for prescriptions that it mailed to patients and that the patients did not in fact receive, Walgreens' claim for payment would be factually false. That Relator has now identified two such instances in which this occurred provides plausible factual support for this theory of falsity.

Relator has also added allegations to support his theory that unclaimed prescriptions are medically unnecessary and therefore factually false. For example, Relator points to a manual issued by CMS providing examples of pharmacy fraud, waste, and abuse. (FAC ¶ 3.) Among the manual's examples of fraud is the following: "Billing for Prescriptions that are never picked up (i.e. not reversing claims that are processed when prescriptions are filled but never picked up.)" (FAC ¶ 3.) The manual also states that billing for medically unnecessary prescriptions may constitute fraud, waste, or abuse. (FAC ¶ 3.) Relator also identifies a rate notice published by CMS on April 1, 2013. (FAC ¶ 4.) The rate notice concerns automatic delivery practices such as Walgreens' alleged mailing scheme. The notice indicates that CMS had received complaints from Medicare beneficiaries that pharmacies had mailed unwanted or otherwise unnecessary prescriptions to them. (FAC ¶ 4.) The notice explains CMS's position that "Part D sponsors should require their network retail and mail pharmacies to obtain patient consent to deliver a prescription, new or refill, prior to each delivery. We believe unintended waste and costs could be avoided if pharmacies confirmed with the patient that a refill, or new prescription received directly from the physician, should be delivered." (FAC ¶ 4.)

The mailing scheme's basic premise— that Walgreens mails valid prescriptions to real patients—does not fall within the manual's prohibition against billing for unclaimed prescriptions. The manual demonstrates nothing more than the unobjectionable proposition that it would be false or fraudulent to charge for a prescription that a patient does not receive. And the Court has already concluded that Walgreens' failure to reverse the charges for mailed prescriptions that patients later return demonstrates falsity. The manual may support this theory of liability; it does not, however, establish that all mailed prescriptions are medically unnecessary and therefore factually false.

The rate notice also fails to support Relator's theory that mailed prescriptions are

unnecessary and false. That CMS directed Plan D sponsors to require a patient's consent before mailing a prescription does not demonstrate that Walgreens' alleged failure to do so resulted in overcharges or false claims to the government. Like the manual, the rate notice does not alter the fundamental premise behind the mailing scheme—that Walgreens delivers genuine prescriptions to actual patients—which this Court has concluded cannot logically result in factually false claims. (*See* Dkt. No. 26 at 12.) Further, that only two mailed prescriptions were returned to Walgreens undermines the assertion that mailed prescriptions are medically unnecessary or unwanted.

ii. False Certification

In connection with Walgreens' first motion to dismiss, Relator did not argue that the mailing scheme resulted in false claims based upon false certifications. (*See* Dkt. No. 26 at 10.) Relator now asserts a false certification argument, again under the theory that government healthcare plans only reimburse for medically necessary prescriptions, of which mailed medications are not. (*See* Relator's Opp'n at 19–20.) Relator again points to the CMS manual and rate notice, as well as various federal regulations to suggest that unclaimed mailed prescriptions are unwanted and unnecessary.

To demonstrate falsity under a false certification theory, Relator must allege that Walgreens, either expressly or impliedly, certified its compliance with federal or state law when submitting claims for mailed prescriptions, and that this certification of compliance was a prerequisite to payment. *See Ebeid*, 616 F.3d at 996, 998; *see also Hendow*, 461 F.3d at 1172. The First Amended Complaint includes only one allegation demonstrating Walgreens' certification of compliance with the law in connection with the mailing scheme. To that end, Relator directs the Court to 42 C.F.R. § 423.505, which requires downstream entities such as Walgreens to certify that the claims data they generate is accurate, complete, and truthful, and to acknowledge that the data will be used for the purpose of obtaining federal reimbursement. (*See* FAC ¶ 32 (citing 42 C.F.R. 423.505(k)(3)).) Relator alleges that because CMS counseled against mailing prescriptions without a patient's consent, (*see* FAC ¶ 4), the mailing scheme resulted in inaccurate, incomplete, or untruthful claims.

Relator's allegations regarding § 423.505 are insufficient to demonstrate falsity under an express or implied false certification theory. Critically, § 423.505(k)(3) does

not condition a downstream entity's right to payment upon its certification that the claim data is accurate, complete, and truthful. *See generally* § 423.505(k). Thus, even if the regulation demonstrates a certification of compliance with federal law, it does not support a false certification theory of falsity, as the certification is not the *sine quo non* of payment. *See Hendow*, 461 F.3d at 1172.

The First Amended Complaint also references 42 C.F.R. § 423.322(a), which provides that payment to Part D sponsors is conditioned upon "provision of information to CMS that is necessary to carry out [subpart g] or as required by law." (*See* FAC ¶ 30 (quoting 42 C.F.R. § 423.322(a)).) This regulation also fails to demonstrate false certification because it only conditions a Plan D *sponsor's* payment upon the provision of information required by law. And Relator concedes that Walgreens is not a Plan D sponsor, but rather a downstream subcontractor. (FAC ¶¶ 25–26.)

Relator's remaining citations to federal laws and regulations also fail to establish falsity under an express or implied false certification theory. For example, Relator alleges that Walgreens violated 42 C.F.R. § 423.505(i)(3)(iv) and § 423.505(i)(4)(iv), which require every contract between a Part D sponsor and first tier or downstream entity to specify that the entity must comply with all applicable federal laws, regulations, and CMS instructions. (FAC ¶¶ 29, 36.) Relator also alleges that the scheme violates federal laws regarding patient counseling. (FAC ¶ 68.) But again, these regulations do not condition a downstream entity like Walgreens' right to payment upon compliance with federal laws, regulations, and CMS instructions. *See generally* 42 U.S.C. 1396r-8(g); 42 C.F.R. § 423.505(i). Accordingly, even if the mailing scheme did not comport with CMS guidance, these regulations do not establish the scheme's falsity under a false certification theory.

In sum, Relator's new allegations demonstrate falsity only to the extent Relator alleges Walgreens failed to reverse the charges for prescriptions it mailed to patients and that the patients returned or otherwise did not in fact receive. Relator's other allegations fail to establish falsity in connection with the mailing scheme. To the extent Relator's FCA claims rely on these deficient allegations, Relator's claims are **DISMISSED**.

C. Whether the Mailing and Return to Stock Schemes Demonstrate Scienter

To state a claim under the FCA, Relator must also establish that Walgreens submitted claims for government payment "with knowledge that the claim[s] w[ere] false or fraudulent." *Hooper*, 688 F.3d at 1047. The FCA defines "knowingly" as having "actual knowledge of the information" or acting "in deliberate ignorance" or "in reckless disregard" of the information's truth or falsity. *See* 31 U.S.C. § 3729(b)(1). This definition reflects Congress's "intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence." *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir. 1998) (quoting S. Rep. No. 99–345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272) (internal quotation marks omitted). The Ninth Circuit has also clarified that "'known to be false' does not mean scientifically untrue; it means a lie." *Id.* (quoting *United States ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815–16 (9th Cir. 1995)). Thus, "[t]he requisite intent is the knowing presentation of what is known to be false." *United States ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991).

Rule 9(b)'s heightened pleading standard applies to claims under the FCA. *See Cafasso*, 637 F.3d at 1054. Under the rule, a party may allege knowledge generally. Fed. R. Civ. P. 9(b). Nevertheless, because of Rule 8's plausibility requirement, a relator alleging an FCA claim must allege enough facts to plausibly plead scienter. *See Cafasso*, 637 F.3d at 1055.

The Court previously dismissed Relator's FCA claims to the extent they relied upon the return to stock or controlled substance schemes for lack of scienter. The Court now considers whether the First Amended Complaint has cured this deficiency. Additionally, because the Court has concluded that the First Amended Complaint demonstrates falsity in part in connection with the mailing scheme, the Court also considers whether the mailing scheme demonstrates scienter.

1. Relator Has Adequately Alleged Scienter in Connection With the Mailing Scheme

In dismissing the Complaint, the Court did not consider whether Relator had demonstrated scienter in connection with the mailing scheme given that the allegations

failed to establish falsity. (*See* Dkt. No. 26 at 17.) As discussed above, the Court now concludes that Relator has adequately alleged falsity to the extent Walgreens failed to reverse the charges for returned or undelivered prescriptions. Accordingly, the Court considers whether these allegations demonstrate scienter.

The First Amended Complaint sets forth various new allegations concerning Walgreens' knowledge of the mailing scheme's falsity. Relator asserts that in December 2011, Walgreens instituted an initiative designed to increase the profitability of its stores. (FAC ¶ 58.) As part of this initiative, pharmacies throughout Orange County, including Store 5771, began mailing unclaimed prescriptions to patients without their consent. (FAC ¶ 58, 90, 93.) Relator alleges that this practice ran counter to Walgreens' internal written policies, which required that prescriptions not picked up within seven days should be deleted, and which stated that prescriptions should only be mailed to patients upon their request. (FAC ¶¶ 83, 85.) Relator also alleges that Walgreens concealed the mailing scheme from auditors. (FAC ¶ 104.) In response to an auditor's inquiry as to the procedure for handling unclaimed prescriptions, an assistant store manager answered that the pharmacy simply returned the medication to stock. (FAC ¶ 104; Ex. U.)

The majority of these allegations presume that all mailed prescriptions result in false claims. But as the Court has already concluded, the mere fact that a patient does not timely pick up a prescription does not mean that the medication is unnecessary or render Walgreens' claim for payment false. Thus, that Walgreens initiated the mailing scheme to increase profitability, that the scheme did not comport with the company's internal written policies, and that Walgreens failed to disclose the scheme to an auditor do not sustain Relator's FCA claims to the extent they rely on inadequately alleged falsity.

But to the extent Relator's FCA claims rely on the allegation that Walgreens failed to reverse the charges for returned and undelivered prescriptions, the First Amended Complaint demonstrates scienter. Assuming Walgreens personnel received returned prescriptions and failed to reverse the charges for them, Walgreens acted with actual knowledge that it had submitted factually false claims for payment. At the very least, the failure to inquire any further into the matter demonstrates reckless disregard.

Accordingly, to the extent Relator's FCA claims rely on the mailing scheme's particular allegation that Walgreens failed to reverse the charges for prescriptions that

were returned or undelivered, Relator's claims remain viable. But to the extent Relator's claims rely on the mailing scheme's other allegations, these claims fail for lack of falsity and are **DISMISSED**.

2. Relator Has Adequately Alleged Scienter In Connection With the Return to Stock Scheme

The Court previously dismissed Relator's FCA claims to the extent they relied on the return to stock scheme because Relator failed to plausibly allege scienter. As the Court explained: "Relator has not alleged that Walgreens has a policy or practice of deliberately failing to reverse charges for unclaimed prescriptions. Nor has Relator alleged that any Walgreens pharmacists, employees, or other representatives returned unclaimed medications to stock with the knowledge or intent that the charges would not be reversed." (Dkt. No. 26 at 18.)

The First Amended Complaint contains two new factual allegations regarding Walgreens' purported knowledge of the return to stock scheme's falsity. First, Relator has attached to the First Amended Complaint a photograph of an envelope containing receipts for prescriptions that Walgreens billed for but never dispensed, whether in person or by mail. (FAC ¶ 70; Ex. D.) The envelope's face displays the following handwritten notation: "scanned to sold but never p/u March–April 2012." (FAC Ex. D.)

Walgreens argues that the photograph does not create a plausible inference of scienter. (Mot. to Dismiss at 14.) Specifically, Walgreens asserts that the photograph neither establishes a policy or practice of failing to reverse the charges for unclaimed prescriptions, nor demonstrates any individual's knowledge that unclaimed prescriptions were returned to stock without reversing the charge for them. Essentially, Walgreens argues that the Court's previous order required Relator to allege facts establishing scienter in one of these ways.

Contrary to Walgreens' characterization of the Court's previous order, the Court has not imposed any such pleading requirement. The Court merely offered these statements as examples of ways in which Relator might plausibly allege Walgreens' knowledge of the return to stock scheme's falsity. Thus, although the letter alone does not necessarily demonstrate a corporate policy or practice of failing to reverse the charges

for unclaimed prescriptions, it nevertheless raises a plausible inference of scienter. That Walgreens knew of a discrete set of prescriptions, within a particular period of time, for which it billed the applicable government payer but which the patient never received, suggests Walgreens actually knew it had submitted false claims for payment. At a minimum, Walgreens' failure to investigate the matter demonstrates reckless disregard, which is sufficient to allege scienter under the FCA. *See* 31 U.S.C. § 3729(b)(1).

Relator has also alleged new facts regarding an internal audit of Store 5771. (FAC ¶ 71.) According to the First Amended Complaint, the audit revealed that the pharmacy had retained over $98,000 in excess prescription drug inventory, "due in large part to medications that were scanned as 'sold' but later returned to stock." (FAC ¶ 71.) Walgreens argues that whether a particular pharmacy discovered it had excess inventory "has no bearing on whether employees knew any claims were false when made." (Mot. to Dismiss at 15.) But this argument misses the mark. Assuming Walgreens knew that it charged for certain prescriptions that patients did not pick up, Walgreens' failure to investigate whether it reversed the charges for those unclaimed prescriptions raises a plausible inference of knowing falsity, or at least reckless disregard. That one pharmacy's internal audit revealed $98,000 in excess inventory reinforces this inference. Accordingly, Relator's new allegations are sufficient to plausibly allege scienter in connection with the return to stock scheme.[9]

[9] Walgreens argues that these new allegations cannot demonstrate scienter because they do not show the company knew any prescriptions would go unclaimed (or that it would return any prescriptions to stock) when it initially scanned the prescription as sold. (Mot. to Dismiss at 15.) The Court is mindful that under Ninth Circuit precedent, a claim "must in fact be false when made." *Hendow*, 461 F.3d at 1171–72. (internal quotation marks omitted). But Walgreens' reliance on this precedent would lead to an absurd result. To the extent Walgreens knew it submitted claims for payment for prescriptions that a patient never received, the false claim consists of Walgreens' failure to reverse the charge. That Walgreens cannot know when it first charges for a particular prescription that the prescription will go unclaimed does not shield it from all liability under the FCA. This result would be contrary to the Supreme Court's command that the FCA be broadly construed. *See Neifert-White Co.*, 390 U.S. at 233.

3. Relator Fails to Establish Scienter In Connection With the Controlled Substance Scheme

As indicated above, the controlled substance scheme rests on two theories of liability. The second theory regards patients who return for the remainder of a Schedule II prescription after the lawful seventy-two hour window has expired. Because the Court has dismissed this second theory for failure to establish falsity, *see supra* Part V.B.1, the Court will only address whether the first remaining theory demonstrates scienter.

The first theory regards patients who receive less than the full amount of medication on a Schedule II prescription and who do not return to Walgreens for the remainder. The Court previously dismissed this theory of FCA liability because Relator failed to allege any facts demonstrating scienter. (*See* Dkt. No. 26 at 18–19.) Specifically, the Court concluded that Relator failed to allege sufficient facts "giving rise to a plausible inference that Walgreens knew, deliberately ignored, or recklessly disregarded whether patients receiving partially filled Schedule II prescriptions would return within seventy-two hours to retrieve the remainder." (*Id.* at 19.) As the Court reasoned, Walgreens' practice of issuing "IOUs" to these patients "is entirely consistent with negligence or mistake" and fails to plausibly demonstrate Walgreens' knowledge of these claims' falsity. (*Id.*)

Most of Relator's new allegations concern the mailing and return to stock schemes. Relator has, however, attached various documents to the First Amended Complaint to demonstrate scienter in connection with the controlled substance scheme. For example, Relator has attached a photograph of Schedule II prescriptions with handwritten notes indicating that the pharmacy owed the patient a certain quantity of medication. (FAC ¶ 79; Ex. F.) Relator has also attached a document containing one pharmacy manager's responses to an internal audit. (FAC ¶ 80; Ex. G.) In response to the auditor's inquiry, "What is the pharmacy's procedure for partially filled prescriptions?," the manager stated "Bill for partial." (FAC Ex. G.)

These new allegations remain insufficient to raise a plausible inference that Walgreens knowingly failed to adjust the charges for partially filled Schedule II medications that it initially billed for in full. Like Relator's previous allegation regarding Walgreens' issuance of "IOUs," the photograph merely demonstrates Walgreens'

knowledge that it had not dispensed a particular Schedule II prescription in full. The photograph does not, however, plausibly demonstrate that Walgreens knew or recklessly disregarded whether the patient receiving the partially filled prescription would not return within seventy-two hours for the remaining medication.

That one store manager represented Walgreens' policy was to bill for the precise quantity of medication it actually dispensed also fails to establish scienter. Even if Walgreens' internal policy required pharmacies to only partially bill for partially filled Schedule II medications, the fact that some stores billed in full does not suggest these stores knew the patients would not return for the remainder, or that the stores recklessly disregarded this chance. Thus, to the extent Relator's FCA claims rely on the controlled substance scheme's first theory, these claims fail for lack of scienter and are **DISMISSED**.

D. Whether Relator Has Pleaded the Remaining Allegations Concerning the Mailing and Return to Stock Schemes with Particularity

Walgreens argues that Relator's FCA claims fail because the First Amended Complaint does not plead the three allegedly fraudulent schemes with particularity. (*See* Mot. to Dismiss at 2, 3, 16, 18, 20.) As discussed in detail above, the Court finds that many of Relator's new allegations fail to establish falsity or scienter in connection with these schemes. The mailing scheme remains viable to the extent Relator alleges Walgreens failed to reverse the charges for mailed prescriptions that a patient returned, or that were returned as undeliverable. The return to stock scheme may also support Relator's FCA claims to the extent he alleges Walgreens failed to reverse the charges for prescriptions Walgreens knew a patient never picked up or otherwise received. Because these allegations are sufficient to establish liability under the FCA, the Court considers whether they meet Rule 9(b)'s particularity requirement.

"Because the FCA is an anti-fraud statute and requires fraud allegations, complaints alleging a FCA violation must fulfill the requirements of Rule 9(b)." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008) (citing *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001)). The rule requires any party alleging fraud to "state with particularity the circumstances constituting fraud," including "the who, what when, where, and how of the misconduct charged." *Ebeid*, 616

F.3d at 998 (internal quotation marks omitted) (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.)). Additionally, the party "must set forth what is false or misleading about a statement, and why it is false." *Id.* (internal quotation marks omitted).

The Ninth Circuit has rejected a "categorical approach" requiring a relator to identify "representative examples of false claims to support every allegation," at least in the context of implied false certification claims. *Id.* In the Ninth Circuit, "use of representative examples is simply one means of meeting the pleading obligation." *Id.* Accordingly, a relator may satisfy Rule 9(b)'s particularity requirement by alleging "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id.* at 998–99 (internal quotation marks omitted) (citing *United States ex rel. Grubbs v. Ravikumar Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)). In essence, a relator's burden under Rule 9(b) is to "provide enough detail 'to give [the defendant] notice of the particular misconduct which is alleged to constitute the fraud charged so that [the defendant] can defend against the charge and not just deny that [the defendant] has done anything wrong.'" *Id.* at 999 (quoting *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001)).

The First Amended Complaint satisfies Rule 9(b)'s particularity requirements with respect to those allegations the Court has concluded remain viable. In connection with the mailing scheme, Relator has identified two particular instances in which mailed prescriptions were returned to a particular Walgreens store. (FAC ¶¶ 91–92; Ex. L.) The more general allegations concerning Walgreens' practice of mailing prescriptions are also detailed and clear. (*See* FAC ¶¶ 57–68.) In connection with the return to stock scheme, Relator has identified a particular set of prescriptions for which Walgreens failed to reverse the charges, despite knowledge that the patients never received the prescriptions. (FAC ¶ 70; Ex. D.) These allegations are sufficient to give Walgreens notice of the particular misconduct charged against it. *See Ebeid*, 616 F.3d at 999.

E. Relator's CFCA Claims

In addition to FCA claims under § 3729(a)(1)(A), (B), and (G), Relator alleges three state law claims under the CFCA. (*See* FAC ¶¶ 129–141.) Specifically, Relator alleges that Walgreens violated sections 12651(a)(1), (2), and (7) of the CFCA in

connection with the mailing, return to stock, and controlled substance schemes. These provisions track § 3729(a)(1)(A), (B), and (G). The CFCA is largely based on the FCA, *see State ex rel. Bowen v. Bank of Am. Corp.*, 126 Cal. App. 4th 225, 236 (Cal. Ct. App. 2005), and as a result, FCA decisions inform and influence the meaning of the CFCA, *see United States v. Chapman Univ.*, No. SACV 04-1256JVSRCX, 2006 WL 1562231, at *3 n.3 (C.D. Cal. May 23, 2006) (citing *Bowen*, 126 Cal. App. 4th at 236). To the extent Relator's allegations fail to state a claim under the FCA, the allegations also fail to state a claim under the CFCA and are similarly **DISMISSED**. But to the extent Relator's allegations demonstrate falsity and scienter in accordance with Rules 8 and 9(b), these allegations are also sufficient to support Relator's CFCA claims.

VI. CONCLUSION

For the foregoing reasons, Walgreens' Motion to Dismiss is **GRANTED in part** and **DENIED in part**. The following theories of FCA and CFCA liability remain viable as alleged in the First Amended Complaint: (1) that Walgreens failed to reverse the charges for mailed prescriptions that were returned by the patient or by mail; and (2) that Walgreens failed to reverse the charges for unclaimed prescriptions it returned to stock. Because Relator failed to allege any new facts or offer any new arguments to support the second theory of liability under the controlled substance scheme, Relator's claims are **DISMISSED with prejudice** to the extent they rely on this theory. The remaining allegations that the Court has found to be deficient are **DISMISSED without prejudice**. The Court orders Relator to file a Second Amended Complaint by March 30, 2015 at 4:00 p.m. If Relator fails to file a Second Amended complaint, Defendant Walgren is ordered to respond to the First Amended Complaint by April 20, 2015 by 4:00 p.m.

IT IS SO ORDERED.

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