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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, and the
STATE OF CALIFORNIA, et al., ex rel.
LOYD F. SCHMUCKLEY, JR.,

Plaintiffs,

v.

RITE AID CORPORATION,

Defendant.

STATE OF CALIFORNIA, ex rel. LOYD
F. SCHMUCKLEY, JR.,

Plaintiffs,

v.

RITE AID CORPORATION,

Defendant.

No. 2:12-cv-01699-KJM-EFB

ORDER

Defendant Rite Aid Corporation (Rite Aid) moves to dismiss both Relator Loyd F. Schmuckley, Jr.’s first amended complaint (FAC) and the State of California’s Complaint-in-Intervention (CII). ECF No. 101. California and Schmuckley oppose, ECF Nos. 114, 117, and Rite Aid has replied. ECF No. 121. The court held a hearing on March 23, 2018. ECF No. 122.

1 As explained below, the court GRANTS Rite Aid’s motion to dismiss California’s Unjust
2 Enrichment claim with prejudice but otherwise DENIES the motion.

3 I. BACKGROUND

4 Under the False Claims Act (FCA), a private individual can bring an action known
5 as a *qui tam* action on behalf of the United States government against any individual or company
6 who has knowingly presented a false or fraudulent claim to the government. *United States ex rel.*
7 *Anderson v. Northern Telecom*, 52 F.3d 810, 812-13 (9th Cir. 1995). Here, relator Loyd F.
8 Schmuckley alleges Rite Aid has submitted false claims for reimbursement in prescribing “Code
9 1” drugs, which may not be reimbursed unless certain requirements are met. FAC ¶¶ 3,21. These
10 Code 1 drugs have restrictions based on patient age or diagnosis that must be met before the
11 appropriate government entity, here Medi-Cal, will reimburse for prescriptions for that
12 medication. *Id.* ¶ 23. According to Schmuckley, “California regulations explicitly state that the
13 pharmacist must have documentation of the patient’s diagnosis, in order for Medi-Cal to
14 reimburse the prescription.” *Id.* ¶ 24.

15 California has intervened in this case on claims under the California FCA and filed
16 its CII, alleging Rite Aid failed to comply with “Code 1 restrictions.” CII ¶ 4. More specifically,
17 California alleges that “[f]rom 2007 to 2014, [Rite Aid] knowingly submitted false pharmacy
18 claims to Medi-Cal and expressly and impliedly made false certifications through the Medi-Cal
19 electronic claims submission and reimbursement process.” *Id.* ¶ 6. California alleges Rite Aid
20 made these impliedly false certifications in three ways: (1) by not performing “the required Code
21 1 diagnosis review, verification and confirmation before dispensing the Code 1 drug”; (2)
22 providing certification when “the Medi-Cal beneficiary actually did not have the Code 1 drug
23 diagnosis” or condition restriction; “and/or” (3) Rite Aid “failed to adequately document its Code
24 1 review and compliance [with] Code 1 regulations.” *Id.* Schmuckley has incorporated
25 California’s CII allegations by reference in his FAC. FAC ¶¶ 2, 37, 40, 43, 47, 50.

1 II. LEGAL STANDARD

2 A party may move to dismiss for “failure to state a claim upon which relief can be
3 granted.” Fed. R. Civ. P. 12(b)(6). The court may grant the motion only if the complaint lacks a
4 “cognizable legal theory” or if its factual allegations do not support a cognizable legal
5 theory. *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). A
6 complaint must contain a “short and plain statement of the claim showing that the pleader is
7 entitled to relief,” Fed. R. Civ. P. 8(a)(2), though it need not include “detailed factual
8 allegations,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But “sufficient factual
9 matter” must make the claim at least plausible. *Iqbal*, 556 U.S. at 678. Conclusory or formulaic
10 recitations of elements do not alone suffice. *Id.* (citing *Twombly*, 550 U.S. at 555). In a Rule
11 12(b)(6) analysis, the court must accept well-pleaded factual allegations as true and construe the
12 complaint in plaintiff’s favor. *Id.*; *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007).

13 A claim grounded in fraud must be pleaded with the particularity required
14 by Federal Rule of Civil Procedure 9(b). *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1103
15 (2003). Rule 9(b) applies to claims under the FCA. *See Ebeid ex rel. United States v. Lungwitz*,
16 616 F.3d 993, 998 (9th Cir. 2010). Rule 9(b) requires a party to “state with particularity the
17 circumstances constituting fraud or mistake,” including “the who, what, when, where, and how”
18 of the alleged fraudulent conduct. *Vess*, 317 F.3d at 1106 (quoting *Cooper v. Pickett*, 137 F.3d
19 616, 627 (9th Cir. 1997)). In addition, “[t]he plaintiff must set forth what is false or misleading
20 about a statement, and why it is false.” *Id.* (quoting *Decker v. GlenFed, Inc. (In re GlenFed, Inc.*
21 *Sec. Litig.*), 42 F.3d 1541, 1548 (9th Cir.1994) (en banc)).

22 III. DISCUSSION

23 A. State of California’s Complaint

24 “To survive a Rule 9(b) motion to dismiss, a complaint alleging implied false
25 certification must plead with particularity” that: “(1) the defendant explicitly undertook to comply
26 with a law, rule or regulation that is implicated in submitting a claim for payment”; “(2) claims
27 were submitted”; and (3) “the defendant was not in compliance with that law, rule or regulation.”
28 *Ebeid*, 616 F.3d at 998. In the Ninth Circuit, the complaint need not “identify representative

1 examples of false claims to support every allegation.” *Id.* The complaint must afford “notice of
2 the particular misconduct which is alleged to constitute the fraud charged so that [defendant] can
3 defend against the charge and not just deny that [it has] done anything wrong.” *United States v.*
4 *United Healthcare Ins. Co.* (“*United*”), 848 F.3d 1161, 1180 (9th Cir. 2016) (citations omitted).

5 California need not “allege all facts supporting each and every instance” of a
6 violation, and “it is sufficient to allege particular details of a scheme to submit false claims paired
7 with reliable indicia that lead to a strong inference that claims were actually submitted.” *Ebeid*,
8 616 F.3d at 998-99 (internal quotation marks and citation omitted). “[S]tatements of the time,
9 place and nature of the alleged fraudulent activities are sufficient.” *United*, 848 F.3d at 1180
10 (citation omitted). The complaint “need not allege a precise time frame, describe in detail a
11 single specific transaction, or identify the precise method used to carry out the fraud.” *Id.*
12 (internal quotation marks and citation omitted).

13 1. Express or Implied False Certification

14 The Ninth Circuit has recognized that false certifications may violate the
15 FCA. *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266–67 (9th Cir. 1996). False certification
16 may be express or implied. *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999
17 (2016) (“*Escobar*”¹). An express false certification occurs when an entity seeking payment
18 affirmatively certifies compliance with a law, rule or regulation as part of the process through
19 which the claim for payment is submitted, despite noncompliance. *Ebeid*, 616 F.3d at 998. In
20 contrast, implied false certification occurs when an entity has previously expressly certified
21 compliance with a law, rule, or regulation despite noncompliance, and that obligation is again
22 implicated through submission of a claim for payment, even though a renewed certification of
23 compliance is not required. *Id.* The submission of a claim for payment following initial approval
24 of a grant funding agreement is an implicit reaffirmation of compliance. To establish implied

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26 ¹ Julio Escobar was the relator who brought the qui tam suit against Universal Health
27 Services, Inc. under the federal FCA. *See Escobar*, 136 S. Ct. at 1997. The court uses this
28 shorthand to reduce confusion and to conform to the practice of other courts. *See, e.g., United*
States ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890, 895 (9th Cir. 2017).

1 false certification, a plaintiff must show that (1) “the claim does not merely request payment, but
2 also makes specific representations about the goods or services provided;” and (2) “the
3 defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual
4 requirements makes those representations misleading half-truths.” *Escobar*, 136 S. Ct. at 2001.
5 In either situation, express or implied, the false certification of compliance creates liability when
6 that certification is a prerequisite to receipt of the government benefit. *Id.* (citing *Anton*, 91 F.3d
7 at 1266).

8 Here, California has pleaded false implied certifications at least, if not factually
9 false claims, by Rite Aid. First, California pleads the Med-Cal process for submitting claims “if
10 the drug is subject to Code 1 restrictions and [that] these restrictions have been met.” CII ¶¶ 44.
11 Additionally, California has alleged the pharmacy must, to get paid after an initial denial,
12 “resubmit the claim with affirmative statements of compliance with Code 1 requirements.” *Id.*
13 46. California also has pleaded details of Rite Aid’s own procedures for employing override
14 codes and documentation in relation to Code 1 drugs. *Id.* ¶¶ 91, 93. Based on California’s review
15 of “344 of [Rite Aid’s] prescription records out of [a] randomly selected sample of 1,904 Code 1
16 diagnosis-related claims,” California has alleged “Rite Aid did not perform the requisite Code 1
17 diagnosis review before dispensing the Code 1 diagnosis-restricted drug to the Medi-Cal
18 beneficiary for a substantial portion” of those claims. *Id.* ¶¶ 99-100; *see also id.* ¶¶ 103-06.
19 California also has alleged a lack of “any pharmacy-associate notation showing a Code 1
20 diagnosis review.” *Id.* ¶ 101. Had Rite Aid “performed the requisite Code 1 diagnosis review,
21 [Rite Aid] would have found that the Medi-Cal beneficiary, in fact, did not suffer from the Code 1
22 diagnosis or condition-restriction for the subject Code 1 drug.” *Id.* ¶ 106. Thus, Rite Aid’s
23 submission of claims with override codes, representing Code 1 requirements were met when
24 Code 1 review was not performed, entailed the making of “explicit lies in a claim for payment.”
25 CII ¶¶ 107-11. These allegations, taken together, sufficiently allege factually false claims made
26 by Rite Aid. *See United States v. Chen*, No. 2:04CV00859-PMPPAL, 2006 WL 1554546, at *9
27 (D. Nev. May 30, 2006) (use of codes and modifiers that did not meet Medicare definitions
28 constituted factually false claims); *United States v. Somnia, Inc.*, No. 1:15-cv-00433-DAD-EPG,

1 2018 WL 684765, at *6 (E.D. Cal. Feb. 2, 2018) (anesthesia-services claims submitted with false
2 billing codes that triggered higher reimbursement rates were factually false).

3 2. Scienter

4 Although Rule 9(b) requires pleading particularized facts, a plaintiff need only
5 generally allege facts showing intent, knowledge or scienter. *United States ex rel. Lee v.*
6 *Corinthian Colleges*, 655 F.3d 984, 996 (9th Cir. 2011). To plead scienter under either the
7 California FCA or the federal FCA, the government must allege facts plausibly showing
8 defendant acted “knowingly,” which includes “actual knowledge,” deliberate ignorance,” or
9 “reckless disregard.” Cal. Gov’t Code § 12650(b)(3); 31 U.S.C. § 3729(b)(1); *see United States*
10 *ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006). Through this
11 definition, “Congress adopted the concept that individuals and contractors receiving public funds
12 have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the
13 money they seek.” *United States v. Bourseau*, 531 F.3d 1159, 1168 (9th Cir. 2008) (internal
14 quotation marks, citation omitted); *see Siebert v. Gene Sec. Network, Inc.*, 75 F. Supp. 3d 1108,
15 1119 (N.D. Cal. 2014) (“[T]hose who submit claims to the government for reimbursement may be
16 acting in reckless disregard as to the truth or falsity of their submissions if they fail to take steps
17 to confirm the accuracy of those submissions.”). The federal FCA’s “reckless disregard” standard
18 is identical to the California FCA’s reckless disregard standard. *See United States v. Ctr. for*
19 *Employment Training*, No. 2:13-cv-01697-KJM-KJN, 2016 WL 4210052, at *6 (E.D. Cal. Aug.
20 9, 2016). Whether relators can provide sufficient evidence to carry the burden of proof with
21 respect to scienter is not resolved at the pleading stage of the case. *Id.*

22 California successfully pleads scienter here. First, California pleads the existence
23 of an agreement, called a “Provider Agreement,” requiring Rite Aid’s compliance with statutes
24 and regulations applicable to the Medi-Cal program; that Rite Aid “shall not engage in or commit
25 fraud or abuse”; that Rite Aid “shall comply with all of the billing and claims requirements” by
26 statute; and that complying with this agreement’s provisions “is a condition precedent to payment
27 to provider.” CII ¶ 20. Another alleged agreement, called a “CMC Agreement,” requires a
28 pharmacy provider such as Rite Aid to “assume personal responsibility for verification of

1 submitted claims with source documents.” *Id.* ¶ 21. California alleges Rite Aid executed these
2 agreements on behalf of all its California stores. *Id.* ¶ 52. Although California details numerous
3 communications about Code 1 drug compliance procedures from Rite Aid’s Vice President of
4 Pharmacy Operations, Director of Third Party Audits and Director of Third Party Operations to
5 all Rite Aid California pharmacy associates, CII ¶¶ 89-94, California also has pleaded that Rite
6 Aid “did not perform any internal audits to see whether its pharmacies were reviewing, verifying
7 and confirming the Medi-Cal beneficiary’s diagnosis or condition before dispensing the Code 1
8 diagnosis-restricted [drugs] and submitting claims therefor,” and therefore failed to comply with
9 its agreements. *Id.* ¶ 112. Although not required, California has even provided allegations of
10 Code 1 violations on 529 sample claims out of a random sample of 1,904 claims, an allegation of
11 particular facts that supports California’s allegation that Rite Aid did not conduct even a limited
12 inquiry. *See* CII ¶ 115, App. A. At hearing, Rite Aid noted that no pharmacist name was
13 identified in these allegations. But the appendix to California’s CII includes a store number date,
14 beneficiary number and other information. And California has alleged the appendix is a sample
15 of Rite Aid’s “Code 1 diagnosis-restricted claims.” CII ¶ 98. Rite Aid therefore has sufficient
16 allegations from which to review its own records against the CII Appendix and determine which
17 pharmacists are involved in the activity underlying California’s complaint.

18 When viewing the alleged lack of any inquiry against Rite Aid’s requirement that
19 “pharmacy associates . . . complete the dispensing of prescription drugs within certain times” and
20 rewarding “pharmacists with bonus compensation if the pharmacist met target sold prescription
21 counts,” CII ¶¶ 113-14, the court finds California has sufficiently pleaded scienter in the form of
22 reckless disregard. *See Bourseau*, 531 F.3d at 1168; *Siebert*, 75 F. Supp. 3d at 1119.

23 California also has pleaded scienter in the form of pharmacy associates’ actual
24 knowledge of Code 1 violations through resubmission for payment of originally denied Code 1
25 claims by false or fraudulent override codes. CII ¶ 107. Because Rite Aid delegated to its
26 pharmacy associates Code 1 regulation compliance duties, these employees’ knowledge would be
27 imputed to Rite Aid. CII ¶¶ 54-61, 71, 73, 77-78, 82-83, 85; *see Clark Equip. Co. v. Wheat*, 92
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1 Cal. App. 3d 503, 520 (1979) (employee knowledge imputed to employer where employee acts
2 with apparent authority).

3 Rite Aid’s reliance on *United States v. Scan Health Plan*, No. CV 09-5013-JFW
4 (JEMx), 2017 WL 4564722, at *5 (C.D. Cal. Oct. 5, 2017) (“*Swoben*”)² is unpersuasive. There,
5 without acknowledging the Ninth Circuit’s opinion in *Bourseau*, 531 F.3d at 1168, the court
6 adopted a scienter pleading requirement from securities fraud cases, determining that plaintiff
7 “must sufficiently plead at least one [of the corporation’s] officers had the requisite scienter at the
8 time they made the allegedly misleading statements.” (citation omitted). This court in this case,
9 however, is bound by the Ninth Circuit’s opinion in *Bourseau* discussing the scienter required
10 under the FCA. 531 F.3d at 1168. In *Bourseau*, the Ninth Circuit credited Congress’s attempt to
11 remedy situations where “an individual has ‘buried his head in the sand’ and failed to make
12 simple inquiries,” reasoning that Congress adopted “the concept [of] . . . some duty to make a
13 limited inquiry so as to be reasonably certain they are entitled to the money they seek.” *Id.* (citing
14 S. Rep. No. 99-345, at 20 (1986)); *see also United States v. Copeland*, No. CV-08-3065-FVS,
15 2010 WL 5394854, at *3-6 (E.D. Wash. Dec. 23, 2010) (quoting *Bourseau*, examining whether
16 defendant “conducted reasonable and prudent inquiries,” finding jury would be compelled to find
17 defendant “buried his head in the sand” and observing defendant “did not conduct a meaningful
18 investigation of his own”).

19 The court is unpersuaded that the Supreme Court’s decision in *Escobar* affected
20 the Ninth Circuit’s decision in *Bourseau*. *Escobar* focused on materiality, with passing
21 references to scienter. 136 S. Ct. at 1996, 2001-04. The Ninth Circuit has cited *Bourseau* and
22 *Escobar* together without distinguishing those cases or suggesting that *Escobar* modified
23 *Bourseau*. *United*, 848 F.3d at 1174; *see also Gonzalez v. Planned Parenthood of Los Angeles*,
24 759 F.3d 1112, 1116 n.3 (9th Cir. 2014) (distinguishing facts there from those in *Bourseau*
25 because defendant “did not fail to make simple inquiries as to the proper billing methods”)
26 (internal quotation marks and citation omitted).

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² Swoben was the relator in that case. *See Swoben*, 2017 WL 4564722, at *3.

1 3. Materiality

2 “[A] misrepresentation about compliance with a statutory, regulatory, or
3 contractual requirement must be material to the Government’s payment decision in order to be
4 actionable under the [FCA].” *Escobar*, 136 S. Ct. at 2002. This misrepresentation “cannot be
5 deemed material merely because the Government designates compliance with a particular
6 statutory, regulatory, or contractual requirement as a condition of payment.” *Id.* at 2003 (citations
7 omitted). Nor is a misrepresentation material merely because “the Government would have the
8 option to decline to pay if it knew of the defendant’s noncompliance.” *Id.* Materiality “cannot be
9 found where noncompliance is minor or insubstantial.” *Id.*

10 Proof of materiality can include “the Government’s decision to expressly identify a
11 provision as a condition of payment” and “evidence that the defendant knows that the
12 Government consistently refuses to pay claims in the mine run of cases based on noncompliance
13 with the particular statutory, regulatory, or contractual requirement.” *Id.*

14 California has sufficiently alleged materiality. *See* CII ¶¶ 45-46, 89-92, 109.
15 Specifically, California has alleged Medi-Cal’s systems are programmed “to automatically deny
16 every claim for such Code 1 drugs when it is submitted for the first time.” *Id.* ¶ 45. The
17 pharmacy therefore must “resubmit the claim with affirmative statements of compliance with
18 Code 1 requirements.” *Id.* ¶ 46. California has pleaded Rite Aid’s knowledge of the
19 government’s refusal to pay in the form of Rite Aid’s Vice President of Pharmacy Operations’
20 writing to “all California pharmacy associates” and explaining Code 1 drug procedures “to
21 prevent any claim recovery during third party audits,” including anticipated Med-Cal
22 representatives coming “to inspect selected prescription records” and “detect errors and fraud.”
23 *Id.* ¶¶ 89-90. As noted in one of these communications, “If documentation has not been made on
24 the hard copy and the claim is examined in an audit, payment will be recovered.” *Id.* ¶ 90; *see*
25 *also id.* ¶ 92. Rite Aid’s Director of Third Party Audits and Rite Aid’s Vice President also
26 communicated similar information to all California pharmacy associates in writing. *Id.* ¶ 91.
27 These allegations all reflect knowledge by Rite Aid that the government would not pay for claims
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1 based on a failure to comply with Code 1 drug procedures. Thus, at the pleading stage, this court
2 finds California has sufficiently alleged materiality.

3 Rite Aid’s argument that Code 1 regulations are not material because Rite Aid
4 could have sought a Treatment Authorization Request for a beneficiary who did not satisfy Code
5 1 diagnosis restrictions lacks merit. The California Department of Health Care Services does not
6 automatically approve Treatment Authorization Requests; rather, the Department denies these
7 requests for a host of reasons. *See* Request for Judicial Notice (RJN), Ex. C, ECF No. 115-3.³ In
8 other words, California’s allegations do not include Treatment Authorization Requests. *See* CII
9 ¶ 97. At hearing, California confirmed none of the allegations of Code 1 violations on 529
10 sample claims out of a random sample of 1,904 claims was a Treatment Authorization Request
11 claim. *See* CII App. A. Nothing in California’s pleading indicates to the court that “the
12 Government regularly pays” claims that do not conform to Code 1 diagnosis restrictions and do
13 not involve an approved Treatment Authorization Request. *See Escobar*, 136 S. Ct. at 2003.

14 4. Claims to the Government

15 Rite Aid does not contest the sufficiency of California’s pleading of this element
16 of a false claim, and it is well pled. *See* CII ¶¶ 39, 97.

17 5. Other Asserted Rule 9 Deficiencies

18 a) Scheme to Defraud

19 Rite Aid contends California’s complaint “is fatally deficient because it fails to
20 allege any particularized facts showing any fraudulent scheme to defraud the government.” ECF
21 No. 101 at 23. Not so. “[I]t is sufficient to allege particular details of a scheme to submit false
22 claims paired with reliable indicia that lead to a strong inference that claims were actually
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24 ³ “The court may judicially notice a fact that is not subject to reasonable dispute because it
25 (1) is generally known within the territorial jurisdiction, or (2) can be accurately and readily
26 determined by trial courts from sources whose accuracy cannot reasonably be questioned.” Fed.
27 R. Evid. 201(b). Exhibit C is judicially noticeable as a matter of public record “obtained from a
28 governmental website” of a state executive branch agency. *Preciado v. Wells Fargo Home
Mortgage*, No. 13–00382, 2013 WL 1899929, at *3 (N.D. Cal. May 7, 2013); *Paralyzed Veterans
of Am. v. McPherson*, No. 06-4670, 2008 WL 4183981, at *5 (N.D. Cal. Sept. 9, 2008). Thus, the
court may judicially notice this document.

1 submitted.” *Ebeid*, 616 F.3d at 998-99 (internal quotation marks and citation omitted).
2 “[S]tatements of the time, place and nature of the alleged fraudulent activities are sufficient.”
3 *United*, 848 F.3d at 1180 (citation omitted). The complaint “need not allege a precise time frame,
4 describe in detail a single specific transaction, or identify the precise method used to carry out the
5 fraud.” *Id.* (internal quotation marks and citation omitted).

6 Here, California has alleged sufficiently particular details of a scheme to submit
7 claims for Code 1 drug prescriptions in which Rite Aid did not comply with Code 1 requirements,
8 by delegating Code 1 compliance to its employees then failing to conduct even “a limited
9 inquiry” to ensure compliance. CII ¶¶ 6, 39, 54-61, 84, 89-94, 107, 112; *Bourseau*, 531 F.3d at
10 1168. California alleges a specific time frame from 2007 to 2014 and alleges multiple
11 transactions failed to comply with Code 1 requirements, offering examples based on review of a
12 randomly selected sample of Rite Aid’s Code 1 claims. CII ¶¶ 97-98. Although California
13 characterizes its allegations as identifying three “false or fraudulent schemes,” at bottom
14 California alleges a fraudulent scheme in the form of Rite Aid’s delegating to employees
15 responsibility for Code 1 compliance, employees failing to comply with Code 1 regulations and
16 Rite Aid’s submitting claims for payment on improperly dispensed Code 1 drugs. California’s
17 allegations that Rite Aid “did not complete documentation of the necessary Code 1 diagnosis
18 review and verification” or “maintain any documentation of the beneficiary’s diagnosis or
19 condition” that shows Code 1 compliance, ECF No. 114 at 15, are allegations setting forth
20 particular details about the “nature of the alleged fraudulent activities.” *See United*, 848 F.3d at
21 1180. Moreover, this failure to “document the meeting of Code 1 restrictions for medical
22 supplies,” as required by California Welfare & Institutions Code section 14124.1,⁴ supports

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24 ⁴ California Welfare & Institutions Code section 14124.1 states:

25 Each provider, as defined in Section 14043.1, of health care services
26 rendered under the Medi-Cal program or any other health care
27 program administered by the department or its agents or contractors,
28 shall keep and maintain records of each service rendered under the
Medi-Cal program or any other health care program administered by
the department or its agents or contractors, the beneficiary or person
to whom rendered, the date the service was rendered,
and any additional information as the department may by regulation

1 California’s implied certification theory along with Rite Aid’s alleged execution of agreements
2 promising to maintain such records. CII ¶¶ 20-21, 52.

3 To the extent Rite Aid believes California has not sufficiently alleged a scheme to
4 defraud the government because California has not sufficiently alleged scienter, the court has
5 already addressed that argument above. And a plaintiff need only generally allege facts showing
6 intent, knowledge or scienter. *Corinthian Colleges*, 655 F.3d at 996.

7 b) Particularity of False Claims

8 Rite Aid contends California “fails to allege a single specific example of what
9 override code was used in connection with any specific claim, and how or why the use of that
10 unidentified code in that instance in connection with that unidentified claim was ‘false’ or
11 ‘fraudulent.’” ECF No. 101 at 23 (emphasis removed). Rite Aid also asserts the appendix
12 California attaches to its complaint, CII, Ex. A, does not set forth “any ‘false’ claims, much less
13 any pleaded with the specificity required by Rule 9(b).” ECF No. 101 at 24. Rite Aid contends
14 California’s complaint describes the conduct surrounding the 529 claims in the appendix “in only
15 the vaguest and most generalized terms.” *Id.*

16 The court has addressed these contentions in addressing the elements of an FCA
17 claim above. Moreover, California pleads that Rite Aid, in its own response to interrogatories,
18 has described its own computer system’s override code as “comprised of a sub-clarification code,
19 prior authorization code, and prior authorization number” to be filed in by a pharmacist
20 “responsible for assessing whether the Code 1 requirements have been met.” CII ¶ 82. California
21 has also offered details of the code overrides Rite Aid communicated to all California pharmacy
22 employees. *Id.* ¶ 84-90. And Rite Aid’s criticism of California’s exhibit as lacking any
23 “indication of why [the 529 claims] are ‘false’” is unavailing. *See* ECF No. 101 at 24. The lack
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25 _____
26 require. Records required to be kept and maintained under this
27 section shall be retained by the provider for a period of 10 years from
28 the final date of the contract period between the plan and the
provider, from the date of completion of any audit, or from the date
the service was rendered, whichever is later, in accordance
with Section 438.3(u) of Title 42 of the Code of Federal Regulations.

1 of documentation of Rite Aid’s compliance with Code 1 procedures is squarely part of
2 California’s allegations. This is sufficient at the pleading stage.

3 c) Code 1 Violations

4 Rite Aid contends California has not pleaded any Code 1 Regulation violations.
5 According to Rite Aid, any documentation errors, such as the alleged lack of a “pharmacy-
6 associate notation” showing a Code 1 diagnosis, CII ¶¶ 99-102, is not a regulatory violation, ECF
7 No. 101 at 25. Under the applicable regulations, the “practitioner who issues a prescription for a
8 Code 1 supply drug shall document” that the patient’s diagnostic condition satisfies Code 1
9 restrictions. Cal. Code Regs. tit. 22, § 51476(c)(1). The “dispenser,” or pharmacist, “shall
10 maintain readily retrievable documentation of the patient’s diagnostic or clinical condition
11 information that fulfills the Code 1 restriction.” *Id.* § 51476(c)(2). Rite Aid contrasts the word
12 “maintain” to the word “document,” noting dispensers also are required to “document the
13 transmittal date and the name of prescriber or the employee or agent who is legally authorized to
14 transmit such information” when “Code 1 diagnostic or clinical condition information is
15 transmitted to the dispenser other than by personal handwritten order from the prescriber.” *Id.*
16 Thus, Rite Aid claims, the lack of a pharmacy-associate notation showing a Code 1 diagnosis
17 does not violate Code 1 regulations because pharmacists need only maintain that notation if the
18 prescribing practitioner documents it. ECF No. 101 at 25-26.

19 Rite Aid also asserts the lack of Code 1 diagnosis or condition documentation in
20 medical records from doctors allegedly examined by California would show only “an absence of
21 documentation but not an absence of the correct diagnosis or condition.” ECF No. 101 at 26
22 (emphasis removed). This argument misses the point of that lack of documentation: without that
23 documentation, Rite Aid as a “dispenser” could not have possibly “maintained readily retrievable
24 documentation of the patient’s diagnostic or clinical condition information that fulfills the Code 1
25 restriction.” Cal. Code Regs. tit. 22, § 51476(c)(2). Even if the doctor must document and the
26 pharmacist need only maintain documentation, the alleged lack of documentation maintained by
27 Rite Aid states a regulatory violation. Additionally, California still alleges an FCA claim through
28 its allegations related to Rite Aid’s execution of provider and CMC agreements, including that

1 Rite Aid agreed “that no claim shall be submitted until the required source documentation is
2 completed and made readily retrievable in accordance with Medi-Cal statutes and regulations.”
3 CII ¶ 21; *see Escobar*, 136 S. Ct. at 1995 (finding implied certification can be a basis for FCA
4 liability when “defendant submits a claim for payment that makes specific representations about
5 the goods or services provided, but knowingly fails to disclose the defendant’s non-compliance
6 with a statutory, regulatory, or contractual requirement”).

7 The court DENIES Rite Aid’s motion to dismiss California’s FCA claims.

8 6. Unjust Enrichment

9 Rite Aid moves to dismiss California’s claim of unjust enrichment, asserting this
10 claim “is not a cause of action at all.” ECF No. 101 at 20-21. California cites to *Astiana v. The*
11 *Hain Celestial Group, Inc.*, 783 F.3d 753, 762-63 (9th Cir. 2015), asserting “[t]he Ninth Circuit
12 has rejected this argument.” ECF No. 114 at 33.

13 Here, Rite Aid is correct: “in California, there is not a standalone cause of action
14 for ‘unjust enrichment,’ which is synonymous with ‘restitution.’” *Astiana v. Hain Celestial Grp.*,
15 *Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). Although the Ninth Circuit has stated “a court may
16 construe the cause of action as a quasi-contract claim seeking restitution,” the court is unable to
17 do so here because California’s unjust enrichment allegations do not sufficiently plead such a
18 quasi-contract claim, if one exists. *See* CII ¶¶ 124-26; *Astiana*, 783 F.3d at 762 (citing *Rutherford*
19 *Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (2014)).

20 The court therefore GRANTS Rite Aid’s motion to dismiss California’s Unjust
21 Enrichment claim. At hearing on this motion, the State agreed its payment by mistake claim was
22 sufficient for pleading restitution as an alternative equitable remedy. Hr’g Tr. at 26:7-27:15, ECF
23 No. 126. The court therefore dismisses the claim with prejudice.

24 7. Payment by Mistake

25 Rite Aid also moves to dismiss California’s claim of payment by mistake. Rite
26 Aid asserts this quasi-contractual claim should be dismissed “because the [c]omplaint has alleged
27 that either a Provider Agreement or a CMC Agreement, or both, exists covering the subject matter
28 set forth in the [c]omplaint.” ECF No. 101 at 27 (citing *United States ex rel. Jordan v. Northrop*

1 *Grumman Corp.*, No. CV 95-2985 ABC (Ex), 2002 WL 35628748, at *7, n.4 (C.D. Cal. Sept. 25,
2 2002) (“[T]he Government may not pursue the quasi-contractual remedies of unjust enrichment
3 and payment by mistake where valid contracts exist . . .”).

4 Rite Aid’s argument does not square with Federal Rule of Civil Procedure 8(d)(2),
5 which permits a party to “set out 2 or more statements of a claim or defense alternatively or
6 hypothetically, either in a single count or defense or in separate ones.” Moreover, Rite Aid’s
7 authority is a case granting a motion for summary judgment; that authority is therefore inapposite.
8 *See Jordan*, 2002 WL 35628748, at *7 n.4; *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96
9 F.3d 1151, 1156 (9th Cir. 1996) (appeal from final partial judgment).

10 The court DENIES Rite Aid’s motion to dismiss California’s payment by mistake
11 claim.

12 B. Schmuckley’s Complaint

13 1. Standing

14 Rite Aid moves to dismiss Schmuckley’s federal FCA claims for lack of Article III
15 standing, arguing California has “intervened on each and every claim in the Relator Complaint.”
16 ECF No. 101 at 28-29. But Rite Aid overstates. California has only partially intervened in this
17 case, asserting claims under the California FCA and claims for equitable relief on behalf of
18 California. CII ¶¶ 118-30, Prayer for Relief at 39-40. The United States has declined to
19 intervene. ECF No. 38. In his operative complaint, Schmuckley asserts *qui tam* claims under the
20 federal FCA. FAC ¶¶ 37-45. As a *qui tam* plaintiff, therefore, Schmuckley sues on behalf of the
21 United States’ interests in this case. Medicaid is a jointly funded state and federal program and
22 the federal government makes quarterly grants to each state to partially reimburse the state for the
23 federal share of these expenditures. *See* 42 U.S.C. § 1396 *et seq.*; *Arkansas Dep’t of Health and*
24 *Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006). If Schmuckley can successfully show Rite
25 Aid engaged in FCA violations, then the federal government’s partial reimbursement to
26 California would be an “injury in fact” that is concrete, particularized and actual. *Friends of the*
27 *Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). Such injury would
28 be directly traceable to any successful FCA violations, and a favorable decision to Schmuckley

1 would permit recovery of improperly granted reimbursements. *Id.* Schmuckley retains standing
2 to prosecute the federal FCA claims. *See, e.g., U.S. ex rel. Bilotta v. Novartis Pharm. Corp.*, 50
3 F. Supp. 3d 497, 511-12 (S.D.N.Y. 2014) (observing “a relator’s . . . complaint continues to be
4 the operative complaint for all non-intervened claims”); 31 U.S.C. § 3730(c)(1) (permitting
5 relator to “have the right to continue as a party to the action, subject to” some limitations); *id.*
6 § 3730(d) (permitting relator a recovery when government proceeds with an action). Rite Aid
7 cites to 42 U.S.C. § 1396b(q)(5), which provides funds collected under that paragraph “shall be
8 credited exclusively to . . . the Federal health care program (including the State plan under this
9 subchapter) . . .” *See* ECF No. 121 at 23. But Rite Aid’s citation does not account for the federal
10 government’s partial reimbursement to California or the California FCA scheme under which
11 California actually has intervened.

12 Rite Aid also has not shown “that unrestricted participation during the course of
13 litigation by [relator] would be for purposes of harassment or would cause the defendant undue
14 burden or unnecessary expense.” *See* 31 U.S.C. § 3730(c)(2)(D).⁵ Rite Aid’s bare assertion that
15 Schmuckley’s continued active, unrestricted participation “would subject Rite Aid (and the
16 Court) to undue and duplicative motion practice, discovery demands, and scheduling concerns” is
17 not a “showing” under § 3730(c)(2)(D). Here, Rite Aid moved to dismiss the claims of both
18 California and Schmuckley in a single motion, Schmuckley has maintained federal FCA claims in
19 which California has not intervened and there is no reason before the court to limit Schmuckley’s
20 participation at this stage of the litigation. This court, under Federal Rule of Civil Procedure 16
21 and through its inherent power, can manage this case to prevent duplication. *See United States v.*
22 *W.R. Grace*, 526 F.3d 499, 509 (9th Cir. 2008); *In re Phenylpropanolamine (PPA) Prod. Liab.*
23 *Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006).

24
25 ⁵ Title 31, United States Code, section 3730(c)(2)(D) states:

26 Upon a showing by the defendant that unrestricted participation
27 during the course of the litigation by the person initiating the action
28 would be for purposes of harassment or would cause the defendant
undue burden or unnecessary expense, the court may limit the
participation by the person in the litigation.

1 Schmuckley also has standing under the California FCA despite California's
2 intervention with respect to Schmuckley's California FCA claims. Compare CII ¶¶ 118-123, with
3 FAC ¶¶ 47-52. Under California Government Code section 12652(e)(1), "[t]he *qui tam* plaintiff
4 shall have the right to continue as a full party to the action" even "[i]f the state or political
5 subdivision proceeds with the action" with "primary responsibility for prosecution of the action."
6 See *United States v. Sequel Contractors, Inc.*, 402 F. Supp. 2d 1142, 1148 (C.D. Cal. 2005)
7 (where "Orange County opted to intervene," *qui tam* plaintiff still had "standing under the
8 California FCA" as "full party to the action," and same plaintiff also had standing "under the
9 FCA as a *qui tam* plaintiff" where the United States declined to intervene) (citing Cal. Gov't
10 Code § 12652(e)(1)).

11 2. Incorporation of California's Complaint-in-Intervention

12 Rite Aid also contends Schmuckley fails to state a claim under the federal FCA.
13 ECF No. 121 at 23. Rite Aid argues in part that Schmuckley's incorporation of California's CII
14 into his FAC is improper. *Id.* While Rite Aid's argument has some persuasive value, the court
15 finds Schmuckley's representations at hearing sufficient to overcome Rite Aid's contentions, as
16 explained below.

17 Attorneys have a nondelegable responsibility under Federal Rule of Civil
18 Procedure 11 to personally validate the truth of filed papers. *In re Connetics Corp. Securities*
19 *Litigation*, 542 F. Supp. 2d 996, 1005-06 (N.D. Cal. 2008). Courts have stricken allegations
20 where a party has not independently investigated the allegations it makes or incorporates by
21 reference. See *id.* (striking allegations based on SEC complaint where plaintiffs did not contend
22 they conducted independent investigation into facts alleged); *Maine State Ret. Sys. v.*
23 *Countrywide Fin. Corp.*, No. 2:10-CV-0302 MRP, 2011 WL 4389689, at *20 (C.D. Cal. May 5,
24 2011) (granting motion to strike allegations copied from complaints in other cases because
25 "[p]laintiffs' counsel does not claim to have taken . . . measures to investigate the bases for
26 allegations in other complaints they cite"); *Conde v. Sensa*, 259 F. Supp. 3d 1064, 1071 (S.D. Cal.
27 2017) ("Plaintiff may not rely on the unsubstantiated allegations in the attached state-court
28

1 complaints to defeat the[] Motions to Dismiss,” but “the [c]ourt will consider the various primary
2 documents attached to those complaints”).

3 In his complaint, Schmuckley merely states he “incorporates by reference all
4 allegations of the State of California’s [CII].” FAC ¶ 2. Schmuckley offers no explanation for
5 this incorporation, only repeating in a more specific fashion his incorporation “by reference” of
6 “paragraphs 1-117 of the State of California’s [CII].” *Id.* ¶ 37, 40, 43, 47, 50. Additionally,
7 Schmuckley does not explain in his opposition to Rite Aid’s motion to dismiss that he conducted
8 any form of investigation or inquiry into the allegations incorporated by reference. *See* ECF
9 No. 117 at 9, 22-23 (explaining allegations in California’s CII “are adopted and incorporated into
10 the Relator’s FAC”). However, at hearing, the court confirmed with Schmuckley and the State of
11 California that Schmuckley has conducted an independent investigation and has conferred with
12 the State of California throughout this litigation. Hr’g Tr. at 27:19-28:15. Based on
13 Schmuckley’s representations, the court therefore considers Schmuckley’s allegations in the FAC
14 and the incorporated allegations from California’s CII together.

15 Rite Aid’s motion relies heavily on the “very close similarity” between the
16 California FCA and the federal FCA to advance its arguments and contends its arguments apply
17 to both California and Schmuckley. *See* ECF No. 101 at 9 (citing *California ex rel. Grayson v.*
18 *Pacific Bell Tel. Co.*, 142 Cal. App. 4th 741, 746 n.3 (2006)); *see also id.* at 7, 8 n.1 (asserting
19 “the Relator Complaint fails for the same reasons” as “the State’s Complaint” and stating that
20 “[u]nless otherwise indicated . . . each argument made [as to] the State Complaint in this motion
21 applies equally to the Relator Complaint”). Consistent with the court’s analysis above, the court
22 DENIES Rite Aid’s motion to dismiss Schmuckley’s complaint.

23 IV. CONCLUSION

24 Based on the reasons set forth above, the court:

- 25 - DENIES Rite Aid’s motion to dismiss California’s FCA claims.
- 26 - GRANTS Rite Aid’s motion to dismiss California’s Unjust Enrichment claim,
27 with prejudice.
- 28 - DENIES Rite Aid’s motion to dismiss California’s Payment by Mistake claim.

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- DENIES Rite Aid's motion to dismiss Schmuckley's complaint, as described above.

Rite Aid shall file its answers within twenty-one (21) days.

IT IS SO ORDERED.

DATED: September 5, 2018.


UNITED STATES DISTRICT JUDGE