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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ZACHARY SILBERSHER, et al.,

Plaintiffs,

v.

ALLERGAN INC., et al.,

Defendants.

Case No. 18-cv-03018 JCS

**ORDER DENYING MOTIONS TO  
DISMISS AND SETTING CASE  
MANAGEMENT CONFERENCE FOR  
JANUARY 15, 2021 AT 2:00 PM**

Dkt. Nos. 63, 68, 131

**I. INTRODUCTION**

This action is brought under the federal False Claims Act (“FCA”), 31 U.S.C. §§ 3729-3733, by Plaintiff-Relator Zachary Silbersher (“Relator”) on behalf of the United States and numerous States (the “States”)<sup>1</sup> against two sets of defendants: 1) the “Allergan Defendants” or “Allergan”<sup>2</sup>; and 2) the “Adamas Defendants” or “Adamas.”<sup>3</sup> Each set of defendants brings a motion to dismiss (hereinafter, the “Allergan Motion” and the “Adamas Motion” and collectively, the “Motions”). For the reasons stated below, the Motions are DENIED.<sup>4</sup>

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<sup>1</sup> Relator brings this action on behalf of California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia, and Washington.

<sup>2</sup> The Allergan Defendants are: Allergan, Inc., Allergan USA, Inc., Allergan Sales, LLC, and Forest Laboratories Holdings, Ltd. For purposes of this motion, the term “Allergan Defendants” does not include Defendant Allergan PLC, which has been dismissed from this action, even though references to “Allergan” in the operative complaint include Allergan PLC.

<sup>3</sup> The Adamas Defendants are: Adamas Pharma, LLC and Adamas Pharmaceuticals, Inc.

<sup>4</sup> The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c).

1 **II. BACKGROUND**

2 **A. First Amended Complaint**

3 The operative complaint in this action is the First Amended Complaint (“FAC”). In the  
4 FAC, Relator alleges that the Adamas and Allergan Defendants misled the United States Patent  
5 Office (“Patent Office”) into issuing invalid patents protecting the drugs Namenda XR® and  
6 Namzaric®, thus perpetuating their monopoly power and allowing them to overcharge the federal  
7 government and the States for these drugs under various programs, including Medicare and  
8 Medicaid. FAC ¶¶ 1-8.

9 Relator is a citizen of the State of New York whose “profession focuses on investigating  
10 invalid pharmaceutical patents that brand manufacturers use to protect their drugs from price  
11 competition.” *Id.* ¶ 9. He alleges that he has “[t]hrough his independent investigation . . .  
12 uncovered non-public information supporting the claims set forth” in the FAC. *Id.* He further  
13 alleges that his “independent research and investigation has generated information that is  
14 independent of, and materially adds to, any publicly-disclosed allegations and transactions.” *Id.*  
15 According to Relator, he is an “original source” of information within the meaning of the FCA and  
16 he provided the information on which his claims are based to the States and the federal  
17 government before he initiated this action. *Id.* ¶ 10.

18 Relator alleges that Allergan, Inc., Allergan USA, Inc., Allergan Sales, LLC, and Forest  
19 Laboratories Holdings, Ltd. are subsidiaries or divisions of Allergan PLC, which was called  
20 Activas PLC until June 15, 2015. *Id.* ¶ 17. Activas PLC acquired Forest Laboratories, Inc. on  
21 July 1, 2014 and acquired Allergan, Inc. on March 17, 2015. *Id.* ¶¶ 17, 49. Relator alleges that  
22 “Defendant Forest Laboratories Holdings, Ltd. is an Irish corporation with its principal place of  
23 business at Cumberland House, 1 Victoria Street, Hamilton HMU, Bermuda” and that “Allergan is  
24 the successor-in-interest to Forest Laboratories, LLC (f/k/a Forest Laboratories, Inc.) and is liable  
25 for any damages to which Forest is liable.” *Id.* ¶ 16.<sup>5</sup>

26  
27 \_\_\_\_\_  
28 <sup>5</sup> As noted above, the FAC defines “Allergan” as including Allergan, Inc., Allergan USA, Inc.,  
Allergan Sales, LLC, Forest Laboratories Holdings, Ltd, and the now-dismissed Allergan PLC.  
FAC at 1.

1 Defendant Adamas Pharma, LLC is a Delaware limited liability company with its  
2 principal place of business in Emeryville, California; Defendant Adamas Pharmaceuticals, Inc. is  
3 a Delaware corporation, also based in Emeryville, California. *Id.* ¶¶ 18-19. According to Relator,  
4 in 2012, Adamas Pharmaceuticals, Inc. entered into a commercialization and development  
5 agreement with Forest Laboratories, Inc. with respect to memantine hydrochloride (“memantine”)  
6 drugs. *Id.* ¶¶ 50, 59. Relator alleges that “[a]s part of that agreement, Adamas . . . granted Forest  
7 an exclusive license to all of the Went Patents[,]” discussed below. *Id.*

8 Namenda XR® is a delayed-release drug whose active pharmaceutical ingredient (“API”)  
9 is memantine. *Id.* ¶ 50. It is used to treat patients with dementia related to Alzheimer’s disease.  
10 *Id.* According to Relator, generics of Namenda XR® first became available on February 21, 2018,  
11 after the Federal Circuit invalidated patents asserted by Defendants in connection with that drug.  
12 *Id.* Relator alleges that Allergan’s United States net revenue for Namenda XR® was  
13 approximately \$452.8 million in 2017, \$627.6 million in 2016 and \$759.3 million in 2015. *Id.* ¶  
14 52.

15 Namzaric® is also a delayed-release drug prescribed to treat patients with dementia related  
16 to Alzheimer’s disease. *Id.* ¶ 53. It has two APIs: memantine hydrochloride and donepezil  
17 hydrochloride. *Id.* ¶ 54. Relator alleges that “[g]eneric manufacturers have been ready to enter  
18 the market since at least July 13, 2015, but they have been prevented from doing so by the  
19 fraudulently-obtained patents asserted by Defendants” and that “[t]o date, no generic manufacturer  
20 has entered the market for Namzaric®.” According to Relator, Allergan launched Namzaric® on  
21 May 18, 2015; its net revenue for Namzaric® was approximately \$130.8 million in 2017, \$57.5  
22 million in 2016 and \$11.2 [million] in 2015.” *Id.* ¶ 56.

23 Relator alleges that “Defendants listed three categories of patents for Namenda XR® and  
24 Namzaric® in the [Food and Drug Administration (“FDA”)]’s database of “Approved Drug  
25 Products with Therapeutic Equivalence Evaluations,” commonly known as the “Orange Book[,]”  
26 thereby preventing generic manufacturer’s from entering the market. FAC ¶ 57.

27 The first category of patents is the Went Patents, a group of eleven patents that list Dr.  
28

1 Gregory T. Went, PhD., the founder and CEO of Adamas, as the first inventor.<sup>6</sup> *Id.* ¶ 58. For  
2 Namenda XR®, six of the Went Patents are listed in the Orange Book (the '209, '708, '379, '752,  
3 '085, and '233 patents), while all eleven are listed for Namzaric®. *Id.* According to Relator, the  
4 Went Patents “are all generally directed to an extended release formulation for  
5 memantine.” *Id.*

6 The parent patent for all of the Went Patents is the '291 patent, which was issued on  
7 November 15, 2011. *Id.* ¶ 61. Relator alleges that on June 21, 2010, during prosecution of the  
8 '291 patent application, the Examiner issued an Office Action that rejected the pending claims as  
9 anticipated. *Id.* ¶ 62. In response, on November 5, 2010, Dr. Went and his co-inventors amended  
10 the independent claims of the '291 patent application and submitted a declaration by Dr. Went  
11 (the “Original Went Declaration” or “2010 Went Declaration”) in which he discussed the results  
12 of two clinical studies conducted by Adamas, the C106 Study and the ME110 Study. *Id.* ¶ 63.  
13 Relator alleges that Dr. Went misrepresented the results of these studies in his declaration,  
14 asserting that they showed “no incidence” of certain side effects when in fact, the opposite was  
15 true. *Id.* ¶¶ 66-69, 73. According to Relator, on September 23, 2011, the Examiner allowed the  
16 claims based upon the alleged “unexpected results” sworn to by Dr. Went in this declaration. *Id.* ¶  
17 73.

18 Relator alleges that Dr. Went and Adamas continued to resubmit the same fraudulent data  
19 and did not correct these misrepresentations when applying for nine additional patents, misleading  
20 the Patent Office into granting the applications based on them. *Id.* ¶¶ 73-90. However, Relator  
21 alleges, during prosecution of U.S. Patent Application No. 12/757,824 (“the '824 Application”),  
22 on May 7, 2012, Dr. Went submitted another declaration (“the 2012 Went Declaration”) in which  
23 he again described the ME110 Study but provided a table of actual results and stated that they  
24 showed “little incidence” (rather than “no incidence”) of side effects with the extended release  
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26 <sup>6</sup> The Went Patents are U.S. Patent Nos. 8,058,291 (“the '291 patent”); 8,168,209, as  
27 corrected (“the '209 patent”); 8,173,708 (“the '708 patent”); 8,283,379 (“the '379 patent”);  
28 8,293,794 (“the '794 patent”); 8,329,752 (“the '752 patent”); 8,338,485 (“the '485 patent”);  
8,338,486 (“the '486 patent”); 8,362,085 (“the '085 patent”); 8,580,858, as corrected (“the '858  
patent”); and 8,598,233 (“the '233 patent”).

1 formulation. *Id.* ¶¶ 68-69. That application was rejected by the Examiner on the basis that the  
2 extended release formulation that it claimed did “not present better results in regards to side  
3 effects.” *Id.* ¶ 70. Adamas then abandoned that application. *Id.* According to Relator, Adamas  
4 continued to rely on the Original Went Declaration or slightly modified versions of that  
5 declaration that continued to misrepresent the results of the ME110 Study and the Examiner  
6 continued to allow the patents for the same reasons it allowed the ’291 patent. *Id.* ¶¶ 74-84.

7 The second “category of patents” listed for Namenda XR® and Namzaric® upon which  
8 Relator relies is a single patent, U.S. Patent No. 8,039,009 (“the ’009 patent”). *Id.* ¶ 91. Relator  
9 alleges that the ’009 patent was originally assigned to Forest Laboratories, Inc., and expires  
10 September 24, 2029.” *Id.* According to Relator, the ’009 patent is “directed to a method of  
11 treating Alzheimer’s disease with a once-daily sustained release oral dose of memantine.” *Id.* ¶  
12 92. Relator alleges that the application was amended to add the “once-daily” requirement after it  
13 had been rejected “at least six times” by the Patent Office, and based on this amendment the Patent  
14 Office allowed the ’009 patent. *Id.*

15 Relator alleges “[t]he once-daily limitation in the ’009 [p]atent is invalid as obvious in  
16 view of U.S. Patent No. 6,479,553 (“the ’553 [p]atent”), which expressly teaches treating  
17 Alzheimer’s disease by administering memantine once daily.” *Id.* ¶ 93. According to Relator, the  
18 ’009 patent was acquired by fraud because “Defendants were aware of the teachings of the ’553  
19 patent, yet, on information and belief, Defendants intentionally failed to alert the Patent Office to  
20 the teachings of the ’553 patent when they amended the application for the ’009 patent to include  
21 the once-daily limitation.” *Id.* ¶¶ 93-94. Relator alleges that the ’553 patent had been disclosed  
22 during prosecution of the ’009 patent on September 28, 2009, but the disclosure was about 18  
23 months before the amendment that required once-daily administration, on March 15, 2011, and  
24 therefore the once-daily teaching of the ’553 patent had no relevance to the ’009 patent application  
25 at that time and would not have been considered by the Examiner. *Id.* ¶ 96. Relator alleges that  
26 “when Forest amended the application for the ’009 patent to require once-daily administration, it  
27 intentionally declined to inform the Patent Office of the material relevance of the ’553 patent,  
28 because the ’553 patent expressly taught the very limitation added to the claims . . . that justified

1 allowance of the '009 patent.” *Id.* ¶ 97.

2 The “third category” of patents is U.S. Patent No. 5,061,703 (the '703 patent”). *Id.* ¶ 4.  
3 Because the parties have not relied on the allegations related to that patent in their briefs the Court  
4 does not summarize them here.

5 Relator alleges that Defendants used the Went Patents and the '009 patent to prevent  
6 generic manufacturers from entering the market. *Id.* ¶¶ 104-109. “As a direct result of  
7 Defendants’ fraudulent scheme, Defendants have unlawfully excluded generic manufacturers from  
8 introducing lower-priced generic alternatives for Namenda XR® and Namzanic®, allowing  
9 Defendants to charge monopoly prices.” *Id.* ¶ 110. Relator further alleges that for Defendants to  
10 sell Namenda XR® and Namzanic® to federal agencies or otherwise qualify Namenda XR® and  
11 Namzanic® for reimbursement under Medicare and Medicaid, they were required to list the drugs  
12 on the Federal Supply Schedule (“FSS”) and “supply [to the General Services Administration  
13 (‘GSA’)] a ‘written justification for offered pricing, a mechanism for 14 future potential pricing  
14 adjustments, and proof that the price is fair and reasonable.” *Id.* ¶¶ 112-113 (citation omitted).  
15 According to Relator, “[b]y definition, Namenda XR®’s and Namzanic®’s pricing that Defendants  
16 supplied in connection with the FSS was not fair and reasonable” because “Defendants . . . had  
17 artificially inflated Namenda XR®’s and Namzanic®’s prices through the unlawful exclusion of  
18 generic competitors” and therefore Defendants’ “statements to the GSA were expressly false  
19 statements.” *Id.* ¶ 113. Relator further alleges that Defendants made “express and implied  
20 misrepresentations that [their] prices were fair and reasonable – and not inflated through the  
21 unlawful exclusion of competitors.” *Id.* ¶ 117.

22 Relator alleges that “each and every claim for payment or reimbursement for Namenda  
23 XR® and Namzanic® that would have been substituted for a less expensive generic equivalent . . .  
24 constituted a False Claim” that violated the federal FCA and the respective State false claims acts.  
25 In particular, according to the Relator, “each False Claim was for an unlawfully elevated,  
26 maintained, or stabilized price for Namenda XR® or Namzanic® contrary to express  
27 representations and implied certifications by Defendants to the federal government that the price  
28 of Namenda XR® or Namzanic® reflected in each False Claim was ‘fair and reasonable,’ and not

1 unlawfully elevated, maintained, or stabilized in violation of applicable law, including applicable  
2 antitrust laws.” *Id.* ¶¶ 132-133.

### 3 **B. The Motions**

4 In the instant motions, the Allergan and Adamas Defendants ask the Court to dismiss  
5 Relator’s FCA claims under the public disclosure bar that is found in 31 U.S.C. § 3730(e)(4). In  
6 particular, they argue that the FCA claims are barred because the allegations of fraud and all of the  
7 transactions on which Relator’s FCA claims are based were publicly disclosed in documents that  
8 were filed on the Patent Office’s Patent Application Information Retrieval (“PAIR”) website.  
9 They further contend Relator does not fall under the “original source” exception to the public  
10 disclosure bar. In addition, both sets of Defendants argue that Relator has failed to allege facts  
11 sufficient to state a claim against them under the FCA. Because Relator has not stated viable  
12 claims under the FCA, Defendants argue, the Court should dismiss those claims under Rule  
13 12(b)(6) and decline to exercise jurisdiction over the State law claims. In any event, they assert,  
14 the State law claims are insufficiently alleged and should be dismissed on the merits if the Court  
15 chooses to exercise jurisdiction over them.

16 Relator challenges these arguments, asserting that in light of amendments to the FCA that  
17 were made by Congress in 2010, availability of information on the Patent Office’s website is not  
18 sufficient to trigger the public disclosure bar. He further contends the public disclosure bar does  
19 not apply because he is an “original source.” He also argues that he has alleged sufficient facts to  
20 state an FCA claim against both the Allergan Defendants and the Adamas Defendants, and that his  
21 State law claims are adequately pled as well. He notes that the Texas Attorney General has  
22 “requested Relator to inform the Court that the Texas causes of action do not require the  
23 presentment of a false claim, and most do not require proof of materiality.” Opposition to  
24 Allergan Motion at 30.

### 25 **C. The *Valeant* Decision**

26 On May 11, 2020, Judge Donato issued a decision in an FCA case brought by the same  
27 relator based on a theory similar to the one in this case. *See United States ex rel. Silbersher v.*  
28 *Valeant Pharm. Int’l, Inc.*, 445 F. Supp. 3d 393 (N.D. Cal. 2020) (“the *Valeant* decision”). In that

1 case, the defendants brought a motion to dismiss based on the public disclosure bar, pointing to  
2 disclosures in proceedings that took place before the Patent Trial and Appeal Board (“PTAB”) that  
3 resulted in the patent at issue in that case being invalidated, as well as news articles about the  
4 proceeding. The Court found that the public disclosure bar applied because the PTAB proceeding  
5 was a “Federal . . . hearing” under 31 U.S.C. § 3730(e)(4)(A)(ii) and the articles about that  
6 proceeding constituted “news media” under 31 U.S.C. § 3730(e)(4)(A)(iii). It further concluded  
7 that Relator was not an “original source.”

8 With the Court’s permission, the Allergan Defendants filed a statement of recent decision  
9 in the instant action informing the undersigned of Judge Donato’s decision, dkt. No. 129, and  
10 Relator filed a response, dkt. no. 128. Subsequently, the Adamas Defendants requested leave to  
11 file a supplemental statement of recent decision addressing arguments made by Relator in his  
12 response to Allergan’s statement of recent decision. *See* dkt. no. 131. In their proposed  
13 supplemental statement of recent decision, the Adamas Defendants argue, for the first time, that  
14 the proceeding before the Patent Office in this case, like the PTAB Proceeding in the *Valeant* case,  
15 was a “Federal . . . hearing” for the purposes of 31 U.S.C. § 3730(e)(4)(A)(ii). Relator opposed  
16 the request of the Adamas Defendants, arguing that it was improper to make this new argument  
17 and that the remainder of the supplemental statement merely repeats arguments already made by  
18 Allergan. Dkt. No. 132. Relator argues further that if the Court considers Adamas’s new  
19 argument, it fails on the merits.<sup>7</sup>

20 The State of California, through the State Insurance Commissioner, also weighed in, filing  
21 a Statement of Interest in which it informed the Court that it “has a significant interest in stopping  
22 fraudulent practices that raise the price of prescription drugs.” Dkt. No. 133. According to the  
23 State of California, “Relator’s suits, if successful, may set an important precedent that would  
24 discourage drug companies from taking advantage of the ex parte nature of patent proceedings by  
25 withholding or misrepresenting material information relating to patentability – and thereby  
26 significantly reduce the amount governments and insurers pay for important medicines.” *Id.* With

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27  
28 <sup>7</sup> The Court GRANTS the Adamas Defendants’ request and considers the new argument, even though it is untimely. As discussed below, the Court rejects this argument on the merits.



1 respect to the *Valeant* decision, the State of California states as follows:

2 We also understand that, relying on the [*Valeant* decision], defendants  
 3 in this case have sought to argue government authorities were placed  
 4 “on notice” of the alleged fraud because of information pieced  
 5 together from various patent filings with the [Patent Office]. We  
 6 respectfully disagree with the reasoning in the [*Valeant* decision] and  
 7 with the notion that government agencies are placed on notice of fraud  
 8 based on patent filings.

9 Mr. Silbersher’s suits are neither “parasitic” nor “opportunistic.” We  
 10 are not aware of any government agency that regularly monitors  
 11 patent filings to determine whether there has been a material omission  
 12 or misrepresentation in applications for pharmaceutical patents,  
 13 particularly given the specialized expertise and amount of resources  
 14 that would be required to do so. We therefore welcome the efforts of  
 15 relators like Mr. Silbersher to help identify instances where drug  
 16 patents are not just invalid, but fraudulent – particularly in a case like  
 17 this, where there was apparently no preexisting government  
 18 investigation concerning the alleged fraud. Such efforts, if successful,  
 19 may help lower the price of medicine and the cost of health insurance,  
 20 which is consistent with our mission.

21 *Id.*

### 22 **III. ANALYSIS**

#### 23 **A. Legal Standards**

##### 24 **1. The FCA**

25 Under the FCA, any person who “knowingly presents, or causes to be presented, a false or  
 26 fraudulent claim for payment or approval,” or who “knowingly makes, uses, or causes to be made  
 27 or used, a false record or statement material to a false or fraudulent claim” is liable for a civil  
 28 penalty “plus 3 times the amount of damages which the Government sustains because of the act of  
 that person.” 31 U.S.C. § 3729(a)(1)(A)-(B). The elements of an FCA claim are: ““(1) a false  
 statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing  
 (4) the government to pay out money or forfeit moneys due.”” *United States Ex Rel. Rose v.*  
*Stephens Inst.*, 909 F.3d 1012, 1017 (9th Cir. 2018), cert. denied sub nom. *Stephens Inst. v. U.S. ex*  
*rel. Rose*, 139 S. Ct. 1464 (2019) (quoting *United States ex rel. Hendow v. University of Phoenix*,  
 461 F.3d 1166 (9th Cir. 2006)).

“The FCA allows private individuals, referred to as ‘relators,’ to bring suit on the  
 Government’s behalf against entities that have violated the Act’s prohibitions.” *U.S. ex rel.*

1 *Mateski v. Raytheon Co.*, 816 F.3d 565, 569 (9th Cir. 2016) (citing 31 U.S.C. § 3730(b)(1)).  
 2 “Such suits are commonly called *qui tam* suits.” *Id.* In a *qui tam* suit, the relator asserts the FCA  
 3 claim “on behalf of the government, which may choose to intervene in the action” and “[i]f the  
 4 relator is successful, she is entitled to a share of the recovery, whether or not the government  
 5 intervenes.” *Seal I v. Seal A*, 255 F.3d 1154, 1158 (9th Cir. 2001) (citing 31 U.S.C. §§  
 6 3730(d)(1), (2)). As discussed further below, Congress has amended the FCA on a number of  
 7 occasions in an effort to “strike a balance between encouraging private persons to root out fraud  
 8 and stifling parasitic lawsuits . . . .” *Graham County*, 559 U.S. 280, 295 (2010).

## 9 **2. Rule 12(b)(6)**

10 A complaint may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure  
 11 for failure to state a claim on which relief can be granted. “The purpose of a motion to dismiss  
 12 under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp.*  
 13 *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff’s burden at the pleading stage  
 14 is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that a “pleading which  
 15 sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing  
 16 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

17 In ruling on a motion to dismiss under Rule 12(b)(6), the court analyzes the complaint and  
 18 takes “all allegations of material fact as true and construe[s] them in the light most favorable to the  
 19 non-moving party.” *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).  
 20 Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that  
 21 would support a valid theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
 22 1990). A complaint must “contain either direct or inferential allegations respecting all the material  
 23 elements necessary to sustain recovery under some viable legal theory.” *Bell Atl. Corp. v.*  
 24 *Twombly*, 550 U.S. 544, 562 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,  
 25 1106 (7th Cir. 1984)). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation  
 26 of the elements of a cause of action will not do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
 27 (quoting *Twombly*, 550 U.S. at 555). “[C]ourts ‘are not bound to accept as true a legal conclusion  
 28 couched as a factual allegation.’” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S.

1 265, 286 (1986)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of  
 2 ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557)  
 3 (alteration in original). Rather, the claim must be “‘plausible on its face,’” meaning that the  
 4 plaintiff must plead sufficient factual allegations to “allow[] the court to draw the reasonable  
 5 inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S.  
 6 at 570).

### 7 **3. Rule 9(b)**

8 Rule 9(b) establishes a heightened pleading standard for claims based on fraud. “In  
 9 alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud  
 10 or mistake.” Fed. R. Civ. P. 9(b). “To satisfy Rule 9(b), a pleading must identify ‘the who, what,  
 11 when, where, and how of the misconduct charged,’ as well as ‘what is false or misleading about  
 12 [the purportedly fraudulent] statement, and why it is false.’” *United States ex rel. Cafasso v. Gen.*  
 13 *Dynamic Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (alteration in original) (quoting *U.S. ex*  
 14 *rel. Ebeid v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010)). The allegations “must be specific  
 15 enough to give defendants notice of the particular misconduct which is alleged to constitute the  
 16 fraud charged so that they can defend against the charge and not just deny that they have done  
 17 anything wrong.” *United States ex rel. Silingo v. WellPoint, Inc.*, 895 F.3d 619, 628 (9th Cir.  
 18 2018) (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)). Scier, however,  
 19 may be pleaded generally. *Id.* at 631.

### 20 **B. Requests for Judicial Notice**

21 Presently before the Court are three requests for judicial notice: 1) Allergan Defendants’  
 22 Request for Judicial Notice in Support of Allergan Defendants’ Motion to Dismiss Relator’s First  
 23 Amended Complaint [dkt. no. 66] (“Allergan RJN”); 2) Adamas Request for Judicial Notice in  
 24 Support of Motion to Dismiss by Adamas Pharma, LLC and Adamas Pharmaceuticals, Inc. [dkt.  
 25 no. 70] (“Adamas First RJN”); and 3) Adamas Request for Judicial Notice in Support of Motion to  
 26 Dismiss by Adamas Pharma, LLC and Adamas Pharmaceuticals, Inc. [dkt. no. 96] (“Adamas  
 27 Second RJN”). In all of the requests for judicial notice, the Allergan and Adamas Defendants ask  
 28 the Court to take judicial notice under Federal Rule of Evidence 201(b)(2) of documents that they

1 rely upon to show that Relator’s allegations of fraud and/or the transactions upon which they are  
2 based have been publicly disclosed.

3 “Under Federal Rule of Evidence 201, the court ‘can take judicial notice of “[p]ublic  
4 records and government documents available from reliable sources on the Internet,” such as  
5 websites run by governmental agencies.” *United States ex rel. Integra Med Analytics LLC v.*  
6 *Providence Health & Servs.*, No. CV 17-1694 PSG (SSX), 2019 WL 3282619, at \*4 (C.D. Cal.  
7 July 16, 2019) (“*Integra*”) (quoting *Gerritsen v. Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011,  
8 1033 (C.D. Cal. 2015) (quoting *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-CV-  
9 1166-IEG (POR), 2009 WL 6598891, at \*2 (S.D. Cal. Dec. 23, 2009))). The Court has reviewed  
10 Defendants’ requests and finds that all of the exhibits fall within the categories of documents of  
11 which courts may take judicial notice under Rule 201(b)(2), as Relator concedes.<sup>8</sup> *See* Dkt. Nos.  
12 81, 87 & 100 (Relator’s responses). Accordingly, the Court takes judicial notice of the existence  
13 of the documents attached to Defendants’ requests for judicial notice, though it does not take  
14 judicial notice of the “truth of the facts recited therein.” *See Lee v. City of Los Angeles*, 250 F.3d  
15 668, 690 (9th Cir. 2001); *see also United States ex rel. Ambrosecchia v. Paddock Labs., LLC*, 855  
16 F.3d 949, 954 (8th Cir. 2017) (“In evaluating whether the public disclosure bar applies, we may  
17 ‘consider matters incorporated by reference or integral to the claim, items subject to judicial  
18 notice, [and] matters of public record.” (citation omitted)).

19 **C. Whether Relator’s FCA Claims Fail Under the Public Disclosure Bar**

20 **1. History of the Public Disclosure Bar**

21 “As originally enacted, the FCA did not limit the sources from which a relator could  
22 acquire the information to bring a *qui tam* action.” *Graham County*, 559 U.S. at 295. Thus, in  
23 *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (“*Hess*”), the Supreme Court “upheld  
24 the relator’s recovery even though he had discovered the fraud by reading a federal criminal  
25

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26 <sup>8</sup> Relator argues in his responses that the Court nonetheless should decline to take judicial notice  
27 of the documents on the grounds that they are “not helpful” in deciding the instant motions. These  
28 arguments duplicate Relator’s arguments on the merits and are more appropriately resolved in the  
context of ruling on the motions to dismiss brought by the Adamas and Allergan Defendants.  
Therefore, the Court does not address Relator’s arguments in ruling on the requests for judicial  
notice.

1 indictment—a quintessential ‘parasitic’ suit.” *Id.* In *Hess*, the relator brought a *qui tam* action  
 2 against individuals who had engaged in collusive bidding for contracts with local government  
 3 entities that were largely paid for by the federal government under the authorization of the Federal  
 4 Public Works Administrator. 317 U.S. at 543. The same individuals had already been criminally  
 5 indicted for defrauding the government and had paid a fine of \$54,000 for doing so. *Id.* The  
 6 defendants and the Government (which filed an amicus brief at the request of the Court) argued  
 7 that the relator had merely obtained the information on which his claims were based from the  
 8 criminal indictment and therefore should not be permitted to bring an FCA claim, but the Court  
 9 rejected that argument on the basis that the relator “contributed much to accomplishing one of the  
 10 purposes for which the Act was passed.” *Id.* at 545. In particular, it pointed out that the relator’s  
 11 suit had “result[ed] in a net recovery to the government of \$150,000, three times as much as the  
 12 fines imposed in the criminal proceedings.” *Id.*

13 In response to the *Hess* decision and other similar “piggy-back” lawsuits, Congress enacted  
 14 what came to be known as the “government knowledge bar,” which “preclude[d] *qui tam* actions  
 15 ‘based upon evidence or information in the possession of the United States, or any agency, officer  
 16 or employee thereof, at the time such suit was brought.’” *Graham County*, 559 U.S. at 294 (citing  
 17 Act of Dec. 23, 1943, 57 Stat. 609 (codified at 31 U.S.C. § 232(C) (1946 ed.)); *United States ex*  
 18 *rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 680 (D.C. Cir. 1997) (“*Findley*”)(“*Qui*  
 19 *tam* litigation surged [in the 1930s and 1940s] as opportunistic private litigants chased after  
 20 generous cash bounties and, unhindered by any effective restrictions under the Act, often brought  
 21 parasitic lawsuits copied from preexisting indictments or based upon congressional  
 22 investigations.”). After this change, the number of *qui tam* actions dwindled. *Graham County*,  
 23 559 U.S. at 294. As the *Findley* court noted, “by restricting *qui tam* suits by individuals who  
 24 brought fraudulent activity to the government’s attention, Congress had killed the goose that laid  
 25 the golden egg and eliminated the financial incentive to expose frauds against the government.”  
 26 105 F.3d at 680; *see also United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries,*  
 27 *LLC*, 812 F.3d 294, 297–98 (3d Cir. 2016) (“*Moore*”) (“[T]his ‘government knowledge defense’  
 28 did not just eradicate the parasitic lawsuits; it eliminated most FCA lawsuits, for courts strictly

1 interpreted [the government knowledge provision] as barring FCA actions even when the  
2 government knew of the fraud only because the relator had reported it.”).

3 In 1986, Congress once again amended the FCA to make it “a “more useful tool against  
4 fraud in modern times[.]”” *Id.* (quoting *Cook County v. United States ex rel. Chandler*, 538 U.S.  
5 119, 133 (2003) (quoting S.Rep. No. 99–345, p. 2 (1986) (hereinafter “S. Rep. 99-345”))). The  
6 Senate Report that accompanied the 1986 amendments stated that the purpose of the amendments  
7 was to address the “severe” problem of fraud against the federal government and pointed to the  
8 “proliferation of cases [of fraud against the government] among some of the largest Government  
9 contractors.” S. Rep. 99-345 at pp. 1-2. Among the changes enacted in 1986 was replacement of  
10 the government knowledge bar with the public disclosure bar. *Graham County*, 559 U.S. at 294  
11 (“[A]pparently conclud[ing] that a total bar on *qui tam* actions based on information already in the  
12 Government’s possession thwarted a significant number of potentially valuable claims[.]”  
13 Congress replaced the government knowledge bar with the public disclosure bar in order to “strike  
14 a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits  
15 such as the one in *Hess*.”).

16 Under the 1986 amendments to the FCA, the public disclosure bar provided as follows:

17 No court shall have jurisdiction over an action under this section  
18 based upon the public disclosure of allegations or transactions in a  
19 criminal, civil, or administrative hearing, in a congressional,  
20 administrative, or Government Accounting Office report, hearing,  
audit, or investigation, or from the news media, unless the action is  
brought by the Attorney General or the person bringing the action is  
an original source of the information.

21 31 U.S.C. § 3730(e)(4)(A). An “original source” was defined as “an individual who has direct and  
22 independent knowledge of the information on which the allegations are based and has voluntarily  
23 provided the information to the Government before filing an action under this section which is  
24 based on the information.” 31 U.S.C. § 3730(e)(4)(B).

25 In 2010, Congress amended the FCA once again, as part of the Patient Protection and  
26 Affordable Care Act (“ACA”). *See* Pub. L. No. 111–148, § 10104(j)(2), 124 Stat. 119, 901–02  
27 (“2010 amendments”). Among other things, the 2010 amendments reflected an effort by Congress  
28 to “fix[ ] the False Claims Act’s public disclosure provision . . . [to] fairly and appropriately

1 empower whistleblowers to come forward to expose fraud, which is a crucial way to save the  
 2 government money and ensure the health and well-being of Americans.” 155 Cong. Rec. S13661-  
 3 01, 155 Cong. Rec. S13661-01 (daily ed. Dec. 21, 2009), S13693 (statement of Sen. Leahy).

4 A report by the House of Representatives that addressed the proposed changes to the FCA  
 5 explained that the amendments were aimed at court decisions since the 1986 amendments that had  
 6 “limited the reach of the False Claims Act, jeopardizing billions in Federal funds.” H.R. Rep. No.  
 7 111-97 (2009) (“H.R. 111-97”), p. 5. With respect to proposed changes to the public disclosure  
 8 bar, the report stated:

9  
 10 When the 1986 amendments were enacted, Congress expressly stated  
 11 that the public disclosure bar was intended to bar only truly parasitic  
 12 *qui tam* lawsuits; the provision was not intended to bar suits solely  
 13 because the Government already knew of the fraud or could have  
 14 learned of the fraud from information in the public domain, such as  
 15 from a media report. Congress drafted the public disclosure bar to  
 16 provide a balance between “encouraging people to come forward with  
 17 information and preventing parasitic lawsuits.” Yet, despite this clear  
 18 congressional intent and Department of Justice recommendations,  
 19 courts have used the public disclosure bar to dismiss relators who  
 20 provided important information in cases still being pursued by the  
 21 Government.

22 *Id.* at pp. 6-7.

23 As amended in 2010, the public disclosure bar now provides:

24 (4)(A) *The court shall dismiss an action or claim under this section,*  
 25 *unless opposed by the Government,* if substantially the same  
 26 allegations or transactions as alleged in the action or claim were  
 27 publicly disclosed--

28 (i) in a *Federal* criminal, civil, or administrative hearing *in*  
*which the Government or its agent is a party;*

(ii) in a congressional, Government Accountability Office, or  
 other Federal report, hearing, audit, or investigation; or

(iii) from the news media, unless the action is brought by the  
 Attorney General or the person bringing the action is an  
 original source of the information.

(B) For purposes of this paragraph, “original source” means *an*  
*individual* who either (i) prior to a public disclosure under subsection  
 (e)(4)(a), has voluntarily disclosed to the Government the information  
 on which allegations or transactions in a claim are based, or (2) *who*  
*has knowledge that is independent of and materially adds to the*  
*publicly disclosed allegations or transactions,* and who has

1 voluntarily provided the information to the Government before filing  
2 an action under this section.

3 31 U.S.C. § 3730(e)(4) (amended language in italics).

4 “The italicized language has radically changed the ‘hurdle’ for relators.” *Moore*, 812 F.3d  
5 at 298. First, the jurisdictional language in § 3730(e)(4)(A) has been removed, making the public  
6 disclosure bar an affirmative defense rather than a matter of jurisdiction. *Prather v. AT&T, Inc.*,  
7 847 F.3d 1097, 1102 (9th Cir.), *cert. denied*, 137 S. Ct. 2309 (2017). Second, allowable  
8 disclosures under romanette (i) have been limited to disclosures in a federal hearing in which the  
9 Government was a party. Third, the second channel of disclosure, which previously included any  
10 “congressional, administrative, or Government Accounting Office report, hearing, audit, or  
11 investigation[,]” was modified to remove the word “administrative” and add the phrase “other  
12 Federal” before report. 31 U.S.C. § 3730(e)(4)(A)(ii). This narrowed the scope of the public  
13 disclosure bar by excluding state and local reports as permissible channels for disclosure. *See, e.g.*,  
14 *Graham Cnty.*, 559 U.S. at 283 & n.1. Finally, the definition of an “original source” no longer  
15 contains a “direct” knowledge requirement, instead requiring that an original source have  
16 “knowledge that is independent of and materially adds to the publicly disclosed allegations or  
17 transactions.” 31 U.S.C. § 3730(e)(4)(B).

## 18 **2. Contentions of the Parties**

### 19 a. The Allergan Motion

20 Allergan argues that Relator’s FCA claims fail under the public disclosure bar because  
21 they are based on information that is drawn from the “public patent prosecution files, which have  
22 been available for many years to anyone with an Internet connection.” Allergan Motion at 10. In  
23 particular, Allergan points to the prosecution histories of the patents at issue, all of which have  
24 been published on the Patent Office’s Patent Application Information Retrieval website (“PAIR”).  
25 *Id.* at 10 n. 10.<sup>9</sup> Allergan also points to allegations in the FAC that refer to publicly available

26 <sup>9</sup>The Patent Office’s Manual of Patent Examining Procedure explains that:

27 [t]here is both a public and private side to PAIR. In public PAIR, information is available relating to issued patents, published patent  
28 applications, and applications to which a patented or published application claims domestic priority. In private PAIR, an applicant (or



1 materials filed with or published by the U.S. Federal Trade Commission (“FTC”), the U.S.  
2 Securities and Exchange Commission (“SEC”) and the U.S Food and Drug Administration  
3 (“FDA”), arguing that these also publicly disclosed the allegations and/or transactions that are the  
4 basis of Relator’s claims. *Id.* at 12 (citing FAC ¶¶ 47- 48, 58 104-109, 112-116, 132-136, 155;  
5 Declaration of Emma Strong in Support of Allergan Defendants’ Motion to Dismiss Relator’s  
6 First Amended Complaint (“Strong Decl.”), Exs. 48-55, 58-66). Allergan further asserts that  
7 Relator is not an “original source” under either of the tests set forth in 31 U.S.C. § 3730(e)(4)(B).  
8 *Id.* at 8-9.

9 As to the FCA claims based on Allergan’s alleged fraud in connection with the Went  
10 Patents, Allergan argues that Relator essentially admits in the FAC that his claims are based on  
11 “what ‘[t]he prosecution histories for the Went patents . . . show.’” *Id.* at 11 (quoting FAC ¶ 90).  
12 In particular, Allergan points to Relator’s allegation that “in sum” Dr. Went made a “false”  
13 statement in the application and “knew this was false because in a separate, related patent  
14 application within the same family, he disclosed the actual results of the ME110 Study.” *Id.*  
15 (quoting FAC ¶ 83). Further, Allergan argues, the “embellishments” on Relator’s theory alleged in  
16 the FAC are based on other publicly available materials in the Went Patent prosecution history.  
17 *Id.* (citing FAC ¶¶ 58-90; Strong Decl., Ex. 35 (Feb. 8, 2011 Non-Final Rejection); *id.*, Ex. 36  
18 (May 11, 2011 Declaration of Sid Gilman); *id.*, Ex. 37 (June 21, 2010 Office Action); *id.*, Ex. 43,  
19 (October 24, 2012 Office Action); *id.*, Ex. 44 (May 8, 2013 Abandonment)).

20 Similarly, as to the FCA claims based on Allergan’s alleged fraud in obtaining the ’009

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21  
22 his or her registered patent attorney or registered patent agent) can  
23 securely track the progress of his or her application(s) through the  
24 [Patent Office]. Private PAIR makes available information relating to  
unpublished patent applications, but the applicant must associate a  
Customer Number with the application to obtain access.

25 Manual of Patent Examining Procedure § 1730(II)(B)(1)(c). As Allergan correctly notes, “[patent  
26 applications are ‘published . . . promptly after the expiration of a period of 18 months from the  
earliest filing date for which a benefit is sought.’” Allergan Motion at 10 n. 10 (quoting 35 U.S.C.  
27 § 122(b)(1)(A)). “After that point, the ‘complete record of the proceedings before the [Patent  
Office]’ *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005), is a ‘matter[ ] of public  
28 record’ under 37 C.F.R. § 1.11(d) (promulgated Sept. 20, 2000) . . . .” *Id.* In this case, it is  
undisputed that all of the materials from the patent prosecution histories upon which Relator relies  
are available on public PAIR.

1 patent, Allergan argues that the allegations of the FAC show that both the “true” and “false” state  
 2 of affairs were publicly disclosed because Relator alleges that Forest Laboratories made a  
 3 particular disclosure of prior art “at an earlier phase of the prosecution” but failed to do so again  
 4 later, leading to the allegedly improper issuance of the patent. *Id.* (citing FAC ¶ 96 (referring to  
 5 Strong Decl., Ex. 31 (Aug. 14, 2006 Information Disclosure Statement); *id.*, Ex. 30 (Oct. 7, 2009  
 6 List of References); *id.*, Ex. 29 (June 16, 2005 Specification); and *id.*, Ex. 27 (Mar. 15, 2011  
 7 Claims)); *see also* Allergan Motion, Appendix A (Prior Public Disclosures chart) (“Allergan  
 8 Appendix A”). In addition, Allergan argues that “[e]verything that follows after the Relator’s  
 9 allegations about the [Patent Office] proceedings is also readily available in the public record, and  
 10 . . . Relator often helpfully even cites the relevant source” in the FAC. Allergan Motion at 12  
 11 (listing allegations in the FAC and public records cited); *see also* Allergan Appendix A.

12 According to Allergan, the transactions described in the public record with respect to the  
 13 Went Patents and ’009 patent are sufficient to constitute public disclosures under the Ninth  
 14 Circuit’s decisions in *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1243 (9th Cir.  
 15 2000) and *Amphastar Pharm. Inc. v. Aventis Pharma SA*, 856 F.3d 696, 700 (9th Cir. 2017),  
 16 which “confirm that Relator’s Complaint must be dismissed.” *Id.*

17 In addition to arguing that the “transaction” prong of the public disclosure bar is satisfied,  
 18 Allergan asserts that the “allegation” prong is met because the allegation that Defendants  
 19 improperly obtained various patents that allowed them to charge monopoly prices was the subject  
 20 of a “widely publicized 2014 suit [in which] the State of New York alleged that certain defendants  
 21 engaged in anticompetitive conduct aimed at keeping generic competitors to Namenda® from  
 22 entering the market by suspending sales of an earlier version of Namenda® (Namenda® IR) upon  
 23 its launch of the new Namenda® XR.” *Id.* at 13-14. Allergan points to a *Law360* article that  
 24 described a “follow-up class action,” stating:

25 Defendants’ exclusionary conduct has delayed, prevented and  
 26 impeded the sale of generic memantine hydrochloride [Namenda®]  
 27 in the U.S., and unlawfully enabled Forest to sell significantly more  
 28 branded memantine hydrochloride at artificially inflated prices,” the  
 complaint said. “As a consequence, plaintiff[s] . . . have sustained  
 substantial losses and damage . . . in the form of overcharges.

1 *Id.* at 14 (quoting Strong Decl., Ex. 65 (June 9, 2015 *Law360* Article)). Although the  
2 investigation by the State of New York did not expressly allege fraud on the Patent Office,  
3 Allergan argues that it was sufficient to show that an in-depth review of Allergan’s conduct with  
4 respect to the Namenda® line of patents was conducted and therefore, that Relator’s “overlapping  
5 allegations about Defendants’ alleged foreclosure of generics was not necessary to put the  
6 government ‘on the trail’ of any alleged fraud.” *Id.* (citing *United States ex rel. Reed v. KeyPoint*  
7 *Gov’t Sols.*, 923 F.3d 729, 744 (10th Cir. 2019)). This conclusion is further supported, Allergan  
8 argues, by the fact that in December 2014 a generic manufacturer initiated a proceeding before the  
9 Patent Office challenging the validity of one of the Went Patents, the ’085 patent, based on  
10 anticipation and obviousness. *Id.* (citing Strong Decl., Ex. 47 (petition for *Inter Partes* review of  
11 the ’085 patent)).

12 Allergan argues further that all of these public disclosures occurred in a public source  
13 recognized by the FCA. *Id.* First, it argues that the documents that are part of the prosecution  
14 histories of proceedings before the Patent Office constitute government “reports” under §  
15 3730(e)(4)(A)(ii) because prosecution histories are, by law, published as “an official, formal  
16 statement of federal proceedings.” *Id.* at 15 (citing 37 C.F.R. § 1.211). Likewise, it argues that  
17 the SEC filings and FDA materials upon which Relator relies are government “reports” under the  
18 FCA. *Id.* at 15-16. Second, Allergan contends that “[t]o the extent they did not occur in federal  
19 ‘reports,’ the disclosures here occurred in ‘news media’ as the term is used” in the FCA. *Id.* at 16.  
20 In addition, Allergan argues that the Patent Office prosecution histories, SEC filings and FDA  
21 materials discussed above also qualify as “news media” because they are all available online on  
22 websites “expressly designed for the purpose of disclosing them” and also through various  
23 commercial services. *Id.* at 16-17.

24 Finally, Allergan argues that Relator is not an original source. *Id.* at 17. According to  
25 Allergan, Relator has not alleged any facts establishing that before any public disclosure was made  
26 he voluntarily provided the government the “information on which allegations or transactions in  
27 [the] claim are based.” *Id.* (quoting 31 U.S.C. § 3730(e)(4)(B)(ii)). Although Relator does allege  
28 he is an original source, this is not enough to defeat the public disclosure bar, Allergan asserts,

1 because these allegations are conclusory and are not supported by specific factual allegations. *Id.*  
2 (citing *United States v. Kimberly-Clark Corp.*, No. LA CV-14-08313 JAK (JPRx), 2017 WL  
3 10439690, at \*8 (C.D. Cal. Nov. 30, 2017)).

4 Further, Allergan argues that because Relator's knowledge is derived from piecing together  
5 public disclosures, he cannot qualify as an original source. *Id.* at 18. In particular, Allergan  
6 argues that Relator did not have preexisting knowledge that he provided to the government prior to  
7 public disclosure of the information; nor did he have "independent knowledge" prior to public  
8 disclosure. *Id.* (citing *Amphastar*, 856 F.3d at 705; *Malhota v. Steinberg*, 770 F.3d 853, 860 (9th  
9 Cir. 2014)). Allergan also argues that Relator cannot be an original source simply "by applying  
10 specialized knowledge of legal and patent issues to publicly disclosed 'transactions.'" *Id.* (citing  
11 *U.S.A. ex rel. Calva v. Impac Secured Assets Corp.*, No. SACV161983JVSJCGX, 2018 WL  
12 6016152, at \*8 (C.D. Cal. June 12, 2018); *Prather v. AT&T, Inc.*, 847 F.3d 1097, 1105 (9th Cir.),  
13 *cert. denied*, 137 S. Ct. 2309 (2017); *A-1 Ambulance*, 202 F.3d at 1245).

14 Relator argues in his Opposition that the public disclosure bar does not apply to his FCA  
15 claims against Allergan because the 2010 amendments to the FCA narrowed the public disclosure  
16 bar, limiting the types of hearings and proceedings that trigger the public disclosure bar and  
17 lowering the threshold for qualifying as an original source. Allergan Opposition at 3, 21-22.  
18 Relator argues that Allergan's reliance on the investigation and lawsuit against Allergan by New  
19 York State is misplaced because it did not involve "substantially the same allegations or  
20 transactions," as is required under § 3730(e)(4)(A); rather, it involved a different drug (Namenda®  
21 IR) and there was no allegation of fraud on the Patent Office in that lawsuit. *Id.* at 22-23 (citing  
22 *Mateski*, 816 F.3d at 577). Similarly, Relator argues, the proceeding by a generic manufacturer  
23 before the PTAB in which it challenged one of the Went Patents was not a proceeding that  
24 involved the federal government and thus does not satisfy § 3730(e)(4)(A)(i)). *Id.* at 23. Relator  
25 further asserts that Allergan does "not even suggest that the challenger alleged fraud on the Patent  
26 Office" in the PTAB proceeding, which the PTAB would not have had jurisdiction to consider in  
27 any event because it "has no jurisdiction to hear claims based on fraud." *Id.* (citing 35 U.S.C. §  
28 311(b)).

1 Relator also rejects Allergan’s argument that the transactions from which fraud can be  
2 inferred were publicly disclosed because they are reflected in the publicly available patent  
3 prosecution histories, countering that the publication of patent prosecution histories on PAIR does  
4 not make them federal “reports” or “news media” under the FCA. *Id.* at 23-24. According to  
5 Relator, “[l]ike the PACER system for courts, PAIR reproduces the vast majority of documents  
6 submitted in a patent prosecution [and] as with PACER, documents appear on PACER in real time  
7 as they are filed electronically.” *Id.* Relator points out that while Allergan contends these  
8 documents fall under the 31 U.S.C. § 3730(e)(4)(A)(ii) as “reports,” it “assiduously avoids” the  
9 argument that the patent prosecution history constitutes a “hearing in which the Government or  
10 its agent is a party” for the purposes of 31 U.S.C. § 3730(e)(4)(A)(i) because a “patent prosecution  
11 is an *ex parte* administrative proceeding in which the Government is not a party.” *Id.* As such,  
12 Relator argues, patent proceedings “fall squarely within the category of hearings that Congress  
13 sought to carve out of the public disclosure bar in 2010.” *Id.*

14 Relator argues that his interpretation of the public disclosure bar in the wake of the 2010  
15 amendments is supported “[f]irst and foremost” by the statutory text of 31 U.S.C. § 3730(e)(4).  
16 *Id.* at 25. In particular, he argues that Allergan’s reading of the statute would nullify the new  
17 limitation that Congress added to the public disclosure bar in romanette (i) when it inserted the  
18 phrase “in which the Government or its agent is a party.” *Id.* According to Relator, such an  
19 interpretation of the public disclosure bar violates the rule of statutory construction that “the  
20 specific governs the general” and courts are “obliged to give effect, if possible, to every word  
21 Congress used.” *Id.* (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639,  
22 645 (2012) and *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 632 (2018)). Were the Court  
23 to accept Allergan’s reading of the statute, Relator contends, the new limitation in romanette (i)  
24 would be nullified for “each and every proceeding with a public docket – a tremendous share of  
25 private hearings including not only patent prosecutions, but also private federal litigation (for  
26 which PACER automatically posts electronically filed documents to the web).” *Id.*

27 Relator argues further that there has been no case since the 2010 amendments in which a  
28 court has held that “documents available only on PAIR trigger the public disclosure bar under the

1 current version of the statute.” *Id.* He further asserts that the Supreme Court’s decision in  
2 *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 409 (2011) (“*Schindler*”) supports his  
3 reading of the amended version of the public disclosure bar as that case emphasizes the “ordinary  
4 meaning” of the language of the public disclosure bar and the necessity of considering the  
5 provision’s “entire text” as an “integrated whole.” *Id.* at 25-26 (citing *Schindler*, 563 U.S. at 408).  
6 Relator also argues that the “PAIR system is nothing like” the written response that the Supreme  
7 Court found in *Schindler* was a “report” under the FCA. *Id.* In that case, Relator contends, the  
8 written response to a Freedom of Information Act (“FOIA”) request was “prepared by federal  
9 employees who were required to ‘notify the person making such request of [the agency’s]  
10 determination and the reasons therefor,’” and thus “fell within the ordinary definition of a  
11 ‘report.’” *Id.* at 26 (citing *Schindler*, 563 at 410). In contrast, Relator asserts, “nobody would say  
12 that an affidavit, prepared by a private inventor and submitted to the Patent Office in connection  
13 with a patent application, constitutes a ‘Federal report’ or ‘news media.’” *Id.*

14 Relator also argues that to the extent Allergan relies on cases in which courts have found  
15 that databases available on government websites “should qualify as ‘reports’ when they are  
16 ‘readily available’ and ‘easily navigable,’” those cases do not apply to PAIR because the PAIR  
17 database does not meet those requirements. *Id.* at 26-27 (citing Allergan Motion at 16 (quoting  
18 *United States ex rel. Rosner v. WB/Stellar IP Owner, L.L.C.*, 739 F. Supp. 2d 396, 405, 407  
19 (S.D.N.Y. 2010) and citing *United States ex rel. Calilung v. Ormat Indus., Ltd.*, No. 3:14-CV-  
20 00325-RCJ, 2015 WL 1321029, at \*16 (D. Nev. Mar. 24, 2015) (holding under the current version  
21 of the public disclosure bar that SEC filings are “reports” because they are “required by the SEC  
22 and the information contained therein [is] made readily available to the public on easily navigable  
23 websites by the SEC”); *United States, ex rel. Liotine v. CDW Gov’t, Inc.*, No. 05-33-DRH, 2009  
24 WL 3156704, at \*6 (S.D. Ill. Sept. 29, 2009) (holding under pre-2010 version of the FCA that  
25 information on a university website was not a report because “several steps had to be taken to even  
26 locate the article as it is currently archived on the University’s website” and therefore it was not  
27 “readily available to the public.”)). According to Relator, unlike the websites in the cases upon  
28 which Allergan relies, the PAIR database is not “easily navigable” as it contains “the entire

1 histories for millions of patent applications, is difficult to search (and cannot be searched using  
2 external search engines), and . . . utilizes opaque docket sheets providing almost no descriptive  
3 information about the contents of particular files.” *Id.* at 27.

4 Similarly, Relator asserts that the policy behind the public disclosure bar would not be  
5 served by finding that documents on PAIR are “reports” as this database contains “mountains of  
6 raw information submitted by third parties” and there is “no reasons to assume that the  
7 government is likely to be aware of the information in the database.” *Id.* at 27. According to  
8 Relator, because patent applicants are required to provide the Patent Office with all material  
9 related to patentability, including prior art – and those prior art citations “by their very nature are  
10 public” – Allergan’s argument would, if accepted, lead to the result that “there could *never* be a  
11 *qui tam* action based on a defendant’s knowing omission of prior art materials to the Patent Office  
12 . . . .” *Id.* at 27-28.

13 Finally, Relator argues that Allergan’s “news media” argument was recently rejected in  
14 *Integra*, No. CV 17-1694 PSG (SSX), 2019 WL 3282619, at \*11 (C.D. Cal. July 16, 2019), and  
15 that this Court should reject that argument for the reasons stated in *Integra*. According to Relator,  
16 in *Integra* the court found that cases that have “treat[ed] broad swaths of the Internet as ‘news  
17 media’ have ignored the Supreme Court’s guidance in *Schindler* to construe terms in the public  
18 disclosure bar consistently with their ordinary meaning.” *Id.* at 28.

19 As to the question of whether Relator is an “original source” and therefore falls outside the  
20 ambit of the public disclosure bar (as Relator contends), Relator argues that this is a fact question  
21 that cannot be resolved on the pleadings. *Id.* at 28-29. In addition, while he acknowledges that a  
22 relator’s specialized expertise did not make a relator an “original source” prior to 2010, Relator  
23 argues that the amended definition of “original source” allows claims based on a relator’s  
24 knowledge “about the intricacies of drug patents” because “[u]nder the new statute, the key  
25 question is whether the Relator’s knowledge ‘materially adds to’ the publicly disclosed allegations  
26 or transactions.” *Id.* at 29 (quoting *Moore*, 812 F.3d 294, 306 (3d Cir. 2016)).

27 In its Reply, Allergan asserts that Relator does not dispute that: 1) “substantially the same .  
28 . . transactions” were publicly disclosed in public Patent Office sources; and 2) he obtained the

1 information that is the basis for his FCA claims against Allergan from those public documents and  
2 not from his own “primary knowledge.” Allergan Reply at 2. Allergan rejects Relator’s argument  
3 that documents in patent prosecution histories are not “reports” under the FCA as amended in  
4 2010, arguing that in amending subsection § 3730(e)(4)(A) Congress “reinforced the ‘broad  
5 ordinary meaning of “report”” in the pre-2010 statute.” *Id.* at 3 (quoting *Schindler*, 563 U.S. at  
6 408).

7 Allergan also argues that the report at issue in *Schindler*, a “VETS-100” filing that the  
8 government was required to publish under FOIA, was analogous to the documents in the patent  
9 prosecution histories here, which the government is also required by law to publish. *Id.* at 4  
10 (citing *Schindler*, 563 U.S. at 411 & n. 6). According to Allergan, “[t]he only notable difference  
11 from the facts in *Schindler* is that someone (like Relator here) can go online, find the materials  
12 connected to a certain patent application (or various other criteria), press ‘search,’ and see the  
13 official records right away rather than typing up the same request, mailing it off, and paying a fee  
14 for copies returned weeks or months later under FOIA.” *Id.* Allergan argues that if anything, this  
15 difference lends support to the conclusion the public prosecution histories are “reports” under the  
16 reasoning of *Schindler*. *Id.*

17 Courts have applied similar reasoning, Allergan asserts, to a “wide variety of materials  
18 submitted to federal agencies under various regulatory schemes and subsequently released to the  
19 public[,]” including drug product utilization data submitted to the FDA and customs data provided  
20 by shippers to the Department of Homeland Security. *Id.* at 4-5 (citing Allergan Motion at 15 n.  
21 11) (citing *United States ex rel. Colquitt v. Abbott Labs.*, 864 F. Supp. 2d 499, 518 (N.D. Tex.  
22 2012) , *aff’d*, 858 F.3d 365 (5th Cir. 2017); *United States ex rel. Doe v. Staples, Inc.*, 932 F. Supp.  
23 2d 34, 40 (D.D.C. 2013), *aff’d*, 773 F.3d 83 (D.C. Cir. 2014); *United States ex rel. Customs Fraud*  
24 *Investigations, LLC v. Victaulic Co.*, 2014 WL 4375638, at \*10 (E.D. Pa. Sept. 4, 2014); *United*  
25 *States ex rel. Conrad v. Abbott Labs., Inc.*, No. 02–11738, 2013 WL 682740, at \*5 (D. Mass. Feb.  
26 25, 2013)). Similarly, Allergan argues, courts have uniformly found that the FCA’s definition of a  
27 federal “report” in the wake of the 2010 amendments covers “the vast trove of dense corporate  
28 filings submitted to the SEC under the securities laws and made public on the SEC’s EDGAR



1 website.” *Id.* at 5 (citing *United States ex rel. Calilung v. Ormat Indus., Ltd.*, No. 3:14-CV-00325-  
2 RCJ, 2015 WL 1321029, at \*16 (D. Nev. Mar. 24, 2015)). Allergan argues that Relator offers no  
3 explanation why corporate filings with the SEC that are available on EDGAR would be “reports”  
4 under the FCA while public filings with the Patent Office available on PAIR would not be  
5 “reports.” *Id.*

6 Allergan also rejects Relator’s argument that filings on PAIR should not be considered  
7 “reports” because it is unlikely the government would have reviewed patent dockets or be “likely  
8 to know” the information. *Id.* According to Allergan, the Supreme Court has “squarely rejected”  
9 this approach, holding that the question of whether the government knows the information “is ‘not  
10 . . . the right question’ because the ‘statutory touchstone, once again, is whether the allegations of  
11 fraud have been ‘public[ly] disclos[ed],’ § 3730(e)(4)(A), not whether they have landed on the  
12 desk of a DOJ lawyer.’” *Id.* (quoting *Graham Cty.*, 559 U.S. at 300).

13 Allergan also challenges Relator’s argument that the patent prosecution materials are not  
14 “news media,” asserting that this is an “expansive category” and that by leaving this subsection  
15 unchanged when it amended the FCA in 2010, Congress implicitly approved the many pre-2010  
16 court decisions interpreting the term broadly to include information on public websites maintained  
17 to disseminate information to the general public. *Id.* at 6 (citing *United States ex rel. Shea v.*  
18 *Cellco P’ship*, 863 F.3d 923, 933, 934 (D.C. Cir. 2017) (stating that “[n]either party disputes that  
19 publicly available websites can fall in that category” both before and after amendments); *United*  
20 *States ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, No. 5:13-CV-2145, 2015 WL  
21 7575937, at \*6 (N.D. Ohio Nov. 25, 2015) (“Courts have repeatedly held that information on  
22 readily accessible public websites constitutes public disclosure.” (quotation omitted)), *aff’d*, 842  
23 F.3d 430 (6th Cir. 2016)). Allergan argues that to the extent the court in *Integra* adopted a  
24 narrower interpretation of “news media,” that case is distinguishable because the actual materials  
25 in that case were directed to an internal audience, were designated “Proprietary and Confidential,”  
26 and could only be accessed by typing in a precise URL, which brought up hundreds of folders that  
27 were labeled only in “gibberish” file names; in contrast, PAIR contains materials that Congress  
28 has determined should be made available to the public and is public-facing. *Id.* at 7 (citing

1 *Integra*, 2019 WL 3282619, at \*13).

2 Finally, Allergan argues that the 2010 amendments to the FCA did not change the  
3 definition of “original source” or the rule that reliance on specialized knowledge is not sufficient  
4 to avoid the public disclosure bar. *Id.* at 7 (citing *United States ex rel. Calva v. Impac Secured*  
5 *Assets Corp.*, No. SACV 16-1983 JVS(JCGx), 2018 WL 6016152, at \*8 (C.D. Cal. June 12,  
6 2018); *Ormat*, 2015 WL 1321029, at \*19). Allergan argues that Relator concedes he is not an  
7 “original source” under the pre-2010 version of the FCA. *Id.* It also argues that Relator’s reliance  
8 on *Moore* is misplaced because in that case, the relator relied on specific details learned through  
9 discovery that were not publicly disclosed about the “crux of the alleged fraud.” *Id.* at 8 (citing  
10 *Moore*, 812 F.3d 294 (3d Cir. 2016)). Moreover, Allergan argues, the Third Circuit subsequently  
11 “weighed in directly on the issue, explaining that it still ‘appl[ies] the public disclosure bar to  
12 parasitic suits in which a relator uncovers a fraud based only on the application of background  
13 knowledge or experience to the publicly available facts.’” *Id.* (quoting *United States v. Omnicare,*  
14 *Inc.*, 903 F.3d 78, 89 (3d Cir. 2018)).

15 b. The Adamas Motion

16 Adamas, like Allergan, invokes the public disclosure bar in its motion. Adamas argues  
17 that Relator’s complaint “does little more than repeat ‘inequitable conduct’ allegations from  
18 previous patent infringement litigation” relating to Namenda XR® and Namzaric® in 2014 and  
19 2015. Adamas Motion at 1 (citing Declaration of Anthony Portelli in Support of Motion to  
20 Dismiss Amended Complaint (“Portelli Decl.”), Exs. 1-4 (Answers and Counterclaims by  
21 defendants Amneal Pharmaceuticals LLC (“Amneal”) and Amerigen Pharmaceuticals,  
22 Inc. (“Amerigen”) in three District of Delaware lawsuits brought against them by Forest  
23 Laboratories (hereinafter, “the Delaware actions”)). In particular, Adamas asserts that Amneal  
24 and Amerigen, manufacturers seeking to manufacture generics of Namenda XR® and Namzaric®,  
25 asserted in the Delaware actions that six of the Went Patents had been obtained by inequitable  
26 conduct committed during prosecution, namely, intentional misrepresentations in the Original  
27 Went Declaration and two similar Went declarations submitted to the Patent Office regarding the  
28 side effect results of the ME110 Study. *Id.* at 6-7 (citing Portelli Decl., Ex. 1 (Amneal Amended

1 Answer, filed July 2014 in Delaware actions)). According to Adamas, Amneal and Amerigen  
2 cited the 2012 Went Declaration (which contained the actual data from the ME110 Study, as  
3 discussed above) to show that the misrepresentations were intentional. *Id.*; *see also* Adamas  
4 Motion, Attachment A (comparing allegations in FAC with alleged public disclosures in Delaware  
5 actions).

6 Adamas further asserts that it disclosed the inequitable conduct allegations from the  
7 Delaware actions to the Patent Office in 2016, when it filed two Information Disclosure  
8 Statements (“IDSs”) listing documents relevant to patent applications in the Went family of  
9 patents and including in the list the Amneal Amended Answer. *Id.* at 7 (citing Portelli Decl., Ex. 5  
10 (April 4, 2016 IDS filed in connection with Patent Application 15/090,396); *id.*, Ex. 6 (April 4,  
11 2016 IDS filed in connection with Patent Application 15/090,400)). In both IDSs, the Amneal  
12 Amended Answer is listed as document no. 540. *Id.* According to Adamas, the Amneal Amended  
13 Answer was attached to the IDSs. *Id.* Adamas further represents that the patent litigation with  
14 Amneal and Amerigen settled before the inequitable conduct allegations were adjudicated and that  
15 the Federal Circuit invalidated six of the Went Patents for other reasons in 2018. *Id.* According to  
16 Adamas, the settlement agreements were sent to the Antitrust Division of the U.S. Department of  
17 Justice and the U.S. Federal Trade Commission and neither objected to the agreements. *Id.*

18 Adamas argues that the allegations of fraud by Amneal and Amerigen are “substantially  
19 the same allegations” as Relator asserts in this case for the purposes of § 3730(e)(4)(A). *Id.* at 12-  
20 13. Adamas further asserts that even apart from Amneal and Amerigen’s allegations, all of the  
21 transactions necessary to establish fraudulent conduct had been publicly disclosed before Relator  
22 brought this action because, as Allergan also argues, all of the material transactions necessary to  
23 show that fraud had occurred were in the patent prosecution history and had been publicly  
24 disclosed on PAIR. *Id.* at 13-15. Like Allergan, Adamas argues that these materials qualify as  
25 both federal “reports” and “news media” under §§ 3730(e)(4)(A)(ii) & (iii).

26 Adamas also argues that Relator is not an original source under the FCA for the same  
27 reasons offered by Allergan.

28 In his Opposition, Relator makes many of the same arguments he makes against Allergan

1 in support of his contention that the public disclosure bar does not apply. Relator also rejects the  
 2 additional arguments made by Adamas that the public disclosure bar applies because the same  
 3 allegations of fraud were already made in the Delaware actions by Amneal and Amerigen and  
 4 disclosed in the IDSs submitted to the Patent Office. Adamas Opposition at 16-18. Relator argues  
 5 that the allegations of fraud made by Amneal and Amerigen in the Delaware actions do not  
 6 constitute public disclosures under the post-2010 version of the FCA because that litigation did  
 7 not include the government as a party, as is now required under § 3730(e)(4)(A)(i). *Id.* at 16. Nor  
 8 does the fact that these documents are available on PACER make them federal “reports” or “news  
 9 media,” Relator argues, as such a reading of the FCA would be inconsistent with the plain  
 10 meaning of § 3730(e)(4)(A) and the reasoning of *Integra* for the same reasons materials posted on  
 11 PAIR are not federal “reports” or “news media.” *Id.* at 17. Relator also argues that the IDSs do  
 12 not constitute public disclosures, asserting that “they do not actually disclose anything material  
 13 about the fraud alleged in the Complaint [but rather], they merely list the generic ANDA filers’  
 14 pleadings – without any description whatsoever – along with thousands of other references also  
 15 missing any meaningful descriptions.” *Id.* at 18.

16 In its Reply, Adamas argues that the IDSs contain “substantially the same allegations” as  
 17 Relator advances in this case and that Relator mischaracterizes the IDSs when he says they are  
 18 merely a list of patent infringement litigation documents; in fact, Adamas argues, an IDS must  
 19 include legible copies of the documents listed in it as attachments and thus the Amneal  
 20 counterclaims were included with the IDSs that were submitted to the Patent Office.<sup>10</sup> Adamas  
 21 Reply at 5. Adamas further contends that Relator is wrong in asserting that the IDSs could not  
 22 have alerted the government to the fraud alleged by Amneal and Allergan given that the Patent  
 23 Office is required, under federal regulations, to review the documents attached to IDSs. *Id.* (citing  
 24 37 C.F.R. §§ 1.97 & 1.98(a)). Further, Adamas asserts, the Patent Examiner certified that she did,  
 25 in fact, consider the documents disclosed in the IDSs. *Id.* (citing Second Declaration of Anthony  
 26 Portelli in Support of Motion to Dismiss Amended Complaint by Adamas Pharma, LLC (“Second  
 27

28 <sup>10</sup> At oral argument, Adamas conceded, however, that while the IDSs are available on PAIR, the documents listed in them (including Amneal’s Amended Answer in the Delaware actions) are not.

1 Portelli Decl.”), Exs. 1 & 2 (copies of IDSs that were marked up and signed by the Patent  
 2 Examiner)). Adamas argues that Relator’s reliance on the fact that the government was not a party  
 3 to the patent litigation in which Amneal and Amerigen made their fraud allegations is misplaced  
 4 because the materials filed in these cases are both federal “reports” and “news media” even if they  
 5 do not qualify as a public disclosure under § 3730(e)(4)(A)(i). *Id.* at 5-7.

### 6 3. Discussion

7 “The public disclosure bar is triggered if three conditions are met: ‘(1) the disclosure at  
 8 issue occurred through one of the channels specified in the statute; (2) the disclosure was “public”;  
 9 and (3) the relator’s action is “based upon” the allegations or transactions publicly disclosed.’”  
 10 *United States ex rel. Solis v. Millennium Pharm., Inc.*, 885 F.3d 623, 626 (9th Cir. 2018) (quoting  
 11 *Mateski*, 816 F.3d at 570) (citation omitted). Here, the parties’ disputes turn on the first and third  
 12 elements of this test as it is undisputed that the disclosures cited in Defendants’ motions were  
 13 “public.” For the reasons stated below, the Court finds that the “based upon” requirement is  
 14 satisfied but that the disclosures did not occur through one of the channels specified in the statute.

#### 15 a. Are Relator’s Claims Based Upon Substantially Similar Allegations or 16 Transactions?

17 “[F]or a relator’s allegations to be ‘based upon’ a prior public disclosure, ‘the publicly  
 18 disclosed facts need not be identical with, but only substantially similar to, the relator’s  
 19 allegations.’” *Mateski*, 816 F.3d at 573 (citation omitted). Facts showing fraud may be publicly  
 20 disclosed either in the form of direct allegations of fraud or through disclosure of transactions that  
 21 give rise to an inference of fraud. *Id.* at 571 (holding that although the terms “allegation” and  
 22 “transaction” as used in § 3730(e)(4)(A) are not defined in the FCA, courts have held that  
 23 “allegation” refers to a direct claim of fraud and “transaction” refers to facts from which fraud can  
 24 be inferred.). In the latter scenario, fraud is publicly disclosed where the “material elements of  
 25 the allegedly fraudulent ‘transaction’ are disclosed in the public domain.” *Id.* (quoting *United*  
 26 *States ex rel. Found. Aiding the Elderly v. Horizon W.*, 265 F.3d 1011, 1014 (9th Cir.), opinion  
 27 amended on denial of reh’g sub nom. *United States ex rel. Found. Aiding the Elderly v. Horizon*  
 28 *W., Inc.*, 275 F.3d 1189 (9th Cir. 2001) and citing *A-1 Ambulance Serv., Inc. v. California*, 202

1 F.3d 1238, 1243 (9th Cir. 2000)).

2 i. Allegations of Fraud

3 Allergan and Adamas assert that the same allegations of fraud that are the basis for  
4 Relator's claims in this action were disclosed in: 1) a lawsuit brought by the State of New York  
5 ("the New York action") in which it was alleged that Allergan engaged in anticompetitive  
6 conduct aimed at keeping generic competitors to Namenda® XR from entering the market; 2) a  
7 challenge to the '085 patent brought before the Patent Office based on obviousness and  
8 anticipation; and 3) the assertions of fraud by Amneal and Amerigen in the Delaware actions.  
9 Only the last of these involved allegations of fraud that are substantially similar to the allegations  
10 in this case.

11 In the New York action, the misconduct alleged by the State of New York was *not*  
12 inequitable conduct before the Patent Office, which is the crux of Relator's fraud claim here.  
13 Instead, in the New York lawsuit it was alleged that Allergan engaged in anticompetitive conduct  
14 aimed at keeping generic competitors to Namenda® XR from entering the market by suspending  
15 sales of an earlier version of Namenda®. Nor does Allergan's citation to *United States ex rel.*  
16 *Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729 (10th Cir. 2019) support its position. In that case, the  
17 court states that in determining whether allegations are "substantially similar[.]" "the operative  
18 question is whether the public disclosures were sufficient to set the government 'on the trail of the  
19 alleged fraud without [the relator's] assistance.'" 923 F.3d at 744 (citation omitted). But that  
20 case simply held that there need not be "complete identity of allegations" so long as the "essence"  
21 of the fraud was publicly disclosed. *Id.* at 745. The misconduct alleged in the New York lawsuit  
22 does not satisfy that requirement.

23 Likewise, the challenge to the '085 patent brought before the Patent Office was based on  
24 anticipation and obviousness. Allergan identifies no specific allegations of fraud in that  
25 proceeding. Further, the Court has reviewed the Petition for Inter Partes Review supplied by  
26 Allergan, *see* Strong Decl., Ex. 47, and finds no allegations of fraud, much less any that are  
27 substantially similar to the fraud alleged by Relator in this case.

28 On the other hand, the allegations of fraud by Amneal and Amerigen in the Delaware

1 actions *do* mirror Relator’s fraud allegations with respect to the Went Patents. *See* Portelli Decl.,  
 2 Exs. 1-4.<sup>11</sup> In particular, Amneal and Amerigen – like Relator – alleged that the Went Patents were  
 3 obtained on the basis of declarations by Dr. Went that were knowingly false and misleading with  
 4 respect to their characterization of the results of the ME110 Study and that were submitted in order  
 5 to overcome the Examiner’s objections. Therefore, the Court concludes that to the extent Relator  
 6 relies on alleged fraud in connection with the issuance of the Went Patents, substantially similar  
 7 allegations were disclosed in the Delaware actions.

8 ii. Transactions Disclosing Fraud

9 As stated above, the public disclosure bar is triggered not only when direct claims of fraud  
 10 have been publicly disclosed but also where the material elements of the allegedly fraudulent  
 11 transaction are disclosed. *See Mateski*, 816 F.3d at 571. The Ninth Circuit has adopted the  
 12 analysis of the D.C. Circuit in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d  
 13 645, 654 (D.C.Cir.1994) (“*Springfield*”) with respect to the determination of whether a fraudulent  
 14 transaction has been publicly disclosed under the FCA. *U.S. ex rel. Found. Aiding The Elderly v.*  
 15 *Horizon W.*, 265 F.3d at 1014. In *Springfield*, the court stated:

16 On the basis of plain meaning . . . , if  $X + Y = Z$ , Z represents the  
 17 allegation of fraud and X and Y represent its essential elements. In  
 18 order to disclose the fraudulent transaction publicly, the combination  
 of X and Y must be revealed, from which readers or listeners may  
 infer Z, i.e., the conclusion that fraud has been committed.

19 14 F.3d at 654. “That the disclosed transactions themselves may not have pointed directly to any  
 20 wrongdoing is . . . of no moment.” *A-1 Ambulance Serv., Inc.*, 202 F.3d at 1245. Likewise, the  
 21 fact that a relator recognized the fraud because of the relator’s unique knowledge or experience  
 22 does not save the claim from the public disclosure bar if the underlying transactions have been  
 23

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24 <sup>11</sup> The Court notes that one of these documents, namely, Amneal’s July 21, 2014 Amended  
 25 Answer, Affirmative Defenses and Counterclaims, was listed in IDSs that were submitted to the  
 26 Patent Office and are publicly available on PAIR. *See* Second Portelli Decl., ¶ 5 and Exs. 1 & 2,  
 27 item 540. Defendants conceded at oral argument, however, that while the documents listed in the  
 28 IDSs were attached to the IDSs that were submitted to the Patent Office, these attached documents  
 are not on PAIR and can be obtained only by requesting them from the Patent Office. Thus, the  
 IDSs do not publicly disclose any of the allegations of fraud contained in Amneal’s Amended  
 Answer, Affirmative Defenses and Counterclaims. Rather, the relevant public disclosure for the  
 purposes of the Court’s analysis is the disclosure that occurred when Amneal filed this document  
 in the Delaware actions.

1 publicly disclosed and the relator does not fall under the “original source” exception. *Id.*

2           The Court finds that the prosecution histories of the patents at issue in this case disclose  
3 the material elements of the fraud that is the basis for Relator’s claim, both with respect to the  
4 Went Patents and the ’009 patent, as they reveal both the true and false state of affairs with respect  
5 to the alleged fraud. In particular, with respect to the Went Patents, the publicly available  
6 prosecution history contains the Original Went Declaration and other similar declarations  
7 submitted to overcome the patent examiners’ objections and also the 2012 Went Declaration that  
8 Relator contends shows that these earlier declarations were fraudulent. Likewise, the publicly  
9 available prosecution history for the ’009 patent reveals that although Forest Laboratories initially  
10 disclosed the prior art that is the basis of Relator’s fraud allegation, it did not alert the Patent  
11 Office 18 months later, when it amended the application to add a “once-daily” limitation, that this  
12 prior art taught the same once-daily administration. Therefore, the Court concludes that  
13 substantially the same transactions were publicly disclosed on PAIR before Relator initiated this  
14 action.<sup>12</sup>

15           b. Did the Disclosures Occur Under One of the Channels Specified in the FCA?

16           The most difficult question the Court must answer is whether the disclosures discussed  
17 above were made through one of the channels that triggers the public disclosure bar under the  
18 FCA. The disclosures cited by Allergan and Adamas do not fall under romanette (i) of §  
19 3730(e)(4)(A) because that section applies only to “Federal criminal, civil, or administrative  
20 hearing[s]” in which the federal government was a party and it is undisputed that the Government  
21 was not a party to the patent prosecutions here. Defendants contend, however, that the publicly  
22 available patent prosecution histories on PAIR make the disclosures discussed above “reports”  
23 under subsection (ii) or “news media” under romanette (iii) (or both). Adamas also asserts that the  
24 disclosures were made through one of the channels allowed under the FCA because the patent  
25 prosecutions are “Federal . . . hearing[s]” under romanette (ii). To decide whether Defendants are  
26

27 \_\_\_\_\_  
28 <sup>12</sup> Although Allergan points to certain SEC filings that disclose facts similar to ones alleged in  
Relator’s complaint, *see* Allergan Motion, Appendix A at 2, 4-6, these filings do not disclose the  
material elements of the allegedly fraudulent transaction.



1 correct, the Court must grapple with the significance of the 2010 amendments to the FCA. For the  
 2 reasons set forth below, the Court concludes that in the wake of the 2010 amendments to the  
 3 public disclosure bar, the disclosures on PAIR are neither “reports” nor “news media.” The Court  
 4 further concludes that the patent prosecutions are not “Federal . . . hearing[s]” for the purposes of  
 5 the public disclosure bar.<sup>13</sup>

6 i. Federal Report

7 To determine whether the patent prosecution documents discussed above constitute  
 8 “Federal report[s]” under the current version of the public disclosure bar, the Court considers “the  
 9 provision’s ‘entire text,’ read as an ‘integrated whole.’” *Schindler*, 563 U.S. at 408 (quoting  
 10 *Graham County*, 559 U.S. at 290 n. 12). Taking this approach, the interaction between §§  
 11 3730(e)(4)(A)(i) and (ii) is of particular significance in construing the phrase “Federal report” in  
 12 the public disclosure bar. When Congress amended the FCA in 2010, it limited the scope of §  
 13 3730(e)(4)(A)(i) by adding the words “in which the Government or its agent is a party,” reflecting  
 14 “Congress’s intent to exclude from the public disclosure bar information disclosed at hearings in  
 15 cases in which the Government is *not* a party, conceivably in part based on a presumption that the  
 16 Government is less likely to learn about events that transpire in cases it is not involved with.”  
 17 *Integra*, 2019 WL 3282619, at \*11.

18 Here, it is undisputed that patent prosecution is an *ex parte* administrative proceeding in  
 19 which the Government is not a party. Consequently, the limitation Congress added to romanette  
 20 (i) of the public disclosure bar in 2010 would be all but eviscerated as to any federal  
 21 administrative matter if the Court were to adopt the broad reading of “Federal report” urged by  
 22 Defendants, as doing so would result in an interpretation under which *any* federal proceeding with  
 23 a public docket – regardless of whether or not the Government was a party – would become a  
 24

25 \_\_\_\_\_  
 26 <sup>13</sup>It is clear to the Court that the pleadings filed by Amneal and Amerigen in the Delaware actions  
 27 do not qualify under any of the three categories because the federal government was not a party to  
 28 the Delaware actions for the purposes of subsection (i) of § 3730(e)(4)(A) and Defendants have  
 repeatedly stated that they are *not* arguing that availability of these pleadings on PACER makes  
 them “reports” under subsection (ii). Even if Defendants had made this argument, the Court  
 would reject it for the same reasons it concludes availability of a document on PAIR does not  
 make it a “report” under the public disclosure bar, as discussed below.

1 permissible channel that could trigger the public disclosure bar. The amendment to the language of  
2 romanette (i) was clearly intended to carve out from that portion of the public disclosure bar, *inter*  
3 *alia*, federal proceedings to which the government was not a party. Defendants’ construction  
4 would add those proceedings back into romanette (ii). Such a result would be inconsistent with  
5 the rule that courts are “‘obliged to give effect, if possible, to every word Congress used.’” *Nat’l*  
6 *Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 632 (2018) (quoting *Reiter v. Sonotone Corp.*, 442  
7 U.S. 330, 339 (1979)).

8 Such a result also flies in the face of the well-accepted rule of statutory construction that  
9 “‘the specific governs the general.’” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566  
10 U.S. 639, 645 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).  
11 As the Court in *RadLAX* explained, while this canon of construction is “perhaps most frequently  
12 applied to statutes in which a general permission or prohibition is contradicted by a specific  
13 prohibition or permission[,]” it also applies to situations such as the one here, “in which a general  
14 authorization and a more limited, specific authorization exist side-by-side.” *Id.* In that scenario,  
15 the canon requires that the “terms of the specific authorization must be complied with,” which  
16 “avoids . . . the superfluity of a specific provision that is swallowed by the general one,  
17 ‘violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a  
18 statute.’” *Id.* (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)); *see also*  
19 *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (“[I]t is a basic principle of statutory  
20 construction that a specific statute, . . . controls over a general provision . . . particularly when the  
21 two are interrelated and closely positioned”).

22 In order to give effect to Congress’s 2010 amendments of the FCA to specifically exclude  
23 from the public disclosure bar disclosures made in federal hearings where the Government was not  
24 a party, the Court rejects Defendants’ broad interpretation of the term “Federal report[s]” in the  
25 post-2010 version of the FCA as encompassing any disclosures made during patent prosecution  
26 that are publicly available on PAIR.

27 Nor does the Court’s instruction in *Schindler* that courts must consider the “ordinary  
28 meaning” of the word “report” point to a contrary conclusion. *See* 563 U.S. at 510. In *Schindler*,

1 the relator based his FCA claims on information his wife obtained in response to Freedom of  
2 Information Act (“FOIA”) requests made to the Department of Labor and the question before the  
3 Court was whether these responses were “reports” within the meaning of the public disclosure bar  
4 (as it existed prior to the 2010 amendments). *See* 563 U.S. at 406. The responses consisted of  
5 letters and emails describing “the records found for each year, including years for which no  
6 responsive records were located,” and providing copies of the 99 reports that had been found for  
7 those years. *Id.* Noting that the FCA does not define the word “report,” the Court began its  
8 analysis by addressing the “ordinary meaning” of the word, looking to dictionary definitions. *Id.*  
9 at 407. According to the Court, “[a] ‘report’ is ‘something that gives information’ or a  
10 ‘notification,’ Webster’s Third New International Dictionary 1925 1986), or ‘[a]n official or  
11 formal statement of facts or proceedings,’ Black’s Law Dictionary 1300 (6th ed.1990).” *Id.* at  
12 407-408. The Court concluded that the FOIA responses in that case fell within this “broad”  
13 meaning of “report,” which was consistent with the “broad scope of the FCA’s public disclosure  
14 bar.” *Id.* at 408.

15 The facts of *Schindler* fit comfortably within the ordinary meaning of the word “report”  
16 because a government employee prepared the FOIA responses that were sent to the relator in that  
17 case and selected the documents attached to the response. The disclosures here, on the other hand,  
18 are made available to the public by virtue of the fact that the Patent Office maintains a public  
19 website where it publishes patent prosecutions, as is required by law. *See* 35 U.S.C.A. § 122  
20 (providing that with certain exceptions, “each application for a patent shall be published, in  
21 accordance with procedures determined by the Director, promptly after the expiration of a period  
22 of 18 months from the earliest filing date for which a benefit is sought under this title.”). The only  
23 arguable preparation that might make these documents governmental “reports” is the promulgation  
24 of regulations implementing the requirements of §122. *See* 37 C.F.R. § 1.11 (entitled “Files Open  
25 to the Public”). Yet these regulations merely set forth the rules and procedures for making patent  
26 prosecutions public; the Court concludes that they do not turn the documents that are publicly  
27 available on PAIR into governmental “reports” under the ordinary meaning of that word.

28 This conclusion finds further support when the Court considers the use of the word

1 “report” in the context of the “entire text” of the public disclosure bar read as an “integrated  
2 whole.” *Schindler*, 563 U.S. at 408 (quoting *Graham County*, 559 U.S. at 290, 293). In  
3 *Schindler*, the Court based its interpretation of the word “report” on the “generally broad scope of  
4 the FCA’s public disclosure bar” in the pre-2010 version of § 3730(e)(4)(A). However, when  
5 Congress amended the FCA in 2010, it narrowed the scope of the public disclosure bar by, among  
6 other things, excluding information disclosed at hearings in cases in which the Government was  
7 not a party. *See* 31 U.S.C. § 3730(e)(4)(A)(i). As discussed above, this exclusion would be  
8 significantly undermined if the Court were to adopt the broad interpretation of the term “report”  
9 advanced by Defendants, as any information disclosed on a federal public docket (whether it is  
10 PACER, PAIR or some other federal docket) would be considered a public disclosure merely  
11 because it has been filed there, regardless of whether or not the Government is a party in the  
12 relevant proceeding. Thus, considering as a whole the three subsections of the current version of  
13 the public disclosure bar, the Court concludes the term “Federal report” should not be construed so  
14 broadly as to encompass documents that are publicly available on PAIR.

15 Nor does the Court find persuasive Defendants’ reliance on a handful of cases in which  
16 courts purportedly found that comparable materials were “reports” for the purposes of the FCA.  
17 *See* Allergan Motion at 15 n. 11 (citing *United States ex rel. Colquitt v. Abbott Labs.*, 864 F. Supp.  
18 2d 499, 518 (N.D. Tex. 2012) (“*Colquitt*”); *United States ex rel. Doe v. Staples, Inc.*, 932 F. Supp.  
19 2d 34, 40 (D.D.C. 2013) (“*Doe*”); *United States ex rel. Customs Fraud Investigations, LLC v.*  
20 *Victaulic Co.*, 2014 WL 4375638, at \*10 (E.D. Pa. Sept. 4, 2014)(“*Victaulic*”); *United States ex*  
21 *rel. Conrad v. Abbott Labs., Inc.*, No. 02–11738, 2013 WL 682740, at \*5 (D. Mass. Feb. 25, 2013)  
22 (“*Conrad*”); Adamas Motion at 15 (citing *United States ex rel. Rosner v. W.B./Stellar I.P. Owner,*  
23 *LLP*, 739 F. Supp. 2d 396, 405-07 S.D.N.Y. 2010); Allergan Reply at 5 (citing *United States ex*  
24 *rel. Calilung v. Ormat Indus., Ltd.*, No. 3:14-CV-00325-RCJ, 2015 WL 1321029, at \*16 (D. Nev.  
25 Mar. 24, 2015) (“*Calilung*”)).

26 First, one of the cases cited by Defendants, *Victaulic*, did not address the “report” channel  
27 of disclosure at all. In *Victaulic*, the court found that reports published by trade organizations that  
28 collected and compiled certain data submitted to the United States Bureau of Customs and Border

1 Protection qualified as “news media” under the FCA’s public disclosure bar (pre-2010 version).  
 2 2014 WL 4375638, at \*10 (reasoning that “at minimum, a publicly available website may qualify  
 3 as ‘news media’ where the information provided is to some extent curated – that is, where the  
 4 authors or editors of the website actively gather and disseminate information, provide search tools  
 5 for the public to analyze data, provide some editorial content, or exercise some control over the  
 6 information provided – and where the information bears at least some of the ‘indicia of reliability  
 7 or substantiation’ common to more traditional news media sources.”). The case did not address  
 8 whether the trade publication was a “report” or suggest that that requirement might apply (under  
 9 either the pre-2010 version of the FCA or the post-2010 version). Therefore, the case sheds no  
 10 light on the question before the Court here.

11 The remaining cases cited by Defendants, most of which apply the pre-2010 version of the  
 12 public disclosure bar, also do not persuade the Court that the disclosures on PAIR were “reports”  
 13 under the current version of the public disclosure bar. In *Doe*, the FCA claims were based on  
 14 shipping data contained in reports published by PIERS Global Intelligence Solutions (“PIERS”), a  
 15 company which “compiles manifest information submitted to Customs by all shippers.” 932 F.  
 16 Supp. 2d at 40. The court concluded that “while not a traditional news source, this site qualifie[d]  
 17 as ‘news media’ in light of the ample precedent in favor of broad construction of the channels of  
 18 public disclosure listed in § 3730(e)(4)(A).” *Id.* It pointed to the Court’s observation in *Schindler*  
 19 that the “sources of public disclosure in § 3730(e)(4)(A), especially ‘news media,’ suggest that the  
 20 public disclosure bar provides ‘a broa[d] sweep.’” *Id.* (quoting 563 U.S. at 408). It also noted that  
 21 “other courts have found similar trade publications to be ‘news media.’” *Id.* (citing *United States*  
 22 *ex rel. Alcohol Found. v. Kalmanovitz Charitable Found.*, 186 F.Supp.2d 458, 463 (S.D.N.Y.  
 23 2002)).

24 The court went on to find that the same information had been disclosed in “administrative  
 25 reports” within the meaning of the pre-2010 version of § 3730(e)(4)(A) because “[t]he shipping  
 26 information underlying the PIERS trade reports is also available to public subscribers through the  
 27 U.S. Customs and Border Protection Automated Manifest System.” *Id.* (citing 19 CFR §§ 4.7,  
 28 103.31(a) (requiring Customs to provide vessel manifest information to the press)). The court

1 provided no reasoning in support of its conclusion, however, and did not conduct any analysis of  
2 *Schindler* or its implications for whether the information available through the Government’s  
3 automated system in that case was a “report” for the purposes of the FCA. Even assuming the  
4 court in *Doe* was correct, however, there is nothing to suggest that the automated system in that  
5 case was a docket sheet intended to disclose the history of any federal proceedings (much less  
6 proceedings in which the Government is not a party). Consequently, while the holding in that case  
7 may be consistent with the current version of the FCA under the facts of that case (a question the  
8 Court need not decide), it does not point to the same conclusion here; in contrast to the website in  
9 *Doe*, PAIR implicates subsection (i) of the public disclosure bar because it is a docket of federal  
10 proceedings in which the Government is not a party. As discussed above, construing the term  
11 “report” as encompassing such a website appears to be inconsistent with Congress’s 2010  
12 amendment of the public disclosure bar to exclude disclosures made in such proceedings.  
13 Therefore, the Court concludes that *Doe* does not support Defendants’ position.

14 Similarly, in *Conrad*, the court found that drug product data files published quarterly by  
15 the Centers for Medicare and Medicaid Services (“CMS”) were “reports” under the pre-2010  
16 version of the public disclosure bar, but the publication at issue in that case also was not a public  
17 docket. Rather, it was a “consolidated list of all the covered outpatient drugs and any associated  
18 DESI codes that drug manufacturers ha[d] identified in their CMS filing[.]” 2013 WL 682740, at  
19 \*5. Comparing the publication to the FOIA responses in *Schindler*, the court found that it  
20 “summarize[d] information in the agency’s possession in exactly the same way that a FOIA  
21 response [did].” *Id.* The court observed that “[l]ike a FOIA response, the CMS data files  
22 represent at least some minimal preparation and synthesis by the agency, since the listings from  
23 each manufacturer and each state are sorted and compiled into a usable format.” *Id.* It went on to  
24 find the data files published by CMS fit within the ordinary meaning of a “report” because they  
25 “constitute[d] official public statements by CMS” that notified recipients of “the covered  
26 outpatient drugs and DESI codes that each drug manufacturer ha[d] reported” and “how much the  
27 federal government ha[d] reimbursed the states for each covered outpatient drug.” *Id.* Again, the  
28 website in *Conrad* was not a docket that reflected the history of any Federal proceedings and

1 therefore, the 2010 amendments to the public disclosure bar do not cast doubt on the conclusions  
2 of the court in that case but do suggest that the same result is not appropriate here. The Court also  
3 notes that documents found on PAIR are less like FOIA responses than the publication in *Conrad*  
4 because they are not summaries or compilations of the information in the Patent Office's  
5 possession. Therefore, this case also does not support Defendants' position.

6 Similarly, in *U.S. ex rel. Rosner v. WB/Stellar IP Owner, L.L.C.*, the court found that a  
7 database available on a state agency website was a "report" under the pre-2010 version of the  
8 public disclosure bar because it was "readily available to the public[,] "easily navigable[,] and  
9 did not "present raw, unanalyzed data" but instead "present[ed] synthesized tax benefit histories  
10 for many different properties over many years, organized by block and lot number." 739 F. Supp.  
11 2d at 407.<sup>14</sup> Again, the information disclosed on the website at issue in that case was not a public  
12 docket like PAIR but instead, closer to the FOIA responses in *Schindler*.

13 The Court further concludes that in *Colquitt*, the court's reading of *Schindler* was  
14 excessively broad. In that case, the court found that summaries that were prepared by medical  
15 device manufacturers and submitted to the Food and Drug Administration ("FDA") to obtain  
16 clearance to sell the devices in interstate commerce ("510k summaries") were "administrative  
17 reports" under the pre-2010 version of the public disclosure bar. 864 F. Supp. 2d at 518. The  
18 court in that case relied on *Schindler* and a Fifth Circuit case that similarly found that a FOIA  
19 response was an "administrative report" under the FCA, see *U.S. ex rel. Reagan v. E. Texas Med.*  
20 *Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 176 (5th Cir. 2004), to conclude that in order "to be an  
21 administrative report within the meaning of the FCA, a document must (1) constitute official  
22 government action and (2) provide information." *Id.* The court went on to find that both  
23 requirements were met because the 510k summaries provided information and they had been  
24 collected by the FDA as part of its administrative process. In other words, whereas in *Schindler*,  
25 the Court found that the FOIA responses fell within the ordinary meaning of the word "report"

26 \_\_\_\_\_  
27 <sup>14</sup> The court in *Rosner* relied on reasoning in *U.S. ex rel. Kirk v. Schindler Elevator Corp.*, 601  
28 F.3d 94, 111 (2d Cir. 2010), some of which the Supreme Court rejected in *Schindler*, 563 U.S. 401  
(2011). As the Court concludes that *Rosner* is not on point, it need not address whether it remains  
good law.

1 where an employee of the agency compiled the data that was sent to the FOIA requester, in  
2 *Colquitt*, the court found that it was sufficient that the government agency had collected and  
3 published the reports, even without any organizing, compiling or processing of the data that had  
4 been submitted to it. The undersigned concludes that this expansion of the holding of *Schindler*  
5 does not comport with the ordinary meaning of the word “report.” In any event, *Colquitt* does not  
6 address the implications of the 2010 amendments to the FCA or the specific scenario here, where a  
7 treating disclosures on PAIR as “reports” under romanette (ii) appears to directly contradict  
8 Congress’s intent in excluding from romanette (i) disclosures made in federal proceedings in  
9 which the Government was not a party.

10 Finally, *Calilung* does not change the Court’s conclusion. In that case, the court found that  
11 certain SEC filings qualified as “reports” under the current version of the statute based on a Fourth  
12 Circuit case that reached a similar conclusion under the pre-2010 version of the statute. 2015 WL  
13 1321029, at \*16 (citing *United States ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 700 (4th  
14 Cir. 2014)). The court reasoned that the Form–10Ks, Form–10Qs, and Form–8Ks at issue in that  
15 case “were required by the SEC and the information contained therein was made readily available  
16 to the public on easily navigable websites by the SEC.” *Id.* It did not address *Schindler* or the  
17 implications of the 2010 amendments, however. Nor is there any suggestion that the website at  
18 issue was comparable to a public docket for federal proceedings. Therefore, that case also does  
19 not support the conclusion that the information disclosed on PAIR in this case was a “report”  
20 under the current version of the public disclosure bar.<sup>15</sup>

21 Therefore, the Court concludes that the patent prosecution documents in which the  
22 disclosures discussed above were made do not constitute “reports” under the current version of the  
23 FCA’s public disclosure bar.

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<sup>15</sup> The Court need not reach the question of whether PAIR is “readily available” to the public or  
“easily navigable.” In any event, that question is a fact question that is not suitable for  
determination on the pleadings.



## ii. News Media

Defendants rely on numerous cases interpreting the term “news media” broadly to argue that documents reflecting patent prosecution histories published on PAIR are not only “reports” under the FCA but also “news media.” *See, e.g., Bridgeport Educ.*, 2015 WL 4892259, at \*6 n.4 (“[T]he Court finds that the online comment . . . qualifies as a public disclosure as news media” because it occurred on a “a well-established website designed to convey the news to the public”); *United States ex rel. Green v. Serv. Contract Educ. & Training Tr. Fund*, 843 F. Supp. 2d 20, 32 (D.D.C. 2012) (“[C]ourts that have considered the issue have construed the term to include readily accessible websites.”); *United States ex rel. Unite Here v. Cintas Corp.*, No. C 06-2413, 2007 WL 4557788, at \*14 (N.D. Cal. Dec. 21, 2007) (“The ‘fact’ of the contracts . . . was publicly disclosed in the news media, as that information was available on the Internet.”); *United States ex rel. Hong v. Newport Sensors, Inc.* (“*Hong I*”), No. SACV131164JLSJPRX, 2016 WL 8929246, at \*5 (C.D. Cal. May 19, 2016), *aff’d sub nom. United States ex rel. Juan Hong v. Newport Sensors, Inc.*, 713 F. App’x 724 (9th Cir. 2018), and *aff’d sub nom. United States ex rel. Hong v. Newport Sensors, Inc.*, 728 F. App’x 660 (9th Cir. 2018) (“Information publicly available on the Internet generally qualifies as ‘news media.’”).

The Court notes, however, that although the Ninth Circuit affirmed the district court’s decision in *United States ex rel. Juan Hong v. Newport Sensors, Inc.*, it expressly declined to decide whether the broad definition of “news media” adopted by the trial court – any information that is publicly available on the Internet – was correct. *See United States ex rel. Hong v. Newport Sensors, Inc.* (“*Hong II*”), 728 F. App’x 660, 662–63 (9th Cir. 2018) (“Relator does not independently challenge the district court’s broad holding that most public webpages, including the UC Irvine faculty profile, generally fall within the category of ‘news media.’ Accordingly, we do not address that argument here.”).

Moreover, in *Integra*, Judge Gutierrez, in a thoughtful analysis of the meaning of “news media” under the current version of the public disclosure bar, concluded that this definition did not comport with the “ordinary meaning” of the term and was overly broad. No. CV 17-1694 PSG (SSX), 2019 WL 3282619 (C.D. Cal. July 16, 2019). The court in that case observed that the

1 defendant’s “unbounded reading of the news media provision . . . seem[ed] likely to swallow  
2 limitations that Congress specifically placed on the scope of the public disclosure bar” when it  
3 amended it in 2010, and pointed to PACER to illustrate this point:

4 Under Defendants’ view, the mere posting of the transcript on  
5 PACER or a tweet sent to a small handful of followers could render  
6 the information from the hearing publicly disclosed under the FCA,  
7 even though it otherwise would not be. This would run contrary to the  
8 purposes underlying the public disclosure bar, and indeed the FCA  
9 itself. *See Schindler Elevator*, 563 U.S. at 412 (describing the public  
10 disclosure bar as “narrower” than its predecessor, the Government  
11 knowledge bar, which was intended to preclude “parasitic qui tam  
12 actions based on evidence or information in the possession of the  
13 United States at the time such suit was brought”) (cleaned up); *United*  
14 *States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir.  
15 1995) (“[T]he purpose of the qui tam provisions of the False Claims  
16 Act is to encourage private individuals who are aware of fraud being  
17 perpetrated against the Government to bring such information  
18 forward.”) (cleaned up).

12 *Id.* at \*12.

13 The court in *Integra* went on to set forth five “guideposts” for “determining whether  
14 information from an online source has been disclosed ‘from the news media’ within the meaning  
15 of the FCA’s public disclosure bar.” *Id.* at \*14. First, the court found based on dictionary  
16 definitions of “news” and “media” that “the compound term ‘news media’ describes methods of  
17 communication that are used to convey information about recent events or other information that  
18 would commonly be found in newspapers, news broadcast, or other news sources.” *Id.*  
19 “Accordingly, the extent to which the information typically conveyed by a source would be  
20 considered newsworthy is relevant to whether it is a news media source.” *Id.*

21 Second, the court found that the term “generally carries with it a connotation of editorial  
22 independence, or at least, some separation, between the original source of information and the  
23 medium that conveys it.” *Id.*

24 Third, the court found that “a source’s intent to disseminate information widely . . . is  
25 relevant to whether it is acting as a news media entity.” *Id.*

26 Fourth, the court found that “the more that an online source functions like [traditional news  
27 outlets like newspapers and radios and television stations], the more likely it is to be news media  
28

1 under the FCA.” *Id.* at \*15. The court explained that “relevant to this consideration is the extent  
2 to which the conveyance of newsworthy information is the primary purpose of [the] entity  
3 publishing the online source or whether the dissemination of information is merely ancillary to  
4 some other purpose.” *Id.*

5 Finally, the court concluded that “consistent with . . . *Schindler* . . . the most important  
6 consideration is whether the source in question falls within the ‘broad ordinary meaning’ of the  
7 term ‘news media’ – in other words, whether it could reasonably be described as ‘news media’ as  
8 at least some people would [use] that term in ordinary speech.” *Id.* Applying this framework the  
9 court in *Integra* found that the question could not be decided on the pleadings under the facts of  
10 that case because “it appear[ed] that at least some of the information [that was disclosed] [came]  
11 from online sources that were not easily accessible,” such as information that was marked  
12 “proprietary and confidential” and was only available on internal staff home pages. 2019 WL  
13 3282619, at \*16.

14 The undersigned agrees with the approach set forth in *Integra* and therefore rejects  
15 Defendants’ suggestion that the information disclosed on PAIR falls under the “news media”  
16 channel simply because it can be found on the Internet. Moreover, many of the factors set forth in  
17 *Integra* for determining whether a source constitutes “news media” appear to point to the opposite  
18 conclusion. Certainly, docket sheets such as PACER and PAIR do not fall within the meaning of  
19 the term “news media” as it is ordinarily used. Most importantly, though, as Judge Gutierrez  
20 recognized in his discussion of PACER, interpreting “news media” to include a public docket such  
21 as PAIR would be contrary to Congress’s intent when it amended the FCA’s public disclosure bar  
22 in 2010, as it would nullify the limitation Congress added to romanette (i) for the same reasons set  
23 forth above with respect to the term “Federal report.” Accordingly, the Court rejects Defendants’  
24 argument that the fraud alleged by Relator was publicly disclosed under the “news media” channel  
25 of disclosure.

26 iii. Federal Hearing

27 Although neither set of Defendants argued in the original motion papers that the alleged  
28 fraud was disclosed in a “Federal . . . hearing” within the meaning of 31 U.S.C. §

1 3730(e)(4)(A)(ii), Adamas argued in a supplemental brief filed after *Valeant* was decided that it  
2 was. *See* Dkt. No. 131. The Court rejects that argument and respectfully disagrees with the  
3 court’s reasoning in *Valeant*.

4 In *Valeant*, the court held that information disclosed in a PTAB proceeding triggered the  
5 public disclosure bar because the proceeding was a “Federal . . . hearing” under 31 U.S.C. §  
6 3730(e)(4)(A)(ii), even though the Government was not a party to it. The court reasoned that  
7 “hearing” meant “proceeding” and that the PTAB was a federal proceeding. For the reasons  
8 discussed above with respect to “Federal report” under the same subsection, that reading of the  
9 term “Federal . . . hearing” appears to be in direct conflict with what Congress intended when it  
10 amended the public disclosure bar in 2010 to limit it to disclosures that occurred in a “Federal  
11 criminal, civil, or administrative hearing *in which the Government or its agent is a party.*” 31  
12 U.S.C. § 3730(e)(4)(A)(i) (emphasis added).

13 Nor is the Court persuaded that the Ninth Circuit’s decision in *United States ex rel. Bennett*  
14 *v. Biotronik, Inc.*, 876 F.3d 1011 (9th Cir. 2017), on which the *Valeant* court relied, *see* 445 F.  
15 Supp. 3d at 406, supports a contrary conclusion. In that case, the Ninth Circuit held that the  
16 government-action bar of § 3730(e)(3)<sup>16</sup> applies even when the Government is no longer an active  
17 participant in an ongoing qui tam lawsuit. 876 F.3d at 1016. In reaching that conclusion, the court  
18 rejected the relator’s argument that its interpretation of § 3730(e)(3) would make that provision “a  
19 mere subset” of the public disclosure bar because of the overlap with § 3730(e)(4)(A)(i). *Id.* at  
20 1018. The court found that the relator overstated the degree of overlap, noting that under the  
21 court’s reading of the government action bar, that section “describe[d] numerous possible  
22 situations which would not be covered under” the public disclosure bar. *Id.* at 1019. In contrast,  
23 the *Valeant* court’s interpretation of the term “Federal . . . hearing” in § 3730(e)(4)(A)(ii) results  
24

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25 <sup>16</sup> This section provides as follows:

26 In no event may a person bring an action under subsection (b) which is based upon  
27 allegations or transactions which are the subject of a civil suit or an administrative civil  
28 money penalty proceeding in which the Government is already a party.

31 U.S.C. § 3730(e)(3).

1 not just in a partial overlap but in virtually total nullification of the language that Congress added  
2 to romanette (i) of the public disclosure bar in 2010 as applied to any federal proceeding. As  
3 discussed above, in interpreting statutory language, courts avoid constructions that render  
4 language in the statute meaningless or superfluous. That rule supports the Court’s conclusion that  
5 neither the PTAB proceedings in *Valeant* nor the prosecution history published on PAIR in this  
6 case are “Federal . . . hearing[s]” within the meaning of the current version of the public disclosure  
7 bar.

8 The Court also reject Adamas’s argument that “[b]ecause patent prosecution is a non-  
9 adversarial ‘examination’ conducted by the PTO, these proceedings are a ‘hearing, audit, or  
10 investigation’ within the meaning of Section 3730(e)(4)(A)(ii), but not an ‘administrative hearing’  
11 as that term is used in Section 3730(e)(4)(A)(i).” Dkt. No. 131 at 5. This assertion is based on  
12 the use of the word “party” in Section 3730(e)(4)(a)(i), which Adamas contends connotes  
13 adversaries and indicates that the “hearings” in this section must be adversarial. On the other  
14 hand, Adamas asserts, non-adversarial hearings are governed by Section 3730(e)(4)(a)(ii). *Id.*  
15 This argument is not supported by any authority and is unpersuasive in light of the fact that the  
16 word “party” is often used to refer to a patent applicant. *See, e.g.*, 35 U.S.C. § 133 (“Upon failure  
17 of the applicant to prosecute the application within six months after any action therein . . . the  
18 application shall be regarded as abandoned by the *parties* thereto.”); 35 U.S.C. § 2(b)(2)(D) (the  
19 Patent Office “may govern the recognition and conduct of agents, attorneys, or other persons  
20 representing applicants or other *parties* before the Office”); 35 U.S.C.A. § 256 (“Whenever  
21 through error a person is named in an issued patent as the inventor, or through error an inventor is  
22 not named in an issued patent, the Director may, on application of all the *parties* and assignees,  
23 with proof of the facts and such other requirements as may be imposed, issue a certificate  
24 correcting such error.”); Manual of Patent Examining Procedure, § 605.01 (stating the “applicant”  
25 is “the party making the application for patent”). The Court also notes that when Congress  
26 amended § 3730(e)(4)(A)(i), it did not include the word “adversarial” to modify “hearing,” even  
27 though it referred to discovery “in any judicial or administrative proceeding of an adversarial  
28 nature” elsewhere in the FCA, *see* 31 U.S.C. § 3733(l)(7), showing that Congress knew how to

1 limit proceedings to those that are adversarial when it wanted to do so.

2 Nor does the Court find persuasive Adamas’s argument that its interpretation of the public  
3 disclosure bar must be adopted so as not to read the phrase “other Federal . . . hearing” out of  
4 Section 3730(e)(4)(A)(ii). As Relator points out in his responsive brief, “like all the other  
5 ‘hearings’ in romanette (i), patent examination is an adjudication focused on the merits of a party’s  
6 (i.e., the applicant’s) legal claim. The hearings enumerated in romanette (ii), by contrast, are not  
7 typically adjudications of particular legal claims, but are instead inquiries undertaken (typically on  
8 the government’s own initiative) for the purpose of obtaining information for the public’s benefit.”  
9 Dkt. No. 132 at ECF pp. 3-4. Because patent prosecution proceedings fall squarely within the  
10 scope of the specific provision in romanette (i), which excludes from the public disclosure bar  
11 administrative proceedings in which the Government is not a party, the Court concludes that under  
12 the canon of construction that the specific governs the general, discussed above, that provision  
13 governs over the more general phrase “other Federal . . . hearing” found in romanette (ii).

14 Therefore, the Court concludes that the patent prosecution history published on PAIR that  
15 disclosed the fraud alleged in this case does not constitute a “Federal . . . hearing” under romanette  
16 (ii) of the public disclosure bar. More broadly, the Court finds that the disclosures in the patent  
17 prosecution history discussed above were not made through one of the channels specified in the  
18 current version of the public disclosure bar, which therefore does not bar Relator’s claims.<sup>17</sup>

19 **D. Whether Relator States a Claim Under the FCA Against Allergan and Adamas**

20 **1. Background**

21 a. The Allergan Motion

22 Allergan argues in its Motion that even apart from the public disclosure bar, Relator’s FCA  
23 claims are insufficiently alleged and must be dismissed. First, with respect to the ’009 patent,  
24 Allergan argues that Relator does not – and cannot – plausibly allege a fraud on the Patent Office  
25 because the prior art that was allegedly concealed from the Patent Office was, in fact, disclosed to  
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28 <sup>17</sup> Because the Court finds that no disclosures were made through a channel specified in the public  
disclosure bar, it need not reach the question of whether Silbersher is an “original source” under  
31 U.S.C. § 3730(e)(4)(B).

1 it by Forest Laboratories during the prosecution of the '009 patent. Allergan Motion at 19 (citing  
2 FAC ¶¶ 94, 96). According to Allergan, “[i]t is blackletter law that there can be no inequitable  
3 conduct (*i.e.*, fraud on the U.S. Patent Office) by withholding a reference to prior art where the  
4 reference was disclosed elsewhere to the U.S. Patent Office.” *Id.* (citing 37 C.F.R. § 1.56(a)  
5 (providing that “[t]he duty to disclose all information known to be material to patentability is  
6 deemed to be satisfied if all information known to be material to patentability of any claim issued  
7 in a patent was cited by the Office or submitted to the Office . . . .”); *Fiskars, Inc. v. Hunt Mfg.*  
8 *Co.*, 221 F.3d 1318, 1327 (Fed. Cir. 2000) (“An applicant cannot be guilty of inequitable conduct  
9 if the reference was cited to the examiner, whether or not it was a ground of rejection by the  
10 examiner.”)).

11 Allergan further asserts that Relator has not plausibly alleged that the failure to *resubmit*  
12 the relevant prior art (the '553 patent) when the '009 patent application was amended constituted a  
13 knowing concealment, and that he simply speculates that Forest Laboratories deliberately decided  
14 not to disclose this prior art. *Id.* at 20. According to Allergan, these allegations are not sufficient  
15 to meet the pleading requirements of either Rule 9(b) or Rule 12(b)(6) of the Federal Rules of  
16 Civil Procedure. *Id.* Further, Allergan asserts, to the extent patent applicants have no duty to  
17 disclose material information that is “cumulative of information already of record[,]” Relator  
18 cannot plausibly allege scienter as to the fraud claim based on the '009 patent. *Id.* (citing 37  
19 C.F.R. § 1.56(a)). Finally, Allergan argues that Relator has not plausibly alleged that any  
20 defendant other than Forest Laboratories was involved in the alleged fraud on the Patent Office in  
21 connection with the issuance of the '009 patent and therefore, no other defendant can be liable for  
22 any knowing misconduct under this theory. *Id.* at 21.

23 Similarly, Allergan argues that the allegations of fraud based on the Went Patents fail to  
24 state a claim as to the Allergan Defendants because Relator has not alleged any conduct by  
25 Allergan in connection with this claim and cannot do so. *Id.* at 21-22. According to Allergan,  
26 “Relator never articulates his theory of who, how, or when any of the Allergan Defendants – let  
27 alone any specific Allergan entity – participated in any alleged inequitable conduct” before the  
28 Patent Office, instead “resort[ing] to the artifice of group pleading, in an apparent effort to avoid

1 the fact that the Allergan Defendants had nothing to do with the alleged conduct relating to the  
2 Went [P]atent prosecutions.” *Id.* at 22. Allergan points to the allegations in the FAC in support of  
3 its position, arguing that it sets forth a sequence of events that involved only Dr. Went’s  
4 submission of false declarations to the Patent Office, all of which occurred before Adamas entered  
5 into a licensing agreement with Forest Laboratories, and that there is no relevant conduct alleged  
6 as to the Allergan Defendants. *Id.* at 22-23 (citing FAC ¶¶ 58, 61, 63, 69, 71, 74-77, 80).  
7 According to Allergan, these allegations are insufficient to satisfy Rule 9(b), which applies to  
8 fraud claims, and therefore Relator’s FCA claims against Allergan based on inequitable conduct in  
9 connection with the Went Patents must be dismissed. *Id.* at 22.

10 Allergan further asserts that the allegations against it with respect to the Went Patents are  
11 insufficient to allege the intent required to state a claim under the FCA, namely, that the Allergan  
12 Defendants acted “with actual knowledge,” “in deliberate ignorance of the truth,” or “in reckless  
13 disregard of the truth.” *Id.* at 23 (citing 31 U.S.C. § 3729(b)(1)). Rather, Allergan contends,  
14 “Relator never alleges that any Allergan Defendant even knew about the supposed fraud or learned  
15 about it after the fact.” *Id.* Allergan concedes that the FAC alleges, in a conclusory manner, that  
16 “Defendants were aware of a study” and “misrepresented the findings of the study to the Patent  
17 Office.” *Id.* (citing FAC ¶ 2). But according to Allergan, “this conclusory group allegation cannot  
18 be squared” with the more specific allegations in the Complaint that follow. *Id.* at 24.

19 Allergan also challenges Relator’s FCA claims against it on the basis that Relator has not  
20 alleged Allergan made any “false or misleading” claims for payment to the government, which is  
21 required to state a claim under the FCA. *Id.* at 25 (citing *United States ex rel. Campie v. Gilead*  
22 *Scis., Inc.*, 862 F.3d 890, 899 (9th Cir. 2017); 31 U.S.C. § 3729(a)(1)(A)). As a preliminary  
23 matter, Allergan contends “at least one court has expressly held that because ‘misrepresentations  
24 to the [Patent Office]’ years prior are ‘disconnect[ed]’ from ‘invoices submitted to the  
25 government’ they cannot constitute an FCA violation as a matter of law.” *Id.* at 26 (citing *United*  
26 *States ex rel. Promega Corp. v. Hoffman-LaRoche Inc.* (“*Promega*”), No. 03-1447-A (E.D. Va.



1 Sept, 29, 2004), attached as Ex. 67 to Strong Decl.).<sup>18</sup> In any event, Allergan asserts, Relator has  
2 not demonstrated falsity – either by alleging facts showing factual falsity or legal falsity. *Id.* at 25.

3 Allergan argues that Relator fails to allege factual falsity because he does not allege facts  
4 showing that “the goods or services paid for or reimbursed by the government – *i.e.*, the  
5 Alzheimer’s drugs – were defective or nonconforming in any way, or that they were otherwise  
6 misrepresented.” *Id.* To establish legal falsity, Allergan argues, Relator must allege facts showing  
7 that Allergan “misrepresent[ed] compliance with a law, regulation, or contractual requirement,”  
8 either by an “express false certification” that it has complied with the law or an “implied false  
9 certification,” “which occurs when the defendant submits a claim for payment that makes specific  
10 representations about the goods or services provided, but knowingly fails to disclose the  
11 defendant’s noncompliance with a statutory, regulatory, or contractual requirement.” *Id.* (citing  
12 *United States ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1017 (9th Cir. 2018) (“*Rose*”) and  
13 quoting *Universal Health Servs., Inc. v. United States* (“*Escobar*”), 136 S. Ct. 1989, 1995 (2016)).  
14 Allergan argues that Relator has not alleged facts showing that it made either an express or an  
15 implied false certification to the government. *Id.*

16 To the extent Relator relies on the allegation in the FAC that Allergan was required to  
17 supply proof that the price of its drug was “fair and reasonable,” *see* FAC ¶ 113, Allergan argues  
18 that this is not a certification of compliance with the law; rather, it is a certification that the prices  
19 charged are commensurate with the prices the drug manufacturer offers to its commercial  
20 customers. *Id.* at 26. Therefore, any certification that the prices Allergan charged the government  
21 were “fair and reasonable” would not have been an “express certification” of compliance with the  
22 law. *Id.* Allergan further asserts that the FAC does not actually allege that it made any such  
23 certification, much less the “who, what, when, where and how” of any such submissions. *Id.* at  
24 25-26.

25 Allergan also argues that Relator does not adequately allege any implied certification, even

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27 <sup>18</sup> Elsewhere in the motion, Allergan also asserts that the only other FCA case where a relator has  
28 relied on a similar theory (that a drug manufacturer “violated the FCA by foreclosing generic  
drugs”) is *Amphastar* and in that case, as in *Promega*, the case was dismissed at the pleading  
stage. Motion at 4.

1 though it alleges that Allergan submitted “product and pricing data” under various federal  
2 programs. *Id.* at 27 (citing FAC §§ 112-116). According to Allergan, this is because Relator does  
3 not allege that the product and pricing data it submitted inaccurately reflected the commercial  
4 prices charged for the drug and also does not allege that a failure to disclose noncompliance with  
5 the law made any specific statements about the drug into “misleading half-truths.” *Id.* at 27 (citing  
6 *Escobar*, 136 S. Ct. at 2001).

7 Finally, Allergan argues that Relator has not alleged any conduct that is material. *Id.* at  
8 28. According to Allergan, the FCA’s materiality standard turns on whether “the alleged conduct  
9 had a ‘likely or actual effect’ on the government’s payment decision and ‘whether the defendant  
10 knowingly violated a requirement that the defendant knows is material to the government’s  
11 payment decision.’” *Id.* at 28 (quoting *Escobar*, 136 S. Ct. at 1996). Although Relator alleges  
12 that the government “would not have paid” if it knew about the alleged fraud on the Patent Office,  
13 *see* FAC §§ 155-156, Allergan argues that these allegations are entirely conclusory and are not  
14 sufficient to establish materiality. *Id.* Moreover, according to Allergan, the fact that the  
15 government continued to pay for Namenda XR® even after the relevant patents were invalidated  
16 “negates any suggestion that patent disputes would affect the government’s decision to pay.” *Id.*  
17 at 28-29 (citing *Escobar*, 136 S. Ct. at 2003).

18 In his response, Relator argues he has adequately pled his FCA claims against Allergan  
19 based on both the ’009 patent and the Went Patents. As to the ’009 patent, Relator argues that  
20 “even if Forest did not initially obtain the ’009 [p]atent by fraud, the patent nevertheless is plainly  
21 invalid as obvious over the ’553 [p]atent” and thus, Allergan engaged in conduct that is  
22 “independently culpable” under the FCA because it “knowingly or recklessly asserted the  
23 invalid patent to block generic competitors from the market so that it could charge the government  
24 monopoly prices and remove the government’s ability to purchase less expensive generics.”  
25 Allergan Opposition at 9.

26 Relator further asserts that Allergan applies the wrong standards for intent and materiality,  
27 arguing that the more stringent pleading standards that apply to an inequitable conduct defense to  
28 patent infringement do *not* apply to FCA claims, which require only that a relator plead the

1 common law elements of fraud. *Id.* at 9-10 (citing *Escobar*, 136 S. Ct. at 1999). Under this less  
2 stringent standard, Relator contends, he is not required to prove specific intent to defraud and  
3 materiality means only ““having a natural tendency to influence, or be capable of influencing, the  
4 receipt of money or property.”” *Id.* at 10 (citing 31 U.S.C. §§ 3729(b)(1) & (4)). Because of this  
5 lower standard, even though the prior disclosure of the ’553 patent to the Examiner during  
6 prosecution of the ’009 patent might defeat an inequitable conduct defense, the failure of the  
7 applicants to alert the Examiner of this prior art is nonetheless sufficient to establish fraudulent  
8 conduct for the purposes of the FCA, Relator asserts. *Id.* Moreover, even if the more stringent  
9 standard were to be applied to Relator’s FCA claims, Relator contends he has adequately alleged  
10 intent by alleging that Forest Laboratories “intentionally omitted the disclosure of the ’553  
11 [p]atent after amending the application because it knew that the disclosure would scuttle its  
12 application.” *Id.* (citing FAC ¶¶ 94, 97). These allegations are sufficient to establish scienter at the  
13 pleading stage of the case, Relator contends. *Id.* at 10-11 (citing *Bristol-Myers Squibb Co. v. Ben*  
14 *Venue Laboratories*, 90 F.Supp.2d 522, 528 (D.N.J. 2000); *Skedco, Inc. v. Strategic Operations,*  
15 *Inc.*, 287 F.Supp.3d 1100, 1149–1150 (D. Or. 2018)). In addition, Relator contends, Allergan is  
16 wrong to argue that he fails to adequately plead intent under Rule 9(b) because that rule  
17 specifically provides that knowledge may be pleaded “generally.” *Id.* at 11.

18 According to Relator, the cases Allergan cites in support of its argument that cumulative  
19 prior art need not be disclosed are distinguishable because none involved prior art that was  
20 disclosed before it became relevant to the application, as was the case with the ’009 patent. *Id.*  
21 (distinguishing *Fiskars, Inc. v. Hunt Mfg. Co.*, 221 F.3d 1318, 1327 (Fed. Cir. 2000); *Molins PLC*  
22 *v. Textron, Inc.*, 48 F.3d 1172, 1185 (Fed. Cir. 1995); and *Pixion, Inc. v. Citrix Sys., Inc.*, 2012 WL  
23 1309170 (N.D. Cal. Apr. 16, 2012)). Relator argues that “context matters in determining whether  
24 an applicant satisfied its duty of candor and good faith” and therefore, that the Court should not  
25 decide *as a matter of law* that a disclosure of prior art 18 months before it became relevant to the  
26 patent application satisfied that duty. *Id.* at 11.

27 Relator rejects Allergan’s argument that scienter is not adequately pled because Forest  
28 Laboratories relied on an “objectively reasonable” interpretation of 37 C.F.R. § 1.56 as to what

1 was required to be disclosed in prosecuting the '009 patent. *Id.* at 12. Relator contends this  
2 argument amounts to an “attempt to dispute Relator’s well-pleaded facts,” which is improper at  
3 the pleading stage of the case. *Id.* He argues that “[w]hether Forest [Laboratories’] failure to  
4 disclose was strategic, reckless, or based on good-faith misapprehension of what 37 C.F.R. § 156  
5 requires cannot be resolved on the pleadings.” *Id.*

6 Relator rejects Allergan’s assertion that his FCA claims based on the Went Patents fail  
7 because he has alleged no relevant conduct by the Allergan Defendants, arguing that the fraud  
8 occurred not only during prosecution of the patents but also when Allergan later asserted these  
9 patents against generic competitors to take away the government’s ability to choose less expensive  
10 generics that would have been sold by Defendants’ competitors. *Id.* at 13. Because the Allergan  
11 Defendants were involved in this subsequent conduct, Relator argues, they are jointly and  
12 severally liable for the fraud even if they “were not present when the Patent Office was first  
13 defrauded.” *Id.* (citing *Mortgs., Inc. v. United States Dist. Court*, 934 F.2d 209, 212 (9th Cir.  
14 1991); *United States v. Bourseau*, No. 03-CV-907-BEN(WMC), 2006 WL 2961105, at \*13 (S.D.  
15 Cal. Sept. 29, 2006)). Relator further argues that “Allergan would be liable even if Forest had no  
16 role in the fraud because, in cases involving allegations of inequitable conduct, the consequences  
17 of patent fraud do not disappear when a patent is transferred to an innocent third-party.” *Id.* at 13-  
18 14 (citing *In re Rembrandt Techs. LP Patent Litig.*, 899 F.3d 1254, 1272 (Fed. Cir. 2018)).

19 Relator also argues that Allergan misrepresents the chronology of the events alleged in the  
20 FAC, ignoring allegations showing that two of the Went Patent applications were filed *after* Forest  
21 Laboratories entered into an exclusive licensing agreement with Adamas for the Went Patents, in  
22 November 2012. *Id.* at 14. In particular, according to Relator “[a]pplications for two of the Went  
23 Patents – U.S. Patent Nos. 8,580,858 and 8,598,233 – were filed after that date, on December 21,  
24 2012 and January 28, 2013, respectively” and “[i]n connection with those applications, the same  
25 misleading statements about the ME110 Study were submitted to the Patent Office.” *Id.*  
26 Therefore, Relator asserts, “[a]t a minimum, Forest was complicit in that fraud because, as the  
27 exclusive licensee, it was a real-party-in-interest for the patents at that time, and it had a duty of  
28 candor and good faith to the Patent Office that it did not honor.” *Id.* (citing 37 C.F.R. § 1.56(c)(3))

1 (pre-America Invents Act) (duty of candor applies to “[e]very other person who is substantively  
2 involved in the preparation or prosecution of the application and who is associated with the  
3 inventor, with the assignee or with anyone to whom there is an obligation to assign the  
4 application”)).

5 Relator rejects Allergan’s argument that his FCA claims based on the Went Patents fail  
6 because the FAC does not allege that either Forest or the other Allergan Defendants knew of the  
7 fraud on the Patent Office with respect to the Went Patents. *Id.* According to Relator, “Forest  
8 was already the exclusive licensee when two fraudulent patent applications were submitted, and it  
9 was at least reckless with respect to the information submitted in those applications.” *Id.* Relator  
10 argues further that “Dr. Went’s fraud, which Allergan does not dispute, is chargeable to all those  
11 who acquire or enforce the patents.” *Id.* (citing *Rembrandt*, 899 F.3d at 1272; *Avid Identification*  
12 *Sys., Inc. v. Crystal Import Corp.*, 603 F.3d 967, 973 (Fed. Cir. 2010) (“If an individual who is  
13 substantively involved in the preparation or prosecution of an application fails to comply with his  
14 duty of candor, then that individual's misconduct is chargeable to the applicant for the patent, and  
15 the applicant’s patent is held unenforceable.”)). Moreover, it argues, “[a]s the successor in interest  
16 to Forest, which was the exclusive licensee of the Went Patents, Allergan is liable for how these  
17 patents were obtained, and then used to exploit the government.” *Id.*

18 In response to Allergan’s argument that Relator has not alleged any false statements in  
19 support of his FCA claims, Relator argues that he has satisfied this requirement because the FCA  
20 covers both “misleading omissions” under *Escobar* and “situations in which an upstream fraud is  
21 used to facilitate downstream claims.” *Id.* at 15 (citing *United States ex rel. Campie v. Gilead*  
22 *Scis., Inc.* (“*Campie*”), 862 F.3d 890, 903 (9th Cir. 2017), cert. denied sub nom. *Gilead Scis., Inc.*  
23 *v. U.S. ex rel. Campie*, 139 S. Ct. 783 (2019); *United States ex rel. Hendow v. Univ. of Phoenix*,  
24 461 F.3d 1166, 1174 (9th Cir. 2006) (“*Hendow*”). According to Relator, the FCA claims alleged  
25 against Allergan here are analogous to the FCA claims in *Campie*, where the court found that  
26 allegations that a drug manufacturer’s claims for reimbursement for its drugs from the government  
27 were sufficient to allege falsity because the manufacturer allegedly gained approval of the drugs  
28 through false statements to the FDA. *Id.* Here, Relator contends, the facts are even stronger than

1 in *Campie* because the “claims for payment specifically included prices that had been unlawfully  
2 manipulated” and because Defendants knowingly listed invalid patents in the Orange Book, which  
3 “constituted additional statements that were material to false claims.” *Id.*

4 Relator also rejects Allergan’s contention that in requiring proof that prices are “fair and  
5 reasonable” the government is only concerned about commercial prices; according to Relator, the  
6 government “base[s] government prices on commercial ones, but that does not mean the  
7 government is indifferent about whether the commercial price is itself the product of a massive  
8 fraud. Rather, the government assumes that the commercial price reflects fair market conditions,  
9 and it relies on the commercial price for that reason.” *Id.* at 16. To the extent the alleged fraud  
10 “taints the government’s pricing,” Relator alleges, it also renders the resulting claim for payment  
11 from the government fraudulent. *Id.* Relator argues that *Escobar* also supports this conclusion.  
12 *Id.* In that case, according to Relator, the FCA claims were based on use of billing codes  
13 submitted in claims for reimbursement corresponding to services such as “family therapy” and job  
14 titles such as “Social Worker, Clinical.” *Id.* (citing 136 S. Ct. at 1997). Even though there was no  
15 express representation that the social workers were licensed under state law, the court concluded  
16 that use of these billing codes implied as much and therefore that they were sufficient to support  
17 the relator’s FCA claims. *Id.*

18 Relator also rejects Allergan’s assertion that the FCA claims fail because there is no  
19 allegation that it actually *did* present its pricing information to the government. *Id.* at 17-18.  
20 According to Relator, he is only required to “plead ‘particular details of a scheme’ with ‘reliable  
21 indicia that lead to a strong inference’ that claims have been submitted.” *Id.* (quoting *United*  
22 *States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010)). As it is undisputed that  
23 Allergan’s prices for the drugs in this case are listed on the FSS, as is required to receive Medicaid  
24 reimbursement (which Allergan has allegedly received), Relator argues that it is “implausible that  
25 these representations were not made” in light of the allegations in the complaint. *Id.* at 17.  
26 Further, to the extent Allergan argues that the pricing information is not alleged to have included  
27 specific representations about compliance with the law, Relator responds that these arguments  
28 have no bearing on his theories of implied certification under *Escobar* or “upstream fraud” under

1 *Campie. Id.* at 18.

2 Relator rejects Allergan’s reliance on *Promega* to argue that an FCA claim based on the  
3 theory that a drug manufacturer improperly charged monopoly prices because of fraud before the  
4 Patent Office can never state a claim because the false statements to the Patent Office are too  
5 “disconnected” from the invoices submitted to the government. *Id.* at 18-19. According to  
6 Relator, in *Campie* the Ninth Circuit explicitly rejected this “disconnect” reasoning. *Id.* at 19  
7 (citing *Campie*, 862 F.3d at 903). Furthermore, Relator contends, *Promega* was decided before  
8 the FCA was amended and its dismissal based on the public disclosure bar is no longer good law.  
9 *Id.* Relator also rejects Allergan’s suggestion that his theory fails under *Amphastar*, noting that  
10 the district court found that the relator in that case stated a valid FCA claim under a similar theory,  
11 and that the Ninth Circuit did not reach that issue on appeal because it vacated the earlier decision  
12 on jurisdictional grounds under the public disclosure bar. *Id.* at 19.

13 Finally, Relator contends Allergan’s argument that he has not alleged facts demonstrating  
14 materiality because the government continues to pay for its drugs is incorrect. *Id.* at 20.  
15 According to Relator, price is material because a reasonable person would find it relevant to a  
16 payment decision, and in fact, the government is required to purchase generics when they are  
17 available. *Id.* Moreover, Relator contends, courts have found price goes to the “essence of the  
18 bargain” between the government and drug manufacturers and that misrepresentations that affect  
19 the size of government payments are material under the FCA. *Id.* (citing *United States ex rel.*  
20 *Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 834 (6th Cir. 2018), *cert.*  
21 *denied* 139 S. Ct. 1323 (2019); *Unihan Corp. v. Max Group Corp.*, No. CV 09-07921 MMM  
22 PLAX, 2011 WL 6814044, at \*7 (C.D. Cal. Dec. 28, 2011); *Grubea v. Rosicki, Rosicki & Assocs.*,  
23 *P.C.*, 318 F. Supp. 3d 680, 701 (S.D.N.Y. 2018); *United States v. DynCorp Int’l, LLC*, 253 F.  
24 Supp. 3d 89, 102 (D.D.C. 2017)). The fact that the government has continued to pay for  
25 Allergan’s drugs does not demonstrate a lack of materiality, Relator argues, as there is no  
26 allegation that the government was aware of the alleged fraud on the Patent Office when it paid for  
27 the drugs. *Id.* at 21.

28 In any event, Relator argues, “even though the government pays for Namenda XR, it also

1 pays for the generic alternatives to Namenda XR” with the result that prices have gone down. *Id.*  
2 Relator also argues that the fact that the government continued to pay for the drugs does not  
3 demonstrate a lack of materiality because “ceasing payments for Namenda XR altogether would  
4 serve little purpose, and might complicate care for patients who have been using the drug for long  
5 periods of time.” *Id.* (citing *Campie*, 862 F.3d at 906). According to Relator, “[b]ecause it is at  
6 least plausible that Defendants’ fraud – which the Complaint alleges had a massive effect on the  
7 price the government paid for these drugs – was material to the government’s payment decisions,  
8 Allergan’s materiality arguments should be rejected.” *Id.*

9 In its Reply, Allergan reiterates its position that Relator has failed to state any viable FCA  
10 claim against it. With respect to the Went Patents, Allergan points out that Relator argued in his  
11 opposition that Forest Laboratories had already entered into an exclusive licensing agreement with  
12 Adamas when two of the Went Patent applications were filed but that Relator does not cite to any  
13 corresponding allegations in the complaint. Allergan Reply at 9. According to Allergan, this is  
14 because these facts were not pled in the complaint. *Id.* More importantly, Allergan contends, it is  
15 not sufficient to show that “Allergan was a contractual counter-party to Adamas when Adamas  
16 and Dr. Went purportedly engaged in fraud”; rather, Relator must “plead that the Allergan  
17 Defendants knowingly committed some fraud related to the Went Patents,” which Relator has not  
18 done according to Allergan. *Id.*

19 Allergan also rejects Relator’s argument that Forest Laboratories was “at least reckless”  
20 with respect to the misrepresentations that he asserts were repeated in the two Went Patent  
21 applications that were filed after Forest Laboratories entered into the exclusive licensing  
22 agreement with Adamas. *Id.* at 10. According to Allergan, this argument fails because “Relator  
23 offers no explanation (let alone well-pleaded allegations) as to why or how the Allergan  
24 Defendants should have known about any allegedly fraudulent conduct by Dr. Went, much less  
25 how they might have acted ‘reckless[ly].’” *Id.* Given that a patent is presumed valid, Allergan  
26 argues, “if the Allergan Defendants had no involvement in or reason to learn of Dr. Went’s alleged  
27 misconduct – and Relator has not pleaded that they did – they could not have been ‘at least  
28 reckless’ with respect to the Went Patents simply by licensing the patents and enforcing them.”



1 *Id.*

2 Allergan also rejects Relator’s argument that the Allergan Defendants are “‘jointly and  
3 severally liable even if they were not present when the Patent Office was first defrauded’ because  
4 Dr. Went’s alleged fraud is ‘chargeable to all those who acquire or enforce the patents.’” *Id.*  
5 First, Allergan argues, joint and several liability only applies where both of the parties are  
6 “actually liable in the first place,” which is not the case here. *Id.* (citing Rest. (Third) of Torts:  
7 Apportionment Liab. § 12 (2000) (“Each person who commits a tort that requires intent is jointly  
8 and severally liable for any indivisible injury legally caused by the tortious conduct.”)). Allergan  
9 further accuses Relator of “mixing and matching” theories of liability “by targeting Adamas for  
10 the alleged fraud on the Patent Office, and the Allergan Defendants for later enforcing those  
11 patents and securing government reimbursement.” *Id.* Allergan argues that because the FAC  
12 includes no allegations that it was responsible for the “upstream fraud” on the Patent Office, it  
13 cannot be held liable for the “downstream” actions it took “to enforce presumptively valid  
14 patents.” *Id.* at 11.

15 Allergan also asserts that it is irrelevant that a patent that is invalidated due to inequitable  
16 conduct remains invalid even where it has been transferred to an innocent third party. *Id.*  
17 According to Allergan, that rule is very different from transferring liability for fraud to an innocent  
18 third party, for which there is no authority. *Id.* Nor do *Rembrandt* and *Avid* support Relator’s  
19 position, Allergan asserts, as neither of these cases holds that an innocent third party can be held  
20 vicariously liable for fraud. *Id.*

21 With respect to the FCA claims against Allergan based on alleged fraud in connection with  
22 the ’009 patent, Allergan rejects Relator’s argument that he can state a claim under the FCA based  
23 on failure to disclose the ’553 patent in the ’009 patent prosecution even if an affirmative defense  
24 of inequitable conduct would fail under *Fiskars* because of the prior disclosure of the ’553 patent  
25 to the Examiner. *Id.* at 12. Allergan argues that the legal standard for inequitable conduct is  
26 “highly relevant” and that the Court should not “drive a wedge between the legal principles  
27 defining inequitable conduct and fraud on the U.S. Patent Office in the FCA context.” *Id.*  
28 Allergan further asserts that Relator’s attempt to distinguish the facts of *Fiskars* on the basis that

1 the examiner actually considered the prior art reference in that case fails because the same is true  
2 here. *Id.* In particular, Allergan points to a document in the '009 patent prosecution history – the  
3 List of References Cited by Applicant and Considered by Examiner, dated October 7, 2009, *see*  
4 Strong Decl., Ex. 30 – which reflects that all references except those that were lined through had  
5 been considered and that the '553 patent was not lined through. *Id.* at 12-13.

6 Allergan also contends Relator is incorrect in asserting that the '553 patent was not  
7 relevant to the '009 patent at the time it was submitted to the Examiner and therefore its  
8 submission at that point was “likely to mislead” because since 2005 the '009 patent application  
9 had always focused on a single-dose product. *Id.* at 13 (citing Strong Decl., Ex. 29 (original 2005  
10 application) (stating that the “formulation of the present invention includes memantine . . . to be  
11 administered in a once-a-day oral dosage form”); Ex. 12 (publicly available claims as of June 16,  
12 2005, reciting in Claim 31 a “modified release solid oral dosage form” that is “administered once  
13 a day”)).

14 To the extent Relator argues that his FCA claims based on the '009 patent would not fail  
15 even if there was no inequitable conduct – because the patent is nonetheless invalid as obvious  
16 over the '553 patent and Allergan subsequently asserted that invalid patent – Allergan argues that  
17 Relator is incorrect. *Id.* at 13-14. First, Allergan notes that the '009 patent has never been held  
18 invalid. *Id.* at 13. Moreover, Allergan argues, a patent is presumed valid and asserting a patent  
19 that is subsequently found to be invalid is not “independently culpable conduct” under the FCA.  
20 *Id.* at 14. Allergan also argues that Relator is incorrect in asserting the Court cannot decide at the  
21 pleading stage if Forest Laboratories acted in an “objectively reasonable manner” (and therefore,  
22 that scienter has not been adequately pled) with respect to its understanding of what was required  
23 under 37 C.F.R. § 1.56. *Id.* According to Allergan, “[o]bjective reasonableness is a legal, not  
24 factual argument appropriate for determination at the motion to dismiss stage.” *Id.* (citing *United*  
25 *States v. Allergan*, 746 Fed. App'x 101, 110 (3d Cir. 2018)).

26 Finally, Allergan reiterates its position that Relator has failed to allege both falsity and  
27 materiality adequately. *Id.* at 14-15. As to falsity, Allergan argues that Relator has alleged only  
28 false statements by other parties to the Patent Office but has not alleged any facts showing that the

1 Allergan Defendants made false claims under the FCA. *Id.* at 14. Allergan further argues that  
2 Relator has alleged no facts showing that the Allergan Defendants made any express or implied  
3 certifications that were rendered misleading and that Relator has failed to allege specific facts that  
4 “match” the allegations in *Escobar* and *Campie*. *Id.* Allergan also rejects Relator’s assertion that  
5 he has provided “reliable indicia” that claims about its prices were actually made to the  
6 government, arguing that “more is required” to satisfy that standard than “mere suspicions and  
7 attenuated assumptions.” *Id.* at 15. With respect to materiality, Allergan repeats its argument that  
8 Relator has alleged no specific facts showing the prices it charged the government were material,  
9 pointing out again that the government still pays claims for Namenda XR® and Namzaric®. *Id.*

10 b. The Adamas Motion

11 In its Motion, Adamas argues that Relator fails to sufficiently allege any false claim,  
12 materiality or scienter. Adamas Motion at 16-23. Like Allergan, Adamas argues with respect to  
13 the falsity requirement that Relator has not alleged any express or implied misrepresentation to the  
14 Government, even though the FAC includes conclusory allegations about “express and implied  
15 assurances” (FAC ¶ 6), “express and implied misrepresentations” (FAC ¶ 117) and “express and  
16 implied certifications” (FAC ¶ 120). *Id.* at 17. With respect to factually false claims, Adamas  
17 argues that it *cannot* be shown to have made any express representations that were factually false  
18 because Adamas was not involved in pricing or reimbursement for these products and played no  
19 role in submitting information to GSA in connection with FSS listings. *Id.* at 17-18. To the extent  
20 Relator relies on representations about the Went Patents that Adamas made to the Patent Office  
21 (which Adamas asserts are the only misrepresentations alleged with respect to Adamas) to show  
22 falsity, Adamas argues that these were not claims for payment under the FCA and therefore cannot  
23 be “false claims.” *Id.* at 17-18 (citing 31 U.S.C. § 3729(b)(2)).

24 Further, Adamas asserts, Relator has alleged no legally false claims, either on the basis of  
25 an express certification of compliance with legal requirements or implied certification. *Id.* at 18-  
26 19. Like Allergan, Adamas contends that the GSA’s “fair and reasonable” requirement is intended  
27 to ensure only that the prices charged to the government are commensurate with a drug company’s  
28 commercial prices and that it is not a “catch-all regulatory obligation.” *Id.* at 18. Adamas further

1 asserts that to the extent Relator relies on an implied certification theory, he fails to allege specific  
2 facts that satisfy the standard in *Escobar*, which requires that a relator show that the defendant  
3 failed to disclose noncompliance with material legal requirements and that this failure turned  
4 specific representations about the product into misleading half-truths. *Id.* at 19 (citing *Escobar*,  
5 136 S. Ct. at 2001).

6 Adamas argues that Relator also fails to allege any misrepresentations that would be  
7 material to the government's payment decision. *Id.* at 19-22. Adamas argues that Relator relies  
8 on the theory that compliance with the Patent Office's duty of candor and the GSA's "fair and  
9 reasonable" pricing requirement are *per se* material but that *Escobar* and its progeny reject such a  
10 *per se* approach to pleading. *Id.* at 20 (citing FAC ¶ 117; *Knudsen v. Sprint Commc 'ns Co.*,  
11 No. C13-04476 CRB, 2016 WL 4548924, at \*13 (N.D. Cal. Sept. 1, 2016)). According to  
12 Adamas, Relator's allegations are conclusory and they are undercut by the fact that since some of  
13 the Went Patents were invalidated in 2018, there has been no change to the FDA approval status of  
14 Namenda XR® or Namzaric®, which continue to be eligible for government reimbursement (as  
15 the FAC ¶ 165 concedes). *Id.* Adamas further contends the fact that the federal government  
16 declined to intervene in this action also provides "very strong evidence" that the alleged  
17 misrepresentations are not material. *Id.* at 21 (quoting *Escobar*, 136 S. Ct. at 2003-2004 and  
18 listing the following cases in which courts have, according to Adamas, rejected FCA claims in part  
19 because the government investigated the relator's allegations and nonetheless continued to pay:  
20 *D'Agostino v. ev3, Inc.*, 845 F.3d 1, 7 (1st Cir. 2016); *Coyne v. Amgen, Inc.*, No 17-1522, 2017  
21 WL 6459267, at \*3 (2d Cir. Dec. 18, 2017); *United States. ex rel. Petratos v. Genentech Inc.*, 855  
22 F.3d 481, 490 (3rd Cir. 2017); *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027,  
23 1034 (D.C. Cir. 2017); *United States ex rel. Berg v. Honeywell Int'l, Inc.*, 740 F. App'x 535, 538  
24 (9th Cir.2018), *cert. denied sub nom. United States ex rel. Berg v. Honeywell Int'l, Inc.*, 139 S. Ct.  
25 1456 (2019)). Adamas (like Allergan) also points to *Promega*, noting that in that case, the court  
26 did not allow an FCA case against a drug manufacturer based on alleged inequitable conduct  
27 before the Patent Office to go forward. *Id.* at 21.

28 Adamas also argues that Relator has not adequately alleged scienter. *Id.* at 22. In order to

1 meet this requirement where an FCA claim is based on a theory of implied certification, Adamas  
 2 contends, “[w]hat matters is . . . whether the defendant *knowingly* violated a requirement that the  
 3 defendant knows is material to the Government’s payment decision.” *Id.* (quoting *Escobar*, 136  
 4 S. Ct. at 1996 (emphasis added by Adamas)). According to Adamas, Relator does not include  
 5 such allegations in the FAC. *Id.* In particular, Adamas asserts, although Relator included  
 6 “barebones, conclusory” allegations that Adamas and Dr. Went “knowingly” made  
 7 misrepresentations to the Patent Office, *see* FAC ¶¶ 2, 3, 5, the FAC also shows that “Dr. Went  
 8 actively corrected past statements to the Patent Office on multiple occasions.” *Id.* Adamas also  
 9 argues that the FAC “lacks any allegation that Adamas or Dr. Went knowingly violated their  
 10 regulatory obligations, or that Adamas or Dr. Went knew those regulations were material to  
 11 government payment decisions.” *Id.* (citing *Escobar*, 136 S. Ct. at 1996).

12 In his opposition brief, Relator argues that he has adequately alleged that the Adamas  
 13 Defendants made false claims, asserting for the same reasons set forth in the Allergan Opposition  
 14 that he has alleged facts showing falsity under both the implied certification theory of *Escobar*  
 15 and the promissory estoppel theory of *Campie*. Adamas Opposition at 8-11. In addition, Relator  
 16 argues, for the first time, that the patent applications themselves are false claims because they are a  
 17 request for “property” under the FCA and therefore constitute an “independent violation of the  
 18 FCA” by Adamas. *Id.* at 11-12.<sup>19</sup>

19 Relator rejects Adamas’s argument that he has not alleged materiality, citing the arguments  
 20 he made in response to Allergan’s motion. *Id.* at 13. He rejects Adamas’s reliance on the fact  
 21 that the government continues to pay for Namenda XR® and Namzaric®, arguing that the  
 22 “government does not yet know there was fraud” and that he will prove this at trial. *Id.* He  
 23 argues further that the government’s decision not to intervene in this action is not a reflection on  
 24 the merits of his claims as there are many reasons unrelated to the merits of a *qui tam* case that  
 25 may play into the government’s decision and dismissal on this ground would be inconsistent with  
 26 the purposes of the *qui tam* provision. *Id.* (citing *United States ex rel. Chandler v. Cook Cty., Ill.*,

27 \_\_\_\_\_  
 28 <sup>19</sup> Because the FAC does not allege any violation of the FCA on the basis of this theory, the Court declines to reach this argument

1 277 F.3d 969, 974 (7th Cir. 2002), aff'd, 538 U.S. 119 (2003); *United States ex rel. El-Amin v.*  
2 *George Washington Univ.*, 533 F. Supp. 2d 12, 21 (D.D.C. 2008); *United States ex rel. Feldman*  
3 *v. van Gorp*, No. 03 CIV. 8135 (WHP), 2010 WL 2911606, at \*2 (S.D.N.Y. July 8, 2010)).

4 Relator argues that the FAC adequately pleads scienter as to the Adamas Defendants. *Id.*  
5 at 14. In particular, he argues that under Rule 9(b) he is only required to plead scienter  
6 “generally.” *Id.* (citing *Integra*, 2019 WL 3282619, at \*22). To the extent Adamas argues that Dr.  
7 Went’s subsequent corrections of his prior incorrect declarations show that the claims against the  
8 Adamas Defendants fail for lack of scienter, Relator contends these are fact questions that cannot  
9 be decided at the pleading stage. *Id.* According to Relator, for the purposes of a motion to  
10 dismiss, he has adequately alleged scienter based on the allegations that “Adamas’s founder and  
11 CEO knew that he was intentionally misrepresenting the critical results of the ME110 Study,  
12 because he demonstrated knowledge of the actual results he failed to disclose” (FAC ¶ 83) and  
13 that “the CEO revised his original false declaration, but not with respect to the critical  
14 misrepresentation concerning the actual results of the ME110 Study, which he personally  
15 knew about” (FAC ¶¶ 80-83). *Id.*

16 Finally, Relator argues that he has satisfied the requirements of Rule 9(b) with respect to  
17 his claims because “[u]nder Rule 9(b), ‘it is sufficient to allege particular details of a scheme to  
18 submit false claims paired with reliable indicia that lead to a strong inference that claims were  
19 actually submitted.’” *Id.* (quoting *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998–99 (9th Cir.  
20 2010)). According to Relator, he has adequately alleged the “who, what, when, where and why”  
21 of the fraud under this standard. *Id.* at 15-17.

22 In its Reply, Adamas rejects Relator’s arguments that he has stated false claims under all  
23 of the theories advanced in his Opposition. As to the arguments addressing implied certification  
24 and promissory estoppel, Adamas makes arguments similar to Allergan’s that Relator’s claims fail  
25 under both theories. Adamas also challenges Relator’s assertion that the patent applications are  
26 themselves false claims under the FCA. As the Court does not consider that argument, it also does  
27 not summarize here Adamas’s response.  
28

1                   **2. Discussion**

2                   a. Whether Relator Adequately Alleges False Claims or Statements

3                   Courts construe the FCA “broadly, as it is ‘intended to reach all types of fraud, without  
4 qualification, that might result in financial loss to the Government.’” *Campie*, 862 F.3d at 899  
5 (quoting *Hendow*, 461 F.3d at 1170 (internal quotations and citations omitted)). “Such broad  
6 construction has thus given rise to a number of doctrines ‘that attach potential False Claims Act  
7 liability to claims for payment that are not explicitly and/or independently false.’” *Id.* (quoting  
8 *Hendow*, 461 F.3d at 1171). In particular, in addition to recognizing claims for payment that are  
9 factually false because they misrepresent the good or service that was provided (in other words,  
10 claims for nonconforming goods), *see Campie*, 862 F.3d at 900, courts have recognized that FCA  
11 claims may be viable under a theory of implied certification, *id.* (citing *Escobar*, 136 S. Ct. at  
12 1999), or promissory fraud. *Id.* at 902 (citing *Hendow*, 461 F. 3d. at 1173). Relator contends he  
13 has alleged false claims under both theories. For the reasons set forth below, the Court agrees.

14                   i. Implied Certification

15                   The “validity and scope” of the implied certification doctrine was recently addressed by  
16 the Supreme Court in *Escobar*. 136 S. Ct. at 1998. In that case, the relators were parents of  
17 Yarushka Rivera, a teenage beneficiary of Medicaid, which is “a joint state-federal program in  
18 which healthcare providers serve poor or disabled patients and submit claims for government  
19 reimbursement.” 136 S. Ct. at 1996-1997. Rivera died after receiving treatment from a mental  
20 health clinic under the Medicaid program, including therapy and prescriptions for a medication  
21 that caused an adverse reaction and may have resulted in her death. *Id.* at 1997. As it turned out,  
22 many of the staff at the clinic – including the individual who prescribed the medication – were  
23 unlicensed and were not authorized to prescribe medications without supervision. *Id.*  
24 Nonetheless, the clinic received reimbursement from the government for its services, submitting  
25 invoices that used payment codes for services such as “individual Therapy” and “Family  
26 Therapy.” Some of the clinic staff also “registered for a number associated with ‘Social Worker,  
27 Clinical,’ despite lacking the credentials and licensing required for social workers engaged in  
28 mental health counseling.” *Id.* (internal quotation and citation omitted). The relators asserted

1 FCA claims against the clinic based on an implied false certification theory, namely, that the  
2 reimbursement claims “made representations about the specific services provided by specific types  
3 of professionals, but that failed to disclose serious violations of regulations pertaining to staff  
4 qualifications and licensing requirements for those services.” *Id.* at 1997-1998.

5 The Supreme Court in *Escobar* held that the allegations in that case were sufficient to  
6 allege falsity under the FCA based on an implied certification theory. *Id.* at 2000. It began its  
7 analysis by recognizing that “[w]hen . . . a defendant makes representations in submitting a claim  
8 but omits its violations of statutory, regulatory, or contractual requirements, those omissions can  
9 be a basis for liability if they render the defendant’s representations misleading with respect to the  
10 goods or services provided.” *Id.* at 1999. In reaching this conclusion, the Supreme Court looked  
11 to the common law of fraud because the FCA does not define that term. *Id.* at 1999-2000. It  
12 declined to decide whether “*all* claims for payment implicitly represent that the billing party is  
13 legally entitled to payment” – the position taken by the government and the relators in that case.  
14 *Id.* at 2000 (emphasis). It found, however, that the facts of the case fell “squarely within the rule  
15 that half-truths – representations that state the truth only so far as it goes, while omitting critical  
16 qualifying information – can be actionable misrepresentations.” *Id.* at 2000. The Court explained:

17 [B]y submitting claims for payment using payment codes that  
18 corresponded to specific counseling services, Universal Health  
19 represented that it had provided individual therapy, family therapy,  
20 preventive medication counseling, and other types of treatment.  
21 Moreover, Arbour staff members allegedly made further  
22 representations in submitting Medicaid reimbursement claims by  
23 using National Provider Identification numbers corresponding to  
24 specific job titles. And these representations were clearly misleading  
25 in context. Anyone informed that a social worker at a Massachusetts  
26 mental health clinic provided a teenage patient with individual  
27 counseling services would probably—but wrongly—conclude that  
28 the clinic had complied with core Massachusetts Medicaid  
requirements (1) that a counselor “treating children [is] required to  
have specialized training and experience in children’s services,” 130  
Code Mass. Regs. § 429.422, and also (2) that, at a minimum, the  
social worker possesses the prescribed qualifications for the job, §  
429.424(C). By using payment and other codes that conveyed this  
information without disclosing Arbour’s many violations of basic  
staff and licensing requirements for mental health facilities, Universal  
Health’s claims constituted misrepresentations.

*Id.* at 2000-2001. The Court concluded that the implied certification theory can be the basis for a



1 claim “at least where two conditions are satisfied: first, the claim does not merely request  
2 payment, but also makes specific representations about the goods or services provided; and  
3 second, the defendant’s failure to disclose noncompliance with material statutory, regulatory or  
4 contractual requirements makes those representations misleading half-truths.” *Id.* at 2001.<sup>20</sup>

5 The Court in *Escobar* went on to address the defendant’s argument that there should be  
6 liability under the FCA “only if [the claimant] fails to disclose the violation of a contractual,  
7 statutory, or regulatory provision that the Government expressly designated a condition of  
8 payment.” *Id.* at 2001. The Court rejected this argument, finding that this approach would be  
9 inconsistent with the text of the FCA and would also “risk undercutting” the policy goals of the  
10 FCA. *Id.* at 2002. The Court noted that “[i]nstead of adopting a circumscribed view of what it  
11 means for a claim to be false or fraudulent,’ concerns about fair notice and open-ended liability  
12 ‘can be effectively addressed through strict enforcement of the Act’s materiality and scienter  
13 requirements[,]” which are “rigorous.” *Id.* at 2002 (quoting *United States v. Science Applications*  
14 *Int'l Corp.*, 626 F.3d 1257, 1270 (D.C. Cir. 2010)).

15 Here, Relator alleges particular facts that support an inference that Defendants submitted  
16 pricing information to the government in connection with the listing of Namenda XR® and  
17 Namzanic® on the FSS, including written justification of the prices and proof that the prices were

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19 <sup>20</sup> In *United States Ex Rel. Rose v. Stephens Inst.* 909 F.3d 1012, 1017 (9th Cir. 2018), *cert. denied*  
20 *sub nom. Stephens Inst. v. U.S. ex rel. Rose*, 139 S. Ct. 1464 (2019) (“*Rose*”), the court  
21 acknowledged that the test that was previously applied in the Ninth Circuit to claims based on  
22 implied certification, articulated in *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th  
23 Cir. 2010) (“*Ebeid*”), was broader because it did not require a specific representation. In  
24 particular, the test that was used in the Ninth Circuit under *Ebeid* provided, “a relator must show  
25 that ‘(1) the defendant explicitly undertook to comply with a law, rule or regulation that is  
26 implicated in submitting a claim for payment and that (2) claims were submitted (3) even though  
27 the defendant was not in compliance with that law, rule or regulation.’” *Id.* (quoting *Ebeid*, 616  
28 F.3d at 998). The court in *Rose* addressed whether this broader test was still good law in the wake  
of *Escobar*. *Id.* at 1018. It noted the use of the words “at least” in *Escobar*, opining that that  
decision did not purport to describe the *only* circumstances under which a relator could prove false  
certification. Nonetheless, because two previous Ninth Circuit panel had already held (albeit  
without discussion) that the test in *Escobar* had to be met in order to allege implied certification,  
the panel in *Rose* concluded that those cases were binding and therefore, that “unless and until our  
court, en banc, interprets *Escobar* differently,” relators must satisfy the two-part test in that case in  
order to proceed on an implied certification theory. *Id.* (citing *United States ex rel. Kelly v. Serco,*  
*Inc.*, 846 F.3d 325, 332 (9th Cir. 2017); *Campie*, 862 F.3d at 901). Because this Court is bound  
by that Ninth Circuit precedent, Relator here must satisfy the two-part test set forth in *Escobar* to  
assert claims under a theory of implied certification.

1 fair and reasonable. *See* FAC ¶¶ 111-118. Although Relator does not directly allege in the FAC  
2 that Allergan submitted pricing information to the government in connection with the listing of  
3 Namenda XR® and Namzaric® on the FSS, he *does* allege that these drugs cannot be sold under  
4 Medicare or Medicaid unless they are listed on the FSS. *See* FAC ¶ 112. Further, the FAC alleges  
5 that both drugs were covered by Medicaid in all Plaintiff States and lists the specific  
6 reimbursement amounts paid for them under that program between 2013 and 2017. FAC ¶ 136.  
7 Therefore, the Court concludes that Relator has adequately alleged that Defendants certified to the  
8 government that the prices for Namenda XR® and Namzaric® were fair and reasonable. *See*  
9 *Ebeid*, 616 F.3d at 998–99 (holding that to meet Rule 9(b)’s pleading requirements in the context  
10 of an FCA case it is not necessary to “identify representative examples of false claims to support  
11 every allegation”; rather, it is “sufficient to allege ‘particular details of a scheme to submit false  
12 claims paired with reliable indicia that lead to a strong inference that claims were actually  
13 submitted.’”) (quoting *United States ex rel. Grubbs v. Ravikumar Kanneganti*, 565 F.3d 180, 190  
14 (5th Cir. 2009)).

15 The Court further finds that Relator has alleged sufficient facts to plead falsity as to these  
16 certifications. As in *Escobar*, where the use of certain billing codes misleadingly suggested that  
17 the providers were licensed to provide the services to which those codes corresponded,  
18 Defendants’ certification that the prices of the drugs they were listing were “fair and reasonable”  
19 misleadingly suggested that they held valid patents on those drugs that allowed them to charge the  
20 government higher prices as a result of the monopolies they held on them. Yet Relator alleges that  
21 Defendants did not hold valid patents and that in fact, the patents were obtained on the basis of  
22 false statements made to the Patent office – both in connection with the Went Patents and the ‘009  
23 patent. *See* FAC ¶¶ 57-102.

24 The Court rejects Defendants’ argument that these certifications were not misleading, as a  
25 matter of law, because the requirement that drug manufacturers provide proof that their prices are  
26 “fair and reasonable” merely relates to whether their prices are commensurate with commercial  
27 prices charged for the same drugs and does not involve an “unbounded inquiry into whether the  
28 seller is in compliance with every conceivable law that could affect price.” *See* Allergan Motion

1 at 26. While the government looks to commercial prices to determine whether the prices offered  
2 the government are “fair and reasonable” and may rely on those prices when there is “adequate  
3 price competition,” *see* 48 C.F.R. § 15.402(a)(2)(i), Defendants have pointed to no authority  
4 suggesting that prices that are inflated as a result of a fraudulent scheme to manipulate the market  
5 as a whole would be in compliance with the “fair and reasonable” certification simply because  
6 drug companies charge their commercial customers the same inflated prices. The Court declines  
7 to take such a “circumscribed view of what it means for a claim to be false or fraudulent.”  
8 *Escobar*, 136 S. Ct. at 2002. At a minimum, Defendants have not established that rejecting  
9 Relator’s theory of falsity on this basis at the pleading stage of the case is appropriate.

10 The Court also concludes that with respect to both grounds on which Relator alleges fraud  
11 on the Patent Office, namely, the alleged fraud in connection with the issuance of the ’009 patent  
12 and the Went Patents, the Relator alleges the who, what, when, where and how of the alleged  
13 fraud and therefore meets the requirements of Rule 9(b) of the Federal Rules of Civil Procedure.  
14 *See Campie*, 862 F.3d at 898 (“A claim under the False Claims Act must not only be plausible, but  
15 pled with particularity under Rule 9(b).”).

16 The Court is not persuaded by Allergan’s argument that to the extent Relator’s claims are  
17 based on the ’009 patent, they fail as a matter of law because the ’553 patent was disclosed to the  
18 patent office during the prosecution of the ’009 patent. Although Allergan has cited cases that  
19 hold in the context of determining patent validity that “when a reference was cited to the patent  
20 examiner it cannot be deemed to have been withheld,” *Fiskars, Inc. v. Hunt Mfg. Co.*, 221 F.3d  
21 1318, 1327 (Fed. Cir. 2000), the Court declines to borrow this rule to conclude that in light of the  
22 submission of the ’553 patent to the Patent Office there can be no fraud under the FCA *as a matter*  
23 *of law* where no cases that have addressed this issue in the FCA context have been cited.

24 The Court also rejects Allergan’s argument that as to the Went Patents it cannot be held  
25 liable under the FCA because it was not involved in prosecuting those patents. Relator’s theory of  
26 the FCA claim is that the claims for payment of monopoly prices by the government for Namenda  
27 XR® and Namzaric® were fraudulent not only because of the way the patents were obtained but  
28 also because Defendants (including Allergan) knowingly asserted invalid patents against other

1 pharmaceutical companies to maintain their inflated prices. *See* FAC ¶¶ 104-109. Defendants  
 2 have not cited any authority that persuades the Court that as a matter of law Relator cannot state a  
 3 claim under the FCA on that theory.

4 Therefore, the Court finds that Relator has sufficiently alleged that Defendants made false  
 5 claims or statements to the government under the theory of implied certification.

6 ii. Promissory Fraud

7 In *Campie*, the Ninth Circuit recognized that a viable claim under the FCA can be stated  
 8 under the doctrine of promissory fraud, also known as fraud in the inducement. 862 F.3d at 902.  
 9 The court in *Campie* explained:

10 Under this theory, “liability will attach to each claim submitted to the  
 11 government under a contract, when the contract or extension of the  
 12 government benefit was originally obtained through false statements  
 13 or fraudulent conduct.” . . . “In other words, subsequent claims are  
 false because of an original fraud (whether a certification or  
 otherwise).”

14 *Id.* (quoting *Hendow*, 461 F.3d at 1173). In that case, the relators asserted claims under the FCA  
 15 against Gilead, a drug manufacturer that produces anti-HIV drug therapies, including the drugs  
 16 Atripla, Truvada, and Emtriva. *Id.* at 895. All three drugs contain the active ingredient  
 17 emtricitabine, commonly known as FTC. *Id.* To sell the three drugs, Gilead had to obtain  
 18 approval from the FDA by filing new drug applications (“NDAs”). *Id.* In its NDA applications,  
 19 Gilead represented to the FDA that it would source the FTC from specific registered facilities. *Id.*  
 20 The relators alleged that for approximately sixteen months Gilead bought illicit FTC from an  
 21 unregistered facility (“Synthetics China”) while claiming it had obtained it from one of the  
 22 approved facilities. *Id.* In addition, the relators alleged that Gilead engaged in misconduct  
 23 because it used “falsified or concealed data in support of its application” to get Synthetics China  
 24 approved by the FDA as its source for FTC, including misrepresenting the results of tests Gilead  
 25 had conducted on batches of FTC obtained from Synthetics China. *Id.*

26 The relators in *Campie* alleged “that Gilead violated the FCA because it sought payment  
 27 for its drugs containing FTC either directly or indirectly from government programs, but payment  
 28 for drugs under these programs is contingent on FDA approval and, “because the drugs paid for

1 by the government contained FTC sourced at unregistered facilities, they were not FDA approved  
2 and therefore not eligible for payment under the government programs.” *United States v. Gilead*  
3 *Scis., Inc.* (“*Campie IP*”), No. 11-CV-00941-EMC, 2019 WL 5722618, at \*2 (N.D. Cal. Nov. 5,  
4 2019) (quoting *Campie*, 862 F.3d at 897). The Ninth Circuit concluded that relators adequately  
5 alleged false claims based on factual falsity, implied certification *and* promissory fraud. 862 F.3d  
6 at 902-905.

7 With respect to factual falsity, the court found that the relevant claim was for  
8 nonconforming goods, that is, a claim that the defendant “misrepresent[ed] what goods or services  
9 that it provided to the Government”). *Id.* at 899 (citing *United States v. Nat’l Wholesalers*, 236  
10 F.2d 944, 950 (9th Cir. 1956); *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d  
11 295, 305 (3d Cir. 2011)). It further concluded that under *Escobar*, “a claim for nonconforming  
12 goods is not limited to situations where there is an express specification in a payment contract  
13 between a supplier and the government regarding the disputed aspect of the product to be  
14 supplied.” *Id.* Nonetheless, it found that unless the claimant submitted claims to the government  
15 for something that was *worthless* – in which case no false certification is required – “a claim for  
16 nonconforming goods must include an intentionally false statement or fraudulent course of  
17 conduct that was material to the government’s decision to pay.” *Id.* at 900 (citing *Nat’l*  
18 *Wholesalers*, 236 F.2d at 950). Applying these principles, the court in *Campie* concluded that the  
19 relators had satisfied the falsity requirement on the basis of a factually false certification because  
20 “Gilead specifically represented to the FDA that its active ingredients had been manufactured in  
21 approved facilities that had been registered” with the FDA. *Id.* at 902.

22 The Court in *Campie* also found that the doctrine of implied false certification was  
23 satisfied under the *Escobar* test. *Id.* at 902-903. The court reasoned that Gilead submitted claims  
24 for payment using the drug names Truvada, Emtriva, and Atripla, which refer to specific drugs  
25 under the FDA’s regulatory regime, thus amounting to a certification that its drugs were  
26 manufactured at approved facilities and were not adulterated or misbranded. *Id.* Putting aside the  
27 question of materiality, the court found that Gilead’s failure to disclose its noncompliance with  
28 statutory, regulatory, or contractual requirements made these representations “misleading half-

1 truths.” *Id.* (quoting *Escobar*, 136 S. Ct. at 2000). In reaching this conclusion, the court rejected  
 2 Gilead’s argument that the relators could not allege falsity because “the alleged fraud was directed  
 3 at the FDA, not the payor agency.” *Id.* at 903. The court explained:

4 It is not the distinction between the agencies that matters, but rather  
 5 the connection between the regulatory omissions and the claim for  
 6 payment. *See United States ex rel. Petratos v. Genentech Inc.*, 855  
 7 F.3d 481, 492 (3d Cir. 2017) (“[O]ur focus here should not be whether  
 8 the alleged fraud deceived the prescribing physicians, but rather  
 9 whether it affected CMS’s payment decision.”). As we stated in  
 10 *Hendow*, “if a false statement is integral to a causal chain leading to  
 11 payment, it is irrelevant how the federal bureaucracy has apportioned  
 12 the statements among layers of paperwork.” 461 F.3d at 1174.  
 13 *Hendow* itself involved false statements submitted to the Department  
 14 of Education where claims were submitted to private lenders. *Id.* at  
 15 1169–80; *see also, e.g., United States ex rel. Duxbury v. Ortho*  
 16 *Biotech Products, L.P.*, 579 F.3d 13, 29–30 (1st Cir. 2009) (alleging  
 17 defendant’s fraud caused medical providers to submit false claims);  
 18 *Hutcheson*, 647 F.3d at 378 (similar).

19 *Id.*

20 Finally, the court in *Campie* concluded that the allegations in that case also satisfied the  
 21 falsity requirement under the doctrine of promissory fraud. *Id.* at 902, 904. The court reasoned  
 22 that “[b]ecause Gilead committed either factually false or impliedly false certification through its  
 23 representations to the FDA and labeling of its products . . . each claim was fraudulent even if false  
 24 representations were not made therein.” *Id.* at 904.

25 In this case, Relator alleges that Defendants misled the Patent Office to obtain the ’009  
 26 and Went Patents and then used those patents to maintain their monopoly, which then allowed  
 27 Defendants to charge much higher prices for the drugs than they otherwise could have. The Court  
 28 concludes that here, as in *Campie*, Defendants’ false statements to obtain a government benefit are  
 sufficient to render their later claims false for the purposes of the FCA.

The Court rejects Defendants’ assertion, based on *Promega*, No. 03-1447-A (E. D. Va.  
 Sept. 29, 2004), that misrepresentations made to the Patent Office are too “disconnected” from  
 subsequent claims for payment made “years later” to support an FCA claim. Although the court in  
*Promega* concluded that there was a “disconnect between the alleged misrepresentations to the  
 [Patent Office] and the invoices submitted to the government” “years later” and rejected the  
 relator’s argument that “the misrepresentations somehow induced the Government to enter into

1 contracts with the Defendants,” the court did not identify which theory of falsity it was addressing  
 2 and cited no authority in support of its conclusion. Therefore, that decision does not offer any  
 3 meaningful guidance here. In any event, the Ninth Circuit appears to have rejected this reasoning,  
 4 finding in *Hendow* that “the False Claims Act requires ‘a causal rather than a temporal connection  
 5 between fraud and payment[.]’” 461 F.3d at 1174 (quoting *U.S. ex rel. Main v. Oakland City*  
 6 *Univ.*, 426 F.3d 914, 916 (7th Cir. 2005) (“*Main*”)); *see also Hendow*, 461 F.3d at 1174 (“As the  
 7 Seventh Circuit rightly noted, the precise logistical details of how the claim is made – with respect  
 8 to timing, for instance, or the number of stages involved – are immaterial: ‘[i]f a false statement is  
 9 integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has  
 10 apportioned the statements among layers of paperwork.’”) (quoting *Main*, 461 F.3d at 1174).

11 Therefore, the Court concludes that Relator has adequately alleged Defendants made false  
 12 statements under the doctrine of promissory fraud as well as implied certification.<sup>21</sup>

13 b. Whether Relator Has Alleged Facts Showing Materiality

14 The FCA defines “materiality” as “having a natural tendency to influence, or be capable of  
 15 influencing, the payment or receipt of money or property.” 31 U.S.C. § 3729(b)(4). Similarly,  
 16 under common law, “materiality ‘look[s] to the effect on the likely or actual behavior of the  
 17 recipient of the alleged misrepresentation.’” *Escobar*, 136 S. Ct. at 2002 (quoting 26 R. Lord,  
 18 *Williston on Contracts* § 69:12, p. 549 (4th ed. 2003)). In *Escobar*, the Court left open whether  
 19 the statutory definition in § 3729(b)(4) or common law governs the “materiality” inquiry in FCA  
 20 cases, concluding that under either, “[t]he materiality standard is demanding.” *Id.* The Court  
 21 explained:

22 The False Claims Act is not “an all-purpose antifraud statute,” *Allison*  
 23 *Engine*, 553 U.S., at 672, 128 S.Ct. 2123 or a vehicle for punishing  
 24 garden-variety breaches of contract or regulatory violations. A  
 25 misrepresentation cannot be deemed material merely because the  
 26 Government designates compliance with a particular statutory,  
 27 regulatory, or contractual requirement as a condition of payment. Nor  
 28 is it sufficient for a finding of materiality that the Government would  
 have the option to decline to pay if it knew of the defendant's

<sup>21</sup> Because the Court finds that Relator has adequately alleged that Defendants made false statements on these grounds, it does not reach Relator’s arguments that the patent applications themselves are false statements, or that their listing of the two drugs in the Orange Book constitute additional false statements.

1 noncompliance. Materiality, in addition, cannot be found where  
2 noncompliance is minor or insubstantial. *See United States ex rel.*  
3 *Marcus v. Hess*, 317 U.S. 537, 543, 63 S.Ct. 379, 87 L.Ed. 443 (1943)  
4 (contractors' misrepresentation that they satisfied a non-collusive  
5 bidding requirement for federal program contracts violated the False  
6 Claims Act because "[t]he government's money would never have  
7 been placed in the joint fund for payment to respondents had its agents  
8 known the bids were collusive"); *see also Junius Constr.*, 257 N.Y.,  
9 at 400, 178 N.E., at 674 (an undisclosed fact was material because  
10 "[n]o one can say with reason that the plaintiff would have signed this  
11 contract if informed of the likelihood" of the undisclosed fact).

12 *Id.*

13 Under this standard, it is not necessary for the government to expressly identify a statutory  
14 or regulatory provision as a condition of payment in order to demonstrate materiality, though such  
15 express requirements are relevant to materiality. *Id.* Other evidence that may demonstrate  
16 materiality includes "evidence that the defendant knows that the Government consistently refuses  
17 to pay claims in the mine run of cases based on noncompliance with the particular statutory,  
18 regulatory, or contractual requirement." *Id.* "Conversely, if the Government pays a particular  
19 claim in full despite its actual knowledge that certain requirements were violated, that is very  
20 strong evidence that those requirements are not material. Or, if the Government regularly pays a  
21 particular type of claim in full despite actual knowledge that certain requirements were violated,  
22 and has signaled no change in position, that is strong evidence that the requirements are not  
23 material." *Id.* In *Escobar*, the Court found that the materiality inquiry is not too fact intensive to  
24 allow dismissal of claims on that basis at the pleading stage if an FCA claimant has not pleaded  
25 facts to support allegations of materiality. *Id.*, 136 S. Ct. at 2004 n. 6.

26 Here, Relator has alleged that Defendants' fraudulent conduct in obtaining the Went  
27 Patents and the '009 patent and asserting these patents to prevent generics from entering the  
28 market have been the basis for the inflated prices that they have charged the Government for their  
29 drugs. Because price goes to the "essence of the bargain" between the government and drug  
30 manufacturers, the Court finds that Relator has adequately alleged that Defendants' fraud was  
31 material for the purposes of his FCA claims. *See Grubea v. Rosicki, Rosicki & Assocs., P.C.*, 318  
32 F. Supp. 3d 680, 701-702 (S.D.N.Y. 2018) (finding that the FCA's materiality requirement was  
33 adequately alleged based on allegations that defendant had made claims for inflated expenses



1 because it was “highly implausible” that the government “would willingly pay inflated expenses”).  
 2 Moreover, the fact that the government has continued to pay for Allergan’s drugs does not  
 3 demonstrate a lack of materiality because there is no allegation in the FAC that the government  
 4 was aware of the alleged fraud on the Patent Office when it paid for the drugs.<sup>22</sup>

5 c. Whether Relator Has Alleged Facts Showing Scienter

6 Under the FCA, defendants are liable only if they acted “knowingly.” 31 U.S.C. §  
 7 3729(a)(1)(a) & (b)(1)(A). “Under Rule 9(b), ‘circumstances constituting fraud or mistake’ must  
 8 be stated with particularity, but ‘malice, intent, knowledge, and other conditions of a person’s  
 9 mind,’ including scienter, can be alleged generally.” *United States v. Corinthian Colleges*, 655  
 10 F.3d 984, 996 (9th Cir. 2011) (quoting Fed.R.Civ.P. 9(b)). The FCA’s scienter requirement is not  
 11 met by “innocent mistakes, mere negligent misrepresentations and differences in interpretations,”  
 12 *id.* (quoting *Hendow*, 461 F.3d at 1174), but instead requires that a Relator allege that the  
 13 defendant “knew that its statements were false, or that it was deliberately indifferent to or acted  
 14 with reckless disregard of the truth of the statements.” *Id.* (citing *United States ex rel. Hochman v.*  
 15 *Nackman*, 145 F.3d 1069, 1074 (9th Cir. 1998)). Relator has met that requirement here.

16 With respect to the Adamas Defendants, Relator alleges scienter by alleging that Dr. Went  
 17 and Adamas intentionally submitted a series of declarations intended to mislead the Patent Office  
 18 with respect to the results of the ME110 Study. *See* FAC ¶¶ 80-83. The Court rejects Adamas’s  
 19 argument that the allegations show a lack of scienter because Dr. Went subsequently submitted a  
 20 corrected declaration, showing he did not intend to mislead the Patent Office. While that is a  
 21 possible inference it is not the only plausible inference that can be drawn from the allegations in  
 22 the FAC. Drawing all reasonable inferences in favor of Relator, there is at least a plausible  
 23 inference the Dr. Went and Adamas did, in fact, intend to mislead the Patent Office.

24 \_\_\_\_\_  
 25 <sup>22</sup> To the extent Defendants rely on the fact that the Government continues to pay for these drugs  
 26 even after receiving notice of Relator’s claims, the Court does not rely on that information.  
 27 Although the Government is on notice of Relator’s *allegations* its continued payment for these  
 28 drugs could be for any number of reasons. As there may be factual questions related to the  
 reasons for the Government’s continued payment for these drugs, this is an issue that is not  
 suitable for determination at the pleading stage. For the same reason, the Court rejects  
 Defendants’ reliance on the fact that the Government declined to join in this action to establish a  
 lack of materiality.

1 With respect to the Allergan Defendants, Relator alleges in the FAC that Forest  
2 Laboratories was aware of the teachings of the '553 patent yet intentionally failed to disclose them  
3 to the patent examiner when it amended the claims of the '009 patent to include a once-daily  
4 administration of memantine because it knew the patent examiner would reject the application if it  
5 did. *See* FAC ¶¶ 94, 97. Allergan Defendants point to 37 C.F.R. § 1.56 in support of their  
6 contention that Forest had an objectively reasonable belief that it was not required to disclose the  
7 '553 patent when it amended the claims, but this is a question that is more appropriately addressed  
8 at a later stage of the case and not on the pleadings. With respect to the Went Patents, Relator has  
9 also alleged facts that raise a plausible inference that Forest Laboratories acted at least recklessly  
10 to the extent that under the timeline alleged in the FAC it was already an exclusive licensee at the  
11 time two of the applications were filed and was a real-party-in-interest for those patents when  
12 misleading statements about the ME110 study were made to the Patent Office.

13 Accordingly, the Court finds that Relator has sufficiently alleged scienter as to the  
14 Allergan Defendants and the Adamas Defendants.<sup>23</sup>

#### 15 **E. The State Law Claims**

16 In their motions, Defendants contend Relator's State law claims fail because most of the  
17 States' false claims statutes contain a public disclosure bar that mimics the one in the federal FCA  
18 and therefore the claims Relator asserts under those statutes fail for the same reasons they contend  
19 his federal FCA claims are barred. Allergan Motion at 29-30; Adamas Motion at 22-23. The  
20 Allergan Defendants further assert that Relator has not alleged in sufficient detail how false claims  
21 were submitted to the states in violation of their false claims statutes. Allergan Motion at 30.  
22 Next, they argue that the State law claims "suffer from the same defects as the federal claims."  
23 Allergan Motion at 30; Adamas Motion at 22-23. Finally, Allergan asserts that Relator's claim  
24 under New Mexico law is deficient because under the relevant New Mexico law a private right of  
25 action exists only if there has been a determination by the state that there is "substantial evidence  
26 that a violation has occurred" and Relator has not alleged that such a determination has been

27 \_\_\_\_\_  
28 <sup>23</sup> The Court does not reach the question of whether fraud before the Patent Office is chargeable to all those who subsequently acquire and enforce patents for the purposes of FCA claims.

1 made. Allergan Motion at 30 (citing *United States ex rel. Cestra v. Cephalon, Inc.*, No. CIV.A.  
2 14-1842, 2015 WL 3498761, at \*14 (E.D. Pa. June 3, 2015) (citing N.M. Stat. Ann. § 27-14-7(C)).

3 For the same reasons the Court rejects Defendants’ arguments as to the federal FCA  
4 claims, it also rejects their challenges based on the same grounds to the State law claims.

5 The Court also concludes that Allergan’s challenge to the New Mexico claim is premature.  
6 Under New Mexico law, if the state declines to take over a qui tam action the person who brought  
7 the action “shall have the right to conduct the action if the department determined that there is  
8 substantial evidence that a violation of the Medicaid False Claims Act has occurred.” N.M. Stat.  
9 Ann. § 27-14-7. Yet the statute does not require the state of New Mexico to inform the Court of  
10 its determination and Relator is not required to come forward with evidence on a motion on the  
11 pleadings. Thus, at least one court has held that whether New Mexico had made a substantial  
12 evidence determination was not properly decided on a motion to dismiss because the  
13 determination was made after the operative complaint was filed. *See United States. ex rel. King v.*  
14 *Solvay S.A.*, 823 F.Supp.2d 472, 519–21 (S.D.Tex.2011) order vacated in part on recons., No. 06–  
15 2662, 2012 WL 1067228 (S.D. Tex. Mar. 28, 2012). In contrast, in *United States ex rel. Cestra v.*  
16 *Cephalon, Inc.*, the court concluded that this issue could be resolved on the pleadings because in  
17 that case, the motion to dismiss challenged the second amended complaint, which was filed three  
18 years after the original complaint. No. CIV.A. 14-1842, 2015 WL 3498761, at \*14 (E.D. Pa. June  
19 3, 2015). The court reasoned that under those circumstances, the relator had “had the opportunity  
20 to determine and allege in the second amended complaint whether New Mexico issued him a  
21 determination of substantial evidence that its FCA statute was violated.” *Id.*

22 Here, the FAC was filed on January 22, 2019. At that point, New Mexico had not yet filed  
23 its notice of election to decline intervention. *See* Docket No. 15. Because it is not obvious that  
24 Relator had had the opportunity to determine whether New Mexico had issued a substantial  
25 evidence determination at the time he filed the FAC, the Court declines to resolve this challenge  
26 on the pleadings and rejects Defendants’ request to dismiss the New Mexico claim on this basis.

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**IV. CONCLUSION**

For the reasons stated above, the Motions are DENIED. The Court sets a Case Management Conference for **January 15, 2021 at 2:00 p.m.** The parties shall file a joint case management conference statement that includes a proposed schedule for the case no later than **January 8, 2021.**

**IT IS SO ORDERED.**

Dated: December 11, 2020

  
\_\_\_\_\_  
JOSEPH C. SPERO  
Chief Magistrate Judge

United States District Court  
Northern District of California