

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, et
al.; ex rel. EVEREST PRINCIPALS,
LLC,

Plaintiffs and Relator,

v.

ABBOTT LABORATORIES, INC.
a/k/a ABBOTT LABORATORIES,
ABBOTT CARDIOVASCULAR
SYSTEMS INC., and ABBOTT
VASCULAR INC.,

Defendants.

Case No.: 3:20-cv-286-W (AGS)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS SECOND
AMENDED COMPLAINT [DOC. 57]**

Pending before the Court is Defendants Abbott Laboratories, Inc. a/k/a Abbott Laboratories, Abbott Cardiovascular Systems Inc., and Abbott Vascular Inc.'s (collectively, "Abbott" or "Defendants") Motion to Dismiss Plaintiff and Relator Everest Principals, LLC's¹ ("Plaintiff" or "Relator") Second Amended Complaint for failure to

¹ Plaintiff brings this action on behalf of the United States of America, the District of Columbia, and the following 27 states: California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New

1 state a claim under Federal Rule of Civil Procedure 12(b)(6). (*Mot.* [Doc. 59].) Relator
2 opposes the Motion. (*Opp.* [Doc. 60].) The Court decides the matter on the papers
3 submitted and without oral argument. *See* Civ. L.R. 7.1(d)(1).

4 For the reasons stated below, the Court **GRANTS IN PART AND DENIES IN**
5 **PART** Defendants’ Motion to Dismiss [Doc. 59].

6
7 **I. BACKGROUND**

8 Plaintiff and Relator Everest Principals, LLC is a “single member Delaware
9 limited liability corporation whose sole member was employed by Abbott from August
10 2015 to April 2017 as a Therapy Development Specialist in its Structural Heart
11 Division.” Defendant Abbott Laboratories is a publicly traded, global healthcare
12 company that owns the patent for MitraClip (or “MC Device”)—a medical device used
13 on certain cardiac patients. Defendant Abbott Laboratories, Inc. is allegedly the parent
14 company of Defendants Abbott Cardiovascular Systems Inc., and Abbott Vascular Inc.
15 Relator asserts claims against Abbott pursuant to the *qui tam* provisions of the federal
16 False Claims Act (“FCA”), 31 U.S.C. §§ 3729 *et seq.*, the Anti-Kickback Statute
17 (“AKS”), 42 U.S.C. § 1320a-7b, and applicable analogue state laws. Specifically,
18 Relator alleges that Abbott violated the AKS by hosting events for doctors that amounted
19 to illegal remuneration by inducing government-paid MitraClip procedures.

20 This Court previously denied Abbott’s motion to dismiss Relator’s Federal False
21 Claims Act Claims (Counts 1-3) as alleged in the *First Amended Complaint* (“FAC”) and
22 granted Abbott’s motion to dismiss Relator’s State False Claims Act claims (Counts 4-
23 31) with leave to amend. As to the state FCA claims, the Court instructed that Relator
24 needed to plead with particularity how any false claims were submitted to each state.
25 Relator filed the *Second Amended Complaint* (“SAC”) on September 22, 2022, adding
26 _____

27 Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Virginia,
28 and Washington. The federal government and these 27 states declined to intervene in this case. (*Mot.* at
2; Doc. 8.)

1 new allegations to the State FCA claims (Claims 4 through XXIX, hereafter, “State FCA
2 Claims”). [Doc. 57.] Abbott now again attempts to challenge the legal sufficiency of the
3 State FCA Claims asserted in the SAC pursuant to Fed.R.Civ.P. 9(b).

4 5 **II. LEGAL STANDARD**

6 The Court must dismiss a cause of action for failure to state a claim upon which
7 relief can be granted. FED. R. CIV. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
8 tests the legal sufficiency of the complaint. *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d
9 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a matter of law either for
10 lack of a cognizable legal theory or for insufficient facts under a cognizable theory.
11 *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1988). In ruling on the
12 motion, a court must “accept all material allegations of fact as true and construe the
13 complaint in a light most favorable to the non-moving party.” *Vasquez v. L.A. Cnty.*, 487
14 F.3d 1246, 1249 (9th Cir. 2007).

15 Complaints must contain “a short and plain statement of the claim showing that the
16 pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). The Supreme Court has interpreted
17 this rule to mean that “[f]actual allegations must be enough to rise above the speculative
18 level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007). The allegations in the
19 complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to
20 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
21 *Twombly*, 550 U.S. at 570).

22 Well-pleaded allegations in the complaint are assumed true, but a court is not
23 required to accept legal conclusions couched as facts, unwarranted deductions, or
24 unreasonable inferences. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Sprewell v.*
25 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Leave to amend should be
26 freely granted when justice so requires. See FED. R. CIV. P. 15(a). However, denial of
27 leave to amend is appropriate when such leave would be futile. See *Cahill v. Liberty*
28 *Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996); *Plumeau v. Sch. Dist. No. 40 Cnty. of*

1 *Yamhill*, 130 F.3d 432, 439 (9th Cir. 1997).

2 State FCA claims must satisfy the heightened pleading requirements of Rule 9(b).
3 Rule 9(b) requires that in all averments of fraud or mistake, the circumstances
4 constituting fraud or mistake shall be stated with particularity. *United States ex rel. Solis*
5 *v. Millennium Pharm., Inc.*, 445 F.Supp.3d 786, 794–95 (E.D. Cal. 2020) (citation and
6 quotations omitted). Relators must allege the “who, what, when, where, and how of the
7 misconduct charged.” *Id.* (citation and quotations omitted).

8 9 **III. DISCUSSION**

10 **A. State Law FCA Claims**

11 In this Court’s prior order, the Court dismissed Relator’s State FCA Claims
12 because “Relator ha[d] not alleged with particularity how any false claims were
13 submitted to each state identified in the FAC.” *August 18, 2022 Order* [Doc. 56]. In the
14 SAC, Relator adds new allegations, which it avers contain the necessary particularity with
15 respect to each state to meet the requirements of Rule 9(b). *See SAC* ¶¶ 145-47, 152,
16 154-55, 163, 165. Abbott argues that Relator’s new allegations still fail to provide
17 particularized facts as to the claims submitted to each state.

18 **1. California**

19 As to the California FCA claim, Relator adds the following in the SAC:

- 20 • Relator’s manager, Michael Meadors, assigned him/her to California
21 implanting physician Dr. S.K. for practice building support services. Mr.
22 Meadors told Relator that Dr. S.K. had a long-standing, important
23 relationship with Abbott, and thus, it was imperative to “keep him happy”.
24 Relator quickly learned that Dr. S.K. was the top implanting MC implanting
25 physician in the world in terms of volume, and continually driving referrals
26 to Dr. S.K. was one way that Abbott maintained this partnership relationship
27 with Dr. S.K. and kept him happy. From 2015 to 2021, Abbott’s payments to
28 Dr. S.K. exceeded one million dollars (\$1,404,280.64), and from 2013-2020

1 the State of California (MediCal) reimbursed Dr. S.K. \$23,412.22 for the
2 MC TMVR implanting procedure for MediCal covered cardiac patient
3 beneficiaries. (SAC ¶ 163(a));

- 4 • On February 28, 2017, Abbott hosted a MitraClip marketing reception at El
5 Camino Hospital for MC implanting physician Dr. CR. The reception was in
6 the guise of a celebration of the 100th MitraClip procedure, and this
7 marketing event was typical of what Abbott management instructed its
8 national sales representatives to organize and host as a “Milestone
9 Celebration” in order to showcase the loyal implanting physicians and their
10 hospitals/medical centers. The physician being celebrated/ marketed here was
11 paid over \$250,000 by Abbott from 2015 to 2021, and was reimbursed by
12 the State of California (MediCal) over \$12,000.00 for performing the MC
13 TMVR procedure on state healthcare program funded cardiac patients from
14 2013 to 2020. (SAC ¶ 163(b)).

15 Abbott argues that these additions are still insufficient to meet Rule 9(b)’s
16 particularity requirement. The Court disagrees. Taken together with all the allegations
17 already included in the *FAC*—specifically the allegations stating a claim under the
18 federal FCA and the allegations as to California’s Medicaid program—Relator has
19 adequately alleged a state FCA claim under California law at this juncture.

20 **2. Florida**

21 As to the Florida FCA claim, Relator adds the following in the SAC:

- 22 • Dr. J.R. was a key Florida physician targeted by Abbott management for
23 patient-practice building. One example of Abbott’s approach to showing Dr.
24 J.R. the quid pro quo for his commitment to the MC device was manager
25 Michael Meador’s offering Dr. J.R. the opportunity to speak at Abbott’s
26 Annual TMVR Summit in 2017. In addition, from 2015-2021, Abbott made
27 payments to Dr. J.R. that exceeded \$270,000.00, and the State of Florida
28 Medicaid program reimbursed Dr. J.R. nearly \$5,000.00 from 2013 to 2020

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