

Qui tam relator Law Project for Psychiatric Rights (PsychRights®)¹ opposes the motion by certain defendants (Fee Applicants) for attorney fees at Dkt. No. 173, including the following separately filed affidavits.

| Dkt No. | Defendant(s) | Amount |
|----------------|--|----------------------|
| 175 | Central Peninsula Counseling Services | \$ 9,840.00 |
| 176 | Southcentral Foundation | \$ 49,199.26 |
| 177 | Northstar, et al. | \$ 31,044.00 |
| 178 | Bartlett, et al. | \$ 65,698.75 |
| 179 | Matsutani/Providence | \$ 42,481.60 |
| 180 | Ozer | \$ 11,782.00 |
| 180 | Phillips | \$ 11,115.00 |
| 181 | Martino/Rothrock/FbksNeuropsych | \$ 16,713.50 |
| 182 | Curtiss/Clark | \$ 10,984.75 |
| 184 | Anchorage Community Mental Health Services | \$ 23,662.00 |
| 186 | Denali Family Services | \$ 50,003.05 |
| | Total | \$ 322,523.91 |

The seminal Ninth Circuit case on the issue of awarding attorney fees against False Claims Act *relators* is *Pfingston v. Ronan Engineering Co.* which held, "The award of fees under the False Claims Act is reserved for rare and special circumstances."² There, the Ninth Circuit reversed the district court's award of attorney's fees against the *relator's* attorney and remanded for the District Court to reconsider whether attorneys' fees were warranted against the *relator*. In doing so, even though the Ninth Circuit upheld the dismissal on the merits stating "[the *relator*] simply has not proffered sufficient evidence to make out a prima facie case," with respect to an attorney fee award against

¹ It does not appear the attorney fee motion is directed against former foster youth, Daniel Griffin, *relator* in 3:09-cv-246, consolidated with this case.

² 284 F.3d 999, 1005, 1006-7(9th Cir. 2002).

the *relator*, stated, "We are far from convinced that this case presents such [rare and special] circumstances"³

I. THE CASE IS NOT FRIVOLOUS

Under *Pfingston*, "an action is 'clearly frivolous' when 'the result is obvious or the appellant's arguments of error are wholly without merit.'"⁴

While ultimately deciding to dismiss this case because of 31 U.S.C. §3730(3)(4), known as the Public Disclosure Bar, this Court acknowledged there is no consensus on the broad proposition that public disclosure of industry-wide fraud triggers the Public Disclosure Bar.⁵ PsychRights relied on the Ninth Circuit cases of *United States ex rel. Alfatooni v Kitsap Physicians Services*,⁶ (public disclosure bar only applies to defendants identified in public disclosure) and *U.S. ex rel. Foundation Aiding The Elderly v. Horizon West*,⁷ which held that allegations of general or widespread fraud do not trigger the public disclosure bar. *Alcan Electrical and Engineering, Inc.*, 197 F.3d 1014, 1018-19 (9th Cir. 1999), decided between *Alfatooni* and *Foundation Aiding The Elderly* did carve out an exception for "a narrow class of suspected wrongdoers," but the later *Foundation Aiding The Elderly*, held general allegations of fraud against an industry do not trigger the public disclosure bar.

Citing to out of circuit cases as well as these three Ninth Circuit cases, this Court concluded:

A fair reading of all of these cases, however, supports the proposition that where the information in the prior disclosure is sufficient for the Government to initiate an investigation against the defendants, the Public Disclosure Bar applies.⁸

³ *Id.* On remand, the District Court denied the award of attorney's fees. Exhibit 1.

⁴ 248 F.3d at 1005.

⁵ Dkt. No. 163, pp 18-19.

⁶ 163 F.3d 516, 523 (9th Cir. 1999).

⁷ 265 F.3d 1011, n5 (9th Cir. 2001).

⁸ Dkt. No. 163, p. 19.

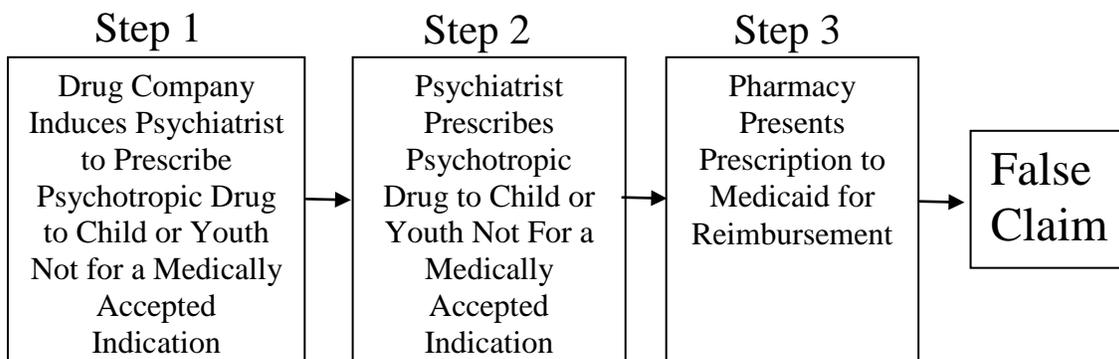
In doing so, citing to *U.S. ex rel. Poteet v. Bahler Medical, Inc.*,⁹ issued just 16 days before, this Court rejected the following First Circuit analysis in *U.S. ex rel Duxbury v. Ortho-BioTech Products*:

Although we have recognized that a "public disclosure" regime has the benefit, one lacking in a "government notice" regime, of providing "public pressure" on the government to act, there also may arise situations when even that is not enough, and the government would benefit from suits brought by relators with substantial information of government fraud even though the outlines of the fraud are in the public domain. . . .

[J]ust as we eschewed reading an exclusion in *Rost* that did not have textual support and resulted in discouraging "productive private enforcement," we similarly decline to do so here.^{10,11}

In the type of false claims at issue here, the Department of Justice is pursuing drug companies, and receiving large recoveries, for causing false claims by inducing psychiatrists to prescribe psychotropic drugs to children and youth that are not for a medically accepted indication, but not pursuing the other participants in the scheme to present false claims, such as the prescribing doctors and pharmacies. The scheme to present false claims might be graphically depicted as follows:

Fraudulent Scheme



⁹ --- F.3d ----, 2010 WL 3491159 (1st Cir. Sept. 8, 2010)

¹⁰ 579 F.3d 13, 27 (1st Cir. 2009) (citations omitted).

¹¹ Even if the just issued decision in *Poteet* backs away from *Duxbury* without citing to it, PsychRights respectfully suggests it cannot be grounds for concluding this case was frivolous since it was issued just two weeks before the dismissal decision in this case.

In other words, the Government has pursued drug companies at Step 1 of the Fraudulent Scheme, but is not pursuing the participants in the fraudulent scheme at Steps 2 and 3. It is inescapable that just as Step 1 causes a false claim, Step 2 also causes a false claim, and Step three is the presentation of a false claim.

This Court held that because the Government knows of this general widespread industry-wide fraudulent scheme, and is not pursuing the non-drug company participants, the public disclosure bar applies:

The Relators note in their opposition brief that the Government already “has pursued False Claims Act cases and achieved extremely large recoveries against drug companies for causing the presentment of claims to Medicaid for prescriptions of psychotropic drugs that are not for medically accepted indications, including Geodon and Seroquel for use in children and youth.” Thus, the Relators have conceded that the Government already knows about the conduct that the Relators are complaining about here, and has already investigated it.¹²

As set forth above, it appeared to PsychRights the Ninth Circuit cases of *Alfatooni*, *Alcan Electrical*, and *Foundation Aiding The Elderly*, holding the Public Disclosure Bar was not triggered unless the public disclosure identified specific defendants, or "a narrow class of suspected wrongdoers," and general allegations of wide-spread industry-wide fraud did not trigger the Public Disclosure Bar applied. However, as set forth above, this Court held these cases inapplicable.

This case was not frivolous.¹³

¹² Dkt. No. 163, p., footnotes omitted.

¹³ The Fee Applicants repeatedly assert that because PsychRights does not claim original source status the case was frivolous. This is specious. It is only if the case is "based upon the public disclosure of allegations or transactions" that the issue of original source comes up. 31. U.S.C. §3730(e)(4)(A). Here, as set forth in this section, PsychRights' relied on the Ninth Circuit precedent that the public disclosure of general industry-wide fraud does not trigger the Public Disclosure Bar in the first instance.

II. THIS CASE WAS NOT VEXATIOUS OR BROUGHT FOR AN IMPROPER PURPOSE

Pfingston held:

An action is “clearly vexatious” or “brought primarily for purposes of harassment” when the plaintiff pursues the litigation with an improper purpose, such as to annoy or embarrass the defendant.¹⁴

There were no improper purposes involved in this case.

The Fee Applicants point to PsychRights' statements that it is "not bringing these cases for the money" as evincing an improper purpose.¹⁵ They then assert this means that PsychRights did not bring the case to restore money to the federal government.¹⁶ This is fallacious. While it is true that PsychRights brought the case as part of its effort to ameliorate the massive harm being inflicted on America's children and youth through psychiatric drugging, the sole purpose of this lawsuit was to address the problem by recovering money for the federal government. In other words, while its purpose was not to bring PsychRights money, it was to recover money for the federal government. This is clear in both the disclosure statement to the Department of Justice (Disclosure Statement) and the News Release, both of which are cited by the Fee Applicants as evidence of improper purpose.¹⁷

A review of the Disclosure Statement reveals the purpose of the lawsuit is recovery of money to the federal government. The unedited quote with respect to PsychRights' interests/motives is:

PsychRights is not motivated by the potential monetary recovery, but by protecting vulnerable children and youth from being forced to suffer the incredible harms of pediatric psychiatric drugging. PsychRights is also very interested in making available the truly helpful, non-medication, approaches that have been shown to actually work. While not motivated by the potential monetary recovery, any such recovery by PsychRights will

¹⁴ 248 F.3d at 1005.

¹⁵ Dkt. No. 174, pp. 3, 15

¹⁶ Dkt. No. 174, p. 10.

¹⁷ Dkt. No. 174, pp. 3, 10, & 12.

be effectively deployed to further PsychRights' mission, including supporting non-drug alternatives.¹⁸

This is simply not an improper purpose.

The News Release, cited by the Fee Applicants in support of their assertion of improper purpose is also clearly focused on recovery of funds to the federal government.

A more full context for the "not bringing these cases for the money" quote is:

PsychRights has also developed a streamlined [model Qui Tam Complaint](#) for use around the country. See, [PsychRights Launches Campaign Against Medicaid Fraud With Model Lawsuit](#), July 27, 2009. The [model Qui Tam Complaint](#) is drafted for former foster youth to bring the lawsuits and receive the whistleblower's share of the recovery, but anyone with knowledge of specific offending prescriptions, such as parents and mental health workers, can bring these suits. . . .

While PsychRights and Mr. Chabasinski are not bringing these cases for the money, such cases represent a tremendous financial opportunity for attorneys to do well by doing good.¹⁹

Again this shows that the purpose is a monetary recovery, including encouraging potential *relators* and attorneys to pursue such cases for the monetary recovery.²⁰

It would be very strange indeed for it to be held that a lawsuit brought to recover money for the federal government was not a proper purpose because the *relator* was not motivated by its own financial interests. In truth, since PsychRights' finances are transparent and has less than \$25,000 in net assets,²¹ it appears the motion for attorney's fees itself has been filed in an attempt to hamstring PsychRights' efforts and chill donations, rather than to actually recover the requested fees.

The Defendants cite to the unpublished decision in *U.S. ex rel. Haight v. Catholic Healthcare West, et al.*,²² and *U.S. ex rel. Alcohol Foundation v. Kalmanovitz Charitable*

¹⁸ Dkt. No. 158-1, p. 7.

¹⁹ Exhibit 2, p. 2.

²⁰ Again, PsychRights does not read the fee motion as being directed against Daniel Griffin. In any event, Mr. Griffin, who was psychiatrically drugged while in foster care brought the case in order to obtain a recovery for himself.

²¹ See, financial reports at <http://psychrights.org/about.htm>.

²² 2008 WL 607150 at *1 (D. Ariz. Feb. 29, 2008).

Foundation,²³ for the proposition that the FCA was designed to incentivize whistleblowers with inside information to protect the financial interests of the United States, and not to afford plaintiffs an opportunity to pursue a less pecuniary and more expansive social agenda.²⁴ However, the court in *Haight* rejected an award of attorney's fees against the *relator* there:

[W]e cannot say that the promotion of plaintiffs' social agenda was paramount over asserting their non-frivolous claims that, if successful, could have earned them a sizable award.²⁵

Moreover, in the earlier appeal of the *Haight* case, *United States ex rel. Haight v. Catholic Healthcare W.*, 445 F.3d 1147 (9th Cir. 2006), the Ninth Circuit reversed the district court's dismissal of Haight's claims under the "public disclosure bar," contained in 31 U.S.C. §3730(e)(4)(A).²⁶ There, the *relators'* social agenda was no impediment to proceeding under the False Claims Act.

In *Kalmanovitz*, after reciting the complaint was based entirely on public disclosures from the enumerated sources and the *relator* was not an original source, the district court dismissed the action as follows:

Alcohol Foundation does not specify what or whose particular false or fraudulent claims deriving from Defendants were submitted to the Government for payment or approval. Thus, Alcohol Foundation's theory seeks to expand the definition of the statutory term to address a generic definition of "fraud" without direct link to specific claims submitted to the Government for approval or payment. This definition would enlarge the *qui tam* mechanism to address all manner of misrepresentations, without link to federal statute or a particular state's common law, if ultimately it might result in the federal Government's payment of a bill. Such a result would effectively eliminate any concept of proximate causation from litigation under the False Claims Act. Regardless of what theorists might opine about the hegemonic market powers at play, as a legal matter, the showing made

²³ 186 F.Supp. 2d 458, 464-65 (S.D.N.Y. 2002).

²⁴ Dkt. No. 174, pp. 10-11.

²⁵ 2008 WL 607150 at *2.

²⁶ Defendants have also filed a motion to dismiss under this provision at Dkt. No. 89, which will be opposed separately by PsychRights.

by Alcohol Foundation cannot satisfy the requirements of 31 U.S.C. § 3730.²⁷

Kalmanovitz was thus not dismissed because of the Alcohol Foundation's social agenda. At most, these cases only hold promoting a social agenda does not relieve a party filing under the False Claims Act from fulfilling its requirements.

The Fee Applicants also cite to *U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 528 F.Supp.2d 533, 539 (E.D.Pa. 2007). However, the court in *Atkinson* denied the defendant's motion for attorney fees there:

The court simply cannot conclude that Atkinson's claim was frivolous, vexatious, or brought primarily for the purpose of harassment. To award attorney fees and expenses in this case would dissuade the type of litigation that Congress has deemed beneficial.²⁸

The Fee Applicants also cite to *U.S. ex rel. Rosner v. WB/Stellar IP Owner, L.L.C.*²⁹ even though, the court there held:

This Court's lack of subject matter jurisdiction over the IPN action is not so staggeringly obvious that it renders Rosner's action “objectively frivolous.” Nor is there evidence that Rosner's suit was primarily intended to vex or harass IPN or any other defendant. Accordingly, IPN may not recover attorneys' fees under section 3730(d)(4).

The other cases cited by the Fee Applicants do not support a holding that this case presents the "rare and special circumstances" that would support the award of attorney's fees.

²⁷ 186. F. Supp. at 464, footnotes omitted.

²⁸ 528 F.3d at 545.

²⁹ --- F.Supp.2d ----, 2010 WL 2670829 (S.D.N.Y. 2010), footnotes omitted, emphasis in original.

I. CONCLUSION

For the foregoing reasons the Fee Applicants' motion for attorney's fees at Dkt No. 173 should be denied.

RESPECTFULLY SUBMITTED this 27th day of October, 2010.

Law Project for Psychiatric Rights, an Alaskan non-profit corporation

By: /s/ James B. Gottstein

James B. Gottstein

Alaska Bar No. 7811100

406 G Street, Suite 206

Anchorage, Alaska 99501

Tel: (907) 274-7686

Fax: (907) 274-9493

E-mail: jim.gottstein@psychrights.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 27, 2010, a true and correct copy of this document was served electronically on all parties of record by electronic means through the ECF system as indicated on the Notice of Electronic Filing, or if not confirmed by ECF, by first class regular mail.

 /s/ James B. Gottstein
JAMES B. GOTTSTEIN

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
(Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:97-cv-06602-R-CW

Douglas V. Pfingston, et al v. Ronan Engineering Co, et al
Assigned to: Judge Manuel L. Real
Referred to: Discovery Carla M. Woehrle
Demand: \$300,000,000
Cause: 31:3729 False Claims Act

Date Filed: 09/04/1997
Date Terminated: 09/11/2000
Jury Demand: Defendant
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

| Date Filed | # | Docket Text |
|-------------------|---------------------|---|
| 06/24/2002 | 144 | MINUTES: by Judge Manuel L. Real; The crt denies an award of atty fees agnst plf or plfs cnsl CR: Leonore LeBlanc (yc) (Entered: 06/27/2002) |
| 06/20/2002 | 143 | OBJECTIONS filed by defendant LA County MTA to plfs request for judicial ntc. (yc) (Entered: 06/21/2002) |
| 06/18/2002 | 142 | REQUEST by plaintiff Douglas V Pfingston that the Court take Judicial Notice of adjudicative facts contained in the attached docs re the issue of attys fees (nhac) (Entered: 06/20/2002) |
| 05/30/2002 | 141 | Brief by defendant LA County MTA in suppt of dft MTA's motion for attorney fees following remand by ninth circuit [108-1] (twdb) (Entered: 05/31/2002) |
| 05/30/2002 | 140 | BRIEF FILED by plaintiff Douglas V Pfingston the issue of attys fees [138-1] (twdb) (Entered: 05/31/2002) |
| 05/15/2002 | 138 | NOTICE of hrg re attys fees by plaintiff Douglas V Pfingston (twdb) (Entered: 05/16/2002) |
| 05/13/2002 | 137 | MANDATE from Circuit Court of Appeals affirming & remanding is hereby filed & spread upon the minutes of this USDC. The crt sets the mtr for a hrg on atty fees on 6/24/02 at 10:00. Simultaneous briefs shall be filed by 5/30/02. Plf shall give notice. (twdb) (Entered: 05/14/2002) |
| 05/13/2002 | 136 | CERTIFIED COPY of Appellate Court Order: #00-56721 affirming & vac in part & remanding the decision of the District Court [111-1]. Each pty shall bear its own costs in this appeal. (ENT 5/14/02), mld ntes. (twdb) (Entered: 05/14/2002) |
| 04/24/2002 | 135 | NOTICE of hearing ; IN COURT HEARING RE: Filing & spreading jgm of crt of appeals (civil) set on 10:00 5/13/02 (twdb) (Entered: 04/24/2002) |
| 04/22/2002 | 139 | RECORD on appeal returned from U.S. Court of Appeals re appeal [125-1] vols: 4, 14 envelopes of underseal docs, transcripts: 4 (pjpg) (Entered: 05/30/2002) |

Psychiatric Rights, Inc.

NEWS RELEASE

FOR IMMEDIATE RELEASE
January 25, 2010

CONTACT
Jim Gottstein
907-274-7686
jim.gottstein@psychrights.org

Massive Medicaid Fraud Lawsuit Unsealed

The Law Project for Psychiatric Rights (PsychRights®) announces the unsealing today of a major Medicaid Fraud lawsuit against psychiatrists, their employers, pharmacies, state officials, and a medical education and publishing company for their roles in submitting fraudulent claims to Medicaid. The defendants are:

| | | |
|--|---|---|
| Osamu H. Matsutani, M.D. | Ruth Dukoff, M.D. | Alternatives Community Mental Health Services, D/B/A Denali Family Services |
| William Hogan, Commissioner Of the Alaska Department Of Health And Social Services | Charter North Star Behavioral Health System | Anchorage Community Mental Health Services |
| Tammy Sandoval, Director Of The Alaska Office Of Children's, Services | Kerry Ozer, M.D. | Lucy Curtis, M.D. |
| Steve McComb, Director Of The Alaska Division Of Juvenile Justice | Claudia Phillips, M.D. | Fairbanks Psychiatric And Neurologic Clinic, Pc |
| William Streur, Director Of The Alaska Division Of Health Care Services | Southcentral Foundation | Peninsula Community Health Services Of Alaska, Inc. |
| Juneau Youth Services, Inc. | Sheila Clark, M.D. | Bartlett Regional Hospital Foundation, Inc. |
| Providence Health & Services, | Hugh Starks, M.D. | Thomson Reuters (Healthcare), Inc. |
| Elizabeth Baisi, M.D. | Lina Judith Bautista, M.D. | Wal-Mart Stores, Inc. |
| | Heidi F. Lopez-Coonjohn, M.D. | Safeway, Inc. |
| | Robert D. Schults, M.D. | Fred Meyer Stores, Inc. |
| | Mark H. Stauffer, M.D. | |
| | Ronald A. Martino, M.D. | |
| | Irvin Rothrock, M.D. | |
| | Jan Kiele, M.D. | |

[Law Project for Psychiatric Rights v. Matsutani, et al., United States District Court, District of Alaska, Case No. 3:09-cv-0080-TMB.](#)

The lawsuit, which was filed on April 27, 2009, and required to be kept under seal (secret) until now, is brought under the federal False Claims Act, which authorizes private parties to bring fraud actions on behalf of the Government. These cases are also called "whistleblower suits" or "qui tam," actions, and those who file them are entitled to a share in the recovery, if any. Each offending prescription carries a minimum penalty of \$5,500.

Exhibit 2, page 1

The Complaint walks through the lack of science supporting the practice and the methods used by the pharmaceutical industry to induce psychiatrists to improperly prescribe these drugs. "Even though the drug companies have been using these methods to induce psychiatrists to prescribe these drugs, it is the psychiatrists' responsibility to base their decisions on the facts, not drug company marketing," said Mr. Gottstein, continuing, "the uncritical acceptance of pharmaceutical company hype represents a massive betrayal of trust by the psychiatrists prescribing these drugs to children and youth."

PsychRights has also developed a streamlined [model Qui Tam Complaint](#) for use around the country. See, [PsychRights Launches Campaign Against Medicaid Fraud With Model Lawsuit](#), July 27, 2009. The [model Qui Tam Complaint](#) is drafted for former foster youth to bring the lawsuits and receive the whistleblower's share of the recovery, but anyone with knowledge of specific offending prescriptions, such as parents and mental health workers, can bring these suits.

Last fall, Mr. Gottstein gave talks at two national conferences, the [National Association for Rights Protection and Advocacy \(NARPA\)](#), and the [International Center for the Study of Psychiatry and Psychology \(ICSPP\)](#), where he presented on how to bring and conduct these cases. Mr. Gottstein is also giving a [presentation in New York City, February 2nd](#) following [oral argument in Lilly v. Gottstein](#).

Mr. Gottstein indicates a number of these cases are percolating around the country. In one that is not as far along as some others, Ted Chabasinski, a Berkeley, California, lawyer, is seeking a former foster youth as a client to bring such a lawsuit in the Bay Area. Any former foster youth in the Bay Area who was given psychiatric drugs within the last 6 years can call Mr. Chabasinski at (510) 843-6372 to talk to him about bringing such a case. "Foster children are singled out for psychiatric drugging because they and their foster parents have almost no legal protections and no way they can refuse these damaging drugs," says Mr. Chabasinski, who as a foster child, was electroshocked at the age of six as part of an experiment involving hundreds of foster children.

While PsychRights and Mr. Chabasinski are not bringing these cases for the money, such cases represent a tremendous financial opportunity for attorneys to do well by doing good.

"These are about as open and shut as cases can get," said Mr. Gottstein, "it is Medicaid fraud to cause or submit prescriptions to Medicaid for reimbursement if they are not for a medically accepted indication. End of story." PsychRights has developed a [Medically Accepted Indications Chart](#) showing what is allowable for common psychiatric drugs. Every other use of these drugs in children and youth and submitted to Medicaid is fraudulent. PsychRights conservatively estimates that at least half of psychotropic drug prescriptions to children and youth submitted to Medicaid are not for medically accepted indications and therefore fraudulent.

The Law Project for Psychiatric Rights is a public interest law firm devoted to the defense of people facing the horrors of forced psychiatric drugging and electroshock. PsychRights is further dedicated to exposing the truth about psychiatric interventions and the courts being misled into ordering people subjected to these brain and body damaging drugs against their will. Extensive information about these dangers, and about the tragic damage caused by electroshock, is available on the PsychRights web site: <http://psychrights.org/>.

#