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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA Ex rel. Law Project for Psychiatric Rights, an Alaskan non-profit corp.,	)	
Plaintiff,	)	Case No. 3:09-cv-0080-TMB
OSAMU H. MATSUTANI, MD., et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS UNDER RULES 12(B)(1) AND 12(H)(3) FOR LACK OF SUBJECT MATTER JURISDICTION UNDER THE FALSE CLAIMS ACT'S PUBLIC DISCLOSURE BAR, 31 U.S.C. § 3730(E)(4)(A)

Because the allegations in this False Claims Act ("FCA") *qui tam* case are based on publicly disclosed information and the relator, The Law Project for Psychiatric Rights

("PsychRights"), offers no insider information, the Court has no subject matter jurisdiction under the FCA's public disclosure bar. Accordingly, the Court should dismiss the case with prejudice.[1]

I. INTRODUCTION

A district court lacks subject matter jurisdiction over a FCA case in which the government has not intervened if the facts supporting the allegations were publicly disclosed before the relator filed the case and the relator is not an original source (i.e., does not have direct and independent insider knowledge) of the allegations.[2]

The relator in this case, PsychRights, which is run by its counsel, James Gottstein, has a mission "to mount a strategic campaign against forced psychiatric drugging and electroshock in the United States akin to what Thurgood Marshall and the NAACP mounted in the 40's and 50's on behalf of African American Civil Rights."[3] As part of this mission, PsychRights wants to

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[1] Defendants bring this motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3). A motion to dismiss for lack of subject matter jurisdiction may be raised at any time, and the court may consider evidence outside the pleadings to determine whether subject-matter jurisdiction exists. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *Gemtel Corp. v. Cmty Redevelopment Agency*, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994) (noting that the district court properly considered various public documents submitted in granting motion to dismiss for lack of subject matter jurisdiction and that this did not convert the motion to dismiss to a motion for summary judgment).

[2] *See* 31 U.S.C. § 3730(e)(4)(A) ("No court shall have jurisdiction over an action under [the FCA] based upon the public disclosure of allegations or transactions . . ., unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."); *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009). The recently passed Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (PPACA), amended the public disclosure bar, but not retroactively. Because the provision in place when PsychRights filed its Complaint will govern, defendants will cite to that and the relevant law in this brief.

[3] PsychRights.org, Recent News/Highlighted Items, http://psychrights.org/index.htm., (last visited April 2, 2010), Ex. 1.

stop physicians from prescribing psychotropic medications to pediatric patients or at least put limits on the use of these medications. PsychRights filed a state court case to accomplish this goal directly, but the case was dismissed for lack of proper standing, and is currently on appeal.[4]

Thwarted in that previous case, PsychRights chose a more circuitous route in the present case. Focusing on claims to the Alaska Medicaid Program and Alaska Children's Health Insurance Program ("CHIP") for psychotropic medications prescribed and dispensed to pediatric patients (i.e., under 18 years old), PsychRights accuses thirty-two defendants of submitting or causing to be submitted "false or fraudulent" claims to the federal agency that provides partial funding to the Medicaid and CHIP programs. Brandishing an incorrect interpretation of select provisions of the Social Security Act, PsychRights alleges that the defendants submitted or caused to be submitted claims that were not supposed to be covered by the Medicaid program and CHIP. Although physicians may prescribe medications off-label (i.e., for indications or conditions beyond those specifically approved by the FDA), PsychRights claims that defendants should have not provided those medications to Medicaid or CHIP patients.[5]

Regardless of whether PsychRights's theory could be legally valid, this Court has no jurisdiction over this case under the FCA's public disclosure bar. First, PsychRights is alone in

[4] *See Law Project for Psychiatric Rights v. State of Alaska, et al.*, No. 3AN 08-10115 CI (Alaska Sup. Ct. 3rd Judicial Dist., June 17, 2009) *appeal docketed*, No. S-13558 (Alaska June 30, 2009) (seeking declaratory and injunctive relief that Alaskan children have the right not to be administered psychotropic drugs unless and until certain requirements are met).

[5] This theory is expressed only in the broadest sense in the Complaint. As noted in Defendants' Rule 9(b) Motion To Dismiss, the Complaint fails to specify any particular patient, prescription, or claim.

representing the federal government here. The U.S. Department of Justice chose not to intervene in the case.[6]

Second, the allegations in this case were publicly disclosed long before PsychRights filed its Complaint. Letters from 2007 and 2008 between the State of Utah and the Federal Centers for Medicare & Medicaid Services ("CMS"), which even appear on PsychRights's website, addressed precisely the issue about which PsychRights complains. The internet offers many public reports alleging that physicians have been over-medicating pediatric patients, including Medicaid beneficiaries, with psychotropic agents and have been using the medications for off-label purposes not supported by the relevant drug compendia. Public reports, including PsychRights's previously filed state-court lawsuit against the State of Alaska and other previously filed cases, also leave no doubt that Medicaid knowingly paid for this type of prescribed medication. On top of these publicly disclosed allegations, PsychRights merely

[6] The Justice Department may have chosen to decline intervention because the Centers for Medicare & Medicaid Services ("CMS") has expressly sanctioned the submission of the types of claims that PsychRights challenges here. *See* 2007-08 correspondence between Utah and CMS, Ex. 2 ("Section 1927 of the Social Security Act (the Act) does not provide definitive policy on the coverage of Medicaid drugs for the uses you describe in your letter, nor have we addressed this issue in implementing Federal regulations. Section 1927(d) of the Act authorizes States to exclude or otherwise restrict coverage of a covered outpatient drug if the prescribed use is not for a medically accepted indication (as defined in section 1927(k)(6) of the Act), however, it does not explicitly require them to do so."); CMS Medicaid Drug Rebate Release No. 141 (May 4, 2006), Ex. 3 ("Section 1927(k)(5) defines 'medically accepted indication' to mean any use for a covered outpatient drug which is approved by the Food and Drug Administration, or a use which is supported by one or more citations included or approved for inclusion in the compendia specified in subsection (g)(1)(B)(II) . . . . The statute requires coverage of off-label uses of FDA-approved drugs for indications that are supported (as opposed to listed) in the compendia specified in section 1927(g)(1)(B)(II). Prior approval policies may be put in place, but prior authorization cannot be used to deny the off-label indications supported by citations included or approved for inclusion in the above-referenced compendia.").

reiterates its and Utah's interpretation of the most public of sources, a statute, to argue that Medicaid (and accordingly CHIP) should not have covered those claims.

Third, PsychRights must, but cannot, show that it was an original source of the public disclosures. As a matter of law, as a corporate organization (rather than an individual), PsychRights cannot be an original source under the FCA. In addition, and putting aside that legal infirmity, the facts doom any claim that PsychRights is an original source. PsychRights makes no claim to have direct or independent knowledge of these allegations and indeed cannot as it was not a Medicaid beneficiary or guardian of one, was not (and did not work for) a physician or a pharmacy, and did not work for either State medical assistance program. PsychRights simply has no direct and independent knowledge of the relevant facts, as the FCA requires.

For these reasons, this Court has no subject matter jurisdiction over this case, and thus, the entire case should be dismissed with prejudice.[7]

II. BACKGROUND

A. Procedural History

PsychRights filed this action on April 27, 2009. (Dkt. #1.) The U.S. government swiftly declined intervention. (Dkt. #14.) The Complaint was unsealed on January 25, 2010. (Dkt. #16.)

B. Public Disclosures

PsychRights's allegations were publicly disclosed prior to PsychRights filing its Complaint in this case.

[7] *See* 31 U.S.C. § 3730(e)(4)(A).

1. Utah and the federal government's investigation and communications.

In 2007-08, the State of Utah's Attorney General's Office and CMS exchanged letters regarding Utah's investigation into the allegation that "many state Medicaid programs are liberally reimbursing – and presumably receiving Federal Financial Participation ('FFP') – for outpatient drugs used for indications that are neither FDA-approved nor supported in the relevant compendia."[8] PsychRights's own website contains this series of letters.[9] These letters specifically described (and notified CMS of) the type of fraudulent conduct that PsychRights alleges in this case. CMS, however, concluded that the provision of the Social Security Act cited by Utah (and PsychRights in this case) "authorizes" but "does not explicitly require" "States to exclude or otherwise restrict coverage of a covered outpatient drug if the prescribed use is not for a medically accepted indication (as defined in section 1927(k)(6) of the Act . . . ."[10]

2. PsychRights's dismissed case against Alaska.

In September 2008, PsychRights filed a lawsuit in the Alaska superior court against the State of Alaska seeking declaratory and injunctive relief to prevent the administration of psychotropic drugs to Alaskan children unless and until: (1) evidence-based psychosocial interventions have been exhausted; (2) benefits of the drugs outweigh the risks; (3) the person

[8] Ex. 2.

[9] PsychRights.org, PsychRights' Medicaid Fraud Initiative Against Psychiatric Drugging of Children & Youth, http://psychrights.org/education/ModelQuiTam/ModelQuiTam.htm#UtahAG, (last visited April 5, 2010), Ex. 4.

[10] Ex. 2.

authorizing administration of the drugs is fully informed of the risks and benefits; and (4) monitoring safeguards are in place.[11]

In its amendment to the complaint filed on November 24, 2008, PsychRights made the exact allegation that it is making in this case:

> 22. It is unlawful to for the State to use Medicaid to pay for outpatient drug prescriptions except for indications approved by the Food and Drug Administration (FDA) or included in the following compendia:
>
> (a) American Hospital Formulary Service Drug Information,
>
> (b) United States Pharmacopeia-Drug Information (or its successor publications), or
>
> (c) DRUGDEX Information System.[12]

PsychRights further alleged in that case that Alaska Medicaid did, in fact, authorize these alleged illegal claims.[13]

PsychRights's state court case also contains several other allegations that demonstrate that the allegations in its current complaint were previously publicly disclosed. Indeed, paragraphs 23-30 of the Amended Complaint describe Alaska state legislature hearings from as early as 2004 concerning the use of allegedly unapproved psychotropic medications on children in state custody.[14] Additionally, in its Amended Complaint, PsychRights candidly states that

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[11] ¶ 1 of April 3, 2009 Amended Complaint in *Law Project for Psychiatric Rights v. State of Alaska, et al.*, No. 3AN 08-10115 CI, Ex. 5.

[12] Amend. to ¶¶ 22, 236 of Complaint, Ex. 6.

[13] Ex. 5, ¶¶ 218-36.

[14] *Id.* ¶¶ 23-30.

most of the allegations relating to the allegedly improper use of psychotropic medications on children were taken from the "Critical Think Rx Curriculum," which was developed and published as part of the "Critical Think Rx" program under a grant from the Attorneys General Consumer and Prescriber Grant Program of which the Attorney General of the State of Alaska is a participant.[15]

PsychRights's case was dismissed by the superior court because PsychRights lacked standing to assert this cause of action.[16] PsychRights appealed the dismissal, and the appeal is currently fully briefed before the Alaska Supreme Court.[17]

3. Other court cases

Previous cases have also included allegations that allegedly false claims for off-label, non-compendium drug prescriptions have been paid by Medicaid. Most notably, in *United States ex rel. Franklin v. Parke-Davis*, No. 96-11651-PBS, 2003 U.S. Dist. LEXIS 15754 (D. Mass. Aug. 22, 2002), the relator alleged that claims for off-label, non-compendium supported uses of the drug Neurontin (one of the drugs named in PsychRights's Complaint) to the 50 state Medicaid programs (including Alaska Medicaid) constituted "false" claims for purposes of the FCA.[18] The defendant in that case, the relator's former employer, Parke-Davis, was alleged to have promoted Neurontin for uses not approved by the FDA which resulted in the alleged

[15] *Id.* ¶¶ 31-36.

[16] *Id.*

[17] *See Law Project for Psychiatric Rights v. State of Alaska, et al.*, No. S-13558 (Alaska).

[18] *Parke-Davis*, 2003 U.S. Dist. LEXIS 15754, at 1-2.

ineligible Medicaid payments for the drug.[19] As in this case, the government declined to intervene in *Parke-Davis*.[20]

4. News reports of alleged inappropriate off-label use of psychotropics on pediatric Medicaid beneficiaries.

Numerous reports in the news media have commented about the allegedly inappropriate off-label use of psychotropic medications on children, while also pointing out that these children are often Medicaid recipients. The following are just a small sample of these articles:

- *Johnny get your pills — Are we overmedicating our kids*, Salon.com (June 17, 1999) (available at http://www.salon.com/health/feature/1999/06/17/antidepressants) ("In Michigan, in 1996, investigators looking through records of state Medicaid patients found 157 children aged 3 or younger who had been given any of 22 different psychotropic medications for attention deficit disorder.") (Ex. 7);

- *Attention Deficit: Is it in the Genes?*, Business Week (Nov. 22, 1999) (available at http://www.businessweek.com/archives/1999/b3656091.arc.htm) ("researchers reviewed 15 months' worth of Medicaid billing records and found that 233 children between the ages of one and three were diagnosed with ADHD. . . [N]early 60% of those toddlers were treated with psychotropic medications such as Ritalin and Prozac, though little is known about the impact of such drugs on children so young.") (Ex. 8);

- *Some infants get medication despite advice of experts*, Chicago Sun-Times (Apr. 21, 2002) ("A study published in the Journal of the American Medical Association in 2000 found that almost 1.5 percent of children 2 to 4 enrolled in Medicaid programs and a particular managed care group were taking psychotropic drugs such as Ritalin or Prozac, an anti-depressant'" for off-label uses.) (Ex. 9);

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[19] *Id.*

[20] *Id.* at *2. The *Parke-Davis* court never specifically resolved the question of whether off-label non-compendium prescriptions can be reimbursable under Medicaid, but it did indicate that relator's interpretation of the relevant statutes was likely incorrect and that defendant's interpretation that states may choose to exclude or include these types of claims was better supported by the basic rules of statutory construction. *Id.* at *7-8.

- *The Psychotropic Drugging of Florida's Medicaid Children*, Citizens Commission on Human Rights of Florida (2006)(available at http://www.cchr.org/media/pdfs/The_Psychotropic_Drugging_of_Floridas-Medicaid_Children.pdf ("most off-label prescriptions for children may not be covered under Medicaid, and such reimbursements constitute Medicaid fraud.") (Ex. 10);

- *Tyke-Psych Push*, The New York Post (March 9, 2008) ("New York's Medicaid program paid nearly $90 million in 2006 for two dozen psychiatric drugs for kids . . .most have not been tested adequately on kids or approved by the Food and Drug Administration for their use. Doctors may prescribe them to children or teens 'off-label.'") (Ex. 11); and

- *Rep. McDermott announces hearing on utilization of psychotropic medication for children in foster care*, US Fed News (Mar. 12, 2008) ("One recent study found that psychotropic drug treatment was three or four times more common for youth in foster care than for other children receiving health care services through the Medicaid program. Additionally, children in foster care are often prescribed multiple psychotropic medications, and sometimes these drugs are used for off-label purposes . . . .") (Ex. 12).

Several articles describe an investigation into the off-label use of psychotropic drugs for children, launched by the Texas Comptroller Carole Keeton Strayhorn, as a head of a Medicaid fraud task force.[21]

III. ARGUMENT

The FCA's public disclosure bar denies courts subject matter jurisdiction over suits based on "allegations or transactions" that have been "public[ly] disclos[ed]," unless the relator "is an

[21] *See, e.g.*, *Drug fraud alleged in foster care*, The Dallas Morning News (Nov 13, 2004), Ex. 13; *Strayhorn to investigate alleged drug fraud in foster care*, Associated Press (Nov. 12, 2004), Ex. 14; *Comptroller Strayhorn's response to statement by Texas Medical Association, States News Service* (Nov. 12, 2004), Ex. 15; *Texas comptroller to investigate possible prescription drug fraud abuse*, The Brownsville Herald (Nov. 13, 2004), Ex. 16.

original source of the information."[22] Accordingly, the "threshold question in a False Claims Act case is whether the statute bars jurisdiction."[23] This is a two-tiered inquiry: (1) the court must first determine whether there has been a prior public disclosure; and (2) if there has been such a public disclosure, the court then must determine whether the relator is an "original source" of each public disclosure within the meaning of Section 3730(e)(4)(B).[24] The relator bears the burden of establishing subject matter jurisdiction.[25]

A. The Complaint's Allegations Were Previously Publicly Disclosed.

The Ninth Circuit uses a two-part test to determine if there has been a public disclosure under the FCA. First, the court determines whether the public disclosure originated in one of the sources enumerated in the statute:[26]

- A criminal, civil, or administrative hearing, including prior civil complaints brought by the same relator.[27]
- A federal or state congressional, administrative or government report, hearing, audit, statement, or investigation.[28]

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[22] 31 U.S.C. § 3730(e)(4)(A). *See also Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. ___, No. 08-304, slip. op. at 11 (Mar. 30, 2010) ("It is the fact of 'public disclosure'—not Federal Government creation or receipt—that is the touchstone of § 3730(e)(4)(A).").

[23] *U.S. ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 20 (1st Cir. 2009) (citing *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 727 (1st Cir. 2007)).

[24] *See Meyer*, 565 F.3d at 1199.

[25] *Id.*

[26] *Id.*; 31 U.S.C. § 3730(e)(4)(A).

[27] *See Meyer*, 565 F.3d at 1199; *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917 (9th Cir. 2006).

- The "news media," which includes newspapers, magazines, and other publications that "disseminate information to the public in a periodic manner" and "are as generally accessible to any other strangers to the fraud as would be a newspaper article."[29]

A disclosure to even one individual outside of the government makes the disclosure "public."[30] Furthermore, the "elements of the fraud allegation need not be made public in a single document,"[31] but rather can come from multiple sources, which are "considered as a whole."[32]

Second, if the first part of the test is met, the court must determine whether the complaint is "based upon" the public disclosure.[33] "[A] claim is 'based upon' a public disclosure when the claim repeats allegations that have already been disclosed to the public."[34] The publicly

(continued…)

[28] *See Bly-Magee*, 470 at 917-18 (following the 8th Circuit in holding that non-federal reports, audits, and investigations qualify as public disclosures); *see also Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003) (Medicaid audits prepared by a state agency qualify as public disclosures).

[29] *United States ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 463 (S.D.N.Y. 2002), *aff'd*, 53 F. App'x 153 (2d Cir. 2002).

[30] *See Seal 1 v. Seal A*, 255 F.3d 1154, 1161-62 (9th Cir. 2001).

[31] *United States v. Catholic Healthcare W.*, 445 F.3d 1147, 1152 n.1 (9th Cir. 2006).

[32] *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 n.8 (5th Cir. 2004); *see also Dingle v. Bioport Corp.*, 388 F.3d 209, 214 (6th Cir. 2004) ("The fact that the information comes from different disclosures is irrelevant."); *A-1 Ambulance Serv., Inc. v. Cal.*, 202 F.3d 1238, 1244-45 (9th Cir. 2000) (holding that, when taken together, the contents of multiple administrative proceedings were sufficient to constitute public disclosure).

[33] 31 U.S.C. § 3730(e)(4)(A).

[34] *United States ex rel. Biddle v. Bd. of Trustees of Leland Stanford, Jr. Univ.*, 161 F.3d 533, 536-40 (9th Cir. 1998) (rejecting relator's argument that "based upon" means "derived from," and affirming district court's dismissal of case for lack of subject matter jurisdiction).

disclosed facts need be only substantially similar to, not identical with, the relator's allegations.[35] Defining "substantially similar," the Ninth Circuit has held that, "the substance of the disclosure need not contain an explicit 'allegation' of fraud; the jurisdictional bar is raised so long as the material elements of the allegedly fraudulent 'transaction' are disclosed in the public domain."[36] A disclosure meets this requirement if it "'set[s] the government squarely on the trail of fraud' such that it would not have been difficult for the government to identify [the defendant] as a potential wrongdoer."[37]

1. The investigation and communications by Utah and CMS are public disclosures.

The letters between Utah and CMS pre-date the Complaint in this case and discuss a government investigation, which is a category of public disclosures specifically listed in the FCA.[38] Furthermore, PsychRights' possession of the letters (and their public display on its website) proves that the allegations were publicly disclosed.[39] There can be no doubt that

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[35] *See Meyer*, 565 F.3d at 1199; *United States ex rel. Lujan v. Hughes Aircraft Co*., 243 F.3d 1181, 1189 (9th Cir. 2001).

[36] *A-1 Ambulance Serv.*, 202 F.3d at 1243.

[37] *In re Pharm. Indus. AWP Litig.*, 538 F. Supp.2d 367, 383 n.10 (N.D.N.Y. 2008) (citing authorities); *see also In re Nat. Gas Royalties Qui Tam*, 562 F.3d 1032, 1043 (10th Cir. 2009); *United States ex rel. Gear v. Emergency Med. Assocs. Ill., Inc.* 436 F.3d 726, 729 (7th Cir. 2006) ("We are unpersuaded by an argument that for there to be public disclosure, the specific defendants named in the lawsuit must have been identified in the public records.").

[38] While the federal government participated in that investigation, the letters are public disclosures even if they are classified as reflecting a state investigation. *See Graham County Soil*, slip op. at 12 (holding that the FCA public disclosure bar included state and local reports, audits, and investigations).

[39] *See Seal 1*, 255 F.3d at 1161-62 (disclosures of a government investigation to even one individual outside of the government is sufficient to make the disclosure "public").

PsychRights's case is based upon this public disclosure as the investigation and letters were about precisely the same issue raised by PsychRights in this case.

2. The State of Alaska case is a public disclosure.

The Ninth Circuit has specifically held that an earlier complaint brought by the same relator may constitute a public disclosure.[40] PsychRights's state court case disclosed the same allegations that PsychRights makes in the present case.

3. Other court cases, including *Parke-Davis*, are public disclosures.

Again, civil court proceedings are one of the enumerated categories of public disclosures.[41] The *Parke-Davis* case put the federal government squarely on notice that Medicaid claims were being made for off-label, non-compendium supported prescriptions. This is the exact type of alleged fraud that PsychRights pleads in this case seven years later.

4. The myriad articles in the press are public disclosures.

PsychRights cannot contest that the articles cited in Section II, B. 4, *supra*, are public disclosures. They all appeared in the public media. PsychRights even has several of them on its public website, www.psychrights.org. Moreover, the articles disclosed the allegations that PsychRights makes in this case: that psychotropic medications were being prescribed off-label to pediatric patients for indications that may not be listed as approved by the compendia; and that

[40] *See Bly-Magee*, 470 F.3d at 916.

[41] 31 U.S.C. § 3730(e)(4)(A).

many of those prescriptions were dispensed to Medicaid patients and billed to and paid by Medicaid.[42]

B. PsychRights Is Not an Original Source of the Complaint's Allegations.

Because the allegations in the Complaint were publicly disclosed, this Court has no jurisdiction over this case unless PsychRights can demonstrate that it was an original source of these disclosures.[43] PsychRights cannot meet this burden here.

The requirement that a relator be an "original source" of the complaint's allegations is founded on the notion that "[a] whistleblower sounds the alarm; he does not echo it."[44] "[T]he paradigm qui tam case is one in which an insider at a private company brings an action against

[42] The sparse allegations against TR Healthcare derive not from any information discovered by PsychRights, but – as referenced in PsychRights' March 29, 2010 discovery motion – from a 2003 Wall Street Journal article. *See* Dkt. No 80, Ex. 2 (the "WSJ Article"). The WSJ Article purported to review DrugDex's approach to analyzing off-label uses of drugs and noted that TR Healthcare also offered continuing medical education services ("CME") (a business that it is no longer engaged in). Plaintiff's few factual allegations in the Complaint relating to TR Healthcare are pulled practically verbatim from the WSJ Article. *Compare* Compl. ¶ 193 ("One of Thomson's scientific and health-care division's biggest operations is running continuing medical education seminars paid by pharmaceutical companies which promote off-label prescribing of such drug companies' drugs ….") *with* WSJ Article ("One of the division's biggest operations is running "continuing medical education" seminars for the pharmaceutical industry … Off-label uses of drugs are a frequent topic at medical-education seminars."), Compl. ¶ 192 ("In 2002, Thomson's scientific and health-care divisions, which includes DRUGDEX, accounted for $780 million of Thomson's $7.8 Billion in revenue.") with WSJ Article ("Thomson's scientific and health-care divisions, which includes DrugDex, accounted for $780 million of the company's $7.8 billion in revenue last year."). Aside from the facts taken from the WSJ Article, the Complaint is devoid of any facts relating to TR Healthcare.

[43] *See* 31 U.S.C. § 3730(e)(4).

[44] *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1475 (9th Cir.) (quotation omitted); *see also United States ex rel.O'Keeffe v. Sverdup Corp.*, 131 F. Supp. 2d 87, 93 (D. Mass. 2001) (noting that "there may be a point at which a private investigator 'should be termed a busybody and turned away at the courthouse steps'") (quoting *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1017 (7th Cir. 1999)).

his own employer."[45] "Legislative history also suggests that Congress envisioned only this paradigm suit when enacting this version of the *qui tam* provisions."[46]

In light of these policy concerns, Congress defined "original source" under the FCA as follows: "an *individual* who has *direct and independent knowledge* of the information on which the allegations are based and has *voluntarily provided the information to the Government* before filing an action under this section which is based on the information."[47]

The Ninth Circuit adds to this standard that the relator must have "had a hand in the public disclosure of the allegations that are part of [its] suit."[48] Thus, the Ninth Circuit has summarized the standard as follows:

> To qualify as an original source, a relator must show that he or she [1] has direct and independent knowledge of the information on which the allegations are based, [2] voluntarily provided the information to the government before filing his or her qui tam action, and [3] had a hand in the public disclosure of allegations that are a part of . . . [the] suit.[49]

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[45] *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995).

[46] *Id. See also United States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1017 (9th Cir. 2006) (with the FCA Congress meant to encourage whistleblowers who were aware of fraud against the government, but "discourage 'parasitic' suits brought by individuals with no information of their own to contribute"); *Wang v. Johnson Controls., Inc.*, 975 F.2d at 1412, 1419 (9th Cir. 1992) ("Q*ui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime.").

[47] 31 U.S.C. § 3730(e)(4)(B) (emphasis added). *See also Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467-79 (2007) (finding that the relator was not an original source under the meaning of the statute).

[48] *United States ex rel. Zaretsky v. Johnson Controls, Inc.*, 457 F.3d 1009, 1013 (9th Cir. 2006) (quoting *Wang v. FMC Corp*., 975 F.2d 1412, 1418 (9th Cir. 1992)).

[49] *Lujan v. Hughes Aircraft Co*., 162 F.3d 1027, 1033 (9th Cir. 1998) (internal quotation marks omitted).

Here, PsychRights cannot show that it is an "original source" of the information contained in the Complaint. First, as a preliminary manner, PsychRights is not an individual and therefore cannot be an "original source" under the statute's plain language. Second, PsychRights – an advocacy organization, and not a Medicaid beneficiary, a physician, or a pharmacy or Medicaid employee – cannot show that it has the requisite direct and independent knowledge of the allegations in its Complaint. Finally, relator did not, as required, have a hand in many of the public disclosures of allegations underlying this suit.

1. PsychRights, as a corporate entity, cannot be an "original source" under the FCA.

PsychRights, a corporation, is not an "individual" and therefore cannot be an original source under the FCA. The FCA draws this distinction between "person," which includes a corporation, and "individual," which does not. The statute permits that "a person may bring a civil action" under the FCA, that "a person shall have the right to continue as a party to the action" if the Government does not intervene and that there is no jurisdiction over publicly-disclosed allegations unless "the person bringing the action is an original source of the information."[50] The FCA's next subparagraph makes clear, however, that "'original source' means an individual who has direct and independent knowledge . . . ."[51]

The term "person" under the FCA is statutorily defined to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as

[50] 31 U.S.C. § 3730(b)(1), (c)(1), (e)(4)(A).

[51] *Id.* § 3730(e)(4)(B).

individuals."[52] As the statutory definition of "person" indicates, an "individual" is distinct from a "corporation," and therefore cannot be a "corporation."[53] Indeed, the First Circuit found that similar language in a statute that likewise "define[d] 'person' to include 'individuals, partnerships, and corporations," showed that "the term [individual] was not meant to include corporations."[54]

Congress's decision to avoid the standard term "person" in 31 U.S.C. § 3730(e)(4)(B) and instead require an original source to be an "individual" must be presumed as meaningful and deliberate, particularly given its repeated use of the more-inclusive term "person" elsewhere in the same section and paragraph.[55] Indeed, such a requirement is logical given that an original source must have "direct," and not second-hand, knowledge of the information upon which the claims are based.[56]

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[52] 1 U.S.C. § 1; *see also, e.g.*, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 782 (2000) (looking to 1 U.S.C. § 1 in defining scope of term "person" under FCA).

[53] *See* 1 U.S.C. § 1.

[54] *In re Spookyworld, Inc.*, 346 F.3d 1, 7 (1st Cir. 2003). *See also Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 198 (S.D.N.Y. 2006) (holding that where the statutory term "person" was defined as "an individual, partnership, association, [or] corporation," the term "'individual' . . . does not include corporations").

[55] *See* 1 John T. Boese, *Civil False Claims and* Qui Tam *Actions*, § 4.02[D], at 4-108.8 (3d ed. 2009-1 supp.) (noting that an "organization may be absolutely barred from bringing suits in cases of public disclosure," as "the original source rule does not refer to the relator as the 'person' . . . but as the 'individual'").

[56] *O'Keeffe*, 131 F. Supp. 2d at 95.

Likewise, defining an "original source" as an "individual" is consistent with the "paradigm of the inside whistleblower" that the False Claims Act is to encourage.[57] By contrast, the legislative history does not discuss anything that could overcome the presumption that the use of the term "individual" rather than "person" was deliberate.

Given that language and the policy considerations, PsychRights is not, by definition, an original source of the Complaint's allegations.

2. PsychRights cannot be an original source because it does not have direct and independent knowledge of the facts alleged in its complaint and did not have a hand in the public disclosures.

Even if PsychRights could qualify as an original source, the court would still lack jurisdiction because PsychRights lacks the requisite "direct and independent knowledge of the information on which the allegations are based,"[58] and did not have "'a hand in the public disclosure of the allegations that are part of [his] suit.'"[59]

To prove direct knowledge, "the relator must show that he had firsthand knowledge of the alleged fraud, and that he obtained this knowledge through his own labor unmediated by anything else."[60] To prove independent knowledge, the relator must have had knowledge "about

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[57] *Id.* at 93.

[58] 31 U.S.C. § 3730(e)(4)(B); *see also Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 471-472 (2007).

[59] *Zaretsky*, 457 F.3d at 1013 (alteration in original) (quoting *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992)); *see also Lujan*, 162 F.3d at 1033.

[60] *Meyer*, 565 F.3d at 1202 (quoting *Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999)); *see also Bly-Magee*, 470 F.3d at 917 (rejecting claim that relator was original source through her investigation as executive director of the Southern California Rehabilitation Services because she failed "to show that she had direct knowledge of a scheme to submit false claims").

the allegations before that information [was] publicly disclosed."[61] "Secondhand information, speculation, background information, or collateral research do not satisfy a relator's burden of establishing the requisite knowledge."[62] Likewise, "[t]he fact that a relator has background information or unique expertise allowing him to understand the significance of publicly disclosed allegations and transactions is also insufficient."[63] Perhaps most important for this case:

> [A] person who obtains secondhand information from an individual who has direct knowledge of the alleged fraud does not himself possess direct knowledge and therefore is not an original source. [T]o be independent, the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources.[64]

PsychRights clearly was not, and could not have been, an original source of the information alleged in the Complaint. Notably absent from the Complaint is the kind of direct and independent knowledge that an original source would have (and not coincidentally the kind of information needed to satisfy Rule 9(b)): The facts showing exactly who, what, where, when, how and why.

The only individuals involved in the alleged fraudulent transaction are the nurses and doctors who saw the patients and wrote the prescriptions, the Medicaid beneficiaries who received the prescriptions, the pharmacists who dispensed the prescriptions, and the Medicaid officials who approved and pay the claims. PsychRights is none of these. It appears that,

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[61] *Meyer*, 565 F.3d at 1202.

[62] *In re Natural Gas Royalties*, 562 F.3d 1032, 1045 (10th Cir. 2009).

[63] *Id.*

[64] *Hays*, 325 F.3d at 990-91 (internal quotations and citations omitted).

instead, PsychRights learned about children being prescribed psychotropic medications, off-label, through the media or through some other indirect means. PsychRights simply deduced that Medicaid was allegedly improperly paying for these claims from the public fact that many of the children prescribed these medications are covered by Medicaid and from its purported (albeit incorrect) understanding of the law concerning Medicaid payments for off-label uses of medications. This simply does not constitute direct and independent knowledge under the FCA.[65] Finally, Psych Rights did not have a "hand" or "play a role" in the Utah-CMS communications or the articles.[66]

IV. CONCLUSION

The FCA's public disclosure bar precludes subject matter jurisdiction in this case. For the reasons stated in this memorandum, the Court should dismiss the Complaint with prejudice.

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[65] *See, e.g., Natural Gas*, 562 F.3d at 1045.

[66] *See United States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1018 (9th Cir. 2006). That PsychRights had a hand in its previous amended allegations in its state court case is wholly inadequate. PsychRights otherwise fails to meet the requirements to be an original source of those allegations.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2010, a copy of the foregoing **Memorandum in Support of Motion to Dismiss under Rules 12(b)(1) ad 12(h)(3) for Lack of Subject Matter Jurisdiction Under the False Claims Act's Public Disclosure Bar, 31 U.S.C. § 3730(e)(4)(a)** was served electronically on Allen Frank Clendaniel; Brewster H. Jamieson; Carolyn Heyman-Layne; Cheryl Mandala; Daniel W. Hickey; David B. Robbins; Evan Craig Zoldan; Gary M. Guarino; Howard S. Trickey; James B. Gottstein; James E. Torgerson; John J. Tiemessen; Matthew K. Peterson; Linda Johnson; Matthew W. Claiman; R. Scott Taylor; Renee M. Howard; Richard D. Monkman; Kay E. Maassen Gouwens; Robert C. Bundy; Sanford M. Gibbs; Stacie L. Kraly, Vance A. Sanders and Howard A. Lazar.

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