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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,)
)
v.)
)
OSAMU H. MATSUTANI, MD.,)
et al.,)
)
Defendants.)
_____)

Case No. 3:09-cv-0080-TMB

**MOTION AND MEMORANDUM OF ALL DEFENDANTS
FOR LEAVE TO FILE OVERLENGTH BRIEF (Local Rule 10.1(m))**

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Defendants, by and through their respective counsel of record, respectfully request that the Court accept their overlength “Reply of All Defendants In Support of Rule 9(b) Motion to Dismiss” for the reasons set forth herein.

Local Rule 10.1(m) provides: “Unless otherwise ordered, principal briefs or memoranda of law in civil and criminal cases (including appeals) may not exceed twenty-five (25) pages and replies may not exceed fifteen (15) pages, exclusive of pages containing a table of contents, table of citations, or reproductions of statutes, rules, ordinances, *etc.*” The substantive portion of Defendants’ Reply Brief is twenty-three pages long.¹ There is good cause to allow the submission of the overlength Reply brief in this matter.

As the Court is aware, PsychRights has sued thirty-two separate mostly unaffiliated defendants, alleging that each has committed “Medicaid fraud.” PsychRights’s Complaint, and now Amended Complaint, alleges that each defendant has violated the False Claims Act, but its claims against all defendants suffer from legal deficiencies, including a blanket failure to comply with Rule 9(b). Accordingly, in the interests of judicial economy, the Defendants collaboratively filed a single Rule 9(b) Motion to Dismiss, rather than filing dozens of individual motions.

¹ The abbreviated caption in this matter takes up a full page, and the signature pages take up eight pages.

The content of PsychRights's Opposition brief, and its Amended Complaint, required the Defendants to provide responses to PsychRights's claims against particular groups of defendants. While each defendant or each separate group of defendants could have filed separate 15-page reply briefs, the Defendants instead have responded collectively to PsychRights's allegations against them in a single reply brief.

Defendants made a concerted effort to present their arguments concisely, but the sheer number of defendants against whom PsychRights has filed claims prevented Defendants from confining their reply brief to the fifteen pages authorized by Local Rule 10.1(m). Because good cause exists to relax the requirements of Local Rule 10.1(m) in this instance, Defendants respectfully request that the Court accept their overlength "Reply of All Defendants In Support of Rule 9(B) Motion to Dismiss."

Dated in Anchorage, Alaska this 25th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2010,
a true and correct copy of the Motion and
Memorandum of All Defendants for Leave
to File Overlength Brief was served electronically
on all parties of record.

s/Cheryl Mandala

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17 UNITED STATES OF AMERICA,
18 *Ex rel.* Law Project for Psychiatric Rights, an
19 Alaskan non-profit Corporation,

20 Plaintiff,

21 vs.

22 OSAMU H. MATSUTANI, MD, et al.,

23 Defendants.

NO. 3:09-cv-00080-TMB

PROPOSED

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2 **I. INTRODUCTION**

3 Plaintiff Law Project for Psychiatric Rights, Inc. (“PsychRights”) responded to
4 Defendants’ Motion to Dismiss under Rule 9(b) by filing a brief and an Amended Complaint
5 purporting to remedy the initial complaint’s obvious defects. These responsive pleadings
6 make abundantly clear why this case should be dismissed with prejudice for failing to plead
7 fraud with particularity.

8 For more than half the Defendants, the Amended Complaint contains no additional
9 allegations of fraud, leaving the allegations against those Defendants entirely generic and non-
10 specific. With respect to the other Defendants, the Amended Complaint fails to correct the
11 Rule 9(b) deficiencies, despite the newly-added information concerning certain drugs
12 prescribed to six Medicaid beneficiaries. Accordingly, the Court should grant Defendants’
13 Rule 9(b) motion to dismiss.

14 In order to understand the Amended Complaint’s deficiencies and why they cannot be
15 cured, the Court need only reflect on the nature of the allegedly fraudulent scheme described
16 in the Amended Complaint. Like its predecessor pleading, the Amended Complaint is largely
17 a generalized attack on the conduct of non-parties—*i.e.*, drug manufacturers’ promotion of
18 psychotropic medication for pediatric patients. Rather than directly challenge the drug
19 manufacturers (who are named as defendants in other “off-label” promotion cases),
20 PsychRights instead names a collection of largely unaffiliated mental health providers and
21 pharmacies, certain state officials and a publisher. Without alleging a conspiracy,
22 PsychRights generally asserts that all these parties somehow independently submitted, or
23 caused to be submitted, claims to the Alaska Medicaid and CHIP programs that PsychRights
24 contends were “false” by virtue of the drug manufacturers’ illegal promotion practices. But
25 PsychRights makes no allegations of “falsity,” fraudulence or wrongdoing that relate to these
26

1 Defendants' conduct, and thus completely fails to satisfy Rule 9(b)'s requirement that it
2 identify the circumstances of fraud with particularity.

3 The thrust of PsychRights's newly Amended Complaint, and the reason it does not
4 state a False Claims Act ("FCA") violation as to any of the Defendants, is embodied in its
5 own explanation of how claims for psychotropic medications submitted to the Medicaid
6 program are "rendered false." According to PsychRights:

- 7 • "[A] drug manufacturer falsified studies or engaged in other, unlawful conduct
8 to procure FDA approval or inclusion in a compendium." [Am. Compl. ¶ 173]
- 9 • "[A] drug manufacturer falsified studies or engaged in other unlawful,
10 fraudulent conduct in the promotion of a drug that resulted in the prescription."
11 [¶ 174]
- 12 • "Illegal off-label marketing [by a drug manufacturer] . . . results in the
13 submission of impermissible claims for reimbursement" [¶ 175]

14 Thus, by PsychRights's own allegations, the alleged "falsity" of any identified claim is
15 the result of the conduct of non-parties—drug manufacturers—and not the Defendants.
16 Nowhere does PsychRights allege facts demonstrating that any Defendant participated in
17 illegal activities with drug manufacturers, or engaged in specific, independent fraudulent or
18 inappropriate conduct that somehow rendered prescription drug claims "false."¹

19 The sum total of PsychRights's allegations of fraudulent conduct regarding the vast
20 majority of the Defendants is that either:

- 21 (i) they wrote or filled prescriptions for psychotropic medications that were
22 billed to Medicaid or CHIP where a federal statute (by PsychRights' reading)

24 ¹ PsychRights's additional allegation that a claim could also be rendered "false" "if a
25 physician submitted a claim for reimbursement for which he or she received a kickback in
26 exchange for prescribing a particular drug" [¶ 176] is also unavailing, as PsychRights has not
specifically identified a single kickback or other unlawful transaction between a drug
manufacturer and any Defendant, in relation to a prescription drug or otherwise.

1 allegedly prohibits federal financial participation in the payment of the claims
2 under the circumstances prescribed; or
3 (ii) they wrote or filled prescriptions for psychotropic medications rendered
4 “false” by some action of a drug manufacturer, such as falsification of studies
5 that led to the drug’s inclusion in an official compendium.

6 But PsychRights alleges no illegal, misleading or nefarious conduct of any of these
7 Defendants demonstrating the circumstances under which each knowingly submitted or
8 caused to be submitted claims for payment that PsychRights contends were false or
9 fraudulent.

10 Further, PsychRights’s theory of falsity itself is fundamentally impossible because the
11 Alaska Medicaid and CHIP programs as administered, having been fully apprised of the
12 nature of the claims, the drugs and the patients, considered the claims to be covered and paid
13 for them.² Indeed, even the federal agency administering the Medicaid program, through its
14 approval of the Alaska State Medicaid Plan, approves the reimbursement methodologies
15 adopted by Alaska for this purpose.³ In short, there is no possibility of wrongdoing, fraud or
16 falsity on the part of these Defendants because the Alaska Medicaid program knowingly

17 ² See *State of Alaska Motion to Dismiss Claims*, Dkt. 90 at 6 (“The [federal Medicaid] Act
18 permits state Medicaid drug programs to cover FDA-approved psychotropic medication
19 prescribed by physicians for indications that are not listed in the compendia, which Alaska’s
20 Medicaid drug program unambiguously does.”) (emphasis added). See also Dkt. 93 at 9-11
(discussion of Alaska law covering off-label prescribed drugs without compendia support.)

21 ³ The Medicaid program is administered by each state through a single Medicaid agency and
22 the federal government participates by providing federal matching grants if certain statutory
23 criteria are satisfied. 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10. In order to qualify for
24 federal financial participation in a given state’s Medicaid program, the Secretary of Health
25 and Human Services must approve the state’s Medicaid Plan. See generally 42 U.S.C. §
26 1396a. By federal law, a state Medicaid Plan must describe the state’s administration of the
program, eligibility categories, coverage of services, reimbursement methodologies and other
aspects of the program. Rules applicable to coverage and reimbursement methodologies for
any given state’s Medicaid program are promulgated by the states, consistent with federal
guidelines. 42 U.S.C. § 1396a(a)(30); 42 C.F.R. Part 447.

1 covered the drugs identified in the Amended Complaint and knowingly paid for them. There
2 was simply no reason for any Defendant to falsify or engage in subterfuge in order to get a
3 claim paid, and thus no Defendant has any reason to engage in the type of fraudulent conduct
4 that requires particularization under Rule 9(b). In short, no fraud on the part of these
5 Defendants is or could be particularized because no fraud or falsity was required to have these
6 claims paid (or would have been material to the government's decision to pay).

7 For the other Defendants—the State officials and the publisher Thomson Reuters
8 (“Thomson”)—the Amended Complaint also fails to particularize the “who, what and where”
9 of any alleged fraud. The State officials are operating without any stated or apparent
10 incentive to misinterpret federal law as the relator maintains, and no misconduct by Thomson
11 is identified with particularity.

12 PsychRights attempts to salvage its fundamentally flawed and non-particularized
13 theory of fraud by identifying a handful of drugs prescribed to a handful of Medicaid
14 beneficiaries, and attributing some of these drugs to some of the Defendants. As discussed
15 below, this additional information adds length to the pleading, but is patently insufficient to
16 save the Amended Complaint from dismissal under Rule 9(b) and demonstrates that further
17 amendment is futile.

18 **II. The Amended Complaint Contains No Particularized Allegations of Fraud as to** 19 **Any of the Defendants**

20 **A. Defendants with Only Generic Allegations of Fraud**

21 The Amended Complaint does not even attempt to augment the allegations as to the
22 following fifteen Defendants.

- 23 1. Anchorage Community Mental Health Services, Inc.
- 24 2. Bartlett Regional Hospital
- 25 3. Dr. Lucy Curtiss
- 26 4. Dr. Ruth Dukoff
5. Juneau Youth Services
6. Dr. Jan Kiele
7. Dr. Heidi Lopez-Coonjohn

- 1 8. Dr. Claudia Phillips
- 2 9. Providence Health & Services
- 3 10. Dr. Irvin Rothrock
- 4 11. Dr. Robert Schults
- 5 12. Southcentral Foundation
- 6 13. Dr. Hugh Starks
- 7 14. Dr. Mark Stauffer
- 8 15. Peninsula Community Health Services

9 For each of these Defendants, PsychRights does nothing more than recite in boiler-plate
10 fashion the False Claims Act liability requirements. [¶¶183, 200, 205] Not a single claim,
11 action, or circumstance is identified linking these fifteen Defendants to the submission of any
12 allegedly false claims, or detailing what specific conduct each engaged in that could have
13 resulted in the submission of a false claim.⁴ As such, PsychRights’s pleading remains
14 deficient under Rule 9(b) and should be dismissed as to each of these Defendants.

15 In its Opposition, PsychRights admits that the Amended Complaint fails to identify
16 specific patients, prescriptions, or any other particularized information as to these fifteen
17 Defendants, and asserts that Rule 9(b) somehow does not require it to set forth particularized
18 allegations.⁵ This assertion is groundless.

19 The cases PsychRights cites make clear the requirement that the Relator must provide
20 sufficiently specific allegations of fraud “to give defendants notice of the particular
21 misconduct which is alleged to constitute the fraud charged so that they can defend against the
22 charge and not just deny that they have done anything wrong.”⁶ PsychRights contends that it
23 is sufficient for its Amended Complaint to identify medications it believes should not be
24 prescribed to pediatric patients, or should be prescribed only under certain circumstances, and

25 ⁴ The generic “prescriber” allegations at paragraphs 216–220 do not add any particularity, as
26 they are asserted universally and with no supporting details of any Defendant’s participation.
See also discussion at Section B below.

⁵ Dkt. 110 at 3.

⁶ *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoted at Dkt. 110, p. 4).

1 to further assert that each of the Defendants should know whether they have written any such
2 prescriptions.⁷ This argument ignores the applicable legal framework and the purpose behind
3 a requirement that FCA claims be pled with specificity.

4 PsychRights supports its argument with a quotation from *United States ex rel. Grubbs*
5 *v. Kanneganti*, which it acknowledges was made “in a slightly different context.”⁸ That
6 “slightly different context” is a complaint that provided detailed, particularized allegations
7 about each defendant’s alleged submissions of false claims, described by the Fifth Circuit as
8 follows:

9 In addition to the described scheme, the complaint avers at least one overt act
10 of false billing for each doctor, each similar to this paragraph:

11 Dr. Desai billed Medicaid for psychotherapy services on January 8,
12 2004, CPT Code #90805, which constituted a false claim in that the
13 medical records indicate that no psychotherapy was provided by Desai
on that date.⁹

14 In response to a claim that these allegations did not satisfy Rule 9(b)’s heightened pleading
15 requirements, the Fifth Circuit concluded that sufficiently specific information had been
16 provided from which each defendant could admit or deny the allegations. The Court did not
17 hold, as PsychRights suggests, that Rule 9(b)’s requirements could be satisfied by vaguely
18 describing a “scheme,” but providing no specified allegations of each defendant’s
19 participation in that scheme.

20 PsychRights’s defense to the Rule 9(b) motion is that each Defendant must possess
21 evidence of whether it ever prescribed various medications to unidentified pediatric patients
22 (presumably who are also Medicaid or CHIP beneficiaries), as well as evidence of whether
23 such medications were ever prescribed for so-called off-label, non-compendium uses, and

24 ⁷ Dkt. 110 at 5-9.

25 ⁸ *Id.*

26 ⁹ *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 184-185 (5th Cir. 2009).

1 therefore PsychRights is absolved of responsibility to plead such claims with any specificity.¹⁰
2 This argument turns Rule 9(b) on its head, and describes precisely the kind of fishing
3 expedition and defamatory but fact-free fraud allegations the specificity requirement is
4 intended to prevent.¹¹

5 Having failed to identify a single claim submitted by Anchorage Community Mental
6 Health Services, Inc., Bartlett Regional Hospital, Juneau Youth Services, Providence Health
7 & Services or Southcentral Foundation, or by Drs. Curtiss, Dukoff, Kiele, Lopez-Coonjohn,
8 Phillips, Rothrock, Schults, Starks or Stauffer that was allegedly false, much less identifying
9 any of the required circumstances of such claims that would provide a basis to allege fraud,
10 PsychRights's Complaint must be dismissed as to each of these Defendants.

11 **B. Defendants That Allegedly Caused False Claims Submissions**

12 For the following nine Defendants, the Amended Complaint identifies certain claims
13 information for a handful of Medicaid beneficiaries, and alleges that the Defendant caused the
14 submission of a false claim with respect to each of the identified claims:

- 15 1. Alternatives Community Mental Health Services d/b/a Denali Family Services
- 16 2. Fairbanks Psychiatric and Neurologic Clinic, P.C.
- 17 3. Frontline Hospital/Northstar Hospital
- 18 4. Dr. Elizabeth Baisi
- 19 5. Dr. Lina Judith Bautista
- 20 6. Dr. Sheila Clark
- 21 7. Dr. Ronald Martino
- 22 8. Dr. Osamu Matsutani
- 23 9. Dr. Kerry Ozer

24 ¹⁰ Dkt. 110 at 10.

25 ¹¹ See *Grubbs*, 565 F.3d at 191 (“Rule 9(b) also prevents nuisance suits and the filing of
26 baseless claims to gain access to a ‘fishing expedition.’”); *United States ex rel. Smith v. Yale Univ.*, 415 F. Supp. 2d 58, 88 (D. Conn. 2006) (describing Rule 9(b)’s “purposes of, *inter alia*, preventing conclusory allegations of fraud from serving as a basis for strike suits and fishing expeditions, and protecting defendants from groundless charges that may damage their reputations.”).

1 PsychRights mistakenly suggests that the identified claims conclusively cure any Rule 9(b)
2 deficiencies—*i.e.*, that prescribing a drug for a non-compendium off-label use that was billed
3 to Medicaid establishes some sort of “per se” FCA liability.¹²

4 PsychRights’s position misconceives both the FCA and its Rule 9(b) pleading
5 obligations. First, there is no such thing as a “per se false claim” and not surprisingly,
6 PsychRights offers no legal support for such a patently incorrect assertion. As described in
7 the opening memorandum, a false claim requires a lie, and even a violation of law or
8 regulation in connection with a claim is not necessarily actionable under the FCA.¹³ Thus,
9 simply identifying claims for drugs that allegedly were not covered by Medicaid or CHIP is
10 insufficient to state an FCA violation.

11 More to the point, in order to satisfy Rule 9(b), “a party alleging fraud must ‘set forth
12 *more* than neutral facts necessary to identify the transaction.’”¹⁴ As the Eleventh Circuit
13 noted in *Grubbs*, a case cited by PsychRights, mere claims information does not, *ipso facto*,
14 provide the particulars of fraud: “Standing alone, raw bills—even with numbers, dates, and
15 amounts—are not fraud without an underlying scheme to submit bills for unperformed or
16 unnecessary work. It is the scheme in which particular circumstances constituting fraud may
17 be found that make it highly likely the fraud was consummated through the presentment of
18 false bills.”¹⁵

19 _____
20 ¹² See Dkt. 110 at 2–3, 8.

21 ¹³ Dkt. 84 at 9-10.

22 ¹⁴ *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting *In re GlenFed Sec.*
23 *Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)) (emphasis in original).

24 ¹⁵ *Grubbs*, 565 F.3d at 190. See also *United States ex rel. Stephens v. Tissue Sci. Labs., Inc.*,
25 664 F. Supp. 2d 1310, 1319 (N.D. Ga. 2009) (“While the Amended Complaint does provide
26 product numbers for the pieces of Permacol sold, it still lacks “the content and manner in
which [the false] statements misled the [surgeons],” which is required in order to satisfy Rule
9(b).”) (quoting *Brooks v. Blue Cross & Blue Shield*, 116 F.3d 1364, 1380-81 (11th Cir.
1997)).

1 Here, even for those Defendants for whom the Amended Complaint now identifies an
2 allegedly offending prescription, PsychRights provides no allegation, much less specification,
3 as to how these Defendants “caused” the identified claims to be submitted nor is there any
4 specific allegation of wrongdoing, inaccuracy, falsification or fraud relative to these claims.¹⁶

5 Instead, the allegations contain the following data, none of which concerns causing a
6 fraudulent claim to be submitted: (i) the initials of a person (and corresponding identification
7 number) who was allegedly prescribed medication that was “presented to Medicaid and/or
8 CHIP for reimbursement;” (ii) the name of a drug; (iii) a “date” (it is unknown if the date
9 provided refers to the date of the prescription, the date it was filled, the date it was submitted
10 for payment, the date it was paid, or some other date); and (iv) an “amount” (PsychRights does
11 not specify if the amount represents the amount billed to Medicaid or CHIP, the amount
12 Medicaid or CHIP paid for the drug, or some other amount).

13 For each drug, PsychRights also states whether, according to its own interpretation of
14 certain drug compendia, the drug has a “medically accepted indication for use in anyone under
15 18 years of age” [¶166] and, if so, what, by its reading, the compendia says are the medically-
16 accepted indications for such patients [¶167]. In addition, for the drug Risperdal and for the
17 entire category of anti-depressants called “SSRIs,” PsychRights alleges that the manufacturers
18 of those drugs conducted unspecified “falsified studies,” made unspecified “falsified
19 statements,” or engaged in “other unlawful, fraudulent conduct” to obtain “FDA approval and
20 support in the Compendia for pediatric use” [¶¶ 218, 220]. It further alleges that the
21 “prescriber” Defendants—collectively—knew or should have known of the drug
22 manufacturers’ alleged but unspecified misconduct. *Id.* Finally, PsychRights alleges, without
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24 ¹⁶ It should be noted that these Defendants, presumably named for prescribing or supervising
25 the prescription of the drugs, are alleged to have engaged in an act—prescribing a drug on an
26 off-label basis—that is entirely legal. While drug manufacturer promotion of drugs for off-
label purposes is arguably illegal under the federal Food, Drug & Cosmetic Act, that law does
not purport to regulate prescriber discretion in this area.

1 reference to any Defendant, patient, prescription, statement, alleged misdiagnosis or alleged
2 correct diagnosis, that “Prescribers make false statements misdiagnosing children and youth
3 for indications to justify prescribing drugs approved by the FDA or supported by one or more
4 of the Compendia.”¹⁷ [¶216]

5 These allegations do not provide any particulars of the alleged fraud for these nine
6 Defendants. As the Sixth Circuit aptly summarized, the details of fraud must at a minimum
7 provide:

8 (1) precisely what statements were made in what documents or oral
9 representations or what omissions were made, and (2) the time and place of
10 each such statement and the person responsible for making (or in the case of
11 omissions, not making) same, and (3) the content of such statements and the
manner in which they misled the government, and (4) what the defendants
obtained as a consequence of the fraud.¹⁸

12 Even more fundamentally, the allegations must be factually plausible to survive the motion to
13 dismiss.¹⁹ Here, there is no Rule 9(b) specificity as to the alleged falsity of the claims or the
14 causation of the submission of false claims. Nor is there the slightest hint of plausibility for
15 the underlying allegation of fraud, given that the Alaska Medicaid and CHIP programs as
16 approved by CMS expressly covered the drugs in question irrespective of whether they were
17 prescribed on an off-label basis.

18 To illustrate how the claims information falls short of Rule 9(b) requirements,
19 consider the allegations against Defendants Dr. Osamu Matsutani and Denali Family Services
20 (“Denali”). PsychRights attributes the same universe of claims as having been “caused” by

21 _____
22 ¹⁷ These generic “prescriber” allegations fail on their face to satisfy Rule 9(b) as they do not
23 specify any Defendant’s role in the alleged fraud. *See Lubin v. Sybedon Corp.*, 688 F. Supp.
1425, 1443 (S.D. Cal. 1988) (“indiscriminately grouping all of the individual defendants into
[a] wrongdoing monolith” is prohibited by Rule 9(b)).

24 ¹⁸ *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006).

25 ¹⁹ *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007); *Ashcroft v. Iqbal*, 566
26 U.S. ___, 129 S.Ct. 1937, 1950-51 (2009).

1 both Denali and Dr. Matsutani—*i.e.*, twenty-three Cymbalta and fifty-two Risperdal
 2 prescriptions for patient “MG” with “dates” between January and December 2007 [¶¶202,
 3 206].²⁰ Yet there is no allegation as to any relationship between these two Defendants (and
 4 Defendants are unaware of any) that would explain how both could have caused the same
 5 claims to be submitted or that describes the conduct in a manner to either join or differentiate
 6 these two Defendants.²¹ Thus, the failure to specify any fraud leaves the Defendants with the
 7 task of sorting out and defending implausible allegations without responding to any identified
 8 wrongdoing.

9 Moreover, merely listing a drug, a date of unknown reference, and an amount of
 10 unknown reference for a given patient does not identify with particularity how the defendant
 11 “caused” the alleged fraud or even what the alleged fraud is. For Dr. Matsutani and Denali:

- 12 • There is no specific allegation of falsity, inaccuracy or subterfuge in the
 13 prescriptions identified.
- 14 • There is no allegation of who prescribed the identified drugs, as the same
 15 universe of claims is attributed to each of them.
- 16 • There is no indication that “MG” was a pediatric patient (a necessary element
 17 of PsychRights’ theory of fraud given its contentions at ¶¶166–67).
- 18 • There is no specification of the medical indication for which the drug
 19 Risperdal was prescribed in the fifty-two identified instances. Risperdal has
 20 some compendia-supported uses for pediatric patients [¶167]. Rather than
 21 identify the use for which the drug was actually prescribed for “MG,” the

22 _____
 23 ²⁰ One claim is attributed solely to Dr. Matsutani, but the claim is nonsensical as PsychRights
 identifies its “date” as occurring over two months into the future (July 18, 2010) [¶206].

24 ²¹ Similarly, PsychRights attributes the same universe of claims to Fairbanks Psychiatric and
 25 Neurologic Clinic, P.C. and Dr. Martino [¶¶203, 210], and the same universe of claims to
 26 North Star Hospital and Dr. Baisi [¶¶ 204, 207], but fails to differentiate between the
 Defendants as to their respective roles in allegedly causing the submission of a false claim.

1 complaint merely concludes that all of the claims for “MG” “were not for a
2 medically accepted indication” [¶¶202, 206].²²

- 3 • There are no facts describing how or why Dr. Matsutani or Denali knew, or
4 should have known, that “FDA approval and support in the Compendia for
5 pediatric use of Risperdal was obtained through falsified statements or other
6 unlawful, fraudulent conduct” [¶220].
- 7 • There is no allegation regarding “MG”’s diagnosis, or Dr. Matsutani’s and
8 Denali’s participation in that diagnosis, that would add the requisite specificity
9 to the generic “misdiagnosis” allegation asserted against all “prescribers” at
10 ¶ 216.
- 11 • Even if the Court were to accept PsychRights’ flawed interpretation of federal
12 Medicaid law concerning federal financial participation in payment for off-
13 label drugs,²³ there are no facts pled demonstrating that Dr. Matsutani and
14 Denali falsified any information or engaged in subterfuge or wrongdoing in
15 writing these prescriptions for these patients. Nor is there an allegation that
16 they knew, or should have known, that prescriptions for Cymbalta or Risperdal
17 were not properly payable by the Alaska Medicaid or CHIP programs, given
18 that the State of Alaska, which administers both programs, knowingly paid
19 claims for such prescribed drugs for pediatric patients (demonstrated by the
20 State officials’ status as Defendants in this case, by their motion to dismiss the
21

22 ²² For Defendants whose only identified prescriptions are for Risperdal, like Drs. Ozer and
23 Bautista, the Amended Complaint offers no clue as to whether these prescriptions were
24 written for compendia-supported indications. Even by PsychRights’ flawed theory, that
25 failing is fatal to its obligation to specify fraud and comply with Rule 9(b).

26 ²³ A detailed discussion of PsychRights’ erroneous interpretation of federal Medicaid
requirements is set forth in the Memorandum of Certain Defendants in Support of Their
Motion to Dismiss under Rule 12(b)(6) [Dkt. 93].

1 case,²⁴ and by PsychRights’s recent filing of a preliminary injunction to halt
2 the State’s continued reimbursement of these drugs).²⁵ Specification is
3 particularly needed where there is no apparent reason that anyone would
4 engage in wrongdoing or fraud relative to submission of the identified
5 claims.²⁶

- 6 • There is no identification of any legal or other authority that limits a
7 physician’s ability to practice medicine by prescribing drugs for off-label uses,
8 likely because there is none.²⁷ In other words, prescribing off-label is on its
9 face legal, appropriate and anticipated conduct, and PsychRights identifies no
10 factual basis to support that this lawful conduct became fraudulent activity by
11 these Defendants.²⁸

12
13
14 ²⁴ Dkt. 90.

15 ²⁵ Dkt. 113. In its Motion for Preliminary Injunction, PsychRights alleges: “The parties
16 [Hogan and Streuer] sought to be enjoined continue to present claims or cause claims to be
17 presented to Medicaid for payment of prescriptions to children and youth for psychotropic
18 drugs that are not for a medically accepted indication.” [Dkt. 113 at 3, ¶2.]

19 ²⁶ See *United States ex rel. Rost v. Pfizer, Inc.*, 253 F.R.D. 11, *16 (D. Mass. 2008)
20 (“Defendants have a compelling position that state approval of [off-label use] undermines the
21 assertion of a ‘false claim.’”).

22 ²⁷ See *United States ex rel. Franklin v. Parke-Davis*, 147 F. Supp. 2d 39, 44 (D. Mass. 2001)
23 (“[T]he FDA does not prevent doctors from prescribing the drug for uses that are different
24 than those approved by the FDA. Allowing physicians to prescribe drugs for such ‘off-label’
25 usage is an accepted and necessary corollary of the FDA’s mission to regulate
26 [pharmaceuticals] without directly interfering with the practice of medicine.”) (internal
quotations omitted).

²⁸ See *United States ex rel. Laucirica v. Stryker Corp.*, 1:09-CV-63, 2010 WL 1798321, *5
(W.D. Mich. May 3, 2010) (“Nothing in Plaintiff’s allegations make the inference of illegal
intent and conduct any more plausible than the inference of legal intent and legal conduct.”)
(dismissing complaint under Rule 8(a) and 9(b)).

- 1 • There is no allegation of what any Defendant in this category “obtained as a
2 consequence” of the alleged fraud.²⁹ This omission is particularly striking
3 given that prescribers are not alleged to have benefitted financially from
4 writing prescriptions, particularly where other medications were available to
5 treat these patients.

6 In brief, PsychRights’s allegations do not give rise to a claim for fraud that is facially
7 plausible,³⁰ and do not specify circumstances demonstrating how Dr. Matsutani and Denali or
8 the other Defendants in this category “caused” false claims to be submitted to Medicaid or
9 CHIP. The same omissions of the particulars of fraud exist for all Defendants in this category,
10 including the lack of information regarding the patient’s diagnosis, the use for which the drug
11 was prescribed, and facts suggesting that the particular defendant knew, or should have
12 known, that the drug was not properly payable, particularly given the policy of the Alaska
13 Medicaid and CHIP programs to cover and pay for these drugs.

14 Accordingly, the Amended Complaint should also be dismissed as to Defendants
15 Denali, Fairbanks Psychiatric and Neurologic Clinic, P.C., Frontline Hospital/North Star
16 Hospital, and Drs. Baisi, Bautista, Clark, Martino, Matsutani, and Ozer.

17 **C. The Publisher Thomson**

18 PsychRights acknowledges that Thomson is in a “different category” than the other
19 Defendants because “there is an additional link involved” in demonstrating that it allegedly
20

21 ²⁹ *Sanderson*, 447 F.3d at 877.

22 ³⁰ *Twombly*, 550 U.S. at 556-57; *Iqbal*, 129 S. Ct. at 1949. *See also Iqbal*, 129 S. Ct at 1950
23 (the determination of whether a complaint states a plausible claim is “a context-specific task
24 that requires the reviewing court to draw on its judicial experience and common sense”). The
25 allegations here are so bereft of plausible wrongdoing, given the State’s decision to pay for
26 these drugs, and the federal approval of the State’s Medicaid Plan, that the complaint does not
satisfy the *Iqbal* requirements under Rule 8(a), much less under Rule 9(b). *See* note 3, *supra*.
Nevertheless, given that the allegations are made under the FCA, the more stringent
requirements of Rule 9(b) apply.

1 “caused false prescriptions to be presented to Medicaid.”³¹ PsychRights offers not a shred of
2 factual specification for its conclusory assertion that Thomson is causally “linked” to the
3 presentation of false prescriptions through (a) its alleged provision of continuing medical
4 education (“CME”) programs paid for by pharmaceutical companies promoting off-label drug
5 prescription and/or (b) allegedly false statements in its DRUGDEX compendium.³²

6 First, with respect to CME programs that allegedly “exaggerat[ed]” the effectiveness
7 and “downplay[ed]” the harms of the off-label prescription of certain drugs, PsychRights has
8 not alleged any facts that would allow Thomson to defend against this conclusory assertion.³³
9 PsychRights does not specify: (a) the drugs allegedly promoted at these unidentified CME
10 programs, (b) the off-label use or uses allegedly promoted, (c) the content of the CME
11 programs, (d) the drug companies that allegedly sponsored them, and (e) when and where
12 these CME programs occurred. Further, even if factual support for the allegation was
13 forthcoming, PsychRights must also allege—which it does not and cannot—that Thomson
14 engaged in such activity in order to cause the submission of false claims.³⁴

15 Similarly, PsychRights’s conclusory allegation that Thomson made false statements in
16 DRUGDEX is indisputably not pled with the specificity required by Rule 9(b). Again, there
17 is no identification of any specific statements in DRUGDEX relating to any particular
18 indications for any identified drugs that Plaintiff contends are false.³⁵ Moreover, not only

19 ³¹ Dkt. 110. at 10.

20 ³² See Dkt. 110 at 10-11 (quoting FAC ¶¶ 196-199).

21 ³³ *Bly-Magee*, 236 F.3d at 1018-19.

22 ³⁴ See *Rost*, 253 F.R.D. at 16-17 (“Merely alleging off-label marketing . . . is not sufficient,
23 without more, to plead a false claims act violation. Plaintiff must allege that Defendant
24 ‘caused’ the submission of a ‘false claim’ by a doctor.”).

25 ³⁵ Notably, PsychRights itself relies on DRUGDEX ratings as its basis for asserting that
26 various indications for psychotropic drugs are medically accepted. See Motion for
Preliminary Injunction against Defendants Hogan and Streur, Dkt. 113, at 12 Particularly in
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1 does PsychRights fail to identify specific DRUGDEX ratings or the studies underlying those
 2 ratings that it believes are false, it fails to allege—as it must—how Thomson knew they were
 3 false.³⁶

4 PsychRights’s citation to case law from other circuits permitting an FCA claim to
 5 proceed where the allegations present “factual or statistical evidence to strengthen the
 6 inference of fraud beyond possibility”³⁷ does not help its claim against Thomson. The cited
 7 cases—in stark contrast to the present allegations—all include specific factual evidence
 8 (detailed by actual insiders) that the courts could reasonably conclude supported an inference
 9 of fraud.³⁸ While PsychRights believes it is enough to casually allege “Thomson was paid by

10 light of PsychRights’s own adoption of DRUGDEX ratings, PsychRights’s failure to identify
 11 those ratings—if any—it alleges are false further illustrates its claim against Thomson are
 12 meritless.

13 ³⁶ Again, as detailed in Defendants’ opening memorandum, it is not enough that the studies
 14 supporting DRUGDEX’s ratings were scientifically incorrect to state an FCA claim.
 15 PsychRights must identify facts indicating Thomson knew the studies supporting its ratings to
 16 be “lies.” Dkt. 84 at 9 (citing *Wang v. FMC Corp.*, 975 F.2d 1412, 1420-21); *see also Morton*
 17 *A Plus Benefits, Inc.*, 139 Fed. Appx. 980 (10th Cir. 2005) (“Falsity under the FCA ‘does not
 18 mean scientifically untrue; it means a lie.’”).

19 ³⁷ Dkt 110 at 11.

20 ³⁸ *See United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13, 30-31 (1st
 21 Cir. 2009) (where complaint alleged, for example, with respect to a specified hospital, that
 22 defendant provided free as a kickback over \$5,000 of a specific drug that the hospital could
 23 then submit for reimbursement, court concluded that “although a close call,” plaintiff alleged
 24 the “who what, where, and when of the allegedly false of fraudulent representations” and also
 25 sufficiently alleged facts “with respect to the medical providers he identifies that support his
 26 claim that OBP *intended* to cause the submission of false claims”) (emphasis in original);
Grubbs 565 F.3d at 191-92 (“The Complaint sets out the particular workings of a scheme that
 was communicated directly to the relator by those perpetrating the fraud. [Plaintiff] describes
 in detail, including the date, place and participants, the dinner meeting at which two doctors in
 his section attempted to bring him into the fold of their on-going fraudulent plot. He alleges
 his first hand experience of the scheme unfolding as it related to him . . . Also alleged are
 specific dates that each doctor falsely claims to have provided services to patients and often
 the type of medical service or its Current Procedural terminology code that would have been
 used in the bill.”); *Rost*, 253 F.R.D. at 13 (plaintiff physician employed by defendant
 pharmaceutical company alleged specific, illegal off-label marketing tactics of a specific drug

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1 drug companies to promote the off-label prescribing that caused the false claims,”³⁹ Rule 9(b)
 2 exists precisely to prevent such generalized allegations of allegedly fraudulent schemes
 3 asserted without factual support. Accordingly, the Amended Complaint should be dismissed
 4 as to Defendant Thomson.

5 **D. Defendants That Allegedly Directly Submitted False Claims**

6 **1. Pharmacy Defendants**

7 For pharmacy Defendants Fred Meyer, Safeway, and Wal-Mart, the Amended
 8 Complaint identifies a limited number of prescription drug claims that each allegedly
 9 presented to Medicaid or CHIP for payment.⁴⁰ As with the claims attributed to the nine
 10 Defendants alleged to have “caused” false claims described in Section B above, PsychRights
 11 makes the generalized allegation that none of the claims were for a medically-accepted
 12 indication [¶¶ 190–195], and suggests that by adding the claims information to the Amended
 13 Complaint, it meets its obligations under Rule 9(b). These allegations do not, however, add
 14 any particulars of fraud for at least the following reasons:

- 15 • There is no allegation of falsity, inaccuracy or subterfuge in these Defendants’
 16 submissions to the Alaska Medicaid and CHIP programs, likely because the
 17 State of Alaska, by rule and policy, paid for these claims.
- 18 • There is no allegation that the Medicaid beneficiaries in question (“AL” and
 19 “RT” for Fred Meyer; “FH” and “DG” for Safeway; “AL” and “SM” for Wal-
 20 Mart) were under 18 years old.

21
 22
 23 for use with children and alleged that tactics were employed to cause the submission of false
 24 claims by doctors).

25 ³⁹ Dkt. 110. at 11.

26 ⁴⁰ For example, the Amended Complaint attributes only four claims to Wal-Mart, only one of
 which was written by a named Defendant.

- 1 • There is no allegation of the indications for which the drugs were prescribed
2 (for many drugs listed, PsychRights alleges there are some medically-indicated
3 uses for pediatric patients),⁴¹ other than the bald allegation that none of the
4 drugs were prescribed for a medically-accepted indication according to
5 PsychRights’s interpretation of certain drug compendia.
- 6 • Assuming a drug was prescribed for a non-indicated use, there is no allegation
7 that Fred Meyer, Safeway, and Wal-Mart knew or should have known the use
8 for which the non-indicated drug was prescribed.
- 9 • There are no facts pled suggesting Fred Meyer, Safeway, and Wal-Mart knew
10 or should have known that any claims submitted were the result of prescribers’
11 purportedly wrongful behaviors, such as “misdiagnosing” [¶216] or
12 prescribing drugs that were improperly studied or unlawfully promoted by
13 drug companies [¶¶217, 219].
- 14 • Even accepting as true PsychRights’ incorrect interpretation of federal
15 Medicaid law, there are no facts pled suggesting that Fred Meyer, Safeway,
16 and Wal-Mart knew or should have known that the identified drugs were not
17 properly payable. Indeed, as noted above, Alaska Medicaid and CHIP has
18 historically paid, and continues to pay, for them under the circumstances
19 identified in PsychRights’s Amended Complaint.

20 Accordingly, the Amended Complaint should be dismissed as to Defendants Safeway, Fred
21 Meyer and Wal-Mart.

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23
24 _____
25 ⁴¹ Indeed, both medications that Wal-Mart is alleged to have dispensed, Seroquel and Zoloft,
26 have compendia-supported indications for pediatric patients. Seroquel is FDA approved for
bipolar disorder and schizophrenia, and Zoloft is FDA approved for obsessive-compulsive
disorder and is compendia-supported for generalized anxiety disorder and depression.

1 2. *State Defendants*

2 The allegations against the individual representatives of various state agencies (the
3 “State Defendants”) also remain deficient under Rule 9(b). First, the roles of each State
4 Defendant are so vaguely defined and unconnected to the claims identified in the Amended
5 Complaint that they are incomprehensible. For example, the Amended Complaint singles out
6 State Defendant Tammy Sandoval (Director of the Office of Children’s Services) [¶12] as a
7 party that caused the submission of false claims, and associates with her 160 claims for two
8 individuals (“MG” and “AL”). Yet there is no specification whatsoever as to Sandoval’s role
9 in either the generation or processing of these claims, nor are there facts pled that differentiate
10 her role from that of the other State Defendants, William Hogan (Commissioner of DHSS)
11 [¶11], Steve McComb (Director of Division of Juvenile Justice) [¶13], and William Streur
12 (Director of the Division of Health Care Services within DHSS).⁴² Moreover, there is no
13 explanation as to why PsychRights associates 160 of the 280 total identified claims with any
14 given State Defendant, given its allegations that all 280 claims were submitted to the
15 Medicaid or CHIP programs.

16 Finally, PsychRights fails to plead any facts regarding the State Defendants that allege
17 the circumstances under which they engaged in fraudulent conduct.⁴³ At most, PsychRights
18 identifies its disagreement regarding an interpretation of federal Medicaid law, as it is

19 _____
20 ⁴² PsychRights’ brief, at footnotes 14 and 15, attempts to extend the claims expressly
21 associated with Sandoval to Defendants Hogan and Streur, without pleading additional facts
22 as to the latter Defendants’ roles in the generation or processing of these claims [Dkt. 110 at
23 3-4]. This is a particularly glaring omission where the Amended Complaint states that some
24 State Defendants caused the submission of false claims (Sandoval and McComb), and other
25 State Defendants (Hogan and Streur) authorized their reimbursement [¶¶ 11-14].

26 ⁴³ *See, e.g., Bly-Magee*, 236 F.3d at 1018-19 (upholding dismissal of relator’s FCA complaint
under Rule 9(b) where relator broadly asserted that the defendant “concealed the fraudulent
submission of false claims . . . to avoid repayment of funds to the United States” and that the
defendant conspired to “defraud the United States by obtaining payment of fraudulent
claims.”).

1 undisputed that the Alaska Medicaid and CHIP programs have paid for and continue to pay
2 for the drugs in question in this litigation.⁴⁴ Actions taken based on a good faith interpretation
3 of an ambiguous federal statute do not, axiomatically, amount to false claims submissions.⁴⁵
4 Moreover, it is not specified as to why representatives of the State, which bears much of the
5 cost of the Medicaid and CHIP programs, would drive up its own expenses by engaging in
6 false, fraudulent or otherwise wrongful conduct relative to the federal government, which
7 only partially pays for the programs. Certainly, any aspect of the conduct that is alleged to be
8 improper is unspecified and unexplained in the Amended Complaint.

9 In any event, PsychRights fails to identify any claims submitted by the State
10 Defendants that were themselves “false.” While there may be some legal theory under which
11 a state health care benefits program could be liable for authorizing the payment of claims
12 (even against its economic self-interest) that are not payable under a federal statute, the FCA
13 is not such an enforcement vehicle.⁴⁶ For example, the Amended Complaint contains no
14 specification of any “false or fraudulent claim” that the State Defendants “presented” (or
15 “cause[d] to be presented”) for payment. 31 U.S.C. § 3729(a)(1)(A) (emphasis added). The
16 vague allegation that Defendants Hogan and Streur “authorize[ed] false claims for

17 ⁴⁴ See Dkt. 93 (Memorandum of Certain Defendants in Support of Motion to Dismiss
18 Pursuant to Rule 12(b)(6)) & Dkt. 113 (PsychRights’ Motion for Preliminary Injunctions
19 against State Defendants to enjoin their reimbursement of certain Medicaid prescription
20 drugs).

21 ⁴⁵ See, e.g., *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 684 (5th Cir. 2003) (*en*
22 *banc*) (Jones, J. concurring) (“Where there are legitimate grounds for disagreement over the
23 scope of a contractual or regulatory provision, and the claimant’s actions are in good faith, the
24 claimant cannot be said to have knowingly presented a false claim.”); *United States ex rel.*
25 *Hagood v. Sonoma Water Agency*, 81 F.3d 1465, 1477–78 (9th Cir. 1996).

26 ⁴⁶ A state health care benefits program itself is not subject to liability under the FCA.
Vermont Agency for Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) (states and
state agencies are not “persons” within the meaning of the FCA and thus not amenable to
suit). Naming individual State officials acting in their official capacities appears to be a ploy

1 reimbursement by the Government of the United States Government's [sic] federal financial
2 participation share" [Am. Compl. ¶ 213] does not satisfy Rule 9(b)'s requirement that a false
3 claim be identified with particularity. The Amended Complaint does not specify any "claim"
4 submitted by a State Defendant to the federal government for "federal financial participation
5 share," nor does it identify any statement on such a claim that was allegedly false or
6 fraudulent.

7 PsychRights likewise fails to identify any "false record or statement material to a false
8 or fraudulent claim" that the State Defendants allegedly submitted to obtain federal financial
9 participation in connection with the identified medications, 31 U.S.C. § 3729(a)(1)(B), nor
10 does it allege that the State Defendants were engaged in a conspiracy to violate the FCA. *Id.*
11 § 3739(a)(1)(C). In sum, the Amended Complaint is plainly deficient as to the State
12 Defendants, and must be dismissed as to these Defendants as well.

13 **III. Dismissal of the Amended Complaint With Prejudice Is Appropriate**

14 After being fully apprised of the original complaint's Rule 9(b) deficiencies,
15 PsychRights filed an Amended Complaint on May 6, 2010 which appears to represent its best
16 efforts to cure the failings identified in the original. While the amended pleading adds limited
17 claims information for a few Medicaid beneficiaries, it still contains no particularized
18 allegations whatsoever as to fifteen of the Defendants. Further, the limited claims information
19 provided for the remaining Defendants does not remedy the basic Rule 9(b) defect, which is
20 the absence of any specific and particularized circumstances of fraud.

21 PsychRights's fundamental problem is that even if it did have more specific claims
22 information, such as more Medicaid claims, copies of actual prescriptions, or actual claims
23 that pharmacies submitted for payment to Medicaid or CHIP, these details would not
24 constitute the particulars of fraud, as the Amended Complaint does not identify any facts
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26 to evade this ruling without required specification of what roles these individual Defendants
may have had in relation to any of the identified or referenced claims.

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1 demonstrating that the underlying conduct of any Defendant was improper. For example, no
2 facts are pled (nor could any such facts be pled) demonstrating how perfectly legal conduct,
3 such as off-label prescribing, or the State Defendants paying for drugs that are reimbursable
4 under the State's own regulations, constitutes fraud.

5 Having failed to identify the circumstances of fraud with particularity after notice of
6 the deficiencies and an opportunity to amend, it appears that PsychRights has alleged all of
7 the facts in its possession, and thus further amendment would be futile.⁴⁷ Accordingly, the
8 Court should dismiss its Amended Complaint with prejudice.⁴⁸

9 **IV. CONCLUSION**

10 PsychRights maintains that the only purpose of Rule 9(b) is to enable the Defendants
11 to sufficiently understand the fraud so they can respond to the complaint and not simply deny
12 that they have done anything wrong.⁴⁹ That is but one of several purposes identified by the
13 Ninth Circuit, which include

14 (1) . . . provid[ing] defendants with adequate notice to allow them to defend the
15 charge and deter plaintiffs from the filing of complaints as a pretext for the

16 ⁴⁷ Fed. R. Civ. P. 15(a); *Eminence Capital v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.
17 2003) (leave to amend should be granted unless complaint cannot be saved by amendment).
18 *See also Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1015 (11th Cir. 2005) (with prejudice
19 dismissal under Rule 9(b) appropriate where the most recently amended complaint contained
20 the same deficiencies as the previous complaint).

21 ⁴⁸ PsychRights is not permitted to avoid dismissal of its case and cure the pleading
22 deficiencies through discovery. As noted above, PsychRights's response states that the
23 Defendants for whom "offending prescriptions have not been identified" "either have or do
24 not have evidence that they did or did not prescribe a psychotropic drug to a Medicaid
25 beneficiary under the age of 18 that was not for a medically accepted indication." [Dkt. 110
26 at 10] To the extent that this statement is a prelude to a discovery request, discovery cannot
precede compliance with Rule 9(b). *See United States ex rel. Russell v. Epic Healthcare
Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999) (in the absence of reliable allegations that
particulars of fraudulent claims exist, a qui tam plaintiff is not entitled to receive a "ticket to
the discovery process" in order to meet Rule 9(b)'s particularity requirement).

⁴⁹ Dkt. 110 at 4.

1 discovery of unknown wrongs; (2) ... protect[ing] those whose reputation
2 would be harmed as a result of being subject to fraud charges; and (3) ...
3 'prohibit[ing] plaintiff[s] from unilaterally imposing upon the court, the
4 parties and society enormous social and economic costs absent some factual
5 basis.⁵⁰

6 Ending the litigation now by granting this motion to dismiss would serve all the
7 salutary purposes of Rule 9(b), particularly given that PsychRights has demonstrated its
8 inability to make a plausible accusation of fraud. Thus, the Court should dismiss the
9 Amended Complaint with prejudice as to all Defendants.

10 Respectfully submitted this 25th day of May, 2010.

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⁵⁰ *Kearns*, 567 F.3d at 1125 (internal quotations and citations omitted).

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1 **Certificate of Service**

2 I certify that on this 25th day of May 2010, I caused a true and correct copy this Reply of all
3 Defendants in Support of Rule 9(b) Motion to Dismiss served on all parties of record by
4 electronic means through the ECF system as indicated on the Notice of Electronic Filing, or if
not by ECF, by first class regular mail as follows:

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