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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.	)	

REPLY 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)

The False Claims Act ("FCA") contains an important limit on federal courts' subject matter jurisdiction: an action's allegations cannot have been previously publicly disclosed, unless the relator is an "original source" of the information. In this case, PsychRights concedes that it is not an original source.[1] Instead, it relies on three arguments to try to avoid dismissal for lack of jurisdiction. First, PsychRights contends that a March 2010 amendment to the public disclosure bar applies to this action. Second, PsychRights argues that some, but not all, of the documents identified by Defendants fall outside of the FCA's list of sources that constitute "public disclosures." Third, PyschRights claims that the current action neither is "based upon" nor alleges "substantially the same" allegations or transactions described in those documents. PsychRights is mistaken on all three grounds.

First, statutes and amendments do not apply retroactively "absent clear congressional intent favoring such a result."[2] The U.S. Supreme Court already has acknowledged that the recent amendment to the public disclosure bar "makes no mention of retroactivity, which would be necessary for its application to pending cases given that it eliminates petitioners' claimed defense to a *qui tam* suit."[3] PsychRights nonetheless suggests, though admittedly "not without doubt," that a plaintiff "probably" can get around this clear law by filing an amended complaint after the statutory amendment becomes effective.[4] The case law rejects that tactic.

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[1] Opposition To Motion To Dismiss, Dkt. #111, ("PR Opp.") at 19.

[2] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994); *see also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997).

[3] *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, -- U.S. --, 130 S. Ct. 1396, 1400 n.1 (2010).

[4] PR Opp. at 2, 6.

Second, under the bar's applicable pre-amendment version, each of the documents identified by defendants falls within one of the enumerated sources of public disclosures.[5] Even if the newly amended version did apply, however, PsychRights's previous state court case would be the only document that might be eliminated from consideration, and the other documents, upon many of which the state court case was based, are sufficient to preclude jurisdiction.

Third, PsychRights's final argument misstates the standard for what information a public document must disclose for the bar to apply. The documents identified by the defendants disclosed all but the most defendant-specific allegations contained in PsychRights's Amended Complaint.[6] PsychRights cannot avoid the public disclosure bar simply because the documents did not name every defendant or claim. PsychRights's allegations of industry-wide conduct are based upon and substantially the same as the allegations contained in the public disclosures, and unquestionably put the government on the trail of the alleged conduct. PsychRights's concession that it is not the original source of these allegations confirms that this case is one of the classic parasitic *qui tam* actions that the public disclosure bar was designed to prevent.

I. THE RECENT AMENDMENT TO THE PUBLIC DISCLOSURE BAR DOES NOT APPLY RETROACTIVELY TO THIS CASE.

PsychRights tries to squeeze its claim into the newly amended version of the public disclosure bar. Despite the Supreme Court's guidance issued just two months ago, PsychRights argues that the amendment should apply retroactively. PsychRights also argues that its original complaint was rendered "non-existent" when it filed the Amended Complaint and that the amended bar should apply to PsychRights's supposedly new action. Both arguments fail.

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[5] *See* Memorandum in Support of Motion To Dismiss, Dkt. #91, ("MTD") at 11-12 (identifying the three categories of enumerated sources).

[6] *See id.* at 5-10.

First, PsychRights only half-heartedly attempts to challenge the legal rule that a substantive statutory amendment does not apply retroactively to a pending case or past alleged conduct unless Congress makes clear an intent for the amendment to apply retroactively.[7] This is unsurprising, given the Supreme Court's recent statement that the amended public disclosure bar "makes no mention of retroactivity, which would be necessary for its application to pending cases" like this one.[8] Courts similarly held that the 1986 amendments to the FCA did not apply retroactively to pre-amendment complaints or claims.[9] Indeed, the Supreme Court ruled that the amendment narrowing the FCA's "government knowledge" bar did not apply retroactively to conduct occurring before the amendment's effective date, even though the complaint was filed *after* the amendments became effective.[10]

Second, a party may not avail itself of a favorable new statute or amendment merely by amending its complaint after the new law's effective date.[11] This rule is particularly applicable where, as here, the amended complaint relates back to the original complaint.[12] Attempting to

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[7] *See Landgraf*, 511 U.S. at 280 (noting the court's "traditional presumption" that statutes do not apply retroactively "absent clear congressional intent favoring such a result").

[8] *Graham County Soil*, 130 S. Ct. at 1400 n.1.

[9] *See, e.g., United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 968-69 (9th Cir. 1999) (district court did not have jurisdiction over FCA case addressing claims that were reported prior to the 1986 amendments).

[10] *See Hughes Aircraft*, 520 U.S. at 946. PsychRights's attempt to distinguish *Hughes Aircraft* from the present case fails. PR Opp. at 7 (PsychRights refers to *Hughes Aircraft* as "*Schumer*"). In *Hughes Aircraft*, the Court held that the 1986 amendments to the FCA did not apply retroactively because they "eliminate[d] a defense to a qui tam suit – prior disclosure to the Government – and therefore change[d] the substance of the existing cause of action for qui tam defendants. . . " 520 U.S. at 948. Likewise, retroactive application of the 2010 amendments to the FCA would narrow the scope of the public disclosure bar defense to defendants here.

[11] *See, e.g., McAtee v. Capital One, F.S.B.*, 479 F.3d 1143, 1146 (9th Cir. 2007) (for the Class Action Fairness Act ("CAFA") to apply to plaintiffs' claims, the claims must have been "commenced" after the enactment of the statute; plaintiffs could not later amend their complaint to bring their claims within the purview of the CAFA).

[12] *See Weber v. Mobil Oil Corp.*, 506 F.3d 1311, 1314 (10th Cir. 2007) ("if the amendment relates back, the commencement date is the date of original filing of the action notwithstanding the amendment"). Because PsychRights alleges that Defendants continued to prescribe, dispense, and submit the same type of medications and

argue that the Amended Complaint rendered the original complaint "non-existent," PsychRights misinterprets *Rockwell v. United States.* In that case, the Supreme Court held that courts should "look to the amended complaint" to determine which set of allegations must be publicly disclosed, not whether a statutory amendment applies to the case.[13] Similarly, PsychRights misinterprets two Ninth Circuit cases, neither of which holds that an original complaint is treated as "non-existent" for purposes of determining whether a statutory amendment applies retroactively to an action.[14]

Finally, PsychRights argues that, unless the Court analyzes the case only under the amended public disclosure bar, then both the pre- and post-amendment versions of the law would potentially apply because the lawsuit addresses both pre- and post-amendment conduct.[15] Contrary to PsychRights's suggestion that this could pose an undue procedural burden, the Ninth Circuit has already confirmed that there is no difficulty in treating claims in this way.[16] Furthermore, multiple courts have held that the "continuing violation" theory is applicable only to statutes of limitations, and does not overcome the *Landgraf* presumption against the

(continued…)

claims before and after the amendment's effective date, the post-March 23, 2010 conduct and the Amended Complaint relate back to the original complaint. Notably, however, PsychRights fails to cite even one specific example of post-March 23, 2010 conduct.

[13] 549 U.S. 457, 473-74 (2007) (holding that the trial court lacked jurisdiction to enter judgment in favor of the relator because the amended complaint and controlling pretrial order related to matters for which the relator was not an original source).

[14] *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 936 (9th Cir. 2009) (amended complaint, rather than original complaint, was properly considered in analyzing whether class certification standard was met; mentions nothing about retroactive application of any statute); *Ferdick v. Bonzelet*, 963 F.2d 1258, 1263 (9th Cir. 1992) (reviewing dismissal of amended complaint, court ruled that it would not use allegations in original complaint to rectify procedural errors in amended complaint; mentions nothing about retroactive application of any statute).

[15] *See* PR Opp. at 7-8.

[16] *See Newsham*, 190 F.3d at 968 ("the 1982 version of the FCA applies to all false claims presented before the effective date of the 1986 amendments," while "the 1986 amendment applies to the presentation of false claims after its effective date").

retroactive application of statutes.[17] Moreover, with no specific allegation of a post-amendment claim, PsychRights's argument is merely academic. The amended version of the public disclosure bar simply does not apply to this action.

II. THE DOCUMENTS IDENTIFIED BY DEFENDANTS FALL WITHIN THE FCA'S ENUMERATED CATEGORIES OF "PUBLIC DISCLOSURES."

As explained in the Defendants' opening brief, the FCA contains certain enumerated categories of "public disclosures." These include civil complaints filed by the same relator, federal or state investigations, and news media reports.[18] PsychRights concedes that all but one of the identified documents fall within the pre-amended FCA's enumerated categories of public disclosures and that several qualify under the post-amendment version.

A. Investigation by CMS and Utah.

An investigation conducted by the Federal Centers for Medicare & Medicaid Services ("CMS") and the State of Utah Attorney General's Office addressed the precise issue raised by PsychRights. The investigation publicly disclosed 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."[19] PsychRights does not dispute that the investigation was made public or that the federal government was involved in the investigation. Instead, PsychRights argues (1) that the

[17] *See Tomasell v. Rubin*, 167 F.3d 612, 620 (D.C. Cir. 1999) (with respect to Title VII amendments, "an award of compensatory damages for preenactment conduct would have an impermissible effect."); *Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, n.1 (8th Cir. 1997) (holding that the 1991 amendments to Title VII did not apply to claims which predated those amendments, and noting that there was no Eighth Circuit case law "where the concept of continuing violation, ordinarily associated with statutes of limitations issues, has been employed to overcome a non-retroactivity rule. In any case, it is clear we would violate the express teaching of the Supreme Court if we so held.").

[18] *See* MTD at 11-12.

[19] MTD, Ex. 2.

disclosures do not reflect an "investigation" under Section 3730(e)(4)(A), and (2) that, because the investigation was not federal, the amended bar would not apply.[20] Neither argument has merit.

Case law shows that the communications between CMS and the Utah Attorney General's Office constitute an "investigation" under the FCA's public disclosure bar. "[I]investigations need not be . . . formal . . . [but] may be informal or casual inquiries," comparable to a "police officer, hearing a particular noise in a dark shop, investigat[ing] by gingerly shining a flashlight inside and asking, 'What's up?'"[21] In *Glaser v. Wound Care*, the Seventh Circuit held that a CMS letter demanding a doctor's repayment for improper use of billing codes was an "investigation."[22] Courts have applied a low threshold, consistent with the "Act's well-settled purpose to prevent 'parasitic qui tam actions.'"[23]

In addition, the CMS-Utah investigation is "federal" under the amended version of the public disclosure bar. It does not matter whether a federal or state entity started the investigation

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[20] PR Opp. at 9-11.

[21] *United States v. Bank of Farmington*, 166 F.3d 853, 862 (7th Cir. 1999), *overruled on other grounds by Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 915-16 (7th Cir. 2009); *see also id.* (an "investigation" occurs whenever "[a]n official of an administrative agency faced with an anomaly . . . in a matter within his purview [makes] an inquiry to an official of a regulated industry for which the agency was responsible"); *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 384 (3rd Cir. 1999) (the act of responding to FOIA requests were administrative investigations under the FCA); *United States ex rel. Grant v. Rush-Presbyterian/St. Luke's Med. Ctr.*, No. 99 C 06313, 2001 WL 40807, at *3 (N.D. Ill. Jan 16, 2001) (disclosure of information by a company's representatives and employees during the course of interviews conducted by Government investigators and officials is sufficient to amount to an "investigation"); *but cf. United States ex rel. Haight v. Catholic Healthcare W.*, 445 F.3d 1147, 1155-56 (9th Cir. 2006) (responses to FOIA requests are "investigations" under the act only if the document obtained via FOIA request is also one of the enumerated public disclosures under Section 3730(e)(4)(a)).

[22] 570 F.3d at 913-14 (reasoning that the letter signified that "the appropriate entity responsible for investigating claims of Medicare abuse had knowledge of possible improprieties with Wound Care's billing practice and was actively investigating those allegations and recovering funds").

[23] *United States ex rel. Reagan v. E. Texas Med. Ctr. Reg'l. Healthcare Sys.*, 274 F. Supp. 2d 824, 850 (S.D. Tex. 2003) (internal citations omitted).

when both were involved. What matters is that the federal government knowingly participated in the investigation.[24]

B. *PsychRights v. Alaska*

PsychRights asserts that its previous case is a public disclosure under the pre-amendment bar, but not under the amendment.[25] While technically correct regarding the amendment, PsychRights's assertion ignores the fact that its state court complaint appears to rely entirely on the remainder of the documents, which are publicly disclosed and fall within the sources listed in both versions of the bar.

C. Federal Court Cases and Articles

PsychRights concedes that the federal court cases, such as *Parke-Davis*, and the cited articles are public disclosures under both the pre-amendment and the amended versions of the public disclosure bar. Defendants agree.

III. PSYCHRIGHTS'S ALLEGATIONS ARE BASED UPON PUBLIC DOCUMENTS.

Contrary to PsychRights's assertion, the documents identified by defendants did not merely disclose "general information about the overprescribing of psychotropic drugs to children and youth, the great harm it causes, etc."[26] They also disclosed precisely the allegation raised in the present case, which PsychRights describes as an FCA "action [for] presenting or causing the

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[24] *Seal 1 v. Seal A*, 255 F.3d 1154, 1161 (9th Cir. 2000). Nor does it matter that CMS concluded the investigation contrary to how PsychRights would have wished – i.e., that the Social Security Act "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) . . . ." MTD, Ex. 2 (emphasis added).

[25] *See* PR Opp. at 11-18.

[26] *Id*. at 2.

presentment of claims to Medicaid for prescriptions of psychotropic drugs to children and youth that are not for 'medically accepted indications.'"[27]

- As discussed in section II.A., the CMS-Utah investigation disclosed precisely the same allegations.

- In its amended state complaint, filed on November 24, 2008, PsychRights made the same 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 . . . .[28]

  PsychRights further alleged in that case that Alaska Medicaid authorized these alleged illegal claims.[29]

- The other cases identified by defendants made allegations similar to those in this case. Indeed, in its opposition brief, PsychRights recognizes that the government has pursued FCA cases against large pharmaceutical manufacturers "for causing the presentment of claims to Medicaid for prescriptions of psychotropic drugs that are not for medically accepted indications, including Geodon and Seroquel for use in children," and quotes from *United States ex rel. Rost v. Pfizer*, 253 F.R.D. 11, 13-14 (D. Mass. 2008), a statement nearly identical to PsychRights's own description of its case.[30]

- The cited articles also disclosed the allegations. For example:

> In 2002, a large circulation newspaper stated: "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,

[27] *Id.* at 1-2.

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

[29] *Id.* Ex. 5, ¶¶ 218-36.

[30] PR Opp. at 14, 15.

> an anti-depressant" for off-label uses.[31] Notably, both Ritalin and Prozac have never been FDA approved for patients younger than six.
>
> In 2008, a New York paper revealed the costs to New York Medicaid of off-label psychotropic medications to pediatrics.[32]
>
> In 2008, the media reported on federal hearings on the use of psychotropic medication on children on Medicaid. One article noted that these children are often prescribed multiple psychotropic medications, and sometimes these drugs are used for off-label purposes.[33] The hearing itself is another public disclosure.[34]

That the public disclosures did not identify all of the defendants or Medicaid claims is irrelevant.[35] The public disclosure bar does not require that a public disclosure present the level of particularity that, for example, Rule 9(b) demands.[36] Public disclosures do not need to identify each of the named defendants or the precise claims at issue, particularly where, as here, the relator alleges continuous conduct by multiple industry parties.

For instance, in *In re Natural Gas Royalties Qui Tam*, the relator sued 220 defendants in the natural gas industry, alleging misconduct relating to the calculation of royalties owed to the government.[37] Prior to the relator filing the complaint, however, Senate documents described similar misconduct. Even though the Senate documents did not name all alleged bad actors, the

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[31] MTD, Ex. 9, *Some infants get medication despite advice of experts*, Chicago Sun-Times (Apr. 21, 2002).

[32] MTD, Ex. 11, *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 . . . . [M]ost 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.'").

[33] MTD, Ex. 12, *Rep. McDermott announces hearing on utilization of psychotropic medication for children in foster care*, U.S. Fed. News (Mar. 12, 2008).

[34] *Id.*

[35] PsychRights admits that *PsychRights v. Alaska* disclosed the following Alaska State Medicaid defendants: William Hogan, William Streur, Tammy Sandoval and Steve McComb. PR Opp. 11-12.

[36] *See In re Natural Gas Royalties Qui Tam*, 467 F. Supp. 2d 1117, 1135 (D. Wyo. 2006) (rejecting relator's assertion that a public disclosure must contain the specificity required by Rule 9(b) in order to trigger the public disclosure bar to the FCA).

[37] 562 F.3d 1032, 1037-38 (10th Cir. 2009).

Tenth Circuit found that the documents were sufficient to put the government on the trail of the alleged fraud and to allow the government to "target its investigation toward specific actors and a specific type of fraudulent activity."[38] The court accordingly held that the documents precluded subject matter jurisdiction over the relator's case.

Likewise, in *United States ex rel. Gear v. Emergency Medical Associates of Illinois, Inc.*, the Seventh Circuit held that the public disclosures showing an industry-wide fraud barred the relator's claim.[39] The relator alleged that the defendants had improperly billed Medicare for the cost of physicians providing services that residents had actually performed.[40] Prior to the relator filing the complaint, however, the General Accounting Office had reported that there was a settlement between the Department of Justice and the University of Pennsylvania on this issue and that similar problems may be more widespread.[41] There also were several news articles about this potential fraud.[42] None of these disclosures identified the particular defendants, and thus, relator argued, they did not constitute public disclosures under the FCA.[43] The court held: "*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*. The disclosures at issue here were of industry-wide abuses and investigations. Defendants were implicated."[44]

The CMS-Utah investigation, prior court cases, and news articles identified in

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[38] *Id.* at 1042.

[39] 436 F.3d 726, 729 (7th Cir. 2006).

[40] *Id* at 727.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 729.

[44] *Id.* (emphasis added).

Defendants' motion have as much or more specificity as the disclosures in *Natural Gas* and *Gear* that barred those relators' FCA claims. These disclosures publicly revealed that Medicaid was paying for off-label prescriptions for indications not supported by the compendia. They did not limit this prescribing behavior to any particular physicians, pharmacies or states. Defendants in this case were as easily identifiable as the defendants in *Natural Gas* and *Gear*. If the Government was concerned that Medicaid was improperly reimbursing claims for off-label uses of psychotropic medications, it could have easily identified, for example, the pharmacies that were submitting these claims by searching the Medicaid claims data. Data maintained by the Medicaid agencies reveals, on a claim-by-claim basis, the pharmacy that submits the claim, the drug for which the claim is being made, the age of the Medicaid beneficiary, and the prescribing physician. In fact, it appears that PsychRights obtained the claims information in its Amended Complaint by making the same inquiry into the Medicaid claims data that the Government could have made. This is precisely the type of "narrow class of suspected wrongdoers" easily identifiable by the government that the Ninth Circuit held was sufficient to trigger the public disclosure bar.[45]

The other Ninth Circuit cases cited by PsychRights in its opposition are factually distinguishable. In *Alfatooni*, there was no alleged public disclosure of an industry-wide fraud.[46]

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[45] In *Alcan Electrical and Engineering Inc*., the group of suspected wrongdoers named in the public document was composed of local electrical contractors who worked on federally funded projects over a four-year period. Because the electrical contractors in question were required by statute to file certified payrolls with the government on a weekly basis, the court concluded that "the government, as regulator and owner, presumably would have ready access to documents identifying those contractors." *United States v. Alcan Elec. and Eng'g., Inc.,* 197 F.3d 1014, 1019 (9th Cir. 1999). Similarly, the Medicaid providers are identified in the Medicaid data.

[46] *United States ex rel. Aflatooni v. Kitsap Physician Servs.*, 163 F.3d 516, 516-23 (9th Cir. 1998). The case involved allegations that two separate groups of defendants had conspired to submit false claims to Medicare that did not actually reflect services rendered. The Ninth Circuit found disclosure of relator's allegations with respect to one defendant group because it was specifically named in the news media, but held that because the second defendant group had not been named, the allegations against that defendant group had not been disclosed.

With *Foundation Aiding the Elderly*, PsychRights reaches to a single footnote to argue that general allegations of fraud do not trigger the public disclosure bar.[47] The case involved Medicare and Medicaid claims for care that was not given. In the footnote, the Ninth Circuit did state that general allegations of fraud in the nursing home industry were not public disclosures. PsychRights's argument, however, ignores the fact that a general allegation of some sort of fraud within an industry is not analogous to the specific industry-wide activities disclosed by the public documents discussed in Defendants' motion. These documents do not reveal amorphous accusations of fraud within the pharmaceutical industry; they specifically discuss off-label prescriptions for psychotropic mediations to children who receive Medicaid benefits – the basis of PsychRights's allegations here.

PsychRights further misses the mark when it misconstrues the holding in *Bly-Magee* and asserts that post-disclosure allegations could not have been publicly disclosed at the time of the public disclosure.[48] The Ninth Circuit in *Bly-Magee* held that the *specific* public disclosures referenced *specific* time periods and that relator's allegations relating to another time period had not been previously disclosed.[49] *Bly-Magee* does not foreclose the possibility that public disclosures that describe an ongoing scheme may bar claims postdating the public disclosures. Indeed, in *PsychRights v. Alaska*, PsychRights's request for injunctive relief demonstrates its belief that the psychotropic drugging of children is ongoing and is not limited to a particular time period.

Finally, PsychRights's argument that DRUGDEX is a proprietary product and, thus,

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[47] *United States ex rel. Found. Aiding the Elderly v. Horizon W.*, No. 99-17539, 2001 U.S. App. LEXIS 27363, at *1 (9th Cir. Sept. 13, 2001).

[48] PR Opp. at 17.

[49] *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 916-20 (9th Cir. 2006).

cannot be publicly disclosed is a red herring. PsychRights is incorrect when it asserts that a "proprietary" publication – or, more accurately, one for which access may require payment – cannot qualify as a public disclosure.[50] The information remains publicly available, regardless of whether the public must pay a fee to obtain it. In addition, public disclosures do not need to identify the actual transactions. Section 3730(e)(4), both pre- and post-amendment, refers to the disclosure of allegations *or* transactions.[51] The public documents described herein and attached to Defendants' original memorandum, taken as a whole, describe the fundamental allegations in PsychRights's complaint – that Medicaid has been paying for off-label prescriptions of psychotropic medications for pediatric patients for non-medically accepted indications. PsychRights simply took the information in the public domain, slapped the "fraud" label on it, and named as defendants several entities that are known to be involved in the process of prescribing, submitting, and approving Medicaid payments for psychotropic medications.[52]

IV. BECAUSE PSYCHRIGHTS CANNOT ESTABLISH SUBJECT MATTER JURISDICTION UNDER THE FCA, THE COURT MUST DISMISS THE CASE.

PsychRights suggests that, despite the public disclosures, the Court somehow should consider whether "the government would benefit from suits brought by relators with substantial information of government fraud even though the outlines of the fraud are in the public

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[50] *See, e.g.*, *United States ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 463 (S.D.N.Y.) (holding that "the publication of information in scholarly or scientific periodicals" constitutes news media because they "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."), *aff'd*, 53 F. App'x 153 (2d Cir. 2002); *accord In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d at 1155 (holding "media" disclosure to include "trade journal essays . . . [and] seminar papers").

[51] *See also United States ex rel. Olenick v. Presbyterian Intercmty. Hosp*., 2008 U.S. Dist. LEXIS 109635 (C.D. Cal. June 16, 2008) ("the content of the 'public disclosure' must include either the 'allegations' or the 'transactions' underlying the asserted claims.").

[52] PsychRights failed to rebut that 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. #80, Ex. 2.

domain."[53] PsychRights argues that the Court should ignore the public disclosure bar for a "'productive private enforcement' in the face of government inaction, or even acquiescence."[54] The FCA does not afford the Court that discretion, and a court may not consider such issues when it lacks subject matter jurisdiction over the case.[55] PsychRights's arguments belong before Congress, not this Court.

Moreover, whether the case faces "government inaction"[56] is another red herring. The public disclosure bar expressly takes into account whether the government has intervened (in the case of the pre-amendment version) or has declined dismissal (in the case of the amended version).[57] Dismissal of this case under the public disclosure bar does not "immunize from False Claims Act liability everyone" from the conduct alleged in PsychRights's complaint.[58] To the contrary, the Government could have pursued an FCA action for this alleged conduct. The public disclosure bar simply operates to prevent relators, such as PsychRights, from benefiting

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[53] PR Opp. at 13-14 (quoting *United States ex rel. Duxbury v. Ortho-BioTech Products*, 579 F.3d 13, 27 (1st Cir. 2009)).

[54] *Id*. at 14.

[55] *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474-75 (2007) (noting that even potentially valid policy concerns "would not induce us to determine jurisdiction on the basis of whether the relator is an original source of information" where jurisdiction otherwise would not exist). PsychRights similarly misses the point when it argues: "The government has pursued False Claims Act cases and achieved extremely large recoveries against drug companies for causing the presentment of claims to Medicaid for prescriptions of psychotropic drugs that are not for medically accepted indications, including Geodon and Seroquel for use in children. [Similar c]laims . . . made by other parties, such as the defendants in this action, are just as much false claims as those caused by the drug companies." PR Opp. at 14. Whether or not the alleged Medicaid claims were "false" under the FCA is irrelevant once the defendants have presented public disclosures, as PsychRights concedes they have in the first quoted sentence.

[56] PR Opp. at 14.

[57] 31 U.S.C. § 3730(e)(4). *See also United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 104 (3rd Cir. 2000); *United States ex rel. Yannacopolous v. Gen. Dynamics*, 315 F. Supp. 2d 939, 951 (N.D. Ill. 2004); *Kalmanovitz Charitable Found.*, 186 F. Supp. 2d at 462.

[58] PR Opp. at 2.

financially from a lawsuit when the information needed to prosecute the claims is already available to the Government.

Under the FCA's public disclosure bar, the Court has no subject matter jurisdiction over this case. The Court should dismiss the case with prejudice.

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2010, a copy of the foregoing **Reply 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)** 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.

s/ Kevin Cuddy