IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Ex rel. Law Project for Psychiatric Rights, an Alaskan non-profit corp.,	)	No. 10-35887
Plaintiff-Appellants,	)	U.S. District Court for Alaska
OSAMU H. MATSUTANI, MD., et al.,	)	Nos. 3:09-cv-0080-TMB, 3:09-cv-00246-TMB
Defendants-Appellees.	)	

DEFENDANTS/APPELLEES' RESPONSE TO PLAINTIFFS' MOTION FOR JUDICIAL NOTICE [DKT. 20]

Faced with the case law squarely against their arguments, Plaintiffs/Appellants turn to, and ask the Court to take judicial notice of, an *amicus* brief from an unrelated and undecided appeal in the Seventh Circuit (*Baltazar v. Warden*). The Court should deny Plaintiffs' motion for procedural and substantive reasons. Ignoring the requirements of Federal Rule of Appellate Procedure 27(a)(2)(A), Plaintiffs fail to explain why this Court should take judicial notice of the *amicus* brief, which Plaintiffs did not present to the district court and which addresses facts unrelated to the present case.

First, Plaintiffs do not state precisely what information the Court should judicially notice or why they are legally entitled to that relief. *See* Fed. R. App. P. 27(a)(2)(A) (moving party must "state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it"); Fed. R. Evid. 201(d) (requiring a court to take judicial notice upon the request of a party only if "supplied with the necessary information."). Plaintiffs failed to comply with Rule 27(a)(2)(A) and Rule 201(d) most likely because there is no plausible reason for the Court to take judicial notice of the *amicus* brief. The DOJ's argument in another

case is not a legislative fact. *See Korematsu v. United States*, 584 F. Supp. 1406, 1414 (D.C. Cal. 1984) (legislative facts are "established truths, facts or pronouncements that do not change from case to case but [are applied] universally") (quoting *United States v. Gould*, 526 F.2d 216, 220 (8th Cir. 1976)). Nor could the DOJ's litigation position, or the fact that the DOJ is taking the position, count as an adjudicative fact under Federal Rule of Evidence 201. *See* Fed. R. Evid. 201(b) (Courts may only take judicial notice of facts that are "generally known" or "are not subject to reasonable dispute."); Fed. R. Evid. 201, Adv. Comm. Notes ("[T]he adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury. They relate to the parties, their activities, their properties, their businesses."); *Henderson v. State of Oregon*, 203 Fed. Appx. 45, 52-53 (9th Cir. 2006) (declining to take judicial notice of an affidavit from another proceeding that was not part of the record in the lower court, noting that "adjudicative facts appropriate for judicial notice are typically different from facts found in affidavits supporting litigation positions, which often present facts subject to dispute.").[1]

Second, Plaintiffs fail to explain why they should be able to supplement the record with a document that Plaintiffs could have brought to the district court's attention. The DOJ filed its *amicus* brief in *Baltazar* on June 22, 2010, prior to the parties in this case completing the briefing for the motions to dismiss and three months prior to the district court issuing its dismissal order and opinion. Indeed, in September, Defendants filed a motion for leave to present PsychRights's unsealed 31 U.S.C. § 3730(b)(2) relator statement. Plaintiffs could have taken that opportunity to submit the *Baltazar amicus* brief to the district court, but they did not. For that reason alone,

[1] Plaintiffs also do not explain why they are relying on a brief from an unrelated case rather than having the United States, a purported party to this case, file an *amicus* brief in this appeal.

this Court may deny plaintiffs' motion. *See, e.g.*, *Lobatz v. U.S. West Cellular of Cal.*, 22 F.3d 1142, 1148 (9th Cir. 2000) (declining to take judicial notice of four documents that were not submitted to the district court and stating, "While we may take judicial notice of evidence not submitted to the district court, generally we do not if the evidence could have been submitted to the district court.").

Third, even if this Court were willing to overlook these procedural defects, it still should not take judicial notice of the *amicus* brief. Although a party may seek judicial notice of a pleading from another case, the pleading must be relevant to the case in which judicial notice is sought. *See, e.g.*, *Cuellar v. Joyce*, 596 F.3d 505, 512 (9th Cir. 2010) (declining to take judicial notice of materials that were not relevant to the disposition of the appeal); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 (9th Cir. 2006) (same). For example, the district court in the present case properly took judicial notice of PsychRights's state court complaint in order to find that PsychRights had made similar allegations in that earlier case. Also, as in the *Heritage Bond Litigation*, cited in Plaintiffs' motion (App. Dkt. 20-1 at 2 n.2), if an argument is made that a party's claims are barred by an order in another case, the court may take judicial notice of filings in the other case to determine the order's scope.[2]

Some information about this appeal is necessary to understand why the *Baltazar* case is irrelevant. Plaintiff-Relator Law Project for Psychiatric Rights ("PsychRights"), run by its counsel in this case, has a mission to stop physicians from prescribing psychotropic medications to pediatric patients. PsychRights had filed a case in Alaska state court to accomplish that goal directly, but the court dismissed the case. (Dist. Ct. Dismissal Order [Dkt. #163] at 5-6.)

[2] Plaintiffs acknowledge this standard, but fail even to try to meet it: "This Court may take notice of proceedings of other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." (App. Dkt. 20-1.)

Thwarted in that previous effort, PsychRights rehashed many of its state court allegations in the complaint leading to this appeal – a *qui tam* action under the False Claims Act ("FCA") filed in the U.S. District Court for the District of Alaska on April 27, 2009. (Dkt. at 8.) The U.S. government declined intervention, and the complaint was unsealed on January 25, 2010. (*Id.*) Another plaintiff filed a second complaint, based on PsychRights's "model *qui tam* complaint," on December 14, 2009. That complaint was unsealed after the federal government chose not to intervene, and was consolidated with the PsychRights case on July 12, 2010.

Based on an erroneous reading of the Social Security Act, PsychRights asserts that the Alaska Medicaid Program and the Alaska Children's Health Insurance Program ("CHIP") should not have knowingly covered claims for psychotropic medications dispensed to pediatric patients (i.e., under 18 years old) for conditions not specifically authorized by the Food and Drug Administration ("FDA") or listed in compendia that describe "off-label" uses (i.e., for indications or conditions other than those specifically approved by the FDA). Although Plaintiffs do not dispute that physicians may prescribe any FDA-approved drug for any condition, that a pharmacy may fill any prescription by a licensed physician, and that Alaska Medicaid knowingly authorized claims for off-label, non-compendium prescriptions, Plaintiffs seek *per se* FCA liability for all Medicaid and CHIP claims for psychotropic medications prescribed off-label to pediatric patients for non-compendium uses.

Applying this theory, Plaintiffs accuse thirty-two defendants (physicians, hospitals, chain retail pharmacies, officials with Alaska Medicaid, and a publishing company) of submitting or causing to be submitted alleged "false or fraudulent" Medicaid and CHIP claims for psychotropic medications prescribed and dispensed to pediatric patients. Plaintiffs did not determine whom to sue based on any direct and independent knowledge. Instead, PsychRights

identified, from Freedom of Information Act ("FOIA") requests to the Alaska Medicaid program, the providers with the most extensive participation in the delivery of pediatric psychotropic medication to Alaska pediatric Medicaid beneficiaries.

The district court dismissed the consolidated cases, with prejudice, for lack of subject matter jurisdiction under the False Claims Act's Public Disclosure Bar.[3] (Dkt. 163.) The court found that the allegations were based upon multiple public disclosures – (1) correspondence between the State of Utah and the Department of Health and Human Services' Centers for Medicare and Medicaid Services; (2) PsychRights's previously-filed case against the State of Alaska; (3) other publicly-filed cases claiming improper dispensing of psychotropic medications off-label to Medicaid patients; and (4) media reports and other publicly distributed information – and that neither Plaintiff was an original source of the allegations. (*Id.*) The district court recognized that the case fell squarely into Congress's concern "to discourage 'parasitic' suits brought by individuals with no information of their own to contribute to the suit." (*Id.* at 11.)

The *Baltazar* case is irrelevant and unrelated to the present appeal. According to the *amicus* brief, the *Baltazar* case involves an FCA suit by a relator alleging "that her former employer and its proprietor had submitted [falsified] claims for payment to Medicare and private insurers for chiropractic services," including specific reference to dishonest claims for services not provided, inaccurate reports and altered billing slips. (App. Dkt. 20-2 at 1, 6-7.) In dismissing the case, the district court in *Baltazar* identified public documents that discussed only general billing issues for a few of the 50,000 chiropractors in the United States. The present appeal, on the other hand, involves a *per se* theory of FCA liability that could have been asserted

[3] Defendants also served motions based on Rules 9(b) and 12(b)(6), which the district court denied as moot given the court's lack of jurisdiction.

against any physician or pharmacy writing or filling prescriptions for pediatric Medicaid or CHIP patients in Alaska. Indeed, by naming twenty-four physicians and affiliated institutions treating pediatric psychological issues in Alaska and the three largest retail chain pharmacies in Alaska, Plaintiffs covered many of the parties that could have been sued with this theory of liability. (*Id.*) While the *Baltazar amicus* brief notes that the FCA's "qui tam mechanism is intended to alert the government to fraudulent conduct of which it would otherwise be unaware" (*id.* at 2), the Alaska district court found that the federal government was aware of the allegations raised by Plaintiffs. Unlike Baltazar, who had particularized information about her employer, Plaintiffs in the present case merely served FOIA requests and chose to sue the most prominent physicians, institutional providers, and pharmacies providing psychiatric services and medications to pediatric Medicaid patients. The government could have pursued the claims brought by PsychRights based on the publicly disclosed information and information within the government's own control, but the government declined to intervene. This certainly is not the scenario claimed in the *amicus* brief – "where the government has no viable alternative means to obtain the information provided by relator." (App. Dkt. 20-2 at 11.)

Furthermore, the Court cannot assume that the DOJ's position in the *Baltazar* case, involving chiropractors' various billing habits, would be the same in this case, involving a *per se* theory of FCA liability. Indeed, one of the DOJ's principal arguments in its *Baltazar amicus* brief is that "[n]one of the public reports identified . . . the specific methods by which [the] fraud had been achieved." (App. Dkt. 20-2 at 12.) Plaintiffs here cannot make that claim as the public disclosures described precisely how, according to plaintiffs' theory, the Defendants made the allegedly false claims and why those claims allegedly were false.

Finally, neither the parties (in their briefs) nor the district court (in its dismissal opinion) cited the Baltazar district court opinion or the *amicus* brief. The fact that the DOJ has chosen to file an *amicus* brief in an unrelated, easily distinguishable case is simply not worthy of judicial notice.

For the foregoing reasons, defendants respectfully request that the Court deny Plaintiffs' motion for the Court to take judicial notice of the *amicus* brief from the *Baltazar* case.

Dated: December 30, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 30, 2010, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit electronically through the appellate CM/ECF system, and also served co-defense counsel and Plaintiffs' counsel, James B. Gottstein, by email.

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