

1
2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

3 THIRD JUDICIAL DISTRICT AT ANCHORAGE

4 LAW PROJECT FOR PSYCHIATRIC)
5 RIGHTS, an Alaskan non-profit corporation,)
6 Plaintiff,)

7 vs.)

8 STATE OF ALASKA, SARAH PALIN,)
9 Governor of the State of Alaska,)
10 ALASKA DEPARTMENT OF HEALTH AND)
11 SOCIAL SERVICES, WILLIAM HOGAN,)
12 Commissioner, Department of Health and)
13 Social Services, TAMMY SANDOVAL,)
14 Director of the Office of Children's)
15 Services, STEVE McCOMB, Director of the)
16 Division of Juvenile Justice, MELISSA)
17 WITZLER STONE, Director of the Division)
18 of Behavioral Health, RON ADLER,)
19 Director/CEO of the Alaska Psychiatric)
20 Institute, and WILLIAM STREUER, Deputy)
21 Commissioner and Director of the Division of)
22 Health Care Services,)

23 Defendants.)

24 Case No. 3AN-08-10115 CI

25 **STATE OF ALASKA'S REPLY TO PLAINTIFF'S OPPOSITION TO**
26 **MOTION FOR JUDGMENT ON THE PLEADINGS**

27 The State of Alaska and the remaining above-named defendants
28 (hereinafter "the Department"), reply as follows to PsychRights' Opposition to the
29 Department's Motion for Judgment on the Pleadings.

ATTORNEY GENERAL, STATE OF ALASKA
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2 **I. ARGUMENT**

3 **A. The Department's Motion is in Good Faith and Procedurally Proper.**

4 As a threshold matter, the Department addresses PsychRights' assertion
5 that the Department's motion is untimely and/or made in bad faith. Trial in this matter is
6 set for February 2010, almost a year from the Department's filing. Clearly the motion is
7 not an eleventh-hour maneuver calculated to obstruct discovery and delay trial. To the
8 contrary, it was the Department's attempts to prepare for a deposition and comply with
9 PsychRights' discovery requests that prompted the Department to ask the court to decide
10 this dispositive jurisdictional issue so that the parties can move forward. Regardless, the
11 assertion that a party lacks standing implicates the court's subject matter jurisdiction
12 under the actual controversy requirement of the Declaratory Judgment Act. The court
13 not only can—but must—address such an assertion at any time.¹ The Department's
14 motion is both proper and timely.
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17 **B. PsychRights Cannot Establish Citizen-Taxpayer Standing**

18 PsychRights concedes it lacks interest-injury standing (i.e. an adverse
19 interest in the outcome of the litigation), dismissing this argument as extraneous and
20 claiming that the Department's sole ground for its motion is an asserted lack of citizen-
21 taxpayer standing.² But PsychRights fails to achieve even citizen-taxpayer standing,
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23 ¹ See Alaska Rule of Civil Procedure 12(h)(3). "*Whenever* it appears by suggestion
24 of the parties or otherwise that the court lacks jurisdiction of the subject matter the court
25 shall dismiss the action." (emphasis added).

26 ² Opposition at p. 1.

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2 because notwithstanding its unsubstantiated prediction that the State would exact
3 retribution and punishment against a truly adverse litigant,³ the corporation has shown no
4 adversity of interest, is unaffected by the challenged conduct, and advances no
5 compelling argument that it is an appropriate plaintiff. It is well-established that in order
6 to establish citizen-taxpayer standing in Alaska's courts, a plaintiff must show:

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8 "... [T]hat the case in question is one of public significance and the
9 plaintiff is appropriate in several respects. This appropriateness has
10 three main facets: the plaintiff must not be a sham plaintiff with no
11 true adversity of interest; he or she must be capable of competently
12 advocating his or her position; *and he or she may still be denied
13 standing if there is a plaintiff more directly affected by the
14 challenged conduct in question who has or is likely to bring suit.*⁴

15
16 PsychRights makes a number of arguments, none of which supports
17 standing. Initially, PsychRights argues that it will amend its Complaint to allege citizen
18 taxpayer standing, that there are issues of public significance raised in the Complaint, that
19 there are no more directly affected plaintiffs likely to bring suit, that the State would not
20 be a proper plaintiff, and that that no affected child or parent would be likely to sue.
21 However, simply making these statements does not make them true.

22
23 **1. Amending the Complaint is insufficient to establish citizen-
24 taxpayer standing.**

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26 PsychRights clearly seeks to avoid an adverse ruling by arguing that the
Department's motion is based upon a mere technicality. To wit, by simply amending the

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28 ³ *Id.* at p. 13-14.

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30 ⁴ *Ruckle v. Anchorage School District*, 85 P.3d 1030, 1034 (Alaska 2004) (emphasis
added); *Keller v. French*, Slip. Op. 13296 (April 3, 2009).

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2 Complaint to assert standing, PsychRights will have standing and therefore can defeat the
3 Department's motion. While courts routinely grant leave to amend pleadings, as
4 PsychRights has recently asked the court to do,⁵ simply asserting standing does not
5 confer standing. If merely typing a sentence in a complaint were sufficient to confer
6 standing then everyone would do so and the black letter law of standing would be
7 rendered meaningless. Establishing standing to bring suit is not a mere technicality –
8 PsychRights statement it has citizen-taxpayer standing does not moot defeat this motion.
9

10 **2. While the Complaint may raise issues of public significance,**
11 **PsychRights is not best suited to seek redress from the courts;**
12 **there are more appropriate plaintiffs, such as the parents and**
13 **children who are allegedly harmed by the State's practices.**

14 According to PsychRights, the most important relief sought in the case is
15 an injunction against the State directing the Department to—in so many words—do what
16 PsychRights wants and believes is in the best interests of children in state custody.⁶
17 However, PsychRights still does not explain how a corporate entity unconnected to any
18 affected individual, in a state where there is no procedure for a *qui tam* action, possesses
19 citizen-taxpayer standing to assert claims on behalf of children in State custody and/or
20 Medicaid recipients and demand that the court impose a series of sweeping remedies.
21 PsychRights argues that there is no one more directly affected to bring this suit than
22 itself, because if a minor or parent brought suit, the State would somehow retaliate
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24 ⁵ Alaska Rule of Civil Procedure 15. See also *Prentzel v. State, Dept. of Public*
25 *Safety*, 169 P.3d 573 (Alaska 2007).

26 ⁶ Opposition at p. 8.

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2 against such a litigant and the relief that PsychRights is seeking could not be obtained.
3 This is not the case, and PsychRights supplies no basis for these assertions.

4 A review of the pleadings in this case and of the PsychRights website
5 leaves no doubt that PsychRights believes it is authorized to seek judicial relief for the
6 alleged wrongs stated in its Complaint.⁷ However, the advocacy and interest that
7 PsychRights so clearly espouses does not render it the only—let alone the most
8 appropriate—plaintiff to bring this case. PsychRights’ beliefs, no matter how strongly
9 held, do not give the corporation standing to sue for redress of any and all of the alleged
10 wrongs related to psychotropic medication and children. Parents and children
11 themselves are the best suited to address these issues and questions on behalf of
12 themselves. PsychRights may believe that there are wrongs to be righted, but
13 PsychRights’ advocacy mission to “stop the forced drugging” of children in this State is
14 simply insufficient to subject the defendants to litigation.
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17 In a case just decided by the Alaska Supreme Court last week, the question
18 of citizen-taxpayer standing was discussed and the analysis presented there clearly favors
19 dismissal in this case. In *Keller v. French*⁸, the Alaska Supreme Court was asked to
20 address whether the plaintiff in that case (five state legislators) had standing to bring suit
21 against other state legislators claiming a violation of the fair and just treatment clause.
22 After considerable procedural maneuvering at the superior court and Supreme Court
23 levels, an appeal remained related to two issues – whether the plaintiffs had standing to
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25 ⁷ See www.psychrights.org.

26 ⁸ Slip Opinion 13296, April 3, 2009.

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sue and whether the entire case was not justiciable. The bases for standing in that case were predicated upon “citizen-taxpayer standing. In the *Keller* case, the court agreed that the plaintiffs were not sham plaintiffs and that the issue was one of public significance, but did not agree that plaintiffs were best suited to bring suit. While the plaintiffs argued there were no other potential plaintiffs, the court held that argument ignored the persons who were truly at risk from the investigation by the senate – those people who had been subpoenaed to appear and the Governor herself. As stated by the court, “that individuals who are more directly affected have chosen not to sue despite their ability to do so does not confer citizen-taxpayer standing on an inappropriate plaintiff.”⁹

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Additionally, the defendants in the *Keller* case argued that the plaintiffs were “attempting to assert the individual rights of potential or ‘imaginary’ third parties.” The Supreme Court stated emphatically that the Court has “never allowed citizen-taxpayer standing to be used that way.”¹⁰ the Court further stated “[g]enerally, a litigant lacks standing to assert the constitutional rights of another.”¹¹

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This case is particularly germane to the instant matter, and as elaborated further below, Psych Rights is attempting to assert the rights of individuals and imaginary third parties, which is not appropriate. Additionally, Psych Rights is not an

⁹ *Id.* at page 9.

¹⁰ *Id.* at page 11.

¹¹ *Id.* Citing to *State ex. rel. Dept’s of Transp & Labor v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 630 n. 9 (Alaska 1989) (citing *Falcon v. Alaska Pub. Offices Comm’n*, 570 P.2d 496, 475 n. 20 (Alaska 1977) *Wagstaff v. Superior Court*, 535 P.2d 1220, 1225 (Alaska 1975).

1 appropriate plaintiff to seek redress of the alleged ills and wrongs in the Complaint.
2
3 There are better and more directly affected individuals who should bring this case. The
4 fact that they (the parents and children who are directly affected) have not sued does not
5 impart citizen-taxpayer standing on Psych Rights. Like *Keller* plaintiffs, Psych Rights
6 lacks citizen-taxpayer standing and this case should be dismissed.

7
8 **3. The State has sued the pharmaceutical industry under its**
9 **consumer protections powers and continues to do. Therefore,**
10 **the State would be a proper plaintiff as to the allegations against**
11 **the pharmaceutical industry.**

12 On this latter point, its worth noting that contrary to PsychRights'
13 assertions, the Office of the Attorney General has been far from derelict in protecting
14 Alaska's citizens—specifically Medicaid recipients—from wrongdoing by the
15 pharmaceutical industry¹². As PsychRights is aware, the consumer protection section of
16 this Office recently brought a lawsuit against the pharmaceutical giant Eli Lilly to
17 address the company's illegal marketing of the psychotropic medication Zyprexa, and

18 ¹² It appears that PsychRights is seeking to sue on behalf of the State to protect its
19 citizens against the predatory pharmaceutical industry. As stated above, in order for this
20 type of action to occur there would need to be some sort of *qui tam* authority by which
21 PsychRights stands in the proverbial shoes of the State. No such statute exists in Alaska
22 at this time, nor is there any way for a private citizen or corporate entity to seek relief
23 under Alaska consumer protection laws, which is precisely what PsychRights is
24 attempting to do. Alaska's citizens are being ably protected through successful litigation
25 against the pharmaceutical industry as evidenced by cases brought by the consumer
26 protection section of the Department of Law. (See
<http://www.law.state.ak.us/pdf/newsetters/2008-03-MR.pdf>;
<http://www.law.state.ak.us/pdf/newsetters/2006-10-MR.pdf>;
<http://www.law.state.ak.us/pdf/newsetters/2008-10-MR.pdf>;
<http://www.law.state.ak.us/pdf/newsetters/2008-07-MR.pdf>;
<http://www.law.state.ak.us/pdf/newsetters/2005-12-MR.pdf>;
<http://www.law.state.ak.us/pdf/newsetters/2008-10-MR.pdf>).

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2 settled the case against the company for \$15 million dollars.¹³ In prior lawsuits, the State
3 has sued 41 pharmaceutical manufacturers for inflated drug pricing, settling with at least
4 one of the manufacturers for \$1.5 million, and took on both Pfizer and Merck
5 pharmaceutical companies for their misleading drug marketing.¹⁴ The State is also
6 continuing to explore litigation against the manufacturers of Seroquel, Abilify, Geodon,
7 and Risperdol. So the State of Alaska and PsychRights are very much aligned with
8 respect to curbing the illegal and misleading conduct of the pharmaceutical industry.
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10 **C. The State Has Not Abdicated its Duties with Respect to Children in**
11 **State Custody.**

12 PsychRights also makes erroneous assertions and conclusions about the
13 State's conduct toward children in state custody and the conduct of the Department of
14 Law and the courts on this subject, based upon the Department's arguments in the
15 opening motion. As described in the opening motion, under existing law the
16 Department's use of and payment for psychotropic medication for children in state
17 custody must be accomplished through parental/guardian consent and/or a court order.¹⁵
18 Yet PsychRights accuses the Department of abdicating its custodial responsibilities
19 because the Department has identified the pharmaceutical industry—not the named
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22 ¹³ 3AN-06-5630 CI. PsychRights attempted to obtain sealed court records in this
23 case.

24 ¹⁴ See Department of Law links cited at n. 10. 3AN-06-12026 CI (*State of Alaska v.*
25 *Alpharma Branded Products Division, Inc. et al.*); 3AN-05-14292 CI (*State of Alaska v.*
26 *Merck and Company, Inc.*).

¹⁵ Motion at p. 3-6.

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2 defendants—as the genuine target of this Complaint. PsychRights’ opposition only
3 supports the Department’s position:

4 Psychiatrists ought to be able to rely on the information they receive
5 through medical journals and continuing medical education. The
6 State ought to be able to trust that psychiatrists recommending the
7 administration of psychiatric drugs are basing these
8 recommendations on reliable information. Unfortunately, neither of
9 these things, which ought to be true, are true. Thus, one of the key
10 questions in this case is why psychiatrists are prescribing and
11 custodians are authorizing the administration of harmful
12 psychotropic drugs of little or no demonstrated benefit to children
13 and youth. *The answer is that the pharmaceutical companies have
14 been very effectively illegally promoting their use... the drug
15 companies have provided the psychiatrists with inaccurate
16 information. PsychRights will develop this in discovery and through
17 presenting the evidence to this Court.*¹⁶

18 This statement goes squarely to the issue of standing and PsychRights’
19 propriety to bring this action against the named defendants. By PsychRights’ own
20 admission, blame lies with the pharmaceutical industry. Even assuming *arguendo* that
21 everything in the Complaint were true and every remedy requested should be
22 implemented, if the answer to the problem (to paraphrase PsychRights) lies with a
23 corrupt industry that has misled medical professionals and the public, including,
24 presumably, the named defendants, how can the State rectify those alleged misdeeds in
25 the context of this litigation brought by PsychRights, which lacks standing to sue? In
26 other words, the State is the easy—but not actual—target of this Complaint. That is the
point the Department was trying to make in its motion—not, of course, that the
Department is not responsible for the welfare of children in its care. PsychRights’

¹⁶ Opposition at p. 21 (emphasis added).

1 attempt to twist the State’s position is inflammatory, and it is not supported by the facts
2 and the law.
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4 II. CONCLUSION

5 In sum, PsychRights concedes it has no true adversity—the crux of
6 standing—yet asks the court to make the procedural and substantive leap of allowing a
7 corporation to stand in the shoes of the State and prosecute what is effectively an
8 unauthorized *qui tam* action on behalf of the public, against State defendants whom
9 PsychRights has admitted are not the true cause of the conduct alleged.
10

11 The concept of standing in this case goes beyond its mere assertion: the
12 doctrine addresses the substantive propriety of PsychRights to bring this lawsuit against
13 the named defendants for the claims the corporation asserts. The court should evaluate
14 the propriety of individual plaintiffs with respect to citizen-taxpayer standing on a case-
15 by-case basis.¹⁷ Citizen-taxpayer is appropriate where “no one seemed to be in a better
16 position than the plaintiffs to complain of the illegality” of the conduct in question.¹⁸ As
17 argued in its opening motion, a policy agenda and a sweeping critique of alleged state
18 actions perpetrated on unnamed individuals—by persons Psych Rights itself claims are
19 not ultimately responsible for the alleged misconduct—do not constitute the “true
20 adversity of interest” required to maintain citizen-taxpayer standing. There are more
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24 ¹⁷ *Ruckle v. Anchorage School District*, 85 P.3d 1030, 1037 (Alaska 2004); *Keller v.*
French, Slip. Op 6532 (April 3, 2009).

25 ¹⁸ 736 P.2d at 328 (citing *State v. Lewis*, 559 P.2d 630 (Alaska 1977)).
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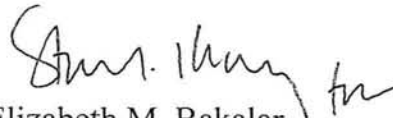
1 appropriate, adverse plaintiffs who could raise such issues and because of their true
2
3 adversity, would be able to do so less abstractly.

4 The Department's arguments regarding standing and the court's jurisdiction
5 in this matter are not refuted. PsychRights lacks standing and the complaint should be
6 dismissed.

7 Dated this 10th day of April, 2009, at Juneau, Alaska.


8
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