IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, ex rel. Law Project for Psychiatric Rights, Plaintiff, vs. OSAMU H. MATSUTANI, et al., Defendants.	Case No. 3:09-cv-0080-TMB
UNITED STATES OF AMERICA, ex rel. Daniel I Griffin, Plaintiff, vs. RONALD A. MARTINO, MD, FAMILY CENTERED SERVICES OF ALASKA, INC., an Alaska corporation, and SAFEWAY, INC., a Delaware corporation, et al., Defendants.	Case No. 3:09-cv-0246-TMB

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)(1) (DKTS. 89 & 141)

These are two related *qui tam* actions under the False Claims Act ("FCA").[1] In the first action, Relator Law Project for Psychiatric Rights ("PsychRights") alleges that the Defendants - consisting of various medical service providers, pharmacies, state officials, and a pharmaceutical data publisher - caused the submission of false claims for reimbursement for psychiatric drugs prescribed to minors under the federal Medicaid program and Children's Health Insurance Program (the "Matsutani Action").[2] In the second action, Relator Daniel I. Griffin alleges that his former medical and pharmaceutical providers caused the submission of false claims for reimbursement for

[1] 31 U.S.C. § 3729-3732.

[2] *See* Dkt. 107 (hereinafter, "Am. Compl.").

psychiatric drugs prescribed to him when he was a minor under the Medicaid program (the "Martino Action").[3] Both actions were consolidated under Docket 3:09-cv-0080-TMB.[4]

Currently before the Court are: (a) the Matsutani Action Defendants' motion to dismiss under Rules 12(b)(1) and 12(h)(3);[5] (b) the Matsutani Action Defendants' motion to dismiss under Rule 12(b)(6);[6] (c) Defendants William Hogan, Steve McComb, Tammy Sandoval, and William Streur's (the "State Official Defendants") motion to dismiss under Rule 12(b)(6) in the Matsutani Action;[7] (d) the Matsutani Action Defendants' motion to dismiss under Rule 9(b);[8] (e) Defendant Safeway, Inc.'s ("Safeway") motion to dismiss in the Martino Action;[9] (f) Defendant Family Centered Services of Alaska, Inc.'s ("FCSA") motion to dismiss in the Martino Action;[10] and (g) PsychRights' motion for a preliminary injunction in the Matsutani Action.[11] The Parties have also requested oral argument on the various motions before the Court.[12] Because the Court concludes that it lacks subject matter jurisdiction over these actions under the FCA, it GRANTS the Defendants' motions to dismiss under Rule 12(b)(1), (Docket Nos. 89 and 141) DENIES the remaining motions as moot,[13] and DISMISSES both actions with prejudice.

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[3] *See* Dkt. 1 in Case No. 3:09-cv-0246-TMB (hereinafter, "Griffin Compl.").

[4] Dkt. 23 in Case No. 3:09-cv-0246-TMB.

[5] Dkt. 89.

[6] Dkt. 92.

[7] Dkt. 90.

[8] Dkt. 83.

[9] Dkt. 141.

[10] Dkt. 143.

[11] Dkt. 113.

[12] Dkts. 122, 133 & 156.

[13] The Relators recently requested leave to file supplemental materials in opposition to the Defendants' 12(b)(6) motions and the Defendants similarly requested leave to file supplemental authority in further support of their Rule 9(b) motion. *See* Dkts. 160 & 162. Because the Court does

I. BACKGROUND

A. Allegations

The Relators allege that the Defendants are knowingly or recklessly participating in a wide-ranging scheme to defraud the federal government by submitting, or causing the submission of, false claims for Medicaid and Children's Health Insurance Program ("CHIP") reimbursement.[14] The Relators' allegations are based on the Defendants' involvement in Medicaid and CHIP claims submitted for psychotropic drugs prescribed to minors. The Relators allege that pharmaceutical companies have promoted "off-label" use of psychotropic drugs for minors through a variety of means, such as suppressing negative research and paying "Key Opinion Leaders" to support it.[15] The Relators contend that the "off-label" uses of these drugs are not properly reimbursable under Medicaid and CHIP because they do not fall within "medically accepted indications" approved by the Food and Drug Administration ("FDA") or supported in statutorily specified "compendia."[16] In essence, the Relators contend that the Defendants are involved in presenting false reimbursement claims while intentionally or recklessly "ignor[ing] information contradicting [the] drug company false statements."[17]

Although the Relators allege that pharmaceutical companies are ultimately responsible for the conduct at issue, those companies are not defendants in this action.[18] The Defendants here consist of: (a) psychiatrists who prescribe psychotropic drugs to minors; (b) mental health service providers that employ the psychiatrists; (c) pharmacies who fill the prescriptions; (d) the State Official Defendants, who "are responsible for authorizing reimbursement" of the claims; and (e)

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not reach those issues, it also denies these requests as moot.

[14] Am. Compl. ¶¶ 5-7, 183; Griffin Compl. ¶¶ 22-28. Alaska's CHIP program "has adopted Medicaid for its benefits package." Am. Compl. ¶ 165; *see also* Alaska Admin. Code. Tit. 7 §§ 100.300-06, 100.310-16 (2010).

[15] Am. Compl. ¶¶ 5, 67-84.

[16] *See id.* ¶¶ 5-6, 156-68; Griffin Compl. ¶¶ 15, 22-26.

[17] Am. Compl. ¶ 179; *see also* Griffin Compl. ¶¶ 22, 24-25.

[18] *See* Am. Compl. ¶¶ 46-84.

Thomson Reuters (Healthcare), Inc., a pharmaceutical data publisher that the Relators allege made false statements while promoting the use of psychotropic drugs for minors.[19] The Matsutani Action focuses on the activities of a wide variety of individuals and entities in the Alaska mental healthcare community allegedly involved in the psychiatric treatment of minors,[20] while the Martino Action focuses on several specific parties allegedly involved in obtaining reimbursement for drugs prescribed to Griffin.[21]

B. Prior Disclosures

The Defendants identify several prior disclosures of allegations that they claim are substantially the same as the Relators allegations here and accordingly, bar the Relators' claims under the FCA. These include disclosures in: (1) correspondence between the State of Utah and the Department of Health and Human Services' Centers for Medicare and Medicaid Services ("Utah/CMS Correspondence"); (2) PsychRights previously-filed case against the State of Alaska, *Law Project for Psychiatric Rights, Inc. v. Alaska*, No. 3AN 08-10115CI (the "State Case"); (3) other publicly-filed cases; and (4) media reports and other publicly distributed information.

1. Utah/CMS Correspondence

The Defendants contend that the Utah/CMS Correspondence is "about precisely the same issue raised by" the Relators.[22] The first letter, from Utah to the Centers for Medicare and Medicaid Services ("CMS"), indicates that Utah was concerned that "many state Medicaid programs are liberally reimbursing - and presumably receiving Federal Financial Participation . . . - for outpatient drugs used for indications that are neither FDA-approved nor supported in the relevant compendia."[23] CMS replied that the relevant law "does not provide definitive policy on the coverage of Medicaid drugs for the uses you describe in your letter, nor have we addressed this issue

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[19] *Id.* ¶¶ 7, 10-41; *see also* Griffin Compl. ¶¶ 7-9.

[20] Am. Compl. ¶¶ 10-41.

[21] Griffin Compl. ¶¶ 7-9.

[22] Dkt. 91 at 6, 13-14; Dkt. 91-4.

[23] Dkt. 91-4 at 1.

in implementing federal regulations." Accordingly, CMS explained, the law "authorizes States to exclude or otherwise restrict coverage of a covered outpatient drug if the prescribed use is not for a medically accepted indication . . . however, it does not explicitly require them to do so."[24]

Utah responded on December 17, 2007, claiming that the "unambiguous statutory" language precludes states from providing coverage for off-label uses that are not medically accepted.[25] Utah's representative elaborated as follows, specifically invoking reimbursement for off-label uses of psychotropic drugs prescribed to minors:

> A "poster child" example of exactly why this issue is important not only for cost considerations, but also for patient safety, is the atypical antipsychotic drug Zyprexa manufactured by Eli Lilly. For about 10 years it has been at or near the highest dollar volume drug reimbursed by Medicaid nationwide. It is only approved for schizophrenia and bipolar disorder in adults, a very narrow segment of the population. It has been widely reported that approximately 50% of utilization is off-label, including for infants and toddlers. Based on recent lawsuit settlements totaling over a billion dollars and involving thousands of Zyprexa users, the drug causes substantial weight gain and diabetes in a significant percentage of cases. In other words, Medicaid is not only paying for a very expensive drug for uses that are not "medically accepted indications," but its reimbursement of this drug is resulting in many Medicaid recipients developing diabetes, a life-threatening condition with many adverse health complications for the individuals and a significant cost burden on taxpayers for treating these complications.[26]

In response, CMS "confirm[ed] that [its] previous response . . . [was] correct."[27]

2. PsychRights' State Case

The Defendants also contend that PsychRights' filings in the State Case disclosed the same allegations that the Relators assert in these cases.[28] In the State Case, PsychRights is seeking declaratory and injunctive relief against Alaska and various state officials to prohibit them from

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[24] *Id.* at 6. The Defendants suggest that this is consistent with the position that CMS has taken elsewhere. *See* Dkt. 91 at 4 n.6 (citing Dkt. 91-5).

[25] Dkt. 91-4 at 3.

[26] *Id.* at 4.

[27] *Id.* at 5.

[28] Dkt. 91 at 6-7, 14; *see also* Dkt. 91-7.

participating in the administration of psychotropic drugs to minors absent certain precautions.[29] The State Official Defendants here are also defendants in the State Case.[30] The Defendants note that on November 24, 2008, PsychRights moved to amend its complaint in the State Case to include a new paragraph alleging:

> 22. It is unlawful for the State to use Medicaid to pay for outpatient drug prescriptions except when medically necessary and for indications approved by the Food and Drug Administration (FDA) or included in the following compendia:
> (a) American Hospital Formulary Service Drug Information,
> (b) United States Pharmacopeia-Drug Information (or its successor publications), or
> (c) DRUGDEX Information System.[31]

Additionally, on April 3, 2009, just before commencing the Matsutani Action, PsychRights moved amend its State Case complaint to include the following additional paragraph:

> 236. The State approves and applies for Medicaid reimbursements to pay for outpatient psychotropic drug prescriptions to Alaskan children and youth that:
> (a) are not medically necessary, or
> (b) for indications that are not approved by the Food and Drug Administration (FDA) or included in (I) the American Hospital Formulary Service Drug Information, (ii) the United States Pharmacopeia-Drug Information (or its successor publications), or (iii) DRUGDEX Information System, or
> (c) both.[32]

The Defendants also note that PsychRights' complaint in the State Case describes what they contend are other prior public disclosures, including PsychRights' prior efforts to persuade Alaska to adopt its proposed reforms and a program favored by PsychRights which it contends will help "to give guidance to people making decisions regarding authorizing the administration of psychotropic drugs to children and youth."[33]

3. Other Court Cases

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[29] Dkt. 91-7 at 6.

[30] *Id.* at 8-9.

[31] Dkt. 91-8 at 1.

[32] *Id.* at 2; *see also* Dkt. 91-7 at 53-56.

[33] Dkt. 91 at 7-8 (citing Dkt. 91-7 at 11-17).

The Defendants further argue that prior "cases have also included allegations that allegedly false claims for off-label, non-compendium drug prescriptions have been paid by Medicaid."[34] The Defendants cite one FCA case, *United States ex rel. Franklin v. Parke-Davis*,[35] which involved allegations that Medicaid claims for the drug Neurontin were fraudulent because they were ineligible for reimbursement. The Defendants note that Neurontin is one of the drugs that PsychRights mentions in its pleading.[36] Responding to the Defendants' argument, PsychRights additionally refers to *United States ex rel. Rost v. Pfizer*,[37] which involved alleged false claims submitted to Medicaid for off-label non-compendium uses for the drug Genotropin.[38]

4. Media Reports

The Defendants also refer to numerous media articles and other publicly available documents dating from 1999 through 2008.[39] These articles generally discuss the use of psychotropic drugs for minors, noting that some are Medicaid patients.[40] Some, however, more specifically state that Medicaid pays for psychotropic drugs prescribed to minors that are being used for off-label purposes.[41] One document - a white paper prepared by a group not unlike PsychRights - specifically discussing prescriptions of psychotropic drugs to minors, states that "most off-label prescriptions for children may not be covered under Medicaid and such reimbursements constitute Medicaid fraud."[42] Some of the articles also discuss government investigations, including an

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[34] *Id.* at 8.

[35] No. 96-11651-PBS, 2003 U.S. Dist. LEXIS, at *1-2 (D. Mass. Aug. 22, 2003).

[36] Dkt. 91 at 8; *see also* Am. Compl. ¶ 167(q).

[37] Dkt. 111 at 2-3 (citing 253 F.R.D. 11 (D. Mass. 2008)).

[38] *Rost*, 253 F.R.D. at 12-15.

[39] Dkt. 91 at 9-10.

[40] *See id.*

[41] *See id.* at 10.

[42] *See id.* (quoting Dkt. 91-12 at 11).

investigation by the former Texas Comptroller suggesting that reimbursement claims for psychotropic drugs prescribed to minors constitute Medicaid fraud.[43]

C. Procedural History

PsychRights commenced the Matsutani Action under seal on April 27, 2009.[44] Griffin commenced the Martino Action under seal on December 14, 2009.[45] PsychRights moved to unseal the Matsutani Action on June 28, 2009, submitting the Utah/CMS Correspondence in support of its motion.[46] After the Government declined to intervene,[47] the Court unsealed each action.[48]

The Matsutani Action Defendants moved to dismiss under Rule 12(b)(1) and 12(h)(3) on April 5, 2010.[49] They also moved to dismiss under Rules 12(b)(6) and 9(b).[50] PsychRights filed an Amended Complaint in response to Defendants' motions to dismiss on May 6, 2010,[51] and filed its opposition papers on May 10, 2010.[52] PsychRights' Amended Complaint substantially repeats the

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[43] Dkts. 91-15, 91-16 (indicating that the Texas Health and Human Services Commissions had stated that it was "reviewing the use of Medicaid drug claims and psychotropic drug use in children"), 91-7, & 91-8.

[44] Dkts. 1-2.

[45] *See* Griffin Compl.

[46] Dkt. 3.

[47] Dkt. 14; Dkt. 9 in Case No. 3:09-cv-0246-TMB; *see also* 31 U.S.C. § 3730(b).

[48] Dkt. 16; Dkt. 10 in Case No. 3:09-cv-0246-TMB.

[49] Dkt. 89.

[50] Dkts. 83, 90, & 92.

[51] Am. Compl.

[52] Dkt. 111.

allegations in its original Complaint, but contains additional allegations regarding specific drugs and transactions.[53] The Defendants filed a reply on May 25, 2010.[54]

In the Martino Action, Safeway moved to dismiss under Rules 12(b)(1), 9(b), and 12(b)(6) on July 27, 2010.[55] Safeway explicitly adopted the arguments in the Matsutani Action Defendants' 12(b)(1) motion papers.[56] The other Martino Action Defendants later joined in Safeway's motion.[57] Griffin filed an opposition on August 16, 2010,[58] adopting PsychRights' opposition to the Matsutani Action Defendants' 12(b)(1) motion.[59] Safeway filed a reply on August 30, 2010,[60] in which Defendant Martino joined.[61]

On September 21, 2010, the Defendants submitted supplemental authority to the Court,[62] and requested leave to present materials that had previously been maintained under seal in further support of their 12(b)(1) motion.[63]

II. LEGAL STANDARD

Where the defendants bring a "factual" motion to dismiss for lack of subject matter jurisdiction based on extrinsic evidence, the court may look "beyond the complaint without having

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[53] *See* Am. Compl. ¶¶ 183-84, 187-88, 190-95, 201-04, 206-11; *cf.* Dkt. 1.

[54] Dkt. 119.

[55] Dkt. 142.

[56] *Id.* at 5.

[57] Dkts. 146 & 149. FCSA also explicitly joined in the Matsutani Action Defendants' motion to dismiss under Rule 12(b)(1). Dkt. 145.

[58] Dkt. 151.

[59] *Id.* at 13.

[60] Dkt. 154.

[61] Dkt. 157.

[62] Dkt. 159.

[63] Dkt. 161.

to convert the motion to dismiss into a motion for summary judgment."[64] The court "may resolve factual disputes based on the evidence presented where the jurisdiction issue is separable from the merits of the case,"[65] as it is here. The proponents of subject-matter jurisdiction bear the burden of establishing its existence by a preponderance of the evidence.[66]

III. DISCUSSION

The FCA provides that a private person may bring an action on behalf of the United States by filing a complaint under seal.[67] The purpose of the FCA is to return fraudulently divested funds to the federal treasury.[68] Congress revised the FCA in 1986 in order to encourage insiders with knowledge of fraudulent activity to "blow the whistle."[69] The statute accordingly provides a relator with a right to share in the recovery as an incentive to bring FCA claims.[70] The primary purpose of the revisions was thus to "alert the government as early as possible to fraud that is being committed against it and to encourage insiders to come forward with such information where they would otherwise have little incentive to do so."[71]

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[64] *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted); *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1200 n.2 (9th Cir. 2009) (citing *Safe Air*). Courts may consider public records as extrinsic evidence. *See Gemtel Corp. v. Community Redev. Agency of L.A.*, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994).

[65] *United States ex rel. Alfatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 521 (9th Cir. 1999) (citation omitted).

[66] *United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1018 (9th Cir. 1999).

[67] 31 U.S.C. § 3730(b)(2).

[68] *See United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 968 (9th Cir. 1995).

[69] *See id.* at 963. *Accord United States ex rel. Zaretsky v. Johnson Controls, Inc.*, 457 F.3d 1009, 1017 (9th Cir. 2006) (stating that Congress sought to "encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward" (citation omitted)).

[70] *See Green*, 59 F.3d at 963-64 (citing 31 U.S.C.A. § 3730(d) (West Supp. 1994)).

[71] *United States ex rel. Biddle v. Board of Trustees of the Leland Stanford, Jr., Univ.*, 161 F.3d 533, 538-39 (9th Cir. 1997).

Congress, however, also "sought to discourage 'parasitic' suits brought by individuals with no information of their own to contribute to the suit."[72] A relator who merely "echoes" previously disclosed fraud is not assisting the Government in its effort to expose fraud, but is rather opportunistically seeking to share in the Government's recovery of funds from the defrauding party at the Government's expense.[73] Accordingly, the FCA bars relators from asserting claims where the information has been previously "public[ly] disclosed" unless the relator is the "original source" of the information (the "Public Disclosure Bar").[74]

The Public Disclosure Bar involves a two-part inquiry.[75] A court must first determine whether "there has been a prior public disclosure of the allegations or transactions underlying the *qui tam* suit."[76] If there has been a prior public disclosure, the court must then determine "whether the relator is an original source within the meaning of" the statute.[77] Before engaging in either of those inquiries, however, this Court must first determine whether the recently amended version or prior version of the FCA Public Disclosure Bar controls the analysis here. As explained below, the Court concludes that the prior version of the statute controls, that the allegations at issue here have

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[72] *Zaretsky*, 457 F.3d at 1017 (citation omitted). Relator argues for a narrow reading of the FCA's Public Disclosure Bar, quoting a passage from the First Circuit's decision in *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 27-28 (1st Cir. 2009), where that court "question[ed] th[e] conclusion" that FCA suits brought after a public disclosure are "parasitic." Dkt. 111 at 13-14. In a more recent decision, however, that court has reaffirmed the principle that the Public Disclosure Bar "is designed to preclude parasitic *qui tam* actions." *See United States ex rel. Poteet v. Bahler Med., Inc.*, __ F.3d __, No. 09-1728, 2010 WL 3491159, at *6 (1st Cir. Sept. 8, 2010). In any event, while there may well be policy reasons for expanding the reach of the FCA, this Court is compelled to evaluate the Relators' claims in light of the statutory text and controlling authority in this Circuit.

[73] *See United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1018-19 (9th Cir. 1999); *Seal 1 v. Seal A*, 255 F.3d 1154, 1158, 1161 (9th Cir. 2001).

[74] *See* 31 U.S.C. § 3130(e)(4) (2006).

[75] *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009).

[76] *Id.* (citation omitted).

[77] *Id.* (citation omitted).

been "publicly disclosed" within the meaning of the prior version of the FCA, and that the Relators are not an "original source" of the disclosures.

A. Controlling Text

Congress amended the language of FCA's Public Disclosure Bar on March 23, 2010.[78] The primary difference between the old version and the amended statute, for the purposes of this case, is that the new language narrows the categories of "public disclosure[s]."[79] The Supreme Court has found that the recent amendments to the FCA do not apply retroactively to pending actions.[80]

The Relators argue that the new version of the statute "probably" applies to the Matsutani Action because PsychRights filed its Amended Complaint on May 6, 2010 - i.e., after the FCA amendment.[81] Therefore, they argue that the Matsutani Action - as it is currently constituted - was not "pending" on the date of the FCA amendment and the Supreme Court's recent ruling does not apply to it.[82] In support of their argument, the Relators rely on *Rockwell Int'l Corp. v. United States*, for the proposition that "courts look to the amended complaint to determine jurisdiction."[83] In *Rockwell*, the Supreme Court held that courts should examine the allegations in an amended complaint when determining whether the Public Disclosure Bar applies.[84]

The Relators misconstrue this authority. Although it is true that a court should look to an amended pleading when examining the allegations forming the alleged basis for jurisdiction, that

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[78] Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 § 10104(j)(2) (2010).

[79] *Compare id. with* 31 U.S.C. § 3130(e)(4) (2006). The new version of the statute also omits the prior text's reference to "jurisdiction" suggesting that a prior public disclosure is no longer a jurisdictional defect, although the statute still compels courts to "dismiss" cases involving prior public disclosures. *See* Pub. L. 111-148, 124 Stat. 119 § 10104(j)(2) (2010).

[80] *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010).

[81] Dkt. 111 at 6-8.

[82] *Id.*

[83] *Id.* at 6 (citing 549 U.S. 457, 474 (2007)).

[84] 549 U.S. at 473-74.

does not mean that a party may erase the entire procedural history of a case for all purposes by amending its pleading.[85] Indeed, Rule 15(c) provides that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - or attempted to be set out - in the original pleading."[86] PsychRights' Amended Complaint includes some additional detail about the drugs and transactions at issue but asserts essentially the same claims against the same parties based on the same conduct as its original Complaint. These relatively minor amendments do not change the fact that the Matsutani Action was "pending" when Congress revised the FCA. *Rockwell* and the rest of the authority cited by the Relators are not to the contrary.[87] The Relators essentially concede this point later in their opposition brief when they argue that information disclosed on PsychRights' website *after* it filed the Matsutani Action Complaint but *before* it filed the Amended Complaint "cannot trigger the public disclosure bar because . . . it *post dates the filing of this action*[.]"[88] Thus, both actions were "pending" on the date of the FCA amendment and the Supreme Court's recent ruling controls this Court's analysis. Under that precedent, the pre-amendment version of the Public Disclosure Bar applies to these consolidated actions.

B. Public Disclosures

Prior to the recent amendment, the FCA's Public Disclosure Bar provided:

> No court shall have jurisdiction over an action brought under this section based upon the public disclosure of allegations or transactions [1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or Government Accounting Office [GAO] report, hearing, audit, or investigation, or [3] from the news

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[85] *Stubbs v. de Simone*, No. 04Civ. 5755(RJH)(GWG), 2005 WL 2429913, at *3 (S.D.N.Y. 2005) ("Plaintiff's amended complaint may supplant the original complaint, but it does not delete the procedural history of the case").

[86] Fed. R. Civ. P. 15(c).

[87] *Cf. Desai v. Deutsche Bank Secs. Ltd.*, 573 F.3d 931, 936 (9th Cir. 2009) (discussing a district court's failure to consider a recently amended pleading when denying a motion for class certification); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992) (finding that the names of defendants included in earlier complaints could not be used to "fill[] in" the names of defendants included in a later pleading omitting the names in favor of the phrase "et al.").

[88] Dkt. 111 at 17 n.32.

> media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[89]

The public disclosure inquiry involves two "distinct but related determinations."[90] First, whether the disclosure "originated in one of the sources enumerated in the statute."[91] Second, whether the present action is "based upon" the prior disclosure.[92]

Here, the Defendants invoke disclosures made in: (1) the Utah/CMS Correspondence; (2) the State Case; (3) prior cases involving Medicaid fraud allegations based on off-label prescriptions; and (4) various media reports.[93] Section 3730(e)(4)(A)'s first category undoubtedly includes a state proceeding, such as the State Case[94] or the other cases cited by the Defendants involving Medicaid fraud allegations.[95] Similarly, the second category encompasses the Utah/CMS Correspondence.[96]

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[89] *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1401-02 (2010) (quoting § 3730(e)(4)).

[90] *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009).

[91] *Id.* (citation omitted).

[92] *See id.* (citations omitted).

[93] The Relators do not suggest that any of this information is not "public" for the purposes of the FCA. *Cf. Seal 1 v. Seal A*, 225 F.3d 1154, 1162 (9th Cir. 2001) (indicating that allegations or transactions are "public[ly] disclosed" where they are provided "to one member of the public, when that persons seeks to take advantage of that information by filing an FCA action").

[94] *See Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1404-05 (2010).

[95] *See United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999). Disclosures filed in the context of litigation may be encompassed by the statute even if they are not the subject of a hearing. *Id.* Additionally, the fact that the court has not ruled on the issue does not matter. *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1474 (9th Cir. 1996) ("An issue need not be decided in prior litigation for the public disclosure bar to be triggered; rather, its mere disclosure suffices.").

[96] The Relators argue, without any analysis, that the Utah/CMS Correspondence does not constitute an "investigation" under either version of the statute. Dkt. 111 at 11. Under the FCA, however, the term "investigation" is extremely broad, encompassing "any kind of government investigation - civil, criminal, administrative, or any other kind." *Seal 1 v. Seal A*, 225 F.3d 1154,

The Relators do not dispute that the media reports fall squarely within the third category.[97] Accordingly, the disclosures identified by the Defendants all qualify as "public disclosure[s]" for the purposes of the statute.

The Court must still determine, however, whether the allegations or transactions at issue are "based upon" the public disclosures identified by the Defendants.[98] The Parties devote most of their argument to this issue.

In the Ninth Circuit, the relevant inquiry is whether the relator's allegations, "fairly characterized," repeat what the public already knows.[99] The "publicly disclosed facts need not be identical with, but only substantially similar to," the relator's allegations to invoke the Public Disclosure Bar.[100] Thus, simply adding a "few factual assertions never before publicly disclosed" will not change the character of allegations that were otherwise known to the public.[101] Allegations that "rest on the same foundation" as other claims that have been previously disclosed do not

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1161 (9th Cir. 2001). Thus, while an act such as responding to a FOIA request that merely requires duplicating records might not qualify as an "investigation" or "report," acts that involve creating "independent work product" by analyzing findings or conducting "leg-work" do qualify. *See United States v. Catholic Healthcare W.*, 445 F.3d 1147, 1153 (9th Cir. 2006). Here, the Utah/CMS Correspondence plainly involved analysis and "leg-work" on the part of both parties involved. Additionally, the version of the statute that applies here does include *state* investigations. *See Graham Cty.*, 130 S. Ct. at 1400. Even if the second category were limited to *federal* investigations as it is under the revised statute, *see* 31 U.S.C.A. § 3130(e)(4) (West 2010), the correspondence would still qualify as a federal investigation because of CMS's role in it.

[97] Dkt. 111 at 18.

[98] Courts may consider multiple sources as a whole when determining whether the allegations or transactions have been "publicly disclosed." *See United States v. Catholic Healthcare W.*, 445 F.3d 1147, 1151 n.1 (9th Cir. 2006) (noting that transactions do not have to be disclosed in "a single document" in order to constitute a public disclosure; the court may analyze multiple documents or hearings to determine whether the allegations or transactions have been publicly disclosed).

[99] *United States ex rel. Biddle v. Board of Trustees of the Leland Stanford, Jr., Univ.*, 161 F.3d 533, 537 (9th Cir. 1997) (quoting *Wang v. FMC Corp.*, 975 F.2d 1412,1417 (9th Cir. 1992))..

[100] *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009).

[101] *Biddle*, 161 F.3d at 537 (quoting *Wang*, 975 F.2d at 1417).

provide a basis for jurisdiction.[102] Mere disclosure of allegations - as opposed to *proof* of the allegations - invokes the Public Disclosure Bar.[103] Moreover, allegations do not have to be specifically "derived from" a public disclosure in order to be "based upon" the disclosure.[104]

Thus, where the "broad categories" of fraud have been disclosed and the relator merely fills in details, the allegations have been publicly disclosed where they are sufficient "to enable the government to pursue an investigation."[105] Similarly, the fact that the specific defendants in an FCA action were not named in a prior disclosure does not preclude a finding that the action was "based upon" the same allegations as the disclosure.[106] Indeed, the specific identity of the defendants is less of a concern where the government could easily identify those committing the fraud.[107]

Nor do the allegations need to mention the FCA or fraud to constitute a public disclosure.[108] Where "transactions" as opposed to "allegations" are at issue and the "material elements of the allegedly fraudulent 'transaction' are disclosed in the public domain" the transaction has been

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[102] *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1475 (9th Cir. 1996).

[103] *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992).

[104] *Biddle*, 161 F.3d at 536-40.

[105] *United States ex rel. Longstaffe v. Litton Indus., Inc.*, 296 F. Supp. 2d 1187, 1193-94 (C.D. Cal. 2003). *Accord United States ex rel. Poteet v. Bahler Med., Inc.*, __ F.3d __, No. 09-1728, 2010 WL 3491159, at *8-9 (1st Cir. Sept. 8, 2010) (finding that allegations that include additional details that add "color" but that "target[] the same fraudulent scheme" as prior disclosures will trigger the Public Disclosure Bar); *United States ex rel. Swan v. Covenant Care, Inc.*, 279 F. Supp. 2d 1212, 1219 (E.D. Cal. 2002) (stating that "a relator's ability to reveal specific instances of fraud where the general practice has already been publicly disclosed is insufficient to prevent operation of the jurisdictional bar.").

[106] *United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1018-19 (9th Cir. 1999).

[107] *Id.* at 1019.

[108] *Id.* at 1019-20.

publicly disclosed.[109] Some courts have used variations of the following formula to explain the Public Disclosure Bar:

> If X+Y=Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed. Under the framework, X stands for the allegedly false set of facts set forth in the claim at issue, and Y is a proxy for the allegedly true set of facts. Thus when X (the false set of facts) and Y (the true set of facts) surface publicly, or when Z is broadcast there is little need for *qui tam* actions and the claim will be barred.[110]

In contrast, where the Government might "benefit from obtaining information about separate allegations of wrongdoing" against defendants that have not been previously disclosed, the Public Disclosure Bar would not prohibit the claim.[111] Accordingly, prior general allegations of fraud that do not "fairly characterize[]" the kind of fraud alleged by the relator and which would not be "sufficient to enable [the Government] adequately to investigate the case and make a decision on whether to prosecute" do not trigger the Public Disclosure Bar.[112]

Thus, like the rest of the FCA, the "based upon" requirement must be interpreted in light of the goals of the statute.[113] The essence of the inquiry turns on the question of whether the previously undisclosed allegations "are valuable to the government in remedying the fraud that is being

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[109] *United States ex rel. Foundation Aiding the Elderly v. Horizon W. Inc.*, 265 F.3d 1011, 1014-15 (9th Cir. 2001) (citation omitted). Thus, a "relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation already have been publicly disclosed." *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1245 (9th Cir. 2000) (citation omitted).

[110] *United States ex rel. Ven-A-Care v. Actavis Mid Atlantic LLC*, 659 F. Supp. 2d 262, 267-68 (D. Mass. 2009) (citations omitted); *see also Foundation Aiding the Elderly*, 265 F.3d at 1015.

[111] *See United States ex rel. Alfatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 523 (9th Cir. 1999).

[112] *Foundation Aiding the Elderly*, 265 F.3d at 1016 (citation omitted).

[113] *See United States ex rel. Biddle v. Board of Trustees of the Leland Stanford, Jr., Univ.*, 161 F.3d 533, 538-39 (9th Cir. 1997).

committed against it" or whether they "confer no additional benefit upon the government" because they simply repeat previously disclosed allegations of fraud.[114]

Here, the Defendants do not appear to contend that the specific transactions identified by the Relators were previously disclosed. Rather, they claim that the allegations of Medicaid fraud based on off-label prescriptions of psychotropic drugs to minors were publicly disclosed numerous times before the instant actions were filed.[115]

The Relators argue that the allegations in the prior disclosures are not "substantially similar" to their allegations in the instant actions. The Relators rely on *United States ex rel. Alfatooni v. Kitsap Physicians Servs.*[116] and *United States ex rel. Foundation Aiding the Elderly v. Horizon West Inc.*,[117] for the proposition that "the public disclosure bar only applies to defendants identified in the public disclosure" and "that allegations of general or widespread fraud do not trigger the public disclosure bar."[118] As these decisions make clear, however, the relevant question when examining the level of detail in prior disclosures is whether those disclosures "would give the government sufficient information to initiate an investigation" against the defendants.[119]

The Relators similarly urge this Court to reject or distinguish cases suggesting that industry-wide allegations of fraud are sufficient to invoke the Public Disclosure Bar.[120] Indeed, there is no

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[114] *Id.* at 539.

[115] *See* Dkt. 119 at 14.

[116] 163 F.3d 516, 523 (9th Cir. 1999).

[117] 265 F.3d 1011, 1016 n.5 (9th Cir. 2001).

[118] Dkt. 111 at 9-10.

[119] *Foundation Aiding the Elderly*, 265 F.3d at 1016 n.5 (citing *United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1019 (9th Cir. 1999)); *see also Alfatooni*, 163 F.3d at 523 (determining that the relators' allegations against certain defendants were not barred because "the government may still benefit from obtaining information about separate allegations of wrongdoing against" those defendants despite some prior disclosures).

[120] *See* Dkt. 111 at 10; *Grynberg v. Pacific Gas & Elec. Co.*, 562 F.3d 1032, 1042-43 (10th Cir. 2009) (finding that allegations that "allow[] the government to target its investigation toward specific actors and a specific type of fraudulent activity" constitute public disclosures even where

consensus on that broad proposition.[121] A fair reading of all of these cases, however, supports the proposition that where the information in the prior disclosure is sufficient for the Government to initiate an investigation against the defendants, the Public Disclosure Bar applies.[122]

Examining the disclosures here, plainly, some of them - standing alone - would not provide the Government with enough information to initiate an investigation against the Defendants. General allegations that health care providers are prescribing psychotropic drugs to children would not be sufficient for the Government to initiate an investigation.[123] However, many of the prior disclosures reveal considerably more than that. Indeed, these disclosures reveal: (a) that health care

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they are directed "industrywide" instead of toward specific defendants); *United States ex rel. Gear v. Emergency Med. Assoc. of Ill., Inc.*, 436 F.3d 726, 729 (7th Cir. 2006) ("Industry-wide public disclosures bar *qui tam* actions against any defendant who is directly identifiable from the public disclosures." (citation omitted)); *United States ex rel. West v. Ortho-McNeil Pharma., Inc.*, 538 F. Supp. 2d 367, 383 n.10 (D. Mass. 2008) (finding that "even assuming Defendant was not named, the jurisdiction bar can still apply" where the disclosures "set the government squarely on the trail of fraud" (citation omitted)); *see also United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 685-88 (D.C. Cir. 1997) (finding that the publicly available information which did not include the defendant's identity was sufficient to allow the government to bring a suit against the defendant and accordingly, the relator's claim was publicly disclosed); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571-72 (10th Cir. 1995) (finding that prior disclosures barred FCA action where they "set the government squarely on the trail of the alleged fraud" despite not naming the potential defendants, where there were a limited number of potential defendants and they were "easily identifiable").

[121] *See Cooper v. Blue Cross & Blue Shield of Fl.*, 19 F.3d 562, 566-67 (11th Cir. 1994) (finding that prior allegations must be "specific to a particular defendant" in order to trigger the Public Disclosure Bar because identifying the "individual actors engaged in the fraudulent activity" will aid the Government's efforts to reveal fraud); *United States ex rel. Ven-A-Care v. Actavis Mid Atlantic LLC*, 659 F. Supp. 2d 262, 268 (D. Mass. 2009) (rejecting the defendants' argument that industry wide disclosures invoked the Public Disclosure Bar where the defendants and drugs at issue were not readily identifiable from the disclosures).

[122] *See United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1018-19 (9th Cir. 1999).

[123] *See* Dkt. 91 at 7-8 (citing Dkt. 91-7 at 11-17 (discussing PsychRights' efforts to lobby the Alaska state legislature and PsychRights' favored reform program)).

providers are prescribing psychotropic drugs to minors;[124] (b) that some of these minors are covered by Medicaid;[125] (c) that in many instances, these drugs are being prescribed for "off-label" or potentially unsupported uses;[126] and (d) that these unsupported uses may not be reimbursable through Medicaid under the law.[127] Some tie all this information together, even alleging that this activity constitutes Medicaid fraud. This is true of the CMS/Utah Correspondence,[128] PsychRights' filings in the State Case,[129] and several of the other media reports and documents.[130] In other words, these disclosures reveal the X, the Y, and the Z.

Certainly, not all of the disclosures cited by the Defendants identify all of the drugs discussed by the Relators or all of the Defendants. However, the disclosures do identify at least some of the drugs - indeed, PsychRights' Complaint in the State Case appears to identify most, if not all, of them[131] - and the State Case even identifies some of the Defendants. The fact that the prior disclosures do not identify all of the Defendants or all of the transactions is irrelevant - they provide more than enough information for the Government to investigate the conduct at issue. And, as the Defendants note, here, the Government is in a better position that the Relators to identify the parties engaging in that conduct.[132]

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[124] *See* Dkt. 91-9; Dkt. 91-10; Dkt. 91-11; Dkt. 91-13; Dkt. 91-14

[125] *See* Dkt. 91-10; Dkt. 91-13; Dkt. 91-14.

[126] *See* Dkt. 91-9; Dkt. 91-11; Dkt. 91-13; Dkt. 91-14.

[127] *See, e.g., United States ex rel. Franklin v. Parke-Davis*, No. 96-11651-PBS, 2003 U.S. Dist. LEXIS, at *5-10 (D. Mass. Aug. 22, 2003).

[128] Dkt. 91-4.

[129] Dkt. 91-7 at 53-56; 91-8 at 1-2.

[130] Dkt. 91-12 at 11-12; Dkt. 91-15, Dkt. 91-16, Dkt. 91-17, Dkt. 91-18.

[131] *See* Dkt. 91-7 at 28-41; *see also* Dkt. 91-4 at 4 (Zyprexa); Dkt. 91-9 (Ritalin); Dkt. 91-10 (Ritalin and Prozac); Dkt. 91-11 (Ritalin); Dkt. 91-12 (discussing various categories of drugs and mentioning Ritalin, Paxil, Effexor, Wellbutrin, and Doxepin by name).

[132] Dkt. 119 at 11.

Moreover, the Relators' position is betrayed by their own prior admissions. The Relators note in their opposition brief that the Government already "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 and youth."[133] Thus, the Relators have conceded that the Government already knows about the conduct that the Relators are complaining about here, and has already investigated it.[134]

PsychRights also alleges in the Amended Complaint that its State Case filings "informed" Defendants Sandoval and McComb "that presenting or causing the presentment of Medicaid claims that are not for medically accepted indications [namely, psychotropic drugs prescribed to children] are false claims."[135] The Defendants note that PsychRights also referred to the State Case in its statutorily required disclosure statement describing its claim for the Government.[136] PsychRights specifically quoted paragraph 22 of its amended complaint in the State Case (quoted in full above) and indicated that it became aware of the basis for the Matsutani Action while litigating that case.[137] Essentially, PsychRights has affirmatively alleged that it already publicly disclosed the allegations at issue here in the State Case.

Additionally, in seeking to have this Court unseal its Complaint, PsychRights submitted the Utah/CMS Correspondence to the Court in support of its argument that the Government was "unlikely" to intervene in the Matsutani Action. PsychRights argued that "the false or fraudulent nature of claims for prescriptions that are not for a medically accepted indication[] had been brought

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[133] Dkt. 111 at 14.

[134] Notably, Geodon and Seroquel are also both included in the PsychRights' Amended Complaint. Am. Compl. ¶¶ 166(h), 167(v).

[135] Am. Compl. ¶ 185.

[136] Dkt. 161. When a private person or entity initiates an FCA action it must provide the Government with a copy of the complaint and a "written disclosure of substantially all material evidence and information the person possesses" in order to allow the Government to make an informed decision on whether to intervene in the action. 31 U.S.C. § 3130(b)(2).

[137] Dkt. 161-1 at 3; Dkt. 151-1 at 3.

to the Government's attention in October of 2007[] and the Government declined to stop the fraud."[138] In other words, PsychRights was arguing that Utah had already brought the same issue that it is seeking to litigate here to the Government's attention eighteen months before it commenced the Matsutani Action. Indeed, the Utah/CMS Correspondence specifically raises that issue: whether prescriptions of psychotropic drugs for off-label uses to minors violate the Medicaid reimbursement law.[139]

The Relators also attempt to avoid the Public Disclosure Bar by arguing that "a public disclosure cannot trigger the public disclosure bar as to false claims that post date such public disclosure," relying on the Ninth Circuit's decision in *United States ex rel. Bly-Magee v. Premo.*[140] In *Bly-Magee*, the relator had brought a series of FCA actions against the defendants alleging that they had "violated federal procurement standards in awarding contracts, forced the Government to 'purchase unnecessary and duplicative services,' gave contracts to irresponsible parties, and falsely certified that they had conducted audits."[141] The Ninth Circuit held that the allegations that were disclosed in one of the earlier cases and a state audit report were publicly disclosed.[142] However, the court permitted the relator to move forward based on allegations related to a more recent time period which had not been encompassed by the prior disclosures.[143]

Here, unlike *Bly-Magee*, the public disclosures allege a continuing course of conduct which are not limited to specific time periods. The Relators' allegations would not provide the Government with any new basis to investigate these well-disclosed allegations.[144]

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[138] Dkt. 3 at 9.

[139] *See* Dkt. 91-4 at 4.

[140] Dkt. 111 at 17 (citing 470 F.3d 914, 920 (9th Cir. 2006)).

[141] 470 F.3d at 916-17.

[142] *Id.* at 916-19.

[143] *Id.* at 920.

[144] Moreover, the most recent prior disclosure dates from three weeks before the Matsutani Action was filed. *See* Dkt. 91-7 at 2-3. The specific claims described by the Relators all predate that

In summary, the prior public disclosures provided the Government with more than sufficient information to investigate the allegations that the Relators are making in this case. Accordingly, under the controlling statute here, the Relators' allegations have been publicly disclosed.

C. Original Source

Even where there has been a prior public disclosure, a relator may still pursue a *qui tam* action under the FCA where the relator is an "original source" of the information. Prior to the recent amendment, the FCA defined "original source" as follows:

> For the purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.[145]

The Ninth Circuit has explained that in order to qualify as an "original source," a relator must demonstrate that he or she: (1) has "direct and independent knowledge" of the information that the allegations are based on; (2) "voluntarily provided the information to the government" before filing

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filing with the exception of one claim for $283.94 on September 11, 2009. Am. Compl. ¶ 188. This transaction cannot change the fact that the substance of the Relator's allegations have been widely disclosed in a number of public sources. Nor can the Relators' request for injunctive relief, which may not even be available under the FCA. *See United States v. Sriram*, 147 F. Supp. 2d 914, 946 n.21 (N.D. Ill. 2001) (discussing the legislative history of the FCA 1986 amendments and noting that a provision providing the Government with explicit authorization to obtain preliminary injunctive relief was dropped from the bill); *Robbins v. Desnick*, No. 90 C 2371, 1991 WL 5829, at *3 (N.D. Ill. 1991) (determining that injunctive relief was inappropriate and noting that the plaintiff failed "to cite any cases where injunctive relief was granted for FCA violations"); *see also United States ex rel. Dep't of Defense v. CACI Int'l Inc.*, 953 F. Supp. 74, 79 (S.D.N.Y. 1995) (finding that the plaintiff had not shown that the public would suffer if the court did not issue an injunction since "the civil and treble damages that the government may recover under the [FCA] will serve to punish the defendants for their fraudulent conduct and to deter others from doing the same."); *cf. United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 968 (9th Cir. 1995) (indicating that the goal of the FCA is to compensate the Government by returning funds to the federal treasury and thereby deter future fraud).

[145] 31 U.S.C. § 3730(e)(4)(A) (2006).

the *qui tam* action; and (3) "had a hand in the public disclosure of allegations that are a part of the suit."[146]

A relator "must show that he [or she] had firsthand knowledge of the alleged fraud, and that he [or she] obtained this knowledge through his [or her] own labor unmediated by anything else" in order to satisfy the "direct knowledge" requirement.[147] Where a relator adds detail to information he or she obtained from another source that does not "add[] anything of significance" to the original information, the relator does not have "direct" knowledge.[148] In order to satisfy the "independent knowledge" requirement, the relator must show that he or she "kn[ew] about the allegations before that information [wa]s publicly disclosed."[149] Additionally, a relator is not an "original source" merely because the relator was the first to publicize allegations.[150] Rather, the relator's disclosure must have "'triggered' the investigation that led to the publicly disclosed information."[151]

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[146] *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1201 (9th Cir. 2009) (citation omitted); *United States ex rel. Zaretsky v. Johnson Controls, Inc.*, 457 F.3d 1009, 1013 (9th Cir. 2006) (citation omitted).

[147] *United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999); *United States ex rel. Devlin v. California*, 84 F.3d 358, 361 (9th Cir. 1996) (finding that the relators did not satisfy the "original source" requirement where "[t]hey did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else.").

[148] *See Devlin*, 84 F.3d at 361-62 (finding that the relator's efforts to verify the alleged fraud "did not make a genuinely valuable contribution to the exposure of the alleged fraud" since the "federal investigators would have done precisely the same thing" with the information).

[149] *Meyer*, 565 F.3d at 1202 (citation omitted).

[150] *Cf. Devlin*, 84 F.3d at 360-61 (9th Cir. 1996) (finding that the relator did not qualify as the "original source" of the information despite the fact that the relators had first revealed allegations to the media); *see also United States ex rel. Alfatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 522 (9th Cir. 1999) (rejecting relator's argument that "his allegations were not 'based upon' publicly disclosed information because he was the source of the information provided to the news media").

[151] *Seal 1 v. Seal A*, 225 F.3d 1154, 1162 (9th Cir. 2001).

Here, the Relators have explicitly conceded that they are "not asserting original source status."[152] Indeed, they cannot credibly claim to have direct, firsthand knowledge of fraud that adds anything of significance to the disclosures generated by others. The Relators here are simply not the types of "whistleblowers" that the FCA was created to encourage and reward. The Relators obviously feel very strongly about the issues raised in their pleadings. However, they are essentially echoing issues that have been previously raised by others and considered by the Government. The FCA is not the proper vehicle for the Relators to challenge these practices.

IV. CONCLUSION

For the foregoing reasons, the Court hereby ORDERS that:

1. The Defendants' motions to dismiss (Dkts. 89 and 141) and related request to present supplemental materials (Dkt. 161) are GRANTED;
2. The Parties' remaining motions (Dkts. 83, 90, 92, 113, 122, 133, 143, 156, 160, and 162) are DENIED as moot; and
3. Both of the instant actions are hereby DISMISSED with prejudice.

Dated at Anchorage, Alaska, this 24th day of September, 2010.

/s/ Timothy Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

[152] Dkt. 111 at 19.