

DANIEL S. SULLIVAN, Attorney General
STACIE L. KRALY, Chief Assistant Attorney General
R. SCOTT TAYLOR, Senior Assistant Attorney General
Alaska Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5255 (phone)
(907) 279-8644 (facsimile)

Counsel for Defendants William Hogan,
Tammy Sandoval, Steve McComb,
and William Streur

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

UNITED STATES OF AMERICA)	
<i>Ex rel.</i> Law Project for Psychiatric)	
Rights, an Alaskan non-profit corp.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 3:09-cv-00080-TMB
)	
OSAMU H. MATSUTANI, MD, <i>et al.</i>)	
)	
Defendants.)	
_____)	

**REPLY IN SUPPORT OF MOTION TO DISMISS CLAIMS
AGAINST STATE OF ALASKA OFFICIALS WILLIAM HOGAN,
TAMMY SANDOVAL, STEVE McCOMB, AND WILLIAM STREUR**

In opposing the State Officials’ Motion to Dismiss [Dkt. 90] PsychRights maintains that the State Officials are “personally liable for their violations of the False Claims Act.” [Dkt. 109] While the Ninth Circuit has held that “state employees sued in their personal capacities are ‘persons’ who may be subject to liability for submitting a

false claim to the United States,”¹ PsychRights has failed to plead any facts alleging that any of the four State Officials personally presented, or caused to be presented, a fraudulent claim that could subject them to personal liability under the FCA. At most, PsychRights has pled facts alleging (incorrectly) that the state’s Medicaid drug program covers prescriptions that are not entitled to Federal Financial Participation (FFP) under federal Medicaid law.² But an FCA claim against a state program is foreclosed by the U.S. Supreme Court’s decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.³ Absent any allegation that the State Officials were personally involved in submitting false claims to the United States, PsychRights’ claims against these officials can only be construed as “official capacity” claims: seeking to hold them liable for Medicaid claims processing activities that take place within the state agencies that they head.

PsychRights misrepresents *Stoner* in suggesting that the “official capacity” distinction may not be meaningful in the context of FCA liability.⁴ *Stoner* does not hold, as PsychRights asserts, that “state officials are personally liable for actions *within the*

¹ *United States ex rel. Stoner v. Santa Clara County Office of Education*, 502 F.3d 1116, 1123 (9th Cir. 2007).

² PsychRights’s misreading of federal Medicaid law, which forms the basis of its claims of FCA liability against all defendants, is demonstrated in Defendants’ Memorandum and Reply in Support of Motion to Dismiss Under Rule 12(b)(6) [Docket 92].

³ 529 U.S. 765 (2000)(states and state agencies are not “persons” within the meaning of the FCA and thus not subject to suit).

⁴ Opposition to Motion to Dismiss Under Rule 12(b)(6), Dkt. 109 at 2.

scope of their official responsibilities.”⁵ *Stoner* actually “hold[s] that state employees may be sued in their individual capacities under the FCA *for actions taken* in the course of their official duties.”⁶ To state an FCA claim against state employees “in their personal capacities,” a plaintiff needs to show “that the individual employees ‘knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval.’”⁷ *Stoner*’s complaint was held to plead personal capacity claims where it alleged that four Santa Clara County Office of Education employees had “falsely certified compliance with the Individuals with Disabilities Education Act to induce the government to disburse more money for certain education programs.”⁸ PsychRights here makes no such allegations of false or fraudulent actions personally taken by any of the State Officials.

That PsychRights’s claims against the State Officials are really “official capacity” claims against the state offices they occupy – and not against the officials personally – is evident from the manner in which the claims are pled. The Complaint alleges that “State Medicaid programs are not allowed to authorize reimbursement for prescriptions that are

⁵ *Id.* (emphasis added).

⁶ 502 F.3d at 1125 (emphasis added).

⁷ *Id.* at 1125 (quoting 31 U.S.C. § 3729(a)(1)).

⁸ *Id.* at 1120. *Stoner*’s FCA claims against the County Office of Education and the School District were properly dismissed under *Stevens*, as claims against “arms of the state,” which are not “persons” subject to *qui tam* liability under the FCA. *Id.* at 1123. The district court’s similar dismissal of *Stoner*’s “official capacity” claims against the individual county employees, as suits against their office – and no different from suits against the state itself – was not challenged on appeal. *Id.*

not for an indication that is either approved by the FDA or supported by one or more of the Compendia.”⁹ The State Officials are alleged to “administer programs” that have submitted claims for FFP from the United States for such prescriptions¹⁰ or to be liable under the FCA “for Alaska authorizing” such claims.¹¹ PsychRights effectively admits that its claims are really against the State Officials’ offices as Commissioner and Division Directors by its argument that it is their failure “to exercise their authority over their respective programs” that subjects them to FCA liability.¹² But *inactivity* by supervisory state officials does not amount to individual “actions taken” – prerequisite facts for holding individual state employees personally liable for their knowing participation in the submission of false or fraudulent claims to the United States government.¹³ The State of Alaska and its Medicaid drug program are the real targets of PsychRights’s claims for FCA liability, but states and state agencies are not amenable to such suits and, further, they “enjoy sovereign immunity from liability under the FCA.”¹⁴ PsychRights cannot circumvent congressional intent and the holding of *Stevens* merely by claiming that it seeks to hold the State Officials “personally liable.” Absent allegations of personal fraudulent actions, there can be no personal liability for state employees under the FCA.

⁹ First Amended Complaint at ¶ 160, Dkt. 107 at 33.

¹⁰ *Id.* at ¶186.

¹¹ *Id.* at ¶¶ 213 & 214.

¹² Dkt. 109 at 3.

¹³ *Stoner*, 502 F.3d at 1125.

¹⁴ *Id.* at 1122.

PsychRights's argument that it can properly sue the State Officials in their "official capacities" for injunctive relief is equally misplaced.¹⁵ First, in their "official capacities" the State Officials are not "persons" subject to liability under the FCA; if they are not amenable to suit in the first place, they cannot be enjoined. Second, injunctive relief is not available where there is an adequate remedy at law, such as the monetary damages specifically provided for in the FCA.¹⁶ Third, PsychRights can cite to no FCA case where injunctive relief was permitted against a state official.¹⁷ Fourth, the scope of PsychRights's request for injunctive relief merely confirms that its complaint is really against a state agency and not the individual State Officials. Its Refiled Motion for Preliminary Injunction Against Defendants Hogan and Streur actually seeks to enjoin these officials as well as "their agents, servants, employees and attorneys, and any persons who are in active concert or participation with them" – in other words, the entire Department of Health & Social Services.¹⁸ Even if injunctive relief were available under the FCA, PsychRights cannot escape the fact that it has failed to allege any fraudulent conduct by the individual State Officials that could make them amenable to suit here.

Absent any allegation of a fraudulent act personally performed by the State Officials, the claims against them are nothing more than "official capacity" claims that are barred by *Stevens*. In their official capacities, as the heads of state programs, the

¹⁵ Dkt. 109 at 3.

¹⁶ *See, e.g., Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995).

¹⁷ Dkt. 109 at 3.

¹⁸ Dkt. 113 at 1.

State Officials are not “persons” subject to liability in *qui tam* suits brought by private parties. PsychRights’s claims against the State Officials should be dismissed, as they fail to state FCA claims as a matter of law.

DATED this 25th day of May, 2010, at Anchorage, Alaska.

DANIEL S. SULLIVAN
ATTORNEY GENERAL
Attorneys for the State Defendants

By: /s/ Stacie L. Kraly
Alaska Bar No. 9406040
Chief Assistant Attorney General
P.O. Box 110300
Juneau, Alaska 99811
Telephone: (907) 465-4164
Fax: (907) 465-2539
Email: Stacie.Kraly@alaska.gov

/s/ R. Scott Taylor
Alaska Bar No. 8507110
Senior Assistant Attorney General
1031 W. Fourth Avenue, Ste. 200
Anchorage, Alaska 99501
Telephone: (907) 375-7775
Fax: (907) 279-8644
Email: Scott.Taylor@alaska.gov

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2010, a true and correct copy of the REPLY IN SUPPORT OF MOTION TO DISMISS CLAIMS AGAINST STATE OF ALASKA OFFICIALS WILLIAM HOGAN, TAMMY SANDOVAL, STEVE McCOMB, AND WILLIAM STREUR was served electronically on all parties of record.

/s/ R. Scott Taylor
Alaska Bar No. 8507110