

contends instead that the prescriptions are not covered by the Medicaid provisions in the Social Security Act. The motion, however, is procedurally and substantively defective in several ways. First, it improperly seeks an injunction not only against the two state defendants – Alaska Department of Health & Social Services Commissioner William Hogan and Deputy Commissioner William Streur – but also against the State of Alaska and other, unidentified non-parties:

their agents, servants, employees and attorneys, and any persons who are in active concert or participation with them from presenting claims or causing claims to be presented to Medicaid for reimbursement or payment of the United States Government’s federal financial participation (FFP) share of outpatient prescriptions for psychotropic drugs to recipients under the age of 18 (children and youth) that are not for a medically accepted indication.¹

Second, even an injunction against defendants Hogan and Streur would be improper because states, state agencies, and employees acting in their official capacities are not amenable to suit under the False Claims Act (FCA),² and the FCA does not provide for injunctive relief. Third, the motion also lacks any legal merit for the reasons explained in Defendants’ pending and fully briefed motions to dismiss [Dkt. Nos. 83, 89, 90, 92], principally because the court lacks subject matter jurisdiction and PsychRights’s bases the case on an erroneous interpretation of the Social Security Act. Finally, PsychRights fails to establish the other requisite factors for a preliminary injunction.

¹ Refiled Motion for Preliminary Injunction Against Defendants Hogan and Streur, Dkt. No. 113 at 1-2.

² See Motion to Dismiss Claims Against State of Alaska Officials, Dkt. No. 90.

I. The State Cannot Be Enjoined Because It Is Neither a Party Nor Amenable to Suit Under the False Claims Act.

PsychRights's requested injunction would impermissibly reach beyond the parties to this case. PsychRights seeks to enjoin not just the two state defendants, but also the State of Alaska and various other, unidentified non-parties, from requesting FFP for certain psychotropic drugs that PsychRights contends are not covered under the federal Medicaid program.³ The motion's over-breadth is no mistake: PsychRights is simply trying to accomplish what it failed to accomplish in a state court case that was dismissed because PsychRights lacked standing.⁴ Here, the motion argues that "states" must agree to abide by federal Medicaid requirements as a condition of participation, that "the State Medicaid agency is required to review" each prescription for compliance, that "Alaska's Medicaid program" has "flouted" these requirements, and that the Court should "preliminarily enjoin" what PsychRights alleges is the State's "continuing violation of federal law."⁵ The motion also seeks to include in the injunction "agents, servants, employees and attorneys, and any persons who are in active concert or participation with [the two state defendants]."⁶ The State of Alaska, the Alaska Department of Health &

³ PsychRights does not dispute that Alaska's Medicaid regulations and state plan have covered the challenged prescriptions and "that Alaska has been obtaining reimbursement under its approved plan" for these drugs. Dkt. No. 108 at 10.

⁴ See Dkt. No. 91 at 6-8.

⁵ Dkt. No. 113 at 3, 6-9.

⁶ *Id.* at 1-2.

Social Services, and the various unidentified persons are not defendants in this case, and the Court has no jurisdiction to enter the requested injunction against them.⁷

Furthermore, the problem is incurable. Neither the State nor the state agency could be named as a defendant in this case. States, state agencies, and state officials in their official capacities are not “persons” subject to *qui tam* liability under the FCA.⁸ The Ninth Circuit has also held that states and state agencies enjoy sovereign immunity from liability under the FCA.⁹ While PsychRights has claimed that the state officials “are personally liable for their violations”¹⁰ of the FCA, the complaint and the injunctive relief sought here demonstrate that the state officials have been sued only in their official or representative capacities as Commissioner and department heads.¹¹ Indeed, this motion reveals the flaw in PsychRights’s attempt to include the two state defendants in this case to begin with: that PsychRights is really seeking to change state policy even though its state case was dismissed for lack of standing and the FCA does not offer that relief. A

⁷ See, e.g., *In re Infant Formula Anti-trust Litigation, MDL 875 v. Abbott Laboratories*, 72 F.3d 842, 842-43 (11th Cir. 1995) (finding that a federal court lacks subject matter jurisdiction to issue preliminary or permanent injunction against a non-party).

⁸ See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000).

⁹ *United States ex rel. Stoner v. Santa Clara County Office of Education*, 502 F.3d 1116, 1122 (9th Cir. 2007) (citing *Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001)).

¹⁰ Dkt. No. 109 at 1.

¹¹ PsychRights has not alleged that either state official engaged in any personal fraudulent actions that could subject either of them to personal liability. See Motion to Dismiss Claims Against State of Alaska Officials and supporting Reply, Dkt. Nos. 90 & 124.

suit against a state official in his or her official capacity “is no different than a suit against the state itself”¹² – and is similarly barred by *Stevens* and the Eleventh Amendment.¹³ PsychRights cannot circumvent Congress’s intent and the controlling legal precedent merely by claiming that it seeks to hold the state officials “personally liable.” Since PsychRights seeks to preliminarily enjoin official state entities that have not been sued – and cannot be sued under the FCA – its motion must be denied.

II. Injunctive Relief Is Not an Available Remedy Under the False Claims Act.

PsychRights’s motion is also fatally flawed because injunctive relief is not an available remedy under the FCA. PsychRights has brought this case as a *qui tam* relator, “to recover all damages, penalties and other remedies established by the False Claims Act on behalf of the United States.”¹⁴ The FCA specifically provides for monetary damages.¹⁵ Where defendants are defrauding the government, the treble damages and civil penalties that the government may recover under the FCA, § 3729(a), adequately serve to punish them and deter others from doing the same. It is well established that a party is entitled to equitable relief only if there is no adequate remedy at law.¹⁶ The

¹² See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989).

¹³ *Stoner*, 502 F.3d at 1123.

¹⁴ Plaintiff’s First Amended Complaint, Dkt. No. 107 at 2.

¹⁵ The FCA includes an expanded remedy for a terminated *qui tam* whistleblower plaintiff, which does not apply to PsychRights. 31 U.S.C. § 3730(h) (a terminated whistleblower employee has the right to “all relief necessary to make the employee whole . . . [including] reinstatement . . .”).

¹⁶ See *Lewis v. Cocks*, 90 U.S. 466, 470 (1874).

monetary damages “established by” the FCA constitute a complete and adequate remedy at law – rendering equitable relief unavailable as a matter of law.

PsychRights has identified no authority supporting a right to injunctive relief for a *qui tam* relator under the FCA. The cases cited in its motion as support for the availability of injunctive relief are not FCA cases, but direct actions for injunctive relief against state agencies violating federal law.¹⁷ Moreover, those cases merely hold that the exception to Eleventh Amendment immunity set forth in *Ex parte Young*¹⁸ allows an “official capacity” suit against state officials that seeks only prospective injunctive relief to end a continuing violation of federal law.¹⁹ As a *qui tam* relator, PsychRights’s right to recovery under the FCA “exists solely as a mechanism for deterring fraud and returning funds to the federal treasury.”²⁰ PsychRights’s FCA claims against the state officials in their official capacity are barred by *Stevens* and FCA claims generally do not fall under the *Ex parte Young* exception as they seek monetary damages for false claims to the federal Government – not prospective injunctive relief.

¹⁷ See Dkt. No. 113 at 9 (citing *Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997) (suit by disabled inmates under the Americans With Disabilities Act and the Rehabilitation Act); and *Independent Living Center of California, Inc. v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009) (Social Security Act and the Supremacy Clause)).

¹⁸ 209 U.S. 123 (1908).

¹⁹ See *Armstrong*, 124 F.3d at 1025; see also *Independent Living Center*, 572 F.3d at 660.

²⁰ *In re Schimmels*, 127 F.3d 875, 883 (9th Cir. 1997) (quoting *United States v. Northup Corp.*, 59 F.3d 953, 968 (9th Cir. 1995)).

III. PsychRights Has Failed To Meet Its Burden of Establishing the Requirements for a Preliminary Injunction.

A. PsychRights is not likely to succeed on the merits.

PsychRights has failed to state a claim for a violation of the FCA. The fatal defects in its FCA allegations are set out in the memoranda supporting defendants' pending motions to dismiss, which are fully incorporated here in support of this opposition.²¹

First, this Court has no subject matter jurisdiction under the FCA's public disclosure bar, because PsychRights's allegations are based on publicly disclosed information and, as PsychRights concedes, it was not an original source of its allegations.²²

Second, PsychRights's assertion that Medicaid does not cover prescriptions of psychotropic drugs for indications that are neither FDA approved nor listed as supported in the compendia – the “gravamen of this action”²³ and the premise of this motion – is based on a fundamental misinterpretation of federal Medicaid law.²⁴ The claims challenged by PsychRights are covered by Alaska's Medicaid plan, and there can be no FCA liability for submitting a Medicaid claim that state law allows.²⁵

²¹ See Dkt. Nos. 83, 89, 90 & 92.

²² See Dkt. Nos. 91 & 119.

²³ Dkt. Nos. 110 & 111 at 1-2.

²⁴ See Dkt. Nos. 93 & 125 at 3-8.

²⁵ See Dkt. Nos. 93 & 125 at 2-3.

Third, as set forth in defendants' Memorandum and Reply in support of their Rule 9(b) Motion to Dismiss [Dkt. No. 83], PsychRights has failed to identify any circumstances of fraud that could constitute a violation of the FCA.²⁶

B. There is no likelihood of irreparable harm.

Given that the purpose of the FCA's provision for monetary damages is to deter fraud and return funds to the federal treasury, there can be no showing of irreparable harm in the absence of preliminary relief: if there were continuing false claims, they would result in additional restitution and financial penalties.²⁷

PsychRights's reliance on *California Pharmacists* as establishing irreparable harm as a matter of law is misplaced and nonsensical.²⁸ *California Pharmacists* involved a direct action by Hospital plaintiffs with Article III standing against a state agency for violating the fee-for-service rate requirements of the Social Security Act.²⁹ The court held that the economic injury doctrine precluding injunctive relief did not apply where the Hospital plaintiffs could obtain no remedy for their damages against the state because of the Eleventh Amendment.³⁰ Here, PsychRights has not sued the state or a state agency

²⁶ See Dkt. Nos. 84 and 115-1.

²⁷ See, e.g. *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (irreparable harm must be an injury that cannot be remedied by monetary damages); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (typically, monetary harm does not constitute irreparable harm).

²⁸ Dkt. No. 113 at 9.

²⁹ See 563 F.3d at 850.

³⁰ See *id.* at 852. In contrast, as an FCA relator, PsychRights's Article III standing to maintain this suit rests solely on the FCA's partial assignment of the Government's

and cannot do so under the FCA.³¹ “The inability of this Court to issue a money judgment against the State”³² is irrelevant to whether PsychRights has a valid FCA claim against any of the parties it has actually sued. If PsychRights has a valid FCA claim, any injury will be adequately remedied by monetary damages. To the extent PsychRights seeks “a remedy in damages against the state of Alaska,” which is unavailable under the FCA and the Eleventh Amendment, it merely underscores its failure to state a claim against the state defendants.³³

C. The balance of equities and public interest weigh against PsychRights.

Any harm to the public fisc is adequately redressed and deterred through the monetary damages provided in the FCA. Instead of preventing FCA violations, the injunction PsychRights seeks would restrict the scope of the state’s established Medicaid drug program and deny coverage for certain psychotropic drugs that doctors have lawfully prescribed to treat their pediatric patients. No public interest is served by judicial interference with the provider/patient relationship to deprive Medicaid beneficiaries of access to certain prescribed drugs that are generally available to patients with the means to pay for them. The balance of equities and public interest weigh heavily against the preliminary injunction sought here.

damages claim. *See Stevens*, 529 U.S. at 773. Unlike the rate reduction that harmed the Hospital defendants in *California Pharmacists*, PsychRights can claim no direct injury of its own.

³¹ *See Stevens*, 529 U.S. at 787-788.

³² Dkt. No. 113 at 9.

³³ *See Motion to Dismiss Claims Against State of Alaska Officials*, Dkt. No. 90.

IV. Conclusion.

For all the foregoing reasons, PsychRight's motion for preliminary injunction should be denied.

DATED this 3rd day of June, 2010, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2010, a true and correct copy of the OPPOSITION TO REFILED MOTION FOR PRELIMINARY INJUNCTION AGAINST DEFENDANTS HOGAN AND STREUR was served electronically on all parties of record.

/s/ R. Scott Taylor
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