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11 and William Streur

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

14 UNITED STATES OF AMERICA)
15 *Ex rel.* Law Project for Psychiatric)
16 Rights, an Alaskan non-profit corp.,)
17)
18 Plaintiff,)
19)
20 v.) Case No. 3:09-cv-00080-TMB
21)
22 OSAMU H. MATSUTANI, MD, *et al.*)
23)
24 Defendants.)
25)
26)

27 **MOTION TO DISMISS CLAIMS AGAINST STATE OF ALASKA**
28 **OFFICIALS WILLIAM HOGAN, TAMMY SANDOVAL,**
29 **STEVE McCOMB, AND WILLIAM STREUR**

30 The relator in this case, the Law Project for Psychiatric Rights
31 (PsychRights), has failed to state a claim under the False Claims Act (FCA) upon which
32 relief can be granted against defendants William Hogan, Tammy Sandoval, Steve
33 McComb, and William Streur (State Defendants), who are all officials of the State of
34 Alaska Department of Health and Social Services. State officials sued in their official

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1 capacities are not subject to FCA liability as a matter of law. Moreover, PsychRights's
2 sole theory of FCA liability against all the defendants in this case fails as a matter of law
3 because it is based on the false premise that FDA-approved drugs prescribed for off-label
4 and non-compendium-supported indications are barred from Medicaid federal financial
5 participation. Since PsychRights has not – and cannot – state an FCA claim against
6 these officials, the State Defendants move for dismissal of the claims against them
7 pursuant to Federal Rule of Civil Procedure 12(b)(6).
8

9 **I. STATE OFFICIALS SUED IN THEIR OFFICIAL CAPACITY, ARE NOT**
10 **SUBJECT TO LIABILITY UNDER THE FALSE CLAIMS ACT.**

11 In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,¹
12 the Supreme Court held that a state or state agency is not a "person" within the meaning
13 of the False Claims Act and, therefore, not subject to liability in *qui tam* suits brought by
14 private parties.² An official-capacity suit against a state officer, "is not a suit against the
15 official but rather is a suit against the official office. As such it is no different from a suit
16 against the State itself."³ And it is to be treated as a suit against the State.⁴ Accordingly,
17 FCA claims against state officials acting in their official capacities are barred under
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23 ¹ 529 U.S. 765 (2000).
24 ² *Id.* at 787-788.
25 ³ *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989).
26 ⁴ *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citing *Kentucky v. Graham*, 473
U.S. 159, 166 (1985)).

1 *Stevens*, just as FCA claims brought explicitly against the State as a defendant.⁵

2 The State officials named among the 32 defendants in PsychRights's
3 Complaint are: the Commissioner of the Alaska Department of Health and Social
4 Services, William Hogan; the Director of the Alaska Office of Children's Services,
5 Tammy Sandoval; the Director of the Alaska Division of Juvenile Justice, Steve
6 McComb; and the Director of the Alaska Division of Health Care Services, William
7 Streur. Although the caption of the Complaint states that the State Defendants are being
8 sued "individually" as well as in their official capacities, the descriptions of the parties
9 and the allegations against them in the body of the Complaint are limited to their official
10 capacity status as the heads of the state department and divisions that contain the Alaska
11 Medicaid and Children Health Insurance Programs.⁶ The Causes of Action against the
12 State Defendants allege defendants "Hogan and Streur are ... liable under the False
13 Claims Act for Alaska authorizing false claims for reimbursement by the Government"
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17 ⁵ See, e.g., *United States ex rel. Stoner v. Santa Clara County Office of*
18 *Education*, 502 F.3d 1116, 1123 (9th Cir. 2007) ("state instrumentalities" that are
19 "effectively arms of the state" are not subject to liability under the FCA, and the
20 Eleventh Amendment poses an independent bar to *Qui tam* action against such entities);
21 *United States ex rel. Adrian v. Regents of the University of California*, 363 F.3d 398, 402
22 (5th Cir. 2004) ("no FCA cause of action against [state agency employees] in their
23 official capacities"); *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d
24 932 (8th Cir. 2001), cert. denied, 536 U.S. 925 (2002) (dismissing qui tam suit against
25 official for conduct taken as part of official duties); *Bly-Magee v. California*, 236 F.3d
26 1014, 1018 (9th Cir. 2001) (dismissing qui tam suit against state's attorneys for conduct
related to their official litigation duties); *Alexander v. Gilmore*, 202 F. Supp. 2d 478
(E.D. Va. 2002) (dismissing suit against officials of state department of corrections
where no facts alleged to suggest that officials were acting in anything other than official
capacity).

⁶ Complaint at ¶¶ 11 – 14 and ¶¶ 188 – 190.

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1 and that defendants Sandoval and McComb are liable under the FCA because they
 2 "administer programs" that have submitted false claims for federal reimbursement.⁷ The
 3 Complaint makes no allegation that any of the State Defendants individually presented,
 4 or caused to be presented, a claim to Medicaid for payment of the federal financial
 5 participation share of an outpatient prescription that was for an indication not in the
 6 compendia, which is PsychRights's sole theory of FCA liability. The language and
 7 context of the Complaint allege a claim of FCA liability against the State of Alaska over
 8 the scope of its Medicaid Drug Program – not against the State Defendants individually.⁸
 9 PsychRights's claims against the State Defendants, as the heads of the department and
 10 divisions that contain the state Medicaid program, are "official capacity" claims against
 11 their official offices. PsychRights has thereby failed to state a claim against the State
 12 Defendants, because there is no FCA cause of action against state officials in their
 13 official capacities.

14 While "official capacity" FCA claims against county officials were
 15 dismissed in *Stoner*, the Ninth Circuit reversed the district court's dismissal of
 16 "individual capacity" claims, holding that "state employees may be sued in their
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23 ⁷ Complaint at ¶¶ 188 – 190 (emphasis added).

24 ⁸ See, e.g., Complaint at ¶ 168 ("State Medicaid programs are not allowed to
 25 authorize reimbursement for prescriptions that are not for an indication that is approved
 26 by the FDA or supported by one or more of the Compendia.").

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1 *individual capacities* under the FCA for actions taken in the course of their official
 2 duties."⁹ But the mere incantation of the term "individual capacity" is not enough to
 3 transform an official capacity action into an individual capacity action.¹⁰ Even in the
 4 context of "individual capacity" actions under 42 U.S.C. § 1983, upon which the *Stoner*
 5 court relied, state officers may be held personally liable for damages based upon official
 6 actions, only where they were sufficiently involved personally in a constitutional or
 7 statutory violation.¹¹ The relator in *Stoner* had alleged that three county employees
 8 personally made false certifications to induce the government to give money for
 9 educational programs.¹² No individual actions by the State Defendants are alleged here.
 10 A thorough reading the Complaint reveals not a single allegation suggesting that any of
 11 the State Defendants were individually involved in submitting claims for Medicaid
 12 federal financial participation that could subject them to personal liability and damages
 13
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16 ⁹ 502 F.3 at 1125 (but noting that state employees sued individually under
 17 the FAC maybe entitled to qualified immunity) (emphasis added). This holding is in
 18 conflict with the Eighth Circuit decision in *Gaudineer*, 269 F.3d at 937, and several
 19 district court decisions that have held that a state official cannot be sued under the FCA,
 20 even in an individual capacity, unless the official was acting "outside his official duties."
 21 See, e.g., *Alexander v. Gilmore*, 202 F.Supp.2d 478, 482 (E.D. Va. 2002); *United States*
 22 *ex rel. Honeywell, Inc. v. San Francisco Housing Authority*, No. C99-1936 TEH, 2001
 23 WL 793300, at *5 (N.D. Cal. July 12, 2001) (holding that FCA claims against
 24 government officials in their individual capacity must include allegations of personal
 25 gain).

22 ¹⁰ *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 543 (1986).

23 ¹¹ *United States ex rel. Burlbaw v. Regents of the New Mexico State*
 24 *University*, 324 F.Supp.2d 1209, 1216 (D. N.M. 2004) (citing *Alden v. Maine*, 527 U.S.
 25 706, 757 (1999) ("[A] suit for money damages may be prosecuted against a state officer
 26 in his individual capacity for unconstitutional or wrongful conduct fairly attributable to
 the officer himself ...").

1 under the FCA, as interpreted in *Stoner*. PsychRights's claims against the State
2 Defendants are in their official capacities and only in those capacities.¹³ As such, the
3 Complaint fails to state a claim against the State Defendants under the FCA as a matter
4 of established law.

5
6 **II. PSYCHRIGHTS HAS NOT ALLEGED A FALSE CLAIM AS A MATTER
7 OF LAW.**

8 Even if PsychRights were able to sue the State Defendants under the FCA,
9 it would have to prove that they knowingly submitted, or caused to be submitted, false
10 claims to the government.¹⁴ But, as demonstrated in the concurrently-filed Motion to
11 Dismiss Under Rule 12(b)(6) and supporting Memorandum, PsychRights's sole theory of
12 FCA liability is based on an erroneous interpretation of the Social Security Act. The Act
13 permits state Medicaid drug programs to cover FDA-approved psychotropic medication
14 prescribed by physicians for indications that are not listed in the compendia, which
15 Alaska's Medicaid drug program unambiguously does. In addition to all of its other
16 flaws, PsychRights's Complaint simply fails to allege a false claim, without which there
17 can be no liability under the FCA.
18

19 **CONCLUSION**

20 Because the State Defendants cannot be subject to suit in their official
21 capacities as defendants in an FCA action, and because, in any event, PsychRights's
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24 ¹² 502 F.3d at 1119-1120.

25 ¹³ See *Bender*, 475 U.S. at 543 (paraphrasing the holding in *Brandon v. Holt*,
26 469 U.S. 464, 469 (1985)).

¹⁴ 31 U.S.C. § 3729(b).

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1 Complaint fails to state an FCA claim as a matter of law, the claims against the State
2 Defendants should be dismissed with prejudice pursuant to Civil Rule of Federal
3 Procedure 12(b)(6).

4
5 DATED this 5th day of April, 2010, at Anchorage, Alaska.

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25 **CERTIFICATE OF SERVICE**

26 I hereby certify that on April 5, 2010, a true
and correct copy of the 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/ Stacie L. Kraly
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