No. 12-3671

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA and STATE OF WISCONSIN,
Plaintiffs,

and

TOBY T. WATSON,
Plaintiff-Appellant

v.

JENNIFER KING-VASSEL,
Defendant-Appellee.

Appeal from The United States District Court
for the Eastern District of Wisconsin,
Case No. 11-CV-236
The Honorable Judge J.P. Stadtmueller

BRIEF OF DEFENDANT-APPELLEE JENNIFER KING-VASSEL

GUTGLASS, ERICKSON, BONVILLE & LARSON, S.C.
Mark E. Larson
Bradley S. Foley
Attorneys for Defendant-Appellee Jennifer King-Vassel

735 North Water Street, Suite 1400
Milwaukee, WI 53202
Telephone: 414- 273-1144

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 12-3671

Short Caption: Watson v. King-Vassel

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Jennifer King-Vassel

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Gutglass, Erickson, Bonville & Larson, S.C., by Attorneys Mark E. Larson and Bradley S. Foley.

3. If the party or amicus is a corporation:

I) Identify all its parent corporations, if any; and

Not applicable.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable.

Attorney's Signature: s/Bradley S. Foley Date: March 29, 2013

Attorney's Printed Name: Bradley S. Foley

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit rule 3(d). **Yes** **X** **No** ____

Address: 735 North Water Street, Suite 1400, Milwaukee, WI 53202-4267

Phone number: 414-273-1144 Fax Number: 414-273-3821

E-mail address: bradley.foley@gebsc.com

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JURISDICTIONAL STATEMENT

A. District Court for the Eastern District of Wisconsin.

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and the False Claims Act, 31 U.S.C. § § 3729, 3730, and 3732(a) and (b). The district court also had supplemental jurisdiction over the claim asserted under Wisconsin law pursuant to 28 U.S.C. §1367(a).

B. Court of Appeals for the Seventh Circuit.

Appellate jurisdiction is conferred by 28 U.S.C. § 1291. This appeal is proper to the Seventh Circuit Court of Appeals as it is an appeal from the United States District Court for the Eastern District of Wisconsin, a district court located in the Seventh Circuit. 28 U.S.C. § 1294(1). The district court judgment dismissing claims against all defendants, on the merits, was filed on October 23, 2012. (Document 60, pp. 1-2) (Document references are to the district court record, unless otherwise noted.) Plaintiff-Appellant Toby T. Watson filed his notice of appeal on November 23, 2012. (Document 69.)

Watson's contention that the district court's entry of judgment on October 23, 2012 disposed of all claims against all parties is not accurate. *Watson's Appellant Opening Brief*, p. 1; Cir. R. 28(b). The district court dismissed all claims against the defendants. (Document 60, p. 2.)

The district court's order also granted in part defendant Encompass Effective Mental Health Services, Inc.'s (Encompass) motion for sanctions against Attorney Rebecca Gietman and Watson and further ordered supplemental information be

provided to it. *Id.* On January 8, 2013 this Court dismissed Attorney Gietman's and Watson's appeal of the sanctions awarded to Encompass. (Document 15 in the Court of Appeals, p. 15.) On February 1, 2013, this Court dismissed Attorney Gietman's appeal of the district court's award of sanctions against her, and Watson's claims against Encompass. (Document 18 in the Court of Appeals, p. 1.)

STATEMENT OF THE ISSUE

Whether the district court's conclusion that expert testimony was necessary to establish a *qui tam* Medicaid fraud claim pursuant to 31 U.S.C. § 3729(a)(1)(A), and as a result it dismissed all claims against Dr. King, should be affirmed?

Answered by the district court: Yes, expert testimony was necessary. The district court granted Dr. King's motion for summary judgment.

STATEMENT OF THE CASE

I. Nature of the Case.

Although other activity occurred in this case in the district court, the following is relevant to this appeal. This is a *qui tam* action in which Watson contends that Dr. King fraudulently induced the federal and state governments to pay for medications that Dr. King had prescribed for a minor patient, N.B., who is not a party and who Watson has never met. Dr. King denied the fraud allegations, and raised affirmative defenses, among others, that she did not receive any federal or state funds for the prescription of medications, that Watson lacked direct and independent knowledge of his allegations, and that prior public disclosure of essential aspects of the allegations

had occurred such that Watson was not a qualified person to pursue a *qui tam* action. (Document 14, p. 6.)

II. The Course of Proceedings.

The complaint was filed under seal on March 3, 2011. (Document 1.) The complaint alleged violations of the federal false claims act, 31 U.S.C. § 3729 *et seq*., and the Wisconsin False Claims Act, Wis. Stat. § 20.931, against defendants Dr. King, CAPS Child & Adolescent Psychiatric Services (CAPS), and Encompass. *Id.* The United States declined to intervene on September 2, 2011. (Document 8.) The State of Wisconsin declined to intervene on September 6, 2011. (Document 13.) The district court ordered the complaint unsealed on September 13, 2011. (Document 9.)

The parties' proposed Fed. R. Civ. P. 26(f) discovery plan was filed on February 13, 2012. (Document 20.) After a February 15, 2012 scheduling conference with the district court occurred, it issued a trial scheduling order that same day. (Document 21.) The parties' proposed Fed. R. Civ. P. 26(f) discovery plan was adopted on February 29, 2012. (Document 24, pp. 1-2; Appendix, pp.1-2. A motion has been filed in the district court to add Document 24 to the appellate record.) Watson was required to name all expert witnesses by April 11, 2012, (Document 24, p. 1), but did not name any experts.[1]

Dr. King and CAPS filed a summary judgment motion, and a supporting memorandum of law, proposed findings of fact, and affidavits on July 16, 2012.

[1] Dr. King was required to disclose experts by August 13, 2012, but moved for relief in light of Watson's failure to name experts and the contemporaneous motion for summary judgment. (Document 24, p. 2; Appendix, p. 2; Document 32.)

(Documents 26-31.) Watson moved to dismiss all claims against Encompass on August 12, 2012. (Document 40.)

Watson filed his memorandum of law in opposition to Dr. King's summary judgment motion, and his response to Dr. King's proposed statements of fact, on August 15, 2012. (Documents 42 and 42-1; also, citation is made to Document 42-1 in this brief to note that Watson does not dispute them).)Watson filed another memorandum of law, and supporting affidavits, in opposition to Dr. King's motion for summary judgment on August 20, 2012. (Documents 44-46.)Watson moved to dismiss CAPS on August 29, 2012. (Document 50.) Also on August 29, 2012, Watson filed an amended motion to dismiss all claims against Encompass.(Document 49.)

III. Disposition in the District Court.

The district court issued its order on October 23, 2012, granting Dr. King's motion for summary judgment.(Document 59;Appendix, pp. 3-24.) The district court also granted Watson's motions to dismiss Encompass and CAPS. *Id.* The district court judgment dismissing claims against all defendants, on the merits, was filed on October 23, 2012. (Document 60, pp. 1-2.)

Watson filed his notice of appeal on November 23, 2012. (Document 69.) Although this appeal originally was an appeal of other aspects of the district court's decision, plaintiff-appellant Attorney Gietman and defendants-appellees CAPS and Encompass were dismissed prior to the filing of Watson's appellant opening brief.(Documents filed in the Court of Appeals, 15, 18, and 20.)

STATEMENT OF FACTS

I. The Factual Background.

The district court, in its order granting Dr. King's summary judgment motion, noted that the parties "do not dispute the core facts." (Document 59, p. 2.) After researching *qui tam* claims through the web site PsychRights.org and meeting an attorney at a meeting of the International Society for Ethical Psychology and Psychiatry, the same attorney that is his appellate counsel, Watson placed an ad in a Sheboygan, Wisconsin newspaper. (Document 59, p. 2; Document 42-1, pp. 3-4, ¶¶ 4 and 5.) That ad solicited families of minor patients receiving Medicaid who had been prescribed certain psychotropic medications with an enticement of money from potential legal action. *Id.* The advertisement, as described by Watson, stated as follows.

> Bold heading, Medicaid patients, if you were prescribed one or more of these medications while you were under the age of 18, you may be entitled to participate in a possible Medicaid fraud suit, and then it listed a fair number of the medications that there were no - a fair number of medications that may not have been indicated that are approved. And then it had, please, if you are interested, please call, and then it listed a general number I have.

(Document 42-1, p. 4, ¶ 5.)

N.B.'s mother responded to the advertisement and, according to Watson's testimony, entered into an agreement to share any monies recovered with Watson and Attorney Gietman.(Document 42-1, p. 9, ¶ 15.) Neither N.B., nor any guardian acting on his behalf, were a party to this action or the agreement with Watson or Attorney Gietman. *See* (Document 42-1, pp. 9-10, ¶ 16.) Watson admitted at his deposition that he had never been involved in N.B.'s care and treatment, and he had never met N.B.

(Document 42-1, p. 4, ¶ 6.)

N.B.'s mother signed an authorization addressed to Dr. King for disclosure of N.B.'s treatment records "[f]or the purpose of providing psychological services and for no other purpose what so ever [sic]" without any mention of the real purpose, litigation. (Document 42-1, pp. 7-8, ¶¶ 11 and 12.)Watson acknowledged that the release never stated that records were being obtained solely for the purpose of litigation. (Document 42-1, p. 8, ¶ 13; Appendix 54 (which is Document 31-2).)He also conceded that this was misleading and even recognized that it was unethical, testifying that the authorization misrepresented the purpose for which N.B.'s records were sought. (Document 42-1, pp. 8-9, ¶ 14.)

Watson did not have any personal knowledge of Dr. King, N.B., or her treatment of N.B. (Document 42-1, p. 5, ¶ 7; Document 42-1, pp. 3-4, ¶ 4 ("I had no knowledge of Dr. King).) He never met her professionally, nor ever treated any of her patients. (Document 42-1, p. 5, ¶ 7.) Watson testified that he did not know if Dr. King received any compensation for writing prescriptions. (Document 42-1, pp. 5-6, ¶ 8.)

Although Watson is not a psychiatrist and does not have the ability to legally prescribe, he was aware that off-label use of prescription medication is reasonable, "almost customary," and a recognized part of medical practice in Wisconsin and the entire country. (Document 48, p. 4 (the citation is on pp. 51-52 of the deposition).) Watson also admitted that off-label use of prescription medication is actually more common and more widely utilized by physicians than the approved Food and Drug Administration purpose. *Id.*(the citation is on p. 52 of the deposition.)

Also undisputed is that Dr. King had no control or involvement with submitting any claims for any prescriptions she wrote. Dr. King did not submit the cost of prescription medications for N.B. through the Medicaid program. (Document 42-1, p. 6, ¶ 9.) She was paid for providing psychiatric services regardless whether she prescribed any medication or whether any prescriptions were filled for N.B. *Id.* Dr. King's compensation was not impacted in any way whether or not she prescribed medications to patients such as N.B. *Id.* Moreover, Dr. King's clinical judgment was not influenced by whether prescription medications were submitted to Medicaid. *Id.* Dr. King did not receive any benefits from any source for prescribing medications to N.B. or other minor patients. *Id.*

In the same manner, Watson did not know if Dr. King knew N.B. was a Medicaid patient when she treated him. (Document 42-1, p. 6, ¶ 10.) In his appellant brief, Watson alleges that N.B.'s mother knew that N.B. was receiving Medicaid. *Watson's Appellant Opening Brief*, p. 6. This unsubstantiated allegation will be addressed in the argument section below.

II. Dr. King's Summary Judgment Motion and the Subsequent District Court Decision.

A. Dr. King's summary judgment motion.

In support of her summary judgment motion, Dr. King asserted, among other things, that Watson had failed to name an expert in support of any of his claims. (Document 29, pp. 15-16.) In particular, Dr. King argued that the issue presented, whether expert testimony was necessary to establish a *qui tam* Medicaid fraud claim

pursuant to 31 U.S.C. § 3729(a)(1)(A), was an issue beyond the knowledge of lay persons. (Document 29, p. 15.) Thus an expert was required to discuss how claims for reimbursement for medications were presented to Medicaid programs, how payments were made by those programs, and the application of Medicaid and related state regulations to the medications Dr. King prescribed. (Document 29, pp. 15-16.)

Moreover, Dr. King contended that Watson did not dispute that he did not know whether she received reimbursement through Medicaid, and did not know whether she would have been reimbursed regardless whether she prescribed medications for N.B. ((Document 47, p. 10.)In addition, Dr. King argued that an expert was required to discuss off-label use of the medications, which Watson acknowledged is a widespread and reasonable medical practice that is actually more common and widely utilized by physicians than the approved Food and Drug Administration purpose. (Document 48, p. 4; Document 47, pp. 10-11).

Additionally, Dr. King asserted that Watson did not possess any actual knowledge of the alleged Medicaid fraud and thus could not pursue a *qui tam* claim. (Document 29, pp. 5-10.) Dr. King also contended that Watson did not have a basis to pursue his claim because the allegations in the complaint were previously publicly disclosed. *Id.*, pp. 10-15.

B. The district court granted summary judgment as Watson never named an expert.

After briefing on Dr. King's summary judgment motion concluded, the district court issued its order. (Document 59). In addressing the contention that Watson failed to

name necessary witnesses, including expert witnesses, the district court stated that in order to prevail in a false claim action, Watson must establish that Dr. King "*knowingly* present[ed], or *cause*[*d*] *to be presented*, a false or fraudulent claim for payment or approval. 31 U.S.C. § 3729(a)(1)(A)(emphasis added)." (Document 59, p. 10.) "A 'false or fraudulent claim' occurs when Medicaid pays for drugs that are not used for an indication that is either approved by the Food, Drug, and Cosmetic Act (FDCA) or supported by a drug compendia."(*Id.*, p. 11.)(citation omitted.)

With this background, the district court set forth the framework to guide its decision on this issue.

> The relator must not only show that there was, in fact, a false or fraudulent claim made to Medicaid through the submission of a prescription for a non-approved purpose, but also must show that the defendant knowingly caused that submission to be made. If the relator fails to show *either* of these elements, then his claim must fail.

(Document 59, p. 11.)(emphasis in original.)

The district court examined the "knowingly caused" requirement first. *Id.*, p. 12. The "knowingly caused" requirement means that Dr. King must have known the claim was fraudulent, and that she knowingly caused the claim to have been made. *Id.* Watson, however, "admits that he, himself, is unaware of whether Dr. King-Vassel actually received any reimbursements through Medicaid or would be entitled to reimbursements in the absence of prescribing medication." *Id.* The district court concluded that Watson failed to present any evidence to support these contentions. "[*I*]*t is clear that Dr. Watson himself lacks understanding of the reimbursement system*, and,

therefore, will not be able to establish that Dr. King-Vassel had any knowledge whatsoever of the likelihood of submission of a fraudulent claim." (Document 59, p. 12)(emphasis added.)

Additionally, Watson did not present any evidence that Medicaid would have been responsible for covering the cost of N.B.'s prescriptions. *Id.* "He has acknowledged his lack of personal knowledge on the topic, and has also failed to list any expert to provide further testimony. In that way, his failure to name an expert is fatal to his case." (Document 59, pp. 12-13.) Of significance, the district court also opined that the Medicaid reimbursement system is "obviously" confusing. (Document 59, p. 13.) Watson's lack of knowledge meant that he could not testify about the operation of the Medicaid reimbursement system and its application to Dr. King's care and treatment of N.B., including her writing prescriptions which were provided to his mother. (Document 59, p. 13.) Thus, Watson could not meet any of the required elements of Medicaid fraud. *Id.*

The district court also concluded that Watson failed to establish causation. *Id.* "[W]ithout testimony of an expert, the Court cannot know what other intervening steps may have occurred between Dr. King-Vassel's signature of the prescription and the submission of a claim to Medicaid."(Document 59, pp. 13-14.) The district court described it as a proximate cause problem for Watson. (Document 59, p. 14.) "Without an expert to testify, there is a grand mystery between the time of the prescription and the claim being made to Medicaid." *Id.*

Last, the district court held that Watson could not establish the fraudulent claim element of 31 U.S.C. § 3729(a)(1)(A). (Document 59, p. 14.) To do this, he would have to establish that Dr. King prescribed medications for N.B. "'for a medical indication which is not a medically accepted indication.'" *Id.* (citation omitted.) While Watson contended that this was easy to establish, he did not provide any evidence to support this assertion. *Id.* The district court opined that "in reality, medical documents typically are not readily understandable by the general public and would require an expert to explain their application to a particular set of circumstances." (Document 59, pp. 14-15.) The district court cited to a 1994 Fordham Law Review article in support of this analysis. (Document 59, p. 15.) As Watson did not name an expert who could establish the applicability of the drug compendia or the Food, Drug, and Cosmetic Act to N.B.'s indications, he failed to produce "'definite, competent evidence,'" which he also failed to do to meet the other elements, and summary judgment was granted. (Document 59, p. 15)(*citing EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000).)

Addressing the *qui tam* jurisdictional bar of 31 U.S.C. § 3730(e)(4) also raised, the district court concluded that there had not been public disclosure of the facts in the instant case and therefore Watson's suit was not barred. (Document 59, p. 8.) Watson provided "particular information relating to Dr. King-Vassel that was previously unknown to the government." (Document 59, p. 8.) The previous public disclosures, as cited in Dr. King's evidentiary submissions in the district court, could not have

triggered the alleged public disclosure, according to the district court. *Id.*, p. 9.

C. The district court awarded sanctions against Watson and Attorney Gietman and in favor of Dr. King.

Based on the "unscrupulous tactics" used by Attorney Gietman and Watson to gain access to N.B.'s medical records, the district court imposed sanctions of $250 each against Attorney Gietman and Watson to pay to Dr. King. (Document 59, p. 10.) In reaching this conclusion, the district court held that Watson obtained N.B.'s medical records "in a manner that could best be described as borderline-fraudulent. He obtained a medical release for those records only after representing that he was going to treat N.B. – a total falsity." (Document 59, pp. 18-19)(citation omitted.) The district court noted that "Dr. Watson never used those [medical] records in the treatment of N.B., and in reality obtained them only to bring the immediate suit." (Document 59, p. 3, footnote 1.)

The district court then addressed in particular how Watson singled out Dr. King, causing undue harm to her, in his attempt to create a *qui tam* claim.

> And that does not even touch upon the fishing-expedition style of fact gathering engaged in by Dr. Watson. His attack here on a single doctor's prescription to a single patient does not provide the government with substantial valuable information, as intended by the *qui tam* statutes. Instead of providing the government with valuable information, Dr. Watson seemingly sought only to cash in on a fellow doctor's attempts to best address a patient's needs. In return, Dr. King-Vassel was treated to a lawsuit, the proceeds of which would be split three ways between Dr. Watson, Ms. Gietman, and the parent of the patient Dr. King-Vassel was attempting to serve.

(Document 59, p. 19.)

SUMMARY OF THE ARGUMENT

In order to establish Medicaid fraud, pursuant to 31 U.S.C. § 3729(a)(1)(A), Watson must meet two elements: 1, that there was in fact a false or fraudulent claim made to Medicaid through the submission of a prescription for a non-approved use; and 2, that Dr. King knowingly caused that submission to be made. Watson has failed to meet both elements.

As to the "knowingly caused" element, Watson did not present any evidence that he had any knowledge of the Medicaid reimbursement system, nor did he present any evidence that Medicaid would be responsible for paying for N.B.'s medications. Moreover, Watson never provided any evidence or expert testimony to explain how a prescription signed by Dr. King was somehow allegedly submitted to Medicaid.

Watson also failed to establish a fraudulent claim occurred because he did not present any evidence, or identify any witnesses, who could address how the drug compendia he cited applied to the medications prescribed by Dr. King, particularly in light of his concession of reasonable and widespread off-label prescription practices and Dr. King's undisputed non-involvement in the submission of the prescriptions.

Further, because he failed to name an expert, Watson attempts to establish that he can testify in support of what defines fraudulent use of N.B.'s prescription medications. Watson cannot do this, however, as he is attempting to present expert testimony under the guise of lay opinion testimony, which is prohibited. To this end, Watson cannot use judicial notice to introduce a chart of what is a medically accepted indication without foundational testimony, which he has not presented, and which is subject to reasonable

dispute.

Watson's last argument, that the district court should have provided him an opportunity to list an expert, fails also. Watson cannot now request a reversal of his litigation strategy. Watson deliberately chose to not name an expert in the district court, and should not now be permitted to be rewarded for that failed choice. Moreover, before and after the district court issued its order, Watson had numerous opportunities to name an expert, or request relief to do so, but he never did so. The district court's order must be affirmed.

As an alternative basis for affirming the district court's order, Dr. King maintains that, contrary to the district court's decision, Watson failed to overcome the *qui tam* jurisdictional bar to prosecute this action. Watson did not present any evidence that he had direct and independent knowledge of the *qui tam* claims against Dr. King, nor did he dispute that the allegations at issue here have existed in the public realm for years prior to the filing of his complaint.

ARGUMENT

I. Watson Failed to Present Any Evidence that Dr. King Knowingly Caused a Submission to Medicaid.

A. Standard of review.

This court reviews the district court's decision to grant summary judgment *de novo* and may affirm on any basis supported by the record and law. *See Holmes v. Vill. of Hoffman Estates*, 511 F.3d 673, 681 (7th Cir. 2007). "However, our favor toward the nonmoving party does not extend to drawing '[i]nferences that are supported by only

speculation or conjecture.'" *Argyropoulos v. City of Alton*, 539 F.3d 724, 732 (7th Cir. 2008)(alteration in original)(internal citation omitted.) "[A] party will be successful in opposing summary judgment only if they present definite, competent evidence to rebut the motion." *Smith v. Severn*, 129 F.3d 419, 427 (7th Cir. 1997)(citations and internal quotation marks omitted.) This court's review is limited to the record presented to the district court at that time. *Joseph P. Caulfield & Assoc., Inc. v. Litho Prod., Inc.,* 155 F.3d 883, 888 (7th Cir. 1998).

B. Watson failed to provide evidence of knowledge of the Medicaid reimbursement system.

As noted above, the district court concluded that in order to establish Medicaid fraud, Watson must meet two elements: 1, that there was in fact a false or fraudulent claim made to Medicaid through the submission of a prescription for a non-approved use; and 2, that Dr. King knowingly caused that submission to be made. (Document 59, p. 11). Watson must meet both elements. *Id.* Of significance, Watson does not dispute the district court's analysis of 31 U.S.C. § 3729(a)(1)(A) in order to establish Medicaid fraud; Watson only challenges the characterization of the evidence required to meet these elements.

In his first argument, Watson believes that expert testimony was not required to establish the second element (the "knowingly caused" element), but in fact the "knowingly caused" requirement has two elements: knowledge and causation. (Document 59, 12.) Watson's argument is devoid of any discussion of the knowledge prong, and focuses instead on cause. *See Watson's Appellant Opening Brief*, pp 10-13.

The district court, however, thoroughly addressed Watson's failure to meet the "knowledge" prong.

Nowhere in Watson's appellant opening brief does he address his admission that "he, himself, is unaware of whether Dr. King-Vassel actually received any reimbursements through Medicaid or [that she] would be entitled to reimbursements in the absence of prescribing medication." (Document 59, p. 12; *see also* Document 42-1, pp. 5-6, ¶ 8). In fact Watson admitted that he did not know whether Dr. King knew whether N.B. received Medicaid. (Document 42-1, pp. 6-7, ¶ 10.) As the district court concluded, if Watson lacked understanding of the Medicaid reimbursement system, he could not then establish that Dr. King had any knowledge of how to submit a fraudulent Medicaid reimbursement claim. (Document 59, p. 12.) A lack of foundation is "a link missing in a chain of logic needed to show that the evidence is actually relevant." *United States v. Tanner*, 628 F.3d 890, 903, footnote 5 (7th Cir. 2010.)

Relatedly, Watson's lack of personal knowledge about the Medicaid reimbursement system also defeats his claim, even if it was established that Dr. King knew N.B. received Medicaid. Watson never provided any evidence to show that Medicaid would be responsible for paying for N.B.'s medications or whether Medicaid or the state had adopted provisions or practices that addressed the medications. *Id.* If Watson does not possess any knowledge of the Medicaid reimbursement system, then he needed to name an expert that could. He did not. *Id.* Thus, Watson could not "testify as to the operation of the reimbursement system and its application to Dr. King-Vassel." (Document 59,

p. 13.) It is telling that neither the United States nor the State of Wisconsin intervened in support of Watson's claims. (Documents 8 and 13.)

C. Watson failed to establish the cause prong of the "knowingly caused" element of Medicaid fraud.

Watson contests whether he needed expert testimony to support the allegation that Dr. King "caused the claim to be made." He attempts to establish causation through the affidavit of N.B.'s mother, pharmacy records submitted without foundation, a Medicaid claims history report that includes prescriptions written by health care providers other than Dr. King, and one medical record, all of which do not describe how a signed prescription by Dr. King is somehow allegedly submitted to Medicaid. *Watson's Appellant Opening Brief,* p. 12; Watson Short Appendix, p. 39.[2] As with every other portion of his Medicaid fraud claim, Watson failed to provide any "definite, competent evidence" that met this element. *Sears, Roebuck & Co.*, 233 F.3d at 437.

The mother of N.B. speculates that Dr. King knew N.B. was on Medicaid and that his care was being paid by Medicaid, but this speculation is inadmissible. (Document 44, p. 2, ¶¶ 4-5.) N.B.'s mother is not relating an out of court statement made by Dr. King as to her state of mind, but rather speculating as to the state of mind of Dr. King. *Borcky v. Maytag Corp.*, 248 F.3d 691, 695 (7th Cir. 2001)(speculation will not suffice to defeat summary judgment);*Compare* Fed. R. Evid. 803(3). How N.B.'s mother actually obtained the medications allegedly prescribed by Dr. King is irrelevant. It is

[2] The Wal-Mart certification of records is included twice in the Watson short appendix. Watson Short Appendix, pp. 25 and 28.

undisputed that Dr. King did not submit the cost of prescription medications for N.B. for reimbursement through Medicaid, and that her compensation was not impacted whether she prescribed medications. (Document 42-1, p. 6, ¶ 9.) Watson acknowledged N.B.'s mother was free to *not* submit the prescriptions for reimbursement, as they could have been paid "out of pocket" or the prescriptions could not have been filled at all. (Document 42-1, pp. 6-7, ¶ 10.)

Moreover, N.B.'s mother never averred in her affidavit who caused the submission of a claim to Medicaid, nor what happened to a claim in the Medicaid reimbursement system. She states that she had N.B.'s prescriptions filled at Wal-Mart, and used a medical assistance card to pay for N.B.'s prescriptions, but that was the extent of her knowledge. (Document 44, p. 2, ¶¶ 4-5.) As the district court held, "[r]ather, N.B.'s mother would need to submit the claim to a pharmacy at which time she would also need to claim entitlement to Medicaid coverage." (Document 59, p. 13.)

Also, the pharmacy records submitted without explanation, a Medicaid claims history form, and one medical record the pharmacy records attached do not establish causation. *Watson's Appellant Opening Brief*, pp. 12-13. These submissions do not provide any information as to how prescription medications were caused to be submitted to Medicaid, and by whom. The records only establish that there were records kept at Wal-Mart and in the Wisconsin Medicaid system; what Watson is missing is any explanation as to how the prescriptions were caused to be presented to Medicaid and how they were processed, as the district court noted. (Document 59, pp. 13-14.)

Watson also acknowledged in his second brief in opposition to Dr. King's summary judgment motion that the Wal-Mart and Medicaid records lack foundation, are not definite, and are in flux. "Much confusion has been created because the Medicaid Records differ from those provided by Wal-Mart Pharmacies. - [sic] Medicaid Records reflect far fewer claims paid by Medicaid than Wal-Mart records show were paid by Medicaid. Additional discovery is necessary and will be conducted." (Document 45, p. 3, footnote 3.) Watson, however, never pursued any discovery and therefore never submitted any accurate evidence regarding Medicaid expenditures. Furthermore, according to Watson's own testimony, it is possible that a patient eligible for Medicaid could pay for a prescription out of his or her own pocket, or his parents' pockets, rather than billing Medicaid. (Document 42-1, pp. 6-7, ¶ 10.)

As the district court found, Watson's failure to present any evidence, and specifically expert testimony, means that "there is a grand mystery between the time of the prescription and the claim being made to Medicaid. [. . .] Without an expert to explain the workings of the in-between phase (the black box), the Court and an hypothetical jury cannot make any determination of whether Dr. King-Vassel actually caused the submission of a false claim." (Document 59, p. 14.)The district court decision must be affirmed.

II. Watson Failed to Establish That There Was a "Fraudulent Claim."

A. Standard of review.

It is agreed that the proper standard of review may be whether the district court abused its discretion as to whether an expert is required. *See Watson's Appellant*

Opening Brief, p. 18, footnote 33. Although not exactly on point as to the issue presented in the instant case, but similar, a district court's decision to admit or exclude expert witness testimony is reviewed for abuse of discretion. *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997). The appellate court, however, "will not reverse in such a case, unless the ruling is manifestly erroneous." *Joiner*, 522 U.S. at 142, *quoting Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878).

B. Watson's own testimony disproves his allegations.

The second element of a Medicaid fraud claim is that there was in fact a false or fraudulent claim made to Medicaid through the submission of a prescription for a non-approved use. (Document 59, p. 14.) Though Watson spends a great deal of his brief addressing this issue, this issue is fairly simple: as it is undisputed that he never named an expert, in order to prove whether a Medicaid claim was false or fraudulent he had to establish that as a lay person he can present this information to a jury. The district court rejected this argument, as must this Court.

The district court stated that Watson had to establish that Dr. King failed to prescribe N.B. medications for a recognized medical indication. (Document 59, p. 14.) This argument fails for a number of reasons, including the fact that Watson testified that the off-label prescription of medication is an almost universal practiced employed by reasonable physicians in Wisconsin and the entire country, such that medications are more widely prescribed for off-label purposes that the actual purposes approved by the Food and Drug Administration. (Document 48, p. 4 (the citation is on pp. 51-52 of

the deposition).)

Watson fails to address his off-label testimony in his brief. *Watson's Appellant Opening Brief,* pp. 13-17. This is a critical omission. Because Watson acknowledges there can be off-label use that could be medically indicated, this defeats his own contention that the prescription of medication, and thus reimbursement for it, can only fall within the dictates of the Food, Drug, and Cosmetic Act or one of three drug compendia.

C. Watson is prohibited from testifying about the medical indications, as he would in effect be testifying as an expert.

The district court noted that "medical documents typically are not readily understandable by the general public and would require an expert to explain their application to a particular set of circumstances." (Document 59, pp. 14-15.) Instead, Watson apparently argues that the presentation of the medical indications can be accomplished without expert testimony, but through his lay testimony.[3]

Fed. R. Civ. P. 26(a)(2) requires that expert witnesses be disclosed. This rule is based on a fundamental principle: "Knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial." *Musser v. Gentiva Health Serv's*, 356 F.3d 751, 757 (7th Cir. 2004). "Without proper disclosures, a party may miss its opportunity to disqualify the expert, obtain rebuttal experts, or hold depositions for an expert not required to provide a report." *Tribble v. Evangelides*, 670 F.3d 753, 758 (7th

[3] "Apparently" because Watson never stated in his brief who would testify about applying the medical indications to the facts at bar. *Watson's Appellant Opening Brief,* pp. 13-17.

Cir. 2012), *citing Musser,* 356 F.3d at 758.

What Watson proposes to do is testify in a similar manner as an expert, but as a lay person. This issue was addressed in *Tribble*. In that case, two City of Chicago police officers were sued based on 42 U.S.C. § 1983 for an alleged illegal stop, false arrest, illegal search, and a violation of due process, based on an arrest of plaintiff Mr. Tribble. *Id.*, 670 F.3d at 756. Tribble contended that the officers did not have probable cause to arrest him, based in part on a Cook County state court judge's conclusion at a preliminary hearing that there was not probable cause to arrest him. *Id.*

In opposition, the officers introduced testimony at trial, through an assistant state's attorney, that the state court judge's conclusion did not mean that the officers did not actually find drugs on Tribble. *Tribble*, 670 F.3d at 756. The assistant state's attorney testified about the operation of the particular Cook County state court branch where Tribble's preliminary hearing occurred. *Id.* The assistant state's attorney testified that narcotic low gram weight possession cases were regularly thrown out for lack of probable cause. *Id.,* 670 F.3d at 757-58.

This Court held that the assistant state's attorney "*did* testify as an expert and, accordingly, her testimony was subject to the disclosure requirements of Federal Rule of Civil Procedure 26(a)(2)." *Id.* (emphasis in original). This Court arrived at that conclusion based on the assistant state's attorney's testimony about the percentage of cases in that particular state court branch being dismissed for no probable cause over a six month period of time, what "'would be considered'" a low gram weight in a

narcotics cases in that particular state court branch and whether that would include Tribble's case, and that she "surmised that 'the overwhelming majority of the cases that were findings of no probable cause were for what will be considered a low amount of narcotics.'" *Id.*, 670 F.3d at 758 (citations omitted.) The *Tribble* court noted that the assistant state's attorney was "being asked to *summarize* her experiences in Branch 50 and *draw conclusions* about how, in general, she believed it operated." *Id.* (emphasis in original.) The assistant state's attorney, however was not disclosed as an expert. *Id.* Tribble was then granted a new trial. *Id.,* 670 F.3d at 761.

Watson's alleged presentation of his case has the structure of expert testimony. *Tribble*, 670 F.3d at 759 (the assistant state's attorney's testimony has "the familiar syllogistic structure of much expert testimony. *See* 1 McCormick on Evid. § 13 (6th ed.).") In a similar vein, Watson contends that he can establish that the prescriptions written by Dr. King for N.B. were not for indications approved under the Food, Drug, and Cosmetic Act, or supported by any of the drug compendia. *Watson's Appellant Opening Brief,* p. 14. He would base this on a chart drafted by his appellate attorney's advocacy organization, the Law Project for Psychiatric Rights, and *conclude* that expert testimony was not required. *Id.*, pp. 15-16, footnotes 28 and 29.

In effect Watson, a psychologist who cannot prescribe medications and has no personal experience doing so, is requesting that his testimony be categorized as lay opinion testimony as to the practice of a board certified psychiatrist. He cannot testify about how complicated medical/legal provisions applied to medications she prescribed,

how she was compensated, and then draw a conclusion as to whether a fraudulent claim was made. "Broad generalizations and abstract conclusions are textbook examples of opinion testimony." *Tribble*, 670 F.3d at 758.

> Lay opinions and inferences - as compared with opinions and inferences of experts - may not be 'based on scientific, technical, or other specialized knowledge' within the scope of Rule 702. Fed. R. Evid. 701. Lay opinion 'most often takes the form of a summary of firsthand sensory observations' and may not 'provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.' [*United States v.*] *Conn*, 297 F.3d [548,] at 554 [7th Cir. 2002].

Id.

Fed. R. Evid. 701, Opinion Testimony by Lay Witnesses, requires that lay testimony be limited to testimony: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c), not based on scientific, technical, or other specialized knowledge within the scope of Fed. R. Evid. 702, Testimony by Expert Witnesses. "Limitation (a) is the familiar requirement of first-hand knowledge or observation." Fed. R. Evid. 701, Notes of Advisory Comm. on Proposed Rules.

The last requirement is designed "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in *lay witness clothing*." Fed. R. Evid. 701, Committee Notes on Rules, 2000 Amendment (emphasis added.) As an example, the advisory committee cited to a Tennessee state court case that set forth the distinction between lay and

expert witness testimony. "[L]ay witness testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'" *Id.* "The court in [the Tennessee case] noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. *That is the kind of distinction made by the amendment to this Rule.*" *Id.* (emphasis added.)

This is not just a simple case of presenting a chart based on personal observations and requesting the jury to draw conclusions from it. Watson would be testifying about the application of statutes and drug compendia to the practice of medicine by a psychiatrist. Even in reviewing the chart prepared apparently by Watson's attorney, Watson admits that there may be occasions where expert testimony may be required in interpreting the DRUGDEX recommendations: "While what 'support' means under meaning of 42 U.S.C. § 1396R-8(k)(3) is primarily one of statutory interpretation, an expert may be helpful, *or even required*, for that inquiry." *Watson's Appellant Opening Brief*, p. 17, footnote 29 (emphasis added.)

Watson is prohibited from testifying about such issues, as he would be attempting to introduce expert testimony as a wolf in the sheep's clothing of lay opinion testimony. By failing to disclose himself as an expert as required by the district court's order, Watson deprived Dr. King of the opportunity to depose him based on his alleged expert opinions, to obtain an expert to rebut the opinions of Watson, and deprived her of the

opportunity to disqualify his testimony before the district court based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See Musser*, 356 F.3d at 757-58.

D. The chart of Medically Accepted Indications is inadmissible.[4]

In the case at bar, Watson seeks to introduce at the appellate level a chart entitled "Medically Accepted Indications for Pediatric Use of Certain Psychotropic Medications" that was previously filed in an Alaskan federal court case by Watson's appellate counsel. That chart was never submitted to the district court in the case at bar and is therefore outside the appellate record. It is well-established that this Court may not consider factual material outside the record which was never presented to the district court. *United States v. Noble*, 299 F.3d 907, 911 (7th Cir. 2002.)

Watson never states that who actually drafted the chart. The Law Project for Psychiatric Rights published the chart. *Watson's Appellant Opening Brief*, pp. 16-17, footnote 29. Watson's request for judicial notice of the chart must be denied, as he is using judicial notice to establish facts that are in dispute and are really the unfounded opinion of Attorney Gottstein. *See Id.,* p. 15, footnote 28.

Although Watson did not reference it, Fed. R. Evid. 201 provides the structure for a court to determine judicial notice. A court may "judicially notice a fact that is not subject to *reasonable* dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be *accurately and readily determined from sources*

[4] A motion to strike this chart has been filed under separate cover.

whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201 (b) (emphasis added.)

In other words, judicial notice cannot occur if the facts are subject to reasonable dispute or the accuracy of the source cannot be determined. *Ennenga v. Starns*, 677 F.3d 766, 773-74 (7th Cir. 2012). This chart, for example, is not a document created by a federal or state authority or entity.

The chart that Watson requests to be judicially noticed is not appropriate for judicial notice. It is a document that was submitted in a federal district court of Alaska case prosecuted by the same advocacy group that is counsel for Watson in this case. The admissibility of that document, which was submitted in support of the plaintiff's motion for a preliminary injunction, was never decided by the district court, as the district court granted the defendants' motions to dismiss. *See* (Appendix, pp. 25 and 26; the motion for a preliminary injunction was denied as moot.) The plaintiff's appeal of the decision of the Alaska district court was affirmed by the United States Court of Appeals for the Ninth Circuit. (Appendix 50.)

This request is not a case of simply asking a court to take judicial notice of a verifiable fact, but rather to accept a party's opinion, specifically the opinion of an advocacy group headed by Watson's appellant counsel. *See* Watson's Judicial Notice Appendix, pp. 1-7. According to pages one to six of the chart, the chart was drafted by The Law Project for Psychiatric Rights, but nowhere does this document state who actually drafted it, the qualifications of those individual(s) that may have drafted it,

and thus lacks any foundation. *Id.* This is a document that is subject to reasonable dispute and judicial notice must not be afforded to it.

Moreover, this chart was never introduced in the district court, which is acknowledged by Watson, as he never refers to filing of this chart in the district court. *See* Watson's Judicial Notice Appendix, pp. 1-7. An appellate court typically will not consider facts that were not presented to the district court. *Green v. Warden*, 699 F.2d 364, 369 (7th Cir. 1983). Watson has failed to meet the elements of judicial notice, and the district court should not be blind sided by Watson's late attempt to supplement the record on appeal.

III. Watson Cannot Ask for Relief He Did Not Seek from the District Court, Despite Having Ample Time to Request Time to Name an Expert.

The underlying premise of Watson's request that the district court should have permitted him to name an expert, after it issued its order, is that he should not be penalized for his own litigation strategy and actions/omissions. *Watson's Appellant Opening Brief*, p. 19. "A district court is not required to fire a warning shot." *Hal Commodity Cycle Management Co. v. Kirsh*, 825 F.2d 1136, 1139 (7th Cir. 1987). Watson chose to not name an expert in a highly complex area of the law involving facts of medicine, administrative law, and procedures.[5] This was a risk inherent in his litigation strategy. *Chicago Title Land Trust Co. v. Potash Corp. of Saskatchewan Sales*

[5] In contrast, Dr. King, on July 17, 2012, the day after she filed her summary judgment motion, filed her motion requesting relief from the August 13, 2012 defense deadline to name experts until 30 days after the district court issued its decision on her motion. (Document 32, pp. 1-2.)

Ltd., 664 F.3d 1075, 1081 (7th Cir. 2011.)

Watson's assertion that he should be provided additional time to name an expert belies his actions in the district court, where he had plenty of opportunities to name experts, or request relief to name an expert. First, Watson, by his attorney, participated in a February 9, 2012 Fed. R. Civ. P. 26(f) conference call where the disclosure of experts was discussed. (Document 20, pp. 2-3.) Watson consented to naming his experts on or before April 11, 2012. (Document 20, p. 3.) The Fed. R. Civ. P. 26(f) proposed discovery plan was filed on February 13, 2012. (Document 20). Two days later, at the scheduling conference with the district court at which Watson's attorney attended, no objection was ever raised to the proposed discovery plan. (Document 22, p. 1.) In fact, the district court noted its satisfaction with the dates requested by the parties as provided in the proposed discovery plan, and the court minutes note that the "[p]laintiffs have nothing to raise." *Id.*

Even after the deadline to name experts had passed, Watson never filed any motion for relief from the scheduling order to name an expert. On July 16, 2012, Dr. King filed her summary judgment motion. (Documents 26-31.) Between July 16, 2012 and the time he filed her briefs on August 15, 2012 and August 20, 2012, Watson never requested relief to name experts. Even in his briefs in opposition to summary judgment, Watson did not request time to name any expert, *but instead he asserted that expert testimony was unnecessary*. (Document 42, pp. 6-8.) Watson cannot be permitted to raise this issue for the first time on appeal and somehow blame the

district court for not protecting him from his own actions and decisions. Moreover, after the district court issued its order on Dr. King's motion for summary judgment, (Document 59), Watson never asked for the opportunity to name an expert at the district court level, even after its decision that expert testimony was required. Fed. R. Civ. P. 60.

In sum, Watson's contention that this Court should provide him additional time to name an expert is without a basis in fact in light of the numerous opportunities he had, first, to establish the amount of time required for him to name an expert in the proposed discovery plan, and two, move for relief from the scheduling order prior to the district court's summary judgment order, or move for relief after the district court issued its summary judgment order. Now, however, he desires that the Court ignore this substantial history of inaction and provide him another opportunity to name an expert. For the above reasons, this Court must deny this request.

In addition, the case on which Watson bases this contention, *Lech v. St. Luke's Samaritan Hospital*, 921 F.2d 714 (7th Cir. 1991), never held the district court could only grant summary judgment if the plaintiff had been afforded multiple opportunities to rectify his failure to have an expert necessary to support his case. In *Lech*, the plaintiff named an expert, but she then refused to produce the expert for a deposition and the district court granted summary judgment, which this Court affirmed. *Id.*, 921 F.2d at 714.

Here, Watson never named an expert or even sought time to name an expert after

Dr. King's motion for summary judgment had been filed. He also never moved for reconsideration of the district court's decision after it was issued.

IV. As an Alternative Argument, Watson Failed to Overcome the *Qui Tam* Jurisdictional Bar to Prosecute this Action.

Even though Watson did not address the *qui tam* jurisdictional bar in his appellant opening brief because the district court did not grant summary judgment on this issue, Dr. King raises this issue as an alternative argument in support of affirming the district court's summary judgment order. *See* (Document 59, pp. 9-10)(concluding that Watson's complaint is not barred by 31 U.S.C. § 3730 (e)(4).)

The standard of review is the same as presented in Argument section I (A) of this brief, page 14.

A. Watson did not have direct and independent knowledge of the facts underlying the complaint against Dr. King.

In order to qualify as a relator and have standing to bring a *qui tam* claim under federal or Wisconsin law, Watson must be "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." 31 U.S.C. § 3730(e)(4)(B).[6] In *Rockwell*

[6] On March 23, 2010, the President signed into law the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U. S. 280, 1400 n.1 (2010). This legislation replaces the prior version of 31 U.S.C. § 3730(e)(4) with new language. The "legislation makes no mention of retroactivity, which would be necessary for its application to pending cases given that it eliminates petitioners' claimed defense to a *qui tam* suit." *Id.* As the allegations in the case at bar are contended to have occurred prior to the revision of the statute, the prior version of the statute applies to the case at bar.

Int'l Corp. v. United States, 549 U.S. 457, 1407-1408 (2007), the Court held that a plaintiff must possess "direct and independent knowledge" of the information on which the allegations of his complaint are based.

To determine whether it has subject matter jurisdiction to hear a *qui tam* suit pursuant to 31 U.S.C. § 3730(e)(4), a court must engage in a three step inquiry. *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 913 (7th Cir. 2009); *see also* (Document 59, p. 7.)

> First, it examines whether the plaintiff's allegations have been 'publicly disclosed.' If so, it next asks whether the lawsuit is 'based upon' those publicly disclosed allegations.' If it is, the court determines whether the plaintiff is an 'original source' of the information upon which his lawsuit is based.

Glaser, 570 F.3d at 913. The public disclosure bar applies if Watson is not an original source of information. "At each stage of the jurisdictional analysis, the plaintiff bears the burden of proof." *Id.*

Here, Watson conceded at his deposition that he failed to meet the criteria to be a relator, having no personal knowledge of the factual basis for the allegations set forth in his complaint. Watson never treated N.B. or even met him, although his treatment is the basis for this lawsuit.(Document 42-1, pp. 4-5, ¶ 6.)Watson did not have any involvement with N.B. or his mother during any time relevant to Dr. King's treatment of the patient. *Id.* Instead, his only connection with N.B., N.B.'s mother, or any knowledge of Dr. King came through his solicitation through a newspaper ad of patients or their families who were treated with an enumerated list of medications,

expressly stating that they could become part of a lawsuit.(Document 42-1, pp. 4-5, ¶¶ 5 and 7.) All of this evidence establishes that Watson did not have any direct and personal knowledge of Dr. King's alleged Medicaid fraud and therefore lacks standing to pursue this action.

Watson has never had contact with N.B. or Dr. King, and only obtained the factual basis for the allegations through a newspaper solicitation. Any person could stand in the shoes of Watson by taking a publicized legal theory and soliciting the public for a specific instance of what is undisputably a widespread and reasonable medical practice. Dr. King was a defendant not because Watson was aware of some improper acts by her, but rather she was a defendant only by virtue of a random selection process where Watson solicited the public for the identity of *any* psychiatrist who prescribed medications to minor mental health patients, dangling a promise of monetary reward.

B. Watson's complaints have already been disclosed in the public realm.

The allegations that form the basis of the complaint have already been extensively discussed, and litigated, in the public realm and therefore are not a proper basis for a *qui tam* action. The controversy over whether reimbursement of prescription medications was appropriate has been widely discussed in decisions by the judicial system, Congressional proceedings, disclosures in the news media, and letters between the federal Centers for Medicare and Medicaid Services and the State of Utah. (Document 42-1, pp. 11-13, ¶¶ 18-20.)

Although the district court concluded that the facts here are similar to the facts presented in *United States ex rel. Baltazar v. Warden*, 635 F.3d 866 (7th Cir. 2011) and thus did not grant summary judgment on that issue, there are factual differences that prevent the application of *Baltazar* here to the public realm requirement. *See* (Document 59, p. 9.) Unlike the instant case where the overall claims involved have already been publicly disclosed, the plaintiff in *Baltazar* was a former employee whose personal involvement and discovery of fraud formed the basis for her contention that the defendant in that case had submitted fraudulent bills to the Medicare and Medicaid programs. *Baltazar*, 635 F.3d at 866. During the four month period of time she worked for her former employer, the *Baltazar* plaintiff noticed that fraudulent billing was occurring. *Id.*, 635 F.3d at 866-867.

Watson raised the same issue in this lawsuit that has already been disclosed in the public realm. To minimize suits without a basis in law or fact, Congress has implemented various hurdles "designed to separate the opportunistic plaintiff from the plaintiff who has genuine, useful information that the government lacks." *In re Natural Gas Royalties Qui Tam Litigation*, 566 F.3d 956, 961 (10th Cir. 2009). The False Claims Act's public disclosure bar means that Watson cannot prosecute this action if the allegations in the complaint were publicly disclosed before he filed this action. 31 U.S.C. § 3730(e)(4)(A) and (B).

The allegations underlying the case at bar have been previously publicly disclosed. "[A] realtor's FCA [False Claims Act] complaint is 'based upon' publicly disclosed

allegations or transactions when the allegations in the plaintiff's complaint are *substantially similar* to publicly disclosed allegations." *Glaser*, 570 F.3d at 920 (emphasis added.) "Information brought forward by plaintiffs in *qui tam* suits is less useful to the government once revelations about fraudulent conduct are in the public domain because the government is already aware that it might have been defrauded and can take responsive action." *Id.*, 570 F.3d at 915.

A lawsuit in the federal district court of Alaska (mentioned above), news media reports, a report of the Citizen's Commission on Human Rights of Florida, a hearing conducted by Congressional Rep. McDermott, and correspondence between the Centers for Medicare and Medicaid Services and the State of Utah addressed the issue presented here: whether medication that is prescribed for Medicaid recipients that are children can lead to Medicaid fraud. (Document 42-1, pp. 11-13, ¶¶ 18-20.) The disclosures by the Congressman and the news articles were all disclosures in the public realm, before this lawsuit was filed. The letters between the State of Utah and CMS, discussing the allegations that form the basis of this complaint, demonstrate public disclosure as well. "For purposes of § 3730(e)(4), a public disclosure occurs when the critical elements exposing the transaction as fraudulent are placed in the public domain . . . ." *Glaser*, 570 F.3d at 913 (internal quotations and citation omitted).

Last, the Alaska lawsuit, where many of the allegations underling this suit are based, and where many of the documents used in this case have been previously filed, is a public disclosure. "An issue need not be decided in prior litigation for the public

disclosure bar to be triggered; rather, its mere disclosure suffices." *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1474 (9th Cir. 1996). In sum, these previous disclosures in the public realm, prior to the filing of Watson's complaint, demonstrate that an alleged false claim was brought to the attention of the relevant governmental authorities. *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003).

CONCLUSION

For the above-stated reasons, defendant-appellee Jennifer King-Vassel respectfully requests that this Court affirm the order of the district court, which granted her motion for summary judgment and dismissed all claims against her with prejudice.

Dated this 29th day of March, 2013 at Milwaukee, Wisconsin.

GUTGLASS, ERICKSON, BONVILLE & LARSON, S.C.

s/Bradley S. Foley
Mark E. Larson
Bradley S. Foley
Attorneys for defendant-appellee Jennifer King-Vassel

ADDENDUM

31 U.S.C. § 3729(a)(1)(A)

(a) Liability for Certain Acts. --

(1) In general. – Subject to paragraph (2), any person who –

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

[. . .]

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. § 3730(e)(4)

e) Certain Actions Barred.—

(4)

(A)The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i)in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii)in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii)from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B)For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is

independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A) because: this brief contains 9,581 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using WordPerfect x5 in 12 point font and Century Schoolbook type style.

Dated: March 29, 2013

GUTGLASS, ERICKSON, BONVILLE & LARSON, S.C.

s/Bradley S. Foley
Mark E. Larson
Bradley S. Foley
Attorneys for defendant-appellee Jennifer King-Vassel

CERTIFICATE OF SERVICE

Certificate of Service When all Case Participants are CM/ECF Participants

I hereby certify that on March 29, 2013, I electronically filed the foregoing and a separate appendix with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Bradley S. Foley

No. 12-3671

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA and STATE OF WISCONSIN,
Plaintiffs,

and

TOBY T. WATSON,
Plaintiff-Appellant

v.

JENNIFER KING-VASSEL,
Defendant-Appellee.

Appeal from The United States District Court
for the Eastern District of Wisconsin,
Case No. 11-CV-236
The Honorable Judge J.P. Stadtmueller

APPENDIX OF DEFENDANT-APPELLEE JENNIFER KING-VASSEL IN SUPPORT OF BRIEF

GUTGLASS, ERICKSON, BONVILLE & LARSON, S.C.
Mark E. Larson
Bradley S. Foley
Attorneys for Defendant-Appellee Jennifer King-Vassel

735 North Water Street, Suite 1400
Milwaukee, WI 53202
Telephone: 414- 273-1144

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, and THE STATE OF WISCONSIN, ex rel. DR. TOBY TYLER WATSON,

Plaintiffs,

v.

JENNIFER KING-VASSEL, CAPS CHILD & ADOLESCENT PSYCHOLOGICAL SERVICES, and ENCOMPASS EFFECTIVE MENTAL HEALTH SERVICES, INC.

Defendants.

Case No. 11-CV-236-JPS

SCHEDULING ORDER

The above-captioned matter having come before the court on February 15, 2012, for a Fed. R. Civ. P. 16 conference, and based on the arguments of counsel, the parties' proposed discovery plan pursuant to Fed. R. Civ. P. 26(f), and the court's February 15, 2012 oral decision;

IT IS HEREBY ORDERED that the court adopts the parties' proposed Fed. R. Civ. P. 26(f) discovery plan as the court's scheduling order as follows:

1. The initial disclosure of witnesses and documents, as contemplated by Fed. R. Civ. P. 26(a), shall be made on or before **February 23, 2012.**

2. Any amendments to the pleadings shall be completed on or before **March 30, 2012.**

3. The relator/plaintiffs shall name all expert witnesses and produce reports from expert witnesses on or before **April 11, 2012.**

4. The defendants shall name all expert witnesses and provide reports from expert witnesses on or before **August 13, 2012.**

5. Discovery shall be completed on or before **November 9, 2012.**

6. Potential dispositive motions shall be filed on or before **September 15, 2012.**

Dated at Milwaukee, Wisconsin, this 29th day of February, 2012.

BY THE COURT:

J.P. Stadtmueller
U.S. District Judge

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, and
THE STATE OF WISCONSIN,
ex rel. DR. TOBY TYLER WATSON,

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v.

JENNIFER KING-VASSEL,
CAPS CHILD & ADOLESCENT
PSYCHOLOGICAL SERVICES, and
ENCOMPASS EFFECTIVE MENTAL
HEALTH SERVICES, INC.,

Defendants.

Case No. 11-CV-236-JPS

ORDER

This *qui tam* action was initially filed by the relator, Dr. Toby Watson, on March 3, 2011. (Docket #1). The complaint alleges that defendant Dr. Jennifer King-Vassel violated the Federal False Claims Act and Wisconsin False Claims Law by prescribing medications to a minor patient receiving Medicaid assistance for reasons that are not medically-accepted. (Compl. ¶¶ 1, 26–29). The complaint also alleged that CAPS Child & Adolescent Psychological Services (CAPS) and Encompass Effective Mental Health Services (Encompass) employed Dr. King-Vassel and were, therefore, liable under a theory of *respondeat superior*. (Compl. ¶¶ 30–33). At the time of filing, this matter was sealed while the United States and the State of Wisconsin determined whether to intervene in the matter; after they declined to do so, the Court unsealed the matter, and summons were issued to the defendants. (Docket #4, #9, #10, #11, #12). The parties appeared before the Court on February 15, 2012, after which time the Court scheduled relevant trial and

discovery dates. (Docket #21, #22, #24). After completing much of the discovery process, Dr. King-Vassel and CAPS jointly moved for summary judgment on July 16, 2012; Encompass joined in that motion and filed a separate brief on July 19, 2012. (Docket #28, #29, #33, #35). That motion is now fully briefed, and the Court takes it up along with other procedural matters that remain outstanding. (Docket #32, #38, #40, #42, #45, #47, #49, #50, #51, #52, #54, #55, #56, #57).

1. BACKGROUND

The factual background of this case is fairly straightforward, and the parties do not dispute the core facts. The case's history, on the other hand, is very detailed, and includes a multitude of motions and briefs filed by the parties. Therefore, the Court will discuss those two bodies of facts separately—it will first address the factual background of the case before detailing the case history.

1.1 Factual Background

The relator, Dr. Watson, secured the cooperation of N.B. in bringing this suit after meeting an attorney through the International Society for Ethical Psychology and Psychiatry, and doing further research into bringing a *qui tam* claim through the website PsychRights.org. (King-Vassel/CAPS PFF ¶¶ 3–4). After researching *qui tam* false claims actions, Dr. Watson placed an ad in a Sheboygan newspaper soliciting minor Medicaid patients who had received certain medications. (King-Vassel/CAPS PFF ¶ 5). N.B.'s mother

responded to the advertisement, and Dr. Watson obtained N.B.'s medical records through a medical release.[1] (King-Vassel/CAPS PFF ¶¶ 11–14).

Thereafter, based on those records, Dr. Watson filed this *qui tam* action alleging that defendant Dr. King-Vassel prescribed psychotropic drugs to N.B., a minor Medical Assistance recipient, from 2004 until 2008. (King-Vassel/CAPS PFF ¶¶ 1–2; Encompass PFF ¶ 3). Dr. Watson alleges that those prescriptions were not for indications approved by the Food and Drug Administration (FDA) or otherwise supported by applicable sources, and that therefore the prescriptions were false claims when made to Medicaid for reimbursement and further that Dr. King-Vassel is responsible for the filing of those false claims. (King-Vassel/CAPS PFF ¶ 2; Encompass PFF ¶ 3).

During the relevant time period, Dr. King-Vassel worked in conjunction with both CAPS and Encompass, and therefore Dr. Watson filed *respondeat superior* claims against both CAPS and Encompass, alleging that those parties employed Dr. King-Vassel. (King-Vassel/CAPS PFF ¶ 21; Encompass PFF ¶ 5–47).

1.2 Case History

After this case was filed, the United States and State of Wisconsin declined to intervene. (Docket #8, #13). Thereafter, the Court set a trial schedule and discovery began. (Docket #21, #22, #24).

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[1]Dr. Watson obtained these records through what might be described as a borderline-fraudulent medical release. (*See* King-Vassel/CAPS PFF ¶¶ 11–12). The release stated that the information to be released was for the "purpose of providing psychological services and for no other purpose what so ever." (King-Vassel/CAPS PFF ¶¶ 11–12). Dr. Watson never used those records in the treatment of N.B., and in reality obtained them only to bring the immediate suit. (King-Vassel/CAPS PFF ¶¶ 13–14). Notwithstanding the highly questionable–indeed unethical–manner in which the release was obtained, the fact is not ultimately relevant to the motion for summary judgment currently under consideration.

After several months of discovery, CAPS and Dr. King-Vassel filed a joint motion for summary judgment. (Docket #28).[2] Encompass joined that motion and filed a separate brief, specifically addressing Encompass' role in this case, and arguing that *respondeat superior* could not apply to Encompass. (Docket #33).

While the summary judgment motion was pending, however, it apparently became clear to Dr. Watson that Dr. King-Vassel was not an employee of either CAPS or Encompass, and therefore those parties could not be held liable under a *respondeat superior* claim. (Docket #40, #49, #50). Accordingly, Dr. Watson filed a motion to dismiss Encompass on August 12, 2012 (Docket #40), and later filed an amended motion to dismiss Encompass (Docket #49) and an additional motion to dismiss CAPS (Docket #50).

The motion to dismiss Encompass apparently was not made quickly enough, though, and on August 29, 2012, Encompass filed a motion for sanctions against Dr. Watson for his failure to dismiss Encompass earlier in the litigation process. (Docket #51).

That motion for sanctions is still outstanding, as is the motion for summary judgment. However, because the Court will grant Dr. Watson's motions to dismiss both Encompass and CAPS (Docket #49, #50), the Court need only address the summary judgment motion as it pertains to Dr. King-Vassel.

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[2]One day after filing their motion for summary judgment, CAPS and Dr. King-Vassel filed a motion to stay the Court's scheduling order pending resolution of the summary judgment motion. (Docket #32). Dr. Watson never filed a response to the motion to stay, and the Court has not yet acted upon that motion. Because the Court grants summary judgment as to Dr. King-Vassel, below, that motion is now moot and the Court will deny it as such. (Docket #32).

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The Court addresses the substance of both the motion for summary judgment and the motion for sanctions, below.

2. DISCUSSION

The Court must address two separate substantive issues: first, whether Dr. King-Vassel is entitled to summary judgment as to Dr. Watson's claims against her; and, second, whether Encompass is entitled to sanctions against Dr. Watson.

2.1 Summary Judgment

As mentioned above, the Court will dismiss defendants CAPS and Encompass, pursuant to Dr. Watson's motion. (Docket #49, #50).

Therefore, the outstanding summary judgment motion must be decided only insofar as it effects Dr. King-Vassel. (Docket #28). The Court turns to that issue now, and determines that Dr. King-Vassel is not entitled to summary judgment.

2.1.1 Summary Judgment Standard

The Court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Court must construe all facts in a light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). Nonetheless, the nonmoving party must present "definite, competent evidence to rebut" the summary judgment motion in order to successfully oppose it. *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000).

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The purpose of the summary judgment motion is to determine "whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

2.1.2 Substantive Analysis

Dr. King-Vassel has raised two primary arguments for summary judgment. First, she argues that this action is jurisdictionally barred by 31 U.S.C. § 3730(e)(4). (King-Vassel/CAPS Br. in Supp. 5–15). And, second, she alleges that Dr. Watson failed to name any expert to establish that the relevant medications were prescribed for off-label uses or that the claims for those medications were ever officially submitted and payments received therefor. (King-Vassel/CAPS Br. in Supp. 15).

2.1.2.1 Jurisdictional Bar

The False Claims Act (FCA) prohibits false or fraudulent claims for payments to the United States. 31 U.S.C. § 3729(a). In order to remedy such fraud, the FCA allows private individuals to bring *qui tam* actions in the government's name against violators. 31 U.S.C. § 3720(b)). If the *qui tam* action is successful, then the relator of the action is entitled to receive a share of any proceeds in addition to attorney's fees and costs. 31 U.S.C. §§ 3730(d)(1)–(2)).

However, there are jurisdictional limits on the abilities of private individuals to bring suit. *See, e.g.*, 31 U.S.C. § 3730(e)(4); *United States v. Bank of Farmington*, 166 F.3d 853, 888 (7th Cir. 1999); *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 130 S.Ct. 1396, 1407 (2010).

At specific issue here is one of those jurisdictional limits: the "public disclosure" bar. 31 U.S.C. § 3730(e)(4). Under that bar, the Court "shall dismiss" any claim based on allegations that had previously been publicly

disclosed in: (1) Federal hearings in which the Government is a party; (2) Federal reports hearings, audits, or investigations; or (3) news media reports. 31 U.S.C. § 3730(e)(4)(a). However, even if there is a public disclosure upon which a *qui tam* action is based, the Court may still hear the action if the relator is an "original source" of the information in the *qui tam* complaint and either brought the suit before public disclosure or has independent knowledge that materially adds to the public disclosure. 31 U.S.C. § 3730(e)(4)(B). As the Seventh Circuit stated the rule in *United States ex rel. Baltazar v. Warden*, this inquiry is a three-prong analysis:

> ***first***, the Court must determine whether there has been a public disclosure of the allegations in the *qui tam* complaint—and if there has not been a public disclosure, then 31 U.S.C. § 3730(e)(4) does not bar the suit;
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> *then*, ***second***, the Court must determine whether the suit at hand is based upon that public disclosure—and if the suit at hand is not based on such disclosure, then 31 U.S.C. § 3730(e)(4) does not bar the suit;
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> *finally*, ***third***, the Court must determine whether the relator is an original source of the information upon which the suit is based—and if the relator is an original source, then 31 U.S.C. § 3730(e)(4) does not bar the suit.

United States ex rel. Baltazar v. Warden, 635 F.3d 866, 867 (7th Cir. 2011) (citing 31 U.S.C. § 3730(e)(4).

Importantly—and perhaps lost on counsel for Dr. King-Vassel—if the relator, Dr. Watson, prevails on *any* of those three questions, then his suit is not barred by 31 U.S.C. § 3730(e)(4). *Baltazar*, 635 F.3d at 867.

Here, there has not been public disclosure of the relevant facts and, therefore, 31 U.S.C. § 3730(e)(4) does not bar Dr. Watson's suit. A public disclosure has occurred only when "the critical elements exposing the transaction as fraudulent are placed in the public domain." *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003) (citing *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1512 (8th Cir. 1994); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994)). Even when there have been public reports of rampant fraud—such as information showing fraud by half of all chiropractors—there has not been public disclosure. *Baltazar*, 635 F.3d at 867–68. Such a "very high level of generality" cannot establish public disclosure. *U.S. ex rel. Goldberg v. Rush University Medical Center*, 680 F.3d 933, 935 (7th Cir. 2012). The important fact in *Baltazar* was that there had been no public disclosure of "a *particular* fraud by a *particular* chiropractor." *Id.* (citing *Baltazar*, 635 F.3d at 867–68). Rather, because the news accounts that formed the alleged public disclosures lacked particulars, they could not be used as the basis of litigation, and therefore did not trigger the public disclosure bar; quite to the contrary, in fact, the relator in *Baltazar* provided detailed and particular information not otherwise available to the government that enabled the government to seek reimbursement—the very goal of allowing *qui tam* actions. *See Baltazar*, 635 F.3d at 867–68; *Goldberg*, 680 F.3d at 935.

The situation in the case at hand is almost precisely analogous to that in *Baltazar*. Here, Dr. Watson has provided particular information relating to Dr. King-Vassel that was previously unknown to the government. Nonetheless, Dr. King-Vassel argues that there has been public disclosure as a result of previous news accounts of Medicaid fraud and similar lawsuits

throughout the nation. (*See* King-Vassel/CAPS Br. in Supp. 10–15). But, just as in *Baltazar*, none of those news accounts or lawsuits touched upon the *particular* facts of this case—they did not deal particularly with Dr. King-Vassel, with the places at which she practiced, or even with the geographic area in which she practiced. As such, exactly as was the case in *Baltazar*, the alleged public disclosures could not have formed the basis of this lawsuit, and, therefore, lack the particulars that the Court must look for to find the public disclosure bar triggered. *See Baltazar*, 635 F.3d 867–68. Had Dr. Watson not brought this suit, the government would not be aware of Dr. King-Vassel's alleged fraud (despite any highly generalized awareness of ongoing Medicaid fraud by doctors prescribing medications to minors for off-label uses)—thus, just as in *Baltazar*, this *qui tam* action serves the precise purpose for which such actions were intended. *Id.* As such, the Court must determine that there has not been a public disclosure of the allegations in this action.

Having determined that there has not been a public disclosure of the allegations in Dr. Watson's complaint, the Court is obliged to conclude that his action is not barred by 31 U.S.C. § 3730(e)(4). *See, e.g., Goldberg*, 680 F.3d at 935, *Baltazar*, 635 F.3d at 867, *Feingold*, 324 F.3d at 495. As stated above, the mere fact that Dr. Watson's complaint satisfied a single one of the three prongs of analysis under 31 U.S.C. § 3730(e)(4) is enough to overcome that bar. Thus, though it is very possible that the Court would conclude that the

other two prongs were not satisfied,[3] the Court does not need to engage in that analysis. *Baltazar*, 635 F.3d at 867.

Dr. Watson's *qui tam* action is not barred by 31 U.S.C. § 3730(e)(4).

2.1.2.2 Failure to Name Expert Witness

Dr. King-Vassel's only other argument for summary judgment centers around Dr. Watson's failure to name an expert witness to testify. (King-Vassel/CAPS Br. in Supp. 15). On this point, Dr. King-Vassel argues that Dr. Watson cannot establish Medicaid fraud without an expert to provide details on two broad areas of fact: (1) the processing of Medicaid reimbursements and whether Dr. King-Vassel received such reimbursement; and (2) the off-label nature of the prescriptions made by Dr. King-Vassel to N.B. (King-Vassel/CAPS Br. in Supp. 15; King-Vassel/CAPS Reply 10–13). This is a confusing way of arguing that Dr. Watson has not made the requisite showing to establish an actual Medicaid fraud.

To prevail in a false claims action, a relator must establish that the defendant "*knowingly* presents, or *causes to be presented*, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A) (emphasis added).

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[3]Dr. King-Vassel's brief extensively addresses the issue of whether Dr. Watson is an "original source" of information in his complaint, with "direct and independent knowledge of the information on which the allegations are based." (*See* King-Vassel/CAPS Br. in Supp. 5–10 (citing 31 U.S.C. § 3730(e)(4)(B); King-Vassel/CAPS Reply 5–6). And, while the Court agrees that there may be some question as to whether Dr. Watson is a direct source, that inquiry is wholly irrelevant to the Court's analysis. As the Court has mentioned throughout this Order, the public disclosure bar inquiry consists of three sequentially-posed prongs, the satisfaction of any one of which is sufficient to overcome the bar. In fact, courts do not reach the original source issue unless they first determine that the first two prongs are not satisfied. Thus, despite Dr. King-Vassel's extensive arguments to the contrary, the Court need not address the original source issue, because that issue is entirely irrelevant to the final analysis.

A "false or fraudulent claim" occurs when Medicaid pays for drugs that are not used for an indication that is either approved by the Food, Drug, and Cosmetic Act (FDCA) or supported by a drug compendia. *See, e.g., U.S. ex rel. West v. Ortho-McNeil Pharmaceutical, Inc.*, 2007 WL 2091185, at *2 (N.D. Ill. July 20, 2007) ("Medicaid generally reimburses providers only for 'covered outpatient drugs,'" which "do not include drugs 'used for a medical indication which is not a medically accepted indiction.'")[4] (citing 42 U.S.C. §§ 1396b(i)(10), 1396r-8(a)(3), 1396r-8(k)(3)); *U.S. ex rel. Franklin v. Parke-Davis*, 147 F. Supp. 2d 39, 45 (D. Mass. 2001)); 42 U.S.C. §§ 1396r-8(k)(2),(3), (6) (setting forth the definitions of "covered outpatient drug" and "medically accepted indication"; a "medically accepted indication" is present only when the use is approved by the Food, Drug, and Cosmetic Act (21 U.S.C.A. § 301, et seq.) or any drug compendia (as described in 42 U.S.C. §§ 1396r-8(g)(1)(B)(I))).

With that information in mind, the Court views the required showing to have two elements. The relator must not only show that there was, in fact, a false or fraudulent claim made to Medicaid through the submission of a prescription for a non-approved purpose, but also must show that the defendant knowingly caused that submission to be made. If the relator fails to show *either* of these elements, then his claim must fail.

The Court will examine the "knowingly caused" requirement first. In order to establish that Dr. King-Vassel knowingly caused the submission of

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[4]Dr. King-Vassel takes issue with the use of *West*, alleging that the court in that case "expressly acknowledged that physicians can prescribe for off-label uses even though pharmaceutical companies are prohibited from marketing or promoting off-label uses." (King-Vassel/CAPS Reply 13 (citing *West*, 2007 WL 2091185 at *2)).

a false claim, Dr. Watson must establish proof that Dr. King-Vassel acted with "actual knowledge," "deliberate ignorance," or "reckless disregard," of the fact that a claim she caused to be submitted was fraudulent. 31 U.S.C. §§ 3729(a)(1)(A), (b). This requirement, itself, has two separate prongs: a knowledge prong, and a causation prong. That is, it is not enough that Dr. King-Vassel knew that a claim was fraudulent, she must also have knowingly caused the claim to have been made.

When the Court examines those two prongs of the "knowingly caused" requirement, it must conclude that Dr. Watson has not shown "definite, competent evidence to rebut" the summary judgment motion, and therefore the Court will grant Dr. King-Vassel's motion for summary judgment. *See Sears, Roebuck & Co.*, 233 F.3d at 437. Dr. Watson admits that he, himself, is unaware of whether Dr. King-Vassel actually received any reimbursements through Medicaid or would be entitled to reimbursements in the absence of prescribing medication. (King-Vassel/CAPS PFF ¶ 8, and Response). Thus, while he argues that Dr. King-Vassel *should have* known that any prescriptions would have been presented to Medicaid purely as a result of her knowledge that N.B. otherwise used Medicaid services, it is clear that Dr. Watson himself lacks understanding of the reimbursement system, and, therefore, will not be able to establish that Dr. King-Vassel had any knowledge whatsoever of the likelihood of submission of a fraudulent claim. (Relator's Resp. [Docket #45], 3–4). Even if Dr. King-Vassel knew that N.B. received Medicaid, Dr. Watson has not presented any evidence to show that Medicaid would be responsible for covering the cost of N.B.'s prescriptions. He has acknowledged his lack of personal knowledge on the topic, and has also failed to list any expert to provide further testimony. In that way, his

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failure to name an expert is fatal to his case. The Medicaid reimbursement system is obviously confusing—Dr. Watson himself is not sure of its application to the very person he has sued. Given his personal lack of knowledge of the reimbursement system, Dr. Watson will not be able to testify as to the operation of the reimbursement system and its application to Dr. King-Vassel. And, without that testimony, he will be unable to establish that Dr. King-Vassel had any knowledge (actual or constructive) that N.B.'s claim would be submitted to Medicaid. Because Dr. Watson will not be able to make that showing, there is no way that he will be able to establish the required elements of Medicaid fraud. His failure to show any "definite, competent evidence" to rebut Dr. King-Vassel's motion is fatal to his case, and the Court must grant Dr. King-Vassel's motion for summary judgment. *See Sears, Roebuck & Co.*, 233 F.3d at 437.

Relatedly, without the testimony of an expert, the Court believes that Dr. Watson would be unable to establish causation. Without a doubt, Dr. King-Vassel prescribed N.B. certain medications. But her mere prescription of those medications would not, in and of itself, *cause* the submission of a false claim. Rather, N.B.'s mother would need to submit the claim to a pharmacy at which time she would also need to claim entitlement to Medicaid coverage. Furthermore, the pharmacy would need to check the Medicaid coverage for N.B., ensure the validity of the prescription, fill the prescription, and then submit the claim to Medicaid for reimbursement. And those steps are just the basics that would need to logically occur so that N.B. received his medication and the pharmacy received payment—without testimony of an expert, the Court cannot know what other intervening steps may have occurred between Dr. King-Vassel's signature of the prescription

and the submission of a claim to Medicaid. Perhaps more accurately, the Court can describe this as a proximate-cause problem for Dr. Watson. Without an expert to testify, there is a grand mystery between the time of the prescription and the claim being made to Medicaid. In many ways, that mystery is like a black box—perhaps Dr. King-Vassel's signature on the prescription set off a series of reactions that on the other side of the box resulted in a false claim, but the churning mechanism on the inside is still a mystery. Without an expert to explain the workings of the in-between phase (the black box), the Court and an hypothetical jury cannot make any determination of whether Dr. King-Vassel actually caused the submission of a false claim.

Finally, without an expert, Dr. Watson also cannot establish the "fraudulent claim" element required to show a violation of the False Claims Act. *See* 31 U.S.C. § 3729(a)(1)(A). To make the fraudulent claim showing, Dr. Watson would need to establish that Dr. King-Vassel prescribed N.B. medications "for a medical indication which is not a medically accepted indication." *West*, 2007 WL 2091185, at *2. As mentioned above, medically accepted indications must be approved in either the FDCA or one of three drug compendia. *Id.*; 42 U.S.C. §§ 1396r-8(g)(1)(B)(I), (k)(2), (3), (6). Dr. Watson argues that this is an easy showing to satisfy, requiring only a comparison of the FDCA and drug compendia to N.B.'s noted indications. (Relator's Resp. [Docket #42], 7–8). Despite that statement, though, Dr. Watson did not submit any pages of those documents to the Court that would show how easy it would be to make such an identification. And, in reality, medical documents typically are not readily understandable by the general public and would require an expert to explain their application to a

particular set of circumstances. *See* Pamela H. Bucy, *The Poor Fit of traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 FORDHAM L. REV. 383, 402–04 (1994) (parties will "need billing experts to guide fact finders through these various applicable regulations...[and] the inapplicability of, or least confusion about, such regulations."). Dr. Watson has not named an expert who could establish the applicability or non-applicability of the drug compendia or FDCA to N.B.'s indications. Therefore, as with the other required showings noted above, Dr. Watson has failed to produce "definite, competent evidence" to rebut Dr. King-Vassel's motion for summary judgment on the issue of fraudulent claim requirement, and the Court must, therefore, grant Dr. King-Vassel's motion. *See Sears, Roebuck & Co.*, 233 F.3d at 437.

Having determined that Dr. Watson has failed to establish ample evidence to support either requirement to succeed in a false claim action, the Court is obliged to grant Dr. King-Vassel's motion for summary judgment and dismiss this action against her.

2.2 Sanctions

The only remaining issue is whether to grant Encompass' motion for sanctions against Dr. Watson for Dr. Watson's filing a complaint against Encompass for what Encompass alleges were unsubstantiated claims of *respondeat superior* liability. (Encompass Reply 6–14).

Encompass alleges three separate bases upon which relief could be granted. First, Encompass argues that sanctions are appropriate under Rule 11 of the Federal Rules of Civil Procedure. (Encompass Reply 6–9). Under that rule, the Court may award sanctions if the non-moving party sustained an action without evidentiary support or based on frivolous legal

contentions, even after 21 days of being notified by the moving party that it would seek sanctions if the nonmoving party did not dismiss the claim. Fed. R. Civ. P. 11(b)(2), (b)(3), (c)(2). Dr. Watson counters that his voluntary dismissal of Encompass occurred within the 21-day safe harbor period, due to the additional days granted by Rules 5(b)(2)(E) and 6(d) following email service. (Relator's Atty. Fees Resp. 2–3).

The Court agrees that the dismissal occurred within the safe harbor period and, therefore, Rule 11 sanctions are inappropriate.

But, that does not end the Court's sanctions analysis, as Encompass also requests sanctions pursuant to 28 U.S.C. § 1927. Under that provision, sanctions are appropriate where an "attorney...multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. Under that statute, Dr. Watson's attorney Ms. Gietman could be held liable if the Court determines she unreasonably and vexatiously multiplied the proceedings. Ms. Gietman (in a brief written for Dr. Watson) argues that sanctions are inappropriate under this term because it voluntarily "moved to dismiss the claims against Encompass once it determined that those claims were not likely to succeed." (Relator's Atty. Fees Resp. 4). But the question the Court must ask is not whether Ms. Gietman moved to dismiss the claims when she determined they were unlikely to succeed, but instead whether she acted in an "objectively unreasonable manner" and with a "serious and studied disregard for the orderly process of justice" in waiting to dismiss Encompass until she did. *Jolly Group, Ltd v. Medline Indus., Inc.*, 435 F.3d 717, 720 (7th Cir. 2006) (quoting *Pacific Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 119 (7th Cir. 1994)).

Here, the Court is left with the inescapable conclusion that Ms. Gietman acted in an objectively unreasonable manner and with a serious disregard for the order process of justice, and therefore sanctions against her are appropriate. 28 U.S.C. § 1927. As Encompass points out in its brief, its attorney provided Ms. Gietman with a copy of Encompass' contract with Dr. King-Vassel in February of 2012, and explained that under the contract (under which Dr. King-Vassel was an independent contractor) a *respondeat superior* claim could not lie. (Encompass Reply 7–8; Patrick Knight Aff., Ex. 3). Despite that disclosure, Ms. Gietman did not withdraw her claims against Encompass; rather, it was not until nearly six months later, after Encompass was required to participate in the discovery process and prepare and file a summary judgment brief, that those claims were dismissed. At the time of dismissal, there was no additional evidence that would support a *respondeat superior* claim against Encompass—the primary and controlling piece of evidence was the prior-disclosed contract. A reasonable attorney would have attempted to quickly ferret out any information to support a *respondeat superior* claim rather than waiting six months to dismiss such claim. And, while the Court would not suppose that Ms. Gietman should have dropped the claim immediately upon reading the relevant contract, the receipt of such contract should have tipped her off to a serious flaw in the *respondeat superior* claim. She then should have conducted an appropriate investigation into whether there was truly any employment relationship and, barring such relationship, quickly moved to dismiss Encompass. Instead, Encompass was forced to proceed through the entire discovery process and file an extensive summary judgment brief, all to combat a claim that could have been readily dismissed after a minor inquiry based on disclosures made to Ms. Gietman

by Encompass. That is unreasonably vexatious and was based upon Ms. Gietman's serious disregard for the orderly administration of justice. The Court's and Encompass' resources would have been much better spent elsewhere, as opposed to dealing with Dr. Watson's frivolous suit against Encompass. And Ms. Gietman's decision to prolong Encompass' involvement in the matter exposes her to sanctions under 28 U.S.C. § 1927.

Finally, Encompass urges the Court to impose sanctions upon Ms. Gietman and Dr. Watson under *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991). *Chambers* calls for the imposition of sanctions under the court's "inherent powers" to address a full range of litigation abuses by individuals beyond those addressed by 28 U.S.C. § 1927 and Rule 11. *Id.* However, as Dr. Watson points out in his brief, the Court's use of its inherent powers should be limited to situations involving abuse of the judicial process or bad faith. (Relator's Atty Fees Resp. 6); *see also Tucker v. Williams*, 682 F.3d 654, 661–62 (7th Cir. 2012) (citing *Chambers*, 501 U.S. at 55; *Cleveland Hair Clinic, Inc. v. Puig*, 200 F.3d 1063, 1066 (7th Cir. 2000); *Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 793 (7th Cir. 2009); *Maynard v. Nygren*, 332 F.3d 462, 470–71 (7th Cir. 2003); *Runfola & Assoc., Inc v. Spectrum II, Inc.*, 88 F.3d 368, 375 (6th Cir. 1996); *Gillette Foods Inc. v. Bayernwald-Fruchteverwertung, GmbH*, 977 F.2d 809, 813–14 (3d Cir. 1992); *Schmude v. Sheahan*, 420 F.3d 645, 650 (7th Cir. 2005); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385, 391 (7th Cir. 2002)).

Here, an award of sanctions under the Court's inherent powers is appropriate. In bringing this case to trial, Ms. Gietman and Dr. Watson engaged in conduct that skirted the line of their respective professional responsibilities. As to Dr. Watson, he obtained N.B.'s medical records in a

manner that could best be described as borderline-fraudulent. He obtained a medical release for those records only after representing that he was going to treat N.B.—a total falsity. (*See* King-Vassel/CAPS PFF ¶¶ 11–12). And that does not even touch upon the fishing-expedition style of fact-gathering engaged in by Dr. Watson. His attack here on a single doctor's prescriptions to a single patient does not provide the government with substantial valuable information, as intended by the *qui tam* statutes. Instead of providing the government with valuable information, Dr. Watson seemingly sought only to cash in on a fellow doctor's attempts to best address a patient's needs. In return, Dr. King-Vassel was treated to a lawsuit, the proceeds of which would be split three ways between Dr. Watson, Ms. Gietman, and the parent of the patient Dr. King-Vassel was attempting to serve. As to Ms. Gietman, she should know much better than to have allowed Dr. Watson to obtain medical records in the manner described. The fact that those records were used in deciding whether to bring a case before any court shows a lack of judgment on Ms. Gietman's part—those records were not obtained in an appropriate manner, irrespective of whatever role, if any, Ms. Gietman may have played in the decision of how to obtain them. Dr. Watson's borderline-fraudulent acquisition of the documents, and Ms. Gietman's ommissive failure to stop that action, calls for an award of sanctions against both individuals.

Having determined that an award of sanctions is appropriate against both Ms. Gietman and Dr. Watson, the Court now turns to the appropriate form of such sanctions. First, under 28 U.S.C. § 1927, the Court determines that Ms. Gietman should be monetarily sanctioned. Her failure to timely address Encompass' lack of involvement in this matter caused Encompass to

incur substantial legal fees engaging in depositions and preparing a summary judgment motion. Therefore, the Court believes that she should be required to pay Encompass some amount of money to compensate for those fees wasted in responding to frivolous claims. The Court determines that Ms. Gietman should have determined that Encompass should not be subject to suit prior to Encompass' filing a motion for summary judgment—by the summary judgment phase, it should have been reasonably clear through the exercise of reasonable diligence, that a *respondeat superior* claim would not lie again Encompass. Therefore, the Court will impose upon Ms. Gietman a sanction of reasonable attorney's fees incurred by Encompass in researching, drafting, and filing its brief supporting motion for summary judgment (Docket #34) and its subsequent reply (Docket #52).

Finally, as to the sanctions under the Court's inherent powers, it will require Ms. Gietman and Dr. Watson to pay $500.00 ($250.00 to be paid by each individual) to Dr. King-Vassel and $500.00 ($250.00 to be paid by each individual) to Encompass. Those amounts should be substantial enough to penalize both Ms. Gietman and Dr. Watson for engaging in such unscrupulous tactics to gain access to N.B.'s medical records, while not being so draconian as to impose undue financial hardship upon either individual.

3. CONCLUSION

Having fully discussed the entirety of motions and briefs before it in this matter, the Court will now render judgment on each of those motions. In sum, this matter will be dismissed in full (as, after granting Dr. King-Vassel's motion for summary judgment, and otherwise granting Dr. Watson's motions to dismiss CAPS and Encompass, there are no parties left

against which Dr. Watson can sustain a suit). Furthermore, the Court will impose appropriate sanctions upon Ms. Gietman and Dr. Watson.

Accordingly,

IT IS ORDERED that Dr. Watson's amended motion to dismiss Encompass (Docket #49) be and the same is hereby **GRANTED;**

IT IS FURTHER ORDERED that Dr. Watson's first motion to dismiss Encompass (Docket #40) be and the same is hereby **DENIED as moot,** the Court having already granted Dr. Watson's superseding motion to dismiss Encompass;

IT IS FURTHER ORDERED that Encompass' motion for summary judgment and joinder (Docket #33) be and the same is hereby **DENIED as moot,** the Court having already granted Dr. Watson's superseding motion to dismiss Encompass;

IT IS FURTHER ORDERED that Dr. Watson's motion to dismiss CAPS (Docket #50) be and the same is hereby **GRANTED;**

IT IS FURTHER ORDERED that CAPS' and Dr. King-Vassel's motion for summary judgment (Docket #28) be and the same is hereby **DENIED in part as moot, as it relates to CAPS,** the Court having already granted Dr. Watson's motion to dismiss CAPS, and **GRANTED in part, as it relates to Dr. King-Vassel,** for the reasons set forth above;

IT IS FURTHER ORDERED that Encompass' motion for sanctions (Docket #51) be and the same is hereby **DENIED in part,** as to Encompass' request for sanctions pursuant to Rule 11; and **GRANTED in part,** as to Encompass' request for sanctions pursuant to 28 U.S.C. § 1927, and accordingly Ms. Gietman shall **pay Encompass' reasonable attorneys fees** in preparation of Encompass' brief in support of its motion for summary

judgment (Docket #34) and reply brief regarding summary judgment (Docket #51) pursuant to 28 U.S.C. § 1927, and Encompass shall submit documentation of its fees to the Court on or before **November 8, 2012,** and Ms. Gietman shall file any objections thereto on or before **November 29, 2012;** and **GRANTED in part** as to the Court's inherent powers as discussed in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) and Ms. Gietman shall further **pay $250.00** to Dr. King-Vassel pursuant to the Court's inherent powers, and Ms. Gietman shall further **pay $250.00** to Encompass pursuant to the Court's inherent powers, and Dr. Watson shall **pay $250.00** to Dr. King-Vassel pursuant to the Court's inherent powers, and Dr. Watson shall further **pay $250.00** to Encompass pursuant to the Court's inherent powers;

IT IS FURTHER ORDERED that CAPS' and Dr. King-Vassel's motion for relief from the scheduling order (Docket #32) be and the same is hereby **DENIED as moot;**

IT IS FURTHER ORDERED that the state of Wisconsin's motion to substitute its attorney (Docket #55) be and the same is hereby **GRANTED;** and

IT IS FURTHER ORDERED that this Court having dismissed all claims against all defendants, this matter be and the same is hereby **DISMISSED** on its merits, together with costs as taxed by the Clerk of Court.

The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 23rd day of 2012.

BY THE COURT:

J.P. Stadtmueller
U.S. District Judge

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.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAW PROJECT FOR PSYCHIATRIC RIGHTS, ex rel. United States of America; DANIEL I. GRIFFIN, ex rel. United States of America,

Plaintiffs - Appellants,

v.

OSAMU H. MATSUTANI, MD; WILLIAM HOGAN, individually and as Commissioner of the Department of Health and Social Services; TAMMY SANDOVAL, individually and as Director of the Alaska Office of Children's Services; STEVE MCCOMB, individually and as Director of the Alaska Division of Juvenile Justice; WILLIAM STREUR, individually and as Director of the Alaska Division of Health Care Services; JUNEAU YOUTH SERVICES, INC., an Alaskan non-profit corporation; PROVIDENCE HEALTH & SERVICES, an Alaskan non-profit corporation; ELIZABETH BAISI, MD; JAN KIELE, MD; LINA JUDITH BAUTISTA, MD; RUTH

No. 10-35887

D.C. Nos. 3:09-cv-00080-TMB
3:09-cv-00246-TMB

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

DUKOFF, MD; KERRY OZER, MD; CLAUDIA PHILLIPS, MD; SAFEWAY, INC.; FRED MEYER STORES, INC.; SOUTHCENTRAL FOUNDATION, an Alaskan non-profit corporation; SHEILA CLARK, MD; LUCY CURTIS; BARTLETT REGIONAL HOSPITAL, an agency of the City and Borough of Juneau, Alaska; HEIDI F. LOPEZ-COONJOHN, MD; ROBERT D. SCHULTS, MD; MARK H. STAUFFER, MD; RONALD A. MARTINO, MD; IRVIN ROTHROCK, MD; FAIRBANKS PSYCHIATRIC AND NEUROLOGIC CLINIC, PC; ALTERNATIVES COMMUNITY MENTAL HEALTH SERVICES, DBA Denali Family Services; ANCHORAGE COMMUNITY MENTAL HEALTH SERVICES, an Alaskan non-profit corporation; PENINSULA COMMUNITY HEALTH SERVICES OF ALASKA, INC.; THOMSON REUTERS (HEALTHCARE) INC.; WAL-MART STORES, INC.; FRONTLINE HOSPITAL, LLC, DBA North Star Hospital; FAMILY CENTERED SERVICES OF ALASKA, INC., an Alaska corporation,

Defendants - Appellees.

Appeal from the United States District Court
for the District of Alaska
Timothy M. Burgess, District Judge, Presiding

Argued and Submitted October 12, 2011
Seattle, Washington

Before: **KOZINSKI**, Chief Judge, **BEEZER** and **PAEZ**, Circuit Judges.

1. "[T]he public disclosure originated in . . . sources enumerated in the" False Claims Act, 31 U.S.C. § 3730(e)(4)(A). A-1 Ambulance Serv., Inc. v. California, 202 F.3d 1238, 1243 (9th Cir. 2000). In light of our case law's broad construction of "investigation" in this statute, see Seal 1 v. Seal A, 255 F.3d 1154, 1161 (9th Cir. 2001), the Utah Attorney General's correspondence qualifies as an enumerated source.

2. Relators' suit is "'based upon' . . . prior public disclosure." United States ex rel. Meyer v. Horizon Health Corp., 565 F.3d 1195, 1199 (9th Cir. 2009). "[T]he evidence and information in the possession of the United States at the time the False Claims Act suit was brought was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute." United States ex rel. Found. Aiding the Elderly v. Horizon West Inc., 265 F.3d 1011, 1016 (9th Cir. 2001) (internal quotation marks omitted). The Medicaid records relators obtained from their Alaskan FOIA requests already were required by statute to be supplied to the federal government. See Centers for Medicare & Medicaid Services, Medicaid Statistical Information Statistics (MSIS): Overview (July 21,

2011, 12:56:22 PM), http://www.cms.gov/MSIS/01_Overview.asp. Unlike in United States ex rel. Aflatooni v. Kitsap Physician Services, 163 F.3d 516, 523 (9th Cir. 1999), this suit doesn't involve "separate allegations of fraud against two distinct groups of defendants," so the public disclosure bar applies here to all defendants. And, unlike in United States ex rel. Baltazar v. Warden, 635 F.3d 866, 869 (7th Cir. 2011), relators here haven't provided "vital facts that were not in the public domain."

3. Relators' suit concerns ongoing conduct, not specific and discrete time periods as in United States ex rel. Bly-Magee v. Premo, 470 F.3d 914 (9th Cir. 2006). The public disclosure bar thus applies here to all claims at issue, including those made after the relevant disclosures.

AFFIRMED.

Associated Psychological Health Services
2808 Kohler Memorial Drive, Suite 1, Sheboygan, WI 53081
920-457-9192 Tele 920-208-[illegible] Fax
www.abcmedsfree.com

[redacted]

Release of Information & Health Records
CONFIDENTIAL
(If you received this release in error please call to inform us and destroy this copy)
Please call Dr. Watson prior to faxing documents: 920-918-7377

TO: Dr. [illegible] King, MD [illegible] (Respondent) maybe/miss
FROM: Dr. Toby T. Watson, Psy.D. and Agent:
REGARDING PATINET: M[redacted] B[redacted] Date Of Birth [redacted]

For the following Mental Health Records (client please initial on line):

CM * All psychological/psychiatric/family history/social history and any other related reports and summaries of tests.
CM * All treatment and progress summary reports.
CM * All Medication review records (e.g. change reports, PRNs, adverse drug indications, clinical notes and behavioral or symptom reports.)
CM * All intake, staffing and discharge reports/summaries.
CM * All court reports, letters, records, Motions and other related legal documents that are related to the patient's psychological treatment, commitment, transfers and hearings.
CM * To provide open communication from respondent to APHS, _____.

Purpose, Rights, Payment/Fees:
For the purpose of providing psychological services and for no other purpose what so ever. APHS and Dr. Watson are bound by Privacy Rule, and will not release any obtained information to any unauthorized agency. I understand that no fees will be incurred for photocopying, and no fees will be paid to APHS for obtaining this request or requesting a release from another agency. If this release grants a non-health care agency access to my private information, that non health care agency may not be required to protect this private and protected information (i.e. the non health care agency may re-disclose the protected information without my authorization and this will be out of the control of APHS.) I understand I have the right to view all the information being disclosed and view a running record of all information that has been previously released and authorized by me: CM (initial)

This release expires one year from the date of signature or upon the patient request. By signing below, I agree I have been given a copy of this release, fully understand it, and understand that I do not have to sign this release as it will not affect my services, and I may cancel in writing to the address above at anytime; however, the cancellation will not affect past actions. A photocopy or fax of this authorization is authentic as the original. Failure to release and withhold any part of the requested information is subject to violation of Wisc. Stat. 19.37. CM (initial)

Dated this 26th day of April, 2010.

Please fax all documents to APHS at 920-208-7066, or if greater than 20 pages, call for pickup.

Patient Chris Maxwell Meyer
Legal Guardian, Custodial Parent, POA (please circle)

A.P.H.S. Therapist Toby Watson, Psy.D.

EXHIBIT B

Maxwell 5/3/10