

John J. Tiemessen (ABA #9111105)
Lisa C. Hamby (ABA #0111063)
Clapp, Peterson, Van Flein,
Tiemessen & Thorsness, LLC
411 Fourth Avenue, Suite 300
Fairbanks, Alaska 99701
(9 0 7) 4 7 9 - 7 7 7 6
USDC-FBKS-Ntc@cplawak.com
Attorneys for Ronald A. Martino, MD

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA)
Ex. Rel. Daniel I. Griffin,)
Plaintiff,)

vs.) 3:09-cv-00246-RRB

RONALD A. MARTINO, MD, FAMILY)
CENTERED SERVICES OF ALASKA,)
INC., an Alaska corporation,)
and SAFEWAY, INC., a Delaware)
corporation,)
Defendants, _____)

MEMORANDUM IN SUPPORT OF MOTION FOR CONSOLIDATION

Defendant, Ronald A. Martino, MD., through
counsel, moves this Court for consolidation of the
present matter with *United States of America Ex. Rel. Law
Project for Psychiatric Rights v. Matsutani et al.*, Case No.
3:09-cv-00080-TMB. The *Law Project* case was filed April 27,
2009 and is currently before Judge Burgess in the Federal
District Court for the District of Alaska.

CLAPP, PETERSON, VAN FLEIN,
TIEMESSEN & THORSNESS, LLC
411 Fourth Avenue, Suite 300
Fairbanks, AK 99701-4710
Tel: (907) 479-7776
Fax: (907) 479-7966

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. FACTUAL BACKGROUND

This case is substantially similar, and in most aspects completely identical, to the previously filed *Law Project* case. Defendant Ronald A. Martino, MD and Defendant Safeway, Inc. are named parties in both cases, and the allegations against both of these defendants are premised on the same underlying act of prescribing (Dr. Martino) and dispensing (Safeway, Inc.) prescription medications to patients, including Mr. Griffin.

Plaintiffs in both cases allege that Defendants Dr. Martino and Safeway, Inc. (among others) made false claims for off-label, non-compendium drug prescriptions which were paid by Medicaid. Though Mr. Griffin is not mentioned by name in the *Law Project* case, the dates and description of the medication prescribed by Dr. Martino are identical in both actions. Compare Complaint in *Law Project v. Matsutani* (Docket No.1, Case No. 3:09-cv-0080-TMB) at ¶210 with Complaint in *Griffin v. Martino* (Docket No. 1, Case No. 3:09-cv-00246-RRB) at ¶19.

In fact, many of portions of the *Griffin* complaint appear to have been cut and pasted from the *Law Project* complaint. Compare Complaint in *Law Project* at ¶1 with Complaint in *Griffin* at ¶1; Complaint in *Law Project* at ¶3 with Complaint

CLAPP, PETERSON, VAN FLEIN,
TIEMESSEN & THORSNESS, LLC
411 Fourth Avenue, Suite 300
Fairbanks, AK 99701-4710
Tel: (907) 479-7776
Fax: (907) 479-7966

1 in *Griffin* at ¶2; Complaint in *Law Project* at ¶4 with
2 Complaint in *Griffin* at ¶3; Complaint in *Law Project* at ¶42
3 with Complaint in *Griffin* at ¶10; Complaint in *Law Project* at
4 ¶156 with Complaint in *Griffin* at ¶14; Complaint in *Law*
5 *Project* at ¶158 with Complaint in *Griffin* at ¶15; Complaint in
6 *Law Project* at ¶169 with Complaint in *Griffin* at ¶16;
7 Complaint in *Law Project* at ¶170 with Complaint in *Griffin* at
8 ¶17; Complaint in *Law Project* at ¶177 with Complaint in
9 *Griffin* at ¶18; Complaint in *Law Project* at ¶210 with
10 Complaint in *Griffin* at ¶19; Complaint in *Law Project* at ¶193
11 with Complaint in *Griffin* at ¶21; Complaint in *Law Project* at
12 ¶216 with Complaint in *Griffin* at ¶22; Complaint in *Law*
13 *Project* at ¶216 with Complaint in *Griffin* at ¶23; Complaint in
14 *Law Project* at Sec. VIII (Prayer for Relief) with Complaint in
15 *Griffin* at Sec. VIII (Prayer for Relief).

17 In addition to involving the same patient, two of the
18 same Defendants and the same underlying events, these cases
19 raise the same questions of law and involve the same federal
20 statutes. Because this new complaint advances identical
21 claims against Dr. Martino as those in the *Law Project* action,
22 Dr. Martino believes that this Court should consolidate this
23 action into the previously filed *Law Project* action.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

II. LAW

The standard of consolidation of two civil cases is governed by Federal Rule of Civil Procedure 42(a). Rule 42(a) provides that:

If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a).

Thus, Rule 42(a) is designed to encourage consolidation where a common question of law or fact is present. See *Arroyo v. Chardon*, 90 F.R.D. 603, 605 (D.P.R. 1981).

The purpose of consolidation for trial is to avoid 1) overlapping trials containing duplicative proof; 2) excess cost incurred by all parties and the government; 3) the waste of valuable court time in the trial of repetitive claims; and 4) the burden placed on a new judge in gaining familiarity with the cases.

Id. "The district court, in exercising its broad discretion to order consolidation of actions presenting a common issue of law or fact under Rule 42(a), weighs the saving of time and effort consolidation would produce against any inconvenience,

1 delay, or expense that it would cause." *Huene v. United*
2 *States*, 743 F.2d 703, 704 (9th Cir. 1984).

3 **III. DISCUSSION**

4 Due to the identical nature of the claims against Dr.
5 Martino and Safeway, Inc. in these two actions, consolidation
6 would be appropriate under Federal Civil Rule 42(a). Because
7 this case is in its infancy, consolidation would not create
8 any significant hardship or inconvenience to the Plaintiff or
9 other defendant. Also, any delays associated with such
10 consolidation would be minimal. Consolidation, however, would
11 greatly reduce excess costs incurred by the Defendants who
12 presently are faced with the prospect of defending claims in
13 two different cases which are based on the exact same
14 underlying conduct.

15
16 Motion practice in the *Law Project* matter is already well
17 underway, with multiple dispositive motions pending before
18 that Court. Identical motions will likely be filed in the
19 present case based on the same inherent deficiencies in
20 Plaintiff's claims. Assigning this matter to the same judge
21 would not only maximize judicial efficiency and promote
22 judicial economy, but it would also remove the potential
23 hazard of inconsistent rulings of law from two separate
24 courts.

IV. CONCLUSION

Because the present action is substantially similar, and in many ways identical to the previously filed *Law Project* case, and because consolidation would promote judicial economy, prevent parties from incurring excess costs related to duplicative motion practice, and avoid the waste of valuable Court time in the trial of repetitive claims, Defendant Martino's motion for consolidation should be granted.

DATED at Fairbanks, Alaska, this 16th day of June, 2010.

CLAPP PETERSON VAN FLEIN
TIEMESSEN & THORSNESS, LLC
Attorneys for Defendant(s)
Ronald A. Martino, MD,

/s/ John J. Tiemessen
Clapp Peterson Van Flein
Tiemessen & Thorsness, LLC
411 Fourth Avenue, Suite 300
Fairbanks, Alaska 99701
(907)479-7776
(907)479-7966 Fax
Email: jjt@cplawak.com
ABA No.: 9111105

CLAPP, PETERSON, VAN FLEIN,
TIEMESSEN & THORSNESS, LLC
411 Fourth Avenue, Suite 300
Fairbanks, AK 99701-4710
Tel: (907) 479-7776
Fax: (907) 479-7966

CERTIFICATE OF SERVICE

I certify that a copy of this document was electronically served on all counsel of record.

/s/ John J. Tiemessen