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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

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

OPPOSITION TO MOTION TO DISMISS UNDER RULE 12(b)6

Qui tam relator Law Project for Psychiatric Rights (PsychRights®) opposes Defendant State of Alaska Motion to Dismiss Claims Against State of Alaska Officials William Hogan, Tammy Sandoval, Steve McComb, and William Struer, Dkt. No. 90 (Alaska Officials' Motion to Dismiss).

I. THE ALASKA OFFICIALS ARE PERSONALLY LIABLE FOR THEIR VIOLATIONS OF THE FALSE CLAIMS ACT

The Alaska Officials assert there is no False Claims Act cause of action against state officials acting within the scope of their official responsibilities. The controlling

case of *Stoner v. Santa Clara County Office of Education*, 502 F.3d 1116, 1123-24 (9th Cir. 2007), holds otherwise:

The district court also held that Stoner failed to state an FCA claim against the individual defendants in their personal capacities because Stoner could not allege that the defendants' actions exceeded the scope of their official responsibilities. As explained below, this was an error. The plain language of the FCA subjects to liability “any person” who, among other things, knowingly submits a false claim or causes such a claim to be submitted to the United States. 31 U.S.C. § 3729. Although the FCA does not define the term “person,” the Supreme Court has made clear that the term includes “natural persons.” *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125, 123 S.Ct. 1239, 155 L.Ed.2d 247 (2003); see also 1 U.S.C. § 1 (defining the term “person” for purposes of “determining the meaning of any Act of Congress” as including an individual). Therefore, state employees sued in their personal capacities are “persons” who may be subject to liability for submitting a false claim to the United States.

The Alaska Officials argue that because they have been sued in their official capacities, they are immune.¹ However, *Stoner* clearly holds state officials are personally liable for actions within the scope of their official responsibilities, so it is unclear in what manner the “official capacity” distinction is meaningful in the monetary liability context for their causing or presenting the false claims at issue here. Moreover, *Stoner*, 502 F.3d at 1123, also states:

With respect to the official capacity claims, the district court held that the individually named defendants could not be sued for damages in their official capacities because such a suit would, in effect, be against the state. See *Will*, 491 U.S. at 71, 109 S.Ct. 2304 (concluding that a state official sued in his or her official capacity for money damages is not a “person” subject to suit under 42 U.S.C. § 1983 because “a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office,” and for this reason “is no different from a suit against the State itself”). The parties do not challenge this ruling and we express no opinion on the merits of the district court's conclusion.

¹ The Alaska Officials cite *Vermont Agency of Natural Resources v. United States ex rel Stevens*, 529 U.S. 765, 120 S.Ct. 1858 (2000) for the proposition the Alaska Officials are not liable, but the Ninth Circuit in *Stoner* held *Vermont Agency* does not insulate state officials from personal liability under the False Claims Act.

The official capacity distinction is meaningful, however, in the context of the equitable relief requested by PsychRights at Paragraph A of the Prayer for Relief in the First Amended Complaint, Dkt. No. 107, p. 64, that the defendants be ordered to cease and desist from violating 31 U.S.C. §3729 *et seq.* Injunctive relief to enjoin a state official from violating a federal statute is proper and not barred by the 11th Amendment to the United States Constitution. *Armstrong v. Wilson*, 124 F.3d 1019, 1026 (9th Cir. 1997); *Independent Living Center of Southern California, Inc., v Maxwell-Jolly*, 572 F.3d 644, 660 (9th Cir. 2009).

The Alaska Officials also cite to the pre-*Stoner* case of *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir 2001), but the basis for dismissal there was that the State Office of the Attorney General attorneys are immune for litigation related conduct.

The Alaska Officials also cite *Alden v. Maine*, 527 U.S. 706, 757, 119 S.Ct. 2240, 2268 (1999), for the proposition that state officials may be held personally liable for damages based upon official actions only where they were sufficiently involved. In *Alden*, the Supreme Court held:

Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.

Here, the violations of the False Claims Act alleged in both the original and First Amended Complaint, Dkt. No. 107, are fairly attributable to the Alaska Officials. The false nature of the claims they were presenting or causing to be presented was brought to their attention by the end of September of 2008,² and they have since failed and continue to fail to exercise their authority over their respective programs to stop the presentation of the false claims. The false claims are fairly attributable to the Alaska Officials.

² See, Dkt. No. 91-7, pages 11 and 57.

**II. PSYCHRIGHTS HAS ALLEGED A FALSE CLAIM AS A
MATTER OF LAW**

In Section II of the Alaska Officials' Motion to Dismiss, they assert that under the concurrently filed Defendants Motion to Dismiss Under Rule 12(b)(6), Dkt. No. 93, PsychRights is wrong that Medicaid restricts outpatient drug coverage to covered outpatient drugs, *i.e.*, for a medically accepted indication. PsychRights similarly relies on its opposition to the Defendants' Motion to Dismiss Under Rule 12(b)(6), filed at Dkt. No. 108.

III. CONCLUSION

For the foregoing reasons, the Defendant, State of Alaska's Motion to Dismiss under Rule 12(b)(6), Dkt. No. 90, should be denied.

RESPECTFULLY SUBMITTED this 7th day of May, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 7, 2010, a true and correct copy of this document was served electronically on all parties of record by electronic means through the ECF system as indicated on the Notice of Electronic Filing, or if not confirmed by ECF, by first class regular mail.

/s/ James B. Gottstein
JAMES B. GOTTSTEIN