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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

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

REPLY RE:
REQUEST FOR ORAL ARGUMENT AS SOON AS POSSIBLE
ON
REFILED MOTION FOR PRELIMINARY INJUNCTION AGAINST DEFENDANTS HOGAN AND STREUR

In opposing, at Dkt. No. 134, PsychRights' Request for Oral Argument As Soon as Possible on Refiled Motion for Preliminary Injunction against Defendants Hogan and Streur (Request for Oral Argument), [1] Defendants Hogan and Struer turn the procedure regarding preliminary injunctions on its head by asserting this court should defer action

[1] Dkt. No. 133.

on the Motion for Preliminary Injunction,[2] until it has decided the merits of all 32 defendants' four motions to dismiss.

I. THE COURT MAY ADVANCE THE JURISDICTIONAL DETERMINATION, BUT SHOULD NOT DEFER DETERMINATION OF THE PRELIMINARY INJUNCTION

Contrary to Defendants Hogan and Struer's assertion, it is not true that "the court must address the challenge to its jurisdiction . . . prior to adjudicating . . . the Motion for Preliminary Injunction." Dkt. No. 134, p. 2. Neither the civil rules, nor the cases cited by Hogan and Streur, support this position.

First, Rule 65(a)(2) provides in pertinent part, that "the court may advance the trial on the merits and consolidate it with the hearing [on the motion for preliminary injunction]." It does not say the court may defer determination of a motion for preliminary injunction pending a determination on the merits. In fact, the whole purpose of motions for preliminary injunction is to prevent irreparable harm pending a determination on the merits.

PsychRights welcomes an early determination of Defendants' motions to dismiss as allowed by Rule 65(a)(2). However, the defendants have requested oral argument on all four motions to dismiss take place on the same day,[3] and advised the Court that because of the varying schedules of the different counsel involved, the oral arguments should occur during the week of August 2, 2010.[4] PsychRights requested that the oral arguments be held at least a few days apart,[5] which would presumably allow argument on all four motions to be heard substantially before the week of August 2, 2010. The defendants replied, among other things, that the "defendants should not have to absorb the cost and wasted time of traveling to and appearing at multiple hearings."[6] The defendants should not be allowed to delay determination on the Motion for Preliminary

[2] Dkt. No. 113.
[3] Dkt. No. 126.
[4] Dkt. No. 131.
[5] Dkt. No. 123.
[6] Dkt. No. 126, p. 2.

Injunction because they want to hold all of the oral arguments on the same day, which because of their scheduling issues they want to postpone until the week of August 2, 2010.

Defendants Hogan and Streur cite two out-of- circuit cases, *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006) and *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993), for the proposition that the "court must dismiss without reaching the merits if there is no jurisdiction."[7] However, neither case suggests the court must defer consideration of a preliminary injunction pending determination of jurisdiction. *Petruska* merely notes that at issue in a Rule 12(b)(1) motion is the court's power to hear the case. *Capitol Leasing* states, "a court must dismiss the case without ever reaching the merits if it concludes that it has no jurisdiction." (emphasis added). Again, PsychRights welcomes an early determination of the jurisdictional issue, but the possibility the court might conclude it has no jurisdiction does not justify delaying consideration of the Motion for Preliminary Injunction. Moreover, the Motion for Preliminary Injunction is not a decision on the merits.

Ninth Circuit law does not appear to support Hogan and Streur's position. In *Rosales v. United States*, 824 F.2d 799, 803, (9th Cir. 1987), the court held that if the jurisdictional issue and substantive claims are so intertwined that resolution of the jurisdictional question is dependent on factual issues going to the merits, the court must either be able to resolve the issue on summary judgment or it must be resolved by the trier of fact. *See*, also, *U.S. ex rel Biddle v. Stanford Board of Trustees*, 161 F.3d 533, 535 (9th Cir. 1998). In other words, there is no requirement that the jurisdictional question must be decided in advance of a decision on the merits, let alone before a motion for preliminary injunction. In fact, none of the cases hold the court must decide jurisdiction before a motion for preliminary injunction which, after all, is specifically designed to precede a determination on the merits unless the court advances the determination on the merits under Rule 65(a)(2).

[7] Dkt. No. 134, p. 2, n. 1.

Perhaps most importantly with respect to the jurisdictional issue, the Rule 12(b)(1) motion to dismiss[8] was filed by 23 defendants and involves various issues and different circumstances pertaining to different categories of defendants, while the Motion for Preliminary Injunction involves only two defendants and circumstances which the Ninth Circuit has definitively ruled can not trigger the "Public Disclosure Bar" depriving this court of jurisdiction.

Specifically, in *U.S. ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 920 (9th Cir. 2006), the Ninth Circuit held a public disclosure can not trigger the Public Disclosure Bar as to false claims that post date such public disclosure. The public disclosure bar thus can not apply to Hogan and Streur with respect to false claims identified in the First Amended Complaint that were presented or caused to be presented by or under their direction after such public disclosure in late September, 2008, when the amended complaint in *PsychRights v. Alaska* was filed.[9] Paragraph 188 of the First Amended Complaint here, Dkt. No. 107, pp. 44-46, identifies numerous such false claims which, as paragraph 215 states, defendants Hogan and Streur approved for presentment or presented to the government for FFP.

For the same reason, the Public Disclosure Bar can not apply to the ongoing presentment to Medicaid for federal reimbursement of prescriptions of psychotropic drugs used on children and youth that are not for medically accepted indications, which defendants Hogan and Streur admit.[10] It is this ongoing presentment of such false claims that necessitates the granting of the requested preliminary injunction. That the Public Disclosure Bar might apply to some other claims and defendants does not dispose of the Motion for Preliminary Injunction against Defendants Hogan and Streur.

[8] Dkt. No. 89.
[9] *See*, Dkt. No. 91-7, p. 8, paragraph 22, and page 54 (for the date).
[10] Dkt. No. 130, footnote 3.

II. THE COURT MAY ADVANCE THE RULE 12(b)(6) DETERMINATION, BUT SHOULD NOT DEFER DETERMINATION OF THE PRELIMINARY INJUNCTION

At page 2 of their opposition, Hogan and Struer also argue this Court granting any one of the defendants motion to dismiss would render the Motion for Preliminary Injunction Moot, citing to *Communications Telesystems International v. California Public Utilities Comm.*, 14 F.Supp.2d 1165, 1167 (N.D. Cal. 1998), for the proposition that the court there found it appropriate to rule on the threshold questions of jurisdiction and failure to state a claim upon which relief may be granted before ruling on the motion for preliminary injunction. Except for the 12(b)(6) motions, Dkt. Nos. 90 & 92, the other motions to dismiss, Dkt. Nos. 83 & 89, involve many issues not relevant to dismissal against defendants Hogan and Streur and the Court granting dismissal with respect to one or more of these issues against one or more of these other defendants does not make the Motion for Preliminary Injunction moot.

Again, PsychRights would be pleased for this Court to advance the determination on the merits to the hearing (oral argument) on the motion for preliminary injunction as allowed by Civil Rule 65(a)(2), but respectfully suggests deferral of determination of the Motion for Preliminary Injunction is not appropriate.

III. THE FEDERAL GOVERNMENT IS SUFFERING IRREPARABLE HARM

At pages 2-3 of their opposition, Dkt. No. 134, defendants Hogan and Streur assert the federal government is not suffering irreparable harm without the preliminary injunction. This, of course, is a determination to be made in deciding the Motion for Preliminary Injunction and not whether argument should be held, but PsychRights will note here that Defendants Hogan and Streur have never responded to PsychRights' point that a continuing violation of federal law constitutes irreparable harm as a matter of law.[11]

[11] *See*, Dkt. No. 113, p. 10. PsychRights also asserts that, contrary to Defendants Hogan and Streur's protestation at pages 2-3 of their opposition that monetary damages is an

IV. CONCLUSION

For the foregoing reasons, PsychRights respectfully requests this court grant argument and schedule it as soon as possible.

RESPECTFULLY SUBMITTED this 15th day of June, 2010.

Law Project for Psychiatric Rights, an Alaskan non-profit corporation

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 15, 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
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adequate remedy, that irreparable harm exists as a matter of law under *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009).