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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA)
Ex rel. Law Project for Psychiatric Rights,)
an Alaskan non-profit corp.,)
)
Plaintiff,)

vs.)

OSAMU H. MATSUTANI, MD, et al.)
)
Defendants.)

Case No.: 3:09-cv-00080-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,)
)
Defendants.)

Case No.: 3:09-cv-00246 RRB

(CONSOLIDATED)

**REPLY TO OPPOSITION TO FAMILY CENTERED SERVICES OF ALASKA, INC.’S
MOTION TO DISMISS**

Introduction

Relator Griffin brought this qui tam action against Family Centered Services of Alaska, Inc. (hereinafter “FCSA”) on behalf of the United States of America. Griffin claims that FCSA has committed a fraud against the United States of America. What is that fraud? FCSA allegedly took Griffin to a doctor when he was a minor. That doctor allegedly prescribed medication for Griffin; namely Abilify, Trazadone, Zoloft and Trileptal. Griffin claims that prescribing said medications to a minor was beyond the medically accepted indications of those medications. Therefore, assuming that FCSA presented a claim for reimbursement for those claims to Medicaid, the mere act of presenting the claim was a fraud on the government. FCSA does not concede that it presented any claims to Medicaid for reimbursement for the prescriptions as alleged in Griffin’s complaint, but for purposes of this motion it is the material elements of the alleged fraud that are important, not the validity of the allegations. The material elements of the fraud alleged by Griffin are precisely the same elements of the fraud alleged against a multitude of mental health agencies in the qui tam action filed by the Law Project for Psychiatric Rights (hereinafter “PsychRights”) on April 27, 2009, approximately seven months before Griffin filed his action.¹ Griffin is barred by law from bringing this related action, and therefore his claim against FCSA must be dismissed.

Argument

The Ninth Circuit has established an exception-free, first-to-file bar in order to promote the purposes of the 1986 amendments to the act.² Section 3730(b)(5)’s plain language unambiguously establishes a first-to-file bar, preventing successive plaintiff’s from bringing

¹ Dkt. No. 1, Complaint in *ex rel. Psych Rights*, 3:09-cv-80-TMB at paragraph 208

² *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001) *Quotations and citations omitted.*

related actions based on the same underlying facts.³ The purpose of the first-to-file rule is to weed out parasitic claims and create an incentive for relators with valuable information to file quickly. Furthermore, once a relator has filed a qui tam suit, the purpose behind allowing such suits has been satisfied because duplicate claims do nothing to further assist the government, as the first qui tam claim puts the government on notice of the essential facts of the fraudulent scheme such that it can discover related frauds.⁴

Section 3730(b)(5)'s plain language does not contain exceptions. Moreover, an exception-free, first-to-file bar conforms with the dual purpose of the 1986 amendments: to promote existence for whistle-blowing insiders and prevent opportunistic successor plaintiffs.⁵ To fall within this rule, an action need not assert facts identical to those in the prior complaint. Rather, the current action need only allege the same material elements of fraud described in the similar suit.⁶ The first-to-file provision is jurisdictional requiring dismissal under Rule 12(b)(1) and 12(b)(6) of any claims it precludes.⁷

Relator Griffin's qui tam action asserts the same material elements of fraud against FCSA as the previously filed PsychRights' action alleged against many other mental health agencies. The basis of both actions is the claim that the mental health agencies participated in presenting claims to Medicaid for reimbursement for prescriptions drugs that were prescribed outside of medically accepted indications to minors. The material elements in Relator Griffin's claim are not only related but are nearly identical to the claims in PsychRights' action. The government has been placed on actual notice of the allegations by PsychRights' action. Relator Griffin's

³ Id.

⁴ Id.

⁵ Id.

⁶ U.S. ex rel. Lee Brodale v. Apollo Group, Inc., 2009 WL 3756623 (S.D. Cal.) Citing Lujan at 1118-89

⁷ Id.

claim is repetitive and barred by the first-to-file rule. Relator Griffin's claim must be dismissed for lack of subject matter jurisdiction pursuant to FRCP 12(b)(1).

In his opposition to FCSA's Motion to Dismiss, Griffin asserts that the identity of a new defendant, namely FCSA, constitutes a different material element of the alleged fraud against the government sufficient to create an exception to the first-to-file rule and therefore his action brought subsequent to the Psych Rights action is not barred. Relator Griffin supports the notion by citing to two cases, *Pfeifer*⁸ and *Westmoreland*.⁹ These cases are distinguishable from the present case.

Both *Pfeifer* and *Westmoreland*, contain descriptions of conspiracies involving subterfuge and artifice designed to hide the devious acts of the participants in their attempt to illegally profit from the government. The schemes in both cases were of such a nature that they would not have been discovered if not for an insider willing to blow the whistle. That is come forward with information that was obtained by way of their position in the organization or conspiracy that allowed them to observe or learn the details of the fraud that would not otherwise be known to the government. That is not the case with Griffin's claims against FCSA.

In *Westmoreland* the fraudulent scheme involved kickbacks to doctors from medical device manufacturers to induce the doctors to purchase certain medical devices. The kickbacks were disguised in several different ways including payments to the doctors that were falsely claimed to be compensation for consulting. In reality the doctors did not do any consulting. In exchange for the consulting fee, the doctors pushed the defendant's product to their patients. Payment for the product was made by Medicare and Medicaid, In that case the court held that a subsequent qui tam action that exposed a similar scheme perpetrated by a different manufacturer

⁸ U.S. ex rel. Pfeifer v. ELA Medical, Inc. 2010 WL 1380167 (D.Colo.)

⁹ U.S. ex rel. Westmoreland v. Amgen, Inc. 2010 WL 1634315 (D.Mass)

was not barred by the first-to-file rule.¹⁰ In that case the scheme perpetrated by the separate defendant would not have been revealed to the government by the allegations of the prior qui tam action. The subsequent action revealed a similar but separate fraud that the government would not have been on notice of based on the claims in the first filed action.

In *Pfeifer* the first qui tam Relator alleged a scheme where doctors were paid to participate in a bogus patient monitoring program that was actually designed to funnel clients to cardiac surgeons that sold the defendant's pacemakers. The Relator in the subsequent qui tam action alleged a scheme where the defendant paid doctors to provide training, where no training ever actually took place, to encourage the increased use of the defendant's products. The court held that the subsequent qui tam case was not barred by the first-to-file rule because the subsequent claim exposed a completely different scheme that would not have been revealed to the government based on the allegations of the first filed claim.¹¹ Unlike the relators in *Pfeifer* or *Westmorland*, Griffin has neither identified a separate scheme nor a defendant that was not known to the government based on the allegations of PsychRights qui tam action.

Neither the PsychRights claim nor the subsequent claim filed by Griffin alleges subterfuge or artifice on behalf of any of the defendants. There is no allegation of a hidden scheme to steal money from the government. Griffin's claim against FCSA is that it employed a licensed physician that prescribed certain medications to Griffin that he claims were not medically indicated for minors. The prescriptions were presented and filled by a pharmacy. The pharmacy allegedly requested payment from Medicaid and was paid for the prescriptions. Griffin does not allege that the government was not aware or did not have actual notice of the essential facts of the alleged "fraudulent scheme." In his complaint against FCSA, Griffin states that the

¹⁰ *Id.*, p.6.

¹¹ *Pfeifer*, p.9.

government paid and continues to pay such false claims.¹² Contrast this with the PsychRights' complaint that states: "The government unaware of the falsity of the claims made or caused to be made by the defendants paid and continues to pay the false claims."¹³ Griffin acknowledges that the government is aware that claims for these particular drugs are being presented to Medicaid for reimbursement and the government is paying those claims without objection. This scenario is similar to the situation described in Lujan. The government was aware of the allegations of fraud made by Lujan, who was attempting to proceed with a second qui tam action. The government had closely monitored the actions complained of and decided not to intervene because it determined that it had benefitted from the actions that Lujan claimed were fraud on the government.¹⁴

FCSA is not participating in hidden scheme to steal money from the government. The scheme complained of by Griffin is well known to the government. It is a government program. FCSA is following the rules of the system set forth by Medicaid. Unlike the underhanded schemes in *Pfeifer* or *Westmoreland*, there was no need for an insider to come forward and inform the government about the scheme. The scheme was developed and is tightly regulated and audited by the government. Even if the government was not aware of the specific claim that it was paying for drugs not prescribed for a medically accepted indication, that information was revealed when PsychRights filed its qui tam action. The information provided in PsychRights' complaint gave the government all of the information it needed to discover every related claim. All the government had to do was identify every claim filed with Medicaid for reimbursement for prescriptions of the drugs included in PsychRights' complaint that were filed on behalf of a minor. Then the government could follow the claims back and identify the pharmacy, the doctor

¹² Dkt. No. 1, Complaint in *ex rel. Griffin*, 3:09-cv-246-TMB at paragraph 27

¹³ Dkt. No. 1, Complaint in *ex rel. Psych Rights*, 3:09-cv-80-TMB at paragraph 208

¹⁴ Lujan at 1187, Footnote 10

that prescribed the medication, and identify any mental health providers that employed the doctor, including FCSA.

Griffin's claim does not forward any of the purposes of permitting a qui tam action under the False Claims Act. Griffin has not provided any information to the government that the government did not already have. Providing the name of a mental health provider that was not listed as a defendant by PsychRights, but that the government already knew had participated in the Medicaid program is not a new or different material element sufficient to distinguish Griffin's claim from the fraud claims presented by the allegations in PsychRights' action. In this case the government already knew the essential facts of the "fraudulent scheme". If the fraud upon the government has already come to light the court has the power to hear only qui tam actions from the relator who originally exposed the deception, not those from subsequent relators who may try to copycat and capitalize on the original source's efforts.¹⁵ Griffin's claim is parasitic. Griffin has not come forward with any new or valuable information. The government already had enough information to identify all of the participants in his alleged scheme. Permitting Griffin to proceed with his claim will not provide any additional benefit to the government.

Conclusion

Griffin's qui tam action is clearly materially related to the prior action filed by PsychRights. FCSA respectfully requests that the court apply the unambiguous and exception free first-to-file rule and dismiss Relator Griffin's action pursuant to 31 U.S.C. § 3730(b)(5), FRCP 12(b)(1) and 12(b)(6).

¹⁵ Pfeiffer, p.6.

DATED at Fairbanks, Alaska, this 26th day of August, 2010.

ZIMMERMAN & WALLACE
Attorneys for Defendants Family Centered Services
of Alaska, Inc.

By: /s/John Foster Wallace
John Foster Wallace, ABA #9211115

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the
foregoing was electronically served on all parties of record.

/s/Lisa R. Miller 08/26/10
Lisa R. Miller for Zimmerman & Wallace