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JP138349/1804026

May 18, 2011

Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
The James R. Browning Courthouse
95 Seventh Street
San Francisco, California 94103

Re: Defendants' Rule 28(j) Supplemental Authority for *United States ex rel. Law Project for Psychiatric Rights v. Matsutani et al.*, Case No. 10-35887

Dear Clerk of the Court:

On May 16, 2011, the United States Supreme Court ruled that an agency's response to a Freedom of Information Act ("FOIA") request for records constitutes a "report" under the False Claims Act's Public Disclosure Bar. *Schindler Elevator Corp. v. United States ex rel. Kirk*, No. 10-188, ___ U.S. ___ (2011) (attached hereto). The Supreme Court noted that the "broad ordinary meaning of 'report' is consistent with the generally broad scope of the FCA's public disclosure bar." (Slip op. at 5; *see also id.* at 6 (wording of statute "suggests a wide-reaching public disclosure bar").) The Court clarified that "[a]ny records the agency produces along with its written FOIA response are part of that response," and covered by the Public Disclosure Bar. (*Id.* at 9.)

The ruling is pertinent and significant to the present case on appeal, *United States ex rel. Law Project for Psychiatric Rights v. Matsutani et al.*, No. 10-35887, because the relator, PsychRights, obtained the information upon which its allegations are based through FOIA requests to the Alaska Medicaid program. (Joint Answering Brief at 1, 21, 24.) Although the district court looked to other public disclosures to dismiss the case under the Public Disclosure Bar, the *Schindler Elevator* opinion provides an additional reason for dismissal. The Supreme Court's description of Kirk's investigation also applies to PsychRights:

Although Kirk alleges that he became suspicious from his own experiences as a veteran working at Schindler, anyone could have filed the same FOIA requests and then filed the same suit. Similarly, anyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA.

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(Slip op. at 11.) The present case is another “example of the ‘opportunistic’ litigation that the public disclosure bar is designed to discourage.” (*Id.* at 10.)

Very truly yours,

/s/ Eric P. Berlin
Eric P. Berlin

Attachment

cc: All counsel of record