

# PsychRights

Law Project for  
Psychiatric Rights, Inc.

May 20, 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: Dkt. No. 46-1, Case No. 10-35887, *United States ex rel. Law Project for Psychiatric Rights v. Matsutani et al.* Response of Law Project for Psychiatric Rights and Daniel Griffin to Defendants' Rule 28(j) Supplemental Authority.

Dear Clerk of the Court:

This responds to Defendants' assertion that *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, No. 10-188, \_\_U.S.\_\_ (2011), holding written responses to Freedom of Information Act (FOIA) requests are public disclosures within the meaning of the Public Disclosure Bar is pertinent and significant to this case.

It is hard to see why *Schindler* is pertinent or significant to a decision in this case since there is no dispute that there had been public disclosure of industry-wide fraud, or at least wide-spread off-label prescribing of psychotropic drugs to children and youth. The question in this appeal is whether the District Court was correct when it held public disclosure of industry-wide fraud triggers the Public Disclosure Bar in light of this Court's contrary holding in *U.S. ex rel. Foundation Aiding The Elderly v. Horizon West*, 265 F.3d 1011, n5 (9th Cir. 2001):

Appellees also point to general allegations of fraud that were directed at the nursing home industry in general. But, as pointed out by Appellants, none of these "disclosures" related to Horizon West or specifically to any of its facilities. Therefore, they do not trigger the jurisdictional bar. See *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566 (11th Cir. 1994) ("The allegations of widespread ... fraud made in sources in which BCBSF was not specifically named or otherwise directly identified are insufficient to trigger the jurisdictional bar.").

While *Schindler* may have abrogated *United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147 (9th Cir. 2006), *Foundation Aiding The Elderly* is

still controlling in this Circuit. *See*, Opening Brief, pp 18-19 and Reply Brief, pp 1, 3 & 5.

In fact, *Schindler* supports this in the very portion cited by Defendants where Justice Thomas states that anyone could "submit FOIA requests until he discovers a federal contractor who is out of compliance," implying the FOIA response has to identify a specific defendant(s) to trigger the Public Disclosure Bar.

Yours truly,

/s/ James B. Gottstein  
James B. Gottstein, Esq.

cc: All counsel of record