No. 10-35887

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAW PROJECT FOR PSYCHIATRIC RIGHTS, ex rel. United States of America;
DANIEL I. GRIFFIN, ex rel. United States of America,
Plaintiffs-Appellants
v.
OSAMU H. MATSUTANI, MD; *et al.*,
Defendants-Appellees.*

**ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF ALASKA,
THE HONORABLE TIMOTHY M. BURGESS PRESIDING
AK U.S. DISTRICT COURT
CASE Nos. 3:09-cv-80-TMB & 3:09-cv-246-TMB**

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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Dated: November 7, 2011

* LIST OF ALL DEFENDANTS/APPELLEES

Osamu H. Matsutani, MD; William Hogan, individually and as Commissioner of the Department of Health and Social Services; Tammy Sandoval, individually and as Director of the Alaska Office of Children's Services; Steve McComb, individually and as Director of the Alaska Division of Juvenile Justice; William Streur, individually and as Director of The Alaska Division of Health Care Services; Juneau Youth Services, Inc., an Alaska non-profit Corporation; Providence Health & Services, an Alaska non-profit Corporation; Elizabeth Baisi, MD; Ruth Dukoff, MD; Kerry Ozer, MD; Claudia Phillips, MD; SouthCentral Foundation, an Alaska non-profit Corporation; Sheila Clark, MD; Lina Judith Bautista, MD; Heidi F. Lopez-Coonjohn, MD; Robert D. Schults, MD; Mark H. Stauffer, MD; Ronald A. Martino, MD; Irvin Rothrock, MD; Jan Kiele, MD; Alternatives Community Mental Health Services, d/b/a Denali Family Services; Anchorage Community Mental Health Services, an Alaska non-profit Corporation; Lucy Curtiss, MD; Fairbanks Psychiatric and Neurologic Clinic, PC; Peninsula Community Health Services Of Alaska, Inc.; Bartlett Regional Hospital, an Agency of The City And Borough Of Juneau; Thomson Reuters (Healthcare) Inc.; Wal-Mart Stores, Inc., Safeway, Inc.; Fred Meyer Stores, Inc.; Frontline Hospital, LLC, d/b/a North Star Hospital; and Family Centered Services, Inc.

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RULE 35 STATEMENT

For the following reasons, Appellants request panel rehearing and rehearing *en banc* of the decision in this appeal, a copy of which is attached hereto:

(A) Unless corrected by the Panel, consideration by the full Court is necessary because the proceeding involves a question of exceptional importance. The effect of the decision is a breathtaking expansion of the Public Disclosure Bar far beyond that intended by Congress, immunizing parties from private, *qui tam* enforcement under the False Claims Act for all past and future false claims when general information of industry-wide fraud has been publicly disclosed.

(B) The Panel's decision misapprehends the law. The Public Disclosure Bar, 31 U.S.C. § 3730(e)(4)(A), is not triggered by information possessed by the government; the information must have been publicly disclosed.

(C) The Panel's decision conflicts with the following decisions of this Court: *U.S. ex rel. Foundation Aiding The Elderly v. Horizon West*, 265 F.3d 1011, n5 (9th Cir. 2001), *amended* at 275 F.3d 1189; *United States ex rel. Aflatooni v Kitsap Physicians Services*, 163 F.3d 516, 523 (9th Cir. 1999), as clarified by *United States ex rel. Harshman v. Alcan Electrical and Engineering, Inc.*, 197 F.3d 1014 (9th Cir. 1999); and *U.S. ex rel. Bly-Magee v. Premo*, 470 F.3d 914 (9th Cir. 2006). Thus, unless corrected by the Panel, consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions.

INTRODUCTION

This Petition for Rehearing is about the unprecedented restriction of private, *qui tam*, enforcement under the False Claims Act that, if left uncorrected, would in the words of the United States Government, "apply in practically every healthcare fraud case."[1] In 1986, Congress amended the False Claims Act to "encourage more private enforcement,"[2] including repealing the "Government Knowledge Bar," and replacing it with the "Public Disclosure Bar."[3] The Panel's decision, however, affirmed the dismissal of this case because of information in the government's possession, rather than information that had been publicly disclosed as required under the Public Disclosure Bar, 31 U.S.C. § 3730(e)(4)(A).

This Court's heretofore consistent jurisprudence is the Public Disclosure Bar cannot be triggered unless the specific defendants or a "narrow class of suspected wrongdoers" were publicly disclosed.[4] In this case, the Panel held the Public Disclosure Bar was triggered because the government could have pored through millions of claims caused or presented by tens of thousands of potential defendants to ferret out false claims. This is contrary to every other Court of Appeals opinion

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[1]Dkt-Entry. 20-2, p. 20, of which judicial notice was taken at Dkt-Entry 64.

[2] S.Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986), reprinted at U.S.Code Cong. & Admin.News 1986, pp. 5266, 5288-5289.

[3] *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, ___ U.S. __, 130 S.Ct. 1396, 1406, 176 L.Ed.2d 225

[4] *Aflatooni*, 163 F.3d at 523; *Harshman*, 197 F.3d at1019.

under the 1986 Amendments of which *relators* are aware.[5]

The Senate Report accompanying the 1986 Amendments to the False Claims Act states, "perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies,"[6] and in *Seal 1 v. Seal A*, 255 F.3d 1154, 1160 (9th Cir. 2001), this Court reiterated:

> "[t]he 1986 amendments also reflected Congress's recognition that the government simply lacks the resources to prosecute all viable claims, even when it knows of fraudulent conduct."

The Panel's decision ignores this key purpose behind the 1986 Amendments, rolling back *qui tam* enforcement in the Ninth Circuit to the regime based on information in the government's possession Congress repealed as too restrictive.

Out of the tens of thousands of potential defendants and millions of claims from which defendants and false claims might be identified, the appellants brought suit against 32 defendants whom they knew caused or presented false claims, identifying a couple hundred specific false claims. This is exactly the type of

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[5] *See, e.g. United States ex rel. Baltazar v. Warden*, 635 F.3d 866, 867 (7th Cir. 2011)(summarizing cases); *In re Natural Gas Royalties*, 562 F.3d 1032, 1042 (10th Cir. 2009); *United States ex rel. Findley v. FPC–Boron Employees' Club*, 105 F.3d 675, 687 (D.C.Cir.1997); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 572 (10th Cir.1995); *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 566 & n. 7 (11th Cir.1994).

[6] S.Rep. No. 99-345 (1986), reprinted at U.S.Code Cong. & Admin.News 1986, p. 5272.

information the government needs in False Claims Act cases and the type of non-public information that precludes operation of the Public Disclosure Bar.

There are, however, four state officials and a health care publisher here who were identified publicly to which the foregoing does not apply. As to these defendants *Bly-Magee*, 470 F.3d at 920, holds the Public Disclosure Bar cannot be triggered for false claims occuring after the public disclosure.

Panel rehearing or rehearing *en banc* should be granted.

ARGUMENT

I. THE PANEL'S DECISION THAT GOVERNMENT POSSESSION OF INFORMATION CONCERNING MILLIONS OF CLAIMS INVOLVING TENS OF THOUSANDS OF POTENTIAL DEFENDANTS TRIGGERS THE PUBLIC DISCLOSURE BAR CONFLICTS WITH THIS COURT'S AND ALL OTHER CIRCUIT COURTS' PRECEDENTS

The Panel held government possession of facts buried in millions of claims involving tens of thousands of potential defendants triggers the "Public Disclosure Bar." This is contrary to all authority of which Appellant is aware.

As set forth in the United States' Statement of Interest in *U.S. ex rel Polansky v. Pfizer, Inc.*, in order to protect "public health as well as the public fisc," Congress limited outpatient drug prescription coverage to those that are for a

"medically accepted indication,"[7] defined as indications approved by the Food and Drug Administration or "supported" by a citation in at least one of three drug references known as "Compendia."[8] In other words, Congress did not limit coverage (reimbursement) for all "off-label," prescriptions, but limited off-label coverage to indications for which there is scientific support in the Compendia.

Under the False Claims Act, 31 U.S.C. § 3729, *et seq.*, which was enacted in its original form during the Civil War to address rampant fraud against the government, anyone who presents or causes the presentment of a false claim to the United States Government is liable for treble damages plus civil penalties of between $5,500 and $11,000 per false claim. Because the government cannot possibly pursue all false claims, the *qui tam* provisions of the False Claims Act deputize individuals, known as *relators*, to bring claims on behalf of the government and share in the recovery, if any. 31 U.S.C. § 3730.

In reaction mainly to *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546, 63 S.Ct. 379 (1943), which held a *relator* could bring a *qui tam* action under the False Claims Act even though his knowledge was gained from a criminal indictment, Congress amended the False Claims Act in 1943 to bar jurisdiction

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[7] Dkt-Entry 37-2, p8. Judicial notice of the Statement of Interest was granted at Dkt-Entry 64.

[8] 42 U.S.C. § 1396r-8(k)(2), (3) and (6); 42 U.S.C. § 1396r-8(g)(1)(B)(i). *See*, also, United States Statement of Interest in *Polansky*, Dkt-Entry 37-2, pp 2-8.

over *qui tam* suits that were "based upon evidence or information in the possession of the [government] at the time such suit was brought."[9]

This proved far too restrictive because defendants could almost always point to information in the government's files, and thus, in 1986, in order to "encourage more private enforcement,"[10] Congress eliminated the Government Information Bar and replaced it with the Public Disclosure Bar:

> No court shall have jurisdiction over an action under this section **based upon the public disclosure** of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[11]

The Panel decision, however, was premised on government possession of millions of claims involving tens of thousands of potential defendants. This ignores the 1986 Amendments and is the paradigmatic example other appeals courts have held does not trigger the Public Disclosure Bar.

Baltazar, 635 F.3d at 867-868, is the most recent example:

> A statement such as "half of all chiropractors' claims are bogus" does not reveal which half and therefore does not permit suit against any particular medical provider. It takes a provider-by-provider

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[9] Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608.

[10] S.Rep. No. 99-345, 99th Cong., 2d Sess. 23-24 (1986), reprinted at U.S.Code Cong. & Admin.News 1986, pp. 5266, 5288-5289.

[11] PL 99–562, October 27, 1986, § 3; 100 Stat 3153, emphasis added.

> investigation to locate the wrongdoers. Baltazar contends in this suit that defendants are among the providers who have submitted intentionally false claims. That allegation is not based on public reports; it is based on Baltazar's knowledge about defendants' practices. By placing defendants among the perpetrators of fraud, Baltazar performed the service for which the False Claims Act extends the prospect of reward (if the allegations are correct).

Baltazar is very analogous to this appeal because the government would have had to pore through millions of claims to identify which chiropractors presented false claims. Here, *relators* identified specific defendants causing and presenting false claims out of the thousands of potential defendants and millions of claims. Thus, as the *Baltazar* court held, the *relators*, "performed the service for which the False Claims Act extends the prospect of reward."

Cooper is also very analogous to this appeal in that it involved widespread healthcare fraud where numerous public sources exposed the fraudulent practice. After holding the Public Disclosure Bar is not triggered unless defendants are specifically named, the Eleventh Circuit explained at footnote 7 that to hold otherwise is at odds with the 1986 amendments:

> As an example, suppose it was widely believed that there is bid-rigging in the defense industry. Under BCBSF's approach, any disclosure in a suit against a contractor or a media account of "industry-wide" corruption for instance-could bar a suit by a qui tam plaintiff against any member of the defense industry. This result is at odds with the purpose of the 1986 amendments.[12]

[12] 19 F.3d 562 at n7.

The Panel's decision is at odds with the 1986 Amendments in just this way, immunizing all members of the healthcare industry from *qui tam* liability for psychotropic drug prescriptions to children and youth that are not for a medically accepted indication and therefore not covered by Medicaid.

In *Sandia*, 70 F.3d at 572, the Tenth Circuit pointed to healthcare fraud that would involve combing through a large number of records as the paradigmatic example of when the Public Disclosure Bar does not apply.

In re Natural Gas Royalties, 562 F.3d at 1042–43 also specifically contrasted the situation where the public information involved nine, easily identifiable government contractors in which case the Public Disclosure Bar applied (*Sandia*), and having to comb through voluminous medical records in search of fraud in which case it doesn't (*Cooper*).

Until the Panel's decision here, this Court was in accord. *Aflatooni*, 163 F.3d at 523, holds the Public Disclosure Bar is not triggered unless the qualifying public disclosure identifies the specific defendants. The subsequent case of *Harshman*, 197 F.3d at 1018-19, carved out an exception if "a narrow class of suspected wrongdoers" has been identified. Subsequent to these two decisions, citing *Cooper*, this Court in *Foundation Aiding The Elderly*, 265 F.3d 1011 at n5, explicitly held allegations of general or widespread fraud do not trigger the Public Disclosure Bar.

By misapprehending these cases which properly implemented the 1986 Amendments repealing the Government Knowledge Bar, the Panel's decision prevents private, *qui tam* enforcement not only in "practically every healthcare fraud case," as explained by the United States,[13] but against all industry members whenever public disclosure of widespread industry practice suggests false claims are being presented. The Panel's decision makes this clear when it held at ¶2, "this suit doesn't involve 'separate allegations of fraud against two distinct groups of defendants,' so the public disclosure bar applies here to all defendants."

II. THE PANEL'S DECISION THAT THE PUBLIC DISCLOSURE BAR PRECLUDES PRIVATE, QUI TAM ENFORCEMENT INVOLVING FALSE CLAIMS OCCURRING AFTER THE DATE OF THE PUBLIC DISCLOSURE CONFLICTS WITH THIS COURT'S PRECEDENT

The Panel decision also dramatically restricts private, *qui tam* enforcement under the False Claims Act in derogation of this Court's precedent regarding false claims occurring after the date of the public disclosure.

Five of the defendants were identified in enumerated public sources so the foregoing analysis does not apply to them. However, these five defendants continued to cause false claims after the date of the public disclosures and this Court's jurisprudence is the Public Disclosure Bar does not preclude such actions:

> Bly-Magee alleges in her complaint, however, that the false claims continued through the 1999-2000 fiscal year, which ended June 30,

[13]Dkt-Entry. 20-2, p. 20.

> 2000. We conclude, therefore, that on the present record the district court appears to have had jurisdiction over allegations in the complaint of false claims occurring after June 30, 1999, because they were not publicly disclosed.

Bly-Magee, 470 F.3d at 920, emphasis added.

However, the Panel at ¶3, held:

> Relators' suit concerns ongoing conduct, not specific and discrete time periods as in *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914 (9th Cir. 2006). The public disclosure bar thus applies here to all claims at issue, including those made after the relevant disclosures.

(emphasis added).

Bly-Magee thus held that public disclosures do not preclude private, *qui tam* enforcement for ongoing or continuing conduct resulting in false claims occurring after the public disclosure, while the Panel's decision held the opposite. This gives a free pass to continuing or ongoing fraud from private, *qui tam* enforcement.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted.

Law Project for Psychiatric Rights, an Alaska non-profit corporation and Daniel I. Griffin, Plaintiffs-Appellants

By: /s/ James B. Gottstein

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CERTIFICATE OF COMPLIANCE

This Petition for Rehearing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, Times New Roman, 14 point font, using Microsoft Word 2007.

/s/ James B. Gottstein
JAMES B. GOTTSTEIN

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 7, 2011. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ James B. Gottstein
JAMES B. GOTTSTEIN

FILED

OCT 25 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAW PROJECT FOR PSYCHIATRIC RIGHTS, ex rel. United States of America; DANIEL I. GRIFFIN, ex rel. United States of America,

Plaintiffs - Appellants,

v.

OSAMU H. MATSUTANI, MD; WILLIAM HOGAN, individually and as Commissioner of the Department of Health and Social Services; TAMMY SANDOVAL, individually and as Director of the Alaska Office of Children's Services; STEVE MCCOMB, individually and as Director of the Alaska Division of Juvenile Justice; WILLIAM STREUR, individually and as Director of the Alaska Division of Health Care Services; JUNEAU YOUTH SERVICES, INC., an Alaskan non-profit corporation; PROVIDENCE HEALTH & SERVICES, an Alaskan non-profit corporation; ELIZABETH BAISI, MD; JAN KIELE, MD; LINA JUDITH BAUTISTA, MD; RUTH

No. 10-35887

D.C. Nos. 3:09-cv-00080-TMB
3:09-cv-00246-TMB

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

DUKOFF, MD; KERRY OZER, MD; CLAUDIA PHILLIPS, MD; SAFEWAY, INC.; FRED MEYER STORES, INC.; SOUTHCENTRAL FOUNDATION, an Alaskan non-profit corporation; SHEILA CLARK, MD; LUCY CURTIS; BARTLETT REGIONAL HOSPITAL, an agency of the City and Borough of Juneau, Alaska; HEIDI F. LOPEZ-COONJOHN, MD; ROBERT D. SCHULTS, MD; MARK H. STAUFFER, MD; RONALD A. MARTINO, MD; IRVIN ROTHROCK, MD; FAIRBANKS PSYCHIATRIC AND NEUROLOGIC CLINIC, PC; ALTERNATIVES COMMUNITY MENTAL HEALTH SERVICES, DBA Denali Family Services; ANCHORAGE COMMUNITY MENTAL HEALTH SERVICES, an Alaskan non-profit corporation; PENINSULA COMMUNITY HEALTH SERVICES OF ALASKA, INC.; THOMSON REUTERS (HEALTHCARE) INC.; WAL-MART STORES, INC.; FRONTLINE HOSPITAL, LLC, DBA North Star Hospital; FAMILY CENTERED SERVICES OF ALASKA, INC., an Alaska corporation,

Defendants - Appellees.

Appeal from the United States District Court
for the District of Alaska
Timothy M. Burgess, District Judge, Presiding

Argued and Submitted October 12, 2011
Seattle, Washington

Before: **KOZINSKI**, Chief Judge, **BEEZER** and **PAEZ**, Circuit Judges.

1. "[T]he public disclosure originated in . . . sources enumerated in the" False Claims Act, 31 U.S.C. § 3730(e)(4)(A). A-1 Ambulance Serv., Inc. v. California, 202 F.3d 1238, 1243 (9th Cir. 2000). In light of our case law's broad construction of "investigation" in this statute, see Seal 1 v. Seal A, 255 F.3d 1154, 1161 (9th Cir. 2001), the Utah Attorney General's correspondence qualifies as an enumerated source.

2. Relators' suit is "'based upon' . . . prior public disclosure." United States ex rel. Meyer v. Horizon Health Corp., 565 F.3d 1195, 1199 (9th Cir. 2009). "[T]he evidence and information in the possession of the United States at the time the False Claims Act suit was brought was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute." United States ex rel. Found. Aiding the Elderly v. Horizon West Inc., 265 F.3d 1011, 1016 (9th Cir. 2001) (internal quotation marks omitted). The Medicaid records relators obtained from their Alaskan FOIA requests already were required by statute to be supplied to the federal government. See Centers for Medicare & Medicaid Services, Medicaid Statistical Information Statistics (MSIS): Overview (July 21,

2011, 12:56:22 PM), http://www.cms.gov/MSIS/01_Overview.asp. Unlike in United States ex rel. Aflatooni v. Kitsap Physician Services, 163 F.3d 516, 523 (9th Cir. 1999), this suit doesn't involve "separate allegations of fraud against two distinct groups of defendants," so the public disclosure bar applies here to all defendants. And, unlike in United States ex rel. Baltazar v. Warden, 635 F.3d 866, 869 (7th Cir. 2011), relators here haven't provided "vital facts that were not in the public domain."

3. Relators' suit concerns ongoing conduct, not specific and discrete time periods as in United States ex rel. Bly-Magee v. Premo, 470 F.3d 914 (9th Cir. 2006). The public disclosure bar thus applies here to all claims at issue, including those made after the relevant disclosures.

AFFIRMED.