David B. Robbins (*pro hac vice*)
Washington Bar No. 13628
Renee M. Howard (*pro hac vice*)
Washington Bar No. 38644
Bennett Bigelow & Leedom, P.S.
1700 Seventh Avenue, Suite 1900
Seattle, WA 98101
Telephone: 206-622-5511
Facsimile: 206-622-8986
Email: drobbins@bbllaw.com
Email: rhoward@bbllaw.com

Counsel for Defendants
Providence Health & Services & Osamu Matsutani, M.D.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, *Ex rel.* Law Project for Psychiatric Rights, and Alaskan non-profit Corporation, Plaintiff, vs. OSAMU H. MATSUTANI, MD, et al., Defendant.	Case No. 3:09-cv-0080-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, et al., Defendants.	Case No. 3:09-cv-246-TMB (CONSOLIDATED)

MEMORANDUM OF CERTAIN DEFENDANTS IN SUPPORT OF MOTION FOR ATTORNEY FEES AND EXPENSES UNDER 31 U.S.C. § 3730(d)(4)

I. RELIEF REQUESTED

The undersigned Defendants, consisting entirely of Alaskan physicians, hospitals, and nonprofit community mental health care providers, are among the prevailing parties in the above-captioned cases, and seek an award of attorney fees and expenses because the Relators' False Claims Act ("FCA") claims were "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(4). On September 23, 2010, this Court entered judgment in favor of all defendants, dismissing with prejudice the complaints filed by the Law Project for Psychiatric Rights ("PsychRights") and Daniel Griffin (collectively, the "Relators") for lack of subject matter jurisdiction under the "public disclosure bar" of the FCA, 31 U.S.C. § 3730(e)(4).[1] As explained below, the Court should award the undersigned Defendants their attorney fees and costs to partially compensate them for their expenses associated with defending this frivolous and improper action.

II. ARGUMENT

A. Purpose of Awarding Attorney Fees Under the FCA

"To balance the incentive to bring suit provided by the 'original source' and damages provisions [of the FCA], Congress authorized the award of attorney fees and expenses to prevailing defendants if an action is frivolous, harassing, or vexatious."[2] Congress added the attorney fee provision to the FCA to deter inappropriate private enforcement and exhorted courts to apply the remedy in appropriate cases:

> The Committee added this language in order to create a strong disincentive and send a clear message to those who might consider using the private enforcement provisions of this Act for illegitimate purposes. The Committee encourages courts to strictly apply this provision in frivolous or harassment suites as well as any applicable sanctions under the Federal Rules of Civil Procedure. [3]

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[1] [Dkt. 163, 166]

[2] *United States ex rel. Barajas v. Northrup Corp.*, 5 F.3d 407, 410 n.9 (9th Cir. 1993).

[3] S. Rep. 99-345, 1986 U.S.C.A.A.N. 5266 (July 28, 1986).

The FCA's public disclosure bar "was similarly intended to strike a balance between the twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." [4]

Here, Defendants were forced to defend two patently frivolous FCA lawsuits that were brought to vindicate PsychRights' political and social agenda, not to expose a fraud unknown to the government. Indeed, PsychRights' Complaint framed its lawsuit as promoting its "campaign" to stop the practice of prescribing psychiatric medications to children and youth:

> Relator, the Law Project for psychiatric Rights, Inc., is an Alaskan non-profit corporation . . . whose mission is to mount a strategic litigation campaign in the United States against psychiatric drugging and electroshocking people against their will. PsychRights has made a priority the massive, mostly ineffective, and extremely harmful, over-drugging of children and youth with psychiatric drugs.[5]

While social activism has its place, Congress did not enact the FCA as a vehicle to vindicate social or political causes. Rather, its sole purpose is to recover money for the federal government.[6] PsychRights admitted at the outset, however, that it is not interested in recovering money for the government. In its press release announcing the unsealing of this case, it stated that it was "not bringing these cases for the money."[7] It also acknowledged that

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[4] *United States ex rel. Atkinson v. Penn. Shipbuilding Co.*, 528 F. Supp. 2d 533, 539 (E.D. Penn. 2007) (internal quotations omitted).

[5] [Dkt. 1, ¶9; Dkt. 107, ¶9] This statement is repeated on PsychRights' website, which further reveals the role of this litigation in advancing PsychRights' social agenda. *See* http://psychrights.org/index.htm.

[6] *See Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 183 (3d Cir. 2001) ("The False Claims Act seeks to redress fraudulent activity which attempts to or actually causes economic loss to the United States government. As the Supreme Court held in *Hess*, the purpose of the False Claims Act 'was to provide for restitution to the government of money taken from it by fraud.'") (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, *reh'g denied*, 318 U.S. 799, (1943)); *United States ex rel. Pogue v. Am. Healthcorp., Inc.*, 914 F. Supp. 1507, 1512 (M.D.Tenn.1996) ("The legislative history of the False Claims Act reveals that it was designed to protect the Federal Treasury.") (citing S.Rep. No. 99-345 at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269); *United States v. McNinch*, 356 U.S. 595, 599, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958) ("The False Claims Act was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury.").

[7] The PsychRights press release is available at http://psychrights.org/index.htm.

this case was but an "additional avenue" to pursue its desire to enjoin the Alaska Medicaid program from covering medically necessary psychiatric medications for children, a remedy sought and rejected in the state court case, *PsychRights v. Alaska*.[8] Finally, PsychRights admitted that it was not offering any original information to the government to support its allegations, effectively conceding at the outset that it was not a proper whistleblower under the FCA.[9]

Thus, there can hardly be a clearer case of misuse—and abuse—of the whistleblower provisions of the FCA. As such, this is one of those unusual instances where an award of fees is appropriate to effectuate Congressional intent of deterring frivolous, vexatious or harassing FCA claims.

B. Standard for Awarding Fees

The FCA's fee-shifting provision reads: "If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexations, or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(4).

Although a dismissal under the public disclosure bar is a finding of no subject matter jurisdiction, the district court "retains jurisdiction over § 3730(d)(4) claims for attorney fees and expenses."[10] Court authority is retained because "[e]liminating jurisdiction to award

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[8] Case No. 3AN 08-10115 CI. On October 1, 2010, the Alaska Supreme Court affirmed the dismissal of PsychRights' state court case on the grounds that PsychRights lacked standing.

[9] PsychRights never alleged that it was an original source of its allegations of fraud in its complaint, and later confirmed that it was not an original source, and was not even claiming original source status, in its opposition to Defendants' 12(b)(1) motion. [Dkt. 111 at 19]

[10] *Id. See also United States v. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1057-58 (10th Cir. 2004) (considering fee request because court was not being asked to continue to consider the merits of the underlying *qui tam*, but simply whether the lawsuit was or became frivolous).

attorney fees and expenses in such cases would have the illogical consequence of disallowing fees in cases specifically identified by Congress as undesirable."[11]

In the Ninth Circuit, an action is "clearly frivolous" "when the result is obvious or the appellant's arguments of error are wholly without merit."[12] An action is "clearly vexatious" or "brought primarily for the purposes of harassment" "when the plaintiff pursues the litigation with an improper purpose."[13] In addition, courts will consider a claim to be frivolous or vexatious "if the government's awareness of the circumstances constituting the alleged transgression makes any claim of fraud untenable."[14] The term "vexatious," however, "in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him."[15]

As discussed below, each of these factors supports an award of fees.

C. Application of the Public Disclosure Bar Was Clear at the Outset of Litigation.

Congress included a fee-shifting provision in the FCA to deter opportunists from, among other things, filing claims related to conduct already known to the government. It is no surprise then that courts often award attorney fees to prevailing defendants after finding that the public disclosure bar applies, and that the relator should have foreseen its application. For example, in *United States ex rel. Yuyyuru v. Jadhav*, the Fourth Circuit upheld an award of attorney fees under the FCA, finding "[w]ithout a doubt" that the relator's "claim that he qualified as a proper relator under § 3730(e)(4) clearly ha[d] no reasonable chance of success."[16] The court based its conclusion on the "glaring lack of evidence" regarding the

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[11] *Atkinson* 528 F.3d at 539-40.

[12] *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999 (9th Cir. 2002) (internal quotations omitted).

[13] *Id.*

[14] *United States ex rel. J. Cooper & Assocs., Inc. v. Bernard Hodes Group, Inc.*, 422 F. Supp. 2d 225, 239 (D.D.C. 2006).

[15] *Grynberg*, 389 F.3d at 1058 (internal quotations omitted).

[16] 555 F.3d 337, 356 (4th Cir. 2009).

relator's original source status,[17] and the fact that the various news media disclosure made clear that his FCA case was at least "partly based upon prior public disclosures."[18]

Similarly, the Fifth Circuit twice affirmed the award of fees under the FCA for jurisdictionally-barred and poorly pled lawsuits. In *Martel v. Maxxam Inc.*, the court found that the relator knew or should have known that "the essential facts, allegations and transactions underlying his [FCA] suit had been publicly disclosed."[19] Specifically, "[t]he district court could reasonably conclude that the information relied on in Martel's complaint is best characterized as a continuation of, or as derived from, prior newspaper articles and investigations," and that "Martel knew that his suit was based on publicly disclosed information of which he was not the original source and that Martel's suit was therefore frivolous."[20] Likewise, the court in *United States ex rel. Bain v. Georgia Gulf Corp.* had no trouble affirming a fee award after a public disclosure bar dismissal:

> Taken together, Bain's overwhelming failure to establish subject matter jurisdiction and satisfy pleadings requirements—even after the district court gave notice of heightened pleading requirements before the amended complaint was filed—leads us to conclude that the district court did not abuse its discretion in determining that Bain's suit was frivolous or vexatious.[21]

Various district courts have similarly awarded fees after public disclosure bar dismissals,[22] and in other contexts where the defendants prevailed.[23]

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[17] *Id*. at 354.

[18] *Id*. at 351.

[19] 322 F.3d 594 (Table), 2000 WL 329354, *2 (5th Cir. March 23, 2000).

[20] *Id.*

[21] 208 Fed. Appx. 280, 284 2006 WL 3093637, *4 (5th Cir. Oct. 26, 2006).

[22] *See, e.g.*, *Cooper*, 422 F. Supp. 2d at 238-39 (awarding fees after public disclosure bar dismissal because plaintiff had clearly reviewed the publicly-disclosed information and had even acknowledged the government's awareness of the alleged wrongdoing); *United States ex rel. Herbert v. Nat. Acad. of Scis.*, 1992 WL 247587, *5 (D.D.C. Sept. 15, 1992) ("Herbert is seeking to use the *qui tam* provisions to redress a private grievance between him and the NAS. As such his action is an abuse of the *qui tam* process. Plaintiff's private grievance is nearly identical to the claim in Plaintiff's prior case dismissed by the Court."). *Accord United States ex rel. Sampson v. Crescent City E.M.S., Inc.*, 1997 WL 570688, *6 (E.D. La. Sept. 12, 1997) (awarding attorney fees under Rule 11 after FCA case dismissed for lack of subject matter jurisdiction where relator "was not the 'original source,'

Here, PsychRights was clearly aware of the disclosures that triggered the public disclosure bar. In fact, PsychRights itself was the source of one of those disclosures—its state court case *PsychRights v. Alaska*. Further, the CMS/Utah correspondence that alleged improper Medicaid billing by providers for off-label purposes was similarly well-known to PsychRights, as it is posted on its website, and was cited by PsychRights to the government in its Motion to Unseal.[24]

Even more problematic, PsychRights filed its lawsuits with full knowledge that it was not an original source of any of the public disclosures, and thus was a quintessentially parasitic relator. PsychRights expressly admitted "it is not asserting original source status" in its opposition to Defendants' motion to dismiss, and never professed to be an original source when it filed its complaint.[25] This is a remarkable admission—until this case, counsel for Defendants has not encountered a single relator in FCA case law who conceded original source status. In any event, this concession sets this case apart from other public disclosure cases where relators at least advanced some good faith argument that they were an original source to defeat a claim for attorney fees.[26] Here, as in *United States ex rel. Yuyyuru*, the "glaring lack of evidence"[27] regarding PsychRights' original source status confirms that

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knew he was not the 'original source,' and where the allegations "were derived in part and/or based upon the earlier information publicly disclosed via an earlier lawsuit").

[23] *See, e.g., United States ex rel. Mikes v. Straus*, 98 F. Supp. 2d 517 (S.D.N.Y. 2000), *aff'd* 274 F.3d 687 (2d Cir. 2001) (finding FCA claim of medically unnecessary MRIs to be frivolous and awarding fees where there was no evidence of Medicare MRI referrals); *United Sates ex rel. Jimenez v. Health Net Inc.*, 2005 WL 2002435, *4 (D. Colo. Aug. 19, 2005) (fees awarded after FCA claims found to be barred by waiver and release executed by relator).

[24] [Dkt. 3 at 9-10]

[25] [Dkt. 111 at 19]

[26] *See United States ex rel. Rosner v. WB/Stellar IP Owner, LLC*, -- F. Supp. 2d --, 2010 WL 2670829, **7-8 (S.D.N.Y. July 2, 2010) (relator argued he was an original source, and while the court disagreed, it found that the lack of subject matter jurisdiction was "not so staggeringly obvious that is renders [relator's] action 'objectively frivolous.'").

[27] 555 F.3d at 354.

initiation of FCA litigation was patently frivolous and without regard to the requirements of the law.

It is also clear that PsychRights decided to impose the substantial costs of this litigation on the undersigned Defendants—all of whom are physicians, hospitals, or not-for-profit providers of mental health services—to further its political ends irrespective of the fact that the lawsuits were improper. As noted above, PsychRights framed its lawsuits in the context of its "strategic legal campaign against the forced psychiatric drugging and electroshock in the United States."[28] Seemingly without any consideration of the fact that the allegations supporting its "legal campaign" had been publicly disclosed, PsychRights has pursued these cases and raised money to support them even after it was fully apprised of their manifest jurisdictional failings. PsychRights has even continued to market a "model complaint" (modeled after the two that were just dismissed with prejudice) for use by other attorneys to file similar cases across the country.[29] There can hardly be a better example of a case that Congress specifically sought to dissuade by the threat of attorney fees: *i.e.*, "unnecessary suits brought by persons who do not have first-hand knowledge of fraudulent misconduct that could instead be brought by the government based on publicly available information."[30] Moreover, this case and those that PsychRights wishes to engender appear designed to impose substantial costs on healthcare providers, or at least have a chilling effect on the services they provide to Medicaid beneficiaries, without regard to the cases' legal merit.

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[28] http://psychrights.org/index.htm (emphasis added).

[29] *See, e.g.*, PsychRights News Release: Illinois Medicaid Fraud Case Using PsychRights' Model Complaint Unsealed (Aug. 11, 2010), *available at* http://psychrights.org/index.htm.

[30] *Atkinson*, 528 F.3d at 539.

D. PsychRights' Arguments That the Public Disclosure Bar Did Not Apply Were Wholly Without Merit.

The frivolous and vexatious nature of the litigation is confirmed by the fact that Relators offered no credible legal support for their position that that the public disclosure bar should not apply. Relators' primary defense was their specious argument that the public disclosure bar provisions in effect at the time its complaints were filed do not apply, and that the Court should instead apply the amended version of the FCA's public disclosure bar that took effect on March 23, 2010. A quick review of FCA retroactivity jurisprudence would have revealed that this argument is unavailing, particularly where the 2009 filing dates of the *Matsutani* and *Griffin* complaints (the trigger for the application of the FCA's public disclosure bar) came well before the FCA amendments. In any event, even if this retroactivity argument had been colorable, it did not address the multiple news media disclosures, which remain categories of potential "public disclosures" even after the March 23, 2010 amendments.

Second, recognizing the striking similarities between its fraud allegations and the contents of the public disclosures, PsychRights attempted to argue that the disclosures did not publish the specific identities of all of the named defendants, and thus its complaint was not based upon the public disclosures.[31] In support, it cited factually inapposite cases[32] and ignored compelling precedent that allegations of widespread or industry-wide fraud that "put the government on the trail of the alleged fraud" are sufficient to trigger the public disclosure bar.[33] Relators also ignored well-established precedent that a case is subject to dismissal

[31] [Dkt 111 at 9-14 & Dkt. 151 at 13-14]

[32] *See* discussion of PsychRights' cited authority in Defendants' Reply in Support of Their Motion to Dismiss. [Dkt. 119 at 12-13]

[33] *In re Nat. Gas Royalties Qui Tam*, 562 F.3d at 1042; *United States ex rel. Gear v. Emergency Medical Assocs. of Illinois, Inc.*, 436 F.3d 726, 729 (7th Cir. 2006) ("We are unpersuaded by an argument that for there to be public disclosure, the specific defendants named in the lawsuit must have been identified in the public records. The disclosures at issue here were of industry-wide abuses and investigations. Defendants were implicated.").

under the public disclosure bar even if it is only "partially based" on a prior public disclosure.[34]

In short, Relators' only defense—that the news media reports, its own state court complaint and the Utah/CMS correspondence did not contain every last detail of the allegedly fraudulent scheme—was specious when viewed in light of the FCA's purpose of promoting genuine whistleblowing, and PsychRights' own admission that it was not the original source of the information.

E. PsychRights' Conduct Demonstrates its FCA Lawsuit Was Clearly Vexatious.

Even a cursory look at the complaints and PsychRights' website and press releases trumpeting its filings confirms that PsychRights brought this case not to restore money to the federal government, but to continue its political attack on psychopharmacological treatment of pediatric patients suffering from mental illness. As noted above, PsychRights declared in its January 25, 2010 press release announcing the unsealing of the *Matsutani* lawsuit that it was "not bringing these cases for the money,"[35] confirming that its case was primarily intended to accomplish an end other than recovering monies for the government fisc. Rather, its case was designed to intimidate, financially penalize and otherwise impugn the named mental health care providers in order to deter or prevent them from rendering medically necessary care to Alaska's children. Indeed, physicians targeted by the lawsuit felt they were faced with a Hobson's choice of denying patients medically necessary and potentially life-saving treatment or risking continued exposure to PsychRights' defamatory accusations of Medicaid fraud.

Even if the Court views PsychRights' mission as well-meaning, this case was clearly an improper means to its end. The FCA was designed to incentivize whistleblowers with inside information to protect the financial interests of the United States, and not to afford

[34] *Grynberg*, 389 F.3d at 1051 ("Even *qui tam* action only partially based upon publicly disclosed allegations or transactions may be barred.").

[35] The PsychRights press release is available at http://psychrights.org/index.htm.

plaintiffs an opportunity to pursue a "less pecuniary and more expansive social agenda."[36] As this Court correctly noted in dismissing this case: "The Relators here are simply not the types of 'whistleblowers' that the FCA was created to encourage and reward. The Relators obviously feel very strongly about the issues raised in their pleadings. However, they are essentially echoing issues that have been previously raised by others and considered by the Government. The FCA is not the proper vehicle for the Relators to challenge these practices."[37]

The vexatious nature of PsychRights' litigation strategy has revealed itself repeatedly:

- Before the government decided whether to intervene, PsychRights moved to lift the seal and opposed the government's routine request for a seal extension while it completed its investigation.[38] Rather than let the government do its work, PsychRights appeared determined to prod the government into declining to intervene as quickly as possible so that it could make its case public and obtain the associated publicity. In its Reply memorandum, the government noted that relator "has further wasted government and judicial resources by filing a meritless Motion to Unseal and a meritless Opposition to the Government's Application [for Extension of the Seal]."[39]

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[36] *United States ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 464-65 (S.D.N.Y. 2002). *See also United States ex rel. Haight v. Catholic Healthcare West*, 2008 WL 607150 at *1 (D. Ariz. 2008) (dismissing similar strike suit relating to stopping animal research because "[t]he purpose of the False Claims Act is to remedy fraud against the government, not to provide a vehicle for relators to pursue their own agenda").

[37] [Dkt. 163 at 25]

[38] [Dkt. 3; Dkt. 165-2] PsychRights' characterization of the government's actions in its Motion to Unseal are particularly provocative: "The conclusion PsychRights reaches is the Government believes it may ignore the 60 day [seal] period mandated by Congress with impunity. PsychRights respectfully suggests this Court should not countenance such an approach and allow the Government to unnecessarily delay lifting of the seal . . . by ignoring the 60 day time limit mandated by Congress." [Dkt. 3 at 8-9]

[39] [Dkt. 165-3 at 2]

- PsychRights' disclosure statement makes clear that it did not file an FCA case because it possessed insider information of fraud regarding the Defendants. Instead, it described the case as yet another pathway to advance its social agenda: "the False Claims Act might be an additional avenue to pursue to end the pervasive practice of prescribing harmful, ineffective, psychiatric drugs to children and youth."[40] Its central allegation of improper Medicaid payment for off-label, non-compendia use drugs was already set forth in its state court complaint, *PsychRights v. Alaska*.[41]
- PsychRights filed a motion to preliminarily enjoin the State Defendants from paying for certain off-label medications prescribed to minors, an extraordinary motion because the FCA does not provide for injunctive relief and such relief would appear to be contrary to the financial interests of any genuine relator. This action is also further evidence that its FCA case was just another attempt to accomplish what it was unable to do in *PsychRights v. Alaska*—i.e., get the State to stop covering psychiatric drugs prescribed to children and youth.
- PsychRights admitted it was not claiming original source status, effectively conceding that its litigation derived from publicly available information. Given the number and quality of the prior public disclosures, and PsychRights' role in either creating them (*PsychRights v. Alaska*) or perpetuating them (Utah/CMS correspondence), it is difficult to conceive of any good faith basis for pursing its jurisdictionally flawed FCA claims.

[40] [Dkt. 158-1 at 3]

[41] *Id.*

III. CONCLUSION

For the reasons set forth above, the Court should GRANT the motion of the undersigned Defendants for attorney fees under 31 U.S.C. § 3730(d)(4). The amount of fees requested hereunder is reflected in each of the separately-filed affidavits of the undersigned Defendants as required by Local Civil Rule 54.3(a), which provide the hours worked and billing rate for each lawyer and paraprofessional, the total charges to the client, and itemizations of the requested fees.

DATED this 14th day of October, 2010.

BENNETT, BIGELOW, LEEDOM, P.S.
Attorneys for Providence Health & Services and Osamu Matsutani, M.D.

By: */s/David B. Robbins*
David B. Robbins, *pro hac vice*
Renee M. Howard, *pro hac vice*
1700 Seventh Avenue, Suite 1900
Seattle, WA 98101
Telephone: (206)622-5511
Facsimile: (206)622-8986
drobbins@bbllaw.com
rhoward@bbllaw.com

GRUENSTEIN & HICKEY
Attorneys for Providence Health & Services and Osamu Matsutani, M.D.

By: */s/Daniel W. Hickey (consented)*
Daniel W. Hickey
Alaska Bar No. 7206026
Resolution Plaza
1029 W. 3rd Avenue, Suite 510
Anchorage, AK 99501
Telephone: (907) 258-4338
Fax: (907) 258-4350
Email: ghlaw3@gci.net

JERMAIN, DUNNAGAN & OWENS, P.C.
Attorneys for Anchorage Community Mental Health Services, Inc.

By: */s/Howard S. Trickey (consented)*
Howard S. Trickey
Alaska Bar No. 7610138
Cheryl Mandala
Alaska Bar No. 0605019
3000 A Street, Suite 300
Anchorage, AK 99503
Telephone: (907) 563-8844
Facsimile: (907) 563-7322
htrickey@jdolaw.com
cmandala@jdolaw.com

CLAPP, PETERSON, VAN FLEIN TIEMESSEN & THORSNESS, LLC
Attorneys for Defendants Ronald A. Martino, MD, Irvin Rothrock, MD, and Fairbanks Psychiatric and Neurological Clinic

By: */s/John J. Tiemessen (consented)*
John J. Tiemessen
Alaska Bar No. 9111105
411 Fourth Avenue, Suite 300
Fairbanks, Alaska 99701
Telephone: (907) 479-7776
Fax: (907) 479-7966
Email: jjt@cplawak.com

CLAPP, PETERSON, VAN FLEIN TIEMESSEN & THORSNESS, LLC
Attorneys for Defendants Elizabeth Baisi, MD, Ruth Dukoff, MD, Lina Judith Bautista, MD, Jan Kiele, MD, and Frontline Hospitals, a Limited Liability Company

By: */s/Linda J. Johnson (consented)*
Linda J. Johnson
Alaska Bar No. 8911070
711 H Street, Suite 620
Anchorage, Alaska 99501
Telephone: (907) 272-9272
Fax: (907) 272-9586
Email: ljj@cplawak.com

SEDOR, WENDLANDT, EVANS &
FILIPPI, LLC
Attorneys for Defendants Kerry Ozer, MD and Claudia Phillips, MD

By: */s/Allen Frank Clendaniel (consented)*
Allen Frank Clendaniel
Alaska Bar No. 0411084
500 L Street, Suite 500
Anchorage, Alaska 99501
Telephone: (907) 677-3600
Fax: (907) 677-3605
Email: clendaniel@alaskalaw.pro

DORSEY & WHITNEY, LLP
Attorneys for Defendant Southcentral Foundation

By: */s/Robert C. Bundy (consented)*
Robert C. Bundy
Alaska Bar No. 7206021
1031 W. 4th Avenue, Suite 600
Anchorage, Alaska 99501
Telephone: (907) 257-7853
Fax: (907) 276-4152
Email: bundy.robert@dorsey.com

BROWN, WALLER & GIBBS, PC
Attorneys for Defendants Sheila Clark, MD and Lucy Curtiss, M.D

By: */s/Keith Brown (consented)*
Keith Brown
Alaska Bar No. 6903003
821 N Street, Suite 202
Anchorage, Alaska 99501
Telephone: (907) 276-2050
Fax: (907) 276-2051
Email: brownwag@alaska.net

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP
Attorneys for Defendants Heidi F.
Lopez-Coonjohn, MD, Robert D. Schults, MD,
Mark H. Stauffer, MD, and City and Borough of
Juneau, Alaska (Bartlett Regional Hospital)

By: */s/Kay Gouwens (consented)*
Kay Gouwens
Alaska Bar No. 8106023
900 West 5th Avenue, Suite 700
Anchorage, Alaska 99501
Telephone: (907)258-6377
Fax: (907)272-8332
Email: kay@sonosky.com

Richard D. Monkman
Alaska Bar No. 8011101
302 Gold Street, Suite 201
Juneau, Alaska 99801
Telephone: (907) 586-5880
Fax: (907) 586-5883
Email: dick@sonoskyjuneau.com

LANE POWELL, LLC
Attorneys for Defendant Alternative Community
Mental Health d/b/a Denali Family Services

By: */s/Matthew W. Claman (consented)*
Matthew W. Claman
Alaska Bar No. 8809164
301 W. Northern Lights Blvd., Suite 301
Anchorage, Alaska 99503-2648
Telephone: (907) 277-3311
Fax: (907) 276-2631
Email: clamanm@lanepowell.com

DELANEY WILES, INC.
Attorneys for Defendant
Peninsula Community Health
Services of Alaska, Inc.

By: */s/ Howard A. Lazar (consented)*
Howard A. Lazar
Alaska Bar No. 8604013
1007 West Third Avenue, Suite 400
Anchorage, Alaska 99501
Telephone: 907-279-3581
Fax: 907-277-1331
Email: hal@delaneywiles.com

Certificate of Service

I certify that on this 14th day of October 2010, I caused a true and correct copy of the foregoing document to be served on all parties of record by electronic means through the ECF system as indicated on the Notice of Electronic Filing, or if not by ECF, by first class regular mail as follows:

Richard Pomeroy
Assistant U.S. Attorney
United States Attorney's Office
222 West 7th Avenue, #9
Anchorage, AK 99513-5071

Evan C. Zoldan
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Ben Franklin Station
Washington, D.C. 20044

/s/ David B. Robbins

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