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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)

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

I. INTRODUCTION

The undersigned Defendant physicians, hospitals, and nonprofit community mental healthcare providers hereby reply to the Opposition filed by Plaintiff Law Project for Psychiatric Rights ("PsychRights") to Defendants' Motion for Attorney Fees and Expenses under the False Claims Act ("FCA"), 31 U.S.C. § 3730(d)(4).[1] Despite PsychRights' protests to the contrary, this is the unusual case in which the high standard for imposition of attorney fees is met by PsychRights' knowing pursuit of publicly disclosed allegations that added absolutely no inside information of fraud.

Specifically, this case is plainly frivolous, vexatious or interposed for purposes of harassment when viewed in light of the fact that (i) PsychRights was aware that its essential allegations of fraud were in the public domain and available to the government, (ii) PsychRights never professed to be an original source, (iii) the case replicated PsychRights' own failed prior state court litigation, and (iv) there was no reason for Defendants to resort to falsity or subterfuge in order to obtain Medicaid payment for drugs from the Alaska Medicaid program as that program knowingly paid for the drugs in question.

II. ARGUMENT

A. PsychRights Had No Reasonable Basis to Believe Its Case Was Not Jurisdictionally Barred.

Although it argues its case was not frivolous, PsychRights cannot dispute that it unsuccessfully litigated essentially identical claims against the State of Alaska previously—*i.e.*, that the Alaska Medicaid program knowingly paid for psychiatric drugs prescribed off-label to children and youth for indications not listed in certain drug data compendia. That case, *PsychRights v. Alaska*, embodies two fundamental problems with this case that render it frivolous: (i) PsychRights' improper use of the FCA to advance a social agenda; and (ii) its

[1] Dkt. 196.

knowledge that the essential allegations of fraud were well-known or discoverable by the federal government long before PsychRights filed this case.

First, PsychRights admitted to the government when it filed its case that its FCA claims were an additional avenue to pursue the relief it sought in *PsychRights v. Alaska*, *i.e.*, to enjoin State reimbursement of off-label psychiatric drugs prescribed to pediatric patients.[2] Subsequent public statements that it was not bringing this case "for the money" were not simply a profession of altruism, as PsychRights suggests.[3] Instead, the statements confirm that this lawsuit was not about restoring money to government coffers. Indeed, PsychRights' actions throughout this litigation have run contrary to the government's interests and the financial interest of a true whistleblower. For example, it filed a frivolous motion to show cause against the United States and opposed routine seal extensions while the government investigated PsychRights claims at the outset of litigation. It even took the extraordinary step, unheard of in FCA cases, of filing a motion to preliminarily enjoin Medicaid reimbursement of off-label psychotropic medications for children and youth, an action that was antithetical to the financial interest of an FCA relator, redundant to what it unsuccessfully attempted to accomplish in *PsychRights v. Alaska*, and plainly vexatious because it lacked any legal justification.

Second, PsychRights' state case is only one of several examples that its allegations of fraud were in the public domain when it brought this case, and PsychRights knew it. The fact that the public disclosures were well-known to PsychRights, and in the case of *PsychRights v. Alaska*, were *caused* by PsychRights, further demonstrates the frivolous and vexatious nature of its supposed "whistleblower" claims here, as well as its defense to the pending fee motion.

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[2] *See* Dkt. 158-1 at 3 (describing the state court case and noting that "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").

[3] Dkt. 196 at 6.

PsychRights' concession that it is not an original source of its allegations of fraud is grounds enough for concluding its FCA claims were frivolous. Without inside information of its fraud claims, PsychRights is not the sort of relator that Congress intended to encourage by the *qui tam* provisions of the FCA, and has no basis to proceed under that law.[4]

Unsurprisingly, PsychRights argues that despite its lack of original source status, it had a reasonable basis to believe the public disclosure bar would not apply based on its crabbed reading of Ninth Circuit public disclosure bar cases involving widespread fraud throughout an industry.[5] As this Court correctly held, PsychRights' reading of these cases is wrong.[6] The public disclosure bar does not require that allegations of industry-wide fraud identify the individual defendants unless their identity would be a mystery otherwise.[7] Here, PsychRights simply took aim at prominent Alaska providers of pediatric mental health services and the pharmacies that serve them. Were the government interested in pursuing the theory of fraud set out in the various public disclosures (including nearly identical allegations in *PsychRights v. Alaska*), it could have done the same thing. Moreover, PsychRights brought no new information to the government by naming the numerous defendants in this case, as this information could have been provided by anyone with a copy of the yellow pages or internet access.[8] In short, PsychRights simply did what the government would have done

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[4] *See, e.g., United States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010) ("[T]he FCA is geared primarily to encourage insiders to disclose information necessary to prevent fraud on the government.").

[5] *See United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1018-20 (9th Cir. 1999); *United States ex rel. Foundation Aiding the Elderly v. Horizon W. Inc.*, 265 F.3d 1011, 1014-15 (9th Cir. 2001); *United States ex rel. Alfatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 523 (9th Cir. 1999).

[6] Dkt. 163 at 16-18.

[7] *See* Dkt. 163 at 16 (*quoting Harshman*, 197 F.3d at 1018-19).

[8] PsychRights' utter lack of inside information is further betrayed by the fact that its Complaint did not identify any facts relative to many of the Defendant, but offered only

with the information had it any interest in this matter—investigate and prosecute prominent providers of the services, without knowing anything more about what they may have done.

Finally, the federal government-initiated proceedings against drug manufacturers for off-label drug promotion cited by PsychRights do not demonstrate its case was not frivolous, as it contends.[9] To the contrary, these cases, which were uniformly brought against drug companies, confirm the frivolity of a case that seeks to impose liability on downstream health care providers and pharmacies for the alleged illegal and nefarious acts of the drug companies. More importantly, these prosecutions demonstrate that the federal government was aware of any impact that off-label marketing might have on claims submitted by providers to payors like Medicaid. The government could have chosen to prosecute health care providers for the same conduct alleged by PsychRights if it thought a case could be made, but for obvious reasons has elected not to do so.[10]

B. The Case Was Vexatious Because It Was Brought to Advance a Social Agenda, Not to Restore Funds to the Government Under the FCA.

PsychRights also argues that it did not pursue its case to be vexatious or for purposes of harassment. This Court need not determine that the action was clearly vexatious or brought

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formulaic recitations of its FCA cause of action in derogation of its responsibilities under FRCP 9(b).

[9] Dkt. 196 at 4.

[10] While the government's litigation theories and strategy are unknown (and not relevant to this fee motion), presumably it has not taken up a theory like the one PsychRights advances because, unlike drug companies, prescribers are not subject to FDA labeling laws and, even if they were the recipients of improper manufacturer marketing, under the laws of virtually all states they were legally entitled to prescribe and dispense FDA-approved drugs for medically appropriate care, irrespective of the FDA-approved labeled indications. Certainly the government had all the information it needed to make this call—including information and legal theories developed in off-label marketing cases brought against drug companies, and the suggestion (via the Utah Attorney General) that state Medicaid programs that cover off-label indications may be acting in violation of federal Medicaid law. It also had notice that the federal Centers for Medicare and Medicaid Services was fully aware that state Medicaid programs were covering the off-label use of drugs and approved of it.

to harass, however, if it concludes that the action was frivolous.[11] In any event, PsychRights' subjective intent in filing its lawsuit is only relevant to whether the action was brought for purposes of harassing the defendants.[12] The vexatious nature of the litigation is an objective determination.[13]

PsychRights' only rejoinder to Defendants' characterization of its case as vexatious or brought for an improper purpose is that its press releases and Disclosure Statement announce that it is not motivated by financial gain.[14] These representations, though, are entirely consistent with vexatious or harassing litigation. They demonstrate the PsychRights was using the FCA to advance a social agenda that was unrelated to any inside information of fraud on the federal government. Further, PsychRights does not even address its other vexatious actions taken that are manifestly inconsistent with *qui t*am litigation, such as seeking a preliminary injunction to prevent further claims from being submitted, aggressively contesting the federal government's right to fully investigate its claims and, most importantly, filing the case with the knowledge that it has no independent information that adds to publicly available data. Nor does it refute the frivolous and vexatious nature of accusing providers of fraud who, given the Alaska Medicaid program's policy-based coverage of the drugs, had no reason to submit false or fraudulent claims in order to obtain payment.

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[11] 31 U.S.C. § 3730(d)(4) (attorney fees may be awarded to defendants if the action is "clearly frivolous," "clearly vexatious," or "brought primarily for purposes of harassment").

[12] *United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 528 F. Supp. 2d 533, 544 (E.D. Pa. 2007) ("The existence of relator's subjective intent distinguishes between vexatious and harassing litigation.").

[13] *See United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1058 (10th Cir. 2004) ("[T]he term 'vexatious' in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him . . . [A] district court may in its discretion award attorney's fees to a prevailing defendant . . . upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.") (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

[14] Dkt. 196 at 6–7.

C. PsychRights Does Not Contest the Reasonableness of the Undersigned Defendants' Fees and Expenses

PsychRights does not address, and therefore does not contest, the reasonableness of the submitted fees and expenses. Thus, assuming this Court awards fees and expenses to the undersigned Defendants, the fees and expenses should be awarded in full.

III. CONCLUSION

For the reasons set forth above, and in their Memorandum in Support of Attorney Fees and Expenses, the Court should GRANT the motion of the undersigned Defendants for attorney fees under 31 U.S.C. § 3730(d)(4).

DATED this 3rd day of November, 2010.

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Certificate of Service

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