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Attorneys for Family Centered Services of Alaska, Inc.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA )  
*Ex rel.* Law Project for Psychiatric Rights, )  
an Alaskan non-profit corp., )  
 )  
Plaintiff, )

vs. )

OSAMU H. MATSUTANI, MD, et al. )  
 )  
Defendants. )

Case No.: 3:09-cv-00080-TMB

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UNITED STATES OF AMERICA )  
*Ex rel.* Daniel I. Griffin )  
 )  
Plaintiff, )

vs. )

RONALD A. MARTINO, MD, )  
FAMILY CENTERED SERVICES OF )  
ALASKA, INC., and Alaska corporation, and )  
SAFEWAY, INC., a Delaware corporation, )  
 )  
Defendants. )

Case No.: 3:09-cv-00246 RRB

(CONSOLIDATED)

**MEMORANDUM IN SUPPORT OF FAMILY CENTERED SERVICES MOTION TO  
DISMISS RELATOR GRIFFIN'S CLAIMS PURSUANT TO 31 U.S.C. § 3730(b)(5)**

## 1. INTRODUCTION

Family Centered Services of Alaska, Inc. moves the court to dismiss Relator Daniel Griffin's complaint as required by 31 U.S.C. § 3730(b)(5). This section of the False Claims Act is commonly referred to as the "first-to-file rule" and as interpreted and applied by the United States Court of Appeals for the Ninth Circuit the rule provides an absolute bar prohibiting Griffin from prosecuting his claim.

## 2. FACTS

On April 27, 2009, Law Project for Psychiatric Rights (hereinafter "PsychRights") brought an action as a qui tam relator under 31 U.S.C. § 3729, et seq. and known as the False Claims Act. On December 14, 2009, Relator Griffin filed a qui tam action against Family Centered Services of Alaska, Inc., among others, under the same False Claims Act. The material elements of both complaints are nearly identical.

## 3. ARGUMENT

Relator Griffin filed his action after PsychRights filed its action under the False Claims Act and is therefore barred from bringing the second related action and the court lacks jurisdiction over Relator Griffin's claim pursuant to 31 U.S.C. § 3730(b)(5).

The False Claims Act section commonly referred to as the "first-to-file rule" reads, When a person brings an action under this subsection no person other than the Government may intervene or bring a related matter based on the facts underlying the pending action. 31 U.S.C. § 3730(b)(5). The Ninth Circuit has established an exception-free, first-to-file bar in order to promote the purposes of the 1986 amendments to the act.<sup>1</sup> Section 3730(b)(5)'s plain language

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<sup>1</sup> U.S. ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9<sup>th</sup> Cir. 2001) *Quotations and citations omitted.*  
Griffin v. Martino, et al., 3:09-CV-00246 RRB  
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unambiguously establishes a first-to-file bar, preventing successive plaintiff's from bringing related actions based on the same underlying facts.<sup>2</sup>

Section 3730(b)(5)'s plain language does not contain exceptions. Moreover, an exception-free, first-to-file bar conforms with the dual purpose of the 1986 amendments: to promote existence for whistle-blowing insiders and prevent opportunistic successor plaintiffs.<sup>3</sup> To fall within this rule, an action need not assert facts identical to those in the prior complaint. Rather, the current action need only allege the same material elements of fraud described in the similar suit.<sup>4</sup> The first-to-file provision is jurisdictional requiring dismissal under Rule 12(b)(1) and 12(b)(6) of any claims it precludes.<sup>5</sup>

Relator Griffin's action asserts the same material elements of fraud as the pending PsychRights' action. The basis of both actions is the assertion that by providing claims to Medicaid for drugs that were prescribed to minors outside of medically accepted indications. The material elements in Relator Griffin's claim are not only related but are nearly identical to the claims in PsychRights' action. The government has been placed on notice of the allegations by PsychRights' action. Relator Griffin's claim is repetitive and barred by the first-to-file rule. Relator Griffin's claims must be dismissed for lack of subject matter jurisdiction pursuant to FRCP 12(b)(1).

#### 4. CONCLUSION

Family Centered Services of Alaska, Inc. respectfully requests that the court dismiss Relator Griffin's claims against it pursuant to 31 U.S.C. § 3730(b)(5), FRCP 12(b)(1) and 12(b)(6).

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<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> U.S. ex rel. Lee Brodale v. Apollo Group, Inc., 2009 WL 3756623 (S.D. Cal.) Citing Lujan at 1118-89

<sup>5</sup> Id.

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DATED at Fairbanks, Alaska, this 27<sup>th</sup> day of July, 2010.

ZIMMERMAN & WALLACE  
Attorneys for Defendants Family Centered Services  
of Alaska, Inc.

By: /s/John Foster Wallace  
John Foster Wallace, ABA #9211115

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the  
foregoing was electronically served on all parties of record.

/s/Lisa R. Miller 07/27/2010  
Lisa R. Miller for Zimmerman & Wallace