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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA ex rel. Law Project for Psychiatric Rights, Plaintiff, vs. Osami H. Matsutani, et al. Defendants.	Case No. 3:09-cv-0080-TMB *UNDER SEAL*

REPLY IN SUPPORT OF THE UNITED STATES' APPLICATION FOR AN EXTENSION OF TIME, RESPONSE TO RELATOR'S MOTION TO UNSEAL THE COMPLAINT, AND RESPONSE TO ORDER TO SHOW CAUSE

INTRODUCTION

On June 28, 2009, the Relator moved to unseal the complaint and serve Defendants in the above-captioned qui tam. On June 30, 2009, the Court ordered the United States to show cause why the Complaint should not be unsealed. On July 1, 2009, the United States made its first request for an extension of the time during which it may elect to intervene and assume primary responsibility for prosecuting the above-captioned qui tam case. In its Application for an Extension of Time, the United States demonstrated good cause for extending the period for six months, a modest extension given the breadth and complexity of the allegations in the relator's Complaint. On July 2, 2009, the relator, who purports to bring this qui tam to assist the Government's recovery of funds fraudulently obtained by the Defendants, has further wasted government and judicial resources by filing a meritless Motion to Unseal and a meritless Opposition to the Government's Application. Because the relator misunderstands the purpose of the False Claims Act's seal provisions and misstates the law related to these provisions, the Court should reject the relator's arguments. Because the Government has good cause for a six month extension, the United States respectfully requests that the Court GRANT the Government's July 1, 2009 Application for an Extension of Time and DENY the relator's June 28, 2009

Motion to Unseal the Complaint.

BACKGROUND

This is an action under the qui tam provisions of the False Claims Act, 31 U.S.C. § 3729 et seq. (FCA), that permit a private party, known as a relator, to bring suit to recover damages allegedly suffered by the United States due to fraud. In his Complaint, the relator alleges a scheme by which dozens of doctors, corporations, State of Alaska entities, and other organizations have worked together to defraud the government out of hundreds of millions of dollars. Compl. at ¶¶ 10-41, 209. The Complaint names over 30 Defendants that have filed, or caused to be filed, claims for reimbursement under federal healthcare statutes and regulations. The Complaint further alleges that the Defendants made these claims although they knew that they were not entitled to receive reimbursement under these federal programs. Compl. at ¶¶ 188-206.

The Complaint includes allegations that unnamed drug companies "keep negative data about their drugs secret" from the FDA and "pay sales representatives to make false statements to prescribers to induce them to prescribe particular psychotropic drugs to children and youth for uses not approved by the FDA." Compl. at ¶¶ 64, 77.

The relator filed its Complaint and disclosure materials, which contain these

and other allegations, and served the United States Attorney for the District of Alaska on April 27, 2009. However, the Attorney General of the United States did not receive a copy of these documents until May 4, 2009.

As required by the FCA, the relator initially filed its Complaint under seal. The FCA provides that the seal remain in place for at least 60 days, but this period may be extended upon application of the United States for "good cause." 31 U.S.C. § 3730(b)(3). On June 28, 2009, the Court ordered the United States to show cause why the Complaint should not be unsealed by July 9, 2009. (Doc. 5). On July 1, 2009, the United States moved for an extension of the time in which the case would remain under seal in order for the United States to make an intervention decision. The relator opposed the United States' application on July 2, 2009. Pursuant to this Order, the United States files this Reply to the Relator's Opposition, Response to the relator's Motion to Unseal, and Response to the Court's Order to Show Cause.

DISCUSSION

In its Motion to Unseal and Opposition to the United States' first Application for an Extension of Time, the relator makes two arguments as to why the United States' first Application for an Extension of Time should not be granted. First, the relator argues that the Application is untimely. Second, the

relator argues that the United States does not demonstrate "good cause" for the Court to grant an extension. The relator's arguments are erroneous and should be rejected.

A. The United States' July 1, 2009 Motion Was Timely Filed

The relator argues that the initial 60 day period in which the United States has to elect to intervene or move for additional time begins to run when the United States Attorney receives the Complaint and disclosure materials. (Doc. 3 at 4-5). Contrary to the relator's argument, however, the initial 60 day period of investigation does not commence until the Attorney General receives the Complaint and the disclosure materials. As the FCA makes explicit, it is the Attorney General, and not the United States Attorney, who primarily has the responsibility to investigate an FCA violation, bring an FCA civil action against a defendant, or consent to dismissal of an FCA claim. 31 U.S.C. § 3730(a), (b)(1). As a result, when the FCA provides that the 60 day initial seal period begins to run when the "Government . . . receives" the Complaint and disclosure materials, it is referring to when the Attorney General receives these materials. § 31 U.S.C. 3730(b)(2). The Attorney General did not receive the Complaint or disclosure materials until May 4, 2004. The relator does not dispute this fact. Opp. at 2.

Because these materials were not received by the Attorney General until

May 4, 2009, the 60 day period could not have started to run before May 4, 2009. The United States filed its Motion for an Extension of Time on July 1, 2009, which is within the initial 60 day period provided for by statute. For this reason, the relator's argument that the United States' motion was untimely is without merit.

B. There is Good Cause for a Six Month Extension

In its Motion to Unseal and its Opposition to the United States' Application for an Extension of Time, the relator argues that the United States has not provided the Court with "good cause" to grant the Government's first request for an extension of time. First, the relator argues that even a single extension is warranted "only in the most extraordinary cases." (Doc. 8 at 3); (Doc. 3. at 6). Second, the relator further suggests that an extension is only warranted when there is a parallel criminal investigation already underway. (Doc. 3 at 6). The relator is wrong on both counts.

As an initial matter, the relator's assertion that a single extension is granted "only in the most extraordinary cases" is factually wrong. Since October 2003, the average length of time from the Civil Division's receipt of a qui tam case until the Department notifies the court of its election decision is approximately 15 months. One six month extension for the government to make an intervention decision is

far below the average time in which these decisions are routinely made.

In addition, the relator's suggestion that the seal's purpose is limited to situations in which a parallel criminal investigation is already underway is also wrong. By providing for the seal provision, Congress also intended to "allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if the suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action." United States ex rel. Lujan v. Hughes Aircraft Co., 67 F.3d 242, 245 (9th Cir. 1995). Despite the relator's assertion that "there is no necessity for continuing the seal for the Government to perform the evaluation that it says it will be performing" (Doc. 8 at 4), this is exactly what the seal provision contemplates: the provision is explicitly intended to allow "the government the opportunity to study and evaluate the relator's information." Lujan, 67 F.3d at 245.

In addition to providing the government "an adequate opportunity to fully evaluate" the qui tam allegations, id. , a secondary objective is to "prevent defendants from having to answer complaints without knowing whether the government or relators would pursue the litigation." United States ex rel. Pilon v. Martin Marietta Corp., 60 F.3d 995, 998 (2d Cir. 1995). The seal also protects the

"defendant's reputation from the taint associated with being a defendant in a lawsuit ostensibly brought by the United States" before the United States has determined whether the qui tam allegations have merit. United States ex rel. El-Amin v. The George Washington University, 2007 WL 1302597 at *3 (D.D.C. 2007) (internal citations omitted).

All of these objectives will be met if the Court grants the Government's motion for a six month extension. [Redacted]

An extension is particularly appropriate in this case because of the gravity and breadth of the allegations in the Complaint. The relator alleges a scheme by which dozens of doctors, corporations, State entities, and other organizations have worked together to defraud the government out of hundreds of millions of dollars. Compl. at ¶¶ 10-41, 209. The Complaint names over 30 Defendants who have,

allegedly, defrauded the government by, inter alia, causing false claims to be submitted for drugs manufactured by unnamed drug companies that "keep negative data about their drugs secret" from the FDA and "pay sales representatives to make false statements to prescribers to induce them to prescribe particular psychotropic drugs to children and youth for uses not approved by the FDA." Compl. at ¶¶ 64, 77.

If these serious allegations have merit, the Government must be provided "an adequate opportunity to fully evaluate" them. Lujan, 67 F.3d at 245; if these allegations turn out to be unsupported, then continuing the seal will "prevent defendants from having to answer [the] complaint[] without knowing whether the government or relator[] would pursue the litigation." Pilon, 60 F.3d at 998; The George Washington University, 2007 WL 1302597 at *3. Because Congress intended the Government to have adequate time to fully evaluate allegations such as those in the above-captioned qui tam Complaint, good cause exists for the continuation of the seal period for six months.

At base, the relator misunderstands the purpose of the seal. By arguing that it will be prejudiced by the continuation of the seal (Doc. 3 at 11) and by opining, without any basis, on whether the Government is likely to intervene, the relator fails to acknowledge that the purpose of the seal, as noted above, is to "allow the

Government an adequate opportunity to fully evaluate the private enforcement suit." Lujan, 67 F.3d at 245 (emphasis added). Because the seal is for the benefit of the Government and not for the relator, the relator's preference for when the case should be unsealed is of no moment.

CONCLUSION

For these reasons, the United States respectfully requests that the Court GRANT its application for an extension of time up to and including January 4, 2010, during which time the complaint and all other documents filed in this matter remain under seal, and during which period the United States may continue its investigation of the relator's allegations in order to determine whether to intervene in the action and DENY the relator's Motion to Unseal.

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RESPECTFULLY SUBMITTED this 8th day of July, 2009, in Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2009, a copy of the foregoing **REPLY IN SUPPORT OF THE UNITED STATES' APPLICATION FOR AN EXTENSION OF TIME, RESPONSE TO RELATOR'S MOTION TO UNSEAL THE COMPLAINT, AND RESPONSE TO ORDER TO SHOW CAUSE** was served via U.S. Mail on:

James B. Gottstein, Esq.
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s/ Daniel R. Cooper, Jr.