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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Ex rel. Law Project for Psychiatric Rights, an Alaskan non-profit Corporation,

Plaintiff,

vs.

OSAMU H. MATSUTANI, MD, et al.,

Defendants.

NO. 3:09-cv-00080-TMB

DEFENDANTS' RESPONSE TO UNITED STATES' RESPONSE TO ORDER TEMPORARILY SEALING DOCUMENTS AND REQUESTING FURTHER BRIEFING

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On March 11, 2010, the Court asked the United States and all interested parties to submit briefing addressing the unsealing of certain documents in this case, which the Court temporarily resealed on March 11, 2010. (Doc. 70) To the best of the undersigned Defendants' understanding, the resealed documents (Doc. 2–13, and 15) represent the United States' pre-declination filings, certain clerical and other court orders, and pre-declination motions and documents filed by the relator Law Project for Psychiatric Rights ("PsychRights").

The United States, which chose not to intervene in this case, requests a blanket seal preventing both the public and Defendants (and their counsel) from viewing any documents filed before the Complaint was unsealed. (Doc. 71 at 9) On the other hand, PsychRights, the sole plaintiff, argues that all documents in the case should be unsealed and made available to both the public and the Defendants. (Doc. 72) For the reasons set forth below, the undersigned Defendants agree with PsychRights and respectfully request that the Court unseal the documents as to both the Defendants and the public, as there is no basis for maintaining a seal.

ARGUMENT

The burden of establishing that documents are privileged and thus should remain under seal rests with the party asserting privilege. *In re Grand Jury Investigation v. The Corp.*, 974 F.2d 1068, 1070 (9th Cir. 1992). Here, the United States has not met its burden to establish the privileged nature of any of the resealed documents.

First, there is no basis for the continued sealing of pre-declination documents filed by the United States and related documents filed by the clerk. The United States argues that these documents should be sealed because they "record the government's investigative

processes" and "work product." (Doc. 71 at 4–8) Yet, it provides no information as to why these documents are distinguishable from routine government pre-intervention filings that courts generally find to be non-privileged. For example, in *United States ex rel. Erickson v. University of Washington Physicians*, 339 F. Supp. 2d 1124 (W.D. Wash. 2004), the court unsealed (over the government's objection) the government's *in camera* submissions to the court because the documents "merely describe routine investigative procedures" and "contain no information that could compromise a future investigation, such as explanation of specific techniques employed or specific reference to ongoing investigations." *Id.* at 1126–27. *See also United States ex rel. Mikes v. Straus*, 846 F. Supp. 21, 23 (S.D.N.Y. 1994) (unsealing government status report that merely "described routine investigative procedures which anyone with rudimentary knowledge of investigative processes would assume would be utilized in the regular course of business").

If the Court is inclined to maintain a seal here on the government's filing, the Defendants respectfully request that the Court inspect *in camera* the resealed documents to determine whether they in fact "disclose any confidential investigative techniques, information which could jeopardize an ongoing investigation, or matters which could injure nonparties," or merely "describe routine investigative procedures." *Erickson*, 339 F. Supp. 2d at 1126. If the Court determines the latter, the documents should be unsealed.

Second, regardless of the Court's decision as to the government's own filings, there is no basis for the continued sealing of the Relator's Motion to Unseal and exhibits thereto at document numbers 3, 3-3, and 3-3. Significantly, the exhibits to the Motion to Unseal contain PsychRights's "written disclosure statement" that it was statutorily required to provide to the government at the outset of the litigation. 31 U.S.C. § 3730(b)(2).[1] Under the terms of the

[1] Exhibits 4-7 to PsychRights's written disclosure constitute documents that are themselves public records and already published on PsychRights's website (correspondence between the Utah Office of the Attorney General and the Centers for Medicare and Medicaid Services, at Doc. 3-2, p. 13–18). There is no basis to seal documents otherwise available to the public.

FCA, this written disclosure sets forth "substantially all material evidence and information" that a relator possesses relative to its FCA claim. *Id.* The United States does not address these documents in its request to keep all documents sealed. To the extent any privilege could be asserted as to these documents, it would belong to PsychRights alone, and PsychRights specifically requests the Court to unseal them. (Doc. 72) On that basis alone, documents 3, 3-3, and 3-3 should be unsealed.

Even if a privilege applied and continued to apply to those documents, their relevance and Defendants' substantial need for them outweigh any basis to keep them sealed. Here, PsychRight's written disclosure will be critical to determine if the Court has subject matter jurisdiction over this case due to the FCA's public disclosure bar.[2] Indeed, courts regularly compel production of relators' written disclosures of material facts to the government for these reasons.[3]

For example, in *Stone v. Rockwell Corp.*, 144 F.R.D. 396 (D. Colo. 1992), the court rejected four separate bases upon which the relator attempted to avoid production of its written disclosure. First, it noted that nothing in the FCA provides a "cloak of confidentiality to the written disclosure statement." *Id.* at 398. Indeed, "[o]nce the government makes an intervention decision and the case goes forward, fundamental fairness dictates that the plaintiff must disclose to the defendant the factual basis for the suit," and thus "no legitimate reason exists for preserving the confidentiality of the written disclosure statement." *Id.*

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[2] 31 U.S.C. § 3730(e)(4)(A).

[3] *See, e.g.*, *United States ex rel. Grand v. Northrop Corp.*, 811 F. Supp. 333, 337 (S.D. Ohio 1992); *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 839 (N.D. Ill. 1993); *United States ex rel. Burns v. A.D. Roe Co., Inc.*, 904 F. Supp. 592, 594 (W.D. Ky. 1995); *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 918 F. Supp. 1228, 1346 (E.D. Mo. 1996); *United States ex rel. Kosenske v. Carlisle HMA, Inc.*, No. 1:05-CV-2184, 2006 U.S. Dist. LEXIS 44840 (M.D. Pa. June 29, 2006). This case is unusual in that Defendants are not seeking PsychRight's written disclosure through discovery, but instead as part of the court record (attached to PsychRight's Motion to Unseal at Doc. 3-2). Also, as noted, PsychRights does not object to its disclosure.

at 399. Second, the court found that the disclosure is not an attorney-client communication because the relator did not create it for purposes of seeking legal advice, or with an expectation that it would remain confidential. *Id.* Third, the court noted that no work product protection applied. *Id.*

Finally, the court expressed "serious doubt" that any government privilege would apply to the written disclosure, and that even if a privilege did apply, it is outweighed by the document's relevance to the case and the defendant's need for it. In particular, where there has been a public disclosure of the allegations or transactions in an FCA action, the information in the written disclosure statement is essential to resolve the "threshold standing question" as to whether the relator was the original sources of the publicly-disclosed information:

> [W]ithout access to the plaintiff's disclosure statement, the defendant cannot make the critical comparison between the facts purportedly revealed by the plaintiff as an original source and facts which may have previously been available for public consumption.

Id. at 401-02. *See also United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 918 F. Supp. 1228, 1346 (E.D. Mo. 1996) (citing *Rockwell*, and noting that "all the courts to address this issue in published opinions have compelled the relator and government to produce the written disclosure on similar grounds") (emphasis added).

Here, PsychRights has not asserted any attorney client or work product privilege relative to its written disclosure, and asks the Court to unseal this and all other resealed documents. Nor has the United States asserted any privilege in connection with documents 3, 3-3, and 3-3, other than its general objection that none of the resealed documents should be unsealed because they record investigative techniques or work product. Certainly, no government investigative techniques are revealed in documents prepared by the relator for the government prior to the government's investigation. Nor can the government claim a work product privilege over a document simply because the document was provided to it.

In any event, even if a qualified privilege could attach to the written disclosure, Defendants' substantial need for the document outweighs any claim of privilege. As discussed above, to the extent that it becomes necessary to bring a jurisdictional challenge to PsychRight's claims under the FCA's "public disclosure bar" doctrine, the information in the written disclosure is critical for purposes of establishing whether PsychRights is an original source of information supporting its fraud claims. *See Rockwell*, 144 F.R.D. at 401 ("The threshold standing question relating to original source must be resolved largely on the basis of the knowledge of the private plaintiff at the time he first made disclosure of the facts supporting his claims, rather than on what he might know at the time discovery takes place in the *qui tam* suit.") (emphasis added). *See also United States ex rel. Burns v. A.D. Roe Co., Inc.*, 904 F. Supp. 592, 594 (W.D. Ky. 1995) ("[N]owhere else can Defendant obtain a more detailed summary of its alleged wrongdoing. . . . The statement of material evidence is the best source of information and nothing can serve as its substitute.") (emphasis added).

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court unseal documents 2-13 and 15, both as to the Defendants and the public. If the court is not inclined to unseal any or all of these documents as to the public, the Defendants request in the alternative that the Court seal them only from the public.

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DATED this 17th day of March, 2010.

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Certificate of Service

I hereby certify that on March 17, 2010, a copy of this DEFENDANTS' RESPONSE TO UNITED STATES' RESPONSE TO ORDER TEMPORARILY SEALING DOCUMENTS AND REQUESTING FURTHER BRIEFING was served electronically on all parties of record.

s/ David B. Robbins

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