

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MEDIATION QUESTIONNAIRE

The purpose of this questionnaire is to help the court's mediators provide the best possible mediation service in this case; it serves no other function. Responses to this questionnaire are *not* confidential. Appellants/Petitioners must electronically file this document within 7 days of the docketing of the case. 9th Cir. R. 3-4 and 15-2. Appellees/Respondents may file the questionnaire, but are not required to do so.

Any party may provide additional information *in confidence* directly to the Circuit Mediation Office at ca09_mediation@ca9.uscourts.gov. Please provide the case name and Ninth Circuit case number in your message. Additional information might include interest in including this case in the mediation program, the case's settlement history, issues beyond the litigation that the parties might address in a settlement context, or future events that might affect the parties' willingness or ability to mediate the case.

9th Circuit Case Number(s):	<input type="text" value="10-35887"/>
District Court/Agency Case Number(s):	<input type="text" value="3:09-cv-00080-TMB, 3:09-cv-00246-TMB"/>
District Court/Agency Location:	<input type="text" value="U.S. District Court for Alaska Anchorage"/>
Case Name:	<input type="text" value="Law Project for Psychiatric Rights et al."/> v. <input type="text" value="Matsutani, et. al."/>

Please briefly describe the dispute that gave rise to this lawsuit.

The False Claims Act, 31 USC §3729, et seq., authorizes private parties to bring suit on behalf of the federal government to recover for fraud in presenting or causing the presentation of false claims and share in the recovery, if any. Medicaid only allows reimbursement for outpatient drug prescriptions for "medically accepted indications, defined as indications approved by the Food and Drug Administration (FDA), or "supported" by one or more specified compendia. 42 U.S.C. § 1396r8 (k)(3), (6); 42 U.S.C. § 1396r-8 (g)(1)(B)(I). The defendants/Appellees argue that Congress authorized Medicaid to pay for all prescriptions by licensed prescribers.

However, the Department of Justice has pursued and recovered over \$2 Billion from drug companies for causing such false claims. This case is against specific psychiatrists and other parties causing such false claims and three pharmacies for presenting such false claims. More specifically, the false claims are for prescriptions of psychotropic drugs to children and youth that were not for a medically accepted indication.

(Please continue to next page.)

Briefly describe the procedural history, the result below, and the main issues on appeal.

The appeal involves two consolidated cases in the District Court for the District of Alaska, 3:09-cv-80-TMB, Law Project for Psychiatric Rights (PsychRights) v. Matsutani, et al., filed April 27, 2009 (PsychRights Action) and 3:09-cv-246-TMB, Daniel Griffin v. Martino, et al (Griffin Action) filed December 14, 2009. Under the False Claims Act, such cases are initially sealed to allow the Government an opportunity to investigate the claims and decide whether to intervene and take over the case. 31 U.S.C. § 3730(b). The Government declined to intervene in the Matsutani Action on December 31, 2009, and it was unsealed on January 25, 2010. The Government declined to intervene in the Griffin Action on April 26, 2010, and the case unsealed on May 17, 2010. These two cases were consolidated on July 12, 2010.

As expected (see, USDC Dkt. No. 84-2, pp 2-12), the defendants moved to dismiss for failure to state a claim upon which relief may be granted under Civil Rule 12(b)(6), failure to plead with sufficient particularity under Civil Rule 9(b), and the court lacked jurisdiction under what is known as the "Public Disclosure Bar," 31 U.S.C. § 3130(e)(4).

On September 24, 2010, the District Court granted the defendants/appellees' motion to dismiss under the Public Disclosure Bar, and issued a final judgment on October 1, 2010. The notice of appeal was filed October 1, 2010.

The main issue on appeal is whether the District Court was correct in deciding the Public Disclosure Bar applies to public disclosure of widespread fraud. There are also other issues regarding the applicability of the Public Disclosure Bar, such as whether the "Utah Attorney General Correspondence" is one of the "enumerated sources" to which the Public Disclosure Bar applies. See, U.S. ex rel Meyer v. Horizon Health Corp., 565 F.3d 1195, 1199 (9th Cir. 2009).

Describe any proceedings remaining below or any related proceedings in other tribunals.

There are no proceedings remaining below. Appellant is aware of a similar case pending in the USDC Northern District of Illinois, Case No. 10-cv-3361.

Provide any other information that might affect the suitability of this case for mediation.

Since the case was dismissed for lack of jurisdiction under the previous version of the Public Disclosure Bar (the Public Disclosure Bar is no longer jurisdictional. see, USDC Dkt. No. 111, pp 3-4), it seems hard for there to be a settlement even if any of the defendants/appellees were interested in settling, which they have not been thus far.

On the other hand, the District Court's dismissal seems contrary to directly controlling Ninth Circuit law, which holds that public disclosure of widespread fraud does not trigger the public disclosure bar. United States ex rel. Alfatooni v Kitsap Physicians Services, 163 F.3d 516, 523 (9th Cir. 1999) (public disclosure bar only applies to defendants identified in public disclosure); U.S. ex rel. Foundation Aiding The Elderly v. Horizon West, 265 F.3d 1011, n5 (9th Cir. 2001)("The allegations of widespread ... fraud ... insufficient to trigger the jurisdictional bar"). Alcan Electrical and Engineering, Inc., 197 F.3d 1014, 1018-19 (9th Cir. 1999), decided between Alfatooni and Foundation Aiding The Elderly does carve out an exception for "a narrow class of suspected wrongdoers," but again, in the later Foundation Aiding The Elderly, the Ninth Circuit held general allegations of fraud against an industry do not trigger the public disclosure bar.

CERTIFICATION OF COUNSEL

I certify that:

- a current service list with telephone and fax numbers and email addresses is attached (see 9th Circuit Rule 3-2).

- I understand that failure to provide the Court with a completed form and service list may result in sanctions, including dismissal of the appeal.

Signature

("s/" plus attorney name may be used in lieu of a manual signature on electronically-filed documents.)

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Note: Use of the Appellate ECF system is mandatory for all attorneys filing in this Court, unless they are granted an exemption from using the system. **File this document electronically** in Appellate ECF by choosing Forms/Notices/Disclosure > File a Mediation Questionnaire.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA)	
<i>Ex rel.</i> Law Project for Psychiatric)	
Rights, an Alaskan non-profit)	
corporation,)	
)	Case No. 3:09-CV-00080-TMB
Plaintiff,)	
)	
vs.)	
)	
OSAMU H. MATSUTANI, MD, <i>et al.</i> ,)	
)	
Defendants.)	
)	
<hr/>)	
UNITED STATES OF AMERICA,)	
ex rel Daniel I. Griffin,)	Case No. 3:09-CV-00246-TMB
)	(CONSOLIDATED)
Plaintiff,)	
)	
v.s)	
)	
RONALD A. MARTINO, MD., FAMILY)	
CENTERED SERVICES OF ALASKA, INC.,)	
an Alaska corporation, and SAFEWAY, INC.,)	
a Delaware corporation,)	
)	
Defendants.)	
<hr/>)	

Circuit Rule 3-2(b) Representation Statement

Pursuant to Ninth Circuit Court of Appeals Rule 3-2(b), *Qui tam relators* Law Project for Psychiatric Rights (PsychRights®), and Daniel I. Griffin identify all parties to the action along with the names, addresses and telephone numbers of their respective counsel as follows:

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RESPECTFULLY SUBMITTED this 30th day of September, 2010.

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