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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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UNITED STATES OF AMERICA,
ex rel. JENNIFER PUTNAM,

NO. CIV. 07-192 E-BLW

Plaintiff,

v.

MEMORANDUM AND ORDER RE:
MOTION FOR RECONSIDERATION

EASTERN IDAHO REGIONAL MEDICAL
CENTER; EASTERN IDAHO HEALTH
SERVICES, INC.; THE BOARD OF
TRUSTEES OF MADISON MEMORIAL
HOSPITAL, a/k/a, d/b/a MADISON
MEMORIAL HOSPITAL; IDAHO FALLS
RECOVERY CENTER; MATTHEW
STEVENS; MICHELLE DAHLBERG;
SPEECH AND LANGUAGE CLINIC,
INC.; PREMIER THERAPY
ASSOCIATES, INC., a/k/a THERAPY
SERVICES, INC., a/k/a TETON
SPEECH LANGUAGE PATHOLOGY, INC.;
HCA INC., a/k/a HCA - THE
HEALTHCARE COMPANY; HCA -
MANAGEMENT SERVICES, L.P.; HTI
HOSPITAL HOLDINGS, INC.; HEALTH
TRUST, INC. - THE HOSPITAL
COMPANY; and DOES 1 through 50,

Defendants.

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On September 8, 2009, the court denied defendants
Michelle Dahlberg and Speech and Language Clinic Inc.'s

1 ("defendants") motion to dismiss qui tam Relator Jennifer
2 Putnam's ("Relator") First Amended Complaint for lack of subject
3 matter jurisdiction. Defendants specifically argued that the
4 jurisdictional bar provision of the False Claims Act ("FCA"), 31
5 U.S.C. § 3730(e)(4)(A), deprived this court of jurisdiction over
6 Relator's qui tam action because the allegations of fraud in her
7 First Amended Complaint were publicly disclosed before she
8 initiated this action. Pursuant to Federal Rule of Civil
9 Procedure 59(e), defendants now move for reconsideration of the
10 court's September 8, 2009 Order.

11 A district court may grant a Rule 59(e) motion for
12 reconsideration "if the district court (1) is presented with
13 newly discovered evidence, (2) committed clear error or the
14 initial decision was manifestly unjust, or (3) if there is an
15 intervening change in controlling law." Zamani v. Carnes, 491
16 F.3d 990, 997 (9th Cir. 2007) (internal quotation marks omitted).
17 Defendants seek reconsideration under the second criteria,
18 arguing that the court committed clear error in maintaining
19 jurisdiction over Relator's qui tam action and that the court's
20 September 8, 2009 Order was manifestly unjust.

21 In finding that § 3730(e)(4)(A) does not deprive the
22 court of jurisdiction over Relator's qui tam action, this court
23 addressed each of the three avenues that defendants contended
24 resulted in a public disclosure: 1) Relator's disclosures about
25 the alleged fraud to the Idaho Department of Health and Welfare
26 ("DHW"); 2) DHW's audit of defendants and Idaho Falls Recovery
27 Center ("IFRC"), including DHW's and IFRC's communications about
28 the audit with Relator and defendants' and IFRC's employees and

1 independent contractors; and 3) statements Relator made in a
2 deposition for a previous state court action. Defendants only
3 seek reconsideration of the court's finding that a public
4 disclosure did not occur based on Relator's statements in the
5 deposition for the prior state court action.

6 As the court identified in its September 8, 2009 Order,
7 the first inquiry under the jurisdictional bar provision of the
8 FCA is whether the alleged public disclosure at issue originated
9 in one of the fora enumerated in § 3730(e)(4)(A). United States
10 ex rel. Meyer v. Horizon Health Corp., 565 F.3d 1195, 1199 (9th
11 Cir. 2009). The fora, which most courts divide into three
12 categories, are limited to: "(1) 'a criminal, civil, or
13 administrative hearing'; (2) 'a congressional, administrative, or
14 Government Accounting Office report, hearing, audit, or
15 investigation'; and (3) 'the news media.'" United States ex rel.
16 Bly-Magee v. Premo, 470 F.3d 914, 917 (9th Cir. 2006) (quoting §
17 3730(e)(4)(A)). Based on the plain language of the statute,
18 plaintiff's disclosures made during the deposition for the state
19 court proceeding could only come within the first category of
20 fora, i.e., a "public disclosure of allegations or transactions
21 in a [] civil . . . hearing." 31 U.S.C. § 3730(e)(4)(A).

22 Relying on highly persuasive Ninth Circuit precedent
23 and what appears to be the majority approach in the circuits,
24 this court concluded that discovery documents that are not
25 publicly filed with a court cannot constitute a "public
26 disclosure of allegations or transactions in a [] civil . . .
27 hearing." While Relator may have divulged certain allegations
28 underlying her qui tam action in the deposition at issue, this

1 court concluded that a public disclosure under § 3730(e)(4)(A)
2 could not have occurred because the deposition transcript was
3 never filed with the state court and hence was only
4 "theoretically available" to the public. United States ex rel.
5 Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1519-20 (9th Cir.
6 1995), (quoting United States ex rel. Springfield Terminal Ry.
7 Co. v. Quinn, 14 F.3d 645, 652 (D.C. Cir. 1994)), rev'd on other
8 grounds, Hughes Aircraft Co. v. United States ex rel. Schumer,
9 520 U.S. 939 (1997).

10 Defendants do not ask the court to reconsider this
11 conclusion; instead, they argue that, even if Relator's
12 deposition transcript did not result in a public disclosure, her
13 testimony during the deposition resulted in a public disclosure
14 to the litigants, attorneys, and court reporter present for the
15 deposition. Because the deposition transcript could not
16 constitute a public disclosure "in a civil hearing" unless the
17 transcript was filed with the state court, it must follow that
18 the testimony given at the deposition--standing alone--cannot
19 constitute a public disclosure "in a civil hearing." Put another
20 way, the requirement that the transcript from a deposition be
21 filed with the court in order to constitute a "public disclosure"
22 in a civil hearing would be meaningless if a public disclosure
23 occurs simply because someone at the deposition was an outsider
24 to the information.¹

25
26 ¹ The court is mindful that, under different
27 circumstances, it could be argued that a disclosure at a
28 deposition comes within one of the fora enumerated in §
3730(e)(4)(A), such as the production of a congressional report
at a deposition.

1 Defendants' argument that a public disclosure under §
2 3730(e)(4)(A) occurred based on the deposition testimony given in
3 front of outsiders to the investigation also ignores the first
4 step in the inquiry: "First, 'we must decide whether the public
5 disclosure originated in one of the sources enumerated in the
6 statute.'" Meyer, 565 F.3d at 1199. The Ninth Circuit has
7 further held that the sources enumerated in the statute are the
8 exclusive means by which a public disclosure can occur under the
9 statute. See United States ex rel. Haight v. Catholic Healthcare
10 W., 445 F.3d 1147, 1153-55 (9th Cir. 2006) (explaining that
11 Congress "limit[ed] the enumerated sources to th[e] narrow list"
12 in § 3730(e)(4)(A) and holding that a document obtained pursuant
13 to the Freedom of Information Act ("FOIA") does not constitute a
14 public disclosure under the subsection unless the document was
15 "from one of the sources enumerated in the statute").²

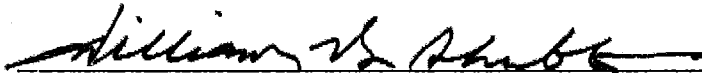
16 Accordingly, a disclosure of allegations underlying a qui tam
17 action made outside of one of the enumerated fora--whether made
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19 ² Defendants rely on U.S. ex rel. Fine v. Advanced
20 Sciences, Inc., 99 F.3d 1000 (10th Cir. 1996), which held that §
21 3730(e)(4)(A) "defines the sources of allegations and
22 transactions which trigger the bar but it does not define the
23 only means by which public disclosure can occur." Id. at 1004.
24 This distinction, however, is inconsistent with Ninth Circuit
25 precedent. See Haight, 445 F.3d at 1156 ("We hold that whether a
26 document obtained via FOIA request should invoke the
27 jurisdictional bar should be determined by reference to the
28 nature of that document itself. If the document obtained via
FOIA request is a public disclosure of a 'criminal, civil, or
administrative hearing, . . . a congressional, administrative, or
[General] Accounting Office report, hearing, audit, or
investigation, or [is] from the news media," then the
jurisdictional bar is applicable. If, as was the case here, the
document obtained via FOIA does not itself qualify as an
enumerated source, its disclosure in response to the FOIA request
does not make it so.") (omission and alterations in original)
(underscored emphasis added).

1 at a public park or in a deposition--simply cannot constitute a
2 "public disclosure" under § 3730(e)(4)(A).

3 IT IS THEREFORE ORDERED THAT defendants' motion for
4 reconsideration of the court's September 8, 2009 Order be, and
5 the same hereby is, DENIED.

6 DATED: November 2, 2009

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8 WILLIAM B. SHUBB
9 UNITED STATES DISTRICT JUDGE

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