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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 TO DISMISS

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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The False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733,
"prohibits false or fraudulent claims for payment to the United

1 States, 31 U.S.C. § 3729(a), and authorizes civil actions to
2 remedy such fraud to be brought by the Attorney General, §
3 3730(a), or by private individuals in the government's name, §
4 3730(b)(1)." United States ex rel. Meyer v. Horizon Health
5 Corp., 565 F.3d 1195, 1198 (9th Cir. 2009). When a private
6 individual--known as a Relator--initiates a qui tam action, the
7 FCA divests a court of jurisdiction over the Relator's FCA action
8 if the Relator's allegations of fraud were publicly disclosed
9 before the Relator initiated the qui tam action and the Relator
10 does not constitute an "original source" of the allegations. 31
11 U.S.C. § 3730(e)(4)(A); United States ex rel. Haight v. Catholic
12 Healthcare W., 445 F.3d 1147, 1151 (9th Cir. 2006).

13 Invoking this jurisdictional bar, defendants Michelle
14 Dahlberg and Speech and Language Clinic Inc. ("SALC")¹ move
15 pursuant to Federal Rule of Civil Procedure 12(b)(1) to dismiss
16 Relator Jennifer Putnam's qui tam action for lack of subject
17 matter jurisdiction. Defendants specifically contend that the
18 allegations of fraud in Relator's First Amended Complaint ("FAC")
19 were publicly disclosed before she initiated this action and that
20 she is not an original source of those allegations.

21 I. Relator's Qui Tam Action

22 Relator and Dahlberg are speech language pathologists
23 ("SLPs") in Idaho, and Dahlberg is the shareholder and President
24 of SALC. (Duke Aff. Ex. D at 38:17-19; Dahlberg Decl. 4-5.) At
25 times relevant to Relator's qui tam action, Dahlberg provided
26

27 ¹ As only Dahlberg and SALC move to dismiss Relator's qui
28 tam action, the court's reference to "defendants" is limited to
those parties.

1 speech language services at defendant Idaho Falls Recovery Center
2 ("IFRC") as a subcontractor for defendant Matthew Stevens and,
3 ultimately, a direct subcontractor for IFRC with other SLPs
4 subcontracting for her.

5 In her FAC, Relator alleges that defendants caused
6 fraudulent Medicare and Medicaid claims to be submitted for
7 speech language services. Specifically, the FAC alleges that
8 defendants used "aides to provide services to Medicare and
9 Medicaid patients, and knowingly and fraudulently billed both
10 programs for the work performed by the" aides even though
11 Medicare and Medicaid only cover therapy performed by SLPs. (FAC
12 ¶ 43.) The FAC further alleges that defendants fraudulently
13 provided and sought reimbursement from Medicare and Medicaid for
14 speech language services that were provided in locations that
15 were not covered by Medicare or Medicaid, such as locations
16 outside of a provider hospital's financial and administrative
17 control. (Id. ¶ 49.)

18 Relator initiated this qui tam action on April 25,
19 2007, and, pursuant to § 3730(b)(4), the United States
20 subsequently intervened. Although defendants do not question the
21 court's jurisdiction over the United States' operative complaint,
22 they move to dismiss Relator's FAC pursuant to Rule 12(b)(1) and
23 the jurisdictional-bar provision of the FCA based on the alleged
24 public disclosure of Relator's qui tam allegations.²

25
26 ² Without offering additional arguments or evidence, IFRC
27 initially joined defendants' motion to dismiss. (Docket Nos.
28 162, 163.) After Relator had filed an opposition to defendants'
motion to dismiss and defendants had filed a reply, Relator filed
an opposition to IFRC's motion to dismiss. (Docket Nos. 164-

1 Specifically, defendants contend that the allegations underlying
2 Relator's qui tam action were publicly disclosed through three
3 different avenues: 1) Relator's disclosures about the alleged
4 fraud to the Idaho Department of Health and Welfare ("DHW"); 2)
5 DHW's audit of defendants and IFRC, including DHW's and IFRC's
6 communications about the audit with Relator and defendants' and
7 IFRC's employees and independent contractors; and 3) statements
8 Relator made in a deposition for a previous state court action.

9 II. Governing Standards

10 "Federal courts are courts of limited jurisdiction" and
11 possess only the power to adjudicate cases that the Constitution
12

13 166.) Because IFRC's involvement at that point was limited to
14 adopting the arguments in defendants' memorandum supporting their
15 motion to dismiss, Relator used the opposition to "respond[] to
16 the arguments in Dahlberg's reply brief." (Docket No. 166 at
17 1:13-14.) Wanting the last word on their motion, defendants
18 moved to file a response to Relator's second opposition. (Docket
19 No. 170.) That same day, IFRC filed a reply in which, for the
20 first time, it proffered arguments and submitted evidence in
21 support of its joinder in the motion to dismiss. (Docket No.
22 171.) Relator then opposed defendants' motion to file a response
23 and, in that motion, initially responded to the arguments in
24 defendants' proposed response and IFRC's reply and requested
25 additional time to respond if the court granted defendants'
26 motion to file a response. (Docket No. 179.) At the same time
27 she filed her opposition, Relator also filed a motion to strike
28 the new arguments raised in defendants' proposed response and
IFRC's reply. (Docket No. 180.)

Mindful that the existence of the court's subject
matter jurisdiction awaited resolution, the court provided the
parties with ten days to file "additional briefing and evidence
that is not presently before the court and is in response to any
factual or legal argument that was omitted from an opposing
party's initial brief." (Docket No. 188.) The Order also
provided that, "[a]fter the ten-day period for additional
briefing, no further briefing will be allowed, and the court will
consider all of the arguments in and evidence submitted with the
parties' various briefs." (Id.) None of the parties filed
additional briefing or evidence within the ten-day period.
Moreover, on August 5, 2009, IFRC indicated that it reached a
settlement with the United States and Relator and withdrew its
joinder in defendants' motion to dismiss.

1 and federal statutes permit. Kokkonen v. Guardian Life Ins. Co.
2 of Am., 511 U.S. 375, 377 (1994). "A federal court is presumed
3 to lack jurisdiction in a particular case unless the contrary
4 affirmatively appears." Stock W., Inc. v. Confederated Tribes of
5 the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989)
6 (citing California ex rel. Younger v. Andrus, 608 F.2d 1247, 1249
7 (9th Cir. 1979)).

8 When considering a motion to dismiss for lack of
9 subject matter jurisdiction, a district court may properly review
10 evidence outside the pleadings to resolve factual disputes
11 concerning the existence of jurisdiction. Land v. Dollar, 330
12 U.S. 731, 735 n.4 (1947) ("[W]hen a question of the District
13 Court's jurisdiction is raised, either by a party or by the court
14 on its own motion . . . the court may inquire, by affidavits or
15 otherwise, into the facts as they exist."); see also United
16 States ex rel. Aflatooni v. Kitsap Physicians Servs., 163 F.3d
17 516, 521 (9th Cir. 1999) ("In making its determination [about
18 jurisdiction,] the district court may resolve factual disputes
19 based on the evidence presented where the jurisdictional issue is
20 separable from the merits of the case."); Biotics Research Corp.
21 v. Heckler, 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of
22 material outside of the pleadings does not convert a Rule
23 12(b)(1) motion into a motion for summary judgment). The court
24 will therefore consider the evidence the parties submitted to
25 determine whether it has jurisdiction over Relator's qui tam
26 action.

27 The FCA entitles relators who initiate qui tam actions
28 to "share in any recovery obtained on the government's behalf" in

1 an effort to encourage the uncovering of fraud against the
2 government. Haight, 445 F.3d at 1151 (citing 31 U.S.C. §
3 3730(d)). "At the same time, the FCA discourages opportunistic
4 qui tam relators by depriving the courts of subject matter
5 jurisdiction in actions where the fraud allegations were publicly
6 disclosed via a source listed in the provision, unless the
7 relator was the original source of the allegations." Id.
8 Specifically, the jurisdictional-bar provision of the FCA
9 provides:

10 No court shall have jurisdiction over an action under
11 this section based upon the public disclosure of
12 allegations or transactions in a criminal, civil, or
13 administrative hearing, in a congressional,
14 administrative, or Government [General]Accounting Office
report, hearing, audit, or investigation, or from the
news media, unless the action is brought by the Attorney
General or the person bringing the action is an original
source of the information.

15 31 U.S.C. § 3730(e)(4)(A).

16 The court must therefore assess its jurisdiction in
17 light of § 3730(e)(4)(A)'s "two-tiered" inquiry. Meyer, 565 F.3d
18 at 1199. "If and only if" the court determines there has been a
19 public disclosure under the first inquiry, the court must then
20 determine whether the relator was the original source under the
21 second inquiry. A-1 Ambulance Serv., Inc. v. California, 202
22 F.3d 1238, 1243 (9th Cir. 2000). "Relators, as the qui tam
23 plaintiffs, bear the burden of establishing subject matter
24 jurisdiction by a preponderance of the evidence." Meyer, 565
25 F.3d at 1199.

26 "Determining whether the allegations underlying a fraud
27 claim have been publicly disclosed under § 3730(e)(4)(A) itself
28 requires two inquiries." Haight, 445 F.3d at 1151. First, the

1 court must determine whether a public disclosure originated in
2 one of the sources enumerated in § 3730(e)(4)(A). Meyer, 565
3 F.3d at 1199. The sources, which most courts divide into three
4 categories, include: "(1) 'a criminal, civil, or administrative
5 hearing'; (2) 'a congressional, administrative, or Government
6 Accounting Office report, hearing, audit, or investigation'; and
7 (3) 'the news media.'" United States ex rel. Bly-Magee v. Premo,
8 470 F.3d 914, 917 (9th Cir. 2006). If a disclosure occurred in
9 one of the enumerated fora, the court must then assess whether
10 "the content of that disclosure [] consist[s] of the 'allegations
11 or transactions' giving rise to Relators' claim." Haight, 445
12 F.3d at 1152. Although "[t]he substance of the disclosure . . .
13 need not contain an explicit "allegation" of fraud," the
14 "'material elements of the allegedly "fraudulent transaction"'"
15 must be disclosed in the public domain. Id.

16 III. Whether Relator's Allegations of Fraud Were Publicly

17 Disclosed

18 A. Relator's Disclosures to DHW

19 Defendants first contend that Relator's disclosures to
20 DHW through a series of letters, faxes, and phone conversations
21 publicly disclosed the allegations underlying her qui tam action.
22 Relator's correspondence with DHW began when she reported alleged
23 fraud by Idaho SLPs and SLP providers in a five-page letter sent
24 to "Medicaid Fraud" on approximately September 14, 2005 ("2005
25 Letter"). Although Relator's 2005 Letter focused primarily on
26 alleged fraud by Stevens, it also identified defendants as
27 fraudulently using aides to perform therapy and billing for those
28 services. (Wayment Aff. Ex. 12 to Ex. A. at 3-4.) The 2005

1 Letter also accused defendants of "seeing children in groups" and
2 billing for two clients at the same time even though Dahlberg met
3 with only one of the clients while an aide met with the other.

4 (Id.) As a result of Relator's 2005 Letter, Ben Johnson, an
5 investigator within the Division of Management Services of DHW,
6 was instructed to conduct an initial inquiry into the
7 allegations. (Guillon Aff. Ex. A ("Johnson Dep.") at 16:19-
8 17:21, 86:21-87:14; id. Ex. B ("Johnson Aff.") ¶ 1.)

9 Approximately two months after her 2005 Letter, Relator
10 also faxed Johnson a list of SLPs and aides whom she believed had
11 knowledge of the alleged fraudulent practices by defendants and
12 other SLPs. (Wayment Aff. Ex. 3 to Ex. A.) At some point, the
13 DHW audit was reassigned to Brian Emfield, and Relator brought
14 Emfield "up to speed" on the audit during a telephone
15 conversation. (Id. Ex. A (Putnam Dep.) at 171:13-24.) After
16 their conversation, Relator sent Emfield a six-page letter in
17 January 2007 that recounted the investigations that had occurred
18 since she sent her 2005 Letter and described the alleged fraud
19 that had and continued to occur. (Id. at 170:10-171:12, Ex. 2.)
20 With respect to Dahlberg, Relator's 2007 letter to Emfield
21 stated:

22 [Dahlberg w]orked for Matt Stevens and then for Vicki
23 Hulet until she was fired. Obtained her own contract
24 through [IFRC] in 2003. She has been creatively billing
25 since including seeing children in groups (which Medicaid
26 does not pay for), when no service is provided, when
27 aides provide the service, when talking to parents o[n]
28 the phone, when writing notes. She has also encouraged,
even since the 1st audit in 2005, her therapists do the
same. On the first investigation, parents provided
information to Ben. J. when Michelle took their children

1 to look at jet skis for therapy.³ Michelle also has a
2 contract with the Infant Toddler Program, where
3 complaints for fraud have occurred in the past. However,
4 nothing formal has been done that I am aware of. . . .

4 (Id. Ex. 2 to Ex. A.)

5 In a case with similar communications, the Ninth
6 Circuit recently held that a public disclosure did not occur when
7 the relators presented evidence of alleged fraud to a Medicare
8 fraud investigator. Meyer, 565 F.3d at 1199. The court
9 emphasized that the disclosure of alleged fraud to a government
10 agency does not come within one of the three public-disclosure
11 fora provided in § 3730(e)(4)(A). Id. at 1200. The court
12 further stated that, even if it created a fourth forum,
13 "'information that was "disclosed in private"' is not a public
14 disclosure under the [FCA], . . . even when the private
15 disclosure is made to a government employee." Id. (citations
16 omitted); see also id. at 1201 n.3 ("[T]he majority of circuits
17 that have considered the issue have concluded that disclosure to
18 the government, without more, is not a public disclosure under §
19 3730(e)(4)(A)."); Seal 1 v. Seal A, 255 F.3d 1154, 1158-59 (9th
20 Cir. 2001) (explaining that the FCA was amended in 1986 because
21 the 1943 amendment had "led to unintended consequences, [] as it
22 deprived courts of jurisdiction over suits in which the would-be
23 relators had given their information to the government before
24 filing their claims"). Accordingly, Relator's disclosures to DHW
25 through her letters, faxes, and telephone conversations cannot

27 ³ None of the parties suggest that Johnson publicly
28 disclosed the allegations underlying Relator's qui tam action in
his conversations with parents or patients.

1 constitute public disclosures under § 3730(e)(4)(A).⁴

2 B. The DHW Audit

3 Defendants next contend that DHW's audit constituted a
4 public disclosure under § 3730(e)(4)(A). Although Johnson found
5 it difficult to initially determine whether the SLPs' practices
6 were in compliance with Medicare and Medicaid, the DHW audit
7 ultimately revealed that some SLPs and SLP providers were
8 improperly using aides and providing services in locations that
9 were not covered by Medicare or Medicaid. (See Johnson Dep.
10 24:7-26:25; Guillon Aff. Ex. A ("Gunnell Dep.") Ex. 82; Duke Aff.
11 Exs. A, C, D ("Mar. 28, 2007 Putnam Dep.") at 47:24-48:8.)

12 Under § 3730(e)(4)(A), a public disclosure can occur in
13 an "administrative . . . audit[] or investigation." As a
14 threshold matter, however, the Supreme Court is currently
15 scheduled to resolve a circuit split regarding "[w]hether an
16 audit and investigation performed by a State or its political
17 subdivision constitutes an 'administrative . . . audit, or
18 investigation' within the meaning of the public disclosure
19 jurisdictional bar of . . . § 3730(e)(4)(A)." U.S. Supreme Court
20 Docket, Question Presented, Graham County Soil & Water
21 Conservation Dist. v. United States ex rel. Wilson, No. 08-304,
22 available at <http://www.supremecourtus.gov/docket/08-304.htm>
23 (granting certiorari on June 22, 2009, to hear United States ex
24 rel. Wilson v. Graham County Soil & Water Conservation Dist., 528

25
26 ⁴ To the extent defendants argue that IFRC's Chief
27 Executive Officer's request in November 2005 that DHW audit IFRC
28 constituted a public disclosure (see Putnam Dep. at 172:17-173:4,
Ex. 2 to Ex. A), Meyer similarly prevents this private disclosure
to the government from constituting a public disclosure.

1 F.3d 292 (4th Cir. 2008)). Compare, e.g., Bly-Magee, 470 F.3d at
2 918 ("We agree with the Eighth Circuit and now hold that the
3 second category of sources includes non-federal reports, audits,
4 and investigations."), with United States ex rel. Dunleavy v.
5 County of Delaware, 123 F.3d 734, 746 (3d Cir. 1997) ("[W]e
6 conclude that Congress meant to bar reliance only on
7 'administrative reports' originating with the federal
8 government.").

9 Nonetheless, assuming that the second category of fora
10 in § 3730(e)(4)(A) includes state administrative audits or
11 investigations, the allegations or transactions at issue in the
12 audits or investigations must have been publically disclosed to
13 at least one member of the "public." See Meyer, 565 F.3d at 1201
14 ("[E]ven when the government has the information, it is not
15 publicly disclosed under the Act until it is actually disclosed
16 to the public."); Seal 1, 255 F.3d at 1161 ("Disclosure of
17 information to one member of the public, when that person seeks
18 to take advantage of that information by filing an FCA action, is
19 public disclosure."); see also United States ex rel. Schumer v.
20 Hughes Aircraft Co., 63 F.3d 1512, 1519 (9th Cir. 1995) ("[I]n
21 passing the 1986 amendments, Congress specifically sought to
22 diminish the government's ability 'to sit on, and possibly
23 suppress, allegations of fraud when inaction might seem to be in
24 the interest of the government.'"), rev'd on other grounds,
25 Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S.
26 939 (1997); accord Haight, 445 F.3d at 1153 n.2.

27 It does not appear that any of the allegations
28 underlying DHW's audit and Relator's qui tam action were

1 disclosed to the general public. In his affidavit, Johnson
2 states that, to the best of his knowledge, "no reports, audits,
3 or other information about DHW's investigation was placed on
4 DHW's website." (Johnson Aff. ¶ 3.) Lori Stiles, a member of
5 the Surveillance and Utilization Review Unit of DHW who has and
6 continues to participate in the DHW audit, states that she does
7 "not know of any reports, audits or other information nor did
8 [she] author any such report or audit about DHW's investigation
9 that was placed on DHW's website before the complaint in this
10 action was filed on April 25, 2007." (Id. Ex. C (Stiles Aff.) ¶¶
11 1-3.)

12 Defendants neither dispute Johnson's and Stile's
13 representations nor suggest that any of the allegations of fraud
14 were released to the general public. Instead, defendants contend
15 that the allegations underlying the DHW audit and Relator's qui
16 tam action were disclosed to the public when Johnson discussed
17 the audit with Relator and defendants' and IFRC's employees and
18 independent contractors.

19 1. DHW's Discussions with Relator

20 In Seal 1, a relator filed a qui tam action against his
21 former employer, Packard-Bell NEC, Inc. ("PBNEC"), in April 1995.
22 255 F.3d 1157. In September 1995, conversations with individuals
23 other than the relator prompted the United States Attorney's
24 Office ("USAO") to investigate Zenith, a company that had an
25 "alliance agreement" with PBNEC and subsequently became a
26 wholly-owned subsidiary and then a division of PBNEC. Id.
27 Approximately nine months after the relator initiated his qui tam
28 action against PBNEC, the USAO allowed him to review PBNEC

1 documents it had obtained during its investigation of Zenith, and
2 some of those documents "contained information raising the
3 possibility that Zenith had committed fraud on the government
4 similar to that committed by PBNEC." Id. Based on those
5 documents, relator initiated a second qui tam action against
6 Zenith.

7 In his qui tam action against PBNEC, the district court
8 held that it had jurisdiction, and the relator ultimately
9 received a share in the government's settlement with PBNEC. Id.
10 at 1157-58. As to his qui tam action against Zenith, however,
11 the district court held and the Ninth Circuit agreed that the
12 government publicly disclosed Zenith's alleged fraud when it
13 shared its investigation documents with the relator. Id. at
14 1157, 1162. The Ninth Circuit explained that the relator was a
15 member of the public for purposes of the Zenith investigation
16 because he was an "outsider" to that investigation. Id. at 1161.
17 The court clarified, however, that a public disclosure may not
18 have occurred if the government had disclosed the same
19 information "to some other member of the public who [had]
20 independently come[] upon information already possessed by the
21 government . . . and who then file[d] an FCA action based on the
22 information independently obtained." Id. at 1162.

23 In her 2005 Letter, which initiated DHW's audit
24 (Johnson Dep. 16:19-17:21), Relator reported in detail about
25 defendants' alleged fraud:

26 Michelle then contacted Matt Stevens and started billing
27 through Idaho Falls Recovery Center. . . . This leads me
28 to the ongoing, current use of assistants/aides by Matt
Stevens and Michelle Dahlberg. I have personally been
contacted by a family who[se] son was to be seen by

1 Michelle Dahlberg who her assistant was going to see. .
2 . . Recently the Speech and Language Clinic has started
3 seeing children in groups, which is not a billable option
4 through [a] medical facility with Medicaid. Michelle
5 Dahlberg will see one child and the assistant will see
6 another, but Michelle signs all the notes. You will only
7 be able to determine if this has happened by looking for
8 duplicate times on more than one patient's daily
9 documentation records, where it would appear that
10 Michelle somehow saw two people at the same time on the
11 same day. You may [] only be able to tell by an
12 interview with parents, transportation, or client if they
13 are cognoscente enough to be reliable.

14 (Wayment Aff. Ex. 12 to Ex. A.) When describing his telephone
15 conversations with Relator, Johnson also explained that she
16 "basically was reporting as to how aides were being used and how
17 she felt that was inappropriate." (Johnson Dep. 74:12-24.)

18 This evidence establishes, by a preponderance of the
19 evidence, that Relator had independent knowledge about
20 defendants' alleged fraud before DHW began its audit and was thus
21 not an "outsider" to DHW's audit. Accordingly, Relator did not
22 learn about the alleged fraud from DHW, and DHW's communications
23 with Relator could not have resulted in a public disclosure of
24 Relator's qui tam allegations.

25 2. DHW's and IFRC's Discussions with Defendants' and
26 IFRC's Employees and Independent Contractors

27 In addition to Relator, DHW and IFRC also disclosed
28 information about the audit to defendants' and IFRC's employees
and independent contractors.⁵ The specific disclosures at issue

⁵ It is unclear from the record whether most of the SLPs
and aides were employees or independent contractors of Dahlberg,
SALC, IFRC, or another SLP. As Dahlberg was an independent
contractor for IFRC and the qui tam action against defendants is
based on conduct occurring at IFRC, the precise relationship of
the SLPs and aides with defendants, IFRC, or another SLP does not
affect the court's analysis.

1 are: 1) Johnson's March 24, 2006 audit letter to IFRC; 2) IFRC's
2 March 30, 2006 change of policies letters; and 3) the April 18,
3 2006 meetings between Johnson and defendants' and IFRC's
4 employees and independent contractors.

5 On approximately March 24, 2006, Johnson sent IFRC a
6 letter informing it that DHW had initiated an investigation into
7 its facility on November 7, 2005, and that, "[d]uring the course
8 of the audit, it ha[d] been discovered and documented that on
9 numerous occasions unqualified/unlicensed staff ha[d] been
10 performing speech and language therapy, and [IFRC] ha[d] billed
11 Idaho Medicaid for those services, in violation of Idaho Statute
12 56-388 A." (Duke Aff. Ex. A.) In response, IFRC's
13 Administrator, Lin Dee Hokanson, sent an identical change in
14 policies letter to eleven therapists at IFRC.⁶ The letters
15 informed the therapists that the IFRC Board had "approved and
16 adopted the [] policies" of discontinuing the use of aides and
17 "tag theme therapy" and instructed the therapists to immediately
18

19
20 ⁶ The individuals who received a change in policies
21 letter included Dahlberg, Alice Balcena, Laura Dolezal, Gunnell,
22 Laura Tavenner, Keri James, Alyson Elsethagan, Brooke Belnap, Kay
23 Williams, Davie Allen, and Jenny Johnson. (*Id.* Ex. B.)
24 Relator's January 2007 letter to Emfield indicates that Balcena,
25 Dolezal, Elsethagan, Gunnell, and Tavenner are SLPs who worked
26 for Dahlberg. (Wayment Aff. Ex. 2 to Ex. A; Gunnell Dep. at
27 209:6-8.) Belnap was either an SLP or aide working at IFRC.
28 (*Compare* Duke Aff. Ex. C at 2 (identifying "Brooke" as an SLP at
IFRC), *with* Johnson Dep. 108:9-25 (indicating that Belnap saw
children by herself, but was still working to getting her SLP
license and was supposed to be supervised by an SLP).) Although
the record does not appear to identify James, Williams, Allen, or
Johnson, defendants do not suggest that these individuals were
not SLPs, employees, or aides working at IFRC. Similarly,
defendants do not contend that the unidentified individuals who
received courtesy copies of each letter--Reed Larsen, Daryl
Shurtliff, and Dr. Steve Klippert--were not IFRC employees.

1 comply with these new policies.⁷ (Id. Ex. B.)

2 In a three-page letter to Johnson dated April 12, 2006,
3 Dahlberg also responded to "concerns" about her billing
4 practices, including her use of externs, aides, and group theory.
5 (2d Guillon Aff. Ex. L.) On April 18, 2006, Johnson and Lynette
6 Porter also "met with the individual therapists at [IFRC]."
7 (Duke Aff. Ex. A.) During those meetings, Johnson indicated that
8 DHW would likely require IFRC to repay the "billings generated by
9 the 'group sessions'" and that Dahlberg was a "target" if DHW
10 revoked licenses for any of the SLPs. (Id. Ex. C.)

11 When confronted with similar disclosures, the Ninth
12 Circuit has held that "employees of a corporation later sued
13 under the FCA" are not "members of the public for purposes of
14 that suit." Seal 1, 255 F.3d at 1161 (citing Schumer, 63 F.3d at
15 1519). According to the Ninth Circuit, allowing disclosures to
16 such employees to constitute a public disclosure would conflict
17 with the FCA because the "strong economic incentive [an employee
18 has] to protect the information from outsiders" could prevent
19 "revelation of information to an employee [from] trigger[ing] the
20 potential for corrective action presented by other forms of
21 disclosure." Id. The court further emphasized that holding
22 otherwise "'would run contrary to [the] purpose [of the FCA], for
23 it drastically curtails the ability of insiders to bring suit
24 once the government becomes involved in the matter.'" Id.

25 _____
26 ⁷ Although DHW's audit letter is dated March 24, 2006,
27 the change in policies letters dated March 30, 2006 state that
28 the IFRC Board adopted the new policies on March 22, 2006. It
therefore appears that the change in policies letters misstate
the meeting date of the Board's action or that DHW discussed the
audit with IFRC before sending the March 24, 2006 letter.

1 (alterations in original). DHW's disclosures to defendants or
2 their employees are therefore insufficient to constitute public
3 disclosures.

4 Although some of the SLPs and aides were independent
5 contractors, not employees, of defendants, IFRC, or other SLPs,
6 the Ninth Circuit's rationale from Seal 1 still applies. The
7 primary allegations underlying DHW's audit were based on the
8 independent contractors' use of aides or team therapy. As this
9 conduct potentially resulted in defendants' billing for services
10 that Medicare and Medicaid did not cover, the independent
11 contractors and aides had very real interests in keeping the
12 information confidential to protect their professional
13 reputations and licenses. (See, e.g., Johnson Dep. 109:7-15
14 (explaining that Belnap was "very reluctant" to talk to him
15 because she feared retaliation from Dahlberg and that Belnap
16 asked Johnson "to meet her away from the facility because she
17 felt uncomfortable because she was being managed to get her
18 licensing from ASHA, and she was fearful that there would be
19 retaliation, so she asked that [they] meet somewhere else and
20 then she called and basically canceled on [Johnson]"); see also
21 Duke Aff. Ex. C (memorializing that Johnson indicated that the
22 revoking of SLP licenses was a possibility).)

23 Independent contractors providing therapy at IFRC also
24 had substantial financial incentives to ensure a favorable
25 resolution of the audit, which could be frustrated by public
26 disclosure of the accusations. For example, Dahlberg's contract
27 with IFRC provided that she was required to reimburse IFRC for
28 any partial reimbursements it received from a third-party payor,

1 and it allowed IFRC to immediately terminate the contract if IFRC
2 lost its certification as a Medicare provider. (2d Guillon Aff.
3 Ex. G at Addendum 3; see id. ¶ 4.3 (reserving for IFRC and
4 Dahlberg “any common law right of indemnity and/or
5 contribution”); id. ¶¶ 1.2.3.1, 1.6, 1.12, 5.6 (suggesting that
6 Dahlberg would be in material breach of her contract with IFRC if
7 she violated Medicare or Medicaid regulations); Duke Aff. Ex. C
8 (indicating that Johnson informed IFRC that it might have to
9 repay DHW for claims that were not covered).) Similar to
10 Dahlberg, the DHW audit more than likely presented a financial
11 risk to the SLPs and aides that worked for IFRC, Dahlberg, or
12 another SLP at IFRC. The independent contractors providing
13 therapy at IFRC are thus indistinguishable from the employees in
14 Seal 1, and any disclosures DHW or IFRC made to them are
15 insufficient to result in a public disclosure under §
16 3730(e)(4)(A).

17 3. Relator’s Deposition Testimony in the Prior State
18 Action

19 Finally, defendants contend that Relator publicly
20 disclosed the allegations giving rise to her qui tam action
21 through her deposition testimony in a prior Idaho state court
22 action, Peak Performance Therapy Services, P.C. v. Mountain View
23 Hospital, LLC, No. 06-4944. In that case, Relator was deposed as
24 a non-party on March 28, 2007, based on her former employment
25 with the plaintiff. (Duke Aff. Ex. E (Putnam Dep.) 8:15-9:4.)
26 During that deposition, Relator testified about defendants’ use
27 of aides, the provision of services outside the 35-mile radius,
28 her reporting of the alleged fraud to DHW, and her subsequent

1 conversations with Johnson. (2d Wayment Aff. Ex. B (Mar. 28,
2 2007 Putnam Dep.) at 41:23-42:10, 43:5-14, 44:8-12, 21-24, 57:7-
3 13.)

4 "[I]nformation disclosed through civil litigation and on
5 file with the clerk's office should be considered a public
6 disclosure of allegations in a civil hearing [for] the purposes
7 of section 3730(e)(4)(a)." United States v. Northrop Corp., 59
8 F.3d 953, 966-67 (9th Cir. 1995) (internal quotation marks
9 omitted). "That documents filed with an agency or court during
10 administrative proceedings or civil litigation are considered
11 publicly disclosed is a firmly established principle." Hagood v.
12 Sonoma County Water Agency, 81 F.3d 1465, 1474 n.13 (9th Cir.
13 1996). Circuit courts disagree, however, about whether a
14 discovery document produced during a civil hearing but never
15 filed with the clerk's office can also result in a public
16 disclosure under § 3730(e)(4)(a).

17 In Schumer, the Ninth Circuit directly confronted the
18 split of authority and, in dicta, rejected the Third Circuit's
19 holding that "a discovery document turned over to another party
20 to the litigation, but not actually filed with the court, should
21 be deemed publicly disclosed." 63 F.3d at 1519-20. In doing so,
22 the court was persuaded by the District of Columbia Circuit's
23 distinction between "actual" and "theoretical" availability of
24 documents:

25 [The District of Columbia Circuit] concluded that only
26 discovery material "actually made public through filing"
27 was disclosed. It concluded that discovery material
28 exchanged by parties but not filed with the court "is
only theoretically available upon the public's request."
We conclude that the District of Columbia Circuit's
distinction between actual and theoretical availability

1 is persuasive

2 Id. at 1520 (quoting United States ex rel. Springfield Terminal
3 Ry. Co. v. Quinn, 14 F.3d 645, 652 (D.C. Cir. 1994)).

4 Although Schumer may no longer be binding precedent,⁸
5 the Ninth Circuit's clear rejection of finding a public
6 disclosure based on discovery documents that are not publicly
7 filed with the court is highly persuasive and appears to be
8 consistent with a majority of the circuit courts that have
9 addressed the issue. See United States v. Bank of Farmington,
10 166 F.3d 853, 860 (7th Cir. 1999) ("[T]he language of the statute
11 itself is 'public disclosure,' not 'potentially accessible to the
12 public.'"), overruled on other grounds by Glaser v. Wound Care
13 Consultants, Inc., --- F.3d ----, 2009 WL 1885500 (7th Cir.
14 2009); United States ex rel. Ramseyer v. Century Healthcare
15 Corp., 90 F.3d 1514, 1519 (10th Cir. 1996) ("We agree with the
16 District of Columbia and Ninth Circuits that 'public disclosure'
17 signifies more than the mere theoretical or potential
18 availability of information."); cf. Meyer, 565 F.3d at 1199
19 (indicating relators' concession that a public disclosure
20 occurred when "very similar allegations" were disclosed in a
21 complaint filed in a prior action).

22 Here, the transcript from Relator's March 28, 2007
23 deposition in the state action was not filed with the state
24

25
26 ⁸ Compare Haight, 445 F.3d 1147, 1153 n.2 (9th Cir. 2006)
27 (noting that, because Schumer was vacated by the Supreme Court on
28 grounds unrelated to the public disclosure analysis, it is "only
persuasive authority and is not binding precedent"), with Meyer,
565 F.3d at 1200, and Seal 1, 255 F.3d at 1161 (applying
Schumer's public disclosure analysis as precedent).

1 court. Any disclosures Relator made in that deposition were
2 therefore limited to the parties in the action and only
3 theoretically available to members of the public. Cf. Seattle
4 Times Co. v. Rhinehart, 467 U.S. 20, 33 & 33 n.19 (1984)
5 (“[P]retrial depositions and interrogatories are not public
6 components of a civil trial. . . . Jurisdictions that require
7 filing of discovery materials customarily provide that trial
8 courts may order that the materials not be filed or that they be
9 filed under seal. . . . Thus, to the extent that courthouse
10 records could serve as a source of public information, access to
11 that source customarily is subject to the control of the trial
12 court.”); (Hirst Aff. Ex. 1 (Putnam Dep.) at 12:19-24 (indicating
13 that defendants’ counsel obtained a copy of Relator’s prior
14 deposition transcript only through discovery in this case).)
15 Therefore, the transcript from Relator’s deposition testimony in
16 the prior state case did not result in a public disclosure under
17 § 3730(e)(4)(A) because it was not filed with the state court and
18 thereby publically disclosed in the course of the civil hearing.⁹

21 ⁹ In her March 27, 2008 deposition, Relator also
22 testified that a “team” of people put together a report
23 (presumably the 2005 Letter) for Medicaid about the alleged
24 fraud. According to Relator’s testimony, the team included
25 Lorraine Hart (a former Dahlberg aide), two Idaho State
26 University (ISU) graduate students who had done SLP internships
27 (Brenda Malepeai and Jen Taylor), Trent Gunnell (an SLP who
28 contracted with Dahlberg), and Jessica Hartson (a former aide to
two therapists who contracted with Dahlberg). (Mar. 28, 2007
Putnam Dep. 44:21-47:4.) In describing the “team,” Relator
answered affirmatively when asked whether the two ISU students
“complained to the college.” (Id. at 45:6-8.) Defendants do
not, however, contend that the ISU students publicly disclosed
the relevant allegations to the college, and the record neither
confirms the existence nor reveals the content of those
complaints.

1 Accordingly, because Relator's qui tam allegations
2 about defendants' alleged fraud were not publicly disclosed, the
3 court need not determine whether Relator was an original source
4 of those allegations and must deny defendants' motion to dismiss
5 Relator's qui tam action based on that conduct.

6 IT IS THEREFORE ORDERED that (1) Dahlberg and SALC's
7 motion to dismiss Relator's FAC be, and the same hereby is,
8 DENIED; and (2) Dahlberg and SALC's motion to file a response to
9 Relator's reply brief in opposition to IFRC's reply and Relator's
10 motion to strike new evidence and arguments in IFRC's reply brief
11 be, and the same hereby are, DENIED as moot.

12 DATED: September 8, 2009

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15 WILLIAM B. SHUBB
16 UNITED STATES DISTRICT JUDGE
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