IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA *ex.rel.* ELIN BAKLID-KUNZ	)	
Relator	)	
vs.	)	CASE NO.: 6-09-CV-1002
HALIFAX HOSPITAL MEDICAL CENTER d/b/a HALIFAX HEALTH a/k/a HALIFAX COMMUNITY HEALTH SYSTEM a/k/a HALIFAX MEDICAL CENTER and HALIFAX STAFFING, INC.	)	[FALSE CLAIMS ACT – QUI TAM]
Defendants	)	

CONSOLIDATED REPLY TO RELATOR'S OPPOSITION AND THE DEPARTMENT OF JUSTICE'S STATEMENT OF INTEREST

Pursuant to Fed. R. Civ. P. 12(b)(6), 12(b)(1), and 9(b), Defendants Halifax Hospital Medical Center d/b/a Halifax Health a/k/a Halifax Community Health System a/k/a Halifax Medical Center and Halifax Staffing, Inc. (collectively "Halifax") by its undersigned counsel, respectfully submit this consolidated reply to Relator Elin Baklid-Kunz's ("Relator") Opposition and the Department of Justice's ("DOJ") Statement of Interest.

ARGUMENT

I. HALIFAX IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY FROM SUIT UNDER THE FEDERAL FALSE CLAIMS ACT

Relator's False Claims Act ("FCA") lawsuit must be dismissed because the Eleventh Amendment immunizes Halifax from this action. Halifax functions as an arm of the state of

Florida ("the State") by providing critical health care services to central and Northeast Florida through a network of organizations. Halifax is the principal charity care provider for the region and treats all patients, including state-funded Medicaid beneficiaries and the indigent, who come through its Emergency Department regardless of ability to pay.

As set forth in Halifax's Motion to Dismiss and its Reply, this Court has ample basis to find that it is an arm of the state and, therefore, immune from suit under the FCA.

A. Halifax Is An "Arm Of The State" For Purposes Of The Eleventh Amendment Sovereign Immunity Clause Under The Four-Factor Test

The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The DOJ acknowledged in its Statement of Interest that the Eleventh Circuit applies a four-factor test to determine if an entity is an "arm of the state." DOJ Stmt. of Interest, at 3. While the Eleventh Circuit has clearly stated that no single factor is dispositive, *Miccosukee Tribe of Indians v. Fla. State Athletic Comm'n.*, 226 F.3d 1226, 1231-34 (11th Cir. 2000), the DOJ has focused its argument on minimizing the ultimate control that State authorities have over Halifax's operations. The DOJ, for instance, cites the fact that Halifax pays judgments from its own accounts as a factor weighing against immunity without acknowledging the State's ultimate authority over Halifax's expenditures. DOJ Stmt. of Interest, at 4.

The U.S. Supreme Court has observed that, when indicators of immunity point in opposite directions, most Federal Courts of Appeals have cited whether a judgment against the entity must be satisfied out of a state's treasury as the most important factor in

determining whether a state-created entity enjoys Eleventh Amendment sovereign immunity. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994). The *Hess* court, however, did not hold that this factor is dispositive. *Id.* The Eleventh Circuit's guidance is clear that no one factor is dispositive. *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309, 1314 (11th Cir. 2003). Neither Relator nor the DOJ has cited contrary controlling authority.

1. Halifax's Board Of Commissioners Operates Under The Public's Oversight And Under The Governor's Ultimate Authority

Halifax is an arm of the State because the State controls its fiscal life in a way readily distinguishable from a municipality. Halifax's Governing Board of seven commissioners is appointed by the governor of the State as specified by state law.[1] The Board of Commissioners is bound by state law to hold monthly meetings subject to public notice and open to the public.[2] The State retains oversight of Halifax's use of all state funding that it receives, effectively controlling Halifax's budget. Fla. Stat. § 189.413 (2010). The DOJ cited Halifax's ability to hire its own staff, *see* DOJ Stmt. of Interest, at 6, but fails to note that initial appointments and reappointments to the Medical Staff, for example, are made and renewed by the Board of Commissioners who are, in turn, subject to appointment by the State.[3] The governor-controlled Board of Commissioners also has ultimate oversight of the following critical operational matters otherwise managed by the Halifax Medical Staff: (1) granting of clinical privileges; (2) disciplinary action; (3) all matters relating to professional

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[1] The Governing Board of the Halifax Special Taxing District consists of seven Commissioners who are appointed by the governor of Florida under the provisions of Chapter 2003-374, Laws of Florida, as may be amended or codified from time to time. *See* Article I, Bylaws Of The Board Of Commissioners Of Halifax Hospital Medical Center, Approved August 13, 2008.

[2] *Id.*, at Section 1, Article II.

[3] *Id.*, at Section 3, Article VII.

competency; (4) the types and specialties of practitioners to be appointed to the Medical Staff, as well as the determination of the appropriate number of practitioners that may be so appointed; and (5) any other specific matters as may be referred to the Medical Staff by the Board of Commissioners. *See* Article VII, Section 4(C), Bylaws Of The Board Of Commissioners Of Halifax Hospital Medical Center, Approved August 13, 2008 (adopted pursuant to Ch. 2003-374, Laws of Florida). Last, the State assesses the financial health of Halifax on an annual basis and dictates which services Halifax can provide within its district. Fla. Stat. § 189.428(5).

2. In This Eleventh Amendment Analysis, State Budget Oversight Of Halifax Trumps Its Ability To Collect *Ad Valorem* Taxes

Halifax's ability to collect *ad valorem* taxes to pay for its own expenses does not alter the fact that it is protected by Eleventh Amendment immunity. *See Miccosukee*, 226 F.3d at 1233 (citing to *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518, 1520-21 (1983)). The *Miccosukee* court held that, although the Park Authority raised its own money and was relatively self-sufficient, the state controlled the Park Authority's fiscal life because the Park Authority had to submit its budget and annual reports to the legislature. *See also Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir. 1985) ("Where the budget of an entity is submitted to the state for approval, this suggests that the entity is an agency of the state.") and *Grimshaw v. S. Fl. Water Mgmt. Dist.*, 195 F. Supp. 2d 1358, 1368 (S.D. Fla. 2002) (holding that water management district was an arm of the state for purposes of Eleventh Amendment sovereign immunity even though the district was self-insured against suit and was 35-45% funded by *ad valorem* taxes). As the Eleventh Circuit has previously found, "[t]he Eleventh

Amendment . . . does not turn a blind eye to the state's sovereignty simply because the state treasury is not directly affected." *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003).[4]

In *Grimshaw*, the court examined whether the South Florida Water Management District ("SFWMD") was an arm of the state under the *Miccosukee* four-factor test and focused on operational characteristics similar to those found here with Halifax. *Id.*, 195 F. Supp. 2d at 1362-63. Importantly, the court found that even though the taxing district served a state function, its *ad valorem* taxing powers do not violate Article VII § 1(a) of the Florida Constitution. *Id.* at 1364 (citing *St. Johns River Water Mgmt. Dist. v. Deseret Ranches of Fl., Inc.*, 421 So. 2d 1067, 1070-71 (Fla. 1982)). The court also found that the State exercised "pervasive and substantial" control over SFWMD based on the following factors: (1) the governor appoints members of the SFWMD's governing board; (2) the governor has authority to remove from office any officer of a water management district; (3) appointment of the executive director is subject to approval of the Senate; (4) the Commission, comprised of the governor, his cabinet among others, has authority to review any rule or order from the SFWMD; (5) the governor is authorized to approve or disapprove of the budget of each water management district; and (6) SFWMD's budget director testified that the governor's control of SFWMD's finances extended to every aspect of the water management district's operations. *Id.* The *Grimshaw* court was not dissuaded from upholding SFWMD's sovereign immunity by either SFWMD's self-funding of 35-45% of its budget through *ad*

[4] The DOJ misapplies the Eleventh Circuit's holding in *Manders* as adverse to Halifax in the present case. In *Manders*, the Eleventh Circuit held that the sheriff was an "arm of the state" carrying out a state function in establishing and enforcing a use-of-force policy and, accordingly, was protected by Eleventh Amendment immunity. *Id.* at 1328. Halifax similarly carries out a state function through the provision of services to indigent citizens of the State under the budgetary and operational control of the State.

valorem taxes or its $6 million in self-insurance. *Id.* at 1369-70. Specifically, the *Grimshaw* court found that "[w]hile a judgment is legally enforceable against [SFWMD], as a practical matter the state's treasury is directly implicated both through the budget process and by the reality that the state in order to execute its water management function and plan for the future must maintain the financial viability of [SFWMD]." *Id.* Halifax's circumstances are far more analogous to SFWMD than not as it similarly serves an indispensable function to the State. The *Grimshaw* court's sovereign immunity analysis is sound.

3. *Bolt v. Halifax* Is Not Controlling Here

The DOJ and Relator have misplaced their reliance on *Bolt v. Halifax Hosp. Med. Ctr.*, 980 F.2d 1381, 1384 (11th Cir. 1993) ("*Bolt IV*"). *See also Bolt v. Halifax Hosp. Med. Ctr.*, 851 F.2d 1273 (11th Cir. 1988) ("*Bolt I*"); *Bolt v. Halifax Hosp. Med. Ctr.*, 874 F.2d 755 (11th Cir. 1989) (en banc) ("*Bolt II*"); and *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810 (11th Cir. 1990) ("*Bolt III*") (collectively, "the *Bolt* decisions"). None of the *Bolt* decisions address either the FCA or Eleventh Amendment sovereign immunity, nor do they apply the *Miccosukee* four-factor test. The *Bolt* holdings should not be stretched to cover the question or the legal standard squarely before the Court here.

In the *Bolt* decisions, the courts addressed Halifax's claims of the state-action exemption to alleged antitrust conspiracy claims. The operative question in the *Bolt* decisions was whether there was "active state supervision" over Halifax's medical staff privilege decisions, an issue that was never addressed by the Eleventh Circuit after Halifax withdrew its claims of state-action immunity. *Bolt IV*, 980 F.2d at 1390.

In dicta, the *Bolt IV* court characterized Halifax as akin to a municipality. *Id.* at 1384. Relator unsurprisingly agrees. *See* Rel. Opp. to Mot. to Dismiss, 3-4. The DOJ also advances this position. *See* DOJ Stmt. of Interest, at 5. Neither comparison, however, withstands close scrutiny, though there is irony in Relator relying on a court decision that states that Halifax is immune from suit in another context.

The Eleventh Circuit did not apply the four-factor "arm of the state" test in the *Bolt* cases. In *Bolt*, the Eleventh Circuit considered whether Halifax could avail itself of the state-action exemption to Sherman Act antitrust violations under the *Parker* doctrine, not Eleventh Amendment sovereign immunity under the *Miccosukee* factors. *See, e.g.*, *Bolt III*, 891 F.2d 810, 817 (11th Cir. 1990) ("In our first effort, we held that the appellee hospitals and their medical staffs were exempt from federal antitrust liability under the state-action doctrine of *Parker* . . .") (citing *Parker v. Brown*, 317 U.S. 341 (1943)). It is well settled law in the Eleventh Circuit that the *Miccosukee* four-factor balancing test is used to determine whether an entity is an arm of the state for Eleventh Amendment sovereign immunity purposes. *See Manders*, 338 F.3d at 1309 ("In Eleventh Amendment cases, this Court uses four factors to determine whether an entity is an 'arm of the State' in carrying out a particular function . . .") (citing *Miccosukee*, 226 F.3d at 1231-34). In its *Bolt* holdings, the Eleventh Circuit determined Halifax's status as a sovereign based solely on whether "in discharging its delegated responsibilities, it is closely supervised and controlled by the sovereign" under *Parker* and *Hoover*. *Bolt III*, 891 F.2d at 824 (considering *Hoover v. Ronwin*, 466 U.S. 558, 568-69 (1984). The ultimate resolution of whether Halifax can avail itself of Eleventh Amendment immunity in the present case will be based on the four-factor *Miccosukee*

balancing test, not under the *Hoover* "supervision and control" test. The *Bolt* cases are no more than a distraction here rather than a source of guidance.

II. RELATOR HAS FAILED TO SATISFY THE PLEADING REQUIREMENTS WITH RESPECT TO THE FALSE CLAIMS ACT FOR HER STARK AND MEDICAL NECESSITY CLAIMS

Relator alleges that Halifax violated the Stark Laws and submitted Medicare claims that were not medically necessary, but Relator has not pleaded either set of claims sufficiently. The Eleventh Circuit has held that Rule 9(b)'s particularized pleading requirement applies to claims arising under the FCA. *See United States ex rel. Clausen v. Lab. Corp. of Am.*, Inc., 290 F.3d 1301, 1308-09 (11th Cir. 2002). In *Clausen*, the relator generally alleged that the defendant laboratory had violated the FCA over a ten-year period by knowingly submitting false claims for unauthorized, unnecessary or excessive medical tests and for over-charging for other tests, but he failed to identify any specific claims submitted by the defendant to the Government. The Eleventh Circuit noted that the FCA does not "create liability merely for a health care provider's disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe." *Id.*, 290 F.3d at 1311.

The Court held that "without the presentment of such a claim, while the practices of an entity that provides services to the Government may be unwise or improper, there is no actionable damage to the public fisc as required under the False Claims Act." *Id.* "The submission of a claim is . . . the *sine qua non* of a False Claims Act violation." *Id.* Thus, the Court held that the relator's failure to allege with any specificity if, or when, any improper claims were actually submitted to the Government was fatal to his complaints. *Id.* at 1312.

The DOJ's heavy reliance on a relaxed application of the *Clausen* pleading standard for Relator's medical necessity claims is incorrect, and the DOJ's failure to defend the sufficiency of Relator's Stark Law claims is telling.

The DOJ's reliance on *United States ex rel. Walker v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349 (11th Cir. 2005), *cert. denied sub nom R&F Properties of Lake County, Inc. v. Walker*, 549 U.S. 1027 (2006), is also misplaced. The generalized nature of Relator's allegations here do not approximate those at issue in *Walker*, where the plaintiff alleged that a nurse practitioner defrauded the government through improper billings for services rendered "incident to" the services of a physician. *Walker*, 433 F.3d at 1353. In *Walker*, the nurse practitioner in question did not have her own billing code, so her default billing of services as "incident to" the service of a physician were *per se* false claims. *Id.* at 1360.

In this case, Relator relies on a targeted audit, devised in-part by the Relator herself, that is not representative of Halifax's overall billing practices. Relator further relies on self-created spreadsheets listing patients, procedures, and government payments to the hospital for services rendered, but no documentation to support her allegations that such submissions were *per se* false. At no point does Relator tie the payments listed to the alleged improper billing or to procedures that did not meet medical necessity criteria.

III. CONCLUSION

For the foregoing reasons, and those stated in Halifax's Memorandum in Support of Motion to Dismiss Second Amended Complaint, this Court should dismiss Relator Kunz's Complaint with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Middle District of Florida using the CM/ECF system on April 20, 2011. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Amandeep S. Sidhu
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