

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

UNITED STATES OF AMERICA *ex. rel.* ELIN
BAKLID-KUNZ,

Relator,

vs.

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.,

Defendants.

CIVIL ACTION FILE
NO. 6-09-CV-1002

[FALSE CLAIMS ACT – QUI TAM]

**RELATOR’S SUR-REPLY IN OPPOSITION TO DEFENDANTS’
MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

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The Halifax Consolidated Reply (“Reply”) does not sustain Defendants’ burden of establishing that Halifax is entitled to Eleventh (“11th”) Amendment immunity or that the Second Amended Complaint (“SAC”) fails to adequately plead fraud under Fed. R. Civ. P. 9(b).

I. Halifax is Not an “Arm of the State” and is Not Entitled to Immunity Under the 11th Amendment

A. *Magula* Dictates No 11th Amendment Immunity for Halifax

Defendants’ conspicuously ignore the case most directly on point that was brought to the Court’s attention by both the United States and the Relator, *Magula v. Broward General Medical Center*, 742 F. Supp. 645, 648 (S.D. Fla. 1990). DOJ Statement of Interest at 5; Response in Opposition at 2 (“Response”). The *Magula* Court decided against Defendants’ position here, holding that the Broward General Medical Center was not an arm of the state and not entitled to share in Florida’s sovereign immunity. *Magula*, 742 F. Supp. at 648-650(citing *Eldred v. North Broward Hospital District*, 498 So.2d 911 (Fla. 1986)). Every aspect of the North Broward Hospital District’s enabling legislation on which the *Magula* Court, guided by the Florida Supreme Court in *Eldred*, relied upon in deciding that the North Broward Medical Center is independent of the state and not entitled to 11th Amendment immunity, is also present in the Halifax District’s enabling legislation and equally applicable to Halifax’s claim of immunity.

B. *Halifax is a Local Government Under Florida Law*

The Florida Statutes establish that Halifax is a local governmental entity. In the chapter dedicated to “Formation of Local Governments,” the legislature defines a “Special district” as “a local unit of special government, as defined in § 189.403(1)[the Uniform Special Districts

Act”].” F.S. § 165.031. The Uniform Special Districts Act defines “special district” as “a local unit of special purpose, as opposed to general purpose, government within a limited boundary For purposes of section 196.199(1)[(government property exempted from taxation)], **special districts shall be treated as municipalities.**” F.S. § 189.403(1)(emphasis added).

Moreover, the Florida Supreme Court has opined that special taxing districts are local governmental entities. *Eldred*, 498 So.2d at 914. The authority to levy ad valorem taxes has been held to preclude 11th Amendment immunity. *Miccosukee Tribe v. S. FL Water Management Dist.*, 1999 WL 33494862 (S.D. Fla. 1999)(statutory authority to levy *ad valorem* taxes conflicts with the Florida Constitution’s prohibition on the state levying such taxes and thus “necessarily requires an interpretation that [the special taxing district] is not a state agency for 11th Amendment purposes.”) Defendants try to avoid the ad valorem death knell by erroneously relying on *Miccosukee Tribe v. Fla. State Athletic Comm’n*, 226 F.3d 1226 (11th Cir. 2000). Reply at 4. But that case provides no safe harbor: It explicitly differentiates the levying of fines by the defendant Florida Athletic Commission from the ability to levy ad valorem taxes. Rejecting the Tribe’s argument that the Commission’s ability to levy fines means the Commission cannot be an arm of the state, the Court explains that “[f]ines . . . differ in kind from ad valorem taxes. [State] Agencies typically levy fines on those who violate laws within the area an agency regulates, while [state] agencies do not impose ad valorem taxes.” 226 F.3d at 1233, ftnt. 9. There is no conflicting authority here. Halifax is a form of local government in Florida and not an arm of the State.

C. *Bolt* is Directly Applicable and Dictates No 11th Amendment Immunity

In addition to refusing to address *Magula* (or the *Eldred* decision on which *Magula* relies), Defendants' Reply attempts to obviate the Eleventh Circuit's holding in *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 824-825 (11th Cir. 1990) ("*Bolt III*"), overruled *sub nom* on other grounds, *Bolt v. Halifax Hospital Medical Center*, 980 F.2d 1381, 1385 (11th Cir. 1993) ("*Bolt IV*"), because the case involved immunity from antitrust liability. Reply at 6-8. But the Eleventh Circuit's scrutiny of Halifax in *Bolt III* is intensely relevant here. Relator is citing *Bolt III* for the proposition that the first factor of the four factor 11th Amendment immunity analysis under *Tuveson*, *Miccosukee Tribe* and the other applicable Eleventh Circuit cases - - how state law defines the entity - - has already been decided and weighs against immunity. In *Bolt III*, Halifax argued that it was a state agency under *Parker v. Brown*, 317 U.S. 341 (1943), and thus immune from antitrust liability, and in the alternative, that it was a municipality and thus could be immune from antitrust liability under the Supreme Court's opinion in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, (1985). *Bolt IV*, 980 F.2d at 1383-84. The Eleventh Circuit held that Halifax was akin to a municipality. *Bolt III*, 891 F.2d at 824. "The powers granted to [Halifax] by its enabling legislation are in many important aspects identical to the powers of a Florida municipality. Compare Fla. Stat. chs. 166, 170 (1987)(general municipality powers) with 1979 Fla. Laws Ch. 79-577 ([Halifax] enabling legislation)." 891 F.2d at 824-825. Contrary to Defendants' hollow attempt to evade the import of this decision, the analysis in *Bolt III* is exactly what is required by the first factor of the four factor 11th Amendment immunity analysis. See Response at 2-4. Defendants do not and cannot distinguish the Eleventh Circuit's

analysis from what is required by the first factor in the 11th Amendment analysis and that factor weighs against immunity.

In addition, *Bolt III* instructs the Court as to the application of the second factor in the 11th Amendment analysis - - whether the state controls Halifax's financial relationships with referring physicians (SAC, Counts 2, 3 and 4) and controls Halifax's submissions of fraudulent claims for payment to government payers (SAC, Count 1). Response at 5-6. In *Bolt III*, the Eleventh Circuit rejected Halifax's argument that it was a state agency acting as sovereign when it denied Dr. Bolt's hospital privileges. 891 F.2d at 824. The Eleventh Circuit looked at Halifax's Enabling Act to determine that Halifax is governed by a board appointed by the governor; and that it is empowered to employ such "agents and employees as may be advisable." *Id.* Halifax is required to disclose its financial condition annually and is required to be audited annually by an independent auditor, with discretionary auditing by the Florida Auditor General. *Id.* Based on those facts (the same as in this case), the Eleventh Circuit held that Halifax's Enabling Act "provides the legislature, supreme court, and governor with no authority to supervise directly the board's personnel decisions, imposing upon the board a general duty to act in a manner consistent with the 'public good.'" *Id.*

The very same aspects of the Halifax Enabling Act are before this Court and the same conclusion must be reached: Nothing in Halifax's Enabling Act provides the legislature, supreme court, or governor with authority to supervise directly Halifax's financial relationships with referring physicians and Halifax's submissions of fraudulent claims.¹ Halifax does not attempt to distinguish the Eleventh Circuit's analysis of its independence from the state from

¹ Defendants also cite the fact that the Halifax Board has to hold meetings that are open to the public as evidence that it is an arm of the state. Reply at 3. But that is true for municipal and county hospitals as well, which do not enjoy 11th Amendment immunity. F.S. § 286.011.

what is required by the second factor in the 11th Amendment immunity analysis. That factor also weighs against immunity. Halifax has previously admitted that the fourth and most important factor -- whether a judgment against the entity is must be satisfied out of the state treasury -- also weighs against immunity. Reply at 2-3.

D. The Governor-Appointed Board of Commissioners of Halifax Hospital District does not Afford the Governor “Ultimate Authority” over Halifax

Defendants’ “governor-controlled Board of Commissioners” that “has ultimate oversight of the following critical operational matters . . .,” Reply at 3, is not “governor-controlled” at all. The Governor appoints the board members for 4 year terms and all must be residents of the District. F.S. Ch. 2003-374, §2(1). The Governor is empowered to suspend board members and county officials for “malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony.” *Id.* §2(2)(citing FL Const. Art. IV, §7). Further “[Halifax’s enabling] legislation . . . provides the legislature, supreme court, and governor with no authority to supervise directly the board’s personnel decisions, imposing upon the board [only] a general duty to act in a manner consistent with the public good.” *Bolt III*, 891 F.2d at 824. The level of state control over Halifax’s Board is at issue here: The level of Halifax’s board’s involvement, or lack thereof, in Halifax’ operations (including its contracts with referring physicians and decisions on medical treatment and billing therefor) is not relevant to whether Halifax is an arm of the state for 11th Amendment purposes.

As a legal matter, “the power to appoint is not the power to control . . . [e]specially when that power is diffused among different public officials who may hold quite different views of how the entity should conduct itself.” *Takle v. Wisconsin Hospital and Clinics Authority*, 402 F.3d 768, 770-71 (7th Cir. 2005) (hospital authority created by Wisconsin legislature separate

from the state university is not an arm of the state and not entitled to Eleventh Amendment immunity).²

Defendants erroneously cite to the Bylaws of the Board of the Halifax Special Taxing District as “state law.” Reply at 3, fnntes. 1-3 and at 4. But Halifax is not subject to the Florida Administrative Procedure Act and does not engage in rulemaking. Accordingly, its Bylaws cannot be considered state law. *Eckert v. Board of Commissioners of the North Broward Hospital District*, 720 So.2d 1151, 1154 (Fla. 4th Dist. 1998). Further, the Board can amend its Bylaws at any time without state approval. Bylaws, Art. X. Thus the Bylaws do not assist in an analysis of how Florida *law* defines Halifax.

Defendants argue that the state has “ultimate authority over Halifax’s expenditures” and “effectively control[s] Halifax’s budget” because “[t]he state retains oversight of Halifax’s use of all state funding that it receives.” Reply at 3. But Florida law permits the state to monitor the use of state funds **IF** the state issues state funds to a special district. F.S. § 189.413. There is nothing in the record to suggest any material or identifiable funding relationship between the state and Halifax. Halifax is self-funded through patient service fees, ad valorem taxation and investment income. See selected pages of Halifax Audit Report, Attachment 4 to Relator’s Response in Opposition. Further, the state does not approve or control Halifax’s budget. Compare F.S. § 189.418 (allowing governing body of each special district to adopt a budget each fiscal year without approval from the state) with F.S. § 373.536 (requiring water districts to submit tentative budgets to the Executive Office of the Governor for review and approval or

² See also *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico & Caribbean Cardiovascular Center Corp.*, 322 F.3d 56, 68 (1st Cir. 2003) (hospital that was special purpose public corporation established by Commonwealth of Puerto Rico is not an arm of the state and not entitled to Eleventh Amendment immunity), *cert. denied sub nom. Puerto Rico v. Fresenius Medical Care Cardiovascular Center Corp.*, 540 U.S. 878, 124 S.Ct. 296 (2003).

disapproval). The contrast fully illustrated below between the state's control over water districts as compared to Halifax's relationship to the state, is stark and a matter of record.

E. *Grimshaw* is a Water District Case Involving Statewide Water Management.

Ignoring the applicable Florida special hospital district cases, Defendants reach out and far afield to one of the many Florida water district cases, *Grimshaw v. South Florida Water Management District*, 195 F.Supp. 1358, (S.D. Fla. 2002). Reply at 5. Not only is *Grimshaw* readily distinguishable from the case at bar because it deals with regional water management for Florida and a critical state resource (water) rather than medical services for 1/3 of 1 county, but its holding is in conflict with other holdings on the same subject in the same court. See *Miccosukee Tribe of Indians of Florida v. So. Florida Water Mgmt. Dist.*, Case No. 98-6056-Civ, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999)(after recognizing conflicting authority, the court conducted an independent analysis and found all four factors require a finding that SFWMD is not an instrumentality of the state); *Thomas v. SFWMD*, No. 96 Civ. 896 (M.D. Fla. March 23, 1998); *IT Corp. v. So. Florida Water Mgmt. Dist.*, Case No. 97-8872-Civ (S.D. Fla. July 20, 1998). Relator is compelled to note that Defendants have again failed to disclose conflicting precedent to the Court.

Even if the *Grimshaw* holding were not contradicted by other opinions, it is limited to water management districts and has no bearing on the very different animal that is a hospital district. See *Friends of the Everglades, Inc. v. South Florida Water Management District*, 2006 WL 3635465, *52-53 (S.D. Fla. 2006) (examining legislative intent in establishing water districts to accept the delegation of power from the FL Dept. of Environmental Protection to manage water), *rev'd in part on other grounds, appeal dismissed in part* 570 F.3d 1210 (11th

Cir. 2009), *cert. den.* 131 S.Ct. 643 (2010). Florida law divides the State into 5 regional water management districts. F.S. § 373.0693. The South Florida Water Management District (“SFWMD”) encompasses all or part of 16 counties in total, covers an area of 17,930 square miles and includes a population of approximately 6 million people. *Grimshaw*, 195 F. Supp.2d at 1360. Water management in Florida is a distinctly state function because water is a critical state resource. *Friends of the Everglades* at *52-53.

In sharp contrast, Halifax is not a delegate of any state department or agency, as are water districts. Halifax is one of 28 special taxing hospital districts operating hospitals in Florida, and it is one of three such districts in Volusia County alone. As stated by the Eleventh Circuit, the powers granted to Halifax in its enabling legislation are “virtually identical to those of a municipality in many important respects.” *Bolt III*, 980 F.2d at 1384.

F. The Record is Insufficient to Grant Halifax 11th Amendment Immunity

Although Relator brought it to the Court’s and Defendants’ attention in her Response, Defendants fall woefully short in creating the requisite record upon which the Court could determine that Halifax is an arm of the state. *See Brown v. East Central Health District*, 752 F.2d 615, 617 (11th Cir. 1985)(record insufficient to determine District’s immunity under the 11th Amendment). Like Defendants’ Memorandum in Support of their Motion, Defendants’ Reply contains conclusory allegations and unsupported factual assertions that simply cannot support a decision to give Halifax (and the other 27 Florida hospital districts just like it) a get-out-of-jail-free card under the 11th Amendment. There is nothing in the record that demonstrates that the Board of Commissioners, much less the state, is involved in Halifax’s contracts with referring

physicians or in Halifax's decisions on what medical care to provide to patients (inpatient or observation), or how to bill or code claims for Medicare patients.³

II. Relator's Complaint and Exhibits Identify Over 216 Specific False Claims and Numerous Stark Violations, thereby Satisfying the Requirements of Rule 9(b)

Defendants add absolutely nothing new in their Reply to create any legitimate doubt about the sufficiency under 9(b) of Relator's allegations. Instead, Halifax continues to utterly ignore the detailed facts and allegations contained within Relator's SAC ¶¶ 63, 76-78, 84-87, 89, 91-92, 96-97, 130, 140-141 and Exhibits 1-3, 5, 7-9 and 23.⁴ For example, within the SAC, Exhibit 5, Relator provides specific and unambiguous information for 216 separate fraudulent submission of false claims by Halifax that resulted in Medicare being bilked out of \$844,821.

Despite the fact that Relator's allegations are precise and comprehensive, Halifax refers to Relator's allegations as "generalized" and implies that Relator has failed to establish that improper claims were "actually submitted" to Medicare. Reply, at 8-9.⁵ Relator pleads that specific false claims for payment were submitted to Medicare (SAC ¶ 64) and then shows Halifax's receipt of payments from Medicare for each such false claim (SAC, Exhibit 5). Similarly, Relator pleads that physicians with illegal financial relationships with Halifax referred Medicare patients to Halifax (SAC ¶ 106) and then shows examples of Halifax's receipt of payments from Medicare for treatment of specific patients referred by those physicians (SAC, Exhibit 3, highlighted in relevant respects and attached to the Response as Attachment 5).

³ In fact, the Contract Cover Sheets for the agreements with the specialists indicate that the Board of Commissioners had no involvement in signing off on those contracts. See SAC Exhibit 15, pp. 1, 15, 17, 28, 30, 42, 44, 57, 59, 72, 74, 76; Exhibit 17, pp. 1, 2, 7, 9, 11, 17, 19, 23; Exhibit 20, pp. 1, 9, 11, 13, 20, 27, 42.

⁴ Relator does not have to plead every element of every scheme. See *U.S. ex rel. Longest v. Dyncorp*, 2006 WL 47791 (M.D. Fla. 2006).

⁵ In the same vein, it is incredible that Defendant states, "at no point does Relator tie the payments listed to the alleged improper billing or to the procedures that did not meet medical necessity criteria." That statement simply ignores the SAC ¶¶ 63, 76-78, 84-87, 89, 91-92, 96-97, 130, 141-142 and Exhs. 1-3, 5, 7-9 and 23.

Finally, Defendant states that “[t]he DOJ’s failure to defend the sufficiency of Relator’s *Stark* law claims is telling.” Reply at 9. This statement is very misleading. The 9(b) standards from the controlling Eleventh Circuit case law cited by Relator, Halifax and the DOJ apply to both the FCA medical necessity false claims and Relator’s *Stark* law claims. There are not two different 9(b) standards. Relator’s SAC contains substantive and specific *Stark* allegations that satisfy the requisite 9(b) standards. See SAC §§ 98-156 and Exhs. 13-22.

The SAC fully satisfies all 9(b) requirements for all claims asserted, including the *Stark* and kickback claims. Relator exceeds the pleading standards for an insider under *U.S. ex rel. Walker v. R&F Properties*, 433 F.3d 1349 (11th Cir. 2005), and far surpasses the standards for an ‘outsider’ under *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301 (11th Cir. 2002).

Conclusion

Following the precedent set by *Magula*, *Eldred* and *Bolt III*, as well as the Florida Statutes, it is clear that Halifax is not entitled to 11th Amendment immunity. The *Grimshaw* case is distinguishable as a water district case. The meticulous details and specificity of the SAC and its Exhibits far exceed the applicable 9(b) standards in this Circuit. Defendants’ Motion to Dismiss should be denied in its entirety.

Respectfully submitted this 29th day of April, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system and notification and service will be provided to counsel of record via the CM/ECF notification system.

s/ Christopher Casper_____