UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel., DR. GABRIEL FELDMAN,

Plaintiff,

v.

THE CITY OF NEW YORK,

Defendant.

09 Civ. 8381 (JSR)

ECF Case

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

THE CITY OF NEW YORK,

Defendant.

THE UNITED STATES'S MEMORANDUM OF LAW IN OPPOSITION TO THE CITY OF NEW YORK'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff-intervenor the United States respectfully submits this memorandum of law in opposition to defendant the City of New York's motion for summary judgment.[1]

PRELIMINARY STATEMENT

For a decade, HRA's administration of the PCS program was a mirage. While HRA assumed the responsibilities of a local administrator and made it appear that it was authorizing 24-hour PCS care in accordance with applicable state regulatory requirements, the evidence demonstrates that HRA wholly ignored its responsibility and caused millions in Medicaid funds to be expended in violation of state regulations. Specifically, HRA was well aware that state regulations required authorizations to be based on specific medical and clinical assessments, but it either just ignored such regulatory requirements or recklessly failed to make its employees aware of HRA's own policies implementing these requirements. In the words of its own medical director, HRA's indifference to compliance turned "each of the CASAs [into] sort of a kingdom of their own . . . [with] their set of rules or decisions [on] how they conducted their processes." Nonetheless, HRA issued thousands of authorizations of 24-hour PCS care, implicitly representing that the provision of such services was in accordance with the state regulatory requirements.

The City does not seriously dispute the Government's core factual allegations. Instead, it seeks to evade responsibility for its conduct by advancing five sets of legal arguments that ignore or misstate the law and/or critical facts. None of these contentions has any merit.

First, for the first time in this extensive litigation, the City now asserts that it cannot be held liable for HRA's actions – however reckless and harmful to the public fisc – because the City is not a "person" subject to liability under the False Claims Act, 31 U.S.C. § 3729 *et seq*. ("FCA"). *See* Memorandum of Law in Support of the City of New York's Motion for Summary Judgment ("NYC SJ Br.") at 13. This argument has no merit. *See infra* Point I. The Supreme Court has

[1] Unless specifically noted below, the abbreviations in the Government's opening brief in support of its partial motion for summary judgment are incorporated herein by reference.

unambiguously held that municipal corporations, like the City, are "persons" under the FCA. *See Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 122 (2003). Nor can the City shield itself from FCA liability by proclaiming HRA to be "an arm of [New York] State" because, under the applicable legal standard, HRA is not a state agency or "an arm of the State" for Eleventh Amendment purposes. *See Stoner v. Santa Clara County Office of Education*, 502 F.3d 1116, 1121 (9th Cir. 2007).

Second, the City claims that, notwithstanding its reckless disregard of the governing regulatory requirements, HRA did not cause any false certification either because DOH, the submitting party, was not aware of HRA's unlawful conduct, *see* NYC SJ Br. at 17-18; or because compliance with the State PCS Regulation is not a "precondition of payment" by CMS, *see id*. at 13-16. However, as recently reaffirmed by the First Circuit in *U.S. ex rel. Hutcheson v. Blackstone Medical, Inc*., --- F.3d ----, 2011 WL 2150191, (1st Cir. June 1, 2011), a party, like HRA, that causes a false claim to be submitted may be held liable under the FCA, even if the party submitting the claim, like DOH, is not aware of the falsity. *See id*., at *10-12. Further, under the Second Circuit's decision in *U.S. ex rel. Kirk v. Schindler Elevator Corp*., 601 F.3d 94 (2d Cir. 2010), *rev'd on other ground*, 131 S. Ct. 1885 (2011), the City cannot avoid liability for making a false record under section 3729(a)(1)(B) of the FCA, irrespective of whether the State PCS Regulation is a "precondition of payment." *See id*. at 115-16. In addition, the City is also wrong on the facts — the record shows that federal contributions to expenditures on PCS services required was premised on such expenditures being authorized in compliance with the State PCS Regulation. *See infra* at 10-11. Finally, the City entirely fails to address the "implied certification" theory of falsity. *See infra* Point II.C.

Third, the City posits that it may not be held liable under the FCA because the Form CMS-64 certification at issue is "far too sweeping." *See* NYC SJ Br. at 16-17. This contention

lacks merit both factually and as a matter of law. *See infra* Point III. The record shows that this certification is not surplusage, but instead is a specific requirement designed to implement long-standing federal policies on the allowability of Medicaid expenditures. *See infra* at 12. Further, the Government has obtained judgment under the FCA based, in part, on the falsity of the same certification in the Form CMS-64 that is at issue here. *See United States ex rel. Tyson v. Amerigroup Illinois, Inc*., 488 F. Supp. 2d 719, 723 (N.D. Ill. 2007).

Fourth, the City further asserts, speciously, that HRA did not actually violate the State PCS Regulation because the Government is relying on "incorrect understandings" of that regulation. *See* NYC SJ Br. at 18–22. For example, the City tries to gloss over HRA's reckless conduct by redefining what "split-shift" service means. *See id.* at 20-21 (claiming that "split-shift" is not synonymous with "continuous 24-hour" PCS care). The record, however, belies this and other *post hoc* rationalizations — according to HRA's own "glossary," and as confirmed by deposition testimony of HRA's 30(b)(6) witness, HRA used "split-shift" to refer to "continuous 24-hour" PCS care, *i.e.*, as it is used in this action. *See infra* Point IV.

Finally, the City erroneously contends that HRA lacked the requisite *scienter*. *See* NYC SJ Br. at 22-25. The evidence, however, demonstrates that HRA, at a minimum, acted in reckless disregard of the federal funding requirements. Under the FCA, this is sufficient for *scienter*. Further, the record – including admissions by HRA witnesses and HRA's own documents – shows that HRA utterly failed to meet its compliance responsibility. This refutes the City's suggestion that HRA reasonably tried to comply with the state regulation. Lastly, the FCA expressly does not require proof of a "specific intent to defraud." 31 U.S.C. § 3729(b)(1)(B). Thus, the City cannot evade liability by disclaiming any motive by HRA to defraud. *See infra* Point V.

COUNTER-STATEMENT OF BACKGROUND

There is no dispute that HRA administers the PCS program to Medicaid beneficiaries in New York City, or that this program involves approximately $2 billion in annual expenditures.[2] Likewise, it is undisputed that New York State has promulgated Medicaid regulations implementing the PCS program, *see* 18 N.Y.C.R.R. § 505.14, and the State PCS Regulation supplements federal PCS rules and regulations by, *inter alia*, setting forth specific assessments that local administrators, like HRA, must consider in determining what amount of PCS service, if any, is appropriate for a patient.[3] *See id.*

To evade liability, however, the City mischaracterizes: (*i*) the nature of the state regulatory requirements for authorizing 24-hour PCS services, *see* NYC SJ Br. at 10–12; (*ii*) whether HRA complied with these requirements, *id*. at 11; (*iii*) whether HRA's compliance with the state regulatory requirements had any bearing on the allowability of federal funding, *id.* at 7–10; and (*iv*) HRA's relationship to the State with respect to the PCS program, *id.* at 10. As set forth below, the record undermines each of these mischaracterizations. *First*, the State PCS Regulation expressly required HRA to consider certain assessments in authorizing 24-hour PCS service. *See infra* at 5–8. *Second*, HRA wholly failed to follow these requirements in authorizing and reauthorizing 24-hour PCS care. *See infra* at 8–10. *Third*, complying with the State PCS Regulation was a prerequisite for federal funding to be "allowable." *See infra* at 10–14. *Finally*, the State has not provided HRA with either any insulation from legal liability or the operational oversight necessary to render HRA a state agency or an "arm of the State" for Eleventh Amendment purposes. *See infra* at 14–16.

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[2] Contrary to the City's assertion, *see* NYC SJ Br. at 6, PCS is an *optional* service under Medicaid. *See, e.g.*, *Carter v. Gregoire*, 672 F. Supp. 2d 1146, 1150 (W.D. Wash. 2009) ("Other services, such as personal care services, are optional . . . ").

[3] As with other Medicaid programs, New York's PCS program, is subject to both state and federal rules and regulations. *See* Declaration of Dianne Heffron, dated August 23, 2011 ("Heffron Decl.), at ¶ 4; *see generally* 42 C.F.R. § 430.0.

A. <u>**The State PCS Regulation Provided HRA with Express Requirements on How to Determine Whether to Authorize or Reauthorize 24-Hour PCS Care**</u>

1. <u>The State PCS Regulation Required HRA to Obtain Nursing Assessments Prior to Reauthorizing 24-Hour PCS Care</u>

The City suggests that HRA was not required to obtain nursing assessments to determine whether to reauthorize 24-hour PCS service, as long as it contracted with vendors to have nurses conduct such assessments. *See* NYC SJ Br. at 22. Indeed, while the City does not dispute that the State PCS Regulation required HRA to obtain and to review medical, nursing, and social assessments before authorizing the initiation of 24-hour PCS services, its brief fails to acknowledge that the state regulation also provided requirements on how HRA was to determine whether to *reauthorize* the continuation of such services. *See id*. at 10–12 (addressing only the state regulatory requirements for *initial* authorizations).

The record squarely refutes the City's contention. First, the State PCS Regulation specified that HRA must follow the same procedures to determine whether to reauthorize 24-hour PCS services as the procedures required for initial authorizations, which includes obtaining nursing assessments. *See* 18 N.Y.C.R.R. § 505.14(b)(5)(ix) ("Reauthorization for personal care services shall follow the procedures outlined in paragraphs (2) through (4) of this subdivision"), (b)(2)(iii) (requiring HRA to obtain nursing assessments for initial authorizations). Indeed, HRA has admitted that this has been a requirement for reauthorization of 24-hour PCS service since at least 1995. In that regard, according to HRA's current reauthorization manual, case management staff at HRA must obtain a nursing assessment before 24-hour care service can be reauthorized. *See* Procedure for the Workflow of Home Care Reauthorizations (Friedman Ex. 35), at 4-5 ("Case packages <u>without required M-27R [nursing assessment] . . . are incomplete and will not be reauthorized</u>") (emphasis in original). This manual reflects HRA's understanding as to what is required under the State PCS Regulation. *See* HRA Dep. II at 299:24–301:12 (Martin Ex. 2). Further, HRA's 30(b)(6)

witness conceded that the same requirements for reauthorizing 24-hour care has been in effect since at least 1995. *See id.* at 104:7–107:5.

2. The State PCS Regulation Required HRA to Obtain Independent Medical Determinations Prior to Reauthorizing 24-Hour Split-Shift Service

There can be no genuine dispute that, under the State PCS Regulation, HRA was required to obtain independent medical determinations before reauthorizing continuous 24-hour PCS service (which HRA refers to as "split-shift" service). *See* 18 N.Y.C.R.R. § 505.14(b)(4) (requiring independent medical determinations for initial authorization of continuous 24-hour PCS service); (b)(5)(ix) (imposing the same requirement for reauthorizing such service); *see also* Nov. 4, 2010 Holm E-mail, at 1-2 (Ex. 24 to Martin Decl.) (explaining that the state regulation requires independent medical review for split-shift reauthorizations). The City, however, asserts that this requirement does not apply either because the Government has improperly equated 24-hour "split-shift" service with "continuous 24-hour personal care service," as defined in the State PCS Regulation, or because the decision in *Mayer v. Wing*, 922 F. Supp. 902 (S.D.N.Y 1996), obviated the need for HRA to obtain independent medical review. *See* NYC SJ Br. at 20-22.

As an initial matter, the City argues that its "split-shift" cases did not necessarily involve "continuous 24-hour care," *see* NYC SJ Br. at 21, but the City's effort to redefine "split-shift" simply cannot be squared with HRA's own records and the testimony of HRA's witnesses. For example, according to a "glossary" of "personal care" terms in a HRA presentation, "split-shift" refers to situations where "clients receive *continuous 24-hour care* from 2 different home attendants who stay awake during 12 hour shifts." *See* Home Care Services Program, dated Nov. 9, 2010, at 8 (Friedman Ex. 32) (emphasis added); *see also* Nov. 4, 2010 Holm E-mail (Martin Ex. 24) (discussing split-shift service as continuous 24-hour service under the State PCS Reglation). Similarly, HRA employees, including HRA's 30(b)(6) representative, all acknowledged that HRA used the term "split-shift" to refer to "continuous 24-hour [service]" in the State PCS Regulation.

See HRA Dep. II at 47:12–17 (Q. "[I]s it your understanding that split-shift service refers to continuous 24-hour PCS service as defined under [18 N.Y.C.R.R.] § 505.14(a)(3)?" A. "Yes") (Martin Ex. 2); *see also* Soto Dep. at 29:5–8 (Martin Ex. 21).

Further, the City's claim – that HRA reasonably believed the *Mayer* decision to have "eliminated the need for independent medical review for re-authorizations," NYC SJ Br. at 21 – also finds no basis in the record. Indeed, HRA's 30(b)(6) witness was unable to identify any basis – in the *Mayer* decision or in any analysis of *Mayer* prepared by HRA – that excused HRA from complying with the State PCS Regulation's authorization and reauthorization requirements. *See* HRA Dep. II at 81:11–84:9 (Martin Ex. 2); *see also* Holm Decl. at ¶ 20 (claiming that, on an unspecified date, an unnamed HRA employee told her, without explanation, that *Mayer* had eliminated the need to obtain independent medical reviews).

3. <u>The State PCS Regulation Did Not Permit HRA to Arbitrarily Overrule Independent Medical Determinations by LMDs</u>

The State PCS Regulation unequivocally provides that the determination of an independent medical reviewer on whether a patient should receive 24-hour sleep-in or split-shift service is "final." *See* 18 N.Y.C.R.R. § 505.14(b)(4)(ii). The City claims that state court decisions authorized HRA to ignore this requirement of the state regulation and overrule the determinations of the independent medical reviewer. *See* NYC SJ Br. at 11-12 (citing *Kuppersmith v. Dowling*, 246 A.D.2d 473, 474 (N.Y. App. Div. 1998); *DeGraffe v. City of New York*, 2010 WL 546064, at *4 (N.Y. Sup. Ct. Jan. 8, 2010); and *Bentley v. Perales*, 103 A.D.2d 1005 (N.Y. App. Div. 1984)).

The City is simply wrong in its characterization of these state court decisions. At the outset, none of these decisions holds that HRA did not have to comply with the State PCS Regulation and abide by the determination of the independent medical reviewer. Indeed, in *Bentley*, the Appellate Division upheld the finality accorded to the independent medical determination under the State PCS Regulation, and declined to defer to the PCS patient's own treating physician. *See*

id., 103 A.D.2d at 1005 (upholding a local medical director's determination); *see also Kuppersmith*, 246 A.D.2d at 474 (upholding 18 N.Y.C.R.R. § 505.14(b) and declining to adopt a "treating physician rule"). Nothing in these decisions permitted HRA to ignore the state regulation's requirement and allow its employees to overrule independent medical determinations on an *ad hoc*, "case by case" basis, but HRA did so any way. *See* HRA Dep. II at 186:7–188:5 (acknowledging that HRA's policy allowed CASA directors to overrule independent medical determinations as to amounts of care "case by case") (Martin Ex. 2).[4]

B. <u>HRA's Wholesale Disregard of the State PCS Regulation's Requirements for Authorizing and Reauthorizing 24-Hour PCS Service</u>

The City asserts that, during all relevant times, it "had in place policies, mechanisms and contracts to authorize PCS" in accordance with the State PCS Regulation. *See* NYC SJ Br. at 11. However, the generic summary in the City's 56.1 Statement of what the state regulation required and what HRA staff "may" have done or "typically" did, *see* NYC 56.1 Stmt. at ¶¶ 99–117, does not support the City's assertion. Instead, the evidence shows that HRA failed to implement any "policies [or] mechanisms" to ensure that its employees complied with the state regulatory requirements in authorizing or reauthorizing 24-hour PCS service, and that HRA's reckless disregard of its compliance obligation caused widespread violations of the requirements.

First, there is no meaningful dispute that, until late 2008, HRA lacked a policy requiring its employees to obtain nursing assessments prior to reauthorizing 24-hour PCS care. This is illustrated by the record in several ways: (*i*) the absence of such a requirement from HRA's reauthorization manual, which remained in effect until late 2010, *see* 1992 Manual at 9-10 (Martin Ex. 30); (*ii*) HRA's 30(b)(6) witness's deposition testimony, *see* HRA Dep. II at 131:16–134:2

[4] The City also suggests that the HRA Commissioner had some vague, undefined authority to overrule independent medical determinations and/or ignore regulatory requirements. *See* NYC SJ Br. at 11. But there is nothing in the State PCS Regulation, the cases cited by the City, or the record to support this putative authority. *See also infra* at Point IV.C.

(HRA policy "did not indicate that we had to have [nursing assessment] prior to the reauthorization of service") (Martin Ex. 2); and (*iii*) the nearly identical testimony of numerous other HRA employees, *see*, *e.g.*, Jenkins Dep. at 49:16–25 (Martin Ex. 14); Guzman Dep. at 104:17–107:8 (Martin Ex. 10); Kapsalis Dep. at 205:17–207:3, 216:3–217:4 (Martin Ex. 16). Moreover, because HRA failed to require its employees to comply with the nursing assessment requirement, it became a standard practice for HRA staff to reauthorize 24-hour PCS care without obtaining nursing assessments, in violation of the State PCS Regulation. *See* Hill Dep. at 33:7–34:24 (case worker did not obtain nursing assessments before reauthorizing half of his 24-hour split-shift cases) (Martin Ex. 12); Brady Dep. at 250:13–257:25 (2008 HRA internal audit found numerous missing nursing assessments from patients' case files) (Martin Ex. 5); US 56.1 Stmt. at ¶¶ 78–122 (identifying 13 cases where HRA reauthorized 24-hour PCS services without corresponding nursing assessments).

Second, the record also shows that, from 2000 to late 2010, HRA did not make its employees aware of the state regulatory requirement for obtaining independent medical reviews prior to reauthorizing 24-hour split-shift services. For example, HRA's director of field operations for PCS testified that she did not know HRA was required to obtain independent medical reviews to reauthorize 24-hour split-shift services until "the start of this litigation." *See* Holm Dep. at 196:15–198:12 (Martin Ex. 13). The failure to communicate this requirement, in turn, resulted in HRA having a *de facto* policy of reauthorizing 24-hour split-shift services without any independent medical review, in violation of the State PCS Regulation. *See generally* US 56.1 Stmt. at ¶¶ 80–82, 90-122 (summarizing evidence that HRA repeatedly reauthorizing of 24-hour split-shift services for eleven patients without obtaining any independent medical review); *see also* Shyne Dep. at 116:13–17 (case worker who repeatedly reauthorized 24-hour split-shift service for patient not aware of any independent medical review) (Martin Ex. 20).

Finally, the undisputed evidence reveals a pattern of HRA staff arbitrarily overriding the

independent medical determinations of LMDs as to the appropriate care for 24-hour PCS patients. Although HRA's medical director, Dr. Ana Soto, and its previous director of field operations for PCS, Barbara Draimin, devised a procedure intended to ensure that disagreements between HRA's local office staff and LMDs about the appropriate amounts of care would be resolved consistently and in accordance with the State PCS Regulation, *see* May 29, 2008 Dramin E-mail (describing the procedure) (Martin Ex. 26), Soto Dep. at 58:5–59:5 (Martin Ex. 21), the evidence shows that HRA has not required its local offices to follow that procedure. Instead, the local office directors have been allowed to overrule independent medical determinations without having to adhere to any objective standard. *See* HRA Dep. II at 187:17–188:5 (local offices can overrule LMD determinations on "a case-by-case basis [] depending on where the situation falls") (Martin Ex. 2). As the record shows, the failure to implement a policy requiring adherence to independent medical determinations resulted in a practice at HRA – from the local office level up to the Commissioner level – of arbitrarily overruling independent medical determinations in violation of the State PCS Regulation. *See* US 56.1 Stmt. at ¶¶ 47–77 (documenting instances where HRA overruled independent medical determinations on inappropriate grounds).

C. To Be Eligible for Federal Funding, Medicaid Expenditures Must Comply with the Applicable State Medicaid Regulations

Although the City devotes much ink to argue that compliance with the State PCS Regulation purportedly "is *not* a pre-condition of [federal financial participation]" for expenditures on 24-hour PCS services, *see* NYC SJ Br. at 7-10 (emphasis in original), it largely ignores OMB Circular A-87, consigning it to a footnote, *see id.* at 14 n.8. The City, however, cannot minimize the import of that Circular by proclaiming its irrelevance, when OMB Circular A-87 has been recognized to have the "force of regulation" for determining whether state Medicaid expenditures are entitled to federal financial participation. *See State of New York v. Shalala*, 979 F. Supp. 177,

179 (S.D.N.Y. 1997), *aff'd*, 143 F.3d 119 (2d Cir. 1998).[5] Nor can the City pretend there is no federal requirement for Medicaid expenditures to be authorized by HRA in accordance with the applicable state regulations — when that requirement can be found not only in OMB Circular A-87, but also in the quarterly cost reports that CMS has required states to submit to retain ongoing federal Medicaid funding. *See* Heffron Decl. at ¶¶ 21-22.

1. Under OMB Circular A-87, CMS Can Disallow Claims for Federal Financial Participation If the Expenditures Violated State Medicaid Regulations

CMS and its predecessor agency, the Health Care Financing Administration ("HCFA"), have long relied on OMB Circular A-87 to determine whether claims seeking federal financial participation for Medicaid expenditures are allowable or unallowable. *See* Heffron Decl. at ¶ 9; *see generally New York v. Shalala*, 979 F. Supp. at 179. Further, during all relevant times, OMB Circular A-87 provided that allowable expenditures must be "authorized or not prohibited under State [] laws or regulations." 2 C.F.R. § 225, App. ¶ A(C)(1)(c); *see also* 45 C.F.R. § 92.22(b) (OMB Circular A-87 applied to expenditures of Medicaid funds by state and local governments).

Pursuant to that provision of OMB Circular A-87, CMS and HCFA have disallowed numerous claims seeking federal financial participation on the grounds that the Medicaid expenditures at issue did not comply with the applicable state Medicaid regulations. *See* Heffron Decl. at ¶ 9. When states have appealed such disallowances, the Departmental Appeals Board for the U.S. Department of Health and Human Services ("DAB") has expressly determined that OMB Circular A-87 "provides a basis for a Medicaid disallowance even where [there is no allegation] that any specific federal Medicaid standards had been violated." *Id.* (quoting DAB Decision, dated Nov. 3, 1989 ("1989 DAB Decision"), at 8 (Heffron Ex. 1)). Indeed, the DAB has recognized that, under OMB Circular A-87, CMS may reasonably "conclud[e] that reimbursements which violated the

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[5] This is especially surprising because HRA's own fiscal manual identifies this OMB Circular as a source of "cost principles." *See* Contract Fiscal Manual, App. A (North II Ex. T).

standards set forth in [New York State Medicaid regulations] were not 'authorized' or were 'prohibited'." *See* 1989 DAB Decision, at 8 (Heffron Ex. 1).[6]

2. Federal Contribution to Medicaid Expenditures Is Expressly Conditioned on the Allowability of Such Expenditures under Relevant State Medicaid Regulations

Federal contributions to state Medicaid expenditures are made in a two-step process. *See* Heffron Decl. at ¶ 11. First, prior to the start of each quarter, states must submit Medicaid expenditures estimates, *i.e.*, Form CMS-37, to CMS, allowing CMS to determine how much grant funding to make available to the states during that quarter. *Id*. at ¶¶ 12–15. After the conclusion of each quarter, each state must then submit a report of its actual Medicaid expenditures, *i.e.*, Form CMS-64, to CMS, enabling CMS to reconcile the estimated and actual expenditures and determine the appropriate grant amounts in the subsequent quarters. *Id*. at ¶¶ 16-17.

Since September 2001, CMS required the quarterly reports of actual Medicaid expenditures (Forms CMS-64) to be accompanied by a certification that all of the reported expenditures were "allowable in accordance with applicable implementing federal [and] state [] statutes, regulations, policies." *See*, *e.g.*, 2001 3Q NY CMS-64 (Ex. 37 to Martin Decl.); Heffron Decl. at ¶ 20. The inclusion of this certification reflects the importance, in the Medicaid context, of ensuring that expenditures must comply with not only federal rules and regulations, but also the state rules and regulations that supplement the federal rules.[7] *See* Heffron Decl. at ¶ 22; *see generally* 42 C.F.R. § 430.0 (in Medicaid, "each State decides eligible groups, types and range of

[6] The DAB is an administrative tribunal with the authority to review CMS's disallowance determinations under Medicaid. *See generally* 45 C.F.R. Pt. 16, App. A.

[7] The City makes much of the fact that New York State uses eMedNY, an automated system, to process Medicaid claims and submit cost reports to CMS. *See* NYC SJ Br. at 8, 14-15. But the City is simply wrong in asserting that eMedNY was approved by CMS "as providing information sufficient to determine 'allowability' for FFP purpose." *Id*. An automated system like eMedNY "cannot assure that all claims [] are allowable under the federal and state Medicaid rules and regulations" or, for that matter, whether the claimed services were "medically necessary or . . . actually provided." Guhl Decl. at ¶ 6 Indeed, as a DOH employee admitted, eMedNY cannot be expected to detect all unallowable claims. *See* Wendell Dep. at 136:15–23 (North II Ex. K).

services, payment levels for services, and administrative and operating procedures" within "broad Federal rules").

For CMS, the six certifications in the Form CMS-64 serve distinct purposes, and each must be considered independently from one another. *See* Heffron Decl. at ¶ 23. Thus, each of the six certifications is a necessary prerequisite to a determination that the costs reported in the Form CMS-64 are allowable. The certification that the reported expenditures complied with the applicable state Medicaid regulations, therefore, is an independent condition for the completeness and accuracy of a Form CMS-64.[8] *See id.* at ¶ 20. Submitting a complete and accurate Form CMS-64, in turn, is a requirement for CMS to provide ongoing federal contributions to Medicaid expenditures. *See* Guhl Dep. at 129:11–130:3 (Martin Ex. 64).

3. <u>As a Beneficiary of Federal Medicaid Funding, HRA Is Aware of the Federal Requirements on Cost Reporting</u>

Remarkably, the City contends that it has no "direct economic interest in the submission of the [F]orm CMS-64" and is not aware of "which expenditures are included by the State in the CMS-64." NYC 56.1 Stmt. at ¶¶ 52–53; *see also* NYC SJ Br. at 8-9. Certainly, as a general matter, the City has, in other contexts, been upfront about its abiding interest in obtaining federal Medicaid funds for HRA's operations. Indeed, both the current HRA Commissioner, Robert Doar, and his predecessor, Verna Eggleston, testified before the New York City Council about HRA's efforts to "maximize" or increase federal Medicaid reimbursements. *See* May 26, 2009 Testimony of Robert Doar ("Doar Testimony"), at 4 (describing efforts "to maximize federal [Medicaid] reimbursement" for HRA's staff costs) (North II Ex. Q); March 13, 2003 Testimony of Verna Eggleston ("Eggleston

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[8] The City selectively quotes from the testimony of John Guhl, a manager in CMS's New York regional office, to suggest a contrary conclusion. *See* NYC SJ Br. at 9. The City fails to note, however, that Mr. Guhl corrected his answer during the deposition, and also in the errata sheet. These corrections, which the City has failed to submit, show that Mr. Guhl understood the six certifications in the Form CMS-64 to be independent and, specifically, that the certification concerning allowability of reported expenditures can be false even if certifying official was not aware of this falsity. *See* Guhl Dep. at 156:13–158:5, Errata Sheet (North II Ex. F).

Testimony”), at 3 (North II Ex. R). In fact, HRA is a major beneficiary of federal Medicaid funding — from late 2003 to early 2011, CMS contributed approximately $1.7 billion to administrative costs incurred by HRA. *See* Guhl Decl. at ¶ 11. More specifically, the City has obtained more than $220 million for administering the PCS program during that period. *Id.*; *see also generally* Wendell Dep. at 22:12-25, 137:10-140:7 (North II Ex. K).

Further, because HRA is both a participant in and a major beneficiary of federal Medicaid programs, it is well aware of the federal requirements associated with such programs, including the cost principles in OMB Circular A-87. For example, in connection with another Medicaid-funded program, Commissioner Doar has personally certified that HRA would advise its contractors of the applicability of that OMB Circular. *See* Temporary Assistance and Food Stamps Employment Plan (“Temp. Asst. Plan”), at 1-2 (North II Ex. U). Likewise, HRA’s fiscal manual for its contractors identifies OMB Circular A-87 as a key source of cost principles. *See* HRA Contract Fiscal Manual, App. A (North II Ex. T).

D. HRA Administers the PCS Program Without a Guarantee Insulating It from Liability from the State or Direct Oversight by the State

The City asserts that HRA is “the State’s local arm” in connection with administering the PCS program because PCS is a state Medicaid program. *See* NYC SJ Br. at 10. More specifically, the City claims that the HRA Commissioner “serves at the pleasure of the State.” *See* NYC 56.1 Stmt. at ¶ 25 (citing, *inter alia*, N.Y. Soc. Servs. Law § 116(1), Letter from Michael Bloomberg to David A. Hansell, dated Jan. 24, 2007, and Letter from Hansell to Bloomberg, dated Jan. 31, 2007). On this basis, the City argues that it cannot be held liable even if HRA caused false claims to be submitted to the Government. *See* NYC SJ Br. at 13.

However, the sources cited by the City do not support either the City’s specific claim about the State’s role in selecting the HRA Commissioner, or its general assertion about HRA’s relationship with New York State. First, Section 116(1) of New York’s Social Services Laws

expressly vests the authority to appoint "the chief executive officer of a county or city social services department," *e.g.*, the HRA Commissioner, in "the appropriate county or city body or officer." N.Y. Soc. Servs. Law § 116(1). The State's role, by contrast, is limited to ensuring that an appointee for the HRA Commissioner position meets the "official minimum qualifications required" under state law. *Id.* Further, the letters between Mayor Bloomberg and Acting Commissioner Hansell concerning the appointment of Robert Doar as the HRA Commissioner confirm the State's limited role. *See* Jan. 24, 2007 Bloomberg Letter (proposing to appoint Mr. Doar as the HRA Commissioner) (Friedman Ex. 69); Jan. 31, 2007 Hansell Letter (approving Mr. Doar's appointment because he "me[t] the minimum qualifications per [18 N.Y.C.R.R. § 679.6]") (Friedman Ex. 68). Put simply, there is no basis to claim that Commissioner Doar "serves at the pleasure of the State."

More generally, the record shows that State does not provide either a guarantee from legal liability or the type of operational oversight necessary to make HRA an "arm of the State" in the relevant sense.[9] First, the City has not identified any statute or regulation obligating the State to satisfy HRA's legal liability in connection with administering the PCS program, nor is there any basis for finding that the State has such responsibility. *Cf.* N.Y. Educ. Law § 6224(6) ("comptroller of the state of New York is authorized to . . . pay . . . any settlement, order or judgment . . . which pertains to a senior college of the city university of New York"). Second, as noted above, the authority to appoint the HRA Commissioner is vested in the Mayor of the City of New York, rather than the Governor of New York State. *See* N.Y. Soc. Servs. Law § 116(1); *cf.* N.Y. Educ. Law § 6204(2) (the Governor appoints all the members of CUNY's board of trustees, as well as the

[9] As discussed below, the City's assertion that it is free from liability under the FCA as an "arm of the State" requires a showing that HRA would be entitled to Eleventh Amendment immunity. *See infra* at Point I; *see also Stoner*, 502 F.3d at 1121 ("our Eleventh Amendment case law should guide our determination of whether an entity is a state agency" under the FCA). In the Second Circuit, the Eleventh Amendment analysis looks to (*i*) "the extent to which the state would be responsible for satisfying any judgment" against HRA, and (*ii*) "the degree of supervision exercised by the state over" HRA. *Clissuras v. City Univ. of New York*, 359 F.3d 79, 82 (2d Cir. 2004) (*per curiam*) (internal quotations omitted).

chairperson). Finally, discovery shows that HRA operates autonomously in administering the PSC program. For example, HRA's contracts with PCS vendors specify that it HRA has "the sole [] responsibility to determine" whether to authorize PCS service. *See*, *e.g.*, 2001 Vendor Contract at 14 (Martin Ex. 33). Likewise, according to HRA's 30(b)(6) witness, HRA makes all the substantive determinations on whether to authorize PCS service and the type, amount, and duration of service, while DOH carries out a "pure billing" function. *See* HRA Dep. II at 204:24–205:7, 222:10–228:22 (Martin Ex. 2); *see also* Willard Dep. at 236:23–243:20; 243:21–244:21 (Martin Ex. 23).

ARGUMENT

POINT I

THE CITY IS A "PERSON" SUBJECT TO LIABILITY UNDER THE FCA

A. The City Cannot Evade Liability by Claiming That HRA Is a State Agency or an "Arm of the State" for Purposes of the FCA

Although it has never previously raised this issue, the City now claims that it may not be sued for its conduct in administering the PCS program because it is not a "person" for FCA purposes. NYC SJ Br. at 13. The Supreme Court, however, has expressly held that local governments, like the City, are "persons" under the FCA and subject to *qui tam* suits. *Cook County v. U.S. ex rel. Chandler*, 538 U.S. at 122 ("In … [*Vt. Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000)], we held that States are not "persons" subject to *qui tam* actions under the False Claims Act. Here, the question is whether local governments are amenable to such suits, and we hold that they are.").

Nevertheless, the City tries to evade FCA liability by claiming that HRA is a state agency or an "arm of the State." *See* NYC SJ Br. at 13. The City's argument, however, is premised on both a misstatement of the applicable law and a mischaracterization of the record. Under the correct legal standard, which looks to whether HRA is entitled to immunity under the Eleventh Amendment, *see Stoner,* 502 F.3d at 1121, and considering the relevant facts, which show that the

State does not provide a guarantee insulating HRA from legal liability or direct oversight, *see supra* at 13-14, HRA is not an "arm of the State" for purposes of the FCA.

"[W]hether an entity is a state agency and thus not a 'person'" subject to liability in a FCA *qui tam* lawsuit implicates Eleventh Amendment jurisprudence, *i.e.*, whether that entity would be "immune from suit under the Eleventh Amendment." *Stoner,* 502 F.3d at 1121-22. In the Second Circuit, determining whether HRA is covered by the Eleventh Amendment immunity afforded New York State is contingent on two factors — first, "the extent to which the state would be responsible for satisfying any judgment" against HRA; and second, "the degree of supervision exercised by the state over" HRA. *Clissuras*, 359 F.3d at 82.[10]

Here, the State is not responsible for HRA's legal liability in connection with administering the PCS program. *See supra* at 14. Because this is "the most salient factor" in the Eleventh Amendment analysis, *Clissuras*, 359 F.3d at 82, the Court can determine on this basis alone that HRA is not a state agency or "arm of the State." Further, in administering the PCS program, HRA retains "sole responsibility" for making authorization decisions, and is subject to limited supervision by the State. *See* Ng Dep. at 32:17–21 (Martin Ex. 18). In addition, and contrary to the City's suggestion, state law clearly vests the authority to appoint the HRA Commissioner in the Mayor, rather than a state official. *See* N.Y. Soc. Servs. Law § 116(1). In short, the record shows that HRA is not a state agency or "arm of the State" for purposes of the Eleventh Amendment immunity or the FCA.

None of the cases cited by the City, moreover, supports a contrary conclusion. For example, while the City cites this Court's decision in *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400 (S.D.N.Y. 2006), *see* NYC SJ Br. at 13, it ignores the most relevant passage. Specifically, the

[10] The City tries to conflate these Eleventh Amendment standards with the fact that HRA administers a state program. *See* NYC SJ Br. at 13. As set forth below, neither of the FCA decisions cited by the City – *Stoner* and *Adrian v. Regents of the Univ. of Calif.*, 363 F.3d 398 (5th Cir. 2004) – supports this approach.

Court recognized that the "bar of the Eleventh Amendment to suit in federal courts . . . *does not extend to counties and municipal corporations (i.e., HRA)*." *Id.* at 433 n.14 (emphasis added).

The City's reliance on *Stoner* and *Adrian v. Regents of the Univ. of Calif.*, 363 F.3d 398 (5th Cir. 2004), *see* NYC SJ Br. at 13, is similarly misplaced. It is true that, like here, both *Stoner* and *Adrian* involved the liability of an administrative agency for its conduct in implementing a state program. However, in *Stoner*, the Ninth Circuit found that the Santa Clara school district was a state agency based on its "statutorily mandated relationship with the state," which made "the state treasury unconditionally liable to make up any budgetary shortfall encountered by [the school district] as a result of an adverse judgment." 502 F.3d at 1123. Such a relationship between HRA and the State simply does not exist here. *Adrian* involved a lawsuit against a state university system, an institution "created by the [state's] constitution." *Id.*, 363 F.3d at 401-02. HRA, by contrast, was established pursuant to an Executive Order issued by the Mayor of New York City. *See* The History of Welfare and HRA, (North II Ex. S).

Finally, in *Henrietta v. Bloomberg*, *see* NYC SJ Br. at 13, the Second Circuit was concerned with whether New York State agencies had any duty to ensure that local social service districts comply with federal civil rights laws. *See* 331 F.3d 261, 286–88 (2d Cir. 2003). It does not speak to whether HRA has Eleventh Amendment immunity or is a "person" under the FCA.

B. <u>In Any Event, the City Cannot Avoid Liability under the FCA Because the Government Has Intervened in this Action</u>

Even were the Court to conclude that HRA is a state agency or "arm of the State" for Eleventh Amendment purposes,[11] the City has not established that the immunity that a state agency enjoys for claims brought by a *qui tam* realtor on behalf of the Government, *see Stevens*, 529 U.S. at 788, also applies to this case, which involves claims brought by the United States itself, *id*. at 789

[11] The Court needs not reach this issue because the undisputed record shows that the City is amenable to suit for HRA's conduct under the FCA.

("the question whether the word 'person' encompasses States when the United States itself sues under the [FCA]" remains "open") (*Ginsburg, J. concurring*).

Specifically, *Stevens* involved a *qui tam* action in which the Government did not intervene. *See id.* at 770. In that context, the Court premised its holding – that a state is not a "person" under the FCA – on the "plain statement" rule from Eleventh Amendment jurisprudence, applying an "interpretative presumption that 'person' does not include the sovereign," absent "an affirmative showing of statutory intent to the contrary." *Id.* at 780–81. However, as Justice Ginsburg recognized in her concurrence, *see id.* at 788–89, and as courts have long held, the "plain statement" rule does not apply when the United States brings claims against a state. *See*, *e.g.*, *United States v. California*, 297 U.S. 175, 187 (1936); *Sims v. United States*, 359 U.S. 108, 112 (1959); *Welch v. Texas Dep't of Highways & Public Trans.*, 483 U.S. 468, 486-87 (1987).

Applying ordinary rules of statutory interpretation, states and state agencies can be deemed "persons" under the FCA. Specifically, the purpose of the FCA, which targets "all types of fraud, without qualification, that might result in financial loss to the [federal] Government," *United States v. Neifert-White*, 390 U.S. 228, 232 (1968), and its status as a law of general applicability argues against excluding states from the meaning of "persons" when the Government files suit. Further, the subject matter of the FCA – to prevent parties engaged in transactions with the United States from benefitting from fraudulent conduct – likewise supports the inclusion of state agencies in the meaning of persons, because state agencies frequently transact business with the federal government. Indeed, in a similar context, the Supreme Court recognized that states submitted themselves to liability under generally applicable tax laws when they engage in activities regulated by Congress. *See United States v. California*, 297 U.S. at 186. In light of these considerations, following *Stevens*, one court in this Circuit has held that "in an action by the United States against a state, claiming a violation of the [FCA], the state is a 'person'" amenable to the FCA claims.

United States v. Univ. Hosp. at Stony Brook, 97-CV-3463, 2001 WL 1548797, at *2-3 (E.D.N.Y. Oct. 26, 2001); *but see United States v. Menominee Tribal Enterprises*, 601 F. Supp. 2d 1061, 1066-67 (E.D. Wis. 2009) (holding that Native American tribe is not a "person" under the FCA). In sum, the City has not shown why it can avoid FCA liability in an action brought by the Government.

POINT II

HRA CAUSED DOH TO SUBMIT FORMS CMS-64 CONTAINING FALSE CERTIFICATIONS

There is no dispute that, after September 2001, DOH has submitted a Form CMS-64 to CMS on a quarterly basis, and that each of these forms certified, *inter alia*, that the PCS expenditures reported in the form were "allowable in accordance with applicable implementing [] state . . . regulations." *See* US 56.1 Stmt. at ¶ 25; NYC 56.1 Stmt. at ¶ 57. In that regard, the State PCS Regulation allowed PCS service to be provided only if HRA authorized such service in accordance with the applicable regulatory requirements. *See* 18 N.Y.C.R.R. § 505.14(a)(4), (b)(1); *see also* Willard Dep. at 182:13–201:15, 245:21–246:17 (Martin Ex. 23).

However, as discussed above, *see supra* at 8-10, HRA had a practice of authorizing 24-hour PCS service in violation of these regulatory requirements — its local offices routinely ignored the requirement to obtain a nursing assessment before reauthorizing 24-hour PCS service, made it a standard practice to reauthorize 24-hour split-shift service without obtaining independent medical reviews, and repeatedly violated the state regulation by overruling independent medical determinations as to the amounts of PCS services. *See* US 56.1 Stmt. at ¶¶ 28–122 (summarizing evidence). Thus, the Forms CMS-64 submitted by DOH after September 2001 all contained PCS expenditures that were *unallowable* under the State PCS Regulation, because they related to services that HRA had authorized in violation of the state regulation. *See* U.S. 56.1 Counter-Stmt. at ¶ 10. HRA, in short, caused a false certification to be made in each of the Forms CMS-64 that DOH submitted since after September 2001.

A. The Certifications in the Forms CMS-64 Are Actionable Even If the Submitting Officer at DOH Was Not Aware of the Falsity

The City posits that, even if HRA did cause DOH to include unallowable costs in Forms CMS-64 – thereby making the certification that the costs reported in these forms were "allowable in accordance with applicable implementing [] state . . . regulation" false on its face, the Court nonetheless cannot deem these Forms CMS-64 false because DOH was not specifically aware of HRA's violations of state regulation. *See* NYC SJ Br. at 17-18. This argument is at odds with the FCA's purpose — to reach "all types of fraud [against the Government], without qualification." *Neifert-White*, 390 U.S. at 232. If accepted, this theory would mean that the FCA does not impose liability on parties who cause others to submit false claims to the Government.

Unsurprisingly, courts have rejected similar arguments. Most recently, the First Circuit reversed a district court's dismissal of a FCA claim based, in part, on the theory that a claim cannot be false unless the submitting party itself "knew or should have known" of the falsity. *See U.S. ex rel. Hutcheson v. Blackstone Medical, Inc.*, -- F.3d ----, 2011 WL 2150191, at *10 (internal quotation omitted). Specifically, the First Circuit concluded that, based on an examination of the statutory text and precedents involving fraud by non-submitting parties, the FCA "makes no distinction between how non-submitting and submitting entities may render the underlying claim or statements false or fraudulent." *Id*. at 11-12.

Further, in *Tyson*, the jury found that FCA defendants had caused Illinois's Medicaid agency to submit Forms CMS-64 that contained false certifications "that the expenditures were in compliance with federal laws and regulations." *Id*., 488 F. Supp. 2d at 723-24. The district court, in turn, denied the defendants' motion to set aside the jury verdict, holding, *inter alia*, that the CMS-64 cost reports were rendered false by defendants' conduct. *See id*. at 728-29.

Finally, in furtherance of its argument, the City misrepresents the testimony of John Guhl, a manager in CMS's New York regional office. *See* NYC SJ Br. at 17. As noted above, *see*

supra at 13 n.9, the City offers a quote from Mr. Guhl's deposition, but fails to indicate that Mr. Guhl subsequently made clear that the quoted testimony was a mistake, and corrected the testimony both at the deposition and in an errata sheet. *Id*. Nor has the City submitted the errata sheet from Mr. Guhl's deposition. In fact, the corrected testimony of Mr. Guhl and the testimony of other CMS witnesses show that the certifications in the Forms CMS-64 are independent prerequisites for establishing an entitlement to payment by CMS. *See* Guhl Dep. at 156:13–158:5 (North II Ex. F); Heffron Dep. at 84:21–85:21 (North II Ex. G). Thus, each certification must be true, irrespective of whether DOH or the certifying officer has knowledge of the truth or falsity of the particular certification. *See* Guhl Dep. at 156:13–158:5; *see also* Heffron Decl. at ¶ 23.

B. Under the "Express Certification" Standard, the City Is Liable for the False Certifications in the Forms CMS-64 Caused by HRA's Unlawful Conduct

The City claims that it cannot be held liable under the FCA even if HRA's conduct caused an express certification in the Form CMS-64 to be false, because the subject matter of the certification – compliance with the State PCS Regulation – "is not pre-condition to [payment by the federal government]." NYC SJ Br. at 16. This contention is based on a faulty factual premise. It also should be rejected because it is wrong as a matter of law.

First, the record rebuts the City's factual assertion that the allowability of federal financial participation in PCS expenditures does not require compliance with the State PCS Regulation. Critically, as set forth above, *see supra* at 11-12, OMB Circular A-87 is a key source of federal rules for determining whether federal financial participation in PCS expenditures is allowable. *New York v. Shalala*, 979 F. Supp. at 179 (the Circular has "force of regulation" in the Medicaid context); *see also* Heffron Decl. at ¶ 7. Further, pursuant to that Circular, the DAB has upheld disallowances of federal contributions to Medicaid expenditures that "violated the standards set forth in [New York State Medicaid regulations]." *See* 1989 DAB Decision at 8 (Heffron Ex. 1).

As the testimony of CMS witnesses show, whether Medicaid expenditures were incurred

in violation of relevant state Medicaid regulations bears directly on whether, under OMB Circular A-87, federal contribution by CMS are allowable. *See* Heffron Dep. at 76:1–18 (North II Ex. G); Wanko Dep. at 142:2–25, 144:14–19 (North II Ex. J). HRA's compliance with the State PCS Regulation, thus, is a "prerequisite to payment" by CMS.[12] *See U.S. ex rel. Mikes v. Straus*, 274 F.3d 687, 698 (2d Cir. 2001). HRA's wholesale disregard of its compliance obligations thus rendered the Forms CMS-64 submitted by DOH false under the "express certification" standard. *See Anti-Discrimination Ctr. v. Westchester County* ("*ADC I*"), 668 F. Supp. 2d 548, 561-65 (S.D.N.Y. 2009); *In re Cardiac Devices Qui Tam Litig*., 221 F.R.D. 318, 346-47 (D. Conn. 2004).

Further, in *U.S. ex rel. Kirk v. Schindler Elevator Corp*., the Second Circuit recently rejected a legal argument similar to the one the City advances here. *See* 601 F.3d at 115-16. *Kirk*, as is the case here, involved a claim under the new 31 U.S.C. § 3729(a)(1)(B), as well as a claim under the old § 3729(a)(1). *Id*. at 115; *see also* Am. Compl. at ¶¶ 70-74. In *Kirk*, as here, the defendant argued that even if it submitted reports with false information, FCA liability could not attach because "none of applicable statutes or regulations makes filing an accurate report a precondition to payment." *Id*., 601 F.3d at 115. The Circuit, however, concluded that, even if the defendant were correct, it nonetheless could be held liable under § 3729(a)(1)(B). *See id*. at 116. Put simply, under *Kirk*, the City cannot evade liability under § 3729(a)(1)(B) even if it could show that HRA's compliance with the State PCS Regulation was not a "precondition of payment." *Id*.

C. <u>HRA Caused Submission of False Claims under "Implied Certification" Standard</u>

Finally, as the Government has made clear throughout, *see, e.g.*, United States's

[12] The City contends that CMS is indifferent to whether PCS expenditures are in accordance with the State PCS Regulation because, under the Medicaid reimbursement process, CMS makes federal contributions to PCS expenditures without first verifying their compliance with the state regulation. *See* NYC SJ Br. at 14-15. This contention leaves out key aspects of the Medicaid reimbursement process — CMS conducts only a limited review upon receiving a Form CMS-64, but has other tools, such as audits, that permit it to determine, at a later point, whether that cost report contained unallowable costs, such as expenditures in violation of state Medicaid regulations. *See* Kelly Dep. at 65:8–17 (North II Ex. A).

Memorandum of Law in Opposition to the City's Motion to Dismiss [Dkt. No. 38], at 13-14, and as set forth in its brief in support of partial summary judgment motion, *see* United States's Amended Memorandum of Law [Dkt. No. 76], at 29-30, the City's FCA liability also is based on the "implied certification" standard of falsity delineated in *Mikes*. Specifically, HRA, by authorizing 24-hour PCS care in violation of state regulation, caused PCS vendors to claim Medicaid reimbursements from DOH, although the state regulation did not allow such reimbursements. The City simply fails to address this theory of falsity, which also subjects it to FCA liability. *See ADC I*, 668 F. Supp. 2d at 566-67 (granting summary judgment on falsity under "implied certification" standard).

POINT III

THE CMS-64 CERTIFICATION IS NOT "TOO GENERAL" TO SUBJECT THE CITY TO LIABILITY

The CMS-64 certification at issue here states that the reported expenditures are "allowable in accordance with applicable implementing federal, state, and local statutes, regulations, [and rules]." 2001 3Q NY CMS-64, at 1 (Martin Ex. 37). The City contends that FCA liability cannot arise from this certification because it is "too sweeping" or "too general" to give notice to what compliance would require. *See* NYC SJ Br. at 16-17. This contention cannot be squared with the record, and it also is wrong as a matter of law.

First, as federal Medicaid regulations make clear, the rules and regulations applicable to Medicaid programs include a combination of "broad Federal rules" and implementing rules and regulations promulgated by the states for determining "eligible groups, types and range of services, payment levels for services, and administrative and operating procedures." 42 C.F.R. § 430.0. In New York, DOH has an express grant of statutory authority to promulgate "regulations . . . as may be necessary to implement" PCS and other Medicaid programs. N.Y. Soc. Serv. Law § 363-a(2). Thus, the City's suggestion – that a responsible Medicaid program participant would not understand what the "applicable implementing federal, state, and local statutes, regulations, and rules" in the relevant jurisdiction encompass – simply strains credulity. *See* Heffron Decl. at ¶¶ 3–6.

Indeed, HRA witnesses had no difficulty identifying the State PCS Regulation as the "primary regulation" for the PCS program in New York. Ng Dep. at 18:4–17 (Martin Ex. 18); *see also* HRA Dep. II at 44:10–19, 48:10–49:4 (Martin Ex. 2). Further, HRA's own contracts with PCS vendors employ language essentially similar to the CMS-64 certification. For example, a standard contract in use from 2001 to 2007 required, in relevant part, the PCS vendor to provide services "in accordance with this Agreement, and *such policies and procedures as [HRA and DOH] may from time to time promulgate, and Federal, State and City laws and regulations applicable thereof*, including but not limited to, 18 NYCRR 505.14 and successors and amendments thereto." *See* Nov. 1, 2001 Home Attendant Service Contract, at 14 (Martin Ex. 33) (emphasis added). In short, prior to this litigation, the City did not deem this language too "general" or "sweeping" for purposes of setting forth what it expected from PCS vendors. The City, accordingly, should not be heard to complain about similar language in the Form CMS-64 certification.

The City's legal argument also ignores the *Tyson* decision, which upheld a judgment against the FCA defendants on the basis of the false CMS-64 certification at issue here. *See id.*, 488 F. Supp. 2d at 728-29. Instead, the City attempts to equate the CMS-64 certification with a more generic Medicare certification, which requires hospitals and physicians seeking Medicare reimbursements to certify (*i*) their "familiar[ity] with the laws and regulations regarding the provision of health care services" and (*ii*) their "compliance with such laws and regulations." NYC SJ Br. at 16 (quoting *U.S. ex rel. Colucci v. Beth Israel Med. Ctr*., 06 Civ. 5033 (DC), 2011 WL 1226267 at *11 (S.D.N.Y. Mar. 31, 2011)); *see also U.S.ex rel. Conner v. Salina Reg'l Health Ctr.*, 543 F.3d 1211, 1219 (10th Cir. 2008) (addressing certification with identical language); *U.S. ex rel. Thomas v. Bailey*, No.4:06-CV-00465(JLH), 2008 WL 4853630, at *10-11 (E.D. Ark. Nov. 6, 2008) (same). There is no basis for equating these two certifications, as they are substantially different.

In contrast to the Medicare certification, the meaning of the CMS-64 certification is unambiguous in the Medicaid context. *See* Heffron Decl. at ¶¶ 3–6. There also is no genuine dispute either that the State PCS Regulation is critical for deciding whether PCS service was appropriately authorized, or that OMB Circular A-87 applies in determining the allowability Medicaid expenditures. By contrast, the alleged falsities in *Colucci* and *Conner* did not pertain to the actual allowability of reported expenditures. *See*, *e.g.*, *Colucci*, 2011 WL 1226267 at *10–11 (plaintiff failed to specify any statutory or regulatory violation); *Conner*, 543 F.3d at 1218–1222 (plaintiff's alleged regulatory violations were immaterial). Thus, the Court should follow *Tyson* and hold that the CMS-64 certification can give rise to FCA liability.

POINT IV

THE CITY HAS OFFERED ONLY *POST HOC* RATIONALIZATIONS FOR HRA'S SYSTEMIC VIOLATIONS OF THE STATE PCS REGULATION

There is no dispute that HRA failed to implement policies and procedures to ensure compliance with its obligations under the State PCS Regulation to obtain nursing assessments and independent medical reviews prior to reauthorizations and to adhere to the LMDs' independent medical determinations. Specifically, the City concedes that, until the instant lawsuit commenced, HRA had no policy to obtain independent medical reviews for reauthorizing 24-hour split-shift service. *See* NYC 56.1 Stmt. at ¶ 127. It also implicitly acknowledges that HRA did not have a policy requiring its employees to obtain nursing assessments prior to reauthorizing 24-hour PCS services. *See id*. at ¶¶ 114–16, 130–136. Finally, the City admits that, as a policy, HRA allowed its local offices to reject independent medical determinations on an *ad hoc*, "case by case" basis, and to authorize different amounts of care. *Id*. at ¶ 109.

At summary judgment, the City offers a variety of putative justifications for HRA's reckless disregard of its obligation to comply with the state regulatory requirements – from redefining the term "split-shift", to offering implausible interpretations of judicial decisions, to

introducing the concept of a vague and undefined residual "authority" possessed by the HRA Commissioner. *See* NYC SJ Br. at 19–22. These *post hoc* efforts, however, are unavailing, and simply underscore the recklessness of HRA's conduct.

A. <u>HRA Cannot Excuse the Widespread Violations of the Nursing Assessment Requirement by Relying on Assessments That It Never Obtained from Vendors</u>

Under the State PCS Regulation, the nursing assessment provides a local PCS administrator, like HRA, with the recommendation for the appropriate level of care for the PCS patient. *See* 18 N.Y.C.R.R. § 505.14(b)(3)(iii)(b). Thus, the regulation requires the nurses preparing this assessment to undertake a "review and interpretation" of the request from the patient's physician. *See id.*; *see also* Willard Dep. at 187:20–191:21, 196:1–198:2 (Martin Ex. 23); Soto Dep. at 26:19–30:17 (Martin Ex. 17). The regulation further requires local PCS administrators, like HRA, to obtain the nursing assessments prior to reauthorizing 24-hour PCS care. *See* Willard Dep. at 178:4–191:21.

The City, however, posits that HRA did not need to obtain or review these assessments, as long as such assessments were conducted periodically. *See* NYC SJ Br. at 22. Such an approach, however, cannot be squared with the key role of the nursing assessment for reauthorizations – to "determine what assistance is necessary." Willard Dep. at 189:8-22. Indeed, the nursing assessments that the City obtained from the vendors bear out this fact. In numerous instances, vendors noted changes in patients' medical conditions or personal circumstances, warranting higher or lower levels of care. *See*, *e.g.*, Nursing Assessment dated April 6, 2006 (recommending a higher level of care) (Martin Ex. 52); Nursing Assessment dated July 3, 2009 (recommending a reduction in level of care) (Martin Ex. 51). By not obtaining the nursing assessments in connection with reauthorizations, however, HRA was not aware of these changes.

Further, to the extent that City seeks to rely on nursing assessments it obtained from vendors, serious questions exist as to the admissibility of such records. According to a nurse

working at the Social Concern vendor agency, he was directed by his supervisor – on at least ten to twenty occasions – to sign nursing assessments that he had not prepared. *See* Cowan Dep. at 48:10-53:12 (North II Ex. D); *see also* Social Concern Nursing Assessments (Friedman Ex. 48). Any nursing assessment that was signed by a nurse who did not prepare it clearly cannot be admitted as a business record, as it was not "made … by a person with knowledge." Fed. R. Evid. § 803(6).

B. The City Cannot Excuse HRA's Wholesale Failure to Obtain Independent Medical Reviews by Trying to Redefine "Split-Shift" or Citing *Mayer*

Among the PCS patients, those receiving 24-hour split-shift patients, who require continuous care, typically have the most serious medical conditions. For these patients, as HRA's 30(b)(6) witness acknowledged, independent medical reviews can reveal changes in medical conditions. *See* HRA Dep. II at 351:12–353:14 (North II Ex. B). Specifically, if a LMD finds that the patient's medical condition has deteriorated, then the patient may require a *higher* level of care, whereas if the patient's medical condition has improved, then a reduction in the level of care could be warranted. *Id.* Independent medical reviews thus serve a key function in the reauthorization process for 24-hour split-shift patients.

The City baldly asserts that the 1996 decision in *Mayer v. Wing* eliminated the need for independent medical review in reauthorizing 24-hour split-shift care. *See* NYC SJ Br. at 21.[13] But the City cannot offer any support for this conclusion in either the text of the *Mayer* decision, or in any analysis prepared by HRA. *See* HRA Dep. II at 81:11–83:23 (North II Ex. B). Nor would this conclusion be consistent with the holding of *Mayer*, which conditioned reductions in care for certain

[13] As discussed above, *see supra* at 7, the City attempts to redefine the term "split-shift." The record, however, shows that HRA's internal documents and its witnesses used that term consistent with its usage in this action. The City further asserts that independent medical review is not required for a "subset" of split-shift patients because, in these cases, ALJs ordered services based on environmental, rather than medical, factors. *See* NYC SJ Br. at 21. There is no showing as to the prevalence of such cases. Thus, even if correct, this argument has no application to the vast majority of split-shift patients for whom services were initially authorized on the basis of medical need. *See* 18 N.Y.C.R.R. § 505.14(a)(4) (PCS services allowed only if medically necessary).

patients on, *inter alia*, changes in medical conditions. *See* 922 F. Supp. at 913. In that regard, independent medical reviews can determine whether there is any change in a patient's medical condition changed to warrant changes to the levels of care under *Mayer*. *See* HRA Dep. II at 351:12–353:14 (North II Ex. B).

The City purports to rely on the undated statement of an unnamed HRA employee. *See* Holm Decl. at ¶ 20. This alleged statement, however, is rank hearsay; and under Rule 56, the City cannot rely on it to support its position at summary judgment. *See Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir. 2003). The City, in short, cannot offer any credible justification for HRA's wholesale failure to obtain independent medical reviews for reauthorizing 24-hour split-shift care – as Michael Eisner, the HRA Deputy Commissioner in charge of the PCS program, admitted to a colleague. *See* Nov. 15, 2010 Eisner E-mail, at 1 ("the U.S. Attorney's investigation has revealed one area in which the program has not complied with regulations—we have not been performing LMD reviews on split shift reauthorizations. We need to start doing so immediately.") (North II Ex. O).

C. The City Cannot Justify HRA's Practice of Arbitrarily Overruling Independent Medical Determinations Based on the Vague Concept of Commissioner Authority

The State PCS Regulation unambiguously requires HRA to adhere to an independent medical reviewer's determination as to the amount of service for a PCS patient. *See* 18 N.Y.C.R.R. § 505.14(b)(4)(ii). The City, however, claims that the HRA nonetheless may reject the independent medical determinations on an *ad hoc*, "case by case" basis, based on the asserted authority of HRA Commissioner to ignore the requirements of the State PCS Regulation. *See* NYC SJ Br. at 19-20.

This argument fails as a matter of law, as neither the state regulation nor the cases cited by the City reveals any source of this vague and undefined authority attributed to the HRA Commissioner. Specifically, the sections of the State PCS Regulation cited by the City – 18 N.Y.C.R.R. § 505.14(b)(1), (a)(4), (b)(5) – simply describe HRA's function as a local PCS administrator. *See* NYC SJ Br. at 19. No section vests the HRA Commissioner with any authority

to overrule the independent medical reviewer or disregard the state regulation. Likewise, the judicial decisions cited by the City either show that HRA should *follow* the State PCS Regulation, *see, e.g., Kuppersmith*, 246 A.D.2d 473 (upholding the State PCS Regulation), or follow a court order specifying how HRA should depart from that regulation, *see DeLuca v. Hammons*, 927 F. Supp. 132, 135-37 (S.D.N.Y. 1996). No court decision, however, stands for the proposition that the HRA Commissioner may ignore any requirement of the state regulation based on his own judgment.

The City's argument also founders factually. Notwithstanding its contention that HRA could determine on a "case-by-case" basis whether to overrule an independent medical determination, the record shows that HRA has developed no guidelines or procedures advising what specific factors HRA employees might consider in deciding whether to make such an overruling, or how such an overruling should be justified and documented. *See* HRA Dep. II at 187:17–188:5 (HRA allows overruling on an *ad hoc*, "case-by-case" basis) (Martin Ex. 2); *see also* 2005 Turley Memo (authorizing local office directors and deputy directors to overrule independent medical determinations for undefined "social and/or administrative reasons") (Martin Ex. 25). More specifically, the record shows an arbitrary pattern of overrulings by HRA – from the local office level up to the Commissioner level – which either lack any explanation or were based on improper considerations, *e.g.*, personal relationships and political pressure. *See* US 56.1 Stmt. at ¶¶ 47-77. Even if the HRA Commissioner had the discretion to overrule independent medical determinations, the arbitrary exercise of that authority by HRA would render it an abuse of that discretion. *See generally Brodsky v. Zagata*, 629 N.Y.S.2d 373, 377 (N.Y. Sup. Ct. 1995) (state agency's failure to explain departure from existing practice deemed abuse of discretion).

POINT V

THE EVIDENCE SHOWS THAT HRA HAD THE REQUISITE *SCIENTER*

The City posits that *scienter* cannot be shown because (*i*) HRA was not aware of the Form CMS-64 or federal requirements upon which allowability of PCS expenditures was

contingent, (*ii*) HRA acted in good faith to comply with the State PCS Regulation, and (*iii*) there is no clear evidence of HRA's motive to defraud the Government. None of these arguments has merit. First, HRA, as a beneficiary of federal Medicaid funding, had a duty to understand OMB Circular A-87 and related funding rules, and its asserted ignorance of these rules just underscores its reckless disregard of its responsibility as a Medicaid participant, and is belied, in any event, by HRA's citations to these rules in its own contracting documents. Second, the City's suggestion that HRA reasonably tried to comply with state regulation is belied by the evidence showing, for example, that HRA never gave its employees the reauthorization policy it expected them to follow. Finally, contrary of the City's suggestion, the FCA does not require proof of fraudulent motive or intent.

A. <u>HRA Knew, or Acted in Reckless Disregard of, The Fact That Its Conduct Caused Medicaid to Reimburse Unallowable PCS Expenditures</u>

Under the FCA, the Government can establish *scienter* by showing, *inter alia*, either that HRA actually knew that its unlawful authorizations of 24-hour PCS care caused false claims for Medicaid funds to be submitted, or that it acted in reckless disregard of the consequences of its conduct. *See Mikes*, 274 F.3d at 696 (citing 31 U.S.C. § 3729(b)). Here, the record provides three independent bases for concluding that HRA possessed the requisite *scienter*.

First, the City claims that "HRA officials did not know of the existence of the CMS-64 or its certification before this case." NYC SJ Br. at 9. This asserted ignorance of the federal funding process and rules on HRA's part, considered in light of HRA's participation in Medicaid as both a local administrator and a major beneficiary of federal funds, *see* Guhl Decl. at ¶ 11, is itself sufficient to show that HRA acted in reckless disregard. Specifically, HRA had a duty to familiarize itself with both PCS program requirements and federal rules on allowability of Medicaid costs, such as OMB Circular A-87. *United States v. Mackby*, 261 F.3d 821, 828 (9th Cir. 2001) ("Participants in the Medicare program have a duty to familiarize themselves with the legal requirements for payment"); *see also United States v. President and Fellows of Harvard Coll.*

("*Harvard Coll.*"), 323 F. Supp. 2d 151, 189–90 (D. Mass. 2004) (participant in federal program had duty to know the funding rules). HRA's claim of ignorance of federal rules on cost allowability – notwithstanding its involvement in Medicaid – shows that HRA acted in reckless disregard of the fiscal consequences of its standardless administration of the PCS program. *Mackby*, 261 F.3d at 828 (physician's claim of ignorance of Medicare requirements supported the finding he "acted in reckless disregard" of such requirements); *Harvard Coll.*, 323 F. Supp. 2d at 189 (finding reckless disregard where official claimed not to know the funding rules for a federally-funded program).

Second, there also is substantial evidence that HRA officials in fact were familiar with the federal funding process and rules. For example, as both the current HRA Commissioner and his predecessor testified, HRA has been engaged in extensive efforts to "maximize" or increase federal Medicaid reimbursements. *See* Doar Testimony at 4 (North II Ex. Q); Eggleston Testimony at 3 (North II Ex. R). Further, internal HRA documents show that HRA was well aware, in particular, of the applicability of OMB Circular A-87 to expenditures for Medicaid programs, such as PCS. *See*, *e.g.*, Temp. Asst. Plan, at 1–2 (North II Ex. U). Thus, a fact-finder can reasonably infer that HRA familiarized itself with the requirements for obtaining federal Medicaid funding. Under the FCA, *scienter* does not require proof that any single HRA employee "kn[e]w both the wrongful conduct and the certification requirement." *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 918-19 (4th Cir. 2003); *see also Harvard Coll.*, 323 F. Supp. 2d at 189–90 ("it is not necessary for FCA liability that the defendant 'know' every detail of the false claim"). Thus, HRA had the requisite *scienter* because some if its officials knew of the widespread violations of the state regulation, and some HRA officials were aware of the federal funding rules relating to the allowability of PCS expenditures.

Third, the record amply shows that HRA knew that it authorized 24-hour PCS services

in violation of the State PCS Regulation, and this knowledge alone is sufficient to establish *scienter* for the Government's claims based on the "implied certification" theory of falsity. See US 56.1 Stmt. at ¶¶ 28–122 (summarizing evidence). Specifically, the state regulation unambiguously provides that any PCS service not authorized in accordance with that regulation is not reimbursable. *See* 18 N.Y.C.R.R. § 505.14(a)(4). Further, HRA knew that PCS vendors relied on HRA to issue authorizations to enable the vendors to claim Medicaid reimbursements. *See* Ng Dep. at 32:22–34:6 (Martin Ex. 18). Thus, under the "implied certification" standard, HRA knew that it was causing vendors to submit false claims. *See supra* Point II.C.

B. The Record Rebuts the City's Suggestion That HRA Reasonably Tried to Comply with the State PCS Regulation

While a FCA defendant may seek to avoid liability by asserting that it relied, in good faith, on a reasonable albeit mistaken interpretation of applicable rules and regulations, *see Visiting Nurse Ass'n of Brooklyn v. Thompson* ("*VNS*"), 378 F. Supp. 2d 75, 96 (E.D.N.Y. 2004) (internal citation omitted), the City simply cannot make the requisite showing in light of the evidence in this case. As an initial matter, the City has offered no admissible evidence of any putative good faith reliance by HRA on a reasonable interpretation of the State PCS Regulation. For example, while the City argues that HRA relied on the *Mayer* decision to unilaterally stop obtaining independent medical reviews for reauthorizing 24-hour split-shift cases, the only factual support for this conclusion is the inadmissible, undated statement attributed to an unnamed HRA supervisor. *See* Holm Decl. at ¶ 20. HRA's 30(b)(6) witness was unable to either reconcile this putative interpretation of *Mayer* with the decision itself, or identify any analysis of *Mayer* by HRA supporting that interpretation. *See* HRA Dep. II at 81:11–83:23 (North II Ex. B).

Further, any suggestion by the City that HRA reasonably endeavored to comply with state regulatory requirements relating to PCS services cannot be squared with the evidence. Specifically, discovery reveals a total failure by HRA to ensure its local offices were familiar with

and complied with the state regulations. For example, HRA did not provide its employees with the reauthorization procedure manual that it expected them to follow. *Compare* HRA Dep. II at 165:16–22 (HRA expected its case workers and supervisors to follow the 1992 Manual) (Martin Ex. 2) *with* Kapsalis Dep. at 214:14–215:111 (senior supervisor unaware of any reauthorization manual prior to 2008) (Martin Ex. 16); Jenkins Dep. at 49:16–25 (supervisor testifying to same) (Martin Ex. 14); Shyne Dep. at 133:23–134:12 (case worker never received a copy of Manual) (Martin Ex. 20). Indeed, HRA's indiffernce to regulatory compliance was so clear that Dr. Soto, within months of becoming a medical director at HRA, recognized that "each of the CASAs were sort of a kingdom of their own[,] and each director would have their set of rules or decisions, [as to] how they conducted their processes." Soto Dep. at 61:19–65:4 (Martin Ex. 21).

In sum, this case is not about isolated instances of "mismanagement" in which HRA failed to inquire into the truth or falsity of records submitted by other parties, *see U.S. ex rel. Farmer v. City of Houston*, 523 F.3d 333, 339 (5th Cir. 2008) (evidence that city failed to detect alleged falsities in third-party submissions deemed insufficient to impute knowledge to city), or "a cherry-picked handful of instances with missing paperwork or poor decision-making by HRA staff," *see* NYC SJ Br. at 24. Instead, the record shows, beyond any genuine dispute, a glaring pattern of HRA's utter indifference to its responsibility as a local PCS administrator, all the while issuing authorizations that gave the impression that HRA was complying with the applicable state regulations. This evidence suffices to establish HRA's *scienter*. *See United United States v. Krizek*, 131 F.3d 934, 942 (D.C. Cir. 1997) (affirming judgment for the Government based on finding that FCA defendant acted with reckless disregard where he "utterly failed" to review bills); *United States v. Bourseau*, 531 F.3d 1159, 1168 (9th Cir. 2006).

C. Under the FCA, *Scienter* Can Be Established Through Evidence of HRA's Reckless Disregard of the Truth, Without Proof of a Motive to Defraud

Finally, the City argues that it should not be held liable because there is no compelling

evidence of HRA's motive to defraud the federal government. *See* NYC SJ. Br. at 24-25. This argument lacks merit because the FCA expressly does not require "proof of specific intent to defraud." 31 U.S.C. § 3729(b)(1)(B); *see also Mikes*, 274 F.3d at 696. As a participant in the Medicaid program, HRA "must turn square corners when [it] deal[s] with the Government." *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008) (quoting *Rock Island, Arkansas & Louisiana R.R. v. United States*, 254 U.S. 141, 143 (1920)). Proof of HRA's motive, thus, is unnecessary because the record amply demonstrates a clear discrepancy between what HRA did – recklessly disregarding the state regulatory requirements for authorizing and reauthorizing 24-hour PCS services, and what it purported to do – issuing such authorizations in compliance with the state regulations. Stated differently, liability under the FCA attaches based on *what* HRA did, not *why*. *See United States v. Foster Wheeler Corp.*, 316 F. Supp. 963 (S.D.N.Y. 1970), *aff'd*, 447 F.2d 100 (2d Cir. 1971); *U.S. ex rel. Morris v. Crist*, No, C-2-97-1395, 2000 WL 432781, at *6-7 (S.D. Ohio Mar. 25, 2000).

CONCLUSION

For the reasons set forth above, the City's summary judgment motion should be denied.

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