UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-cv-61053-DIMITROULEAS/SNOW

United States of America *ex rel.* Veronica N. Arven and Estate of Theodore Arven, III,

Relators,

v.

The Florida Birth-Related Neurological Injury Compensation Association and The Florida Birth-Related Neurological Injury Compensation Plan,

Defendants.

DEFENDANTS THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION AND THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN'S
MOTION TO DISMISS THE AMENDED COMPLAINT (ECF NO. 15)

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INTRODUCTION

This is a non-intervened *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, against the Florida Birth-Related Neurological Compensation Plan ("Plan") and its administrator, the Florida Birth-Related Neurological Injury Compensation Association ("NICA"). Established by the State of Florida in 1988, the Plan provides for the care of infants with certain birth-related neurological injuries. In place of the expensive, often uncertain tort system, the Legislature created a no-fault compensation system supported by State tax dollars. As a result, compensation under the Plan is available statewide for eligible families without the need to prove fault. While the Plan covers a variety of expenses for reasonable care, services, drugs, and medical equipment, it does not pay for expenses covered by insurance or federal or State programs, including Medicaid. This aspect of the Plan has been publicly disclosed since 1989.

Now, after more than three decades of operation, NICA[1] stands accused of violating the FCA for the mere reason that, consistent with Florida law, it does not pay for expenses covered by Medicaid. In the Relators' view, NICA is a "third party" under 42 U.S.C. § 1396a(a)(25)(A), and as such, it must pay for expenses that would otherwise be covered by Medicaid. They seek treble damages dating back to NICA's inception. Relators' claims fail for four principal reasons.

First, NICA is not a private corporation. It is a State-created entity, subject to strict State control and funded with State tax dollars. As such, it is an arm of the State of Florida. Under Eleventh Circuit precedent, arms of the State such as NICA are not subject to FCA liability. Nor, for that matter, is NICA even subject to the Court's jurisdiction in this case, as the Eleventh Amendment deprives federal courts of jurisdiction over private individuals' claims against States.

Second, the FCA generally prohibits relators from suing when the alleged misconduct has been publicly disclosed. Beginning in 1989, newspapers, law reviews, and even NICA's own website disclosed the precise practice that is the sole feature of this lawsuit: that NICA does not view itself as a "third party," so it does not cover expenses covered by Medicaid.

Third, NICA is not a "third party" under 42 U.S.C. § 1396a(a)(25)(A). Thus, NICA's position from conception that it is not a "third party" is not "false," as required for FCA liability. Indeed, as a matter of law, since before NICA was created, State entities have been held not to be

[1] As explained below, the Plan lacks the capacity to be sued. This motion generally refers only to NICA, but the arguments why claims against NICA must be dismissed apply equally to the Plan.

third parties. The term "third party" is defined in relation to the State, and a State cannot be a third party to itself.

Fourth, even if NICA were a "third party," the Amended Complaint pleads no facts to satisfy the FCA's requirement that NICA acted "knowingly" with respect to its alleged status as a "third party." 31 U.S.C. § 3729(a).

For these and other reasons discussed below, the Amended Complaint (ECF No. 15) should be dismissed without leave to amend.

BACKGROUND

In 1988, the Florida Legislature created the Plan as a "no-fault" alternative to the tort system for birth-related neurological injury claims and established NICA as its administrator. Ch. 88-1, §§ 60(2), 74, Laws of Fla. (codified at Fla. Stat. §§ 766.301(2), 766.315); *Samples v. NICA*, 114 So. 3d 912, 921 (Fla. 2013). The Plan was designed to "stabiliz[e] and reduc[e]" obstetricians' "very costly" malpractice insurance premiums. Fla. Stat. § 766.301(1)(a), (c). The Legislature singled out these birth-related neurological injury claims after identifying obstetricians as among the "most severely affected by current medical malpractice problems." *See id.* § 766.301(1)(b). Not only did birth-related neurological injuries "frequently" lead to litigation, but they also resulted in "unusually high costs for custodial care and rehabilitation." *Id.* § 766.301(1)(b) & (2). For the injured children and their families, the Plan replaces the "uncertain and speculative compensation parents might receive through traditional tort remedies" with a guarantee of compensation for lifetime care regardless of fault. *Samples*, 114 So. 3d at 921.

NICA administers the Plan according to Fla. Stat. §§ 766.301-.316. It collects the taxes that fund the Plan (called "assessments"), processes and pays claims, and participates in the administrative proceedings that determine whether a claim should be paid and what the payments should cover. Fla. Stat. §§ 766.307(2), 766.314(6)(a), 766.315(4). NICA does not, however, decide which claims to pay or what is compensable. Instead, that role is assigned to an administrative law judge ("ALJ") in the Florida Department of Management Services' Division of Administrative Hearings ("DOAH"). *Id.* §§ 766.302(4)-(5), 766.305, 766.31. Even when NICA agrees that a claim should be paid, an ALJ's approval is still required. *Id.* § 766.305(7).

If the ALJ determines that a claim involves a covered birth-related neurological injury, the ALJ issues an award. *Id.* § 766.31(1). Plan awards provide for a variety of "medically necessary and reasonable" care, ranging from medical care to rehabilitative training to in-home assistance.

Id. § 766.31(1)(a). But they are not available if some other resource available to a claimant covers care. The Plan does not pay for expenses covered by private insurance or expenses covered "under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law." *Id.* As interpreted by DOAH, which must approve any NICA awards, this state-law provision prohibits NICA from paying "expenses paid by Medicaid." *Williams v. NICA*, Case No. 11-5170N, 2014 WL 4704711, at *3 (Fla. Div. Admin. Hr'gs Sept. 17, 2014), *aff'd* 169 So. 3d 1170 (Fla. 1st DCA 2015).

NICA's position that it is not a "third party" under federal law has long been publicly disclosed. The year after NICA's creation, a law review article recognized that NICA payments are reduced "by the amount received from . . . Medicaid [and] other government benefits." Sieradzki, *Throwing out the Baby with the Bathwater: Reform in the System for Compensating Obstetric Accidents*, 7 Yale L. & Pol'y Rev. 538, 550 (1989) (attached as Ex. A). Other disclosures in law reviews and traditional news media followed. *See infra* pp. 13-14. And since at least 2006, NICA has broadcast that position in the FAQ section of its website. *Id.* Indeed, Relators' allegations of misconduct rest entirely upon documents available on the Internet. Am. Compl. ¶¶ 58-70; *infra* p. 14.

Relators[2] originally filed suit in April 2019, amending their complaint in September 2019. Compl. (ECF No. 1); Am. Compl. (ECF No. 15). In their two-count Amended Complaint, Relators allege that NICA's long-disclosed position that it is not a "third party" violates the FCA in two ways. First, NICA requires claimants to seek compensation from Medicaid first, even though, Relators allege, Medicaid is supposed to be a payer of last resort. *Id.* ¶¶ 58-63, 71-77 (Count I). This results, Relators claim, in Medicaid paying claims that it should not pay. *Id.* Second, relying on the Medicaid liens created by federal law, Relators allege that any time NICA awards compensation after Medicaid has previously paid for medical care, NICA itself must reimburse the Medicaid program. *Id.* ¶¶ 65, 78-84 (Count II). Relators seek treble damages under the FCA, attorney fees, and various other relief. *Id.* at 16.

[2] Relators are one parent and the estate of the other parent of a child who received benefits from a neurological birth-related injury program in Virginia. Am. Compl. ¶¶ 8-10. They sued the Virginia program on the same basis in July 2015. *Id.* ¶¶ 5, 28-38. They allege no relationship to or inside knowledge about NICA.

On January 30, 2020, the United States notified the Court that it would not intervene by the Court's deadline to do so. ECF No. 28. The Court unsealed the Amended Complaint the next day. ECF No. 29. Because the Amended Complaint suffers multiple dispositive defects that cannot be cured, NICA and the Plan move to dismiss the Amended Complaint without leave to amend.

LEGAL STANDARD

This motion seeks dismissal for failure to state a claim and lack of subject-matter jurisdiction. To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When evaluating a complaint, a court should "discard[] legal conclusions, conclusory statements, and factually threadbare recitals of a cause of action." *In re Chiquita Brands Int'l, Inc.*, 284 F. Supp. 3d 1284, 1315 (S.D. Fla. 2018). Rule 12(b)(1) permits an arm of the State to assert immunity from suit under the Eleventh Amendment. *Keeler v. Fla. Dep't of Health*, 397 F. App'x 579, 580-81 (11th Cir. 2010). When, as here, the movant does not rely upon extrinsic evidence, the court applies the same analysis as under Rule 12(b)(6). *See, e.g., Vasquez Monroy v. Dep't of Homeland Sec.*, 396 F. Supp. 3d 1206, 1208 (S.D. Fla. 2019) (explaining that the "court takes the allegations as true" in a facial challenge to subject-matter jurisdiction).

ARGUMENT

I. The Plan lacks the capacity to be sued, and in any event, the Amended Complaint fails to state a claim against the Plan.

All claims against the Plan should be dismissed, because it lacks the capacity to be sued. *See Lomax v. City of Miami Police Dep't*, 2010 WL 2163497, at *3 (S.D. Fla. Apr. 20, 2010) (granting a motion to dismiss by a governmental defendant lacking the capacity to be sued). The Legislature expressly provided that NICA may "sue and be sued." Fla. Stat. § 766.315(4)(f). In contrast, nowhere in Chapter 766 did the Legislature provide that the Plan is an entity that may sue or be sued.[3] Section 766.315(4)(f)'s express provision that NICA may be sued demonstrates that the Plan may not. *See Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 315 (Fla. 2006) (explaining that when "language in other statutes [shows] that the Legislature 'knows how to' accomplish what it has omitted in the statute of question," the omission should be given effect).

[3] Indeed, the Plan does not *do* anything. NICA "[a]dminister[s] the plan," the "funds collected on behalf of the plan," and "the payments of claims on behalf of the plan." *Id.* § 766.315(4).

Setting aside the Plan's lack of capacity to be sued, the Amended Complaint contains no specific allegations of wrongdoing against the Plan. All the allegations of wrongdoing—that is, the allegations that NICA directs claimants to seek Medicaid benefits before seeking NICA benefits, Am. Compl. ¶¶ 58-70—relate to Plan administration, which Florida law expressly commits to NICA. Fla. Stat. § 766.315(4)(a). And all the Amended Complaint's exhibits are *NICA* documents. *See* Am. Compl. Ex. A, at 2 (article by NICA's executive director); *id.* Ex. B (NICA Benefit Handbook), *id.* Ex. C (2016-2017 NICA Financial Statements). To be sure, the Amended Complaint uses the defined term "NICA" to include both NICA and the Plan in the allegations of misconduct. *Id.* at 1. But such "lumping defendants together" is no substitute for properly pleaded allegations against each defendant. *See Bentley v. Bank of Am., N.A.*, 773 F. Supp. 2d 1367, 1373 (S.D. Fla. 2011) (Dimitrouleas, J.) (dismissing complaint that "improperly lump[ed] Defendants together" without specifying which defendant did what). Thus, even were the Plan capable of being sued, the claims against it would fail.

II. As an arm of the State of Florida, NICA cannot be held liable under the FCA.

NICA is a State-created program operating under State rules with State tax dollars and overseen by State-appointed directors. In short, it is an arm of the State of Florida. As a result, NICA is not a "person" subject to suit under the FCA, 31 U.S.C. § 3729(a), and it is immune from Relators' claims under the Eleventh Amendment.

A. NICA is not a "person" under the FCA.

Like 42 U.S.C. § 1983, the FCA applies only to a "person" within the meaning of the statute. *See* 31 U.S.C. § 3729(a). And as under § 1983, a State is not a person subject to liability under the FCA. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000) (FCA); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (§ 1983). This protection from FCA liability applies not just to the State itself, but to any officer or entity that acts as an "arm of the State," as that term has been defined in Eleventh Amendment jurisprudence. *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 601-02 (11th Cir. 2014). "[B]ringing an FCA *qui tam* action against an entity not considered a 'person' is properly considered a failure to state a claim." *Id.* at 602 n.5.

Arm-of-the-State status depends on an entity's level of independence from the State. *Versiglio v. Bd. of Dental Examiners of Ala.*, 686 F.3d 1290, 1292 (11th Cir. 2012). When an entity "has the same kind of independent status" as a county or municipality it is not an arm of the State.

Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 n.5 (1997). These local governments typically have their own taxing and policymaking authority—attributes that, as explained below, NICA lacks. In contrast, the Eleventh Circuit has repeatedly recognized that entities created by the State of Florida to serve specific State purposes—such as universities, community colleges, and water management districts—are arms of the State. *Univ. of S. Fla. Bd. of Trs. v. CoMentis, Inc.*, 861 F.3d 1234, 1235-37 (11th Cir. 2017); *Lesinski*, 739 F.3d at 600. Courts assess an entity's independence through case-by-case analysis of four factors: "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Lesinski*, 739 F.3d at 602. These are factors, not requirements, so an entity can be an arm of the State even if not every factor favors that status. *See Lightfoot v. Henry Cty. Sch. Dist.*, 771 F.3d 764, 777 (11th Cir. 2014) (analyzing *Lesinski*).

The Amended Complaint does not address these factors. Relators instead assert that NICA and the Plan "qualify as a 'person' as that term is defined by the federal False Claims Act" based solely on Fla. Stat. § 766.303(3), which waives NICA's sovereign immunity "solely to the extent necessary to assure payment of compensation as provided in" Fla. Stat. § 766.31. Am. Compl. ¶ 12. That NICA has any sovereign immunity to waive in the first place weighs in favor of viewing it as an arm of the State. *Harden v. Adams*, 760 F.2d 1158, 1164 (11th Cir. 1985). Alleging that NICA is an "independent agency" also falls short; an "independent, separate, legal entity" can be an arm of the State. Am. Compl. ¶ 52; *Williams v. Dist. Bd. of Trs. of Edison Comm. Coll.*, 421 F.3d 1190, 1193 (11th Cir. 2005).

The Amended Complaint thus fails to state a claim. The proper analysis set forth below shows that any amendment would be futile. Like Florida's community colleges, water management districts, and universities, NICA is an arm of the State.

1. NICA was created by the State, is a creature of Florida law and serves a state purpose.

The first factor—how state law defines the entity—favors treating NICA as an arm of the State, because NICA was created by statute to serve a specific state function. *See Lesinski*, 739 F.3d at 602-03. Three cases involving Florida state-created entities illustrate this principle. In *Lesinski*, the Eleventh Circuit determined that state law treated regional water management districts as arms of the State because they were created by state law and "designed to perform a state function"—that is, to conserve water resources. *Id.* at 603. Likewise, the first factor favored

viewing community colleges as arms of the State, because they too are established by statute to serve Florida's goal of providing education. *Williams*, 421 F.3d at 1192-93. For essentially the same reasons, Florida law favors viewing Florida's public universities as arms of the State. *CoMentis*, 861 F.3d at 1235-37.

Florida law likewise supports viewing NICA as an arm of the State. Florida "established" NICA for a single purpose: to "govern" the Plan. Fla. Stat. §§ 766.302(1), 766.315(1).[4] In a statute entitled "Legislative findings and intent," the Legislature explained that it was "incumbent upon the Legislature" to establish the Plan to protect Floridians' access to obstetricians' "essential" services by "stabiliz[ing] and reduc[ing]" malpractice insurance rates for these "high-risk medical specialists." *Id.* § 766.301(c). Thus, like water management districts, community colleges, and state universities, NICA is a creature of Florida law designed to serve a state purpose.[5]

Both Florida's judiciary and its executive branch treat NICA as part of Florida's government, not some private entity. The Florida Supreme Court has described Plan as a "state program[]" and held that the assessments that NICA collects "constitut[e] a 'tax' within the meaning of Florida law" because they "support government." *Samples*, 114 So. 3d at 917; *Coy v. NICA*, 595 So. 2d 943, 945 (Fla. 1992).[6] Similarly, the Florida Department of Financial Services treats the Plan as a "component unit" of the State of Florida. Fla. Dep't Fin. Servs., *Comprehensive Annual Financial Report* 58, 60 (Feb. 8, 2019) (excerpts attached as Ex. B) (defining "component units" as "separate organizations" that are nevertheless considered part of state government for

[4] That NICA serves only a "limited purpose" further favors arm-of-the-State status. *Pub. Sch. Ret. Sys. of Mo. v. State St. Bank & Trust Co.*, 640 F.3d 821, 828 (8th Cir. 2011).

[5] Other aspects of Florida law demonstrate that NICA is a part of Florida government. Like other government entities, NICA generally enjoys state-law sovereign immunity. Fla. Stat. § 766.303(3) (providing an exemption "solely" as necessary to satisfy claims for Plan compensation); *see Harden*, 760 F.2d at 1164 (considering state-law immunity to weigh in favor of Eleventh Amendment immunity). It is subject to state public-records laws. Fla. Stat. § 766.315(5)(b). And travel and other reimbursement rates for NICA's board members are governed by the same statute as other State employees. Fla. Stat. § 766.315(3) (cross-referencing Fla. Stat. § 112.061).

[6] The Eleventh Circuit often looks to state courts' characterization of an entity when performing an arm-of-the-State analysis. *E.g.*, *Lightfoot*, 771 F.3d at 769-70.

accounting purposes).[7] Significantly, the report's classification of component units tracks Eleventh Amendment standards. The category includes arms of the State such as water management districts, universities, and community colleges while excluding local governments that are not, such as counties, municipalities, and school districts. *Id.* at 58-60. As the *Lesinski* district court recognized, being a component unit is a "significant" factor that weighs in favor of arm-of-the-State status. *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 2012 WL 12854867, at *4 (S.D. Fla. Oct. 22, 2012).

That NICA's enabling statute says NICA is "not a state agency" does not require a different result. *See* Fla. Stat. § 766.315(1)(a). Arm-of-the-State status turns not on "label[s]" but substance—that is, whether an entity is "acting as an arm of the State." *See Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) (en banc). In *Williams*, the Eleventh Circuit acknowledged that a Florida community college board of trustees is "an independent, separate, legal entity" from the State, "not a state agency," and "not an agent of the executive branch of state government under Florida law." 421 F.3d at 1193. Yet, Florida law still "favors" treating a community college board as an arm of the State because it is a "creature of state law." *Id.* at 1193-95; *see CoMentis*, 861 F.3d at 1235-36 (so reading *Williams*). Here too, the isolated reference to NICA not being a state agency does not outweigh NICA's status as an entity created by the State of Florida to serve a defined state purpose. Florida law thus favors arm-of-the-State status for NICA.

2. Florida exercises pervasive control over NICA through statutory directives, approval of its operating plan, and director appointments.

Turning to the second factor, a State "exercises great control" over an entity when it appoints the entity's directors and defines the entity's powers. *CoMentis*, 861 F.3d at 1235. Both apply to NICA.

First, Florida controls NICA through appointment of all five of NICA's directors. Fla. Stat. § 766.315(1)(c). Each director is appointed by Florida's Chief Financial Officer, a Cabinet member who, like the Governor, is elected statewide. Fla. Const. art. IV, § 5(a); Fla. Stat. § 766.315(1)(c). Although various private associations are entitled to nominate board members, the CFO enjoys complete discretion to disregard those nominations. *See* Fla. Stat. § 766.315(2)(a) (CFO "not required to make an appointment from among the nominees of the respective associations").

[7] Government reports are subject to judicial notice. *Coastal Wellness Ctrs., Inc. v. Progressive Am. Ins. Co.*, 309 F. Supp. 3d 1216, 1220 n.4 (S.D. Fla. 2018) (Dimitrouleas, J.).

Second, Florida law defines NICA's powers in great detail. By statute, NICA's powers are limited to administering the Plan and subsidiary activities necessary to fulfill that duty. Fla. Stat. § 766.315(4). The Plan, in turn, exists solely to provide no-fault compensation for birth-related neurological injuries. *Id.* § 766.303(1). Chapter 766 of the Florida Statutes sets various limits on NICA's administration. For example, Fla. Stat. § 766.314 sets the assessments that—other than appropriations—are the Plan's exclusive funding mechanism, establishing who pays the assessments, how much they are, how often they are paid, and who collects them. *Id.* § 766.314(4)-(6). It further provides that only the Florida Office of Insurance Regulation—not NICA—may change those assessments. *Id.* § 766.314(7); *Coy*, 595 So. 2d at 947-48 (holding that NICA lacks authority to change assessments). The same statute strictly limits the purposes for which NICA may spend assessments and "any income derived therefrom": to pay claims and for reasonable expenses of administering the Plan. *Id.* § 766.314(3). Although NICA is responsible for paying claims, it does not determine the criteria that govern what claims it pays, or even whether it will pay. The criteria for claims payment are set by statute, and a DOAH ALJ, not NICA, determines whether a claim will be paid and how much compensation is due. *See id.* §§ 766.309 (providing findings required for an award), 766.31 (defining elements of an award). And as relevant here, DOAH prohibits NICA from paying for services that would otherwise be covered by Medicaid. *Williams*, 2014 WL 4704711, at *3.

State control extends beyond the written requirements of Chapter 766. NICA operates under a plan of operation originally approved by the Florida Department of Financial Services' predecessor agency, and changes to the plan require approval by the Office of Insurance Regulation. *See* Fla. Stat. § 766.314(2)(a). Moreover, NICA is subject to both legislative and executive oversight. It must provide annual financial reports to the Joint Legislative Auditing Committee and the Office of Insurance Regulation, which may audit NICA whenever they wish. *Id.* § 766.315(5)(d).

In sum, the State of Florida dictates NICA's purpose, the criteria by which it pays claims, and the funding it receives. State-appointed directors implement these statutory guidelines subject to state legislative and executive oversight. This sort of "pervasive and substantial" state control strongly supports NICA's status as an arm of the State. *See Lesinski*, 739 F.3d at 603.

3. The State of Florida provides NICA's funding.

State funding weighs in favor of an entity being viewed as an arm of the State, even when the State it is not the "exclusiv[e]" source of funds. *Williams*, 421 F.3d at 1190. Here, NICA depends on the State of Florida for its funding.

When establishing NICA, Florida appropriated $20 million to fund it, with an additional $20 million back-up appropriation should the initial funding prove inadequate. Fla. Stat. § 766.314(5)(b); Ch. 88-277, § 41, Laws of Fla. An appropriation is quintessential State funding. *See Lesinski*, 739 F.3d at 604 & n.7 (citing appropriations as form of state funding); *Williams*, 421 F.3d at 1194 (same). Aside from those appropriations, NICA's only source of funding is assessments on hospitals and physicians. Fla. Stat. § 766.314. Although called "assessments," these payments are taxes under Florida law. *Coy*, 595 So. 2d at 945; *see also NICA v. Carreras*, 633 So. 2d 1103, 1107 (Fla. 3d DCA 1994) (recognizing that "NICA is tax-funded"). In contrast to local governments, which typically may raise or lower tax rates, NICA has no power to raise or lower the assessments that fund it. *Compare Lightfoot*, 771 F.3d at 777 (noting Georgia school board's ability to set its own tax rates) *with Coy*, 595 So. 2d at 947-48 (holding that NICA cannot change the statutory assessments). Like other State taxes, it is the Legislature that defines who pays the assessments and sets the rates. Fla. Stat. § 766.314(4)-(5). Other than the Legislature, only the Florida Office of Insurance Regulation may change the assessments, and only as necessary to maintain Plan operation on an "actuarially sound basis." *Id.* § 766.314(7)(b).

It makes no difference that NICA receives the assessment revenues directly from those who pay them, rather than by way of annual legislative appropriations. The Eleventh Circuit considered a similar funding mechanism in *Robinson v. Georgia Department of Transportation* and found it to "support" the department being an arm of the State. 966 F.2d 637, 639-40 (11th Cir. 1992). Like NICA, the department directly received the revenues of the Georgia fuel tax "without the intervention of the legislature." *Id.* at 639. Acknowledging that the department was "fiscally autonomous from the state legislature" because it could "spend all the dedicated funds in its discretion," the court dismissed that fact's relevance. *Id.* at 640. What mattered was that the department lacked "any mechanism of raising its own revenues" outside the fuel tax, leaving it "dependent on the state for its funds." *Id.* So too here. NICA's funding consists solely of

appropriations and the assessments set by section 766.314, leaving NICA dependent on the State of Florida for its funds.[8]

Like the first and second factors, NICA's state funding shows that it is an arm of the State.

4. State funds will pay any judgment in this case.

The final factor asks "who is responsible for judgment against the entity"? *Lesinski*, 739 F.3d at 602. State responsibility for judgments is a "core concern" of Eleventh Amendment jurisprudence, which seeks to spare state treasuries from attack in federal court. *Manders*, 338 F.3d at 1327 n.51. Indeed, the Eleventh Circuit has suggested that "the presence of a state treasury drain alone may trigger Eleventh Amendment immunity." *Id.* There is no question that the State of Florida would be responsible for any judgment here. Under Florida law, NICA's funds are "funds of the State of Florida." Fla. Stat. § 766.315(5)(e). Even if they were not, Florida would have to choose between promoting NICA's purposes and increasing NICA's funding should judgment creditors "deplete [its] funds to the point that it can no longer effectively function." *Lesinski*, 739 F.3d at 605. This dilemma "directly implicate[s]" the treasury, as the Eleventh Circuit explained in *Lesinski*, and is the "real funding issue." *Id.*

All four factors thus tilt heavily in favor of NICA being an arm of the State. As such, NICA is not a "person" subject to suit under the FCA.

B. NICA is immune from suit under the Eleventh Amendment.

NICA's status as an arm of the State also justifies dismissal for lack of subject-matter jurisdiction under Rule 12(b)(1).[9] Under the Eleventh Amendment, private citizens cannot sue arms of the State in federal court. *Nichols v. Ala. State Bar*, 815 F.3d 726, 731 (11th Cir. 2016). That *qui tam* actions are brought "in the name of the Government," 31 U.S.C. § 3730(b), does not change this result. *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 882 (D.C. Cir. 1999) (holding that the United States' exemption from Eleventh Amendment immunity

[8] Not only does the State control NICA's funding, but NICA must also annually submit audited financial reports to the Legislature and the Office of Insurance Regulation. Fla. Stat. § 766.315(5)(d). The Eleventh Circuit has repeatedly held that such reporting requirements favor of arm-of-the-State status. *Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n*, 226 F.3d 1226, 1233 (11th Cir. 2000); *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518, 1520-21 (11th Cir. 1983).

[9] The Court need not reach the Eleventh Amendment issue if it determines that NICA is not a "person" under the FCA. *Lesinski*, 739 F.3d at 606 n.9.

does not apply to FCA relator); *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999) (same). Admittedly, not all courts have agreed. Before the Supreme Court's *Stevens* decision, some courts reasoned that the United States—which may sue States in federal court—is the real party interest in a *qui tam* action. *See, e.g.*, *United Sates ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998). Although *Stevens* did not resolve the issue, it expressed "serious doubt" that a relator could piggy-back off the United States' power to sue States. 529 U.S. at 787. Indeed, the Supreme Court rejected the proposition on which these cases rely: that a relator simply proceeds as the United States' representative. *Id.* at 772. Moreover, the cases holding that the Eleventh Amendment does not apply to relators overlook that the United States cannot delegate its exemption to Eleventh Amendment immunity to private persons. *In re PennEast Pipeline Co.*, 938 F.3d 96, 106 (3d Cir. 2019) (collecting authority). The Eleventh Amendment thus deprives the Court of subject-matter jurisdiction.

III. The Relators' claims fail under the Public Disclosure Bar.

The purpose of a *qui tam* action is to "increase private citizen involvement in exposing fraud" hidden from government view. *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 815-16 (11th Cir. 2015). It is not a vehicle for "opportunistic suits by private persons who heard of fraud but played no part in exposing it." *Id.* The FCA thus "bars private *qui tam* suits based on publicly disclosed information." *Id.* at 809. This Public Disclosure Bar applies whenever (1) there has been a public disclosure of the alleged misconduct, (2) the relator's allegations are "based upon" or "substantially the same as" the public disclosures,[10] and (3) the relator is not an "original source." *Id.* at 812. Each requirement is satisfied here.

A. NICA's position regarding Medicaid has been publicly disclosed for decades.

First, NICA's position that is does not pay for expenses covered by Medicaid has been publicly and repeatedly disclosed since it began operation in 1989—*three decades* before Relators filed suit in April 2019. Before detailing these disclosures, it is important to note that when considering whether allegations have been publicly disclosed, courts "routinely" invoke judicial

[10] The Public Disclosure Bar was amended in 2010. *Id.* at 809. Among other changes, the amendments substituted "substantially similar to" for "the basis of." *Id.* The "basis of" standard applies to conduct occurring before the amendments. *United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc.*, 841 F.3d 927, 932 n.1 (11th Cir. 2016). The Eleventh Circuit has construed the two phrases similarly. *Osheroff*, 776 F.3d at 814.

notice to consider documents not referenced in the complaint. *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 208 (1st Cir. 2016). And, each of the sources discussed below falls within the "broad sweep" of "news media" disclosures that trigger the public-disclosure bar. *Osheroff*, 776 F.3d at 813. That category includes traditional media like newspapers, as well as "publicly available websites" and "scholarly journals." *Id.*; *United States ex rel. Patriarca v. Siemens Healthcare Diagnostics, Inc.*, 295 F. Supp. 3d 186, 197 (E.D.N.Y. 2018) ("[C]ourts routinely interpret the 'news media' to include disclosure in scientific and scholarly journals.").

Since at least 2006, NICA's online FAQ for parents has disclosed that Plan awards cover only expenses "not covered by another source, such as insurance *or Medicaid*." Ex. C (Wayback Machine page capture dated Nov. 3, 2006) (emphasis added).[11] The page's content remains the same to this day. *See* Ex. D. Similar disclosures appear in law review articles dating back to 1989. That year, an article in the *Yale Law and Policy Review* explained that NICA and its Virginia counterpart "reduce the compensation by the amount received from . . . Medicaid [and] other government benefits." Sieradzki, *supra*, at 550. In 1998, another scholarly article explained that NICA and the Virginia program "operate as secondary payers to other programs, including . . . Medicaid," which "saves [them] substantial amounts of money" and leaves them to pay "a small amount in each case." Bovbjerg & Sloan, *No-Fault for Medical Injury: Theory and Evidence*, 67 U. Cin. L. Rev. 53, 93 (1998) (attached as Ex. E). Three years later, another article reported that NICA had managed to remain secondary to Medicaid through "informal arrangements with state and federal payers." Studdert & Brennan, *Toward a Workable Model of "No-Fault" Compensation for Medical Injury in the United States*, 27 Am. J. Law & Med. 225, 251 (2001) (attached as Ex. F). The source: an interview with NICA's then-executive director. *Id.* at 251 n.218.

NICA's practices have also been disclosed in local and national newspapers. In 1998, the *Wall Street Journal* informed readers about a lawyer's lament that "NICA pays out very little for medical expenses because private insurance and government programs"—specifically including Medicaid—"would cover most of a child's needs." Terhune, *Crisis May Be Looming for Birth-Injury Program*, Wall St. J., May 6, 1998, at F1 (attached as Ex. G). A 2003 op-ed in the *Orlando Sentinel* described Plan benefits as including "only . . . those expenses that are not already covered by . . . insurance or Medicaid." Anderson, *Immunity for Obstetricians*, Orlando Sentinel, July 3,

[11] *See Pohl v. MH Sub I, LLC*, 332 F.R.D. 713, 716 (N.D. Fla. 2019) ("Numerous courts . . . have taken judicial notice of web pages available through the WayBack Machine.").

2003, at A15 (attached as Ex. H). Five years later, the *St. Petersburg Times* reported that NICA "provides funds for services not covered by Medicaid." Jenkins, *Judge Seems to Agree Agency Isn't Doing Its Job*, St. Petersburg Times, Sept. 10, 2008, at 1B (attached as Ex. I).

Indeed, the Amended Complaint itself relies exclusively on public disclosures for its allegations about NICA's practices. Specifically, Relators cite three documents available on the Internet: an article written by NICA's executive director in 2015 (Am. Compl. Ex. A) (URL on exhibit), NICA's 2015 Benefits Handbook (*id.* Ex. B) (http://www.nica.com/parents/2015%20Handbook%20Revised.pdf), and NICA's 2016-2017 Financial Statement (*id.* Ex. C) (http://www.nica.com/downloads/2017%20NICA%20Audited%20Financial%20Statements.pdf). The NICA practice that is the subject of the Amended Complaint has thus been disclosed in a plethora of news media over the last three decades.

B. Relators' allegations are substantially the same as the public disclosures.

Relators' allegations are "based upon" and "substantially the same" as the public disclosures discussed above. *Osheroff*, 776 F.3d at 812. The Eleventh Circuit has characterized this second requirement as a "quick trigger to get to the more exacting original source" inquiry. *Id.* at 814. If allegations are based "in any part" on the public disclosures, that is enough. *Id.* This requirement is easily satisfied. The gravamen of Relators' claims is exactly what has long been disclosed: that NICA has "declared itself the 'payer of last resort' and shifted much of the cost of care for NICA participants onto the Medicaid program." Am. Compl. ¶ 6.

C. Relators are not an original source.

To overcome the Public Disclosure Bar, Relators must plead sufficient facts to show that they are an original source. *See United States ex rel. Bernier v. InfiLaw Corp.*, 311 F. Supp. 3d 1288, 1297-98 (M.D. Fla. 2018) (dismissing complaint where relator's original-source allegations were insufficient). Relators can be original sources only if they either (1) disclosed "the basis of an FCA claim prior to a public disclosure" or (2) possess "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions" and "voluntarily provided the information to the Government before filing an action." *Id.* at 1297; 31 U.S.C. § 3730(e)(4)(B). The Amended Complaint fails both tests.

Relators fail the first test because the public disclosures discussed above began in 1989, well before Relators first claim that they made a disclosure about NICA to the government in July 2015. *See* Am. Compl. ¶¶ 5, 8. Relators also fail the second test, because they cannot show that

they have knowledge that "materially adds to" the public disclosures. *See* 31 U.S.C. § 3730(e)(4)(B). Each public disclosure discussed above makes clear that NICA pays only what Medicaid does not. All that Relators add is their own belief that NICA's practices violate the law. "[T]hat a relator may have been the first to attach legal wrongdoing to [the] underlying facts is simply of no moment." *United States ex rel. Barber v. Paychex, Inc.*, 2010 WL 2836333, at *9 (S.D. Fla. July 15, 2010); *see Osheroff*, 776 F.3d at 815 ("background information that helps one understand or contextualize a public disclosure is insufficient to grant original source status").

It is little surprise that Relators cannot allege that they are original sources. They have no relationship to NICA. Instead, they received benefits under Virginia's program for birth-related neurological injuries, sued it in 2015, and filed this copy-cat lawsuit four years later based solely on publicly disclosed information. *See* Am. Compl. ¶¶ 2-5, 28-38. This case is precisely the kind of "opportunistic suit[] by private persons who heard of [alleged] fraud but played no part in exposing it" that the Public Disclosure Bar was designed to prevent. *See Osheroff*, 776 F.3d at 816.

IV. NICA is not a "third party" under 42 U.S.C. § 1396a(a)(25)(A).

As the name suggests, the False Claims Act requires a claim that is "false." *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148, 1154 (11th Cir. 2017). Relators proceed under a theory of legal falsity—that is, falsity related to "compliance with the applicable statutes and regulations." *United States ex rel. Carmen Medrano v. Diabetic Care RX, LLC*, 2018 WL 6978633, at *6 (S.D. Fla. Nov. 30, 2018). Specifically, Relators allege that NICA has held itself out as the payer of last resort when, in fact, it is a "third party" under 42 U.S.C. § 1396a(a)(25)(A). Am. Compl. ¶¶ 58-59, 68. Under that statute, the term "third party" "include[es] health insurers, self-insured plans, group health plans . . . , service benefit plans, managed care organizations, pharmacy benefit managers, or other parties that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service." 42 U.S.C. § 1396a(a)(25)(A). NICA does not fit within this definition, for two independent reasons.

A. State entities are not "third parties" under the FCA.

Since 1987—before NICA was created—it has been recognized that State entities are *not* "third parties" under 42 U.S.C. § 1396a(a)(25)(A). *Massachusetts v. Sec'y of Health & Hum. Servs.*, 816 F.2d 796, 803 (1st Cir. 1987) (rejecting the agency's contrary view), *rev'd in part on other grounds sub nom. Bowen v. Massachusetts*, 487 U.S. 879 (1988). After its loss in *Massachusetts*, the U.S. Department of Health and Human Services ("HHS") has likewise rejected

the proposition that a State entity can be a "third party."*E.g.*, *Ore. Dep't of Human Res.*, DAB No. 1298, 1992 WL 685346, at *8 (H.H.S. Jan. 31, 1992) ("[T]he MVAF, as a component of the State, cannot be a third party to the State . . . .").

This reading flows from the plain language of the Medicaid statutes. The term "third party" is inherently relational: "third party" to what? In this case, the "specific context" in which the term is used indicates that an entity is a "third party" if it is third party to the State. *See Nken v. Holder*, 556 U.S. 418, 426 (2009). Under Medicaid, it is the State that provides for medical care. *See* 42 U.S.C. § 1396-1 (explaining that Medicaid appropriations are designed to "enabl[e] each State . . . to furnish . . . medical assistance"). Thus, it is the "State plan" that must ensure "collection of sufficient information . . . to enable the State to pursue claims against such third parties." *Id.* § 1396a(a)(25)(A)(i). Similarly, under subsection (a)(25)(E)(i), the "State shall . . . make payment for [preventive pediatric care] . . . without regard to the liability of a third party for payment of such services. *Id.* § 1396a(25)(E)(ii). In each case, the term "third party" is used in relation to the "State." It follows that only a non-State entity may be a "third party" under 42 U.S.C. § 1396a(a)(25)(A).

The listed examples of third parties confirm this understanding. Before the catch-all "parties that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service," 42 U.S.C. § 1396(a)(25)(A) provides a long list of *non-State* entities: "health insurers, self-insured plans, group health plans . . . service benefit plans, managed care organizations, pharmacy benefit managers." Where, as here, "a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018). The exclusion of any State entity from the list thus reinforces that State entities are not "third parties" under 42 U.S.C. § 1396(a)(25)(A).

Not only would treating a State entity as a "third party" be incompatible with the statutory text, but it would thwart Medicaid's purpose. *See Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 778 (2018) (looking to statute's "purpose and design" to interpret text). Medicaid is a "federal program that subsidizes the States' provision of medical services" to low-income residents. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 323 (2015). In this "cooperative" program, the "Federal Government pays [a percentage] of the costs the State incurs for patient care." *Ark. Dep't of Health & Hum. Servs. v. Ahlborn*, 547 U.S. 268, 275 & n.4 (2006) (citing 42

U.S.C. § 1396d(b)). The federal government picks up 61.47 percent of Florida's tab. *Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy, Aged, Blind, or Disabled Persons for Oct. 1, 2019 Through Sept. 30, 2020*, 83 Fed. Reg. 61,157, 61,159 (Nov. 28, 2018). When a non-State entity—a health plan, for example—covers expenses as a "third party," the State's percentage contribution is not distorted. But if a State entity's program is treated as a "third party," the State must pay *100 percent* of the expense, contrary to Medicaid's cost-sharing design. Such a result hardly "enable[s] [a] State" to provide medical assistance. *See* 42 U.S.C. § 1396-1.

Moreover, there is no principled reason to treat a one part of a State as "third party" to another. In *Massachusetts*, the Secretary of Health and Human Services argued that the Massachusetts Department of Education was a "third party" because the Department of Public Welfare administered the Commonwealth's Medicaid program. 816 F.2d at 803. The First Circuit rejected the argument, reasoning that both agencies were "subdivisions" of the Commonwealth, which "brought them into being to serve complementary social welfare goals." *Id.* Just as easily, the State could combine the agencies into "one 'super agency'" and the "third party argument would disappear." *Id.* The court saw no reason that "third party" status should be "an artifact of the Commonwealth's internal organization." *Id.*

The specific rules of statutory interpretation for Spending Clause legislation further support this result. *See Armstrong*, 575 U.S. at 323 (recognizing that Medicaid is Spending Clause legislation). It is a "fundamental proposition that Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously." *Bd. of Educ. of Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 190 n.11 (1982). Thus, any condition imposed on a State must be presented in "clear and unmistakable statutory terms." *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 563 (4th Cir. 1997) (en banc) (panel dissent of Luttig, J., adopted as en banc opinion). At a minimum, Congress has failed to clearly and unmistakably specify that State entities like NICA are third parties under 42 U.S.C. § 1396a(a)(25)(A).

In sum, the text and design of the Medicaid statutes, caselaw, and administrative decisions all show that State entities like NICA are not third parties under 42 U.S.C. § 1396(a)(25)(A).

B. NICA is not legally responsible to pay for Medicaid-covered items or services.

Even if a State entity could be a "third party," NICA is not. To be a third party, an entity must be "legally responsible" to pay for items or services covered by Medicaid. 42 U.S.C.

§ 1396a(a)(25)(A). Not only is NICA not legally responsible for paying expenses paid by Medicaid, but DOAH does not permit it to pay "expenses paid by Medicaid." *Williams*, 2014 WL 4704711, at *3 (excluding items covered by Medicaid from NICA award). For this separate reason, NICA is not a "third party." Relators therefore cannot plead the falsity that the FCA requires.

V. The Amended Complaint fails to allege a knowing violation.

Even were NICA a "third party," that would not make it liable under the FCA. FCA liability requires "knowledge that the claim was false." *Phalp*, 857 F.3d at 1154; *United States ex rel. Donegan v. Anesthesia Assocs. of Kan. City, PC*, 833 F.3d 874 879 (8th Cir. 2016) (distinguishing mere "regulatory noncompliance" from "an FCA claim of knowing fraud"). Although "actual knowledge" is not required, there must at least be "reckless disregard." *Phalp*, 857 F.3d at 1155 (citing 31 U.S.C. § 3729(b)); *see Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1058 n.15 (11th Cir. 2015) (explaining that the alternative "deliberate ignorance" standard poses a higher barrier). "Strict enforcement of the FCA's knowledge requirement helps to ensure that innocent mistakes made in the absence of binding interpretive guidance are not converted into FCA liability . . . ." *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287 (D.C. Cir. 2015).

At various points, the Amended Complaint asserts, without elaboration, that NICA's violations of federal law were "knowing." Am. Compl. ¶¶ 6, 7, 73, 81. But as this Court has recognized, a "conclusory allegation" of knowledge "without any specific factual allegations" is insufficient. *Bentley*, 773 F. Supp. 2d at 1373; *accord Jacobs v. Bank of Am. Corp.*, 2017 WL 2361943, at *10 (S.D. Fla. Mar. 21, 2017) (requiring "allegations of underlying facts" to show knowledge in FCA case).

For two principal reasons, the need for specific factual allegations about knowledge is particularly acute here. *First*, even if the Court ultimately disagrees with NICA's interpretation, there is a strong argument that text, statutory design, and precedent show that State entities like NICA are not third parties. *Second*, after NICA argued in an administrative proceeding that it was not a "third party," the Florida Legislature considered and rejected legislation that would have expressly classified NICA as a "third party." *See* Fla. HB 35A, § 8, at 14 (2003) (attached as Ex. J); Fla. H.R. Comm. on Approp. HB 35A (2003) Staff Analysis 4 (May 14, 2003) (attached as Ex. K).

When a legal requirement does not unambiguously prohibit a defendant's conduct, courts have at least required "government guidance that warned a regulated defendant away from an

otherwise reasonable interpretation" before finding recklessness. *Donegan*, 833 F.3d at 879-80. Such a warning must consist of "authoritative guidance"; "informal guidance" from agency staff is not enough. *Purcell*, 807 F.3d at 289-90 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 n.19 (2007)). It has been more than three decades since the first public disclosure that NICA treated itself as secondary to Medicaid, and four years since Relators allegedly told the federal government about NICA's practices. Am. Compl. ¶ 5; *supra* p. 13. Yet, Relators cannot point to a single authoritative government warning to NICA that it was misinterpreting federal law. The silence speaks volumes.

Relators make much of discussion in NICA's FY 2016-2017 financial statement, Am. Compl. ¶ 63, but NICA's own financial statement cannot constitute authoritative guidance *from the relevant federal agency*, nor does it reflect the existence of such a warning. The document merely notes NICA's observation that the federal government "*may be* shifting its prior interpretation as to how the *Virginia Program* and Medicaid interrelate . . . by taking the position that the Virginia Program is a 'third party.'" Am. Compl. Ex. C at 6 (emphasis added). The document does not identify the basis for the government's apparent about-face or how it could apply to NICA. As such, it remained "*unclear at this time* whether CMS would apply a similar interpretation with respect to NICA." *Id.* (emphasis added). Noting that such a change would be a "fundamental shift" in the federal government's position "over the past 30 years," NICA emphasized that it "has not been determined to be a liable third party" and "maintains that it is not a liable third party." *Id.*[12] Even if NICA interpreted federal law incorrectly, the Amended Complaint fails to allege facts showing that NICA "knowingly" violated federal law, as the FCA requires.

VI. The Amended Complaint does not identify any false claims or unpaid obligations.

Rule 9(b) applies to FCA claims. *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1308 (11th Cir. 2002). Although the Eleventh Circuit has recognized that this rule "makes it hard for many persons to bring a *qui tam* suit," it is necessary to prevent "speculative

[12] Regardless, it is doubtful that HHS, as opposed to a court, could "authoritatively" resolve the issue of NICA's status. The First Circuit in *Massachusetts* rejected HHS's view that a state agency could be a third party. 816 F.2d at 803. As such, HHS's view (or any other agency's view) on this issue cannot be "authoritative" in any meaningful sense. There is no need to resolve this issue in this case, however, as the government has not yet taken the position, contrary to *Massachusetts*, that NICA is a "third party."

suits against innocent actors for fraud." *Id.* FCA allegations "must include facts as to time, place, and substance of the defendant's alleged fraud." *Id.* at 1309. Both counts fail this requirement.

Count I. The "submission of a claim" is the "*sine qua non* of a False Claims Act violation" under subsection (a)(1)(A). *Clausen*, 290 F.3d at 1311. It is not enough for a relator "merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government." *Id.*; *accord Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1324 (11th Cir. 2009) ("Improper practices standing alone are insufficient to state a claim . . . ."). *Clausen* illustrates the rigor of this principle. The relator "described the various schemes LabCorp allegedly implemented to generate unneeded or duplicative medical tests on unsuspecting . . . patients," "set[ting] the stage for the consummation" of the scheme. 290 F.3d at 1312. But in place of concrete allegations about even one claim—the date, the amount, or even a copy of a single bill—the relator provided only a conclusory allegation that the "practices resulted in the submission of false claims for payment to the United States." *Id.* The Amended Complaint suffers the same defects. Relators describe a NICA policy of requiring claimants to seek compensation from Medicaid first, Am. Compl. ¶¶ 59-62, but they do not identify even one NICA claimant who sought Medicaid funds first.

Count II. For reverse false claims, identifying a "definite and clear obligation to the United States" is of "primary importance." *United States ex rel. Romanosky v. Aggarwal*, 2005 WL 6011259, at *7 (M.D. Fla. Feb. 10, 2005). According to Relators, this only occurs "[t]o the extent that Medicaid paid claims for health care items or services" before NICA makes an award. Am. Compl. ¶ 65. Yet, the Amended Complaint does not identify any claimant as to whom this has occurred. As with Count I, Relators identify a practice without even one example where the practice has resulted in an obligation not being satisfied.

CONCLUSION

The Amended Complaint should be dismissed without leave to amend.

Respectfully submitted:

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