UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT P. KANE, By and on Behalf of the United States of America, Relator, State of New York, *ex rel.* Robert P. Kane, Relator, State of New Jersey, *ex rel.* Robert P. Kane, Relator, vs. HEALTHFIRST, INC., *et al.,* Defendants.	**Civil Action No. 11-2325 (ER)** ECF CASE
STATE OF NEW YORK, Plaintiff-Intervenor, vs. CONTINUUM HEALTH PARTNERS, INC.; BETH ISRAEL MEDICAL CENTER d/b/a MOUNT SINAI BETH ISRAEL; and ST. LUKE'S-ROOSEVELT HOSPITAL CENTER d/b/a MOUNT SINAI ST. LUKE'S and MOUNT SINAI ROOSEVELT, Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT IN INTERVENTION OF THE STATE OF NEW YORK

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PRELIMINARY STATEMENT

The State of New York's Complaint in Intervention (the "NY Complaint") is identical to the Complaint in Intervention filed by the United States (the "US Complaint"), except the NY Complaint alleges that Defendants Continuum Health Partners, Inc. ("Continuum"), Beth Israel Medical Center ("Beth Israel"), and St. Luke's Roosevelt Hospital Center ("St. Luke's") (collectively "Defendants") violated the New York State False Claims Act ("NYFCA"), State Fin. Law §§ 187-194, instead of the federal False Claims Act ("FCA"). Like the US Complaint, the NY Complaint should be dismissed because it fails to allege that Defendants had an "obligation" or that they knowingly concealed or knowingly and improperly avoided or decreased an obligation. The NY Complaint should also be dismissed because the provision of the NYFCA that Defendants allegedly violated was not enacted until 2013, two years after the alleged violation, and the provision cannot be applied retroactively.

FACTUAL ALLEGATIONS AND STATUTORY BACKGROUND

A. Factual Allegations

The factual allegations of the NY Complaint are identical to the allegations in the US Complaint, except the NY Complaint alleges that the Defendants violated the NYFCA, not the federal FCA. The allegations are summarized in the Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint in Intervention of the United States.

B. Statutory Background

The NYFCA was enacted in 2007. 2007 N.Y. Sess. Laws (McKinney's) Ch. 58, S. 2108-c, § 93(5) (Apr. 9, 2007). It is modeled on and closely tracks the federal FCA. *See United States ex rel. Corp. Compliance Assocs. v. N.Y. Soc. for the Relief of the Ruptured and Crippled, Maintaining the Hosp. for Special Surgery*, __ F. Supp. 3d __, No. 07 Civ. 292 PKC, 2014 WL 3905742, at *11 (S.D.N.Y. Aug. 7, 2014).

The State alleges that the Defendants violated one section of the NYFCA: State Fin. Law § 189(h). State Fin. Law § 189(h) provides that a person violates the NYFCA if he or she "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a local government, or conspires to do the same[.]" *See id.* This provision is identical to the second clause of 31 U.S.C. § 3729(a)(1)(G), except that it applies to obligations to the State or a local government whereas § 3729(a)(1)(G) applies to obligations to the United States.

State Fin. Law § 189(h) was not included in the version of the NYFCA that was originally enacted in 2007. *See* State Fin. Law § 189 (2007). Rather, it was enacted in March 2013, approximately four years after a similar provision was added to the federal FCA. *See* 2013 N.Y. Sess. Laws (McKinney's) Ch. 56, S. 2606, § 8 (Mar. 28, 2013).

ARGUMENT

I.
THE COMPLAINT FAILS TO ALLEGE THAT THE DEFENDANTS KNOWINGLY CONCEALED OR KNOWINGLY AND IMPROPERLY AVOIDED AN OBLIGATION

The State alleges that Defendants violated a section of the NYFCA that provides that it is a violation of the statute to "knowingly conceal[] or knowingly and improperly avoid[] or decrease[] an obligation to pay or transmit money or property to the state or a local government." State Fin. Law § 189(h). This provision is identical to the second clause of 31 U.S.C. § 3729(a)(1)(G), except that § 189(h) applies to obligations to a state or local government whereas § 3729(a)(1)(G) applies to obligations to the United States. As set forth in Sections I and II of the Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint in Intervention of the United States, the US Complaint fails to allege that Defendants had an obligation or that they knowingly concealed or knowingly and improperly avoided or decreased

an obligation. For the same reasons, the NY Complaint fails to allege sufficient facts to establish these elements of the cause of action. Consequently, the NY Complaint should be dismissed.

II.
STATE FINANCE LAW § 189(h) CANNOT BE APPLIED RETROACTIVELY

The NY Complaint also should be dismissed because the subsection of the NYFCA that Defendants allegedly violated was enacted two years after the alleged violation and cannot be applied retroactively.

"It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1998); *accord Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.") (internal quotation marks omitted). "[T]he first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether [the Legislature] has directed with the requisite clarity that the law be applied retrospectively." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001). "The standard for finding such an unambiguous direction is a demanding one. Cases where this Court has found truly retroactive effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 316-17 (internal quotations and citation omitted).

The amendment of the NYFCA that added State Finance Law § 189(h) lacks a statement of intent concerning retroactive application that is sufficiently clear to overcome the strong presumption against retroactivity. While one section of the legislation provides that the provisions of "this act" shall apply to "pending cases" and to obligations existing prior to, on or

after the date that the NYFCA was originally enacted, a second provides that "this act shall not be construed to alter, change, affect, impair or defeat any rights, obligations, duties or interests accrued, incurred or conferred prior to the effective date of this act." *See* 2013 N.Y. Sess. Laws Ch. 56, Part A, § 84(3) and (10). The ambiguity created by these conflicting provisions precludes retroactive application of 189(h).

Indeed, several courts have rejected retroactive application of legislation that, like the amendment to the NYFCA at issue here, included conflicting statements concerning retroactivity. For example, in *Aetna Life Ins. Co. v. Enter. Mortg. Acceptance Co., LLC (In re Enter. Mortg. Acceptance Co., LLC Sec. Litig.)*, 391 F.3d 401, 407 (2d Cir. 2004), the Second Circuit rejected retroactive application of a statutory amendment that prolonged the statute of limitations for private securities fraud where one section of the legislation stated that the new statute of limitations would apply to all proceedings commenced on or after its enactment, but another provided that the statute did not create a new private right of action. Similarly, in *United States ex rel. Romano v. New York-Presbyterian Hosp.*, No. 00 Civ. 8792 (LLS), 2008 WL 612691 (S.D.N.Y. Mar. 5, 2008), the court held that the NYFCA, as originally enacted, could not be applied retroactively. Crucially, the legislation enacting the NYFCA included conflicting provisions that were nearly identical to those in the legislation enacting State Fin. Law § 189(h). *Id.* at *2. Specifically, a provision of the enacting legislation stated that the NYFCA "shall apply to claims [for reimbursement] filed or presented prior to, on or after April 1, 2007." *Id.* Another section of the legislation provided: "this act shall not be construed to alter, change, affect, impair or defeat any rights, obligations, duties or interest accrued, incurred or conferred prior to the enactment of this act." *Id.* (quotations and citation omitted). Finally, in *Drax v. Ashcroft*, 178 F. Supp. 2d 296, 308 (E.D.N.Y. 2001), the court held that an amendment to a statute that added a

new crime to the list of deportable offenses lacked a sufficiently clear statement to allow it to be applied retroactively. While the amendment stated that it applied to convictions before, on or after its enactment, the title of the statute indicated that it was a technical amendment. *Id.* This "raise[d] a doubt" as to whether Congress intended for the statute to be applied retroactively, and precluded retroactive application. *Id.* Like the legislation at issue in *Aetna*, *Romano*, and *Drax*, the conflicting statements concerning retroactive application of State Fin. Law § 189(h) preclude its retroactive application.

Where legislation lacks a statement calling for its retroactive application that is sufficiently clear to overcome the strong presumption against retroactivity, the statute will not be given retroactive effect. *St. Cyr*, 533 U.S. at 320. A statute has retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf*, 511 U.S. at 290 (internal quotation marks omitted). At least one court has held that applying the amendment to the federal FCA that added a provision that is analogous to State Fin. Law 189(h) would have an impermissible retroactive effect where the defendant was alleged to have learned of the overpayment before the amendment at issue. *See United States ex rel. Stone v. OmniCare, Inc.*, No. 09 Civ. 4319, 2011 WL 2669659, at *4 (N.D. Ill. July 7, 2011). The same conclusion is warranted where the NY Complaint alleges that Defendants learned of the overpayments in February 2011 and the provision of the FCA they allegedly violated was enacted in 2013. (NY Cmplt. ¶ 7); 2013 N.Y. Sess. Laws Ch. 56, Part A, § 8.

Even if the Court holds that the NYFCA unambiguously provides that it should be applied retroactively (which it does not), retroactive application of the NYFCA would still be impermissible because it would violate the *Ex Post Facto* clause of the United States

Constitution. Retroactive application of punitive statutes violates the *Ex Post Facto* clause. *See Landgraf*, 511 U.S. at 290-93. The New York Court of Appeals recently held that the NYFCA is punitive, as its "imposition of civil penalties and treble damages evinces a broader punitive goal of deterring fraudulent conduct against the State" rather than merely compensating the State for damages caused by violations of the statute. *State ex rel. Grupp v. DHL Express (USA), Inc.*, 19 N.Y.3d 278, 286-87 (2012). In light of this holding, retroactive application of the NYFCA to events occurring before the statute's April 1, 2007 effective date would be unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should dismiss the NY Complaint in its entirety with prejudice.

Dated: New York, New York
September 22, 2014

Respectfully submitted,

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