[redacted]

From: Michael s. Porter
[redacted]
Re: Sanders – whether the Authority, UCHealth, UCH-MHS and/or [redacted] are entitled to immunity
[redacted]

I. Summary:

[redacted] I am providing the following analysis of whether any of the named defendants are entitled to immunity from suit under the FCA. This is not a close call. The University of Colorado Hospital Authority ("the Authority") is no longer a part of the University of Colorado; it is a separate and independent quasi-governmental, corporate entity. As is detailed below, with strong reliance on the statute that formed the Authority, it is extremely clear that the Authority is not an "arm of the state." Moreover it would be highly against the Authority's vast interests to assert that it was an arm of the state.

The remaining corporate defendants, University of Colorado Health and UCH-MHS, are derivatives of the Authority and hold no stronger connection to the state than the Authority.

And, even assuming *arguendo* that the corporate defendants were "arms of the state," UCHealth's CFO Daniel Rieber may properly be sued in his individual capacity under the FCA because of his substantial involvement in causing knowingly false claims to have been submitted to the government.

II. *Stevens* and *Chandler* – the establishment of the issue:

Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 779-788 (2000) established that a state (including a state agency) is not a "person" who can be sued under the False Claims Act ("FCA").

Cook County v. United States ex rel. Chandler, 538 U.S. 119, 125-134 (2003), on the other hand, established that municipal corporations are a "person" under the FCA. *Chandler* held that the term "persons" extends to persons politic and incorporate as well as to natural persons. *Id.,* at 125.

III. The Tenth Circuit three part test for determining whether an entity is an "arm of the state:"

[redacted] *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 716-722 (10th Cir. 2006) is the seminal Tenth Circuit case regarding the application of the "arm of the state" analysis to a FCA case. Adopting from a non-FCA Tenth Circuit case, *Sturdevant v. Paulsen*, 218 F.3d 1160 (10th Cir. 2000), *Sikkenga* states the applicable "arm of the state" test is:

(1) The state's legal liability for a judgment;
(2) The degree of autonomy from the state- both as a matter of law and the amount of guidance and control exercised by the state;
(3) The extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing. 472 F.3d at 718.

I Shepardized *Sikkenga* and it remains good law on this issue. [redacted] *United States ex rel. Ruotsinoja v. Board of Governors of the Colorado State University System*, 43 F.Supp.3d 1190, 1193 (D. Colo. 2014), applied this *Sikkenga* test.

IV. Background on the Authority:

It is important to understand that although the University of Colorado Hospital Authority ("the Authority") bears CU's name, it is not a part of the University. The statutory scheme I provided you last week, C.R.S. § 23-21-501, *et. seq.,* ("Part 5") evidences that the Authority was established by statute and is an independent and self- sufficient entity.

The history of the General Assembly's efforts to convert the University of Colorado Hospital into a private, non-profit entity provides important context for C.R.S. 23-21-501, *et. seq*. In 1989, the General Assembly passed H.B. 1143 which provided for the reorganization of the University of Colorado Hospital as a private, non-profit corporation. H.B. 1143 was codified as C.R.S. § 23-21-401 through 23-21-411 ("Part 4").

As discussed in the attached *Colorado Ass'n of Public Employees v. Board of Regents to University of Colorado*, 804 P.2d 138, 139-144 (Colo. 1990), the public employees' association and the hospital employees brought suit against the CU regents challenging the constitutionality of Part 4 on the grounds that it violated Colo. Const. art XII, § 13, the civil service amendment. The Colorado Supreme Court found that Part 4 was unconstitutional. The Court found that in view of the regents' creation of the hospital and their continuing control over the internal operations of the reorganized hospital, it was evident that the regents had not sufficiently divested themselves of the power over the hospital to enable the new corporation to operate independently as a private corporation. 804 P.2d at 144.

C.R.S. § 23-21-501 *et. seq.,* or Part 5 was enacted on June 1, 1991 to remedy the defects in Part 4, aka C.R.S. § 23-21-401 *et. seq*. A full read of Part 5 evidences that the Authority was established as an economic entity that was intended to be totally separate and independent of the state. The following portions of this statutory scheme evidence this point:

1. C.R.S. § 23-21-501(1)(c)-(e): it was felt that the University of Colorado University Hospital would be unable to become and remain economically viable unless the constraints imposed by being subject to various kinds of government policy and regulation were removed. It was in the best interests of the citizens of the state and the University of Colorado health sciences schools to operate the hospital authority as a quasi-governmental and corporate entity.

2. C.R.S. § 23-21-501(f) – in exchange for the Authority receiving the assets and operating obligations of the University of Colorado university hospital, the Authority would provide medical indigent care in excess of the state reimbursement for the medically indigent.

3. C.R.S. 23-21-502 (4), (5) and (10): on the transfer date, the regents would transfer to the Authority all the assets of the university hospital along will all its liabilities.

4. C.R.S. § 23-21-503(1) – this is the key passage which provides:

There is hereby created the *university of Colorado hospital authority*, which shall be a body corporate and a political subdivision of the *state*, which shall not be an agency of *state* government, and which shall not be subject to administrative direction or control by the regents or by any department, commission, board, bureau, or agency of the *state*.

5. C.R.S. § 23-21-504(1); for every three dollars of moneys appropriated by the general assembly that is distributed to the Authority for the state medically indigent program, the Authority shall provide four dollars worth of medically indigent care.

6. C.R.S. § 23-21-505: in consideration of the transfer of assets by the regents to the Authority, the Authority shall assume responsibility for and shall defend, indemnify and hold harmless the regents and the state with respect to, *inter alia*: all claims related to the Authority's errors and omissions including but not limited to medical malpractice, directors and officers liability, workers compensation, automobile liability and premises, competed operations and products liability.

7. C.R.S. § 23-21-506(1): Following the creation of the Authority and the transfer date, and except for the power of the regents to appoint members of the board of directors, the regents shall have no further control over the operation of the university hospital.

8. C.R.S. § 23-21-507: Any employee of the university hospital who was a state employee at the time of the transfer had the option to remain a state employee. However, any employee initially employed by the Authority after the transfer date shall be deemed an employee of the Authority and not a state employee.

9. C.R.S. § 23-21-513: The Authority was vested with the all the duties, privileges, immunities, rights, liability and disabilities of a body corporate and political subdivision of the state including the right to sue and be sued, to enter into any contract, to borrow money and issue bonds, and to deposit moneys of the Authority in any banking institution.

10. C.R.S. § 23-21-514: The Authority has the power to issue notes and bonds.

11. C.R.S. § 23-21-519: Neither the state nor the regents shall be liable for the bonds of the Authority and such bonds shall not constitute debt of the state or the regents.

12. C.R.S. § 24-6-402(1)(c): defines "political subdivision of the state" to include any county, city and county, town, home rule city, home rule county, home rule city and county, school district, special district, local improvement district, special improvement district or service district.

V. Application of the Tenth Circuit's "arm of the state" test to the Authority:

Again, *Sikkenga's* three part test is:

(1) The state's legal liability for a judgment;
(2) The degree of autonomy from the state- both as a matter of law and the amount of guidance and control exercised by the state;
(3) The extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing. 472 F.3d at 718.

1. The state would have no legal liability for a judgment against the Authority. Per C.R.S. § 23-21-505, the Authority is required to indemnify and hold the state harmless for the Authority's errors and omissions.

2. As a matter of law and as a practical matter, the Authority has complete autonomy from the state. The Authority is expressly not subject to any control from the state or the regents. See C.R.S. § 23-21-503.

3. The Authority is a viable and thriving independent economic entity that has no economic dependency on the state treasury. The only economic connection the Authority has with the state is the state's provision of appropriated funds for the provision of medical care to the indigent. But for every three dollars the state provides, the Authority is required to provide four dollars' worth of medically indigent care. C.R.S. § 23-21-501(f) and 23-21-504(1). So the state's provision of funds for indigent care is more of a burden than a benefit that financially props up the Authority. In addition, as described above, the Authority has the ability to provide for its own financing by borrowing money or issuing bonds. C.R.S. § 23-21-513, 514.

   Some of the publicly identified commercial deals the Authority has engaged in amplifies that it is a privatized and financially independent entity. As is discussed below with respect to UCHealth, in 2012 the Authority entered into a joint venture with a private, non-profit entity, Poudre Valley Health System, to form UCHealth.

   And, in 2015, UCHealth entered into joint venture with a private entity, Adeptus Health to operate at least twelve Colorado based freestanding emergency rooms. When Adeptus Health filed for bankruptcy reorganization in 2017, UCHealth then acquired Adeptus Health's interests in their jointly owned hospitals and emergency rooms.

So, utilizing the *Sikkenga* three part test there should be little question that the Authority is not an "arm of the state." Furthermore, if one takes the time to contrast the present facts with the *Sikkenga* facts, this conclusion becomes stronger.

Sikkenga addressed whether a corporation referred to as ARUP was an arm of the state. As the Court stated the inquiry, the question was whether ARUP is more like a county or city than like an arm of the state.

With respect to the first element of its test, *Sikkenga* noted that the State of Utah's treasury would not be legally liable for any judgment against ARUP. Any judgment against ARUP would be satisfied out of ARUP's treasury with no recourse to either the state treasury or the general funds appropriated for normal operation of the University. It is interesting to note that unlike our situation where the Authority's assets were transferred to it, ARUP's property was vested in the State of Utah. 472 F.3d at 718.

The facts are stronger in our case. The Authority is required to indemnify the state and the regents. And, the Authority owns its assets.

With respect to the second element, the degree of ARUP's autonomy from the state, the court noted that issue was "a bit tricky." ARUP was incorporated and was a wholly owned subsidiary of a separate corporate entity, AUP, which in turn was owned by the University of Utah. So, ARUP was indirectly owned by the University of Utah. The court found significant the fact that ARUP engaged in nationwide activity as a commercial laboratory, and could enter into contracts and maintain bank accounts in its own name. *Id.,* at 719-720. And, it was significant that the bulk of ARUP's revenues flowed from ARUP's commercial operations to the University rather than from the University to ARUP. The court concluded that while ARUP was a corporation owned by the University, its day to day operations were independent. *Id.*

Unlike our circumstances, ARUP was subject governance by the University regents and its property was owned by the state. But the court concluded that ARUP retained substantial autonomy in its operation, and operated with little, if any guidance or interference from the University or the state. *Id.,* at (720)-721. Here, the Authority is completely autonomous and operates with no guidance or interference from the University or the state. The Authority is more independent than ARUP.

With respect to the third element, financial independence, even though there was a complex history of intertwined relationships for funding and capital improvement projects between the University and ARUP, the Court focused on the facts that ARUP has been self-sustaining generating operating funds through its commercial activity. The Court concluded that when an entity is privatized and is structured to achieve financial independence from the state entity that owns it, the Court will not disregard its structure merely because the state retains proprietorial title to its assets. *Id.,* at 721.

Again, the facts are stronger here. There are no intertwined financial arrangements between the state and the Authority. Upon its creation, the related university's assets were transferred to the Authority, in exchange for the Authorities' assumption of the related liabilities

and the duty to indemnify the state and the regents. Since then, the Authority has become a commercial giant, owning and operating scores of hospitals and emergency rooms in Colorado.

Sikkenga concluded that ARUP was not an arm of the state, even though it was designed to support some public function or use. *Id. at 721-722.* Application of *Sikkenga* to our facts would lead to the same conclusion.

The other two cases you provided, *United States ex rel. Ruotsinoja v. Board of Governors of the Colorado State University System*, 43 F.Supp.3d 1190 (D. Colo. 2014) and *Hartman v Regents of the University of Colorado*, 22 P.3d 524 (Colo. App. 2000) are largely inapposite.

Ruotsinoja applied the *Sikkenga* three part test and concluded that CSU was an arm of the state. The facts applicable to determining CSU's status are quite different than the ones applicable to the Authority. CSU was considered a state agency subject to the control of the state. A significant portion of CSU's financial support comes from the state and the state controls important aspects of CSU's financial affairs. 43 F.Supp.3d at 1194- 1195. Here, the Authority is, by definition, not a state agency, is explicitly not subject to the state's controls and was designed to be economically independent.

Hartman is a state decision deciding whether the CU Regents were entitled to immunity. The Court noted the university has been defined by numerous statutes as a state agency. CU was subject to a wide range of controls by the Colorado Commission on Higher Education, was subject to the Colorado Procurement Code and its employees are subject to the State Personnel System and to the Colorado Code of Ethics. The issue of whether the state would bear liability for the judgment was mixed. In balancing all three factors, the Court concluded that CU was an arm of the state.

VI. Some practical considerations:

Employing the terms "University of Colorado Hospital Authority" and "arm of the state" I researched on Lexis/Nexis whether the Authority had ever asserted that it was an arm of the state. I found no reported decisions evidencing that the Authority has ever taken the position that it is an arm of the state. Otherwise, there are no reported decisions, per Lexis/Nexis, that hold the Authority is an arm of the state.

If you think about it, it would be extremely dangerous for the Authority to make the judicial claim that it is an arm of the state. Please recall that the 1989 H.B. 1143, or Part 4, the statute that first attempted to establish the Authority was eviscerated because the Colorado Supreme Court determined that the CU Regents retained too much control over the Authority.

The present statue, C.R.S. § 23-21-501*, et. seq.,* was carefully structured to set the Authority up as an economically independent quasi-governmental corporate entity with absolutely no control from the regents or the state. Today, the Authority has thrived as evidenced by all the UCHealth hospital and emergency rooms throughout Colorado. If the Authority tried to claim that it was an arm of the state, it would risk another challenge to the

constitutionality of its existence and risk being dismantled, with a complete loss of everything it has built to date.

I found evidence of this policy in the one case that turned up when I employed the search terms "University of Colorado Hospital Authority" and "arm of the state." Attached is Judge Matsch's decision in *Furlow v. Univ. of Colo. Hosp. Authority*, 2014 WWL 1500645 (D. Colo. 2014). The plaintiff in *Furlow* claimed he has been sexually assaulted by a nurse at the University of Colorado Hospital. Furlow sued the nurse, the Authority and the CU regents. Both the Authority and the CU regents were represented by the same counsel.

The Authority and the CU regents moved to dismiss and their motions were granted. There were two common claims asserted against both the Authority and the CU regents: negligence and a § 1983 claim of conscience shocking conduct or danger creation/due process. The attorney jointly retained by the Authority and CU asserted that, with respect to the § 1983 claim against the CU regents, that the University was an arm of the state and not a "person" who could be sued under § 1983. But with respect to the Authority, the "arm of the state" defense was not raised.

I have attached hereto not only Judge Matsch's *Furlow* decision, but the *Furlow* Second Amended Complaint, the University's motion to dismiss and the Authority's motion to dismiss.

There are a couple of interesting things the Authority's attorney stated in the Authority's motion to dismiss:

> Because there is often confusion it should be noted that the Hospital Authority is not in any way subject to the control of the University of Colorado. The Hospital Authority "shall not be subject to the administrative direction or control by the Regents …" C.R.S. §23-21-503(1). Consistent with this separate identity C.R.S. §23-21-505(2)(d) makes the Hospital Authority responsible for "all claims related to the authority's errors and omissions including, but not limited to: Medical malpractice…"

Authority motion to dismiss at page 3.

Certainly if the Authority raises the "arm of the state" defense, it will be readily defeated by the facts as applied to the *Sikkenga* three part test. But, I strongly suspect that the Authority will never raise the claim that it is an "arm of the state."

VII. Background on UCHealth:

With respect to University of Colorado Health ("UCHealth"), there is really no basis to claim it is an arm of the state. UCHealth is a basic Colorado nonprofit corporation. UCHealth was formed on July 1, 2012 as a joint operating company between the Authority and the Poudre Valley Health System. There is absolutely no evidence to suggest UCHealth is connected to the state beyond the fact that it is partially owned by the Authority.

And, there is no cause for concern with respect to the Poudre Valley Health System. From 1962 to 1994, the Poudre Valley Hospital was operated by the Poudre Valley Hospital District. That district was a special tax district that was primarily supported by local property tax dollars. In 1994, the Poudre Valley Hospital District created a locally controlled private, not-for-profit organization to take over the day-to-day management of the hospital under a 50 year lease agreement. That private, not-for-profit organization is Poudre Valley Health System.

A little research at the Colorado Secretary of State evidences that Poudre Valley Health System is actually a tradename owned by Poudre Valley Health Care, Inc., which is a not-for-profit Colorado corporation established in 1994. There is no reason to believe there is any connection between these Poudre Valley entities and the State of Colorado.

VIII. Background on UCH-MHS:

There is not a lot of publicly available information regarding UCH-MHS. It was formed in 2012 at about the same time UCHealth was formed. Its purpose appears to be to operate hospitals and emergency rooms in the Colorado Springs area. As alleged in the Complaint, ¶ ¶ 99, UCH-MHS owns the tradenames for a number of UCHealth emergency rooms in the Springs area. It would appear that, based on its name, and its articles of incorporation, that it is either owned by the Authority or UCHealth. There is no reason to believe it has a special connection with the state that would entitle it to "arm of the state" status.

IX. Discussion re [redacted] exposure for individual liability:

Even assuming *arguendo* that the corporate defendants were entitled to "arm of the state" status, we have made sufficient allegations in the Complaint to hold individual defendan[redacted] [redacted] individually liable for his actions.

In paragraphs 106-139 of the Complaint, we explain Relator Sanders' knowledge, which includes his efforts to discuss the problem with UCHealth's automated billing system with his superiors. On two different occasions, with two different groups of people, Sanders was advised that the problem with the automated billing system was discussed with UCHealth's CFO and the CFO advised the UCHealth staff to keep this automated billing system in place. Complaint at ¶ 133, 137. [redacted]

In paragraphs 19 and 20 of the Complaint, we allege that [redacted] is being sued in his individual or personal capacity because he knowingly violated the FCA.

I have attached three cases that hold that an individual who is an employee of an entity that is an "arm of the state" may be sued individually under the FCA if the individual was sufficiently involved in the violation of the FCA.

United States ex rel. Burlbaw v. Regents of New Mexico University, 324 F.Supp.2d 1209, 1215- 1218 (D. N.M. 2004). *Burlbaw* held that state employees are "persons" who may be sued under the FCA if they are sufficiently involved in the submission of a false claim to the United

States. *Id.*, at 1215. The Court disagreed with a contrary decision out of the Eighth Circuit, *United States ex rel. Gaudineer v. State of Iowa*, 269 F.3d 927 (8th Cir. 2001).

Stoner v. Santa Clara County Office of Education, 502 F.3d 1116, 1123- 1125 (9th Cir. 2007), held, like *Burlbaw*, that state employees could be sued individually under the FCA. Stoner also held that to state a claim against the individual defendants the plaintiff need only show that they knowingly presented or caused to be presented a false claim. *Id.,* at 1124.

United States ex rel. Jones v. Univ. of Utah Health Scis. Ctr., 2013 WL 5372609, *9-14 (D. Utah 2013) adopted the reasoning of *Burlbaw* and *Stoner* and held that a state employee could be sued individually under the FCA.

So, as we have discussed above, there is no reason to conclude that the Authority, UCHealth or UCH-MHS are "arms of the state," but even if they were determined to be so, [redacted] would still be exposed to individual liability for his actions.