15-2449-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

PAUL BISHOP, ROBERT KRAUS, UNITED STATES OF AMERICA, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus,

Plaintiffs-Appellants,

STATE OF NEW YORK, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF DELAWARE, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, DISTRICT OF COLUMBIA, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF FLORIDA, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus,

(Caption continued on inside cover)

On appeal from the United States District Court
for the Eastern District of New York

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FOR *AMICUS CURIAE* TAXPAYERS AGAINST FRAUD EDUCATION FUND

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STATE OF HAWAII, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF CALIFORNIA, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF INDIANA, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF ILLINOIS, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF MINNESOTA, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF NEVADA, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OFNEW HAMPSHIRE, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, COMMONWEALTH OF MASSACHUSETTS, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF NEW MEXICO, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF MONTANA, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF NORTH CAROLINA, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF NEW JERSEY, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF OKLAHOMA, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF RHODE ISLAND, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, STATE OF TENNESSEE, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus, COMMONWEALTH OF VIRGINIA, *ex rel.* Paul Bishop, *ex rel.* Robert Kraus,

Plaintiffs,

—against—

WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A.,

Defendants-Appellees.

Pursuant to Rule 29, Fed. R. App. P., Applicant, Taxpayers Against Fraud Education Fund (TAFEF) seeks leave to file a supplemental brief as *amicus curiae* supporting Plaintiffs-Respondents. In support of this motion, Applicant states as follows:

1. Plaintiffs-Appellants Paul Bishop and Robert Kraus filed this *qui tam* action pursuant to the federal False Claims Act, 31 U.S.C. §§ 3729-3733, alleging that the Defendants-Appellees, Wells Fargo & Company and affiliates, defrauded the federal government and several states by knowingly and falsely certifying compliance with federal banking regulations in order to borrow funds from the Federal Reserve at a subsidized interest rate in violation of the False Claims Act (FCA).

2. This case is before this Court after the United States Supreme Court granted the Appellants' writ of certiorari and vacated and remanded this Court's prior decision upholding the decision of the U.S. Court of Appeals for the Eastern District of New York granting Wells Fargo's motion to dismiss. In its prior decision, this Court applied existing precedent, *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), to reject the "implied certification" theory of FCA liability and limit liability to instances in which the relator alleged false certifications of compliance with a contract, statute, or regulation that expressly stated that compliance was a prerequisite to payment. Since that decision, the Supreme Court has embraced a broader view of liability and ruled that "implied certification" was a legitimate basis for FCA liability, and has

remanded the prior decision in this matter for further consideration in light of *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U. S. 1989 (2016). *United States ex rel. Bishop v. Wells Fargo & Co.*, __ U.S. __, 137 S. Ct. 1067 (2017).

3. TAFEF previously filed an *amicus* brief in this matter (Doc. 39) and on remand, respectfully seeks leave to file a supplemental brief on how *Escobar* revises this Court's standard for evaluating legally false or fraudulent claims under the FCA.

4. TAFEF is the leading nonprofit public interest organization dedicated to combating fraud against the federal government through its education of the public, the legal community, legislators, and others about federal and state FCAs and their *qui tam* provisions. TAFEF supports vigorous enforcement of the Acts by contributing its understanding of the Acts' proper interpretations and applications and working in partnership with *qui tam* plaintiffs, private attorneys, and the Government to effectively prosecute meritorious *qui tam* suits.

5. TAFEF, which is based in Washington, D.C., works with a network of more than 400 attorneys nationwide who represent *qui tam* plaintiffs in FCA litigation. In the past few years, TAFEF has greatly expanded its efforts toward public awareness and education regarding the FCA.

6. TAFEF publishes the *False Claims Act and* Qui Tam *Quarterly Review*, a quarterly publication that provides an overview of case decisions, settlements, and

other developments under the Acts. Past issues of the publication are available online at www.taf.org/quarterlypdf.htm.

7. TAFEF has produced and makes available a variety of other resources regarding FCAs, including: *Advising the* Qui Tam *Whistleblower: From Identifying a Case to Filing Under the False Claims Act; Reducing Health Care Fraud, An Assessment of the Impact of the False Claims Act*; *Fighting Medicare Fraud: More Bang for the Federal Buck*; *Reducing Medicaid Fraud: The Potential of the False Claims Act*; and *Reducing Medicare and Medicaid Fraud by Drug Manufacturers*. Most of these publications are available online at www.taf.org/publications.htm.

8. TAFEF presents a yearly educational conference for FCA attorneys, typically attended by more than 300 practitioners.

9. TAFEF collects and disseminates information concerning the FCA and *qui tam* to its membership and the public. TAFEF regularly responds to inquiries from a variety of sources, including the general public, the legal community, the media, and government officials. TAFEF maintains a comprehensive FCA library open to the public, and TAFEF has an educational presence on the internet. TAFEF also has provided congressional testimony, conference presentations, and assisted with training programs.

10. TAFEF has filed *amicus* briefs on important legal and policy issues in FCA cases before numerous federal courts, including the United States Supreme

Court. TAFEF has filed multiple amicus briefs in *United States ex rel. Escobar v. Universal Health* Services, including in the First Circuit, the Supreme Court, and on remand.

11. TAFEF possesses extensive knowledge about the origin and purposes of federal and state FCAs and has experience with their implementation. As such, its brief will assist the Court's consideration of the FCA issues raised on remand.

12. This brief, which was filed with the Court on June 6, 2017, was timely submitted as the deadline for the filing of Plaintiffs-Appellants' brief was May 30, 2017.

13. TAFEF contacted counsel for the Appellants and counsel for the Appellees. While counsel for the Appellants consented to the filing of TAFEF's brief as *amicus curiae*, counsel for the Appellees had not yet responded as of the time of this filing.

14. For these reasons, Applicant respectfully requests that this motion be granted and that the Clerk be directed to file the enclosed brief.

June 6, 2017

Respectfully submitted,

/s/ Jennifer M. Verkamp

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2017, I caused a corrected copy of the foregoing brief to be filed electronically with the Court's CM/ECF system, and that all counsel will be served by the CM/ECF system.

/s/ Jennifer M. Verkamp

15-2449-cv

IN THE

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SUPPLEMENTAL BRIEF FOR *AMICUS CURIAE* TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Pursuant to Fed. R. App. P. 29, Taxpayers Against Fraud Education Fund respectfully submits this supplemental brief as *Amicus Curiae* in support of Appellants Paul Bishop and Robert Kraus. A Motion for Leave to File has been filed contemporaneously herewith, and this brief is subject to that Motion. TAFEF supports Appellants for the reasons set forth below.

I. STATEMENT OF INTEREST

Taxpayers Against Fraud Education Fund is a nonprofit public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), regularly participates in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve the False Claims Act. TAFEF is supported by whistleblowers and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986. TAFEF has a strong interest in ensuring proper interpretation and application of the False Claims Act.

TAFEF previously filed an *amicus* brief in this matter (Doc. 39) and filed multiple amicus briefs in *United States ex rel. Escobar v. Universal Health*

Services in the First Circuit, the Supreme Court, and on remand to the First Circuit. TAFEF files this supplemental brief on the application of the materiality standard enunciated by the Supreme Court in *Escobar* to the existing jurisprudence of the Second Circuit, including *United States ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001). TAFEF leaves any other disputed issues to the parties.

II. ARGUMENT

A. The Second Circuit's Jurisprudence on Falsity Is Fundamentally Changed by *Escobar*.

In its underlying decision, this Court relied on the standard articulated by the Second Circuit in *Mikes* to affirm the district court's dismissal of this action for failure to state a claim. *United States ex rel. Bishop v. Wells Fargo & Co.*, 823 F.3d 35, 44-49 (2d Cir. 2016). *Mikes* dealt with what has been called the "legally false" or "certification theory" of liability, where liability is "predicated upon a false representation of compliance with a federal statute or regulation or a prescribed contractual term." 274 F.3d at 696. In assessing the scope of this theory, this Court has expressed concern, in both *Mikes* and the earlier opinion in this matter, with how to cabin liability in cases where the program terms at issue are "only tangential" to payment, or "when the alleged noncompliance would not have influenced the government's decision to pay." *Mikes*, 274 F.3d at 697; *Bishop,* 823 F.3d at 48.

In *Mikes* and the cases that have followed, including this matter, this Circuit balanced those concerns by limiting FCA liability premised on legal falsity to those cases where the underlying statute or regulation expressly stated that compliance was a condition of payment. *Mikes*, 274 F.3d. at 699-700; *Bishop*, 823 F.3d at 49. Alternatively, other circuits balanced similar concerns with "strict enforcement of the Act's materiality and scienter requirements." *United States ex rel. Hutcheson v. Blackstone Medical,* 647 F.3d 377, 388 (1st Cir. 2011), *cert. denied*, 565 U.S. 1079 (2011); *United States v. Science Applications International Corporation* ("SAIC"), 626 F.3d 1257, 1269 (D.C. Cir. 2010).

In June 2016, the Supreme Court resolved this conflict, holding that the FCA's rigorous materiality and scienter requirements properly bounded the statute's reach. *Escobar*, 136 S. Ct. 1989, 2002, *quoting SAIC*, 626 F.3d at 1270; *Hutcheson*, 647 F.3d at 388. In so doing, the Supreme Court rejected atextual limitations on FCA liability. *Escobar,* 136 S. Ct. at 2002. Rather, the Court held that the FCA reaches certain misleading omissions regarding material violations of statutory, regulatory or contractual requirements. *Id.* at 1999.

Returning to the text of the statute and its "common law antecedents," the Supreme Court provided guidance on how the materiality requirement should be enforced. *Id.* at 2001. *Escobar* clarifies that labels like "conditions of payment" and "conditions of participation" are not useful when evaluating materially

misleading claims under the FCA because materiality necessarily involves a fact- and context-specific inquiry. *Id.* (rejecting the use of "a single fact or occurrence as always determinative").[1]

Escobar's focus on bounding principles appropriate to reign in liability where the noncompliance at issue is "minor or insubstantial" is exactly in line with this Court's concerns. 136 S. Ct. at 2003. *Escobar*'s rejection of bright lines in favor of a more holistic materiality analysis, however, revises *Mikes* and requires a fresh approach to the issue of legal falsity.

B. ***Escobar* and *Mikes*, Read Together, Impose Liability for Noncompliance with Material Contractual, Statutory and Regulatory Requirements.**

The Supreme Court reaffirmed the long-established view that claims for payment need not include an affirmative false statement of fact in order to qualify as "false" under the FCA. "Because common-law fraud has long encompassed certain misrepresentations by omission, 'false or fraudulent claims' include more than just claims containing express falsehoods." *Escobar*, 136 S. Ct. at 1999.

The Supreme Court held that, *at minimum*, the implied certification theory of legal falsity can be a basis for liability, "when the defendant submits a claim for payment that makes specific representations about the goods or services provided,

[1] *Quoting Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 (2011).

but knowingly fails to disclose the defendant's noncompliance with a [material] statutory, regulatory, or contractual requirement." *Id.* at 1995.

Notably, the Supreme Court's explicit language makes clear that it does not establish the exclusive test for implied certification liability, and instead keeps intact Circuit precedent finding that claims which contain no representations regarding the underlying conduct can be impliedly false.[2] Indeed, the Supreme Court specifically declined to resolve this issue, relying instead on the billing codes present on the healthcare claims at issue in *Escobar*.[3]

This proposition aligns squarely within the rule embraced throughout the common law that "half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations." *Id.* at 2000. This common law precept has long been fundamental to the implied certification theory. *See e.g., Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994) (withholding "information

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[2] *E.g., Hutcheson*, 647 F.3d at 386-88; *SAIC*, 626 F.3d at 1266; *United States v. Rogan*, 459 F. Supp. 2d 692, 714-17 (N.D. Ill. 2006), *aff'd* 517 F.3d 449 (7th Cir. 2008); *United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015), *vacated by* 136 S. Ct. 2504 (2016), *remanded to* 2017 U.S. App. LEXIS 8588 (May 16, 2017).

[3] The Court stated that it was not deciding "whether all claims for payment implicitly represent that the billing party is legally entitled to payment," finding instead that the health care claims at issue contained specific representations through billing codes identifying the services provided and the providers who administered treatment. 136 S. Ct. at 2000. Those representations were "clearly misleading" because "anyone" would conclude that those services complied with material requirements for mental health facilities. *Id*.

critical to the decision to pay" is "the essence of a false claim").

Thus, while *Mikes* is fundamentally altered in its application of conditions of payment (including its bright line that such conditions must be expressly stated), it remains good law with respect to its holding "that falsity may arise from the defendant's submission of a claim for payment that does not include a specific representation about the goods or services provided." *United States ex rel. Wood v. Allergan, Inc.*, 2017 U.S. Dist. LEXIS 50103, *72 (S.D.N.Y. Mar. 31, 2017). As a district court in *Wood* recently and aptly assessed:

> Read together, then, *Escobar* and *Mikes* stand for the proposition that liability can be predicated on a "false representation of compliance with a federal statute or regulation or a prescribed contractual term," *Mikes*, 274 F.3d at 696, so long as compliance with that regulation is "material" to the Government's payment decision, *see Escobar*, 136 S. Ct. at 2002. Applying that rule in the healthcare context, courts have held that a claimant who requests payment from the Government implies that it has held up its end of the bargain — that is, that it complied with [healthcare] statutes and regulations.

Id. at *83.

In this way, "the implied certification theory helps to ensure that the Government can still recover for fraud (limited, of course, by *Escobar*'s materiality and scienter requirements) in circumstances where the relevant forms do not require explicit verification that the goods or services are free from illegal influence." *Id.* at *84-85. Read together, *Escobar* and *Mikes* properly balance the FCA's plain imposition of liability for knowing violations of conditions material to

the Government's payment decision, *Escobar*, 136 S. Ct. at 1995, with the concern for limiting "expansive reach" into matters "irrelevant to the government's disbursement decisions," *Bishop*, 823 F.3d at 44.

Even if this Court were to require specific representations on the claim, the Supreme Court's decision makes clear that that this is not the exception that swallows the rule. Just as billing codes on a healthcare claim are enough to signal a misleading half-truth about services which do not conform to material conditions, *see supra* n. 3, the certifications of compliance identified by relators also misleadingly represent that the defendants have complied with material laws and regulations. If the violations at issue are material to the Government's decision-making, it is of "no moment" that the certifications do not explicitly state which conditions are material. *Wood*, 2017 U.S. Dist. LEXIS 50103 at *86.

The crucial inquiry, then, is the application of the materiality standard to the fact- and context-specific circumstances of this case. As addressed below, this standard requires a fundamental change in the Court's analysis on remand.

C. Materiality Must be Evaluated Holistically And Not By Bright Lines.

The underlying decision rejected arguments that defendants violated material conditions of their bargain with the Government because a "'heart of the bargain' test" had never been adopted by the Second Circuit. *Bishop*, 823 F.3d at 48. Post-*Escobar*, however, this is precisely the analysis the FCA requires.

Escobar affirmed that the "term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 136 S. Ct. at 2002 (citations omitted). As the Supreme Court explained, and this Circuit has already recognized, "materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" *Id.*, *quoted in Grabcheski v. Am. Internat. Grp., Inc.*, 2017 U.S. App. LEXIS 6563, *3 (2d Cir. April 18, 2017) (citations omitted).[4]

As such, the Supreme Court made clear that there are two alternate methods by which materiality can be established — either from the perspective of a "reasonable person" or the particular defendant. Specifically, a matter is material

> (1) "if a reasonable [person] would attach importance to it in determining a choice of action in the transaction"; or
>
> (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter "in determining [a] choice of action," even though a reasonable person would not.

Id. at 2002-03, *quoting in part* Restatement (Second) of Torts § 538, at 80. The Supreme Court explained that in applying this standard, the label attached to a particular rule, regulation or contract term may be relevant, but is not necessarily dispositive. Thus, the Court rejected the false dichotomy invoked by some courts

[4] The Supreme Court explained that it need not resolve whether this definition is taken from the Act itself in § 3729(b)(4) or from the common law because materiality is applied similarly "[u]nder any understanding of the concept." 136 S. Ct. at 2002.

between a so-called condition of participation and a condition of payment:

> [F]orcing the Government to expressly designate a provision as a condition of *payment* would create further arbitrariness. Under Universal Health's view, misrepresenting compliance with a requirement that the Government expressly identified as a condition of payment could expose a defendant to liability. Yet, under this theory, misrepresenting compliance with a condition of eligibility to even participate in a federal program when submitting a claim would not.

Id. at 2002.

Escobar identified a variety of factors which may bear on the materiality inquiry, including whether the violation is "garden-variety" or "minor or insubstantial," 136 S. Ct. at 2003; whether the violation is significant, *id.* at 2004; whether it involves "core" or "basic" requirements, or "critical facts," *id.* at 2000-01; whether the violation goes to the "essence of the bargain," *id*. at 2003 n.5 (citation omitted); or whether and how the Government took action where it had actual knowledge of the same or similar violations, *id.* at 2003-04. The Government's decision to expressly identify a provision as a condition of payment is relevant, but not "automatically dispositive." *Id.* at 2003. In this way, no "single fact or occurrence…[is] always determinative." *Id.* at 2001, *quoting Matrixx*, 563 U.S. at 39. Thus, materiality is a fact- and context-specific standard that rests within the sound discretion of the court and can be met in a variety of circumstances. *Id.* at 2001-04.

At bottom, these factors are focused on whether the underlying misrepresentation is "material to the other party's course of action." *Id.* at 2001. As the First Circuit has described, the relevant materiality inquiry affirmed by *Escobar* focuses on "whether a piece of information is sufficiently important to influence the behavior of the recipient." *United States ex rel. Winkelman et al. v. CVS Caremark Corp.*, 827 F.3d 201, 211 (1st Cir. 2016), *quoted in United States ex rel. Escobar v. Universal Health Servs.*, 842 F.3d 103, 110 (1st Cir. 2016) (on remand).

D. The Government's Payment of Claims During the Pendency of an FCA Action Does Not Negate Materiality.

In the list of non-dispositive factors relevant to the materiality inquiry, the Supreme Court explained that Government action regarding the instant or similar cases may be relevant. The Supreme Court explained,

> if the Government pays a particular claim in full despite its *actual knowledge* that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite *actual knowledge* that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Escobar, 136 S. Ct. at 2003-04 (emphasis supplied).

Many defendants have relied on this language to argue that the Government's continued payment, particularly during the pendency of declined FCA cases, bars a finding of materiality. This argument ignores the main thrust of

the materiality standard by drawing a bright line around whether the Government would have refused payment had it known of the alleged fraud. To the contrary, *Escobar* emphasized that that "[u]nder any understanding of the concept" of materiality, it includes conduct the defendant knows is "*likely to induce* the particularly recipient to manifest his assent." *Id.* at 2002-03 (emphasis added).

Importantly, the language in *Escobar* does not fundamentally change existing law regarding the relevance of government knowledge. All courts of appeal to have considered the issue hold that government knowledge is not a defense to a *qui tam* action, recognizing that this defense was specifically repealed from the FCA as part of the 1986 Amendments.[5] Rather, evidence that the appropriate paying official, with full knowledge of the underlying conduct, approved the particulars of the resulting claim may negate a defendant's scienter as to the falsity of that claim. *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 952 (10th Cir. 2008). To get the benefit of that inference, there must be evidence that a Government agent with (1) the requisite level of authority (2) "*knows and approves* of the facts underlying an allegedly false claim (3) *prior* to presentment" and (4) nonetheless "authorizes the contractor to make that claim." *Id.* at 952 (emphasis added) (citation omitted). And, because no single fact is

[5] *E.g., Varljen v. Cleveland Gear Co.*, 250 F.3d 426, 430 (6th Cir. 2001); *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000); *United States ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 408 (3d Cir. 1999).

dispositive, payment must be weighed against other evidence of materiality and other reasons for continued payment. *Escobar*, 136 S. Ct. at 2001-04.

Continued payment of a claim does not necessarily mean that the Government approves of the defendant's conduct. The Government may have many reasons to continue paying even upon learning of possible wrongdoing, including that stopping the payment of claims could potentially jeopardize the public health, safety and welfare, or interfere with contractual rights. *United States ex rel. Am. Sys. Consulting v. ManTech Advanced Sys. Int'l*, 600 Fed. Appx. 969, 977 (6th Cir. 2015) (termination could cause incremental losses that exceed the benefits, making a decision not to terminate a poor indicator of materiality at the outset).[6]

The reasons weighing against stopping payment – having nothing to do with materiality – escalate after the filing of an FCA case. While the Government is on notice of Relator's allegations, the statute requires the Government to investigate

[6] *See also United States ex rel. Harrison v. Westinghouse Savannah River Co.,* 352 F.3d 908, 917 (4th Cir. 2003) ("we can foresee instances in which a government entity might choose to continue funding the contract despite earlier wrongdoing by the contractor. For example,…to avoid further costs the government might want the subcontractor to continue the project rather than terminate the contract and start over."); *United States v. President & Fellows of Harvard College*, 323 F. Supp. 2d 151, 182 (D. Mass. 2004) (government agency's attempts to continue a project to aid in reform of the Russian market system after discovering the fraud of federal grantee "might simply mean that USAID decided that its first priority would be to salvage some of the work to reform the Russian economy and then deal with its miscreant grantee later"); *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 442 (E.D.N.Y. 1995) (government continued to pay claims after learning of falsity because it was contractually bound to make the payments).

the allegations in an *ex parte* fashion. 31 U.S.C § 3730(a), (b)(2). In many circumstances, it would be premature and inappropriate for the Government to take action before it has fully and carefully evaluated the FCA case. After the investigation under seal concludes, many FCA cases proceed into litigation, some after intervention by the Government, and others following declination, with relators continuing to pursue claims on the Government's behalf. Declination is not a determination of the validity of the action,[7] and the statute specifically contemplates that a relator may proceed after the Government declines. § 3730(c)(3) (giving the relator the "right to conduct the action" after declination). Requiring the Government to stop payment in order to let the relator proceed to litigate in a declined posture would defeat the purpose of this provision of the statute. Indeed, because only the Attorney General is authorized to settle FCA claims under § 3730(b), the actions of program personnel cannot be dispositive of the merits of an FCA action.[8]

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[7] A decision by the Justice Department not to assume control of the suit is not a commentary on its merits. "The Justice Department may have myriad reasons for permitting the private suit to go forward including limited prosecutorial resources and confidence in the relator's attorney." *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 974 n.5 (7th Cir. 2002), *aff'd*, 538 U.S. 119 (2003); *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006) (non-intervention does not mean that the relator's claims lack merit).

[8] In addition, many FCA cases involve defendants that cause other entities to submit false or fraudulent claims under § 3729(a)(1). The Government may choose to pursue individual defendants for the damages caused to the program rather than stop payments to the innocent submitters of the final claims.

Thus *Escobar,* consistent with the long-held common law understanding of materiality, has made plain that actual payment evidence, in specific circumstances, may be a factor, but is not dispositive. Any assumption otherwise would dramatically undermine the effective use of the FCA to combat fraud.

III. CONCLUSION

For the foregoing reasons, this Court should articulate a revised standard for evaluating legally false or fraudulent claims under the FCA in light of *Escobar.* Reading together this Circuit's precedent in *Mikes* and the Supreme Court's recent rejection of atextual limitations in *Escobar*, FCA liability should be imposed when defendants' impliedly represent compliance with a federal statute or regulation or a prescribed contractual term which is "material" to the Government's payment decision. Materiality, as clarified by *Escobar*, should be applied holistically and contextually, and not as a bright line around express statements.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 29(c)(5)

The undersigned, counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies pursuant to Federal Rule of Appellate Procedure 29 that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than Taxpayers Against Fraud Education Fund, *Amicus Curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Dated: June 6, 2017 /s/ Jennifer M. Verkamp

CERTIFICATE OF COMPLIANCE WITH FRAP 29(d) AND FRAP 32(a)

The undersigned, counsel for Taxpayers Against Fraud Education Fund, *Amicus Curiae*, hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 3,472 words as reported by the word count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

Dated: June 6, 2017 /s/ Jennifer M. Verkamp

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2017, I caused a corrected copy of the foregoing brief to be filed electronically with the Court's CM/ECF system, and that all counsel will be served by the CM/ECF system.

/s/ Jennifer M. Verkamp