

14-1423

---

**United States Court of Appeals  
for the First Circuit**

---

**UNITED STATES AND COMMONWEALTH OF MASSACHUSETTS EX  
REL. JULIO ESCOBAR AND CARMEN CORREA**

*Plaintiffs-Appellants*

v.

**UNIVERSAL HEALTH SERVICES, INC.**

*Defendant-Appellee*

---

On Remand from the Supreme Court of the United States

---

**APPELLANTS' BRIEF ON ADDITIONAL ISSUES**

Filed Pursuant to This Court's Order on September 16, 2016

---

THOMAS M. GREENE (Bar No. 1110304)  
MICHAEL TABB (Bar No. 56721)  
ELIZABETH CHO (Bar No. 1175798)  
GREENE LLP  
One Liberty Square, Suite 1200  
Boston, MA 02109  
(617) 261-0040

October 6, 2016

*Counsel for Plaintiffs-Appellants*

---

**TABLE OF CONTENTS**

<b><u>STATEMENT OF PROCEEDINGS SINCE REMAND FROM COURT OF APPEALS</u></b> .....	1
<b>I. THE SECOND AMENDED COMPLAINT REMAINS RELEVANT TO THE PROCEEDINGS IN THIS COURT, GIVEN THE SUPREME COURT’S DECISION</b> .....	6
<b>II. THE FILING OF THE FOURTH AMENDED COMPLAINT HAS NOT RENDERED REVIEW OF THE ALLEGATIONS OF THE SECOND AMENDED COMPLAINT MOOT</b> .....	8
<b>III. THE COURT DOES NOT HAVE JURISDICTION OVER THE FOURTH AMENDED COMPLAINT</b> .....	12
<b><u>CONCLUSION</u></b> .....	14

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Biltcliffe v. CitiMortgage, Inc.</i> , 772 F.3d 925 (1st Cir. 2014).....	11
<i>Calderon v. Moore</i> , 518 U.S. 149, 116 S. Ct. 2066 (1996) .....	8-9
<i>Camreta v. Greene</i> , 563 U.S. ___, 131 S. Ct. 2020 (2011) .....	9
<i>Chafin v. Chafin</i> , 568 U.S. ___, 133 S. Ct. 1017 (2013) .....	9
<i>Connectu LLC v. Zuckerberg</i> , 522 F.3d 82 (1st Cir. 2008) .....	6
<i>Knox v. Service Employees</i> , 567 U.S. ___, 132 S. Ct. 2277 (2012).....	8, 10
<i>United States ex rel. D’Agostino v. EV3, Inc.</i> , 802 F.3d 188 (1st Cir. 2015).....	14
<i>Universal Health Servs., Inc. v. United States</i> , ___ U.S. ___, 136 S. Ct. 1989 (2016) .....	8
<i>United States ex rel. Escobar v. Universal Health Servs., Inc.</i> , 780 F.3d 504 (1st Cir. 2015) (“ <i>Escobar I</i> ”).....	2, 6

### **Statutes**

123 Mass. Gen. Laws § 12(a) (2005) .....	2
--	---

### **Regulations**

130 Mass. Code Regs. § 429.424 .....	2, 7
130 Mass. Code Regs. § 429.421(A)(2) .....	2
130 Mass. Code Regs. § 429.441(A).....	2

## Rules

Fed. R. Civ. P. 15(a) .....	14
Fed. R. Civ. P. 16(b) .....	13, 14

## STATEMENT OF PROCEEDINGS SINCE REMAND FROM THE COURT OF APPEALS

This Court's judgment in this case, reversing the District Court's dismissal of the Relators' complaint and remanding the case for proceedings consistent with its opinion, was entered on March 17, 2015. The mandate arrived in the District Court on April 22, 2015 [Dkt # 77]. In response to an April 30, 2015 order from the District Court [Dkt # 83] instructing the parties to consider "whether an amended complaint should be filed in light of the reasoning of the First Circuit," Plaintiffs-Appellants Julio Escobar and Carmen Correa ("Relators") submitted a proposed Third Amended Complaint [Dkt # 89], which was allowed by the District Court on July 14, 2015 [Dkt # 90].

Below is a summary of the revised allegations contained in the Third Amended Complaint:

- The Relators expanded their treatment of the relevant MassHealth and Department of Public Health regulations relating to licensing, qualifications and supervision of mental health therapists, focusing on the regulations described by this Court in its opinion, *U.S. ex rel*

*Escobar v. Universal Health Services, Inc.*, 780 F.3d 504, 513-16 (1st Cir. 2015) (“*Escobar I*”).<sup>1</sup>

- Relators described an incident during UHS’s treatment of Yarushka Rivera when the Lawrence facility attempted to have Yarushka involuntarily hospitalized in an inpatient mental health facility, pursuant to 123 Mass. Gen. Laws § 12(a) (2005), without having her examined by a physician or another type of specified mental health professional, a requirement of the statute. The complaint described how the Clinical Director of the Lawrence facility used pre-signed commitment forms bearing the signature of the facility’s medical director, Maria Gaticales. The complaint alleges Gaticales signed a stack of blank admission forms which the Lawrence facility regularly

---

<sup>1</sup> The Third Amended Complaint does not identify all of the relevant MassHealth regulations. It does not describe, for example, 130 Mass. Code Regs. § 419.441(A) (expressly conditioning MassHealth’s payment only for services provided by a “a professional staff member, as defined by 130 CMR 429.424”) or 130 Mass. Code Regs. § 429.421(A)(2) (requiring mental health care services to be “delivered by qualified staff in accordance with 130 CMR 429.424”). Nor does it describe how the very service codes identified in UHS’s submissions to MassHealth expressly required the services billed for to be provided “by professional staff member as defined in 130 CMR 429.424.”

used in lieu of the mandatory examination, a practice that had been employed since at least 2000.

- Relators added counts under the federal and Massachusetts FCA for false claims resulting from UHS's illegal efforts to involuntarily commit mental health patients without a physician examination, alleging that MassHealth would have never paid for an illegal involuntary commitment.
- Relators consolidated their claims that UHS presented false claims for therapy provided by unqualified, unlicensed, and/or unsupervised mental health workers into a single federal FCA count and a single Massachusetts FCA count.
- Relators alleged that UHS's intentional practice of presenting claims to MassHealth for unqualified and unsupervised mental health workers was not limited to the Lawrence facility, and that it occurred at all nine outpatient mental health facilities UHS operated under the Arbour Counseling tradename.

Relators' narrative of the treatment Yarushka received from the Lawrence facility, the Relators' investigation of whether UHS mental health care providers were properly qualified or supervised, and the

investigations conducted by state agencies other than MassHealth were not substantively changed. This Court had found that the Relators had pleaded that UHS's misrepresentations to MassHealth were material, so there was no conscious effort to add allegations for the purpose of meeting the FCA's materiality requirement.

At a July 14, 2015 status conference before the District Court, counsel for UHS suggested that UHS was not the appropriate defendant and that the UHS subsidiary that had received the reimbursements from MassHealth, HRI Clinics, Inc., was the proper defendant. The District Court authorized the Relators to file a fourth amended complaint "substituting defendant by name" to be filed within 30 days. [Dkt. # 91]. Shortly after the status conference, Relators discharged their prior attorneys and retained their current counsel.

Relators filed their Fourth Amended Complaint on August 13, 2015, adding HRI and another UHS subsidiary, UHS of Delaware, Inc., and retaining UHS as a party defendant. The Fourth Amended Complaint added allegations describing the relationship between the three UHS entities. Allegations were also added describing the fact that in addition to receiving payments from MassHealth directly, UHS has also presented



Medicaid claims to Massachusetts Behavioral Health Partnership, the contractor that MassHealth has retained to process all mental health services provided on a managed care basis.

HRI answered Relators' Fourth Amended Complaint [Dkt # 107], but UHS and UHS of Delaware, Inc. moved to dismiss [Dkt. # 105] on the ground that the complaint does not sufficiently describe their involvement in the presentation of false claims and that the new counts concerning false claims resulting from improper efforts to involuntarily commit patients in violation of Massachusetts law do not state FCA causes of action. The motion to dismiss was fully briefed, but before it was decided, the United States Supreme Court granted UHS's petition for certiorari on December 4, 2015. More recently, the District Court ordered that it found the motion to dismiss moot.<sup>2</sup>

On June 20, 2016, the United States Supreme Court vacated the judgment of this Court, and remanded the matter to this Court for further proceedings consistent with its opinion.

---

<sup>2</sup> The District Court's order [Dkt. #128] was issued on October 4, 2016. Although no written opinion accompanied the order, Relators presume the District Court's finding recognizes that the Second Amended Complaint is the operative complaint at this time.

**I. THE SECOND AMENDED COMPLAINT REMAINS RELEVANT TO THE PROCEEDINGS IN THIS COURT, GIVEN THE SUPREME COURT'S DECISION**

The Court has asked the parties to brief which complaint is the currently operative pleading. Ordinarily this is a simple inquiry. As this Court has made plain:

An amended complaint, once filed, normally supersedes the antecedent complaint. [Citations omitted] Thereafter, the earlier complaint is a dead letter and “no longer performs any function in the case.”

*Connectu LLC v. Zuckerberg*, 522 F.3d 82, 91 (1st Cir. 2008) (quoting *Kolling v. Am. Power Conversion Corp.*, 347 F.3d 11, 16 (1st Cir. 2003)). The Court, however, stated that this is the *normal* rule. If an exception to this rule exists, it likely applies here.

This case presents the extraordinary situation in which a District Court, which had previously dismissed the Relators' Second Amended Complaint in its entirety, conducted further proceedings pursuant to a mandate that was subsequently vacated by the United States Supreme Court. But for this Court's judgment in *Escobar I*, there would have been no filing of a third or fourth amended complaint. But that judgment, in the

opinion of the Supreme Court, was erroneous and the mandate pursuant to which further proceedings took place is now a nullity.

The consequence, if any, of proceedings conducted pursuant to a vacated mandate is uncertain. Relators' research was unable to disclose any other cases in this unusual procedural posture. As a practical matter, however, Relators do not intend to proceed with the Fourth Amended Complaint; even if this Court determines that the materiality allegations in the Second Amended Complaint are sufficient, Relators intend to seek leave to file a different amended complaint after the case is returned to the District Court.<sup>3</sup> The District Court has also signaled an expectation that the case will not continue with the Fourth Amended Complaint as the operative complaint, given its recent order finding the motion to dismiss the Fourth Amended Complaint moot—if the Fourth Amended Complaint were operative, the Supreme Court's decision could require supplemental

---

<sup>3</sup> At a minimum, Relators anticipate that the amended pleading will describe the Massachusetts regulatory requirements in more detail, *see e.g.* footnote 1, *supra*, and will add a claim for express false certifications because the personal therapy, family therapy and group therapy services for which claims were submitted did not meet the express requirement of the relevant service codes: that the described services were provided by "by professional staff member as defined in 130 [Mass. Code Regs.] 429.424."

briefing of the motion to dismiss before the District Court, but the motion to dismiss would not be considered moot.

More importantly, further analysis of the Second Amended Complaint was clearly anticipated by the Supreme Court, which lawfully and appropriately directed this Court to reconsider “whether respondents have sufficiently pleaded a False Claims Act Violation.” *Universal Health Services, Inc. v. United States*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1989, 2004 (2016). It was the Second Amended Complaint that the Supreme Court had before it, and the Supreme Court has indicated that there is further work to be done with respect to the Second Amended Complaint. This Court may perform that work pursuant to the Supreme Court’s instructions – and as described below, neither mootness nor appellate jurisdiction concerns prevent such review.

## **II. THE FILING OF THE FOURTH AMENDED COMPLAINT HAS NOT RENDERED REVIEW OF THE ALLEGATIONS OF THE SECOND AMENDED COMPLAINT MOOT**

Cases are rendered moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. *Knox v. Service Employees*, 567 U.S. \_\_\_, 132 S. Ct. 2277, 2287 (2012). “[E]ven the availability of a ‘partial remedy’ is ‘sufficient to prevent [a] case from being moot.’”

*Calderon v. Moore*, 518 U.S. 149, 150, 116 S. Ct. 2066 (1996) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 13, 113 S.Ct. 4257 (1992)). As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot. *Chafin v. Chafin*, 568 U.S. \_\_\_, 133 S. Ct. 1017, 1023 (2013).

The filing of the Fourth Amended Complaint has not made the pleading issues briefed by parties irrelevant or academic. In fact, it is clear that Relators and UHS continue to contest materiality with “that concrete adverseness which sharpens the presentation of issues.” *Camreta v. Greene*, 563 U.S. \_\_\_, 131 S. Ct. 2020, 2028 (2011) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660 (1983)).

The most obvious example is UHS’s contention that as a matter of law, any finding of material misrepresentation is precluded by the Second Amended Complaint’s allegations that Massachusetts agencies other than MassHealth investigated the Relators’ allegations without demanding repayment of all claims alleged to be false. According to UHS, such allegations defeat materiality definitively, and any attempted amendment, including the ones permitted by the District Court prior to granting certiorari, is futile. *See* UHS Supplemental Brief at 28-29; UHS Reply Brief

at 29-30. Relators vigorously contest this assertion, arguing that UHS's "government knowledge" defense necessarily raises questions of fact that cannot be determined at the pleading stage, among other arguments.

Several amici have also filed briefs, on both sides of this issue. All of these participants recognize that the Court's ruling on this issue will affect the viability of the Fourth Amended Complaint and any other pleading that might be offered by the Relators in the future. In brief, the question here is clearly a "live controversy." *Knox*, 132 S. Ct. at 2287.

Similarly, Relators contend that, in conjunction with the Massachusetts regulatory scheme and other materials of which the Court may take judicial notice, the allegations in the Second Amended Complaint establish that compliance with MassHealth's qualification and supervision requirements had a natural tendency to influence MassHealth's payment of money or property, or were capable of doing so. Appellants' Supplemental Brief at 40-58. It is true that additional factual allegations could be added that would provide additional support for a finding of materiality. But if the allegations of the Second Amended Complaint are sufficient to establish the materiality of the misrepresentations, the more detailed allegations of the Fourth Amended Complaint (or any subsequent

amended complaint) will also pass muster. The materiality questions raised by the Second Amended Complaint remain highly relevant to whatever operative complaint is ultimately before the District Court.

The pleading issues surrounding the Second Amended Complaint remain relevant to the current pleadings because notwithstanding any tweaking of the language in the factual allegations, the claims at issue have remained the same. When UHS failed to comply with the qualifications and supervision requirements expressly set forth as conditions of payment in the MassHealth regulations but nonetheless submitted claims that explicitly and implicitly represented compliance, is that conduct actionable under the federal and Massachusetts False Claims Acts? This key issue remains the core of the controversy, whatever the operative pleading. The allowance of the Fourth Amended Complaint has not mooted the pleading issues the parties and amici have fully briefed.

### **III. THE COURT DOES NOT HAVE JURISDICTION OVER THE FOURTH AMENDED COMPLAINT**

“Appellate jurisdiction is ‘limited to review of orders and judgments specifically described in the notice of appeal.’” *Biltcliffe v. CitiMortgage, Inc.*, 772 F.3d 925, 929 (1st Cir. 2014) (quoting *Rojas-Velasquez v. Figueroa-*

*Sancha*, 676 F.3d 206, 209 (1st Cir. 2012)). Here, Relators' notice of appeal only specified the District Court's "March 26, 2014, Order (Woodlock, J.) granting the Defendant, Universal Health Services, Inc.'s Motion to Dismiss." JA 10. Thus, only the complaint the District Court actually dismissed on March 26, 2014, the Second Amended Complaint, is properly before the Court. The Fourth Amended Complaint, of course, did not exist when the Notice of Appeal was filed, and the District Court has never ruled on it, much less entered a final decision concerning it.

If the Court concludes that the Fourth Amended Complaint is the operative pleading in this matter, the Court does not have jurisdiction over it. However, for the reasons described above, the Court does have jurisdiction over the Second Amended Complaint, the pleading issues briefed by the parties are not moot, and any decision by this Court on those issues would be binding on the District Court and the parties regardless of status of the Fourth Amended Complaint. Neither the doctrines of mootness or appellate jurisdiction preclude this Court from examining whether the Second Amended Complaint meets the Supreme Court's materiality standard.



Relators nonetheless recognize that prudential doctrines – which the Court has not asked the parties to brief – may lead the Court to refrain from addressing the important issues raised by the parties. Although Relators believe the Court has the authority and the jurisdiction to rule on these issues (and that they are fully ripe to be decided), Relators do not purport to advise this Court on the most prudent course to be taken here.

If the Court, however, does not believe it should exercise its discretion to conduct the review ordered by the Supreme Court, it is still appropriate for this Court to issue some guidance to the District Court on how to conduct further proceedings, specifically whether to permit the Relators to file an amended pleading in response to any change in prevailing law effectuated by the Supreme Court's decision. While the Court could not rule on UHS's contention that any amendment would be futile without conducting a full materiality analysis, it can instruct the District Court on the appropriate standard to be applied when Relators seek leave to file an amended complaint. As the Court is aware from the supplemental briefs, UHS contends that Fed R. Civ. P. 16(b) applies while Relators believe any request to amend should be governed by the liberal

amendment policies of Rule 15(a).<sup>4</sup> *See generally, United States ex rel.*

*D'Agostino v. EV3, Inc.*, 802 F.3d 188, 194-95 (1st Cir. 2015). The Court can quickly and appropriately resolve this disagreement even if it determines the Relators' materiality allegations should be reviewed initially by the District Court.

### CONCLUSION

For the reasons set forth herein and in Relators' Supplemental Brief and their Supplemental Reply Brief, this Court should find that the Relators' Second Amended Complaint adequately alleges that UHS knowingly made material misrepresentations to MassHealth in connection with the presentation of its claims for payment, and remand the case to the District Court for further proceedings consistent with this Court's opinion.

---

<sup>4</sup> To summarize the dispute, UHS contends Rule 16(a) applies because any request to file an amended pleading would contravene the District Court's order of January 24, 2013 setting a date for the filing of a "final amended complaint." [Dkt. # 47]. UHS Supplemental Brief at 27; UHS Reply Brief at 29. Relators, however, met the deadline for the amended pleading, and Rule 16(b) is only appropriate where "a litigant seeks to amend in defiance of a deadline delineated in a scheduling order." *D'Agostino*, 802 F.3d at 194; *see* Relators' Supplemental Reply Brief at 32, n. 10. Moreover, notwithstanding its prior request for a "final" amended complaint, the Court invited and authorized Relators to file two additional amended complaints after this case was remanded back to it. [Dkt. # 83, 91]. *See also* Relators' Supplemental Reply Brief at 23, n. 6.

Alternatively, it should remand the case to the District Court with instructions to grant the Relators leave to amend their complaint and to conduct further proceedings in this case consistent with its opinion and the opinion of the Supreme Court of the United States.

Dated: October 6, 2016

Respectfully submitted,

/s/ Thomas M. Greene  
THOMAS M. GREENE (Bar No.  
1110304)  
MICHAEL TABB (Bar No. 56721)  
ELIZABETH CHO (Bar No. 1175798)  
GREENE LLP  
One Liberty Square, Suite 1200  
Boston, MA 02109  
(617) 261-0040

*Counsel for Plaintiffs-Appellants  
Julio Escobar and Carmen Correa*

**CERTIFICATE OF SERVICE**

I, Thomas M. Greene, do hereby certify that on the 6<sup>th</sup> day of October, 2016, I served a copy of the foregoing Appellants' Supplemental Brief by serving counsel for Defendant-Appellee Universal Health Services, Inc.:

Mark W. Pearlstein  
McDermott Will & Emery  
28 State Street  
Boston, MA 02109-1775

via the CM/ECF System as required by Fed. R. App. P. 25(d) and Local Rule 25(a). I certify that the parties or their counsel of record are registered as ECF filers and that they will be served by the CM/ECF system.

I further certify that on the 6<sup>th</sup> day of October, 2016, 9 copies of the foregoing Appellants' Supplemental Brief were sent by overnight mail to the clerk pursuant to this Court's order of September 16, 2016 and Local Rule 31.0(b), and 2 copies were mailed to counsel for Defendant-Appellee at the address above.

Dated: October 6, 2016

/s/ Thomas M. Greene