No. 14-1423

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES EX REL. JULIO ESCOBAR; CARMEN CORREA, ADMINISTRATRIX OF THE ESTATE OF YARUSHKA RIVERA;
Plaintiffs – Appellants,

COMMONWEALTH OF MASSACHUSETTS;
Plaintiff,

v.

UNIVERSAL HEALTH SERVICES, INC.,
Defendant – Appellee.

On Appeal from the United States District Court
for the District of Massachusetts

SECOND SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLEE UNIVERSAL HEALTH SERVICES, INC.

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October 6, 2016

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure Defendant-Appellee Universal Health Services, Inc. (UHS) states as follows:

1. There is no publicly held corporation that owns 10% or more of UHS's stock.

2. UHS has no parent corporation.

/s/ Mark T. Stancil
Mark T. Stancil

Dated: October 6, 2016

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SECOND SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLEE UNIVERSAL HEALTH SERVICES, INC.

Appellee Universal Health Services, Inc. (UHS) respectfully submits this supplemental brief in response to this Court's order of September 16, 2016, directing the parties to address the following questions:

1. Which complaint is the operative pleading?

2. If the Second Amended Complaint is the operative pleading, has this complaint been rendered moot by the District Court's decision to permit the Fourth Amended Complaint prior to the Supreme Court's grant of certiorari?

3. If the Fourth Amended Complaint is the operative pleading, does this Court have jurisdiction at the Court of Appeals level to consider that complaint—whether as to all claims set forth in that complaint or only as to the claims in that complaint that were also set forth in the Second Amended Complaint—or must the case be returned to the district court to determine whether the Fourth Amended Complaint, the current operative pleading, meets the Supreme Court's materiality test for Civil Rule 12(b)(6) purposes?

For the reasons set forth below, the Second Amended Complaint is the only operative pleading before this Court, and the filing of the Third and Fourth Amended Complaints in the district court has not mooted this Court's consideration of the Second Amended Complaint. Thus, this Court has jurisdiction to determine whether relators' Second Amended Complaint satisfies the materiality and scienter standards articulated by the Supreme Court. The Court may, however,

wish to exercise its discretion to remand this case and allow the district court to consider these issues in the first instance. In no event should the Court consider the allegations of relators' Fourth Amended Complaint. Because that pleading was not the subject of a final order, this Court lacks jurisdiction under 28 U.S.C. § 1291 to consider it.

STATEMENT

1. This is an appeal from the district court's dismissal of relators' Second Amended Complaint, in which relators alleged that a mental health clinic in Lawrence, Massachusetts, owned and operated by an indirect subsidiary of UHS, violated the False Claims Act and parallel state-law provisions. On appeal, this Court held that relators had adequately alleged that the Lawrence clinic had submitted "false or fraudulent" claims, 31 U.S.C. § 3729(a)(1)(A), to the Commonwealth's Medicaid program, MassHealth. The Court therefore remanded this case to the district court for proceedings consistent with that ruling. See *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 780 F.3d 504, 508 (1st Cir. 2015) (*Escobar I*).

This Court thereafter denied UHS's petition for rehearing and rehearing en banc, and also denied UHS's motion to stay the mandate. This Court's mandate issued on April 21, 2015. On June 30, 2015, UHS filed a petition for a writ of

certiorari, which the Supreme Court granted on December 4, 2015. See *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 582 (2015).

2. While UHS's petition for certiorari was pending before the Supreme Court, the district court took up the case again. The district court denied UHS's motion to stay the proceedings while its petition for certiorari was pending, see Dkts. 80, 91, 102, and instead allowed relators to amend their complaint. Relators then filed a Third Amended Complaint on July 13, 2015, in large part to explicitly incorporate the regulatory provisions on which this Court had relied in its appellate decision. See Dkt. 89, at ¶¶ 23, 25-28. The Third Amended Complaint also added new claims stemming from the hospitalization of relators' daughter. *Id.* ¶¶ 80-89, 262-268.

At a July 14, 2015, conference, the district court granted relators leave to amend for a fourth and final time for the sole purpose of substituting HRI Clinics, Inc. as the proper defendant. See Dkt. 102, at 5; see also Dkt. 91 (granting leave to file amended complaint "substituting defendant by name"). Rather than adhere to that limitation, however, relators' Fourth Amended Complaint added *two* additional defendants (HRI and a Delaware affiliate of UHS), while retaining UHS as a defendant, and also advanced a host of new allegations and legal theories. See Dkt. 101. Defendants moved to dismiss the Fourth Amended Complaint in part as to HRI and in full as to UHS and the Delaware affiliate, the improperly named

defendants. See Dkt. 105. That motion remained pending when, on December 18, 2015, the district court granted a stipulated motion to stay further proceedings pending the Supreme Court's decision. See Dkt. 119.

On June 16, 2016, the Supreme Court vacated this Court's judgment and remanded the case for further proceedings. *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2004 (2016) (*Escobar II*). On October 4, 2016, the district court issued an order "finding as moot" the defendants' motion to dismiss relators' Fourth Amended Complaint. Dkt. 128.

ARGUMENT

A. The Second Amended Complaint Is The Operative Pleading Before This Court

On remand from the Supreme Court, this case remains an appeal from the district court's final judgment dismissing the Second Amended Complaint. This Court's jurisdiction arises under 28 U.S.C. § 1291, which provides this Court authority to review "final decisions of the district court." The only "final decision" rendered by the district court and appealed to this Court was the March 28, 2014, ruling granting UHS's motion to dismiss the Second Amended Complaint. See Dkt. 67. Relators' notice of appeal from that decision correctly invoked this Court's jurisdiction under Section 1291. See Dkt. 68 (notice of appeal); see also Relators' Opening Br. 2 (jurisdictional statement). Accordingly, the Second Amended Complaint is the operative pleading for purposes of this appeal, as

relators have previously acknowledged. See Relators' Supp. Br. 3 (describing the Second Amended Complaint as the "operative complaint in this appeal").

In its prior opinion, this Court concluded that relators' Second Amended Complaint stated a claim under the FCA, and thus reversed the district court's judgment. See *Escobar I*, 780 F.3d at 508. As we have previously explained, however, the Supreme Court's decision announced new standards for scienter and materiality under the FCA. See UHS Supp. Br. 8-12. In light of the Supreme Court's conclusion that this Court had applied an erroneous legal standard, the Supreme Court vacated this Court's judgment and "remand[ed] the case for reconsideration of whether respondents have sufficiently pleaded a False Claims Act violation." *Escobar II*, 136 S. Ct. at 2004. In so ruling, the Supreme Court stated that it would "leave it to the courts below to resolve" whether relators "have adequately pleaded a violation of § 3729(a)(1)(A)." *Ibid.*

The effect of the Supreme Court's decision is thus to place this case back before this Court in the same procedural posture as it was when this Court entered its prior decision, but with additional directions regarding the governing legal standards. There has been no determination by this Court whether relators' Second Amended Complaint states a claim under the legal standards articulated by the Supreme Court, or, accordingly, whether the district court's final judgment

dismissing the case was correct. The Second Amended Complaint therefore remains the operative pleading for purposes of this appeal.

B. This Court's Consideration Of The Second Amended Complaint Has Not Been Mooted By The Amended Complaints Filed In The District Court Following This Court's Prior Decision

1. The two amended complaints filed in the district court following remand from this Court's prior decision do not moot this Court's consideration of the Second Amended Complaint. As a general matter, a case becomes moot only when it is "impossible for [this] court to grant 'any effectual relief whatever' to the prevailing party.'" *Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). Here, relators' appeal from the district court's dismissal of their Second Amended Complaint is not moot because the Court can grant effective relief to either party by affirming or reversing the district court's judgment.

If the Court agrees with UHS that relators' Second Amended Complaint fails to state a claim under the materiality and scienter standards announced by the Supreme Court, and that further amendment to address those deficiencies would be futile, then it should affirm the district court's judgment dismissing this case with prejudice. That result would plainly grant "effectual relief" to UHS. *Knox*, 132 S. Ct. at 2287 (citation omitted). The same would be true if the Court agrees that the Second Amended Complaint fails to state a claim, but concludes that leave to

amend may be warranted. In that case, this Court's decision would significantly narrow the remaining issues before the district court, which is itself a form of relief, even though further proceedings would be contemplated on remand. See, *e.g.*, *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 734 (1st Cir. 2007) (ruling that plaintiff's complaint failed to state a claim, but remanding to district court to determine whether leave to amend was warranted). Likewise, if the Court were to agree with relators that their Second Amended Complaint does state a claim, then reversing the district court's judgment would provide relators with relief by clarifying that the case may proceed on the basis of the Second Amended Complaint's allegations as to materiality and scienter.

The fact that relators filed their Third and Fourth Amended Complaints following this Court's prior decision does not diminish the live, justiciable dispute between the parties regarding the validity of the Second Amended Complaint. To be sure, "[a]n amended complaint, once filed, normally supersedes the antecedent complaint," and the earlier complaint typically "no longer performs any further function in the case." *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 91 (1st Cir. 2008) (citation omitted). But, as this Court's phrasing makes clear, that is only the "*normal[]*" rule, *ibid.* (emphasis added), not one that applies in every circumstance or procedural posture. And here, as we have previously explained (UHS Supp. Br. 27 n.4), the litigation on remand to the district court proceeded on the basis of this

Court's conclusion that the Second Amended Complaint stated valid claims under the FCA. In light of the Supreme Court's vacatur of this Court's prior decision, that conclusion is no longer in force, and is subject to the further consideration that the Supreme Court ordered. Thus, if this Court were to determine that the Second Amended Complaint does *not* state a claim, there is no guarantee that any further amendments, such as the Third or Fourth Amended Complaints, would be permitted. Indeed, as we have explained, any further amendment would be futile in light of the standards set by the Supreme Court and the content of the Second Amended Complaint, and leave to amend should be denied on that basis. See UHS Supp. Br. 27-29; UHS Supp. Reply 29-30. Relators, for their part, have asked this Court to permit them to amend their allegations in the district court if this Court determines that the Second Amended Complaint does not state a claim. See Relators' Supp. Br. 65-68; Relators' Supp. Reply 31-33. In doing so, they have effectively acknowledged that the district court proceedings on remand from this Court's prior decision would be superseded if this Court were to determine that the Second Amended Complaint does not state a valid claim, and that, as a result, their prior filing of the Third and Fourth Amended Complaints would not automatically entitle them to leave to amend following an adverse decision by this Court.[*]

[*] Our position is consistent with the district court's apparent understanding of the status of the Fourth Amended Complaint. On October 4, 2016, the district court issued an order "finding as moot" the defendants' motion to dismiss relators'

The contrary conclusion—*i.e.*, that the post-remand proceedings have mooted this Court's consideration of the Second Amended Complaint—could produce bizarre practical consequences. If it were true that this Court lacks jurisdiction to consider the Second Amended Complaint because of the subsequent filing of the Third and Fourth Amended Complaints, that might lead one to argue (erroneously) that the Supreme Court itself lacked jurisdiction to render its decision regarding the Second Amended Complaint's allegations. In effect, the filing of amended pleadings in the district court would insulate this Court's judgment from review by the Supreme Court.

Such a rule would be without foundation, and certainly would bely common experience. Moreover, the stark consequence of allowing a district court amendment to preempt Supreme Court review would complicate this Court's and the Supreme Court's task when faced with a request to stay the mandate. In any case in which further proceedings in the district court might result in the filing of amended pleadings before the Supreme Court acts on a petition for certiorari, the claim would be made that the failure to grant a stay could prove fatal to the Supreme Court's certiorari jurisdiction. The stay inquiry turns primarily on a

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Fourth Amended Complaint. Dkt. 128. The district court's conclusion that defendants' motion to dismiss no longer presents a live controversy strongly suggests that, in the district court's view, the Fourth Amended Complaint is not currently an operative pleading in light of the continued pendency of appellate proceedings before this Court.

practical balancing of the likelihood of Supreme Court review and the harms or inefficiencies that would be introduced by allowing the litigation to proceed; any rule that potentially makes a stay *necessary* for the Supreme Court to grant review *at all* would needlessly raise the stakes of this decision, and would likely result in unnecessary burden and delay in the mine run of cases in which the Supreme Court does not ultimately grant review. The logical rule, then, is that proceedings may continue in the district court without disturbing appellate jurisdiction, and subject to being superseded in the event that the Supreme Court grants review and disagrees with the court of appeals' judgment.

That approach is consistent with the Third Circuit's decision in *Smith v. National Collegiate Athletic Ass'n*, 139 F.3d 180 (1998). Reversing the district court's dismissal of the plaintiff's complaint, the court of appeals concluded that the NCAA was subject to liability under Title IX and remanded with directions to allow the plaintiff an opportunity to amend her complaint. *Id.* at 190-191. While a petition for certiorari was pending, the plaintiff filed an amended complaint. See Amended Complaint, *Smith v. National Collegiate Athletic Ass'n*, No. 96-1604 (W.D. Pa. June 1, 1998). The Supreme Court subsequently granted review and vacated the Third Circuit's opinion, rejecting the theory that the NCAA's members' receipt of federal funds subjected the organization to Title IX. See *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 468 (1999). The Court

declined to address alternative arguments supporting the application of Title IX to the NCAA, and remanded to the Third Circuit to address those theories in the first instance. *Id.* at 470. On remand, the Third Circuit endorsed one of the plaintiff's alternative theories and remanded to the district court to allow Smith to amend her complaint to embrace that theory. See *Smith v. National Collegiate Athletic Ass'n*, 266 F.3d 152, 163 (3d Cir. 2001). In doing so, however, the Third Circuit addressed only the original complaint that was the subject of the plaintiff's appeal, considering whether that complaint, once amended, could state a claim against the NCAA. The court did not consider the amended complaint that had been filed in the district court in the meantime.

2. This Court thus has jurisdiction to consider the Second Amended Complaint and determine whether it states a claim under the materiality and scienter standards articulated by the Supreme Court. This appeal continues to present a live controversy as to the sufficiency of the Second Amended Complaint, and the adequacy of relators' complaint is a purely legal question that does not require input from the district court.

The Court is not, however, bound to consider these issues in the first instance. This Court's precedent is clear that, when the Court rejects the grounds for the district court's decision but the appellee has advanced alternative arguments that were not previously addressed by the district court, the Court has "the

discretion whether to reach those arguments in the first instance, or to remand," even if the unaddressed alternative arguments are purely legal in nature. *Town of Barnstable v. O'Connor*, 786 F.3d 130, 141 (1st Cir. 2015); see also, *e.g.*, *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 552 (1st Cir. 2016) (reversing the district court's holding that only monetary payments could give rise to antitrust liability, and remanding to the district court to decide in the first instance whether plaintiffs had alleged facts sufficient to state a claim under the proper test); *Cruz Berrios v. Gonzalez-Rosario*, 630 F.3d 7, 13 (1st Cir. 2010) (remanding to determine whether, under Puerto Rico law, claim preclusion bars a plaintiff from asserting in federal court claims arising from conduct that took place before entry of judgment in state court proceedings arising from similar conduct).

In this case, the district court dismissed the Second Amended Complaint without reaching—and thus without resolving—the adequacy of the Second Amended Complaint's allegations of materiality and scienter. See *United States ex rel. Escobar v. Universal Health Servs., Inc.*, No. CIV.A. 11-11170-DPW, 2014 WL 1271757, at *11 (D. Mass. Mar. 26, 2014). To state the obvious, the district court did not have the benefit of the Supreme Court's guidance on materiality and scienter when it addressed relators' Second Amended Complaint. Under these circumstances, the Court may decide, in an exercise of its discretion, that it would be prudent to remand the matter to the district court and allow it to address these

issues in the first instance. See *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d at 552 (concluding that "the most prudent course is to proceed one step at a time" by "leav[ing] for another day" the alternative arguments advanced by defendants). UHS would have no objection to that approach if the Court were to conclude that it best serves the interests of judicial economy.

C. This Court Lacks Jurisdiction To Consider The Fourth Amended Complaint

If the Court were to conclude, contrary to the discussion above, that relators' post-remand amendments to their complaint have mooted this Court's consideration of the Second Amended Complaint, then the only appropriate course would be remand to the district court to determine whether relators' Fourth Amended Complaint was properly filed and, if so, whether it adequately alleges materiality and scienter under the standards announced by the Supreme Court. Because the Fourth Amended Complaint is not the subject of a final judgment, this Court lacks jurisdiction to review it at this stage.

Under 28 U.S.C. § 1291, which confers jurisdiction over "final decisions of the district courts," the "general rule is that 'a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)). An order is "final" under Section 1291

"only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Ibid.* (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)); see also, *e.g.*, *DeCambre v. Brookline Hous. Auth.*, 826 F.3d 1, 7 (1st Cir. 2016).

This standard does not permit appellate review of complaints that have never even been considered, let alone dismissed, by the district court. And that is precisely the posture of the Fourth Amended Complaint: At the time UHS's petition for a writ of certiorari was granted by the Supreme Court, a motion to dismiss the Fourth Amended Complaint for exceeding the district court's order allowing for a mere clerical amendment was pending, and HRI had filed an answer to that complaint. The district court has issued no decision—final or otherwise—on the merits of the Fourth Amended Complaint. As a result, this Court does not have jurisdiction to consider the Fourth Amended Complaint in this appeal. See, *e.g.*, *Petralia v. AT&T Glob. Info. Sols. Co.*, 114 F.3d 352, 354 (1st Cir. 1997) (dismissing appeal from non-final decision of district court); *Nikas v. Quinlan*, 29 F.3d 619 (1st Cir. 1994) (unpublished) (same).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

/s/ Mark T. Stancil

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October 6, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with this Court's order of September 16, 2016 because it does not exceed 15 pages in length, exclusive of the sections of the brief identified in Federal Rule of Appellate Procedure 32(a)(7)(iii).

2. This brief, composed in proportionally spaced 14-point Times New Roman typeface, complies with Federal Rule of Appellate Procedure 32(a)(5).

Dated: October 6, 2016

/s/ Mark T. Stancil
Mark T. Stancil

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2016, I will electronically file the foregoing document with the United States Court of Appeals for the First Circuit using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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