No. 14-1423

IN THE 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,

v.

UNIVERSAL HEALTH SERVICES, INC.

Defendant - Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

SUPPLEMENTAL BRIEF FOR *AMICUS CURIAE* TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLANTS AND REVERSAL OF DISTRICT COURT'S MARCH 24, 2014 ORDER

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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 Escobar and Correa. 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"), has participated in litigation as a *qui tam* relator and as an *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 *amicus* briefs in this matter both before this Court and before the Supreme Court on the issue of the proper legal analysis for

determining falsity and materiality under the FCA. TAFEF files this supplemental brief on the application of materiality standard enunciated by the Supreme Court in *Universal Health Services, Inc. v. United States*, ___ U.S. ___, 136 S. Ct. 1989 (2016) ("*Escobar II*"). TAFEF leaves any other disputed issues to the parties.

II. ARGUMENT

A. *Escobar II* Affirmed This Court's Rejection of Artificial Categories in Favor of a Return to the Text of the Statute.

Since *United States ex rel. Hutcheson v. Blackstone Medical*, this Court has eschewed categorical limitations on falsity under the FCA, finding that rigid judge-made categories can "create artificial barriers that obscure and distort" the statute's requirements. 647 F.3d 377, 385-86 (1st Cir. 2011), *cert. denied*, 565 U.S. 1079 (2011). Following closely the D.C. Circuit's decision in *United States v. Science Applications International Corporation*, this Court determined that "strict enforcement of the Act's materiality and scienter requirements," rather than artificial categories, properly cabined liability for false and fraudulent claims *Id.* at 388, *quoting SAIC*, 626 F.3d 1257, 1269 (D.C. Cir. 2010).

In *Escobar II*, the Supreme Court agreed. 136 S. Ct. at *2002. The Supreme Court rejected the artificial limitations imposed by other courts of appeal which cabined FCA liability to express false statements on the claim or express designations of conditions of payment in the underlying statute, regulation or contract. *Id.* at 1998-1999, *citing United States v. Sanford Brown, Ltd.,* 788 F. 3d

696, 711-712 (7th Cir. 2015); *Mikes v. Straus*, 274 F. 3d 687, 700 (2d Cir. 2011); *SAIC*, 626 F.3d at 1269. Rather than adopting "a circumscribed view of what it means for the claim to be false or fraudulent," *id.* at *2002, the Supreme Court, like this Court, returned to the text of the statute, and held that the FCA reaches certain misleading omissions regarding violations of statutory, regulatory or contractual requirements. 136 S. Ct. at *1999. Instead of the bright lines espoused by defendants, the Supreme Court determined, as this Court has, that the FCA's rigorous materiality and scienter requirements properly bounded the statute's reach. *Id.* at *2002, *quoting SAIC*, *626 F.3d* at 1270; *Hutcheson*, 647 F.3d at 388.

Specifically, the Supreme Court held that the implied certification theory can be a basis for liability, at least "when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a [material] statutory, regulatory, or contractual requirement." 136 S. Ct. at *1995. While aligning closely with this Court's treatment of implied certification, the Supreme Court's holding departs from this Court's decision in *Escobar I* in two respects.

First, the Supreme Court declined to resolve whether "all claims for payment implicitly represent that the billing party is legally entitled to payment" because the claims at issue made specific representations through codes identifying the services provided and the providers who administered treatment. *Id.* at *2000. Those

representations were "clearly misleading" because "anyone" would conclude that those services complied with "core" and "basic" staff and licensing requirements for mental health facilities. *Id*. at *2000. *Escobar II* held that FCA liability was triggered in these circumstances because the specific representations falsely omitted that such services did not comply with underlying material conditions. *Id.*[1]

Second, the Supreme Court clarified how the materiality requirement should be enforced, rejecting the use of "a single fact or occurrence as always determinative." *Id*. at *2001, *quoting Matrixx Initiatives, Inc. v. Siracusano,* 563 U.S. 27, 39 (2011). Finding that this Court may have viewed the Government's entitlement to refuse payment as always dispositive of materiality, the Supreme Court remanded for reconsideration regarding whether Relators pled material violations of Massachusetts' Medicaid requirements in line with the precepts outlined in *Escobar II.*

As discussed more fully below, TAFEF respectfully submits that the Supreme Court's decision is strongly aligned with the opinions of this Court and others that bright lines are not useful when evaluating materially misleading claims

[1] This falls 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. *E.g. Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994) (withholding "information critical to the decision to pay" is "the essence of a false claim").

under the FCA, because it necessarily involves a "fact-intensive and context-specific inquiry." *United States ex rel. Westmoreland v. Amgen*, 652 F.3d 103, 111 (1st Cir. 2011).

B. *Escobar II* Affirms the Materiality Standard and Further Eliminates Artificial Labels.

In order to be actionable under the FCA, "a misrepresentation must be material to the Government's payment decision." *Escobar II*, 36 S. Ct. at 2002. *Escobar II* reaffirmed that the "term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *Id*. at *2002 (citations omitted). The 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 "[u]nder any understanding of the concept, materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" *Id., quoting* 26 R. Lord, Williston on Contracts § 69:12, p. 549 (4th ed. 2003).

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 *2002-2003, *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 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.

The Supreme Court specifically rejected Universal Health's argument that materiality, as currently stated, was too fact-intensive for the courts to decide. *Id.* at *2004, n.6.[2] *Escobar II* made clear that the materiality standard is exactly the fact-and-context-specific one contemplated by this Court when it emphasized that materiality may be established through express language but also by other means, "'such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at

[2] Rather, the Court embraced the standard as "familiar and rigorous" and well within the courts' wheelhouse on motions to dismiss or summary judgment. *Id.*

issue.'" *Hutcheson*, 647 F.3d at 394, *quoting SAIC*, 626 F.3d at 1269.

Indeed, the Supreme Court identified a variety of factors which may bear on the materiality inquiry, including whether the violation is "garden-variety" or "minor or insubstantial," *Escobar II*, 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 *2000-1; whether the violation goes to the "essence of the bargain," *id*. at *2003 n.5 (citation omitted); or whether and what actions the Government took where it had actual knowledge of the same or similar violations, *id.* at *2003-2004. 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…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 *2001-2004.

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 this Circuit recently espoused, the relevant materiality inquiry affirmed by *Escobar II* 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.*, 2016 U.S. App. LEXIS 12108 at *24 (1st Cir. June 30,

2016).

C. Universal Health Mischaracterizes *Escobar II* on Materiality.

Universal Health makes two arguments that mischaracterize the Supreme Court's enunciation of the materiality standard. First, it argues that the complaints adjudicated by state agencies other than Massachusetts Medicaid (the paying agency) negate materiality because the Government did not stop paying claims before the FCA case resolved. Second, it argues that because there is no allegation of its actual knowledge of the materiality of the requirements at issue, materiality fails. As demonstrated below both of these conclusions are unsupported by *Escobar II*.

1. 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. For instance, proof of materiality can be based on "evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases" based on noncompliance with the same requirement. *Escobar II*, 136 S. Ct. at *2003. In contrast, 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.

Id. at *2003-2004.

This language in *Escobar II* does not transform the existing materiality standard into outcome materiality, by drawing a bright line around whether the Government would have refused payment had it known. To the contrary, *Escobar II* embraced the common law understanding of materiality and emphasized that this understanding was commensurate with the natural tendency test articulated by the statute. *Id.* at *2002. "Under any understanding of the concept," materiality incudes conduct the defendant knows is "*likely to induce* the particularly recipient to manifest his assent." *Id.* at *2002-2003 (emphasis added).

This language in *Escobar II* also 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. *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). 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). These well-developed elements are germane to the relevance of the Government's continued payment of claims in a materiality analysis. It follows that a *relevant paying official* must have *actual knowledge* of all the particulars underlying a false claim *at the time of presentment* before payment is a relevant factor in the materiality analysis. And, because no single fact is dispositive, payment must be weighed against other evidence of materiality and other reasons for continued payment. *Escobar II*, 136 S. Ct. at *2001-2004.

Continued payment of a claim does not necessarily mean that the Government approves of the defendant's conduct and *Escobar II* does not hold otherwise. 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, as well as contractual rights. As the Sixth Circuit has explained, the government's decision to continue funding despite actual knowledge may weigh against a finding of

materiality, but is not dispositive. *United States ex rel. Am. Sys. Consulting v. ManTech Advanced Sys. Int'l*, 600 Fed. Appx. 969, 977 (6th Cir. 2015). For example,

> The government may make operational changes or investments in reliance on the agreement…In these circumstances, among others, *termination could cause incremental losses that exceed the benefits, making a decision not to terminate a poor indicator of materiality at the outset*.

Id.(emphasis supplied); *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").[3]

Thus, there are many reasons why, as the Sixth Circuit pointed out, a

[3]*See also 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).

decision not to terminate funding may be a poor indicator of materiality. It may be contrary to the best interests of the United States or the States. For instance, in the case of a defense contractor, termination could affect national interests. In the case of a healthcare contractor, stopped payments could affect access to healthcare. This is particularly true in the healthcare context where the Government has long followed a "pay and chase" model in the delivery of healthcare services. The purpose of the pay and chase model has been to ensure that patients do not experience delay in receiving medical services and providers are not delayed payment.[4]

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 that the Government investigate 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 the FCA case is resolved. After the Government's under seal investigation concludes, many FCA cases proceed into litigation, both in an

[4] *See* Preventing Health Care Fraud: New Tools and Approaches to Combat Old Challenges, Hearing Bef. the Sen. Comm. on Finance, 112 Cong. 32 (2011) (statement of Dr. Peter Budetti, Deputy Admin. and Dir. of CMS Center for Program Integrity), available at http://www.finance.senate.gov/imo/media/doc/71524.pdf.

intervened posture and declined posture. Declination is not a determination of the validity of the action,[5] 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 that the Government stop payment in order to let the relator proceed to litigate in a declined posture would be counter-intuitive to 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 FCA action.

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. In the FCA cases involving drug manufacturers, for example, a pharmacy rather than the manufacturer submits claims. It would be nonsensical to require the Government to grind its payment system to a halt as the sole method of demonstrating that the violations at issue are material. Thus, *Escobar II*, consistent with the long-held

[5] 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).

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 use of the FCA to combat fraud.

Counter to these propositions, Universal Health argues that because state agencies investigated Relators' complaint and made findings which did not result in suspension of its Medicaid payments, there can be no materiality. Appellee's Brief at 16. This argument fails on multiple grounds.

First, Universal Health has not established that the agencies are the relevant Government officials. In fact, the state agencies at issue are not the paying agencies, and Universal Health does not allege that any of them had the power to stop payment. The fact that any oversight agency in Massachusetts may have had knowledge does not operate to impute knowledge to the paying agency. *Massachusetts v. Mylan Labs.*, 608 F. Supp. 2d 127, 150 (D. Mass 2008) ("As a general matter, the knowledge of one agency of a government is not imputed to another agency of that government") (citations omitted).[6]

[6] In addition, the relevant Government official does not include all program personnel. If it did, the materiality analysis would have different results depending on the level of responsibility of a particular staff member. *President & Fellows of Harvard College*, 323 F. Supp. 2d at 186 (D. Mass. 2004). As the Seventh Circuit explained: "[a]nother way to see this is to recognize that laws against fraud protect the gullible and the careless … and could not serve that function if proof of materiality depended on establishing that the recipient of the statement would

Moreover, the cited administrative findings all occurred *after* the filing of the FCA action (and are attached to the Amended and Second Amended Complaints). Docs 19, 50. Thus, Universal Health's argument reduces to the proposition that the continuation of Massachusetts Medicaid payments during the pendency of the FCA suit negates its liability. This expansive position would nullify nearly every pending FCA action. And, as described above, the fact that that Massachusetts Medicaid would not take action to stop payment or collect damages during the pendency of a suit in which it is the real party in interest is unremarkable and does not act to waive claims.

Second, Universal Health makes no effort to establish that Massachusetts Medicaid had actual knowledge of its conduct at the time it submitted claims. Just as a defendant's state of mind must be evaluated as of the time it submits the claim, so must the state of the mind of the Government if a defendant seeks to use Government action to absolve itself. *See, e.g., Burlbaw*, 548 F.3d at 951-54 ("the focus properly rests upon the depth of the government's knowledge of the facts underlying the allegedly false claim and the degree to which the government invites that claim"); *United States ex rel. Durcholz v. FKW Inc.,* 189 F.3d 542,

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have protected his own interests." *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008) (rejecting the argument that the government must show it would actually have taken enforcement action if it had been aware of the falsity).

544-45 (7th Cir. 1999), 189 F.3d at 544-45 ("The government's ***prior*** knowledge of an allegedly false claim can vitiate a FCA action . . . . [but the] government's knowledge [is] not a bar to a FCA claim if the knowledge is incomplete or acquired too late in the process.") (internal citations omitted); *Cantekin*, 192 F.3d at 414 (rejecting argument that defendant's letter purporting to disclose industry funding months after application, after he was under investigation, did not exonerate defendant).

It was Relators' own complaint which initiated any administrative investigation. Universal Health can point to no action by Massachusetts Medicaid at the time of its conduct which would signal that Massachusetts did not view the "express and absolute" language of its payment regulations and its "repeated references" to the staffing requirements as central to the services required. *United States ex rel. Escobar v. Universal Health Servs. (Escobar I)*, 780 F.3d. 514, 515 (1st Cir. 2015). To the contrary, as Relators describe in detail, the definitions of MassHealth's payment codes made plain on their face that they incorporated the regulations governing professional staff. Appellants' Brief at 53-54. Moreover, this Court found that "the cost of supervision is automatically built into MassHealth's reimbursement rates." *Escobar I,* 780 F.3d at 514. In the face of abundant evidence from Massachusetts that it views its staffing and licensing requirements as fundamentally important to the services provided, Universal

Health's bare argument that its violations of such core requirements could not have been material because it got paid rings hollow.

2. Universal Health Wrongly Implies Actual Knowledge of Materiality Is Required.

Universal Health argues that Relators have not properly alleged its knowledge of the materiality of the underlying violation. According to Universal Health, "a defendant who knowingly violates a regulation the defendant believes is immaterial to payment—even if the regulation turns out, in fact, to be material—lacks the scienter required to commit fraud within the meaning of the FCA." Appellee's Brief at 26. And, Universal Health believes that the inferences support that it did not know the violations were material based on the so-called "measured reaction" by Massachusetts to the Relators' administrative complaints (such findings which were, as mentioned above, made subsequent to the FCA action). *Id.*

Universal Health's argument gives short shrift to the breadth of the knowledge standard under the FCA and completely skips over the Supreme Court's holding that materiality can be established under a reasonable person standard.

Knowledge under the FCA means "that a person has 'actual knowledge of the information,' 'acts in deliberate ignorance of the truth or falsity of the information,' or 'acts in reckless disregard of the truth or falsity of the information.'" *Escobar II*, 136 S. Ct. at *1996, *quoting* §3729(b)(1)(A). The

Supreme Court's discussion of materiality did not change the definition of knowledge under the FCA. To the contrary, it contemplated it: Materiality is established where "the defendant knew *or had reason to know* that the recipient of the representation attaches importance to the specific matter 'in determining his choice of action,' *even though a reasonable person would not*. *Id.* at * 2003 (emphasis supplied). Thus, even when materiality is established by defendant- or transaction-specific evidence, a defendant's knowledge may still be established by deliberate ignorance or reckless disregard.

Universal Health ignores that *Escobar II* also made clear that materiality may be established by the fact that a reasonable person would attach importance to the violation at issue in determining his or her course of action. *Id.* *2002. Thus, if the Court determines that materiality is established under a reasonable person standard, knowledge follows. As the Supreme Court explained: "[B]ecause a reasonable person would realize the imperative of [the conduct at issue], a defendant's failure to appreciate the materiality of that condition would amount to 'deliberate ignorance' or 'reckless disregard' of the 'truth or falsity of the information' even if the Government did not spell this out." *Id.* at 2002-2003.

Here, as noted above, there is a bevy of evidence to conclude that Universal Health recklessly disregarded multiple and consistent references in Massachusetts' regulations to the requirements governing their staff's qualifications and

supervision. Or, that Universal Health recklessly disregarded that the payment codes submitted on its claims patently required that the services incorporate the professional staffing requirements at issue. Appellants' Brief at 53-54. This is far from the alleged hundreds of thousands of pages of sprawling regulations that Universal Health claims it fears could be the basis for materiality. Appellees' Brief at 14. Rather, Massachusetts gave Universal Health ample "reason to know" that it attached importance to the staffing requirements. *Escobar* II, 136 S. Ct. at *2003.

The record also supports the conclusion that any reasonable payor would attach sufficient importance to the lack of qualified and properly supervised personnel to influence their behavior. *Id.* at *2003; *Winkelman*, 2016 U.S. App LEXIS at *24. The Supreme Court recognized that the requirements at issue were "core" and "basic" and that the use of the payment codes which specifically incorporated the staffing requirements was "clearly misleading." *Id.* at *2000-01. As Justice Sotomayor observed during the oral argument of *Escobar II*:

> I have a very hard time accepting that if you provide -- if you claim money for a service that you don't render, not a qualified individual, unsupervised by a qualified individual, which is a requirement specifically in the regulations, I'm having a hard time understanding how you have not committed a fraud -- … if you knew what you were doing.

Tr. of Oral Argument 54.

At bottom, as the Supreme Court recognized, Relators "alleged that

Universal Health misrepresented its compliance with mental health facility requirements that are so central to the provision of mental health counseling that the Medicaid program would not have paid these claims had it known of these violations." *Escobar II*, 136 S. Ct. at *2004. Allegations that the Government "would not have taken the action" are generally understood to establish materiality. *Id.* at *2003, n.5; *see also id.* at *2003, *citing United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943) (contractors' misrepresentation that they satisfied a non-collusive bidding requirement for federal program contracts violated the False Claims Act because "[t]he government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive") and *Junius Constr. v. Cohen*, 257 N. Y. 393, 400 (N.Y. 1931), 178 N.E. 672, 674 (an undisclosed fact was material because "[n]o one can say with reason that the plaintiff would have signed this contract if informed of the likelihood" of the undisclosed fact).

While the express designation of a condition of payment is not automatically dispositive, this Court's prior finding regarding that designation is relevant. Coupled with its finding regarding the "express and absolute language" of the "repeated references" in the regulations, and the fact that supervision is valued in the reimbursement amount, this Court's fact-and-context-specific analysis already supports a finding of materiality under both a reasonable person and defendant-

specific standard.

Universal Health recklessly disregarded that any reasonable person, and MassHealth in particular, would attach importance to its failure to adhere to basic requirements of qualified and properly supervised staff when providing mental health services. Though Universal Health implies that bright lines still exist, the evaluation of materiality under *Escobar II* is within this Court's sound discretion. TAFEF respectfully submits that the existing record supports a finding of materially false claims. In the alternative, if the Court finds that the record is not developed enough to support this finding, the Court should remand the case to the District Court to permit Relators to amend their complaint in light of *Escobar II*.

III. CONCLUSION

For the foregoing reasons, this Court should hold that Relators' complaint states a claim for relief, reverse the District Court's dismissal of Relators' complaint, and remand for proceedings on the merits.

August 22, 2016

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: August 22, 2016 /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 5,007 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: August 22, 2016 /s/ Jennifer M. Verkamp

CERTIFICATE OF SERVICE

I hereby certify that on this 22d day of August, 2016, 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