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Member
Admitted in SC

October 24, 2016

VIA CM/ECF FILING

Patricia S. Connor, Clerk
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219

Re: *United States ex rel. Michaels v. Agape Senior Community Inc., et al.*
Docket No. 15-2145(L)
Notice of Supplemental Authority (Fed. R. App. P. 28(j))
Scheduled for argument October 26, 2016

Dear Ms. Connor:

I am writing to advise the Court of additional authorities relevant to Agape's argument on statistical sampling.

***United Health Servs., Inc. v. Escobar*, 136 S. Ct. 1989 (June 16, 2016).** In *Escobar*, the Supreme Court emphasized that the plaintiff in an FCA case must prove *fraud*—the *knowing* submission of a claim that is *materially* false—in order to prevail. Further, the Court described the FCA's materiality requirement as “demanding” and held that a “misrepresentation is material only if it would likely induce a reasonable person to manifest his assent.”

Escobar supports Agape's argument that statistical sampling is not properly used to establish liability under the FCA when, as in this case, each allegedly false claim rests on a particular physician's clinical judgment regarding a particular patient. In such cases, sampling shortcuts the plaintiff's burden of proof by *assuming* (1) that each claim involves the same misrepresentation, and (2) that each misrepresentation is equally material to the Government's willingness to pay the claim. *Escobar* makes clear that such assumptions are not compatible with the FCA's “demanding” materiality element.

***United States ex rel. Wall v. Vista Hospice Care, Inc.*, 2016 WL 3449833 (N.D. Tex. June 20, 2016).** As in in this case, the relator in *Wall* sought to use statistical

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sampling to prove that the defendant submitted claims for hospice care for which the patients were not eligible. After examining existing law—including the district court’s decision in this case and the Supreme Court’s ruling in *Tyson Foods, Inc. v. Bouaphakeo*, 136 U.S. 1036 (2016)—the district court held that a relator cannot use statistical sampling to prove the falsity of a hospice-eligibility certification. *Wall*, 2016 WL 3449833, at *13.

In reaching this holding, the district court rejected the argument—also made by the Relators in this case—that statistical sampling was justified because it was the only means of proving the relator’s claims:

If individual review of each chart were impractical, Relator was not required to pursue all potential false claims submitted in fourteen states over nearly a decade, of which she did not have personal knowledge.

Id. at *13.

Very truly yours,

William W. Wilkins

cc: Counsel of Record (via CM/ECF)