No. 17-5826

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA, ex rel., MARJORIE PRATHER,

Relator-Appellant,

v.

BROOKDALE SENIOR LIVING COMMUNITIES, INC.; BROOKDALE LIVING COMMUNITIES, INC.; BROOKDALE SENIOR LIVING, INC.; INNOVATIVE SENIOR CARE HOME HEALTH OF NASHVILLE, LLC, dba Innovative Senior Care Home Health; and ARC THERAPY SERVICES, LLC, dba Innovative Senior Care,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee

**BRIEF FOR THE UNITED STATES OF AMERICA
AS AMICUS CURIAE SUPPORTING APPELLANT**

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INTRODUCTION AND STATEMENT OF INTEREST

The False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*., is the federal government's primary tool to combat fraud and recover losses due to fraud in federal programs. Accordingly, the United States has a substantial interest in ensuring that courts properly interpret and apply the FCA.

This is a declined *qui tam* suit against defendants Brookdale Senior Living Communities and related entities (collectively, Brookdale). Relator, a nurse formerly employed by Brookdale, alleges that Brookdale submitted false Medicare claims that included physician certifications of the need for home-health services completed well after care had been provided, in violation of regulations requiring that certifications be completed at the time a plan for care is established "or as soon thereafter as possible." 42 C.F.R. § 424.22(a)(2). The district court granted Brookdale's motion to dismiss, holding that the alleged regulatory violations were not material as a matter of law under the Supreme Court's recent decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

In *Escobar*, the Supreme Court identified several factors as relevant to the FCA's materiality analysis but made clear that no one factor was dispositive. *See* 136 S. Ct. at 2003. Among other factors, the Supreme Court explained that "if the Government pays a particular claim in full despite its *actual knowledge* that certain requirements were violated" or "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 2003-04 (emphases added). In this case, there is no allegation that the government had actual knowledge of Brookdale's violations of the timing requirement when it paid the claims. To the contrary, relator specifically alleged that the government was "unaware" of Brookdale's violations. RE 98, Page ID # 1493 (Third Am. Compl.).[1] In light of this allegation, which the district court was required to accept as true at the pleadings stage, the court should have found that the government's payment history was not relevant to the materiality analysis.

Instead, the district court committed a series of errors that led it to conclude that the past government action factor "weigh[ed] strongly" against a finding of materiality. RE 112, Page ID # 2198 (Mem. Op.). As an initial matter, the court accepted Brookdale's argument that because the timing requirement was longstanding and millions of Medicare claims had been submitted, there must have been other violations of those regulations and the government must have paid those claims. *Id.* By assuming facts outside of the pleadings and drawing inferences against the relator, the district court violated bedrock motion-to-dismiss principles. But even taking those facts as true, they do not establish the key element that *Escobar* requires for past government action to be relevant: actual knowledge of the violations.

[1] Citations to district court record entry numbers are abbreviated "RE _." Applicable page citations are to Page ID numbers.

The district court compounded those errors by requiring the relator to allege that the government had previously denied similar claims in order to survive the defendant's motion to dismiss—facts that a relator is unlikely to have access to at the pleadings stage, particularly "given applicable federal and state privacy regulations in the healthcare industry." *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 112 (1st Cir. 2016). As the First Circuit held in the remand in *Escobar* itself, there is "no reason to require Relators at the Motion to Dismiss phase to learn, and then to allege, the government's payment practices for claims unrelated" to the specific allegations in the complaint "in order to establish the government's views on the materiality of the violation." *Id.* Moreover, there may be good reasons why the government might continue to pay claims even where it has knowledge of violations, including important public health and safety considerations.

The district court granted Brookdale's motion to dismiss despite finding that another *Escobar* factor supported a finding of materiality. The court concluded that the requirement allegedly violated is an "express condition of payment," which supported a finding of materiality. RE 112, Page ID # at 2195-97 (Mem. Op.). The district court nevertheless held that the alleged violations were *not* material as a matter of law. That holding is inconsistent with the multi-factor, holistic approach to materiality prescribed in *Escobar* because it assigned near-dispositive weight to a single factor: the relator's failure to identify past denials of payment in similar circumstances.

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29, the United States files this amicus brief to urge this Court to reject the district court's incorrect application of the "past government action" prong of materiality under *Escobar*. Although *Escobar* makes clear that well-pleaded allegations concerning past violations and the government's response where it had actual knowledge of such violations may be relevant to materiality, a district court should not assume facts outside of the pleadings or require relators to establish past government denials of claims at the motion-to-dismiss stage. Our brief does not address any other factor relevant to the materiality inquiry under *Escobar*, and we therefore take no position on whether the district court was ultimately correct in dismissing the relator's complaint.

STATEMENT

A. Statutory And Regulatory Background

1. The False Claims Act

The False Claims Act is "the Government's primary litigative tool" for combating fraud. S. Rep. No. 99-345, at 2 (1986). The Act applies broadly to address a wide variety of fraudulent schemes, and it was drafted "expansively . . . to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003) (quotation marks omitted).

Under the current statute, a violation can occur when a person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or

approval." 31 U.S.C. § 3729(a)(1)(A). A violation can also occur when a person "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." *Id.* § 3729(a)(1)(B). The term "material" under the FCA "means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *Id.* § 3729(b)(4).

2. Medicare Requirements

Medicare Parts A and B provide coverage for certain "home health services" for qualified individuals. 42 U.S.C. §§ 1395c, 1395k(a)(2)(A). Medicare, however, "pays for home health services only if a physician certifies and recertifies" the patient's eligibility and continuing need for those services and the face-to-face meeting requirement is satisfied. 42 C.F.R. § 424.22; *see also* 42 U.S.C. §§ 1395n(a)(2)(A), 1395f(a)(2)(C) (detailing requirements for physician certifications). Medicare conditions payments for home-health services on the completion of the physician certifications. *See* 42 C.F.R. § 424.10(a). And the regulations provide that the certifications "must be obtained at the time the plan of care is established or as soon thereafter as possible and must be signed and dated by the physician who establishes the plan." *Id.* § 424.22(a)(2).

B. Factual And Procedural Background

In this *qui tam* action, the relator alleges that Brookdale implemented a far-reaching scheme to bill Medicare for claims "related to care that was provided without physician certifications of need for home health services" or "without required face to

face encounter documentation." RE 98, Page ID # 1478 (Third Am. Compl.). Specifically, the operative complaint alleges that Brookdale violated the FCA by: (1) billing Medicare for home-health services while knowing that it had not obtained physician signatures on certifications or face-to-face documentation at the time that the physician established the patient's plan of care "or as soon thereafter as possible," as required under 42 C.F.R. § 424.22(a)(2), and (2) retaining reimbursements received from Medicare while knowing that Medicare would not have paid the claims if it had known about Brookdale's violations of the "as soon thereafter as possible" certification requirement. *See* RE 98, Page ID # 1492-94 (Third Am. Compl.).

In 2015, the district court granted Brookdale's motion to dismiss. In *United States ex rel. Prather v. Brookdale Senior Living Communities*, 838 F.3d 750 (6th Cir. 2016), this Court reversed with respect to the relator's claims that Brookdale had presented false claims for payment and fraudulently retained payments. This Court held that the untimely physician signatures on the certifications violated the applicable Medicare regulation, explaining that "[t]he only reasonable way to read the regulation . . . is that 'as soon thereafter as possible' requires an examination of why it was not possible to complete the physician certification when the plan of care was established and whether that reason justifies the length of the delay." *Id.* at 763. Thus, this Court determined that the relator had "pleaded legal falsity regarding both the requests for anticipated payment and the requests for final payment." *Id.* at 767. This Court reserved any ruling on materiality, noting that the briefs had been filed before the

Supreme Court decided *Escobar* "and the defendants did not press [materiality] on appeal." *Prather*, 838 F.3d at 761 n.2.

On remand, the district court again granted Brookdale's motion to dismiss, holding that relator had failed to plead materiality under *Escobar*. RE 112 (Mem. Op.); RE 113 (Order). The district court recognized that *Escobar* instructs courts "to apply a holistic approach in determining materiality; no one factor is necessarily determinative." RE 112, Page ID # at 2191 (Mem. Op.) (citing *Escobar*, 136 S. Ct. at 2001). In considering materiality, however, the district court stressed that "relator's inability to point to a single instance where Medicare denied payment based on violation [of the timing requirement] . . . weighs strongly in favor of a conclusion that the timing requirement is not material." *Id.* at 2198. The district court noted that relator did "not dispute [defendants'] assertion" that she had "fail[ed] to allege that the government has ever denied a claim based on a violation of the timing requirements." *Id.* at 2197.

The district court did not address the relator's allegation that the United States was "unaware" of Brookdale's violations of the timing requirement when it paid Brookdale's claims. RE 98, Page ID # 1493 (Third Am. Compl.). Instead, the district court appears to have assumed that there were other past violations of the timing requirement, that the government knew about those violations, and that the government nevertheless paid those claims despite that knowledge. The court based these assumptions solely on Brookdale's argument that the requirement "has been

part of the Medicare regulations for fifty years, and home health care is a huge industry making up a significant portion of the millions of Medicare claims submitted every year." RE 112, Page ID # 2198 (Mem. Op.). The district court did not identify any evidence, much less any allegations in the relator's complaint, demonstrating that the government had actual knowledge of any such violations. *See id.*

With respect to the other factors relevant to materiality, the district court agreed with the relator that the timing requirement was an express condition of payment, which it found "weighs somewhat in favor" of a finding of materiality. RE 112, Page ID # 2197 (Mem. Op.). The district court concluded, however, that the timing requirement did not go to the "essence of the bargain" between claimants and Medicare. The court reasoned that the relator had failed to "point[] to facts in the record, including conduct on the part of CMS, legal precedent, or relevant Medicare guidance" supporting the conclusion that the timing requirement is "an essential and material component of the bargain." *Id.* at 2204. Accordingly, the district court dismissed the complaint and relator appealed.

ARGUMENT

THE DISTRICT COURT ERRED IN ASSESSING MATERIALITY UNDER *ESCOBAR*

A. Materiality Is A Multi-Factor Inquiry And Past Government Payment Decisions Are Relevant To That Inquiry Only When The Government Has "Actual Knowledge" Of Violations

The term "material" is defined under the FCA to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). In *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), the Supreme Court cited that definition and stressed that it was the same as the definition employed in "other federal fraud statutes," which "descends from common-law antecedents." *Id.* at 2002 (quotation marks omitted). The Court explained that the same basic concept of materiality applies in all of these contexts and focuses upon "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, at 549 (4th ed. 2003)). The Court stated that "a matter is material" if: (1) a reasonable person would attach importance to it in determining a "choice of action," or (2) "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," regardless of whether a reasonable person would do so. *Id.* at 2002-03 (quotation marks omitted).

The Court clarified that a variety of factors are relevant to the materiality inquiry and stressed that no one factor is automatically dispositive. *Escobar*, 136 S. Ct. at 2001 (citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 (2011)). For example, the Court explained, "[a] misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory or contractual requirement as a condition of payment." *Id.* at 2003. But while designation as a condition of payment is "not automatically dispositive," the Court recognized that it is relevant to the materiality inquiry. *Id.*

In addition, the Supreme Court identified at least three other factors bearing on the materiality inquiry, including whether the government took action when it had actual knowledge of similar violations, *Escobar*, 136 S. Ct. at 2003-04, whether the violation goes to the "essence of the bargain," *id.* at 2003 n.5 (quoting *Junius Constr. Co. v. Cohen*, 178 N.E. 672, 674 (N.Y. 1931)), and whether the violation is significant or "minor or insubstantial," *id.* at 2003.

Discussing the past government action factor, the Supreme Court explained that "proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." *Escobar*, 136 S. Ct. at 2003. "Conversely, 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." *Id.* Similarly, "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 2003-04.

On remand in *Escobar* itself, the First Circuit rejected the argument that past payment of claims was relevant to materiality absent actual knowledge of the violation by the paying authority. The relators in *Escobar* alleged that their daughter had received mental health treatment from unlicensed and unsupervised personnel in violation of state regulations, and they brought a *qui tam* action alleging that the defendant had fraudulently submitted reimbursement claims to the state's Medicaid agency. *United States ex rel. Escobar v. Universal Health Servs.*, 842 F.3d 103, 105 (1st Cir. 2016). The relators' complaint in *Escobar* contained "no evidence that [the government] continued to pay claims despite actual knowledge of the violations." *Id.* at 112. The First Circuit emphasized that, even assuming "on the most generous reading" of the complaint for the defendant, "that various state regulators had some notice of complaints . . . mere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance." *Id.* The court further stressed that "there is no evidence in the complaint that MassHealth, the entity paying Medicaid claims, had actual knowledge of any of these allegations (much

less their veracity) as it paid [defendant's] claims." *Id.* Finally, the court emphasized that the "specific claims" in the *Escobar* complaint involved the relators' daughter, and the court identified "no reason to require Relators at the Motion to Dismiss phase to learn, and then to allege, the government's payment practices for claims unrelated to services rendered to the deceased family member in order to establish the government's views on the materiality of the violation." *Id.* As the court observed, "given applicable federal and state privacy regulations in the healthcare industry, it is highly questionable whether [r]elators could have even accessed such information." *Id.*

Because none of the various factors *Escobar* identified is automatically dispositive, materiality cannot be decided at the pleadings stage unless, construing the complaint in the light most favorable to the relator, she has failed to plausibly allege that the violation had a "natural tendency to influence" or was "capable of influencing" the government's payment decision. *Escobar*, 136 S. Ct. at 2002. Because materiality depends on a holistic assessment, in many cases it is likely to be a determination for a jury. *See Escobar*, 842 F.3d at 112 (noting that it "may be the case" that the government "continued to pay claims . . . despite becoming aware" of violations and "this information may come to light during discovery," but holding that relators' claim was sufficient to survive a motion to dismiss under the Supreme Court's "holistic approach to determining materiality"); *cf.* Restatement (Second) of Torts § 538 cmt. e (1977) (recognizing that the materiality of a misrepresentation will

often depend on a jury determination of what is reasonable).[2] At the motion to dismiss stage, the relator need only plead enough facts to allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged," *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 533 (6th Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), plus whatever additional particularity may be required by Federal Rule of Civil Procedure 9(b). *Escobar*, 136 S. Ct. at 2004 n.6; *see also United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 838 F.3d 750, 761 (6th Cir. 2016).

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[2] Although materiality is often a question for a jury, there are some circumstances in which a court may properly decide this issue as a matter of law. The Fifth Circuit's recent decision in *United States ex rel. Harman v. Trinity Industries Inc.*, __ F.3d __, 2017 WL 4325279 (5th Cir. Sept. 29, 2017), illustrates this point. In that case, a relator successfully argued to a jury that the defendant violated the FCA by modifying guardrail end terminals that the Federal Highway Administration (FHWA) had approved for use according to certain specifications without informing the government of those changes. It was undisputed, however, that, after learning of relator's allegations, the FHWA issued a memorandum specifically stating the modified guardrails at issue in the case were safe and remained eligible for reimbursement at all times. *See id.* at *3 (explaining that there was "an unbroken chain of eligibility for Federal-aid reimbursement" (quotation marks omitted)). In these extraordinary circumstances, the Fifth Circuit held that the violations alleged were not material as a matter of law. In overturning the jury's verdict in that case, the court stressed that there was no countervailing evidence suggesting that the violation was material, no question about what the government knew and when, and no suggestion that the FHWA was a "captured agency" that had forgiven fraud against the government. *Id.* at *17; *see also id.* at *18 ("When the government, at appropriate levels, repeatedly concludes that it has not been defrauded, it is not forgiving a found fraud—rather it is concluding that there was no fraud at all.").

B. The District Court Erred In Applying The Past Government Action Factor

In this case, the only allegation concerning past government payment decisions is that the government was *unaware* of Brookdale's violations when it paid the claims. RE 98, Page ID # 1493 (Third Am. Compl.). In such circumstances, the past government action factor does not weigh for or against a finding of materiality: it is simply neutral at this stage of the case. The district court thus erred in holding that this factor "weighs strongly" against a finding of materiality.

To reach this conclusion, the court misapplied the motion-to-dismiss standards under Rule 12(b)(6) by assuming facts outside of the pleadings and accepting as true the non-moving party's arguments. The district court also ignored *Escobar*'s emphasis on whether the government has "actual knowledge" of violations in assessing the relevance of the government's payment decisions. And the court effectively required relator to allege past government denials of payment to survive Brookdale's motion to dismiss on materiality—information that a relator is unlikely to have at the pleadings stage, particularly given privacy and confidentiality constraints. Although the district court did not expressly label the past-government action factor dispositive, it gave that factor disproportionate weight, granting Brookdale's motion to dismiss despite finding that another factor weighed in favor of materiality.

In deciding a motion to dismiss under Rule 12(b)(6), "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine

whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. As this Court explained in the first appeal in this case, "the Court must construe the complaint in the light most favorable to the plaintiff" and "accept all factual allegations as true." *Prather*, 838 F.3d at 761 (quotation marks omitted). Moreover, "[a]ssessment of the facial sufficiency of the complaint must ordinarily be undertaken without resort to matters outside the pleadings." *Rondigo, L.L.C. v. Township of Richmond*, 641 F.3d 673, 680 (6th Cir. 2011).

In this case, the complaint only alleges violations of the timing requirement by Brookdale. *See, e.g.*, RE 98, Page ID # 1459-60, 1492 (Third Am. Compl.). But the relator specifically alleged that the government was "unaware of the falsity of the claims"—*i.e.*, the violations of the timing requirement—when it paid "Defendants and other health care providers for claims that would otherwise not have been allowed." *Id.* at 1493. Taking the allegations in the complaint as true, the government's payment of Brookdale's claims is not relevant to materiality because the government did not have knowledge of Brookdale's violation of the timing requirement. Because the relator did not allege any additional violations of the timing requirement by other Medicare claimants, nothing in the complaint supports a finding that the government paid a particular claim or "regularly pays" claims "despite actual knowledge" that the timing requirement was violated. *Escobar*, 136 S. Ct. at 2003-04. If anything, the complaint supports the opposite conclusion: that the government would not have allowed claims if it had been aware of violations of the timing requirement. *See* RE

98, Page ID # 1493 (Third Am. Compl.) (alleging that the government was "unaware" of Brookdale's violations when it paid Brookdale "and other health care providers for claims that would otherwise not have been allowed").

In short, the allegations in the complaint are neutral with respect to the past government action factor of materiality. That is the conclusion the district court should have drawn at this stage of the case. Instead, the district court assumed facts outside of the pleadings—namely, that (1) there were other past violations of the timing requirement, (2) the government knew about those violations, and (3) that the government nevertheless paid those claims—and drew inferences adverse to the relator. The court accepted as true Brookdale's argument in its motion to dismiss that because the timing requirement "has been part of the Medicare regulations for fifty years, and home health care is a huge industry making up a significant portion of the millions of Medicare claims submitted every year," RE 112, Page ID # 2198 (Mem. Op.), there must have been violations of the timing requirement and the government paid those claims. In support, the district court merely noted that Brookdale had "point[ed] out" the longstanding nature of the requirement and the large volume of claims. *Id.*[3]

[3] The district court appears to have been referring to Brookdale's reply in support of its motion to dismiss. *See* RE 108, Page ID # 1967 (Defs.' Reply in Support Mot. to Dismiss). In that reply, Brookdale cited Federal Register notices, an investment bank's market overview, and a CMS website to support its argument that the government has been paying claims in this context for many years. *See id.*

To the extent the parties dispute whether other violations have occurred and what claims the government has paid, those "are matters of proof, not legal grounds to dismiss relator['s] complaint." *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 907-08 (9th Cir. 2017) (explaining that "[a]lthough it may be that the government regularly pays this particular type of claim in full despite actual knowledge that certain requirements were violated, such evidence is not before us" at the motion to dismiss stage). In assuming facts outside of the pleadings and drawing inferences against relator in considering a Rule 12(b)(6) motion to dismiss, the district court violated foundational motion-to-dismiss standards. *See id.* at 907 n.9 ("At the pleading stage we assume the facts alleged by the relators to be true."); *Prather*, 838 F.3d at 761.

The district court further erred by ignoring the "actual knowledge" requirement of the past government action factor under *Escobar*. Even taking as true the facts that the district court improperly assumed—*i.e.*, that there were past violations of the timing requirement and the government paid those claims—those facts do not support a finding that the timing requirement is not material. The government's decision to pay claims is only relevant to materiality where the government had "actual knowledge" of the violations alleged in the complaint. *See* 136 S. Ct. at 2003-04 (emphasizing that payment of claims where the government has "actual knowledge" of violations is evidence of materiality). There is no allegation in the complaint in this case that the government had such knowledge. The only relevant allegation is to the contrary: that the government was "unaware" of Brookdale's

violations. *See* RE 98, Page ID # 1493 (Third Am. Compl.). Nothing in *Escobar* suggests that the government's payment decisions are relevant to materiality in the absence of actual knowledge of the violations.

The district court here faulted the relator for failing "to point to a single instance where Medicare denied payment" based on a violation of the timing requirement. RE 112, Page ID # 2198 (Mem. Op.). But the relator alleged that other factors supported a finding of materiality, including that the requirement was labeled a condition of payment. Because the relator plausibly alleged materiality based on other factors, it was improper for the district court to require additional allegations concerning past government payment practices, particularly since it is unlikely that a relator would have access to this information at the motion to dismiss stage. As the First Circuit explained on remand in *Escobar*, there is "no reason to require Relators at the Motion to Dismiss phase to learn, and then to allege, the government's payment practices" for claims unrelated to those alleged in the complaint. 842 F.3d at 112. Moreover, as is also the case here, "given applicable federal and state privacy regulations in the healthcare industry, it is highly questionable whether Relators could have even accessed such information." *Id.*

This Court should not impose an obligation at the motion to dismiss stage for relators (or the United States) to affirmatively plead that the government routinely denies payment of claims in similar circumstances regardless of whether other factors support a finding of materiality. Such a rule would improperly collapse the multi-

factor materiality inquiry into a single-factor test by requiring relators (and the United States) to always allege instances of past government denials of payment in order to survive a motion to dismiss on materiality. *Escobar* makes clear that a relator (or the United States) may support a finding of materiality with facts that include "that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." *Escobar*, 136 S. Ct. at 2003. And, on the other side, the defendant may defend against a finding of materiality by pointing to the Government's payment of "a particular claim in full despite its actual knowledge that certain requirements were violated." *Id.* But if a complaint properly pleads *other* facts that support a finding of materiality, a defendant should not be permitted to win dismissal of the complaint because the relator (or the United States) did not identify *additional* facts supporting a finding of materiality in the form of government denials of payment despite actual knowledge of violations. That is particularly true where, as in this case, the defendant has not produced evidence that the government has paid particular claims or regularly pays claims despite actual knowledge of violations—evidence that the Supreme Court recognized would cut against a finding of materiality. *Id.*

The First Circuit on remand in *Escobar* rejected the same argument that defendants raise here. As the First Circuit explained, accepting the factual allegations in the complaint as true, "as [the court] must for purposes of evaluating a 12(b)(6)

motion," there was "no evidence" that the government "continued to pay claims despite actual knowledge of the violations." 842 F.3d at 112. The court stressed that "mere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance." *Id.* And because there was "no evidence in the complaint" of "actual knowledge," the court concluded that it did not need to decide whether actual knowledge "would in fact be sufficiently strong evidence that the violations were not material to the government's payment decision so as to support a motion to dismiss." *Id.*; *cf. United States ex rel. Miller v. Weston Educ., Inc.*, 840 F.3d 494, 505 (8th Cir. 2016) (rejecting argument that requirement to maintain accurate student records was not material as a matter of law where the evidence at summary judgment showed that the Department of Education "sometimes terminates otherwise eligible institutions for falsifying student attendance and grade records").

The Ninth Circuit recently adopted a similar approach in *Campie*, holding that relators had sufficiently pled materiality at the motion to dismiss stage of the case and rejecting defendant's argument that violations were not material because the Food and Drug Administration (FDA) continued to approve the drugs at issue "even after the agency became aware of certain noncompliance." 862 F.3d at 906. The court noted that the parties disputed "exactly what the government knew and when," *id.*, but explained that in the absence of evidence, the question concerning "actual knowledge" was not a ground on which to dismiss the complaint, *id.* at 906-07. The

Ninth Circuit also emphasized that "there are many reasons the FDA may choose not to withdraw a drug approval, unrelated to the concern" about the noncompliance at issue in that case. *Id.* at 906.

Here, too, the district court should have held that the past government action factor did not support dismissing the relator's complaint for failure to state a claim where there was no allegation of how the government would have responded if it had known about violations of the timing requirement. That is particularly true because there are good reasons, including important public health and safety considerations, why the government might continue to pay claims even where it had knowledge of the defendants' past violations or false statements. Most notably, given the government's responsibility for ensuring the delivery of health care to millions of Americans enrolled in Medicare, Medicaid, and other health insurance programs, governmental decisions to halt payments based upon fraud allegations are necessarily tempered by the need to ensure adequate access to health care, including considerations such as the unavailability of similar services from different providers. Nothing in *Escobar* suggests that the government must immediately stop all payments or always initiate the most serious enforcement proceedings in order to establish that certain types of violations are material to payment.

In this case, the relator has specifically alleged that the government did not have actual knowledge of Brookdale's violations when it paid those claims. That should have been the end of the past government action inquiry at the motion-to-

dismiss stage. Absent actual knowledge, the past government action factor is not a reason to dismiss the relator's complaint. If discovery later reveals that the government regularly pays claims despite actual knowledge of such violations, that is a "matter[] of proof" that the court may address at summary judgment. *Campie*, 862 F.3d at 907; *Miller*, 840 F.3d at 505. Even then, the court would be required to consider all of the factors weighing both for and against a finding that the violation was material. The district court's approach improperly assumes that there were other violations, that the government had learned of those violations, and that the government continued to pay claims despite such knowledge. Because that approach gives the government's purported failure to deny payment near-dispositive weight, it is inconsistent with the multi-factor inquiry the Supreme Court endorsed in *Escobar*.

CONCLUSION

For the foregoing reasons, the Court should hold that the district court erred in analyzing the past government action factor of materiality under *Escobar*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,567 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Megan Barbero
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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Megan Barbero
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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g), the government designates the following district court documents as relevant:

Record Entry	**Description**	**Page ID # Range**
RE 98	Third Amended Complaint	1459-1554
RE 108	Defendants' Reply in Support of Motion to Dismiss	1956-2077
RE 112	Memorandum Opinion	2175-2205
RE 113	Order	2142