WILMERHALE

LITIGATION/CONTROVERSY

March 8, 2018

False Claims Act Alert

An *Escobar* Roundup: Falsity, Materiality, and Scienter

By Jonathan G. Cedarbaum, Ni Qian and Samuel M. Strongin

In its June 2016 decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), the Supreme Court held that implied certification claims are viable under the False Claims Act (FCA), but only in certain circumstances. In the year and a half since the Court handed down *Escobar*, dozens of lower courts have addressed issues left uncertain by the Supreme Court's ruling, above all: (i) when does a claim for payment constitute a false implied certification of compliance with a regulatory or contractual obligation; (ii) what suffices to allege or prove that alleged non-compliance was material to the government's decision to pay; and (iii) what suffices to allege or prove scienter. This article traces the debates in the lower courts concerning these issues, some of which are just now beginning to return to the Supreme Court in petitions for certiorari.[1]

A few key takeaways:

- The lower courts remain divided over the circumstances in which false implied certifications may be found, with many treating the two conditions identified in *Escobar* as exclusive, but others, often relying on pre-*Escobar* Circuit precedents, finding implied certifications in other circumstances as well.

- Many courts have followed *Escobar*'s instruction to treat continued government payment in the face of knowledge of alleged non-compliance as strong evidence of the alleged non-compliance's immateriality to government payment and so have dismissed complaints or granted summary judgment to defendants on that basis; but a minority of courts, sometimes with the urging of the Justice Department, have kept claims alive despite informed and ongoing payment of claims by the government. The issue may be headed up to the Supreme Court in a pending petition for certiorari filed by Gilead Sciences in *Gilead Sciences, Inc. v. United States ex rel. Campie*, No. 17-936 (docketed Jan. 3, 2018).

- Only a few courts have so far picked up on an aspect of *Escobar* that deserves more attention: the Court's holding that relators and the government must allege and prove not just that a defendant's non-compliance was material to the government's decision to pay, but also that the defendant *knew* the non-compliance was material at the time it sought payment.

I. False Implied Certifications

Without "resolv[ing] whether all claims for payment implicitly represent that the billing party is legally entitled to payment," *Escobar*, 136 S. Ct. at 2000, the *Escobar* Court held that "the implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths," *id.* at 2001. The Court's use of the phrase "at least" in describing the conditions giving rise to false implied certifications has caused disagreement among lower courts over whether *Escobar* created a mandatory two-prong test "or simply defined one situation in which liability may arise under this theory." *United States ex rel. Forcier v. Computer Scis. Corp.*, 12 Civ. 1750, 2017 WL 3616665, at *12 (S.D.N.Y. Aug. 10, 2017). Three Circuits—the Fourth, Seventh, and Ninth—have addressed this question in published opinions.[2] The Seventh and Ninth have treated the two conditions identified by the Supreme Court as exclusive. The Fourth Circuit, by contrast, has appeared to treat them as non-exclusive, thus leaving in place pre-*Escobar* Circuit precedents defining additional circumstances in which implied certifications may be found. District courts, particularly in Circuits where the court of appeals has yet to address this issue, have also come to different conclusions.

The Seventh and Ninth Circuits treat *Escobar*'s two-prong test as mandatory. In *United States v. Sanford-Brown, Ltd.*, the Seventh Circuit before *Escobar* had affirmed summary judgment for the defendant because the only certifications allegedly violated were contained in an agreement to participate in the Department of Education's Title IV financial assistance program, not in claims for payment made at or after the time of the alleged violations. The Supreme Court vacated the decision and remanded for reconsideration in light of *Escobar*. *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 712 (7th Cir. 2015), *cert. granted, judgment vacated*, 136 S. Ct. 2506 (2016). On remand, the Seventh Circuit again held that the relator had failed to establish the elements of an implied certification claim. The court explained that under *Escobar*, an "implied false certification theory can be a basis for liability where two conditions are met" and then quoted the conditions set forth in *Escobar*. *United States v. Sanford-Brown, Ltd*., 840 F.3d 445, 447 (7th Cir. 2016). It found that the relator had failed to satisfy the first condition because he had "offered no evidence that defendant Sanford-Brown College (SBC) made any representations at all in connection with its claims for payment, much less false or misleading misrepresentations." *Id*.[3]

The Ninth Circuit has also held, in two post-*Escobar* cases, that successful implied certification claims must fulfill the two conditions set out in *Escobar*. "First, the claim must not merely request payment, but also make specific representations about the goods or services provided. . . . Second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements must 'make[] those representations misleading half-truths.'" *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 901 (9th Cir. 2017) (quoting *Escobar*, 136 S. Ct. at 2001; *see United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 332 (9th Cir. 2017). In *Kelly*, the relator alleged that the defendant contractor had violated the FCA by failing to track project costs in accordance with a particular industry standard, and by falsifying monthly cost reports to match the expected budget. *Kelly*, 846 F.3d at 329. The Ninth Circuit affirmed the district court's grant of summary judgment to the defendant, for two reasons: the claims for payment did not contain a specific representation suggesting that the defendant maintained costs in accordance with the particular standard at issue, and there was no evidence showing that the claims for payment had contained false or inaccurate statements. *Id.* at 332-33.

In *Campie*, the Ninth Circuit reversed the dismissal of a qui tam complaint, but it did so because, in the panel's view, the relators' allegations satisfied *Escobar*'s two-condition test for false

implied certification. The relators alleged (among other things) that the defendant had submitted claims for payment for drugs the active ingredient of which had not been manufactured in Food and Drug Administration (FDA)-approved facilities. 862 F.3d at 895-98. The Ninth Circuit found the first *Escobar* condition—specific representations—met because the defendant had allegedly requested payment for the three drugs by their FDA-approved marketing names, which, in the court's view, "necessarily refer to specific drugs under the FDA's regulatory regime." *Id.* at 902-903. The Ninth Circuit found the second condition—misleading half-truths—met because the defendant had allegedly acquired the active ingredient from an unapproved supplier and relabeled it to conceal its true provenance. *Id.*[4]

Unlike the Seventh and Ninth Circuits, the Fourth Circuit has appeared to suggest that *Escobar's* two-prong test does not exhaust the circumstances in which implied false certifications may be found. In *United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015), *cert. granted, judgment vacated*, 136 S. Ct. 2504 (2016), the court of appeals had, before *Escobar*, reversed dismissal of a complaint-in-intervention alleging that the defendant contractor had failed to provide security guards who had passed required marksmanship tests. After deciding *Escobar*, the Supreme Court granted certiorari in *Triple Canopy*, vacated the judgment, and remanded for further consideration. On remand, Triple Canopy relied on *Escobar*'s two-prong test, in particular the "specific representation" language, to argue that the government had failed adequately to allege a false representation. Triple Canopy argued that, unlike the Medicare invoices submitted in *Escobar*, which contained specific billing codes for counseling services, its invoices had not contained "specific representations" about the services provided, but rather "merely . . . list[ed] the number of guards and hours worked and these invoices contained no falsities on their face." *Triple Canopy*, 857 F.3d 174, 178 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 370 (2017). The argument failed. The Fourth Circuit held that the request for payment for "guards" whom the defendant allegedly knew had failed to meet required marksmanship tests was a misleading "half-truth" because "[j]ust as in *Universal Health*, anyone reviewing Triple Canopy's invoices 'would probably—but wrongly—conclude that [Triple Canopy] had complied with core [contract] requirements." *Id.* (quoting *Escobar*, 136 S. Ct. at 2000).

Absent post-*Escobar* guidance from the court of appeals in their Circuit, a number of district courts have concluded that *Escobar*'s two conditions are not exclusive, a position the government also has consistently advocated.[5] But other district courts have adopted the *Escobar* two-conditions test as mandatory. In *Forcier*, for example, Judge Batts of the District Court for the Southern District of New York joined what she determined to be "the majority view in [the Second] Circuit, and [found] that [an] implied false certification claim may proceed only if Defendant made specific representations that were rendered misleading by its failure to disclose noncompliance with material regulatory requirements." 2017 WL 3616665, at *12.[6] There, the defendant was a billing agent for New York City's early intervention program (EIP) for children with developmental delays whose contract with the City set its compensation based on the amount of money it collected. *Id.* at *3. Under relevant Medicaid regulations, a billing agent could be reimbursed by Medicaid so long as its compensation was "[r]elated to the cost of processing the billing," but "not related on a percentage or other basis to the amount that is billed or collected." *Id.* at *3-4. The defendant argued, and the court agreed, that the relator had failed to allege false certifications based on its invoices to Medicaid, which addressed the "cost of the EIP services provided as well as the existence of beneficiaries' third-party coverage." *Id.* at *13. The court found that even if these statements could be considered "specific representations" meeting the first prong of the falsity test, these representations would not have led "a reasonable person to conclude *anything* about its compensation arrangement," failing to satisfy the second prong. *Id.*[7]

II. Materiality

Lower courts have spent more time grappling with *Escobar*'s materiality principles than with any other aspect of the opinion. Several courts of appeals have issued decisions setting out their understanding of how *Escobar* refined the materiality element of FCA claims, rejecting claims where the government continued to pay for goods or services despite knowing of the alleged non-compliance. A minority of courts, adopting a position advocated by the government, have refused to find continued government payment combined with such knowledge dispositive, either on the ground that the government knew only of allegations, not proof, of misconduct or on the ground that other considerations might sway the government to continue paying despite the material character of the non-compliance. The debate over materiality may be headed back to the Supreme Court, as Gilead Sciences has filed a certiorari petition challenging the Ninth Circuit's failure to find lack of materiality in the *Campie* case despite Gilead Sciences' contention that the government knew of the alleged non-compliance and continued payment of claims.

A. No Materiality Because of Continued Government Payment

This past year, the First, Third, Fifth, Ninth, and D.C. Circuits all dismissed or granted summary judgment in cases on materiality grounds, relying on *Escobar*'s admonitions that "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," and that "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." *Escobar*, 136 S. Ct. at 2003-04.[8]

A number of district court judges have done the same, perhaps none more strikingly than Judge Merryday in *United States ex rel. Ruckh v. Salus Rehabilitation, LLC*, 8:11-cv-1303-T-23TBM, 2018 WL 375720 (M.D. Fla. Jan. 11, 2018), throwing out a $350 million jury verdict in favor of the relator. Judge Merryday characterized the relator's claims as resting on the defendants' alleged "failure to maintain a 'comprehensive care plan,' ostensibly required by a Medicaid regulation" and "a handful of paperwork defects (for example, unsigned or undated documents)." *Id*. at *1. In holding that the defendants were entitled to judgment as a matter of law, Judge Merryday concluded that the relator "offered no meaningful and competent proof that the federal or the state government, if either or both had known of the disputed practices (assuming that either or both did not know), would have regarded the disputed practices as material to each government's decision to pay the defendants and, consequently, that each government would have refused to pay the defendants." *Id*. On the contrary, he found that "both governments were—and are—aware of the defendants' disputed practices, aware of this action, aware of the allegations, aware of the evidence, and aware of the judgments for the relator—but neither government has ceased to pay or even threatened to stop paying the defendants for the services provided to patients throughout Florida continuously since long before this action began in 2011." *Id*.

Reviewing *Escobar*'s lessons, Judge Merryday explained that "*Escobar* rejects a system of government traps, zaps, and zingers that permits the government to retain the benefit of a substantially conforming good or service but to recover the price entirely—multiplied by three—because of some immaterial contractual or regulatory non-compliance." *Id*. at *4. Thus, he warned:

> . . . the government that continues to pay full fare for a product or service despite knowledge of some disputed practice, some non-compliance, or some other claimed defect, relentlessly works itself into a steadily tightening bind that at some point becomes disabling because the government (or the relator, who sues in the government's stead) must prove that had the government known the facts the government would have

> refused to pay. In other words, at some point, this burden, growing incrementally more formidable each day, presents to the government the insurmountable burden of proving that the government would not do exactly what history demonstrates the government in fact did (and continues to do until this moment). In this action, I find the relator's claims fatally ensnared in that intractable bind.

Id. at *9.[9]

B. Other Factors Supporting Lack of Materiality

While continued government payment despite knowledge of alleged or actual misconduct is the most common basis on which courts have held allegedly false certifications immaterial, courts have relied on other factors as well. In *United States ex rel. Petratos v. Genentech, Inc.*, 855 F.3d 481 (3d Cir. 2017), for example, the Third Circuit found alleged regulatory violations too "insubstantial" to support materiality under the FCA because, during the six years after the relator informed the government that the defendant pharmaceutical company had allegedly suppressed adverse data about one of its drugs, the FDA had never revoked its approval of the drug; never initiated adverse proceedings against the defendant to enforce its rule against failure to report; never required a change in the drug's labeling; and never pursued any legal action against the defendant; but did approve three additional uses for the drug in question. *Id*. at 485, 490.

An unpublished Second Circuit opinion highlighted yet another basis for finding immateriality. In *Grabcheski v. American Int'l Grp.*, 687 F. App'x 84 (2d Cir. 2017), the relator alleged that the defendant's wrongdoing had caused the government to overpay for the acquisition of a company by 0.4%, *id.* at 87. The court held that such a small difference in valuation could not be material. *Id.*; *cf. United States v. DynCorp Int'l*, 253 F. Supp.3d at 101 ("Based on a consideration of the factors outlined in *Escobar*, this Court concludes that a claim for costs that are significantly higher than reasonable satisfies the materiality requirement.").

C. Termination of Government Payment or Other Adverse Action as Supporting Materiality

Just as many decisions have relied heavily on the government's continued payment to hold a claim immaterial, so too have a number of courts held the inverse and relied on the government's *stopping* payment, or taking other adverse action, to determine that a particular alleged type of noncompliance was material to the government's decision to pay. Perhaps the clearest example of this is the Seventh Circuit's decision in *United States v. Luce*, 873 F.3d 999 (7th Cir. 2017). Although *Luce* ultimately reversed a grant of summary judgment to the government based on lack of evidence of causation, *see id.* at 1011-14, the court discussed materiality as well. Luce, who had run a mortgage lending company, had "falsely assert[ed] that he had no criminal history so that his company could participate in the [Fair Housing Act (FHA)]'s insurance program." *Id.* at 1000. In holding that this false certification was material, even though the government had issued insurance for new loans from Luce's company, the court emphasized that as soon as the government learned of Luce's criminal history, it "began debarment proceedings, culminating in actual debarment. There was no prolonged period of acquiescence." *Id.* at 1008. "It did not simply refuse payment in one instance," the court explained, "but terminated its relationship with the loan originator so that no future payments could be made," *Id.* at 1007. Thus, "the Government's actions following its discovery of" Luce's criminal history "support, rather than undercut, a finding of materiality." *Id.* at 1008; *see also United States ex rel. Cairns v. D.S. Med. L.L.C.*, No. 1:12CV00004 AGF, 2017 U.S. Dist. LEXIS 205586, at *5 (E.D. Mo. Dec. 14, 2017) ("evidence at trial that federal regulators and prosecutors aggressively pursue allegations of improper kickback relationships between physicians and their distributors and vendors for medical devices was sufficient for a jury to find

that the Defendants' kickback activities would influence the payment decision made by Medicare for the claims submitted . . . and were therefore material.").[10]

The Fourth Circuit also alluded to a version of this consideration in *Triple Canopy*, in which it viewed the government's termination of the contract as one among several factors leading it to find the alleged noncompliance material. *See* 857 F.3d at 178-79 ("the Government did not renew its contract for base security with Triple Canopy").

D. Other Factors Courts Have Considered in Finding Possible Materiality

Since *Escobar* was handed down the Department of Justice ("DOJ") has argued that courts should consider several factors other than continued government payment in making materiality determinations.[11]

Consistent with the government's urging, one court of appeals has suggested that materiality can be shown even if the government knows of the defendant's alleged wrongdoing but still continues to pay the defendant. In *Campie*, the Ninth Circuit reversed dismissal of the action even though the FDA had never revoked its approval of the drugs, and the government had kept making payments for them. 862 F.3d at 906. Acknowledging that the continued approval and payment presented the relators with "an uphill battle," *id.* at 905 (citing, *inter alia*, *D'Agostino v. ev3, Inc.*, 845 F.3d 1, 9 (1st Cir. 2016), and *Petratos*, 855 F.3d at 490), the court insisted that "to read too much into the FDA's continued approval—and its effect on the government's payment decision—would be a mistake." *Id.* at 906. It asserted that "there are many reasons the FDA may choose not to withdraw a drug approval, unrelated to the concern that the government paid out billions of dollars for nonconforming and adulterated drugs." *Id.* The court further observed that "[o]nce the unapproved and contaminated drugs were no longer being used, the government's decision to keep paying for compliant drugs does not have the same significance as if the government continued to pay despite continued noncompliance." *Id.* The court also relied on the fact that the defendant's alleged fraud went towards not just reimbursements for drugs the FDA had approved but also the achievement of FDA approval in the first place. In the court's view, making the continued approval dispositive "would allow [the defendant] to use the allegedly fraudulently-obtained FDA approval as a shield against liability for fraud." *Id.*

At the same time, it is not clear that the court in *Campie* accepted the argument that the government continued making payments despite having actual knowledge of the alleged fraud. The court specifically noted that "the parties dispute[d] exactly what the government knew and when, calling into question its 'actual knowledge.'" *Id.* at 906-07.[12] Given the complexity of its reasoning, *Campie* does not necessarily suggest that the Ninth Circuit would hold that an FCA suit is viable when the government undisputedly is aware of a defendant's noncompliance with governing conditions on its performance and nonetheless chooses to continue paying the defendant's claims. Gilead Sciences has filed a certiorari petition urging the Supreme Court to address the circumstances undercutting materiality. The petition was docketed January 3, 2018 and should be acted on later in the year.

In *Triple Canopy* the Fourth Circuit laid out three factors beyond continued payment in support of its materiality holding. And much as with its analysis of falsity, the court's materiality analysis was flexible, as no one reason appeared dispositive. The first of these additional factors was "common sense," which cut in favor of materiality since "[g]uns that do not shoot," an example *Escobar* itself gave of a material omission, *see* 136 S. Ct. at 2001-02, "are as material to the Government's decision to pay as guards that cannot shoot straight." *Triple Canopy*, 857 F.3d at 179; *see also United States ex rel. Gelman v. Donovan*, 12 CV 5142, 2017 WL 4280543, at *5 (E.D.N.Y. Sept. 25, 2017) (characterizing materiality as "essentially a matter of common sense rather than technical exegesis of statutes and regulations"). The second factor was "Triple Canopy's own actions in covering up the noncompliance." *Triple Canopy*, 857 F.3d at 178. And

the third was the government's decision to intervene in the lawsuit, which signaled that it considered the alleged violations material. *Id.* at 179. While the court also mentioned the government's decision not to renew its contract with Triple Canopy, the court treated that as simply one factor of several, and not a nearly-dispositive one. *Triple Canopy*, 857 F.3d at 179.

Finally, several district courts this past year have accepted the argument that continued government payment in the face of knowledge only of allegations of wrongdoing rather than of evidence of actual wrongdoing does not suffice to undercut materiality as a matter of law.[13] Other courts have found knowledge of allegations sufficient.[14]

III. Scienter: Knowledge of Materiality

Although *Escobar*'s statements about when non-compliance is material have been the subject of most of the recent decisions by lower courts, *Escobar* is also significant for its holding regarding scienter as it relates to materiality. The Supreme Court made clear that "concerns about fair notice and open-ended liability" should be "addressed through strict enforcement of the Act's materiality *and scienter* requirements." *Escobar*, 136 S. Ct. at 2002 (emphasis added). Thus, the Supreme Court held that liability may lie only when "the defendant knowingly violated a requirement *that the defendant knows is material* to the Government's payment decision." *Id.* at 1996 (emphasis added). To date, few decisions have addressed *Escobar*'s holding that plaintiffs must allege and prove not only that the defendant's alleged non-compliance was material to the government's decision to pay but also that the defendant knew the non-compliance was material when it sought payment (or caused payment to be sought).

In *DynCorp Int'l*, Judge Huvelle, citing pre-*Escobar* D.C. Circuit precedent, reiterated that "'[e]stablishing knowledge . . . on the basis of implied certification requires the plaintiff to prove that the defendant knows (1) that it violated a contractual obligation, and (2) that its compliance with that obligation was material to the government's decision to pay.'" 253 F. Supp. 3d at 102-3 (quoting *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1271 (D.C. Cir. 2010)). And in his recent *Ruckh* decision Judge Merryday granted judgment for the defendants as a matter of law, not only because of the relator's failure to prove the materiality of the defendants' non-compliance to the government's decision to pay, but also because "the relator failed to prove that the defendants submitted claims for payment despite the defendants' knowing that the governments would refuse to pay the claims if either or both governments had known about the disputed practices." 2018 WL 375720 at *1. When and how other courts will rely on this powerful gatekeeping tool remains to be seen.

***

For a comprehensive review of FCA developments during the past year, please read our 2017 FCA Year-in-Review report, available here.

For more information on this or other False Claims Act matters, please contact:

Jonathan G. Cedarbaum	+1 202 663 6315	jonathan.cedarbaum@wilmerhale.com
Ni Qian	+1 202 663 6382	ni.qian@wilmerhale.com
Samuel M. Strongin	+1 202 663 6565	samuel.strongin@wilmerhale.com

[1] Our earlier review of post-*Escobar* developments in the lower courts, published in February 2017, is available here.

[2] The Third Circuit, in an unpublished, non-precedential opinion, has held that "implied false certification liability attaches when a claimant 'makes specific representations about the goods or services provided' and the claimant's 'failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.'" *United States ex rel. Whatley v. Eastwick College*, 657 F. App'x 89, 94 (3d Cir. 2016) (quoting *Escobar*, 136 S. Ct. at 2001). *See United States ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd*., No. 11-4607, 2017 WL 1133956, at *6 (E.D. Pa. Mar. 27, 2017) ("In *United States ex rel. Whatley v. Eastwick College*, the Third Circuit appears to interpret *Escobar* as requiring specific representations that, in conjunction with the claimant's purposeful omissions, renders the ensuing claims legally false."). *Cf*. *United States ex rel. Laporte v. Premiere Education Group, L*.P., No. 11-3523, 2017 WL 3471163, at *2 (D.N.J. Aug. 11, 2017) (assuming arguendo that the two-prong test is strict but rejecting defendant's argument that specific representations were not made in a Title VI program participation case, relying on *Rose v. Stephens Institute*, No. 09-cv-05966, 2016 WL 5076214 (N.D. Cal. Sept. 20, 2016), which is now on appeal before the Ninth Circuit).

[3] *See also United States ex rel. Lisitza v. Par Pharmaceutical Cos. Inc.*, No. 06 C 06131, 2017 WL 3531679, at *12-16 (N.D. Ill. Aug. 17, 2017) (relying on *Sanford-Brown* in granting summary judgment to defendant where plaintiff failed to point to any specific representations in its claim for payment that would lead a reasonable person to conclude that it had complied with a condition of payment that it in fact violated).

[4] The Ninth Circuit may soon have another opportunity to revisit the requirements for alleging falsity. On December 6, 2017, the Court heard oral argument in *Rose v. Stephens Institute*, No. 17-15111, which, like *Sanford-Brown*, involves the Department of Education's Title IV program. The district court held that even if *Escobar*'s two-prong test *was* mandatory, the relator had met it because the defendant had made "specific representations" when it subsequently submitted student loan forms to the Department of Education that the student-borrower was "eligible" and enrolled in an "eligible program," though it knew that it had failed to comply with the conditions of the program. *Rose v. Stephens Institute*, No. 09-cv-05966, 2016 WL 5076214, at *5 (N.D. Cal. Sept. 20, 2016). The defendant sought permission to bring an interlocutory appeal, which was granted.

On appeal, the government filed an amicus brief supporting the relator, arguing that the two-part test set out in *Escobar* is not mandatory. Indeed, the government asserts that "insofar as government claimants are concerned, every claim for payment constitutes an affirmative representation that the claimant is entitled (or at least eligible) to be paid." Brief for the United States of America as Amicus Curiae Supporting Appellee at 15, *Rose v. Stephens Institute*, No. 17-15111 (9th Cir. Aug. 7, 2017). At the very least, the government argues, claims for payment should suffice in situations where a party is receiving federal funds pursuant to a government program that establishes certain program eligibility requirements.

[5] *See United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 815-816 (S.D.N.Y. 2017) (finding *Escobar* does not "require a showing that the submitted claims amount to 'misleading half-truths," and applying *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), to hold that merely submitting a request for payment is an implied certification that defendant complied with all relevant statutes and regulations); *United States v. DynCorp. Int'l, LLC*, 253 F. Supp. 3d 89, 99-100 (D.D.C. 2017) ("Although DynCorp claims that specific representations are necessary to

proceed on a theory of implied certification, this is not the law of the D.C. Circuit . . . Because the Supreme Court in *Escobar* held that the implied certification theory was satisfied 'at least' under the conditions it described and did 'not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment,' the D.C. Circuit's broader statement of the implied certification theory remains good law after *Escobar*.") (citation omitted); *United States ex rel. Landis v. Tailwind Sports Corp.*, 234 F. Supp. 3d 180, 198 (D.D.C. 2017) (finding that "the D.C. Circuit has spoken on the question the Supreme Court declined to resolve," and relying on *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010) for the proposition that "all the government must show is 'that the contractor withheld information about its noncompliance with material contractual requirements'"). For the government's position, see, e.g., Brief for the United States as Amicus Curiae, *United States ex rel. Escobar v. Universal Health Services*, No. 14-1423, at 11 n.1 (1st Cir. Aug. 22, 2016).

[6] As decisions in the majority, *Forcier* cites *New York ex rel. Khurana v. Spherion Corp.*, No. 15 Civ. 6605, 2016 WL 6652735, at *14 (S.D.N.Y. Nov. 10, 2016) ("Recently, the U.S. Supreme Court held that the implied false certification theory is viable where two conditions are met: (1) the claim does not merely request payment, but also makes specific representations about the goods or services provided...." (internal quotation marks omitted)); *United States ex rel. Tessler v. City of N.Y.*, No. 14-CV-6455, 2016 WL 7335654, at *4 (S.D.N.Y. Dec. 16, 2016) ("[A]s to the [implied false certification claim], Relators fail to identify a sufficiently 'specific' representation about the services provided to sustain an FCA claim."); *United States ex rel. Kolchinsky v. Moody's Corp.*, 238 F. Supp.3d 550, 558 (S.D.N.Y. 2017) ("As the Supreme Court recently explained, an FCA complaint premised on implied certification must satisfy two conditions: first, the claim ... makes specific representations about the goods or services provided; and second, the defendant's failure to disclose non-compliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." (internal quotation marks omitted)); *United States v. Northern Adult Daily Health Care Ctr.*, 205 F. Supp. 3d 276, 295 (E.D.N.Y. 2016) ("The Supreme Court held that the implied false certification theory can be a basis for liability where two conditions are satisfied[.]"); *Ameti ex rel. United States v. Sikorsky Aircraft Corp.*, No. 3:14-cv-1223, 2017 WL 2636037, at *8 (D. Conn. June 9, 2017) (citing *Escobar* as "requiring a claim to make specific representations about the goods or services provided and for the misrepresentation to be material." (internal quotation marks omitted)).

[7] *See also United States ex rel. Curtin v. Barton Malow Co.*, No. 14-2584, 2017 WL 2453032 (W.D. La. June 6, 2017) (reciting *Escobar* two-prong test).

[8] *See United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 35 (1st Cir. 2017) (dismissing, on materiality grounds, an FCA claim based on alleged false statements that led to FDA approval of a medical device when "the complaint allege[d] that Relators told the FDA about every aspect of the design . . . that they felt was substandard, yet the FDA allowed the device to remain on the market"), *petition for cert. filed*, (U.S. Feb. 5, 2018), *docketed* (Feb. 7, 2018) (No. 17-1109); *United States ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746, 764 (3d Cir. 2017) (granting summary judgment on materiality grounds when "CMS knew that dummy prescriber IDs were being used by PBMs, that it routinely paid PBMs despite the use of these dummy Prescriber IDs"); *United States ex rel. Petratos v. Genentech, Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (dismissing, on materiality grounds, an FCA claim in which the relator "essentially conceded that [the government] would *consistently reimburse* these claims with full knowledge of the purported noncompliance" with the reporting requirement); *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 667 (5th Cir. 2017) (overturning jury verdict for relator on materiality grounds because government investigated relator's allegations, found them wanting, and kept paying defendant), *petition for cert. filed* (U.S. Feb. 12, 2017) *docketed*, (Feb. 16, 2018) (No. 17-1149); *Abbott v. BP Expl. & Prod., Inc.*, 851 F.3d 384, 388 (5th Cir. 2017)

(granting summary judgment to defendant when the government mandated no change in defendant's position because relator did not rebut "strong evidence" such inaction demonstrates immateriality); *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 334 (9th Cir. 2017) (granting summary judgment to defendant because of "the demanding standard required for materiality under the FCA, the government's acceptance of Serco's reports despite their non-compliance with [the requisite format], and the government's payment of Serco's public vouchers for its work"); *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1034 (D.C. Cir. 2017) ("Moreover, we have the benefit of hindsight and should not ignore what actually occurred: the [government agency] investigated McBride's allegations and did not disallow any charged costs. . . . This is 'very strong evidence' that the requirements allegedly violated by the maintenance of inflated headcounts are not material.").

[9] The government declined to intervene in *Ruckh*. When the defendants filed their motion for judgment as a matter of law notwithstanding the verdict, the government sought leave to file a statement of interest addressing three issues: "(1) the proper test for materiality under the False Claims Act ("FCA") as explained by the Supreme Court's decision in *United Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); (2) the proper test for knowledge of materiality in implied certification cases as addressed by the *Escobar* court; and (3) the causation and scienter requirements under the FCA." United States' Motion for Leave To File a Statement of Interest, *United States ex rel. Ruckh v. Salus Rehabilitation, LLC*, 8:11-cv-1303-T-23TBM, ECF No. 453, at 2 (Apr. 11, 2017). The court denied the government's request. *See id*. ECF No. 456. The relator has noticed an appeal of Judge Merryday's decision. *See id*. ECF No. 476.

Other district court decisions finding a lack of materiality based on continued government payment despite government knowledge of alleged non-compliance include *Kolchinsky*, 238 F. Supp. 3d at 559; and *United States ex rel. Dickson v. Bristol-Myers Squibb*, *Co*., No. 13-1039, 2017 WL 2780744, at *21 (D.N.J. June 27, 2017); *see also United States v. Strock*, No. 15-CV-0887-FPG, 2018 WL 647471, at *9 (W.D.N.Y. Jan 31, 2018) (dismissing complaint for failure adequately to allege materiality where complaint neither alleged that the government typically refused to pay claims that failed to comply with the requirement at issue or that the government had ceased payment to the defendant upon learning of its noncompliance).

Acting in accord with the principle that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," to state a claim, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), several district courts have also recently dismissed FCA complaints on the ground that the complaint merely averred that the defendant's alleged noncompliance was material because the government would have not otherwise paid, without providing any factual allegations buttressing that assertion. *See, e.g.*, *United States v. Carrington Mortg. Servs., LLC*, No. 1:16-cv-00920-RLY-MJD, 2018 WL 372348, at *7 (S.D. Ind. Jan. 10, 2018); *United States ex rel. Schiff v. Norman*, No. 8:15-cv-1506-T-23AEP, 2018 WL 264253, at *2 (M.D. Fla. Jan. 2, 2018); *see also* Order Re Motion to Dismiss, *United States ex rel. Benjamin Poehling v. Unitedhealth Group, Inc., et al.*, no. CV 16-08967-MWF (SSx) (C.D. Cal. Feb. 12, 2018), ECF No. 212, at 16 ("the key allegation that the Attestations have a direct impact on CMS' risk adjustment payments is missing"); *United States v. Scan Health Plan*, CV 09-5013-JFW (JEMx), 2017 WL 4564722, at *6 (C.D. Cal. Oct. 5, 2017) (mere allegation that alleged noncompliance was "material" too conclusory to avoid dismissal); *United States ex rel. Durkin v. County of San Diego*, No. 15-cv-2674-MMA (WVG), 2017 WL 3315784, at *13 (S.D. Cal. Aug. 3, 2017). *See also Coyne v. Amgen*, No. 17-1522-cv, 2017 WL 6459267 (2d Cir. Dec. 18, 2017).

[10] *Luce* also relied on the fact that criminal history certification "was a threshold eligibility requirement that, by extension, was tied to *every* loan." 873 F.3d at 1009. At least one other

district court has adopted the threshold eligibility factor as evidence of materiality. *See United States v. Quicken Loans, Inc.,* 239 F. Supp. 3d 1014, 1040 (E.D. Mich. 2017); *but see Strock*, 2018 WL at *10 ("In theory, the fact that a company violated qualifications necessary for participation in special contracting programs could be material to the government's decision to pay that company for work performed under awarded contracts. But here, Plaintiff's Complaint fails to 'present concrete allegations from which the court may draw the reasonable inference' that Defendants' alleged falsities 'caused [Plaintiff] to make the reimbursement decision.'") (internal citations omitted) (quoting *Coyne v. Amgen*, 17-1522-cv, 2017 WL 6459267, at *2 (2d Cir. 2017)) (alteration in *Strock*).

[11] *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Appellant at 11-17, *United States ex rel. Miller v. Weston Educational d/b/a Heritage College*, No. 14-1760 (8th Cir. Sept. 14, 2016); Brief for the United States of America as Amicus Curiae Supporting Appellee at 21-27, *Rose v. Stephens Institute*, No. 17-15111 (9th Cir. Aug. 7, 2017).

[12] *See also* Order Re Motion to Dismiss, *United States ex rel. Benjamin Poehling v. Unitedhealth Group, Inc., et al.*, No. CV 16-08967-MWF (SSx) (C.D. Cal. Feb. 12, 2018), ECF No. 212, at 21 ("The Government may have had general suspicions about whether Defendants were complying with requirements for submitting diagnostic data and truthful Attestations, but because of the allegedly fraudulent representations Defendants made, could not identify which diagnoses were valid and which were not."); Order: Motion to Dismiss Relator's Second Amended Complaint, *United States ex rel. Ferris v. Afognak Native Corp*., No. 15-cv-00150-HRH (D. Alaska Aug. 11, 2017), ECF No. 295, at 16 (discussing *Campie* and observing, "the question of what SBA knew when is a matter of proof that cannot be resolved on the instant motion to dismiss").

[13] *See, e.g.*, *United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, No. 9:14-230-RMG, 2017 WL 4803911, at *7 (D.S.C. Oct. 23, 2017); *Smith v. Carolina Med. Ctr. et al.*, 2017 WL 3310694, at *12 (E.D. Pa. Aug. 2, 2017); *United States ex rel. Brown v. Pfizer, Inc.*, No. 05-6795, 2017 WL 1344365, at *11 (E.D. Pa. Apr. 12, 2017); *United States v. Public Warehousing Co. K.S.C.*, No. 1:05-CV-2968-TWT, 2017 WL 1021745, at *6 (N.D. Ga. Mar. 16, 2017).

[14] *See Nargol*, 865 F.3d at 35 ("Here . . . there is no allegation that the FDA withdrew or even suspended product approval *upon learning of the alleged misrepresentations*.") (emphasis added); *D'Agostino*, 845 F.3d at 8 ("The FDA's failure actually to withdraw its approval of Onyx *in the face of D'Agostino's allegations* precludes D'Agostino from resting his claims on a contention that the FDA's approval was fraudulently obtained.") (emphasis added). The court in *United States ex rel. Brown v. Pfizer*, Civ. No. 05-6795, 2017 WL 2691927 (June 22, 2017), certified the issue for interlocutory review by the Third Circuit, but the Third Circuit refused the appeal. *Petratos*'s holding that the government's failure to launch an adverse proceeding upon hearing the relator's allegations defeated materiality is of a similar vein, as actual knowledge of misconduct was unnecessary.