UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
ex rel. KEN E. WILLIAMS,

Plaintiffs,

v. **Civil Action No. 12-12193-IT**

CITY OF BROCKTON, CITY OF BROCKTON POLICE DEPARTMENT, AND DOES 1-1000, UNNAMED CO-CONSIPIRATORS,

Defendants.

THE UNITED STATES' STATEMENT OF INTEREST

The United States respectfully submits this Statement of Interest regarding the Relator's Motion to Reconsider the Memorandum & Order the Court issued on August 5, 2016. Although the United States has not intervened and is not a formal party, it remains the real party in interest in this action. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009). In addition, the United States has a significant interest in the proper interpretation and the correct application of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, which plays a central role in the government's ongoing efforts to combat fraud against the public fisc. *See* S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. Therefore, the United States respectfully submits this statement of interest pursuant to its authority under 28 U.S.C. § 517.[1]

[1] This provision authorizes the Attorney General of the United States to attend to the interests of the United States in any action in federal or state court.

BACKGROUND

On October 13, 2015, Relator Ken E. Williams (the "Relator") filed his First Amended Complaint against the Defendants under the *qui tam* provision of the FCA, 31 U.S.C. § 3730(b). (Doc. 44). In his complaint, the Relator alleged that the Department of Justice's Community Oriented Policing Services ("COPS") and Justice Assistance Grant ("JAG") programs conditioned the award of grants to local municipalities on the recipient's compliance with certain non-discrimination laws and regulations, including Title VI of the Civil Rights Act of 1964, as amended at 42 U.S.C. § 2000d ("Title VI"), and 42 U.S.C. § 3789d. (Doc. 44, ¶ 30). The Relator further alleged that applicants for these grants must certify compliance with these non-discrimination laws and regulations. (Doc. 44, ¶ 53, 57 and 58). Finally, the Relator alleged that the Defendants engaged in a consistent pattern and practice of unlawful discrimination, yet falsely certified compliance with the pertinent laws and regulations in order to receive grant money from the COPS and JAG programs. (Doc. 44, ¶ 93-97).

The Defendants filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure ("Rule") 12(b)(6). (Doc. 45). The Relator and the Defendants filed subsequent briefs and participated in hearings before the Court. (Docs. 46, 49, 51, 55). On June 17, 2016, the Court invited the Relator and the Defendants to provide memoranda addressing the Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. --, 136 S. Ct. 1989 (2016). (Doc. 54). After receiving briefs from the Relator and the Defendants, the Court issued its ruling partially dismissing Counts I-III of the Relator's complaint on August 5, 2015. (Doc. 59). The Relator filed a motion for reconsideration on September 2, 2016. (Doc. 60). The Defendants filed their opposition and cross-motion for

reconsideration on September 9, 2016. (Doc. 62). The United States submits this statement of interest in support of Relator's motion for reconsideration.

DISCUSSION

In partially granting the motion to dismiss Counts I-III, the Court held that the Defendants' alleged discriminatory conduct was not material because the government terminates funding under Title VI and 42 U.S.C § 3789d "only after there is an express finding of discrimination." (Doc. 59, p. 12). Therefore, the Court held that "any discrimination that occurs before a finding does not render the certifications *materially* false for the purposes of the FCA, as such discrimination – even though unlawful and counter to the mission of the COPS program – would not be a basis for the government to terminate funding." (Doc. 59, p.12). Because the Relator has not alleged that a court or the government had made a formal finding of discrimination against the Defendants, the Court ruled that the "allegations that Defendants engaged in a pattern and practice of discrimination in violation of Title VI, 42 U.S.C. § 3789d, and their regulations does not support a claim under the FCA." (Doc. 59, p.13).

The United States submits this brief to address three points: First, the proper test for materiality under the FCA, as explained by the Supreme Court's recent decision in *Escobar*. Second, the Court's misapplication of the materiality factors set forth in *Escobar* and creation of an inapplicable administrative exhaustion requirement. Third, that Relator has plausibly alleged materiality under *Escobar*. Because the Relator's allegations pass the FCA's test for materiality, the United States submits that the Court should reconsider its decision and fully deny Defendants' motion to dismiss Counts I-III.

I. *Escobar* Confirmed that the "Natural Tendency" Test Governs the FCA's Multi-Factor Materiality Assessment

Escobar reaffirmed that the proper test for determining materiality in FCA cases is whether the conduct has "a natural tendency to influence, or [is] capable of influencing, the payment or receipt of money or property." 136 S. Ct. at 2002 (citing 31 U.S.C. 3729(b)(4); *Neder v. United States*, 527 U.S. 1, 16 (1999); *Kungys v. United States*, 485 U.S. 759, 770 (1988)). This approach is consistent with the statutory text of the FCA, which was amended in 2009 to expressly incorporate the "natural tendency" test, thereby eschewing a more onerous "outcome materiality" standard that some courts had adopted. *See* Pub. L. No. 111-21 at § 4 (2009) (The Fraud Enforcement and Recovery Act of 2009). As the Fifth Circuit explained, Congress "had ample opportunity to adopt the outcome materiality standard in FERA," but instead "embraced the test as stated by the Supreme Court and several courts of appeals." *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 470 (5th Cir. 2009).[2]

The natural tendency test is also consistent with the common law. Citing treatises on both tort and contract law, the Supreme Court confirmed in *Escobar* that the natural tendency test can be satisfied in one of two ways: (1) by showing that a "reasonable man would attach importance to [the misrepresented information] in determining his choice of action in the transaction"; or (2) demonstrating that "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." 136 S. Ct. at 2002-03 (quoting the Restatement (Second) of Torts § 538, at 80). This test makes clear that the Supreme Court was not establishing a new requirement that the United States or relators show that a claim would

[2] *See also* S. REP. 111-10, 12, 2009 U.S.C.C.A.N. 430, 439 (legislative history explaining that Congress adopted the "natural tendency" standard to be consistent with "the Supreme Court definition" of materiality set forth in *Neder*, "as well as other courts interpreting the term as applied to the FCA." S. REP. 111-10, 12, 2009 U.S.C.C.A.N. 430, 439.

not actually have been paid or even that it would "likely" not have been paid. Indeed, the principal authorities the Court relied upon in *Escobar* confirm that "it is not necessary to materiality that a misrepresentation have even been the paramount or decisive inducement, so long as it was a substantial factor." 26 R. Lord, Williston on Contracts § 69:12 (4th ed. 2003).

By embracing the "natural tendency" test codified in the FCA and enshrined in the common law, *Escobar* made clear that materiality is determined through a holistic assessment of the tendency or capacity of the undisclosed violation to affect the government decision maker. The Supreme Court identified a variety of factors bearing on this holistic assessment, including whether the provision violated is expressly labeled as a condition of payment, *id.* at 16, whether the violation is significant or "minor or insubstantial," *id*. at 2003, whether the violation goes to the "essence of the bargain," *id*. at 2003 n.5 (quoting *Junius Const. Co. v. Cohen*, 257 N.Y. 393, 400 (1931)), and whether the government took action in this or other cases where the government had knowledge of similar violations, *id*. at 2003-2004. Importantly, *Escobar* made clear that no one factor is dispositive, and a court must evaluate these, and any other relevant factors, together to determine whether a particular violation is material. *Id*. at 2001 (citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 (2011) (materiality cannot rest on a "single fact or occurrence as always determinative")).

II. The Court Failed to Follow *Escobar* and Applied the Wrong Standard for Assessing Materiality

In its partial dismissal of Counts I-III, the Court stated that the test for materiality was only "the extent to which the Government actually has or would refuse to pay a claim if it knows of non-compliance. (Doc. 59, p.11). The Court then concluded that the alleged pattern and practice of discriminatory conduct was not material under the FCA, because the relevant statutes and regulations only permit the government to deny funding after a formal finding of

discrimination and the Relator failed to allege such a finding. (Doc. 59, p. 12-13). The Court thus held that, even if there was unlawful discrimination that ran counter to the mission of the COPS program, the violations could not be material to payment unless the courts or the government had already made an express finding of discrimination. (Doc. 59, p. 12-13).

In doing so, the Court's decision effectively requires the government to exhaust its administrative remedies before relief could be pursued under the FCA – a notion that numerous courts have rejected, including the First Circuit. In *United States v. Lahey Clinic Hosp., Inc.*, the First Circuit held that a parallel scheme of administrative remedies "does not displace the United States' long standing power to collect monies wrongfully paid through an action independent of the administrative scheme." 399 F.3d 1, 16 (1st Cir. 2005); *see also United States ex rel. Spay v. CVS Caremark Corp.*, No. CIV.A. 09-4672, 2013 WL 1755214, at *13–14 (E.D. Pa. Apr. 24, 2013); *United States v. Watkins*, No. 01 C 5719, 2002 WL 1263988, at *12-3 (N.D. Ill. June 5, 2002); *United States ex rel. Sanders v. E. Alabama Healthcare Auth.*, 953 F. Supp. 1404, 1412 (M.D. Ala. 1996). Moreover, Congress did not intend for FCA prosecutions to be foreclosed by the mere presence of an alternative scheme of sanctions. The Court's decision was thus contrary to Congress' intent for the FCA to allow the government to choose from a variety of remedies, both statutory and administrative, to combat fraud. *E.g., United States ex rel. Onnen v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 688 F.3d 410, 415 (8th Cir. 2012) (explaining that "a complex regime of regulatory sanctions" does not foreclose FCA liability); *United States ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 608 F.3d 871, 886 (D.C. Cir. 2010) (noting that the FCA "expressly contemplates the possibility [that] the Government will have a choice of remedy").

In addition, the Court's holding subverts the "natural tendency" test reaffirmed by the Supreme Court in *Escobar* and erroneously converts it into an outcome materiality test. As

noted, however, *Escobar* did not *sub silentio* depart from the statutory and common law definitions of materiality and endorse an "outcome materiality" standard. *See also United States ex rel. Winkelman v. CVS Caremark*, No. 15-1991, 2016 WL 3568145, at *8 (1st Cir. June 30, 2016) (noting that *Escobar* adopted the common law understanding of materiality). If the Supreme Court had intended materiality to turn solely upon whether the government would *actually* have denied payment had it known of the fraud, it would not have been necessary to identify any other factors relevant to the multi-pronged materiality inquiry.

More generally, the Court's ruling would effectively stand the whole purpose of the FCA's *qui* tam provisions on their head. The purpose of the *qui tam* provisions are to bring to the government's attention fraud of which it was not previously aware. This purpose would be completely vitiated if the only valid *qui tam* cases were those where the government was already aware of the misconduct and had already taken action to address it. Notably, the *Escobar* expressly contemplates that there will be situations where FCA actions have been filed where the government was not previously aware of the defendant's fraud. As discussed further below, one of the factors identified by *Escobar* as relevant (but not dispositive) of the question of materiality is whether the government paid the defendant's claim (or similar claims by others) with *actual knowledge* of the violation. 136 S. Ct. at 2003. *Escobar* thus makes clear that the government's failure to act without *actual* knowledge does not preclude FCA liability. This not only squares with common sense – the government cannot expected to act where a defendant successfully conceals its fraud – but is also consonant with the purpose of the FCA's *qui tam* provision of bringing fraud to the government's attention. In this particular case, Relator 's complaint contains considerable allegations about which the government was unaware, such as non-public complaints made directly to the Brockton Police Department, which the Defendants are alleged

to have concealed, or events that Relator claims to have witnessed or experienced firsthand. (Doc. 44, ¶ 169-175, 182-183, 188-193, 195, and 200). For the foregoing reasons, it was erroneous for the Court to conclude that the absence of a prior finding of discrimination renders the relator's allegations deficient as a matter of law.

III. Under A Proper Application of *Escobar,* the Relator's allegations satisfy the FCA's materiality requirement.

The Relator's allegations are material under the natural tendency standard and the multifactor test for applying that standard set forth in *Escobar*. Therefore, the Court should deny the Defendants' motion to dismiss Counts I-III.

As noted, one of the factors identified in Escobar is whether the defendant violated a requirement labeled as a condition of payment. 136 S. Ct. at 2003. Here, the Relator alleged that compliance with civil rights laws and regulations was expressly designated as a condition of payment for the COPS grants. (Doc. 44, ¶ 30, 53, 57, and 58). Although this fact is not dispositive, it is very strong indicia of materiality under *Escobar*. 136 S. Ct. at 2003-04.

Escobar identified as another factor whether the requirement at issue goes to the essence of what the government bargained for. In his complaint, the Relator alleged that "non-discriminatory policing policies are a central tenet" of the COPS program, because the program encourages police departments to increase their effectiveness by building trust within their local communities. (Doc. 44, ¶ 28, 34). This Court likewise observed that the government required COPS grant applicants to promise that they will not engage in discriminatory conduct and explained that this requirement stemmed from various federal statutes, including Title VI, 42 U.S.C. § 3789d, and the Department of Justice's implementing regulations contained in 28 C.F.R. 42, Subparts C and D. (Doc. 59, p. 3). And the Court further noted that these laws and their implementing regulations "prohibit unintentional discrimination by any entity that receives

any federal funds from DOJ." (Doc. 59, p. 3). The COPS Owner's Manual also reminds grantees of their obligations with respect to unlawful discrimination. (Doc. 59, p. 5). Furthermore, the administrative schemes for Title VI and 42 U.S.C. § 3789d both specifically allow for the termination or rejection of grants when there has been a finding of noncompliance. (Doc. 59, p. 11-12). Accordingly, compliance with applicable civil rights laws and regulations goes to the "very essence of the bargain" for COPS grant recipients, and this is therefore another factor that weighs heavily in favor of a finding of materiality. *See Escobar*, 136 S. Ct. at 2003, n. 5 (quoting *Junius Const. Co. v. Cohen*, 257 N.Y. 393, 400 (1931)).

Another factor identified in *Escobar* – whether the scope of the violation is significant or minor and insubstantial – also supports a conclusion that relator's allegations, if proven, would be material. Relator does not allege isolated incidents of noncompliance, but rather a pattern of misconduct and systemic violations spanning several years. (Doc. 44, ¶ 93-97). As a result, this case is very different from the insignificant or minor violation that the Supreme Court cautioned against in *Escobar*. 136 S. Ct. at 2003-04.

Finally, the Supreme Court noted that "evidence that the defendant knows the [g]overnment consistently refuses to pay claims in the mine run of cases based on noncompliance," can constitute "proof of materiality." *Id.* at 2003. And conversely, "[i]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated that is strong evidence" that materiality is lacking. *Id.* Here, there is nothing in Relator's complaint that indicates either that the government has refused to pay in the mine run of cases, or that it paid any particular claim in full, with actual knowledge of the type of violations alleged by relator. Accordingly, at this stage of the proceedings, this factor is neutral, and neither weighs in favor or against a finding of materiality.

In sum, based on the allegations in the relator's complaint, the majority of factors identified in *Escobar* weigh strongly in favor of a finding of materiality, and no factors weigh against such a finding. Under these circumstances, it was improper for the Court to conclude – based on the improper and exclusive consideration that the government has not yet made a finding of discrimination – that the Relator has failed to allege a material false claim.

CONCLUSION

For the aforementioned reasons, the United States respectfully requests that the Court reconsider its Order from August 5, 2016, and apply the "natural tendency" test for materiality that is set forth in the statutory text and reaffirmed in *Escobar*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants via First Class Mail.

/s/ Jennifer A. Serafyn
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Dated: September 19, 2016