CASE NO. 17-5826

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; and ARC THERAPY SERVICES, LLC,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee, Case No. 3:12-CV-00764

DEFENDANTS-APPELLEES' MOTION TO STAY THE MANDATE

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Pursuant to Federal Rule of Appellate Procedure 41(d)(2) and Sixth Circuit Rule 41(a), Appellee Brookdale[1] respectfully moves the Court to stay the issuance of the mandate pending Brookdale's filing of a petition for a writ of certiorari in the Supreme Court of the United States and the Supreme Court's disposition of the case. A stay is warranted to allow the Supreme Court to address two substantial questions that Brookdale's certiorari petition will raise about the False Claims Act's ("FCA") materiality and scienter requirements: (1) whether the failure to allege facts regarding past government payment practices can weigh against a finding of materiality, and (2) whether a complaint satisfies the FCA's scienter requirement when it contains no allegation that the defendant knew or was on notice that its alleged violations were material to the government's payment decision.

There is good cause to stay the mandate to allow the Supreme Court to address those questions because of the burdensome, costly, and potentially avoidable costs associated with the extensive discovery regarding whether adequate justification exists for any delay in obtaining physician signatures for the thousands of home health claims from dozens of home health agencies at issue in

[1] "Brookdale" refers collectively to Defendants-Appellees Brookdale Senior Living Communities, Inc., Brookdale Living Communities, Inc., Brookdale Senior Living Inc., Innovative Senior Care Home Health of Nashville, LLC, and ARC Therapy Services, LLC.

this case. On the other hand, Marjorie Prather, as the relator in this declined *qui tam* case, will not be harmed by the temporary stay.

Notably, the Ninth Circuit recently stayed issuance of the mandate in *U.S. ex rel. Campie v. Gilead Sciences, Inc.*, an FCA case involving the same pleading issue as the instant case. The Supreme Court has taken the certiorari petition to conference and invited the Solicitor General to file a brief expressing its views about the petition, which remains pending before the Court. Brookdale's certiorari petition reasonably can be expected to receive similar attention and consideration.

For the reasons set forth herein, Brookdale respectfully requests this Court to stay issuance of the mandate.

BACKGROUND

Prather filed this lawsuit under the *qui tam* provisions of the FCA. The district court initially dismissed the lawsuit for failure to plead falsity and the presentment of false claims. *See U.S. ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, No. 3:12-CV-00764, 2015 WL 6812581 (M.D. Tenn. Nov. 5, 2015). On appeal in *Prather I*, this Court reversed the initial dismissal in a 2-1 decision. *See U.S. ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750 (6th Cir. 2016). Following remand, the district court again dismissed the lawsuit for failure to plead materiality in accordance with the standard for materiality articulated by the Supreme Court in *Universal Health Services, Inc. v.*

U.S. ex rel. Escobar, 136 S. Ct. 1989 (2016). *See U.S. ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 265 F. Supp. 3d 782 (M.D. Tenn. 2017). On June 11, 2018, this Court again reversed the district court in a 2-1 decision, holding that Prather's allegations satisfied the FCA's materiality and scienter requirements. *See U.S. ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822 (6th Cir. 2018) ("*Prather II*").

After Brookdale filed a petition for rehearing en banc, the Court directed Prather to respond to Brookdale's petition. On August 22, 2018, this Court issued an order indicating that although Brookdale's en banc petition had received some support, less than a majority of the judges voted in favor of rehearing en banc. (*See* Order, Doc. No. 47-1.)

ARGUMENT

Rule 41(d)(2) of the Federal Rules of Appellate Procedure and Sixth Circuit Rule 41(a) permit this Court to stay the issuance of its mandate during a party's petition for a writ of certiorari to the Supreme Court if "the certiorari petition would present a substantial question" and "there is good cause for a stay." Both of those factors are satisfied here. Brookdale's certiorari petition will present two substantial questions regarding the requirements for pleading a viable claim under the FCA and will show that this Court's decision conflicts with the decisions of other courts of appeals on both of those questions. Good cause exists to stay the

issuance of the mandate because otherwise the parties, the government, government contractors, third-party providers, and the district court will be forced to devote substantial resources to wide-ranging discovery incumbent in this case. Conversely, temporarily staying the issuance of the mandate will not prejudice Prather.

1. Brookdale's Petition for a Writ of Certiorari Will Present Substantial Questions.

Brookdale's petition for a writ of certiorari will ask the Supreme Court to address (1) whether the failure to allege facts regarding past government payment practices can weigh against a finding that an FCA complaint adequately alleges materiality, and (2) whether a complaint satisfies the FCA's scienter requirement when it contains no allegation that the defendant knew or was on notice that its alleged violations were material to the government's payment decision. Each of those issues presents a substantial question for the Supreme Court to resolve.

a. Whether failure to allege facts regarding past government payment practices can weigh against a finding of materiality presents a substantial question for the Supreme Court.

In construing the limits of FCA liability in the fraudulent omission context, the Supreme Court in *Escobar* held that what a government agency has said about the potential effect of regulatory noncompliance is not as important to assessing materiality as whether such noncompliance actually has affected the government's payment decisions in practice. The Supreme Court held that a regulatory violation

"cannot be deemed material merely because the Government designates compliance with [the regulatory requirement] as a condition of payment" and that it is likewise not "sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance." 136 S. Ct. at 2003. Instead, *Escobar* instructed lower courts to consider how the government actually has responded to the alleged violation in practice. 136 S. Ct. at 2003-04 (describing the government's actual payment practices as "very strong evidence" of materiality).

In dismissing this lawsuit, the district court recognized "the absence of any allegations about past government action" and held that where the regulatory requirement in question had existed for more than fifty years, Prather's "inability to point to a single instance where Medicare denied payment" based on a violation of the regulation "weigh[ed] strongly" in favor of a conclusion that the timing requirement was not material. *See Prather II*, 892 F.3d at 834. This Court reversed the dismissal, holding that Prather was "not required to make allegations regarding past government action" to survive a motion to dismiss and that failure to include such allegations "has no bearing on the materiality analysis." *Id.* Whether a relator's failure to or election not to plead facts about past government action can weigh against finding that materiality has been adequately pled presents a substantial question for the Supreme Court to resolve.

First, the panel majority's decision directly conflicts with a decision from the Third Circuit. *See* S. Ct. R. 10(a) (in evaluating a certiorari petition, the Supreme Court will consider the existence of a split in circuit authority). In *U.S. ex rel. Petratos v. Genentech Inc.*, the Third Circuit held not only that it could consider the relator's "fail[ure] to plead that CMS 'consistently refuses to pay' claims like those alleged," but that that failure weighed against a finding of materiality. 855 F.3d 481, 490 (3d Cir. 2017) (also holding that the alleged violation was not material because the relator failed to "cite[] to a single successful" government enforcement action). Numerous other post-*Escobar* courts have reached that same conclusion. *See U.S. ex rel. Folliard v. Comstor Corp.*, 308 F. Supp. 3d 56, 86-87 (D.D.C. 2018); *United States v. Scan Health Plan*, No. 09-cv-5013, 2017 WL 4564722, at *5-6 (C.D. Cal. Oct. 5, 2017); *U.S. ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd.*, No. 11-cv-4607, 2017 WL 1133956, at *7 (E.D. Pa. Mar. 27, 2017); *U.S. ex rel. Scharff v. Camelot Counseling*, No. 13-CV-3791, 2016 WL 5416494, at *8 (S.D.N.Y. Sept. 28, 2016); *Knudsen v. Sprint Commc'ns. Co.*, No. C13-04476, 2016 WL 4548924, at *14 (N.D. Cal. Sept. 1, 2016).

Second, the Court's decision creates a double standard for FCA cases brought by relators instead of the United States. Had the United States intervened, it would have been expected to allege whether the government routinely has denied

claims based on untimely physician certifications.[2] If the United States failed to make such allegations, that failure would indicate that the regulatory requirement was not actually material to the government's payment decisions. There is no precedent in *Escobar* or otherwise for holding the relator to a lower standard for pleading materiality than that to which the United States would be held.

Third, the treatment of *Gilead Sciences, Inc. v. U.S. ex rel. Campie* by both the Ninth Circuit and the Supreme Court demonstrates that Brookdale's certiorari petition will present a substantial question. *Campie* also involves the application of the past government action factor to the FCA's materiality requirement. The district court dismissed the relators' complaint based in part on failure to plead materiality, but on appeal the Ninth Circuit reversed. 862 F.3d 890, 909 (9th Cir. 2017). The Ninth Circuit held that materiality was adequately pled despite the defendant's argument that the government paid the defendant's claims with actual knowledge of the alleged violation. *Id.* at 906-07. Nonetheless, after denying the defendant's request for rehearing en banc, the Ninth Circuit granted the defendant's motion to stay the mandate pending its filing a petition for a writ of certiorari, recognizing that application of the past government action factor in the

[2] Although the court granted the United States' motion to appear as an amicus at oral argument, counsel for the government "refused to say whether or not she knew of the government's payment habits." *Prather II*, 892 F.3d at 845 (McKeague, J., dissenting).

materiality analysis constitutes a substantial question. *See* No. 15-16380, ECF No. 100 (9th Cir. Oct. 4, 2017).

Furthermore, the Supreme Court has taken the *Campie* certiorari petition to conference and subsequently invited the Solicitor General to file a brief expressing the government's views with respect to the petition. *See Gilead Scis., Inc. v. U.S. ex rel. Campie*, No. 17-936, 2018 WL 1785985, 138 S. Ct. 1585 (Mem. Apr. 16, 2018) (petition still pending). The Supreme Court's treatment of the *Campie* petition illustrates that the standard for pleading materiality in an FCA case is of interest to the Court.[3]

Finally, the majority's holding regarding the past government action factor has significant ramifications for the entire home health industry (*see* Br. of Nat'l Assoc. for Home Care & Hospice, Inc. as Amicus Curiae Supporting Appellees, Doc. No. 45) and other entities that submit claims to the federal government. (*See* Wash. Legal Found.'s Amicus Curiae Br. in Support of Defendants-Appellees' Petition for Rehearing En Banc, Doc. No. 44.) Brookdale's petition for a writ of

[3] If anything, this case represents a better candidate for Supreme Court review than *Campie*, and therefore presents a stronger case for granting a stay. *Campie* was a unanimous opinion, whereas this case was decided with a dissent. The Ninth Circuit found that the allegations showed the defendant in *Campie* made express *and* implied false statements, whereas Brookdale is not alleged to have committed any express fraud. And, in *Campie* the defendant's certiorari petition turns on an issue—"what the government knew and when"—about which the panel found there were factual disagreements requiring discovery, *see Campie*, 862 F.3d at 906, whereas here it is undisputed that Prather did not cite a single example of a claim denied for an untimely certification.

certiorari likely will be supported by interested parties from across the government contracting spectrum.

For all of these reasons, Brookdale's certiorari petition will present a substantial question as to whether the failure to allege facts regarding past government action can weigh against finding that materiality has been adequately pled.

b. Whether a complaint pleads scienter when it contains no allegation that the defendant knew or was on notice that its alleged violations were material to the government's payment decision presents a substantial question for the Supreme Court.

In *Escobar*, the Supreme Court held that to satisfy the scienter element of an FCA claim, a relator must allege facts showing that the defendant "knowingly violated a requirement that the defendant *knows is material* to the Government's payment decision." 136 S. Ct. at 1996 (emphasis added). Here, the panel majority found the scienter requirement satisfied by allegations that Brookdale was "on notice that [its] claim-submission process was resulting in potential *compliance problems*" and "acted with 'reckless disregard' with respect to [its] *compliance* with 42 C.F.R. § 424.22(a)(2)." *Prather II*, 892 F.3d at 837-38 (emphasis added). Those allegations relate only to the first prong of the scienter requirement—whether Brookdale knowingly violated a requirement—and not to the second prong that Brookdale knew or was on notice that its potential violation was material to the government's payment decision.

The Court's opinion departs from the scienter requirement established in *Escobar* and directly conflicts with the D.C. Circuit, which has held that scienter requires showing "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." *United States v. Sci. Applications Intern. Corp.*, 626 F.3d 1257, 1271 (D.C. Cir. 2010) (*SAIC*). Disagreement with *SAIC* is particularly significant because the Supreme Court cited *SAIC* repeatedly in *Escobar*, including within its discussion of scienter. *See Escobar*, 136 S. Ct. at 2002.

In its petition for a writ of certiorari, Brookdale will ask the Supreme Court to resolve whether the allegation that the defendant was "put on notice that [it] may be violating regulations," *Prather II,* 892 F.3d at 838 n.11, is sufficient to plead scienter under the FCA where that allegation does not establish that the defendant knew that its violation was material to government payment. The Court's conflict with *Escobar* and the existence of a split in circuit authority illustrate that Brookdale's certiorari petition will present a substantial question with respect to the FCA's scienter requirement.

2. There Is Good Cause to Stay the Mandate.

In considering whether there is good cause to stay the mandate, courts "balance the equities . . . by assessing the harm to each party if a stay is granted."

Books v. City of Elkhart, 239 F.3d 826, 828 (7th Cir. 2001) (Ripple, J., in chambers). The parties to this case are Prather and Brookdale. Denying a stay of the mandate could cause Brookdale significant and avoidable harm, but granting a stay will not harm Prather. She filed this case on behalf of the government and has not suffered any harm. That will not change if issuance of the mandate is stayed.

Issuing the mandate, on the other hand, will force Brookdale to engage in extensive and costly discovery. Given the Court's rulings in this case on the standard for establishing falsity, discovery may include whether a valid justification existed for any delay in obtaining a physician's signature with respect to the claims at issue and, if not, whether the timing of that signature was material to the government's payment of the claim. The Third Amended Complaint alleges that the Held Claims Project involved a backlog of thousands of claims at dozens of home health agencies located throughout the country. (*See* Third Amended Complaint, R. 98, PageID# 1476-78 ¶¶ 66, 68, 74.) Discovery in such circumstances would be burdensome, costly, and unnecessary should the Supreme Court dispose of the issues as a matter of law. *See U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 510 (6th Cir. 2007) (recognizing the importance of Rule 9(b) in preventing fishing expeditions and protecting defendants from "spurious charges of immoral and fraudulent behavior" (quotation marks removed)); *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 380

(4th Cir. 2008) (recognizing that Rule 9(b) is intended to prevent FCA suits from resting on facts learned from the "costly process of discovery").

Beyond seeking discovery from third-party referring physicians, extensive discovery also will be sought from the United States and Medicare Administrative Contractors regarding whether the timing of physician signatures was material to Medicare's payment of home health claims in 2011-12. Discovery will expend the district court's resources overseeing the litigation of allegations the dismissal of which the Supreme Court might ultimately affirm. Expending such resources by the parties, third parties, and the district court can and should be avoided until the Supreme Court rules on Brookdale's certiorari petition.

Escobar's focus on the "rigorous" materiality and scienter requirements and its reinforcement that allegations of materiality must be analyzed under Rule 9(b)'s heightened pleading standard reflect the strong policy of preventing FCA cases from proceeding to discovery until the allegations have been sufficiently vetted. 136 S. Ct. at 2004 & n.6. Such protections exist to address the concern that *qui tam* relators, who have "'suffered no injury in fact'" but stand to win substantial FCA bounties, "'may be particularly likely to file suit as a pretext'" for a fishing expedition. *U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 732 (4th Cir. 2010) (quoting *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 3690 F.3d 220, 231 (1st Cir. 2004)).

In sum, staying the mandate for a short period of time while Brookdale files a petition for a writ of certiorari will not harm Prather or her ability to pursue her claims should the Supreme Court deny certiorari. Denying a stay, however, will harm Brookdale by forcing it to embark on extensive discovery while its certiorari petition is pending. In addition, the government, Medicare Administrative Contractors, third-party healthcare providers, and the district court similarly may be forced to expend significant resources related to discovery that ultimately might prove unnecessary. The equities thus weigh in Brookdale's favor.

CONCLUSION

Brookdale's petition for a writ of certiorari will raise substantial questions about the application of the past government action factor to the FCA's materiality analysis and the types of allegations required to satisfy the FCA's scienter requirement. A brief stay in the issuance of the mandate will not substantially prejudice Prather but will burden Brookdale, the government, the district court, and other third parties who will become involved in discovery. Brookdale respectfully requests that this Court grant its motion for a stay of the mandate pending the filing of a petition for a writ of certiorari to the Supreme Court and the Supreme Court's disposition of the case.

Dated: August 28, 2018

Respectfully submitted,

BASS BERRY & SIMS PLC

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CERTIFICATE OF COMPLIANCE

1. This Motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because the Motion contains 3,105 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1).

2. The Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

s/ Brian D. Roark

CERTIFICATE OF SERVICE

I certify that on August 28, 2018, the foregoing Motion to Stay the Mandate was filed via this Court's CM/ECF system and thereby was served upon all counsel of record.

s/ Brian D. Roark
Brian D. Roark