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In False Claims Act Cases, Government Must Provide Full Discovery Regarding Materiality

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In some recent False Claims Act ("FCA") cases, the Department of Justice ("DOJ") has opposed defendants' attempts to obtain from federal agencies evidence that would tend to show that the FCA violations alleged were not material to the agency's payment of claims—*i.e.*, evidence that could be outcome-determinative under *Universal Health Services v. United States ex rel. Escobar,* 136 S. Ct. 1989 (2016). While the government understandably may not want the curtain to be drawn back to reveal the actual agency record for the claims at issue as well as similar claims, the government has no grounds to oppose such discovery once an FCA litigation has commenced. In fact, DOJ *itself* should evaluate that agency record as part of its litigation diligence before it launches FCA litigation or makes an intervention and/or dismissal decision in a *qui tam* suit. The options are simple: The government can either allow an FCA matter to proceed and open up the agency to materiality discovery, or the government can shut the suit down. There is no "third" option: DOJ cannot properly allow an FCA case to be litigated but then deny legitimate discovery on this topic.

That approach would be at odds with *Escobar.* There, the Supreme Court validated the implied false certification theory of liability, but only if that requirement was material to the government's payment and the defendant knew it. The Court imposed this materiality requirement as a necessary limit on this otherwise expansive liability theory, and stressed that the courts must rigorously enforce this liability prerequisite. It explained that the materiality inquiry looks "to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation," and that a misrepresentation is material in the FCA context if it was "so central to the provision of" the goods or services that the government "would not have paid these claims had it known of these violations." *Escobar,* 136 S. Ct. at 2004. It is not enough that the government would be entitled to refuse payment if it were aware of the violation; materiality is assessed based on the facts and circumstances surrounding the government's decision to pay "a particular claim" or to "pay claims" in general." *Id.* at 2003-04 ("[I]f 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."). This focus on the government's payment decision brings agency knowledge and conduct to the forefront in false certification cases.

DOJ actually has acknowledged the significance of materiality discovery in some *qui tam* cases, and ultimately furnished government witnesses and provided documentary evidence that defeated plaintiffs' claims of materiality. *See, e.g., United States ex rel. Spay v. CVS Caremark Corp.,* 875 F.3d 746 (3d Cir. 2017); *United States ex rel. Harman v. Trinity Indus. Inc.,* 872 F.3d 645 (5th Cir. 2017). But, in other cases, the government has resisted this type of discovery. For example, in an ongoing Medicare case in which the government declined to intervene, the government opposed the defendant's requests, claiming that the

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requests were unduly burdensome, the documents were "facially privileged," the requests to government agencies other than the Centers for Medicare & Medicaid Services ("CMS")—the agencies that investigated the inpatient claims at issue as well as similar claims in other cases—were "misdirected" because those agencies "did not make any payment decisions," and the government's denial of the requests as a "non-party" in the *qui tam* action must be upheld unless the court finds the decision "arbitrary and capricious" under the Administrative Procedure Act. *See* United States' Memorandum in Opposition to Defendant's Motion to Compel, *United States ex rel. Polansky v. Executive Health Res., Inc.,* No. 12-CV-04239-MMB (E.D. Pa. filed Nov. 27, 2018). Likewise, the government has objected on privilege and relevance grounds to discovery of its dealings with companies similarly situated to the defendant. *See, e.g., United States ex rel. Dean v. Paramedics Plus LLC,* No. 4:14-CV-00203, 2018 WL 620776 (E.D. Tex. Jan. 30, 2018).

Of course, any litigant may assert relevance, burden, and privilege objections to discovery where appropriate, but those standard objections are not what is at play here. As a general rule, the government should not be interposing these types of objections to *Escobar* materiality discovery. For example, the manner in which an agency treats the exact same type of claim with respect to a similarly-situated contractor may indeed undermine the requisite materiality showing. The government's efforts to cut off inquiries based on artificial barriers are inconsistent with its obligations as a litigant or, in the case of a declined *qui tam* action, the real party in interest.

In each FCA case in which the government's practices may be at issue for purposes of establishing or challenging materiality, DOJ should be making an independent pre-litigation or pre-intervention assessment of the agency record on materiality. At that same time, DOJ should be ensuring that the relevant agency materials are identified, preserved, and reviewed. And if DOJ learns through this process that the agency record would not sustain a materiality challenge, it should be moving affirmatively to stop the action from going forward. Insufficient evaluations of this issue can have enormous consequences for FCA defendants in terms of litigation time and expense, and they also cost the government.

In those instances where the record is so voluminous as to be cost prohibitive to have to review and produce in litigation—*i.e.*, so large as to warrant an undue-burden objection—DOJ should be taking that factor into account, including when deciding whether to exercise its statutory authority under FCA § 3730(c)(2)(A) to dismiss the action. The Solicitor General recently acknowledged this exact point in an *amicus curiae* brief advocating for denial of a petition for *certiorari* to the Supreme Court, stating that, pursuant to this authority, DOJ would move to dismiss the case if it is remanded because, among other things, "if this suit proceeded past the pleading stage, both parties might file burdensome discovery and *Touhy* requests for FDA documents and FDA employee discovery (and potentially trial testimony), in order to establish 'exactly what the government knew and when,' which would distract from the agency's public-health responsibilities." Brief for the United States as Amicus Curiae at 15, *Gilead Sciences, Inc. v. United States ex rel. Campie*, No. 17-936 (filed Nov. 30, 2018) (emphasis in original).

While DOJ's decision-making should have occurred earlier in the *Gilead* case, the described outcome is the right one. DOJ's failure to exercise its statutory dismissal authority and failure to exercise pre-suit or pre-intervention decision diligence can lead to consequences beyond the expense and distraction of burdensome discovery. *See, e.g., United States ex rel. Wall v. Circle C Constr., LLC,* 868 F.3d 466 (6th Cir. 2017) (finding government's demand excessive and "unreasonable," and awarding non-prevailing defendant attorneys' fees under the Equal Access to Justice Act).

Accordingly, rather than challenging legitimate materiality discovery on the back end, the government should be making its own materiality evaluation on the front end.

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