16-13004

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA *ex rel*. PARADIES, *et al*.,

Plaintiff/Relator-Appellant,

v.

GGNSC ADMINISTRATIVE SERVICES, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION, CASE NO. 2:12-CV-245-KOB

MOTION OF *AMICUS CURIAE* TAXPAYERS AGAINST FRAUD EDUCATION FUND FOR LEAVE TO FILE BRIEF IN SUPPORT OF APPELLANT UNITED STATES OF AMERICA AND IN SUPPORT OF REVERSAL

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***United States v. GGNSC Administrative Services*, No. 16-13004**

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rules 26.1, 28-1(b), and 29-2, *Amicus Curiae* Taxpayers Against Fraud Education Fund through the undersigned counsel of record certifies that, in addition to the individuals and entities identified in the Appellant's opening brief, the following listed individuals and entities have an interest in the outcome of this case.

DeMar, Jacklyn (counsel for *Amicus Curiae*)

Easton, Amy L. (counsel for *Amicus Curiae*)

Matzzie, Colette G. (counsel for *Amicus Curiae*)

Sylvia, Claire M. (counsel for *Amicus Curiae*)

Taxpayers Against Fraud Education Fund (*Amicus Curiae*)

Amicus Curiae Taxpayers Against Fraud Education Fund is a non-profit entity that does not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *Amicus Curiae*.

/s/ Colette G. Matzzie
Colette Matzzie

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 29(b), Fed. R. App. P., and 11th Circuit Rule 29-1, Applicant Taxpayers Against Fraud Education Fund ("TAFEF") seeks leave to file a brief as *amicus curiae* supporting the Plaintiffs-Appellants. In support of this motion, Applicant states as follows:

1. Plaintiffs-Appellants, Debora Paradies, London Lewis, and Roberta Manley filed this *qui tam* action pursuant to the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, alleging that the Defendants-Appellees, AseraCare Inc., GGNSC Administrative Services, Hospice Preferred Choice, Inc., and Hospice of Eastern Carolina, Inc. (collectively "AseraCare") defrauded the federal government by submitting false claims to the Medicare program and the United States intervened.

2. The district court bifurcated the subsequent trial on liability into separate phases – one on falsity and one on knowledge. Despite the limited evidence presented to the jury in the falsity phase, the jury found that of the claims of the 121 patients for Medicare hospice benefits that the Government introduced into evidence, 104 were false or fraudulent. The district court then granted AseraCare's motion to set aside the jury's verdict and, *sua sponte*, granted summary judgment for AseraCare.

3. The district court held that, as a matter of law, no claim can be false if

based on differences in expert opinion alone. *See* Dkt No. 497.

4. TAFEF now seeks leave to file this *amicus* brief to address the district court's erroneous holding based on an overly restrictive definition of "false or fraudulent" under the FCA and the district court's usurpation of the role of the jury to assess and weigh conflicting expert testimony, along with other evidence.

5. TAFEF is the leading nonprofit public interest organization dedicated to combating fraud against the federal government through its education of the public, the legal community, legislators, and others about the FCA and its *qui tam* provisions. TAFEF supports vigorous enforcement of the FCA by contributing its understanding of the FCA's proper interpretation and application and working in partnership with *qui tam* plaintiffs, private attorneys, and the government to effectively prosecute meritorious *qui tam* suits.

6. TAFEF, which is based in Washington, D.C., works with a network of more than 400 attorneys nationwide who represent *qui tam* plaintiffs in FCA litigation. In the past few years, TAFEF has greatly expanded its efforts toward public awareness and education regarding the FCA.

7. TAFEF publishes the False Claims Act & *Qui Tam* Quarterly Review, a quarterly law journal that provides an overview of court opinions, settlements, and other developments under the Act. Past issues of the publication are available online at www.taf.org/publications/quarterly-review/archive-public.

8. TAFEF has produced and makes available a variety of other resources regarding the FCA, including: Fighting Medicare & Medicaid Fraud: The Return on Investment from False Claims Act Partnerships and The Importance of Whistleblowers to Reducing Fraud Against the Federal Government and Recovering Funds for Taxpayers. These and other assorted TAFEF reports, comment letters and *amicus curiae* briefs are available at http://www.taf.org/publications.

9. TAFEF presents a yearly educational conference for FCA attorneys, typically attended by more than 300 practitioners – including federal, state, and private attorneys.

10. TAFEF collects and disseminates information concerning the FCA and *qui tam* cases and regularly responds to inquiries from a variety of sources, including the general public, the legal community, the media, and government officials. TAFEF has also provided congressional testimony and conference presentations, and has assisted with training programs.

11. TAFEF and its sister nonprofit, Taxpayers Against Fraud, have filed *amicus curiae* briefs on important legal and policy issues in FCA cases before numerous federal courts, including the United States Supreme Court. TAFEF possesses extensive knowledge about the origin and purposes of the FCA Amendments of 1986, 2009, and 2010, and has experience with their

implementation. As such, TAF believes its brief can assist the Court in its consideration of the FCA issues presented in this case.

12. TAFEF's brief, which is being filed contemporaneously with this Motion on Wednesday September 7, 2016, is timely submitted, as Appellants' brief was filed on August 31, 2016.

13. TAFEF contacted counsel for the Appellant and counsel for the Appellees. Appellant has consented to the filing of TAFEF's brief. Appellees have not responded to TAFEF's request for consent.

14. TAFEF respectfully requests that this Motion be granted and that the Clerk be directed to file the enclosed brief.

Dated: September 7, 2016

Respectfully submitted,

/s/ Colette G. Matzzie

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Counsel for Taxpayers Against Fraud Education Fund, Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2016, I caused a copy of the foregoing MOTION OF *AMICUS CURIAE* TAXPAYERS AGAINST FRAUDEDUCATION FUND FOR LEAVE TO FILE BRIEF IN SUPPORT OF APPELLANT UNITED STATES OF AMERICA AND IN SUPPORT OF REVERSAL to be filed electronically with the Court's CM/ECF system, and that all counsel will be served by the CM/ECF system.

/s/ Colette G. Matzzie

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Pursuant to FRAP 26.1 and 11th Circuit Rules 26.1, 28-1(b), and 29-1, *Amicus Curiae* Taxpayers Against Fraud Education Fund through the undersigned counsel of record certifies that in addition to the individuals and entities identified in Appellant's opening brief, the following listed individuals and entities have an interest in the outcome of this case:

DeMar, Jacklyn (counsel for *Amicus Curiae*)

Easton, Amy L. (counsel for *Amicus Curiae*)

Matzzie, Colette G. (counsel for *Amicus Curiae*)

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Amicus Curiae Taxpayers Against Fraud Education Fund is a non-profit entity that does not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *Amicus Curiae*.

/s/ Colette Matzzie
Colette Matzzie

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To the Honorable United States Court of Appeals:

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Taxpayers Against Fraud Education Fund respectfully submits this brief as *Amicus Curiae* in support of Appellant, the United States of America ("the United States" or "Government"). A Motion for Leave to File has been filed contemporaneously herewith, and this brief is subject to that Motion. The Taxpayers Against Fraud Education Fund supports the United States for the reasons set forth below.

STATEMENT OF INTEREST

Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit, public interest organization dedicated to combating fraud against the Government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), has participated in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve the FCA. TAFEF has a strong interest in ensuring proper interpretation and application of the FCA. TAFEF is supported by whistleblowers and their counsel and funded by

membership dues and foundation grants. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.[1]

TAFEF submits this brief primarily to address the district court's March 31, 2016 order dismissing this FCA case, *sua sponte,* after a jury trial prosecuted by the United States and the *qui tam* Relators who initiated this case. The United States presented to the jury evidence that the defendant hospice care providers (collectively "AseraCare") submitted claims to the Medicare program for hospice services that were not eligible for payment because they were not medically reasonable and necessary and therefore "false" within the meaning of the FCA. Because the district court bifurcated the liability portion of the trial into separate phases -- one phase for falsity and the second for knowledge -- the evidence presented to the jury in the falsity phase was truncated. Nevertheless, the jury found that of the claims of the 121 patients for Medicare hospice benefits that the Government introduced into evidence, 104 were false or fraudulent. Notwithstanding the jury's determination that some claims were false and other claims were not false, the district court granted AseraCare's motion to set aside the

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amicus Curiae* represents that no party's counsel has authored this brief in whole or in part, no party or party's counsel has contributed money that was intended to fund preparing or submitting the brief; and no person other than *Amicus Curiae*, its members, or its counsel has contributed money that was intended to fund preparing or submitting the brief.

jury's verdict. The district court then, *sua sponte*, granted summary judgment for AseraCare, on the grounds that, as a matter of law, no claim can be false if based only on a difference of opinions among experts.[2]

The district court's decision adopts an unduly restrictive definition of "false or fraudulent" under the FCA, the Government's most effective tool for addressing fraud against federal government programs. If affirmed by this Court or adopted by other courts, the district court's approach could insulate from liability knowingly fraudulent conduct directed toward a wide array of federal government programs. The district court's decision also usurps the well-settled role of the jury to assess and weigh conflicting expert opinion testimony. Such evidence plays a critical role in many FCA cases, which often involve complex government programs, products, and services, which persons with specialized expertise can assist lay jurors in understanding.

For these reasons, TAFEF files this *amicus* brief to address the district court's erroneous interpretation of the FCA and the potential implications of the district court's opinion if affirmed. TAFEF has a strong interest in ensuring that this Court not adopt the district court's interpretation of falsity or its approach to

[2] Dkt 497. To the extent the other orders cited in the Government's Notice of Appeal rested on this flawed premise, this brief addresses those orders as well.

invalidating a jury verdict that was based on the evaluation of qualified expert testimony along with other evidence.

STATEMENT OF THE ISSUES

Amicus hereby adopts by reference the Statement of the Issues set forth at pages 4-5 of the Brief for Appellant United States of America, filed August 31, 2016.

SUMMARY OF THE ARGUMENT

The district court's holding is premised on an erroneous interpretation of the FCA. The FCA does not require an objective falsehood to establish liability. Nor does the existence of conflicting testimony over application of eligibility criteria immunize conduct from the FCA's reach. If the district court's approach were adopted, the Government's primary tool to redress fraud could be rendered less effective across broad categories of government programs, which often involve consideration by the trier of fact of complex and technical requirements for which expert opinion testimony may be helpful. Whether healthcare claims are eligible for payment under applicable standards including medically necessity, military products conform to material specifications, grant criteria are met, or cost and pricing data are accurate are the types of matters that FCA cases frequently address, and matters which may involve the evaluation of disputed evidence, including conflicting expert opinion testimony. The federal rules of procedure and

evidence adequately control the consideration of such information in FCA cases, just as they do in other cases. There is no basis to impose non-statutory limits on the FCA simply because adjudication of the falsity of claims may require juries to assess the testimony of experts about the exercise of professional judgments.

ARGUMENT

The FCA is the primary law on which the Government relies to recover losses caused by fraud against the Government. S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266; *McNutt ex rel. United States v. Haleyville Medical Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005). First enacted in 1863 during the Civil War, the Act was intended to "'protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly.'" S. Rep. No. 99-345, at 11, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276 (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)).

Since 1986, the FCA has been responsible for recovering billions of dollars wrongfully taken from the federal Treasury, and thereby redressing and deterring fraud in programs as diverse as military procurement, crop subsidies, disaster relief, government-backed loan programs, and healthcare benefits. *See* S. Rep. No. 110-507, at 7 (2008). In recent years, the largest source of recoveries has been the Medicare and Medicaid programs. *See* 155 Cong. Rec. E1295-03, E1297-98 (daily

ed. June 3, 2009) (statement of Rep. Berman). Nonetheless, healthcare fraud remains a persistent problem. *See* U.S. Gov't Accountability Off., GAO-16-92T, Testimony Before the Committee on Finance, U.S. Senate, "Fiscal Outlook: Addressing Improper Payments and the Tax Gap Would Improve the Government's Fiscal Position," (Oct. 2015)); *see also* Donald M. Berwick, *Eliminating Waste in US Health Care,* J. Am. Med. Ass'n, Mar. 2012 (estimating healthcare fraud and abuse cost Medicare and Medicaid between $30 and $98 billion in 2011).

This case involves one type of benefit provided under the Medicare program – hospice services. Hospice care is intended to provide for the needs of a terminally ill patient who has chosen to forego curative treatment. While hospice care can substitute for costly and often inhumane efforts to cure an illness, hospice care has become a big business in the United States, funded primarily with federal dollars. *See* J.E. Perry & R.C. Stone, *In the Business of Dying: Questioning the Commercialization of Hospice*, 39 J L. Med Ethics 224 (2011) (citing U.S. Gov't Accountability Off., GAO-05-42, Medicare Hospice Care: Modifications to Payment Methodology May Be Warranted (Oct. 2004)). Medicare spent roughly $15.1 billion on hospice benefits in 2013 alone. *See* Michael Plotzke, et al., *Medicare Hospice Payment Reform: Analysis of How the Medicare Benefit is*

Used (2015), http://www.cms.gov/Medicare-Fee-for-Service-Payment/Hospice/Downloads/December-2015-Technical-Report.pdf.

In this case, the Government and the Relators alleged that AseraCare knowingly submitted claims for payment to Medicare for hospice benefits for patients who were not eligible for such benefits. Medicare generally pays for only goods and services that are medically reasonable and necessary. 42 U.S.C. § 1395y. Whether hospice care is medically reasonable and necessary is determined in large part by whether the patient's medical records support the representation that the patient has six months or less to live if his or her illness runs its normal course. 42 U.S.C. § 1395y (a)(1)(c); §1395x; 42 C.F.R. § 418.3. Like the determination of eligibility for Medicare payments for many types of healthcare goods and services, evaluation of whether hospice care is medically necessary in a particular case, and therefore eligible for payment by the federal government, involves the exercise of professional judgment and support for that judgment in the medical record.

This Circuit, consistent with its sister circuits, has long recognized that a claim for payment for services that are not eligible for payment is "false" within the meaning of the FCA. If a health care provider knowingly presents, or causes to be presented, a claim for services that are not eligible for payment, the provider has violated the FCA.

Notwithstanding clearly established law that a claim that is ineligible for payment is "false," the district court below held that a claim could not be false as a matter of law absent proof of an "objective" falsehood. Dkt. 497, at 4-5. The district court also held that a jury cannot determine that a claim is false, as a matter of law, where there is conflicting expert opinion testimony about whether the patient's medical records support a determination of eligibility for hospice benefits. *Id.* Although the district court qualified its holding by stating that a claim cannot be false based on expert testimony *alone* where that testimony is disputed, the Government had in fact introduced additional evidence to support the falsity of the claims. Even though the jury found that a large percentage of the claims presented were not eligible for payment after consideration of all the evidence, including conflicting expert opinion testimony, the district court vacated the jury's findings and granted summary judgment for AseraCare. *Id*.

I. THE DISTRICT COURT ERRONEOUSLY INTERPRETED THE FALSE CLAIMS ACT TO REQUIRE PROOF OF AN OBJECTIVE FALSEHOOD

The district court's holding that there must be an "objective" falsehood to establish liability under the FCA has no grounding in the text or purpose of the Act. The Act is broadly construed and the necessity of applying professional judgment to determine whether a claim is eligible for payment does not remove conduct from the Act's reach.

A. The Terms False or Fraudulent Are Broadly Construed

The FCA prohibits the submission (or causing the submission) of "false or fraudulent" claims for payment. 31 U.S.C. § 3729(a)(1)(A). The FCA also prohibits the submission of false statements material to false claims. 31 U.S.C. §3729(a)(1)(B). The FCA does not define the terms "false" or "fraudulent." The statute, however, has long been broadly interpreted to reach "all fraudulent attempts to cause the Government to pay out sums of money." *See United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968).

The United States Supreme Court recently confirmed the breadth of the statute's terms "false" or "fraudulent." In *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), the Court explained that like other statutes that employ such terms, the FCA is understood to incorporate common law definitions of fraud, except to the extent the statute departs from those definitions, as it does, for example, in defining "knowingly" to include reckless disregard. *Id.* at 1999. In rejecting the contention that an express falsehood was necessary to establish liability under the FCA, the Supreme Court explained that "[b]ecause common-law fraud has long encompassed certain misrepresentations by omission, 'false or fraudulent claims' include more than just claims containing express falsehoods." *Id.* In particular, the Court held that the FCA encompasses "fraudulent misrepresentations, which include certain

misleading omissions" and that "when a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." *Id*.

In reaching that conclusion, the Supreme Court eschewed grafting onto the terms "false" or "fraudulent" requirements that do not appear in the statute's text. *Id.* at 2002 (rejecting contention that the statute must be limited to failure to comply with expressly designated conditions of payment and observing that "policy arguments cannot supersede the clear statutory text"). The Court explained that application of the statute's other requirements -- that conduct be done "knowingly" and that the misrepresentation be "material" -- adequately addresses concerns about "fair notice" and "open-ended liability." *Id.; see also United States v. Sci. Applications Int'l Corp*., 626 F.3d 1257, 1270 (D.C. Cir. 2010).

The legislative history of the FCA likewise reflects a broad view of the meaning of false or fraudulent. In reporting on proposed amendments to the FCA in 1986, the Senate Judiciary Committee explained that "a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation." S. Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 (false

claims include "each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation").

Consistent with these authorities, this Circuit has long recognized that FCA liability can be established where a healthcare provider knowingly asks the Government to pay for goods or services that are not eligible for payment. *See United States ex rel. Walker v. R & F Properties of Lake Cty.,* 433 F.3d 1349, 1356 (11th Cir. 2005) (citing *United States v. Calhoon*, 97 F.3d 518, 524 (11th Cir. 1996)); *see also Jallali v. Nova Se. Univ., Inc*., 486 Fed. App'x 765, 766 (11th Cir. 2012). It is "[t]he violation of the regulations and the corresponding submission of claims for which payment is known by the claimant not to be owed, [that] make[s] the claims false." *McNutt ex rel. United States v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005) (holding that claims for healthcare services that were ineligible for payment because of violation of the Anti-Kickback statute were false claims). This Court's view that a claim for payment for goods or services that are ineligible for payment is "false" is consistent with the law of its sister circuits. *See, e.g*., *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 392 (1st Cir. 2011); *United States v. Triple Canopy, Inc.,* 775 F.3d 628, 636-37 (4th Cir. 2015). And this Court has made clear that a claim can be

knowingly false even where a requirement may appear ambiguous and subject to competing interpretations. *Walker*, 433 F.3d at 1357-58.

In this case, as the district court recognized, a central question of fact was "whether clinical information and other documentation in the medical record support the certifications of terminal illness, a pre-requisite for payment of a Medicare Hospice Benefit claim." Dkt. 268 at 15. If the medical record does not support the certification of terminal illness, under Eleventh Circuit precedent the claims for payment are "false" because they are not eligible for payment. *See Walker*, 433 F.3d at 1356.

B. The Application of Professional Judgment Does Not Immunize Conduct from the False Claims Act

That the determination of eligibility for payment in the context of hospice benefits involves application of professional medical judgment does not render such claims immune from FCA liability as the district court's opinion implies. Government statutes, regulations, and contracts across a broad range of federal programs impose requirements that involve the application of professional judgment. *See, e.g.*, *United States ex rel. Cestra v. Cephalon, Inc.*, No. CIV.A. 14-1842, 2015 WL 3498761 (E.D. Pa. June 3, 2015); *United States ex rel. Skinner v. Armet Armored Vehicles, Inc.,* No. 4:12-CV-00045, 2015 WL 2238941 (W.D. Va. May 12, 2015). The fact that a particular government contractor may argue that it thought a claim was eligible for payment (or had a reasonable good faith belief that

that was so) addresses whether the contractor knowingly submitted the false claim, not whether the claim was ineligible for payment, and therefore false. *See United States ex rel. Oliver v. Parsons Co.,* 195 F.3d 457, 463, n.3 (9th Cir. 1999) (observing that a contractor relying on a reasonable good faith interpretation will not be liable not because the existence of such an interpretation precludes a finding of falsity but because the good faith nature of the contractor's action, if demonstrated, precludes a finding that the contractor acted knowingly); *see also Walker*, 433 F.3d at 1357.

While the district court's opinion could be read narrowly because it held that conflicting expert opinions *alone* or *without more* cannot result in a false claim[3], if taken to an extreme—that *any* conflicting expert opinion precludes a false claim—that conclusion would contravene established law and undermine the application of the Government's primary tool in fighting fraud in Medicare and other programs. Many types of submissions to the Government involve professional judgment and expert testimony is often essential to evaluating that judgment. Every Circuit

[3] Contrary to the district court's statement that the only admissible evidence offered by the Government to prove falsity was the opinion of one expert, Dkt. 497 at 3, Dkt. 482, at 11, the Government presented medical records of 121 patients to the jury and evidence to support the Government's contention that AseraCare had a practice of not giving physicians the relevant, accurate and complete information to make a determination of terminal illness and circumventing the clinical judgment of physicians to admit or retain patients who did not meet the terminal illness requirements.

Court of Appeals to have considered the question whether an opinion or exercise of judgment may form the basis for FCA liability, has answered affirmatively. *See, e.g.*, *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 792 (4th Cir. 1999) (quoting Prosser & Keeton on the Law of Torts § 100, at 760 (5th ed. 1984) ("[A]n opinion or estimate carries with it 'an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which would justify it.")); *see also United States ex rel. Loughren v. Unum Grp.*, 613 F.3d 300, 310-12 (1st Cir. 2010) ("the fact that a false statement constitutes the speaker's opinion does not disqualify it from forming the basis of FCA liability"); *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1047-49 (9th Cir. 2012) (false estimates . . . can be a source of liability under the FCA, assuming that the other elements of an FCA claim can be met); *United States v. United Tech. Corp*., 255 F. Supp. 2d 779, 782 (S.D. Ohio 2003) (contractor's "best estimate" could be predicate for FCA liability where the contractor knew of no facts to substantiate estimate and knew facts that would preclude opinion), *aff'd in part, rev'd in part on other grounds*, 626 F.3d 313, 316 (6th Cir. 2010).

Even the Court of Appeal's decision upon which the district court relied for the proposition that "expressions of opinions, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false," Dkt.

482, at 16, does not support the district court's holding. In *United States ex rel. Riley v. St. Luke's Episcopal Hospital*, the Fifth Circuit reversed the district court's dismissal of allegations that false claims had been submitted for medically unnecessary heart transplants and, in so doing, vacated the district court's opinion that "expressions of opinion or scientific judgments about which reasonable minds may differ cannot be 'false.'" 355 F.3d 370, 376 (5th Cir. 2004), (citations omitted). Although the Fifth Circuit noted that it agreed with the district court to the extent that the Act requires a statement "known to be false" and that an "error" would not give rise to an FCA violation, it disagreed with the district court's evaluation of the sufficiency of the allegations in that case. The Fifth Circuit held that the allegations that the defendants "ordered the services *knowing* they were unnecessary" adequately alleged that the defendants knew the claims were false. *Id.* (emphasis added). Here, because of the district court's bifurcation order, the jury had not yet been given the opportunity to consider the evidence proffered by the Government and Relators that the claims were "knowingly" false.

Similarly, the district court's reliance on *United States ex rel. Phalp v. Lincare Holdings, Inc.,* 116 F.Supp.3d 1326, 1360 (S.D. Fla. 2015), citing *Morton v. A Plus Benefits*, 139 Fed. App'x 980 (10th Cir. 2005), is misplaced. The Tenth Circuit in *Morton* took the opposite approach of the district court here, noting that "falsity and scienter requirements are inseparable" and explicitly stated that "we

are not prepared to conclude that in all instances, merely because the verification of a fact relies upon clinical medical judgments . . . the fact cannot form the basis of an FCA claim. *Morton, 139 Fed. App'x* at 982-84.

Moreover, although the district court below stated that falsity could not be determined solely on the basis of conflicting expert testimony, FCA cases are not typically brought based only on expert testimony (and this case was no exception). A range of evidence is typically presented to prove whether the claim was not reimbursable or was "false." By the extraordinary step of bifurcating the liability phase of the trial, the district court also truncated the evidence of a fraudulent scheme that might ordinarily be considered, although notwithstanding that, the jury found claims to be false for 104 of the patients.[4]

Allowing a factfinder to evaluate expert opinion testimony, along with other evidence, to determine whether a patient met the eligibility criteria does not risk allowing the expansive liability the district court stated that it sought to avoid. Dkt 497 at 3-4 (noting that hospice provider could be subject to FCA liability "any time [a relator] could find a medical expert who disagreed with the certifying

[4] As this Court has held, evidence of a defendant's knowledge of *how* a fraudulent scheme was implemented can bear on whether false claims were submitted. *See Walker*, 433 F.3d at 1360 (finding that knowledge of the fraudulent scheme supported a strong inference that the defendant actually submitted false claims).

physician's judgment."). The district court's view ignores that, as the Supreme Court recently explained in *Escobar*, liability under the Act requires not only that a claim be false, but that a false claim have been "knowingly" presented and that the misrepresentation have been material. *Escobar*, 136 S. Ct. at 2002. A hospice provider who did not act with actual knowledge that a claim was false, or act in reckless disregard or deliberate ignorance of whether it was false, would not be subject to liability. The FCA does not reach mistakes or mere negligence.

II. THE DISTRICT COURT'S DECISION USURPED THE FUNCTION OF THE JURY, WHICH PLAYS A CRITICAL ROLE IN FALSE CLAIMS ACT CASES

Because the FCA applies broadly to any type of Government program or expenditure, many of which are complex and not within the ordinary experience of a juror, expert testimony is often essential to assist the factfinder. Such testimony can be helpful in assessing whether the criteria for payment have been met, as well as the extent to which the Government was harmed as a result of the false claims. *See, e.g., United States ex rel. Christiansen v. Everglades Col., Inc.*, No. 12-60185-CIV, 2014 WL 11531790 (S.D. Fla. May 27, 2014); *United States ex rel. Drakeford v. Tuomey*, 976 F.Supp.2d 776, 789-90 (D.S.C. 2013). Under well-established principles that apply to civil litigation generally, the trial court's role is limited to determining whether an expert's testimony is admissible under Rule 702 of the Federal Rules of Evidence. Once that determination is made, it is the jury's

role to weigh that evidence, including determining which of two conflicting expert opinions to credit. In holding that conflicting views of whether healthcare services are eligible for payment means that a claim cannot be false as a matter of law, the district court's decision usurped the jury's role. That holding contradicts settled law on the role of the judge and the jury in considering expert opinion testimony, and if adopted, risks undermining the effective use of the FCA in protecting federal programs.

A. The Trial Court's Role is to Perform a Gatekeeping Function of Evaluating the Soundness of an Expert's Methodology

The trial court's role in considering whether to admit expert testimony is governed by Federal Rule of Evidence 702. Rule 702 provides: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. *See* Fed.R.Evid. 702. In *Daubert v. Merrell Dow Pharmaceuticals*, *Inc*., 509 U.S. 579, 590 n.7 (1993), the Supreme Court held that Rule 702 "compels the district courts to perform the critical 'gatekeeping' function concerning the admissibility of expert scientific evidence." *See United States v. Frazier*, 387 F.3d

1244, 1260 (11th Cir. 2004). Critically, the Court in *Daubert* instructed that, in considering the admissibility of expert testimony, courts must focus "solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595; *see also Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 675 (6th Cir.2010) ("The important thing is not that experts reach the right conclusion, but that they reach it via a sound methodology"). As a gatekeeper, the court has the authority only to determine the admissibility of the evidence; the weight of the evidence is a determination left to the jury. *United States v. Stafford*, 721 F.3d 380, 394 (6th Cir. 2013).

In the Eleventh Circuit, a party seeking to proffer expert testimony under Rule 702 must satisfy a three part inquiry that evaluates whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *Frazier*, 387 F.3d at 1260; *Kilpatrick v. Breg., Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010). Here, the district court admitted the testimony of both parties' experts because it concluded that their testimony satisfied Rule 702. Once that

determination had been made, any disagreement among the experts created a genuine issue of material fact, which was properly decided by the jury.

The district court removed the determination of falsity from the jury after concluding that the disagreement between the Government's expert on the one hand, and AseraCare's expert and the certifying physician on the other hand, precluded the jury from adjudicating any claims as "false." But disagreements among the two sides' experts, and disagreements with the certifying physician, cannot remove conduct from the reach of the FCA. As an initial matter, that a physician certifies that the treatment was medically necessary does not insulate that provider from FCA liability and is the beginning, not the end, of the inquiry. *See, e.g., United States ex rel. Martin v. Life Care Centers of America*, No. 1:08-cv-251, 2014 WL 11429265, at *9 (E.D. Tenn. March 26, 2014) ("the Medicare requirement that a physician certify [rehabilitation] services does not insulate Defendant [skilled nursing facilities] from liability resulting from noncompliance with Medicare regulations"); *United States ex rel. Fowler v. Evercare Hospice, Inc.*, No. 11-CV-00642, 2015 WL 5568614, at *6-8 (D. Colo. Sept. 21. 2015) (hospice claims can be false even when a physician has signed a certification of terminal illness); *United States ex rel. Kappenman v. Compassionate Care Hospice of the Midwest, LLC,* No. CIV. 09-4039-KES, 2012 WL 602315 at *5 (D.S.D. Feb.

23, 2012) (same); *United States ex rel. Landis v. Hospice Care of Kansas*, LLC, No. 06-2455-CM, 2010 WL 5067614, at *4 (D. Kan. Dec. 7, 2010) (same).

A certifying physician could have lied, could have failed to exercise professional judgment, or could have recklessly disregarded the requirements for payment, all of which could support a finding of liability under the FCA notwithstanding certification by a physician that the care was medically reasonable and appropriate. *See, e.g., Harrison*, 176 F.3d at 786-87; *see also United States ex rel. Geschrey v. Generations Healthcare*, LLC, 922 F. Supp. 2d 695, 704 (N.D. Ill. 2012) (false information presented to doctor by hospice staff undermines validity of doctor's clinical judgment). In addition, expert testimony may be appropriate to assist the jury in evaluating the certifying physician's representation. For example, a physician may knowingly submit a claim for a treatment for patients who did not need it, *see, e.g.*, *United States v. Robinson*, No. 13-cv-217-GFVT, 2015 WL 1479396 (E.D. Ky. Mar. 31, 2015) (rejecting argument that subjective judgment of doctor means a claim cannot be false), or knowingly order inpatient hospital care, rather than outpatient care, when the higher level of service was not medically necessary. *See, e.g.*, *United States v. Halifax Hosp. Med. Ctr*, No. 6:09-cv-1002-ORL-31, 2014 WL 68603, at *7-8 (M.D. Fla. Jan. 8, 2014) (allowing expert testimony on medical necessity of hospital admissions).

Nor is disagreement among the two sides' experts grounds for removing the determination form the jury. Because many cases could be characterized as involving a dispute among experts, the district court's approach, if adopted, could remove much false or fraudulent conduct from the reach of the False Claims Act. But under well settled principles of evidence, provided that the expert testimony is admissible, the jury's role is to make credibility determinations when evidence conflicts on whether the criteria for eligibility were met. By vacating the jury's verdict on the grounds that expert testimony conflicted, the district court usurped the jury's critical role.

B. The Factfinder's Role is to Weigh Conflicting Expert Testimony

The function of the testifying expert is to provide helpful information to the factfinder in understanding complex or specialized topics not typically within the common understanding of a juror. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148-49 (1999) (noting that "the expert's testimony often will rest 'upon an experience confessedly foreign in kind to [the jury's] own.'") (quoting Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Har. L. Rev. 40, 54 (1901)). FCA cases involving allegations that medical services or products are not medically necessary, as well as many other types of cases brought under the FCA, often require such expert opinion testimony. Whether a

claim is ineligible for payment (and therefore "false") may require evaluating terms or standards that are not within the common experience of jurors.

Persons with scientific, technical, or specialized expertise can help explain specialized terms and concepts in a range of healthcare cases that involve an evaluation of whether services were medically reasonable and necessary. For example, determining whether ambulance trips are medically reasonable and necessary and therefore reimbursable by Medicare may depend on an evaluation of the patient's mobility, which "is an issue on which the average juror could benefit from a physician's expert testimony." *See United States v. Syme*, 276 F.3d 131, 136, 140 n. 2 (3rd Cir. 2002); *see also United States v. Abdallah*, 629 F. Supp. 2d 699, 722 (S.D. Tex. 2009) (allowing expert testimony on whether ambulance transportation was medically necessary); *United States v. Bertie Ambulance Serv., Inc*., No. 2:14-CV-00053-F, 2015 WL 5916691 (E.D.N.C. Oct. 8, 2015) (same).

Similarly, expert testimony has been held to be useful in evaluating whether hospital admissions were medically reasonable and necessary, *Halifax*, 2014 WL 68603, at *7-8, or whether a drug's mention in a compendium constitutes sufficient support that the drug's off-label use is medically reasonable and necessary and therefore reimbursable. *See, e.g.,Cephalon,* 2015 WL 3498761, at *9 (explaining that expert testimony is particularly important in considering medical evidence because a jury determination must be made on a "case-by-case" basis" and is "not

susceptible to resolution on a motion to dismiss."). In the context of hospice benefits, eligibility for payment turns on whether the medical record supports a conclusion that a patient is expected to live six months or less if an illness runs its normal course. An ordinary juror would not know the regular course of a medical diagnosis and could benefit from hearing the opinion of medical experts.

Expert testimony also is often necessary in other types of FCA cases where eligibility of payment turns on complex concepts not within the purview of the average juror. *See, e.g.*, *United States ex rel. Garbe v. Kmart Corp*., 73 F. Supp. 3d 1002 (2015) (finding that the jury should weigh the testimony of several experts who opined that the "usual and customary" price of a drug was defined as the cash price that would be charged to a member of the general public without any insurance).

And beyond healthcare, expert testimony may be important in cases involving military supplies, or other technical goods or services, as "[e]xpert testimony is most often appropriate in cases in which the average juror would have no basis for evaluating the type of evidence presented in the case without the assistance of an expert." *United States ex rel. Jordan v. Northrop Grumman Corp*., No. CV 95-2985 ABC (EX), 2003 WL 27366315, at *2 (C.D. Cal. Mar. 10, 2003) (allowing testimony of expert that would be helpful in clarifying complex technical engineering terms in military contract). Expert testimony may also aid a

factfinder in determining whether a product provided to the Government had value. *Skinner,* 2015 WL 2238941; *see also United States ex rel. Hudalla v. Walsh Const. Co*. 834 F. Supp. 2d 816 (N.D. Ill. 2011) (denying the defendant's motion for summary judgment, finding that a jury "could go either way" after considering conflicting expert testimony regarding standard practices in the construction industry); *Christiansen*, 2014 WL 11531790, at *3 (testimony relating to federal student loan model and corresponding economics are sufficiently complex to merit elucidation from someone with specialized knowledge and experience). Even where the issue is within the capacity of the ordinary juror, expert testimony may be admitted where it is helpful.

The existence of differences of expert opinion on the meaning of medical records or the application of standards involving professional judgment is not a reason to remove a decision from the jury as the district court did. Rather, evaluating differing opinions is *precisely* the function of the jury. "A jury could very well find [one expert] to be the most credible expert witness and believe that [a defendant] lied about whether the trial patients' test results were medically necessary for purposes of Medicare." *United States ex rel. Turner v. Michaelis Jackson & Associates*, L.L.C., No. 03-cv-4219, 2011 WL 13510 (S.D. Ill. Jan. 4, 2011). Thus, for example, in *United States ex rel. Armfield v. Gills,* No. 8:07-CV-2374-T-27TBM, 2013 WL 371327, at *8 (M.D. Fla. Jan. 30, 2013), the court

found that summary judgment was inappropriate because there were competing expert opinions on whether a surgical procedure to correct a pre-existing astigmatism was medically necessary. As the court observed, the "weight to be afforded those opinions will involve a credibility determination" by the jury. *Id.*

Here, the jury, after sitting through seven weeks of trial, properly weighed the expert testimony and all of the evidence that was presented. After nine days of deliberations the jury verdict found that claims for 104 of the 121 patients the Government introduced into evidence were false. That very determination reflects that the jury performed its function of evaluating what evidence to credit with respect to each patient's claims. In vacating the jury's verdict, the district court deprived the jury of its proper role in evaluating conflicting evidence.

CONCLUSION

For the reasons set forth herein, and in the Brief for Appellant United States, the district court's erroneous interpretation of falsity and restrictive approach to expert testimony should be rejected.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,529 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2016, I caused a true and correct copy of the foregoing Brief of *Amicus Curiae* Taxpayers Against Fraud Education Fund in Support of Appellant United States of America to be served via the Court's ECF Filing System Notification. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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