Case No. 17-15111

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America, ex rel.

Scott Rose, Mary Aquino, Mitchell Nelson and Lucy Stearns

Plaintiffs-Appellees

v.

Stephens Institute, a California corporation

doing business as Academy of Art University

Defendant – Appellant

Appeal from a Decision of the United States District Court for the Northern District of California, No. 4:09-cv-05966-PJH Honorable Phyllis J. Hamilton

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APPELLANT'S MOTION TO STAY THE MANDATE

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Appellant Stephens Institute ("the Academy of Art University" or "AAU"), pursuant to Federal Rule of Appellate Procedure 41(d)(2), respectfully moves for an order staying issuance of the mandate in this appeal pending the filing and disposition of a petition for writ of certiorari with the Supreme Court of the United States. Counsel for Relators indicated they do not oppose this motion.

This Court issued an initial opinion affirming the district court on August 24, 2018, from which Judge Smith dissented. ECF 78. AAU filed a timely petition for rehearing and rehearing *en banc* on October 9, 2018 (ECF 82), pursuant to an extension granted by the Court (ECF 80). The Court denied AAU's petition on November 25, 2018 (ECF 85), so the mandate is currently scheduled to issue on December 3, 2018. *See* FRAP 41(b). AAU's petition for writ of certiorari is due on February 25, 2018. S.Ct. R. 13.

ARGUMENT

Under Federal Rule of Appellate Procedure 41(d)(2)(A), a stay of the Court's mandate pending filing of a petition for writ of certiorari is appropriate when the petition would present a "substantial question" and "there is good cause for a stay." Although this Court does not grant stay requests as a matter of course, "a party seeking a stay of the mandate

following this court's judgment need not demonstrate that exceptional circumstances justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528-29 (9th Cir. 1989).

AAU's petition for certiorari will raise substantial questions about the False Claims Act's materiality element: **(1)** Whether evidence demonstrating that the Government "cares in a broad sense" about compliance with a requirement is enough to satisfy the demanding materiality standard under *Universal Health Servs. v. U.S. ex rel. Escobar*, 136 S.Ct. 1989 (2016), particularly when the Government has investigated the specific fraud allegations at issue and taken no adverse action. *See* Amended Opinion at 28 (Smith, J., dissenting) (asserting that "caring is not enough to make [compliance] material under the *Escobar* standard"); and **(2)** Whether the Department of Education's long-standing written enforcement policy, which affirmed that students remain eligible for financial aid even if the school they attend violates the incentive compensation ban (ICB), is fatal to Relators' FCA claim based on alleged ICB violations.

In addition, there is good cause for a stay because the parties and the district court below will benefit from avoiding the time and expense associated with preparing and conducting a trial that may prove to be

premature, if at all necessary. And Relators will suffer no harm from staying the mandate pending AAU's filing of a petition. Granting AAU's request to stay the mandate will not affect Relators' preparation or presentation of their case at trial following the disposition of AAU's petition. Nor will it affect the relief Relators seek. But denying the requested stay will cause both parties—Relators and AAU—to incur substantial costs preparing for trial when summary judgment may be entered for AAU following Supreme Court review.

1. There is a reasonable probability that four Justices will vote to grant AAU's petition for writ of certiorari and a fair prospect of reversal.

The Supreme Court held in *Escobar* that a misrepresentation about compliance with a statute, regulation, or contractual requirement is only actionable if it is material to the government's payment decision. *Id.* at 1996. And the *Escobar* Court reiterated that the materiality element is demanding and rigorous. *Id.* at 2003. At a minimum, it demands evidence that "the government's decision to pay [] would likely or actually have been different had it known of [the] alleged noncompliance." *United States v. Sanford Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016). It is thus very strong evidence of immateriality when the evidence confirms the Government

investigated the specific fraud allegations and took no action (*see id.*)—at least in most circuits.

The Ninth Circuit is an outlier. In the two years since the Supreme Court issued *Escobar*, several other circuits have applied *Escobar*'s demanding materiality standard as a bar to claims when the Government has investigated specific fraud allegations and concluded that neither administrative penalties nor termination was warranted.[1] But not this Court. *Compare United States v. Sanford Brown*, 840 F.3d 445 (7th Cir. 2016) (reasoning that the Department of Education's inaction after investigating specific alleged fraud warranted summary judgment for defendant) *with* Amended Op. at 19 n.7 (describing the Department of Education's inaction after investigating specific fraud alleged as just "some contrary evidence").

That split creates an important issue that is well-suited for the Supreme Court's review. *See* S.Ct. R. 10(a). Indeed, this Court

[1] *See, e.g., D'Agostino v. ev3, Inc.*, 845 F.3d 1 (1st Cir. 2017); *U.S. ex rel. Nargol v. Depuy Orthopaedics, Inc.*, 865 F.3d 29, 34 (1st Cir. 2017); *U.S. ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481 (3d Cir. 2017); *U.S. ex rel. Harman v. Trinity Indus.*, 872 F.3d 645 (5th Cir. 2017); *Abbott v. BP Exploration & Prod.*, 851 F.3d 384 (5th Cir. 2017); *United States v. Sanford Brown*, 840 F.3d 445 (7th Cir. 2016); *U.S. ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027 (D.C. Cir. 2017); *see also U.S. ex rel. Thomas v. Black & Veatch Special Projects Corp.*, 820 F.3d 1162 (10th Cir. 2016) (decided before *Escobar*); *U.S. ex rel. Marshall v. Woodward, Inc.*, 812 F.3d 556 (7th Cir. 2015) (decided before *Escobar*).

acknowledged just that when it stayed issuance of its mandate in *U.S. ex rel. Campie v. Gilead*, No. 15-16380 (9th Cir. Oct. 10, 2017) (Dkt. # 100). And the probability of Supreme Court review is even more likely now—because the split has deepened and given the Supreme Court's call for the views of the Solicitor General as to *Gilead's* petition.[2] *See Gilead Sciences, Inc. v. U.S. ex rel. Campie*, No. 17-936 (Apr. 16, 2018);[3] *see also Conkright v. Frommert*, 129 S.Ct. 1861, 1862 (2009) (acknowledging that "CVSG'd petitions . . . are granted at a far higher rate than other petitions" and noting that such calls are "relevant to the reasonable probability analysis").

Moreover, this case is a better vehicle than *Gilead* for the Supreme Court to provide guidance about the FCA's materiality standard because discovery is complete and the evidence of the Government's behavior is

[2] Given the significant questions AAU's petition will raise and as described in the body of this motion, there is a reasonable probability that four Justices will vote to grant certiorari and a fair prospect that five Justices would vote to reverse this Court's judgment. But the Court should also consider that the close overlap with the question presented in *Gilead Sciences, Inc. v. U.S. ex rel. Campie*, No. 17-936, raises the likelihood that if the Supreme Court grants certiorari in *Gilead*, it will ultimately grant AAU's petition, vacate this Court's order, and remand for additional proceedings, as happened following *Escobar*. *See, e.g., United States ex rel. Nelson v. Sanford Brown, Ltd.*, 136 S.Ct. 2506 (2016); *Weston Educ., Inc., v. United States ex rel. Miller*, 136 S.Ct. 2505 (2016).

[3] The proceedings and orders in *Gilead* are available at the Supreme Court's website: https://goo.gl/ZXZ7dt

compelling: (1) the Department of Education investigated Relators' specific fraud allegations and took no action (Excerpt of Record (ER) 407-08); (2) the Department of Education had a written enforcement policy for ICB violations that expressly rejected Relators' core theory that ICB violations made students ineligible for federal student aid (ER 104-05); and (3) two separate federal agencies—the Government Accountability Office and the Department's Office of Inspector General—independently confirmed the Department followed that enforcement policy at all times relevant to this suit (ER 74, 95-96). Those particular facts make this case a strong vehicle for the Supreme Court to provide broad guidance about the FCA's materiality standard.

The circuit split is also more apparent here in some respects than *Gilead*. Unlike in *Gilead*, there is no dispute in this case about what the Government knew and when. *See United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890, 906-07 (9th Cir. 2017). The evidence confirms that the Department of Education investigated AAU's compensation policies and ICB compliance with full knowledge of Relators' fraud allegations. The record further confirms that the Department of Education determined that neither administrative penalties nor termination was

warranted. ER at 407-08. In most circuits, similar unrebutted evidence has been fatal to relators' FCA claims.

Those circuits have found compliance with legal requirements immaterial to the Government's payment decision under the same or similar circumstances. The Seventh Circuit held that a plaintiff failed to establish materiality when the Department of Education investigated fraud allegations tied to ICB violations (the same issue here) and determined that "neither administrative penalties nor termination was warranted." *Sanford Brown*, 840 F.3d at 447. The Fifth Circuit entered judgment for defendants because the Government took no action after "substantial investigation into Plaintiff's allegations." *Abbot*, 851 F.3d at 388. And the D.C. Circuit ruled for an FCA defendant because "the [Government] investigated [the relator's] allegations and did not disallow any charged costs." *McBride*, 848 F.3d at 1029.

Indeed, in most circuits, the Department's conduct after investigating specific fraud allegations would constitute "very strong evidence of immateriality." *Escobar*, 136 S.Ct. at 2004. But this Court in this case mentioned the Department's investigation only once, in a footnote, before dismissing it as just "some contrary evidence." Am. Op. at 19 n.7. In doing

so, this Court applied the materiality standard in a much less demanding fashion than its sister courts. *See* Am. Op. at 25-27 (Smith, J., dissenting).

This Court's decision also expands FCA liability to include violations that even the relevant agency says do not affect its payment decision. The Department's undisputed enforcement policy and consistent practice confirm it made financial aid available to students regardless of ICB violations. *See* AAU's Pet. Reh'g at 10-13. By ignoring that policy, this Court encourages Relators to second-guess the Department's policy judgments and requires jurors to speculate about what was material to the Department's payment decision. *See D'Agostino v. ev3, Inc.*, 845 F.3d 1, 8-9 (1st Cir. 2016) (rejecting the notion that "jurors in a single *qui tam* case could determine precisely what representations were essential to approval . . . and how the [agency] interpreted submissions made to it").

In doing so, the Court again split with other circuits as to the FCA's materiality element. For example, in *U.S. ex rel. Harman v. Trinity Indus.*, the Fifth Circuit reversed a jury verdict of $663 Million because the agency's policy decision undercut the jury's materiality finding. 872 F.3d 645 (5th Cir. 2017). The Court explained that it could not "ignore what actually occurred" when it had the benefit of hindsight. *Id.* at 667-68. It therefore

held that the agency's policy determination that the road-safety equipment was eligible for federal funding rendered the alleged non-disclosure immaterial. Similarly, in *D'Agostino v. ev3, Inc.*, the Third Circuit held it would be inappropriate "to enforce [the relevant] regulations through the False Claims Act" and dismissed the *qui tam* action because the "expert agencies and government regulators . . . deemed [the] violations insubstantial." 845 F.3d at 490.

In light of these circuit splits, there is a reasonable probability that four Justices will vote to grant certiorari to provide additional guidance about the FCA's materiality standard, particularly as to the effect of the Government's inaction after investigating specific fraud allegations. And because the Supreme Court unanimously insisted that the FCA's "rigorous" and "demanding" materiality standard be "strictly enforce[d]" by courts (*Escobar*, 136 S.Ct. at 2002), there is at least a fair prospect that five Justices will vote to reverse this Court's judgment. *See* 21 *Moore's Federal Practice*, § 341.14[2] (2017) (party seeking to stay mandate must show (1) a reasonable probability that four Justice will vote to grant certiorari and (2) a fair prospect that five Justice will vote to reverse the judgment below).

2. There is good cause to stay the mandate because the substantial questions AAU's petition will raise should be answered before the parties incur the substantial cost of trial.

In determining whether there is good cause to stay issuance of the mandate, this Court must "balance the equities of granting a stay by accessing the harm to each party if a stay is granted." *See Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001) (Ripple, J., in chambers). Absent an order staying issuance of the mandate, there is a likelihood of irreparable harm to both parties, who will expend substantial time and expense preparing for a trial that may not occur as scheduled and may never occur if the Supreme Court reverses this Court's judgment. In the absence of a stay, the district court will also waste substantial judicial resources resolving pretrial motions, empaneling a jury, and ultimately adjudicating the case only to face the reasonable prospect that the Supreme Court grants certiorari.

Both parties will benefit from avoiding the time and expense associated with preparing and presenting a trial that will later be stayed and possibly unnecessary. Relators will suffer no harm from a short stay in this case pending AAU's petition. A brief delay will not diminish Relators' ability to prepare for trial at a later date, if necessary. Because this case is at the summary judgment stage, there is no risk of loss of information due to

discovery already having been conducted and depositions taken. Neither would a stay of the mandate affect the relief Relators seek if the Supreme Court denies review. Granting AAU's motion to stay the mandate will not prejudice Relators, whereas issuing the mandate will impose irreversible hardship on AAU.

CONCLUSION

For these reasons the Court should grant Appellant's motion to stay issuance of the mandate pending the filing and disposition of a petition for writ of certiorari in the Supreme Court.

Dated: December 2, 2018

Respectfully submitted,

/s/ Steven M. Gombos
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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jacob C. Shorter
JACOB C. SHORTER

Certificate of Compliance

I certify that this motion complies with the format and length requirements in Local Rule 27-1(d).

/s/ Jacob C. Shorter
Jacob C. Shorter