No. 20-

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel:
GWENDOLYN PORTER,

Petitioners

v.

MAGNOLIA HEALTH PLAN,
INCORPORATED

Respondent

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

It is, or at least, was well established that in order to withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" *Ashcroft v. Iqbal*, 556 U.S. 662 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). No "proof" or "evidence" was required at this initial pleading stage and certainly no evidence or proof was to be weighed by the reviewing court in deciding a motion to dismiss.

In *United Health Servs. v. United States ex rel: Escobar*, 136 S. Ct. 1989 (2016), a False Claims Act case, this Court recently ruled that "evidence" or "proof" of the element of materiality will be required by the trial court, and that such evidentiary requirement would be "demanding" and "rigorous". What this Court did not make clear in *Escobar* was when, in the life of the litigation, is such demanding proof required. That case was on appeal to the Supreme Court as a result of the granting of a Rule 12(b)(6) motion to dismiss, which could obviously lead one to surmise from its reading that the demanding and rigorous proof of materiality must be applied at the 12(b)(6) motion to dismiss stage, when, by definition, no proof exists – only pleadings. Such a reading means that, at least with respect to FCA cases, *Twombly* and *Iqbal* have been overruled.

The Ninth Circuit, in *United States ex rel: Campie v. Gilead Sciences, Inc.*, 862 F.3d 890 (9th Cir. 2017), construing *Escobar*'s language regarding materiality, specifically held that, even in a False Claims Act case, no *evidence* or *proof* is required at the initial pleading stage at which a Rule 12(b)(6) motion to dismiss might come into play. Instead, the only question that the reviewing court should ask is whether there are sufficient allegations regarding materiality that there is "more than the mere possibility that the government would be entitled to refuse payment if it were aware of the violations." 862 F3d at 907. *Campie*, applying the *Twombly* and *Iqbal* standard, held

that *proof* would be something that will be required by *Escobar* later in time, but not at the initial pleading stage.

In the case presented by this appeal, the Fifth Circuit did exactly the opposite. It relied on *Escobar* as controlling the standard of review for a motion to dismiss, and never even mentions the word "plausible", or any derivative thereof. Instead, it relies on *Escobar* and uses a new standard of review in a Rule 12(b)(6) context; one requiring "demanding" and "rigorous" proof of materiality and goes further to weigh the evidence (using language in *Escobar*) to determine the sufficiency of the proof in the case and determine if it can withstand what it perceives as the new standard governing the motion to dismiss.

Accordingly, there is a split in the Circuits regarding the interpretation of *Escobar*, and how it should be used in a 12(b)(6) context.

The question presented is whether the Supreme Court ruling in *Escobar* overruled or modified the standard of review to be used in ruling upon Rule 12(b)(6) motions to dismiss in cases involving the False Claims Act so as to require "proof" or "evidence" at the initial pleading stage above and beyond the plausibility standard set forth in *Twombly* and *Iqbal*. And if so, how is the reviewing court to weigh the "evidence", and to what other types of cases, or elements of particular cases, if any, does this new heightened standard of review now apply.

PARTIES TO THE PROCEEDING AND RELATED CASES

All parties to the proceeding in the Court whose judgment is sought to be reviewed are included in the caption of the case.

The list of cases directly related to this appeal are as follows:

- *United States of America, ex rel: Gwendolyn Porter, Relator, v. Centene Corporation and Magnolia Health Plan, Inc.* No. 1:16cv75-HSO-JCG, U. S. District Court for the Southern District of Mississippi. Judgment entered September 27, 2018.

- *United States of America, ex rel: Gwendolyn Porter, Relator, v. Magnolia Health Plan, Inc.,* No. 18-60746, U. S. Court of Appeals for the Fifth Circuit. Judgment entered April 15, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a – 11a, is not reported. The *per curiam* denial of rehearing, Pet. App. 13a – 14a, is not reported. The opinion of the district court, Pet. App. 15a – 31a, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 2020. A petition for rehearing was denied on June 8, 2020, Pet. App. 13a – 14a. Due to this Court's April 15, 2020 Order, the time within which to file this Petition has been expanded to 150 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

With respect to the federal statutes and regulations, the materiality requirement of the False Claims Act, 31 U.S.C. §3729, Pet. App. 33a – 36a, is involved. In addition, those provisions of the Social Security Act, 42 U.S.C. §1396n(g), Pet. App. 37a – 41a, dealing with supplying case management services under Medicaid, as well as the federal regulations defining the scope of practice for providing those case management services, 42 C.F.R. § 440.169, Pet. App. 42a – 43a, are also involved.

With respect to the state statutes and regulations, pertinent provisions of the Mississippi statute, Miss. Code Ann. §§ 73-15-5, Pet. App. 44a – 45a, dealing with the scope of practice of registered nurses (RN) versus the scope of practice of licensed practical nurses (LPN) are involved, as well as the Mississippi state regulations prescribing in greater detail the limits of the scope of practice of the RN versus the LPN are involved, and are reproduced in the Appendix to the Petition, Pet. App. 46a – 49a.

STATEMENT

As alleged in the First Amended Complaint [1] (Complaint), Pet. App. 53a-91a, Medicaid is a joint state – federal program in which healthcare providers serve poor or disabled patients and submit claims for government reimbursement. The Mississippi Division of Medicaid contracts with third parties to co-administer the state's Medicaid program. Companies that contract with the Division are known as Coordinated Care Organizations ("CCO's"). These CCO's operate call centers, process claims, and contract with health service providers for the provision of covered services.

Among these covered services, CCO's are expected to provide "care or case management" services [2] to the beneficiaries. At all relevant times, Magnolia Health Plan, LLC, the defendant herein, acted as a CCO in Mississippi and purported to provide case or care management services to Mississippi Medicaid beneficiaries.

These case management services are specifically permitted under Medicaid by virtue of 42 U.S.C. §1396n(g), Pet. App., 37a – 41a. This statute specifically defines case management as, "services which will assist individuals eligible under the plan in gaining access to needed medical, social, educational, and other services."[3] The statute goes on to define the types of services to be included in case management, such as *medical assessments,*[4] *development*

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[1] While the First Amended Complaint is included in the Appendix, the exhibits to the Complaint, which are voluminous, (over 700 pages) are not. While arguably necessary to form a decision on the merits of the motion to dismiss, for the purposes of deciding whether to address the questions posed by this Petition as to whether to grant a Writ of Certiorari or not, they would unnecessarily clutter the record. Instead, pertinent portions of the exhibits (primarily portions of the Contracts) which bear directly on the questions presented by this Petition are included in the Appendix.

[2] The Mississippi Division of Medicaid has referred to these services as both "care management" and "case management" services. According to the allegations of the Complaint, these terms apply to the same services.

[3] 42 U.S.C. § 1396n(g)(2)(A)(i), Pet. App. 39a.

[4] 42 U.S.C. § 1396n(g)(2)(A(ii)(I), Pet. App. 39a.

of specific care plans,[5] *referral services*[6] *and monitoring and follow-up activities.*[7] The case management services to be provided are further defined in 42 C.F.R. §440.169, Pet. App. 42a – 43a, and, like the statute, include *medical assessments, development of specific care plans, referrals and follow-up.* All of these functions require critical thinking skills and advanced education and training.

With respect to the training and qualifications that distinguish the registered nurse (RN) scope of practice from the scope of practice of the licensed practical nurse (LPN), the Mississippi statutes define the qualifications required of an RN as those which require, ". . .*substantial knowledge* of the biological, physical, behavioral, psychological and sociological sciences and of nursing theory as the basis for *assessment, diagnosis, planning, intervention and evaluation* in the promotion and maintenance of health . . ." [8] (emphasis added).

The Mississippi regulations which govern the practice of nursing in the state likewise, include within the scope of practice of the RN the responsibility for conducting comprehensive nursing assessments, forming nursing diagnoses and formulating and implementing care plans for the patient.[9] All of these functions require advanced education, training and critical thinking skills.

The scope of practice of the LPN, on the other hand, as defined by the Mississippi Statutes, is limited to the performance of ministerial duties as opposed to those duties requiring more critical thinking skills, and is described as those services requiring:

> ... *basic knowledge* of the biological, physical, behavioral, psychological and sociological sciences and of nursing procedures *which do not require the substantial skill, judgment and knowledge required of a registered nurse.* These services are performed under the direction of a registered nurse or a licensed physician or licensed dentist and

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[5] 42 U.S.C. § 1369n(g)(2)(A)(ii)(II), Pet. App. 39a.
[6] 42 U.S.C. § 1396n(g)(2)(A)(ii)(III), Pet. App. 39a.
[7] 42 U.S.C. § 1396n(g)(2)(A)(ii)(IV), Pet. App. 39a.
[8] Miss. Code Ann. § 73-15-5(2), Pet. App., 44a.
[9] Miss. Admin. Code Title 30 Part 2830 Ch. 1, Pet. App. 46a – 47a.

> *utilize standardized procedures* in the observation and care of the ill, injured and infirm . . . .[10] (emphasis added).

The functions of the LPN, as described by the Mississippi regulations, requires her or him to operate under the direction of the RN, and describes those functions as providing such duties such as observing, recording and reporting signs and symptoms which may indicate a change in the patient's condition.[11]

So as to remove all doubt as to whether the furnishing of *case management* services in Mississippi was and is within the scope of practice of the RN, and not within the scope of practice of the LPN, the Mississippi Board of Nursing, which governs the practice of nursing in Mississippi, issued a Letter Opinion to that effect, dated December 3, 2011, Pet. App. 50a – 53a. Simply put, in Mississippi, the LPN is not qualified to perform case management.

Gwendolyn Porter is an RN in Mississippi. She was employed as a case manager by Magnolia for almost two years. The vast majority of her services as a case manager were delivered through telenursing.[12] While there, she learned that LPNs, as opposed to RNs, were serving as case managers; a practice, she alleges, violates state and federal law. Moreover, she learned that Magnolia was misrepresenting, both *expressly* and *impliedly,* the qualifications and licensure of the case managers.[13] Specifically, she alleges that claims for payment of these services were false, since the providers of these services were not minimally trained, nor licensed, to provide them. The reason both federal and Mississippi law does not permit LPNs to serve as case managers is because case management under both federal and state law requires *assessments* and *diagnosing* skills, as well as the

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[10] Miss. Code Ann. § 73-15-5(5), Pet. App. 44a – 45a.

[11] Miss. Admin. Code Title 30 Part 2830 Ch. 2, Pet. App. 48a – 49a.

[12] Due to the fact that these services are delivered telephonically, fraud in delivering them is easily accomplished.

[13] In these days of Covid-19, telemedicine is much more critical and common than ever, and the prospect of similar fraud is, accordingly, one that is likely to be on the rise.

development of care plans, which are beyond the education and training of the LPN.

On March 16, 2016, ninety (90) days prior to the United States Supreme Court's decision in *Universal Health Services, Inc. v. United States, ex rel: Escobar*, 136 S. Ct. 1989 (2016),[14] Porter filed her Complaint in federal court alleging, among other claims, [15] violations of the federal False Claims Act, 31 U.S.C. §3729, Pet. App. 33a – 36a (hereafter, "FCA"). In response, Magnolia filed a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the Complaint did not satisfy the materiality element of the FCA, primarily on the basis that payments for services continued after the fraud was allegedly exposed. The district court, relying on *Escobar*, granted the motion to dismiss and dismissed the Complaint with prejudice. The district court also denied Porter the opportunity to amend her pleadings, holding that any amendment would be futile, Pet. App. 15a – 31a.

Porter appealed. On appeal, the Fifth Circuit affirmed the decision of the district court, both with respect to the dismissal with prejudice of the action, and the denial of the opportunity to amend (App., 1a – 11a). The basis for both decisions were premised on the language regarding proof and evidence and the weight to be given to such evidence, as required under its reading of *Escobar*. Thereafter, Porter filed a Petition for Rehearing *En Banc*, which was denied *per curiam* (App., 13a – 14a).

REASONS FOR GRANTING THE PETITION

1. **Did *Escobar* overrule or otherwise modify *Twombly* and/or *Iqbal* regarding the standard of review to be used in ruling upon Rule 12(b)(6) Motions to Dismiss, in cases involving the False Claims Act, so as to require evidence or proof of the element of materiality.**

Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled

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[14] *Escobar* was decided June 16, 2016.

[15] All other claims were voluntarily dismissed without prejudice.

to relief." This means that a Plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This "plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility . . . ." *Iqbal*, 556 U.S. at 678. Since this is a case brought under the FCA alleging fraudulent misrepresentations, the particularity requirements of Rule 9(b) also come into play.[16]

When ruling on a Rule 12(b)(6) motion, the court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). However, the court does not weigh evidence on a motion to dismiss and does not require "proof" because it must accept the allegations of the complaint as true. *Manzarek*, 519 F.3d at 1031. That is, on a 12(b)(6) motion to dismiss, the court assesses that legal ***feasibility*** of the complaint. It does not weigh evidence or resolve disputed facts. *Luce v. Dalton*, 166 F.R.D. 457 (S.D. Cal. 1996). *See also Citibank, N.A. v. K-H Corp.*, 745 F.Supp. 899, 902 (S.D.N.Y. 1990) (holding the purpose of a motion to dismiss under 12(b)(6) is to "assess the legal feasibility of [the] complaint, not to weigh evidence which plaintiff offers or intends to offer."); *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995)(because it rests on the pleadings rather than the evidence, it is not the court's function to weigh evidence on a 12(b) (6) motion to dismiss); *In re Santa Fe Natural Tobacco Co. Mktg. & Sales Practices & Prod. Liab. Litig.*, 288 F.Supp.3d 1087, 1230 fn 47 (D.N.M. 2017) (Court cannot weigh evidence on 12(b)(6) motion, as "plausibility" requirement of *Twombly* focuses on pleadings and does not require weighing of evidence).

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[16] No allegations were ever made that the Complaint lacked particularity, nor did either the district court or the Fifth Circuit find any problems with respect to the particularity contained in the Complaint.

All that having been said, the Fifth Circuit eschewed any discussion of the "plausibility" of the pleadings. The Fifth Circuit, relying on *Escobar*, instead engaged in its own fact-finding mission, and then undertook to weigh the purported "proof". The Fifth Circuit, citing *Escobar*, repeatedly speaks about what "proof" should be considered by a court in deciding the issue of "materiality" in an FCA case at the Rule 12(b)(6) motion to dismiss stage.[17]

What is more egregious, the Fifth Circuit expressly stated that the standard it was using in its examination of the proof of materiality, at the 12(b)(6) motion stage, was one that was "demanding" and rigorous" (again citing language from *Escobar*) Pet. App. 6a. Thus, the Fifth Circuit has now used this Court's language in *Escobar* to move the standard of review on a motion to dismiss, in an FCA case, from "plausible", to "proof" that is "demanding and rigorous". The Fifth Circuit then went to great lengths to examine and decide whether enough evidence exists so as to survive a motion to dismiss under its new standard.

An example of the Fifth Circuit's weighing what it viewed as evidence (or the lack thereof) is found on page 8 of the opinion in which the Fifth Circuit assumed arguendo, that the Mississippi statutes and regulations require case managers to be RNs and not LPNs. Nonetheless, it examined *some*[18] of the language in the contracts regarding compliance with state and federal law and determined that the particular language it deemed relevant was "boilerplate" language, and therefore, could not support an FCA claim, Pet. App. 8a – 9a.[19]

The Fifth Circuit next examined the "evidence" that the Mississippi Division of Medicaid took no action after

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[17] In every other kind of case, this would be proof that should be presented to and ruled upon by the jury, as "proof" has absolutely nothing to do with a motion to dismiss. That is, on a 12(b)(6) motion to dismiss, no "evidence" yet exists. Only pleadings exist.

[18] The contracts included language which required strict compliance with state and federal law, Pet. App. 93a, which the Fifth Circuit noted. However, the language in the contracts specifically dealing with "case management needs," Pet. App., 96a, was ignored by the Fifth Circuit.

[19] *Escobar* never said that language regarding compliance with state and federal law should be ignored, nor did this Court in *Escobar* say that such language could not constitute support for *plausibility*.

Porter attempted to inform it that Magnolia was staffing case manager positions with LPNs, and payments yet continued. Apparently, the Fifth Circuit discounted any and all alternative explanations for this conduct (without the benefit of permitting the plaintiff discovery or the right to develop and present proof as to why this occurred) and held that as a result of this factual determination, "...*Escobar* dictates that MississippiCAN's continued payments to and contracts with Magnolia substantially increase the burden on Plaintiff-Appellant in establishing materiality." Pet. App. 9a.[20]

The Fifth Circuit then weighed the evidence, looking for "demanding" and "rigorous" proof of materiality coupled with a *substantially increased burden* on the Petitioner. It is hardly surprising that, at this pleading stage, without giving the Petitioner the opportunity to engage in discovery and develop the proof, that it *found* the *proof* lacking. Specifically, the Fifth Circuit *found* that the Complaint was insufficient because there was no *evidence* or *proof* of specific provisions in the contracts which required case managers to be RN's.[21] The Fifth Circuit also *found* that the Complaint failed to identify specific federal or state statutes or regulations from which a jury could conclude that compliance was material. Pet. App., 7a.[22]

While petitioner believes that there was overwhelming "evidence" or "proof" of materiality, as reflected by the proof referenced in footnotes 21 and 22

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[20] Apparently, the Fifth Circuit used this language in *Escobar* to raise the bar yet again above "demanding and rigorous" evidence to something even higher.

[21] This *finding* ignored language included in the contracts that the Contractor: shall at all times adhere to all applicable federal and state law, regulations and standards (Pet. App. 93a); shall provide staffing in accordance with appropriate standards of both specialty and sub-specialty care (Pet. App. 94a); and, specifically with respect to case management, **"shall staff such case management positions with staff at a level that is sufficient to perform all necessary *medical assessments* and to meet all Medicaid enrollees' *case management needs at all times*."** (Pet. App. 96a).

[22] This finding ignores the state and federal statutes and regulations previously cited, as well as the Letter Opinion issued by the Mississippi Board of Nursing interpreting these statutes and regulations *requiring* case managers to be registered nurses in the State of Mississippi. Pet. App. 50a – 52a.

below, that still begs the question. The plaintiff should not be required to prove her case at the Rule 12(b)(6) stage of the litigation. The hill she has to climb in modern-day litigation is steep enough. Her *proof* will be tested at the summary judgment stage, then the directed verdict stage, then the jury trial stage, then the JNOV stage, then the appellate stage. To require her to *prove* her case at the initial pleading stage is a bridge too far, and Petitioner submits, is not what *Twombly* and *Iqbal* require.

This weighing of the evidence by the Fifth Circuit was condemned and harshly criticized by this Court in *Tolan v. Cotton.* 572 U.S. 650, 656-57 (2014) (admonishing court for weighing evidence at summary judgment stage to resolve disputes in favor of moving party, rather than simply determine whether there existed a genuine issue of material fact for trial). In making these "findings" at the Rule 12(b)(6) stage, the Fifth Circuit was asking the wrong questions, clearly engaging in a "weighing of the evidence" -- the same wrongful conduct of weighing the evidence as cautioned against by the Supreme Court in *Tolan.*

Effectively, the Fifth Circuit utilized this Court's holding in *Escobar* to modify the standard of review on a motion to dismiss in any action involving the False Claims Act.[23] The correct question was not whether there was sufficient evidence (at this early stage of the litigation) to sustain a verdict. Rather, the correct question was whether the allegations in the complaint were sufficient to state a claim to relief that is ***plausible*** on its face. *Twombly,* 550 U.S. at 570; *Iqbal,* 556 U.S. at 678 (2009).[24]

Motions to dismiss under 12(b)(6) are disfavored under the law, and courts should rarely encounter

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[23] While the Fifth Circuit's decision uses *Escobar* to require evidence or proof in the pleadings of only one of the four elements in a False Claims Act claim – materiality. It is a very short step to expand the demanding and rigorous proof requirement at the pleading stage to the other three elements of an action under the False Claims Act.

[24] Ironically, by improperly weighing the evidence, the Fifth Circuit also improperly held the complaint to a "technical exercise in the fine points of pleading." *Dussouy v. Gulf Coast Inv. Corp.,* 660 F.2d 594, 597 (5th Cir. 1981)("[T]he liberal position of the federal rules on granting amendments . . . evinces a bias in favor of granting leave to amend" so as to facilitate a determination of claims on the merits and "to prevent litigation from becoming a technical exercise in the fine points of pleading.")

circumstances justifying granting such a motion. *Mahone v. Addicks Utility Dist.*, 836 F.2d 921, 926 (5th Cir. 1988). *See also Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442-43 (5th Cir. 1986) (noting "liberal" standard under Rule 12(b)(6)). However, even were dismissal somehow appropriate, the Fifth Circuit still should have granted leave to amend under Rule 15. Denial of leave to amend due to futility is rare and ordinarily, courts should defer to a consideration on the merits. *Netbula v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003).

Put another way, the general rule is that the Court should not dismiss a complaint under Rule 12(b)(6) without giving an opportunity to amend, *La Croix v. Marshall Cnty., Miss.*, 409 F.App'x. 794, 802 (5th Cir. 2011) and the application of this rule is to be made under the liberal 12(b)(6) standard. *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 873 (5th Cir. 2000) (question of futility under Rule 15 is whether amended complaint would fail to state a claim under Rule 12(b)(6)). *See also Chitimacha Tribe of Louisiana v. Harry L. Laws Company, Inc.*, 690 F.2d 1157, 1163 (5th Cir. 1982)(courts should err on the side of allowing amendment); *Lowrey v. Texas A&M University System*, 117 F.3d 242, 245 (5th Cir. 1997)(Rule 15(a) expresses a strong presumption in favor of liberal pleading).

Furthermore, The Fifth Circuit agreed with the District Court that any amendment would be futile, based upon its findings regarding continued payments by the State of Mississippi. While it is clear that the question of futility should have been judged based on an analysis of the pleadings, it is equally clear that the Fifth Circuit failed to do this and instead, reached its conclusion regarding futility (and thus, denial of any leave to amend) based on an inappropriate weighing of the evidence. It is axiomatic that the purpose of Rule 15(a) "is to assist the disposition of the case on its merits, and to prevent pleadings from becoming ends in themselves." *Foster v. Daon Corp.*, 713 F.2d 148, 152 (5th Cir. 1983). Rather than act consistent with this well-settled principle, the Fifth Circuit viewed and ruled on Rule 15 and the issue of "futility" based upon its construction of *Escobar* that at the motion to dismiss

stage, "proof" is required, at a stage where—by definition, no "proof" should exist.

If permitted to stand, at least in the Fifth Circuit, *Twombly* and *Iqbal* stand effectively overruled by *Escobar* in False Claims Act cases.

2. A split exists in the Circuits as to the standard of review to be used to decide motions to dismiss in cases involving the False Claims Ac.

The Ninth Circuit Court of Appeals, in *United States ex rel: Campie v. Gilead Scis.,* 862 F.3d 890 (9th Cir. 2017) was also faced with the question of whether the element of materiality was sufficiently plead so as to survive a Rule 12(b)(6) motion to dismiss. The defendant in *Campie*, like the defendant here, argued that this Court's ruling in *Escobar* required dismissal under Rule 12(b)(6) because the plaintiff could not demonstrate *proof* of materiality. In its ruling, denying the motion to dismiss, the Ninth Circuit specifically held that at the 12(b)(6) stage, issues regarding proof of materiality ***are not grounds for dismissal***, as the question is not "proof" but rather sufficiency of the pleadings. [25] The Ninth Circuit held, in reliance on *Twombly* and *Iqbal*, that the allegations of the complaint, taken as true, presented more than the "mere possibility" that the government would be entitled to refuse payment if it were aware of the violations, and that the plaintiff had, therefore, sufficiently plead materiality, "at this stage of the case."[26] In reliance on *Twombly* and *Iqbal* in making its decision, the Ninth Circuit preserved those issues of proof and its sufficiency for a later day.

The Fifth Circuit, in its opinion, took note of the *Campie* decision and its reasoning, Pet. App. 9a, n.7, but, noting that it was not bound by that decision as precedent, refused to follow it. While the Ninth Circuit, in *Campie,* refused to wade into the swampy depths of evidence and proof at the pleading stage, the Fifth Circuit dove in headfirst.

Instead of viewing the pleadings in terms of "plausibility", it went so far as to determine what it

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[25] 862 F.3d at 906-907.
[26] 862 F.3d at 907.

believed to be relevant evidence, both pro and con, and then, after loading the scales in favor of the Respondent by subjecting the Petitioner to a *substantially increased burden* to put forth *demanding and rigorous proof* of materiality, weighed that evidence and summarily declared Magnolia the winner. The Fifth Circuit's holding in the case at bar creates a direct and distinctive conflict between the Circuits, and further, is likely to create additional confusion for courts and practitioners nationwide. For this reason, also, this Court should grant this Writ of Certiorari and resolve the conflicts.

3. **If the new standard of review is "demanding and rigorous proof of materiality" at the Rule 12(b)(6) motion to dismiss stage, then the actions of the Department of Health and Human Services Office of Inspector General in prosecuting claims to recover federal funds paid by way of Medicaid for case management services that were performed by those not licensed or qualified to perform them constitutes *conclusive* proof of materiality.**

Even if the Fifth Circuit's interpretation of *Escobar* is correct and T*wombly* and *Iqbal* have been overruled or modified in FCA cases, in this case, "proof" exists, outside of the pleadings, sufficient to satisfy the new "demanding and rigorous proof" requirement. Accordingly, the motion to dismiss should not have been granted. Specifically, the United States Department of Health and Human Services Office of Inspector General has, in precisely situations such as this, clawed back federal Medicaid funds that its investigation revealed had been spent in rendering case management services by people who were insufficiently trained or were not licensed to render them.

In April of 2018, HHS-OIG demanded the return of $2.2 million dollars to the federal government for unallowable claims made in the state of Colorado. A portion of those funds to be refunded were for case management service performed by case managers who were not qualified by the state to do so. Pet. App. 97a – 114a.

This prosecutorial collection action taken by HHS-OIG in precisely the same circumstances prove conclusively that the qualifications of those rendering case management services pursuant to Medicaid are, in fact, "material" with respect to the government's decision to pay for those services.

CONCLUSION

The Fifth Circuit's decision feels like a change in the law, reads like a change in the law and in the end, if left alone, changes the law. *Twombly* and *Iqbal* clearly call for what the Fifth Circuit failed to do— treatment of a 12(b)(6) motion to dismiss based solely on the pleadings, without weighing the evidence. Based on its interpretation of *Escobar*, a decision that was not handed down until after the filing of plaintiff's Complaint, the Fifth Circuit engaged in a new standard of review regarding motions to dismiss in FCA cases. In fact, not once, does the Fifth Circuit even mention the phrase, "plausible on its face".

Instead, the Fifth Circuit decision engages in a lengthy weighing of the evidence, pro and con, and imposes an additional *substantial* burden upon the plaintiff to put forth, "*demanding and rigorous proof*" at this pleading stage. While the Fifth Circuit's decision does not expressly state that *Escobar* modifies *Twombly* and *Iqbal,* in all False Claims Act cases in the Fifth Circuit, that is the practical effect of its ruling.

This case presents the perfect opportunity for the Court to answer outstanding and conflicting questions as to whether the *Escobar* decision modified or overruled its previous decisions in *Twombly* and *Iqbal* in False Claims Act cases. It also presents the opportunity to address a current split within the Circuits on that very issue. If left unchecked, the holding in *Escobar* could easily be expanded by other lower courts so as to require *proof* or *evidence* at the Rule 12(b)(6) motion to dismiss stage with respect to the other elements of the False Claims Act or of any other elements included in any federal statutes. Petitioners ask that their claims be heard by this Court.

Respectfully submitted,

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