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June 28, 2018

VIA CM/ECF

Elisabeth Shumaker, Clerk
United States Court of Appeals
for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

RE: *United States ex rel. Polukoff v. St. Mark's Hospital et al.*, No. 17-4014

Dear Ms. Shumaker:

We write to inform the Court of the recent decision in *United States v. Paulus*, No. 17-5410 (6th Cir. June 25, 2018).

In *Paulus*, the Sixth Circuit reversed a district court's entry of a judgment of acquittal in favor of a defendant cardiologist. The district court had concluded that the government could not prove that the defendant defrauded or made false statements to health care programs, in violation of 18 U.S.C. §§ 1035(a)(2) and 1347, because a determination of the amount of stenosis in an artery is a "*subjective medical opinion*, incapable of confirmation or contradiction," and about which cardiologists might disagree. Slip Op. 8. In rejecting this conclusion, the court of appeals observed that "scientific measurements may sometimes be imprecise." *Id.* at 9. But, the court emphasized, "it is up to the jury—not the court—to decide whether the government's proof is worthy of belief." *Id.* The court reasoned that a "court may not enter a judgment of acquittal merely because it doubts the persuasiveness of the government's expert testimony." *Id.* at 12. The

court also recognized that false statements of opinion can be a basis for liability, *id.* at 9-10, and that falsity and intent "are legally separate inquiries," *id.* at 12.

The Sixth Circuit thus squarely rejected the district court's conclusion in this case that statements involving medical analysis cannot be "false." Instead, as explained in the government's brief in this case, a factfinder can assess the truth or falsity of a statement of medical necessity by potential reference to clinical information and medical documentation, relevant policies and standards, and expert and other witness testimony. *See* U.S. Amicus Br. 14-16. The Sixth Circuit also rejected the district court's mistaken beliefs in this case that a statement of opinion cannot be false, *see id.* at 10-14, and that the potential for reasonable disagreement about the necessity of a medical procedure precludes a finding of falsity, *see id.* at 17-18.

We would be grateful if you would provide copies of this letter to the panel.

Sincerely,

s/ *Sarah Carroll*
SARAH CARROLL
U.S. Department of Justice
Appellate Staff, Civil Division

cc (via CM/ECF): Counsel of Record

Enclosure