IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel.* ROBERT A. CUTLER, Plaintiff, v. CIGNA CORP. *et al.*, Defendants.	No. 7:17 Civ. 07515 (KMK) Hon. Kenneth M. Karas

NOTICE OF DEFENDANTS' MOTION TO TRANSFER THE CASE TO THE MIDDLE DISTRICT OF TENNESSEE

PLEASE TAKE NOTICE that Defendants Cigna Corporation, Cigna Holdings, Inc., Connecticut General Corporation, Healthspring, Inc., New Quest LLC, Healthspring Life & Health Insurance Company, Gulf Quest LP, Home Physicians Management LLC, and Alegis Care Services, LLC (together "Cigna") hereby respectfully move this Court for an order transferring this action to the United States District Court for the Middle District of Tennessee pursuant to 28 U.S.C. § 1404(a). Cigna's Motion to Transfer is based upon the accompanying Memorandum, the Declarations of Casey McKeon and Robert Keeling, and the exhibits thereto, filed concurrently herewith, as well as the Amended Complaint on file in this matter (Dkt. 12) and requested oral argument, if the Court so orders, held on a date and at a time designated by the Court.

Date: December 4, 2020

Respectfully submitted,

/s/ Eamon P. Joyce

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UNITED STATES OF AMERICA *ex rel.* ROBERT A. CUTLER, Plaintiff, v. CIGNA CORP. *et al.*, Defendants.	No. 7:17 Civ. 07515 (KMK) Hon. Kenneth M. Karas

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO TRANSFER THE CASE TO THE MIDDLE DISTRICT OF TENNESSEE

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PRELIMINARY STATEMENT

Defendants Cigna Corporation, Cigna Holdings, Inc., Connecticut General Corporation, Healthspring, Inc., New Quest LLC, Healthspring Life & Health Insurance Company, Gulf Quest LP, Home Physicians Management LLC, and Alegis Care Services, LLC (together "Cigna") respectfully submit this memorandum of law in support of their motion to transfer.

The Court should transfer this False Claims Act ("FCA") suit to the Middle District of Tennessee under 28 U.S.C. § 1404(a). Transfer is appropriate because this case could have been brought in that court originally, and because Tennessee is "the center of gravity of the litigation," where the relevant business operations, documents, and witnesses are located. *Indian Harbor Ins. Co. v. Factory Mut. Ins. Co.*, 419 F. Supp. 2d 395, 402 (S.D.N.Y. 2005). This case has no connection to the Southern District of New York.

Relator's claims deal exclusively with a part of Cigna's business based in and run from Tennessee. His allegations concern Cigna's Medicare Advantage business, and specifically its 360 Exam, an annual comprehensive health assessment of Cigna Medicare Advantage members. The 360 Exams at issue here are provided in the patients' homes by nurse practitioners and other qualified practitioners. Relator alleges that diagnoses identified by licensed nurse practitioners during these in-home exams cannot be used to establish the health status of Medicare Advantage members, and thus that Cigna made false claims to the Government by submitting such diagnoses. Importantly, because Cigna does not offer a Medicare Advantage product in New York, none of these examinations occurred in New York.

Cigna's Medicare Advantage business, and the 360 Exam program specifically, are primarily run by HealthSpring, Inc. and its subsidiaries and affiliates – now commonly known as "Cigna Medicare." Declaration of Casey McKeon ("McKeon Decl.") ¶ 5. Cigna Medicare's operational and executive headquarters are in the Nashville area. Amended Complaint for

Violation of False Claims Act, Dkt. 12 ("Am. Compl.") ¶ 11; McKeon Decl. ¶ 6. The relevant business operations, documents, and witnesses therefore are all in the Middle District of Tennessee. *See* McKeon Decl. ¶¶ 6–13. This case obviously could have been brought in that Court. *See* 31 U.S.C. § 3732(a) (establishing nationwide jurisdiction for False Claims Act cases).

By contrast, the case has no connection to New York. Relator has not alleged that any witnesses reside in New York, that any operative facts occurred in this jurisdiction, or even that Cigna operates a Medicare Advantage plan in this state. Nor could he do so, as Relator appeared to concede at the November 12, 2020 pre-motion conference, when he could not identify any operative facts that occurred in New York in response to this Court's questioning.

Relator sued here and opposes transfer simply for his own convenience. But, a relator's choice of forum in a False Claims Act case is not entitled to any significant weight. *United States ex rel. Roop v. Arkray USA, Inc.*, 1:04 CV 87-M-D, 2007 WL 844691, at *2 (N.D. Miss. Mar. 19, 2007) (collecting cases). Further, "[t]he emphasis that a court places on plaintiff's choice of forum diminishes where the facts giving rise to the litigation bear little material connection to the chosen forum." *United States v. Nature's Farm Prods., Inc.*, No. 00 Civ. 6593 (SHS), 2004 WL 1077968, at *3 (S.D.N.Y. May 13, 2004). The facts giving rise to this litigation have no material connection to this District. The most important § 1404(a) factors thus favor transfer decisively, and the other factors are neutral. The Court should therefore transfer this case.

STATEMENT OF FACTS

A. Relator Robert Cutler

Relator Robert Cutler, who represents himself in this matter, is a Connecticut resident and maintains his law office in Connecticut – not New York.[1] Am. Compl. ¶ 7. Although Relator's former attorneys were in New York, *see id.* p. 35, they have since withdrawn from the case. In any event, "convenience of counsel is not an appropriate factor" in considering a motion to transfer. *See Fuji Photo Film Co., Ltd. v. Lexar Media, Inc.*, 415 F. Supp. 2d 370, 373 (S.D.N.Y. 2006) (quoting *In Vivo Rsch. v. Magnetic Resonance Equip. Corp.*, 119 F. Supp. 2d 433, 438 (S.D.N.Y. 2000)).

B. Cigna and the 360 Exam program

Cigna's Medicare Advantage business, and the 360 Exam program specifically, are primarily run by Cigna Medicare. McKeon Decl. ¶ 5. This is because Cigna's Medicare Advantage business largely stems from its 2012 acquisition of HealthSpring, Inc., which at the time was a standalone company based in the Nashville area. *Id.* Thus, most of the material witnesses, the documents, and the data relevant here are in Tennessee. McKeon Decl. ¶¶ 6–13. None are located in New York.

The 360 Exam program's management is based in the Nashville area. *Id.* ¶ 7. Primary responsibility for the 360 Exam program rests with a department known during the relevant time period as the Medicare Data Quality Operations ("MDQO") department and a unit within that department, the Chronic Care Quality Initiative ("CCQI"). *Id.* For example, the following five

[1] *See* Dkt. 53 (listing the "Law Office of Robert A. Cutler" as located in Westport, Connecticut); New York State Unified Court System, Attorney Online Services Search, https://iapps.courts.state.ny.us/attorneyservices/search?0 (listing the same Westport, Connecticut address for a search for "Robert A. Cutler").

current or former Cigna employees—all based in Tennessee—are among the likely witnesses in this litigation:

- Mr. Casey McKeon served as General Manager of National Health Services for Cigna Medicare from October 2015 through February 2020. *Id.* ¶ 1. In that role, Mr. McKeon had general supervisory responsibility for the MDQO, which included the 360 Exam program, among other responsibilities. *Id.* ¶ 7. Mr. McKeon is currently the President of CareAllies, Inc., a wholly-owned, indirect subsidiary of Cigna. *Id.* ¶ 1. Mr. McKeon lives and works in the greater Nashville area. *Id.*
- Dr. Dirk Wales served as the Chief Medical Officer of HealthSpring before Cigna's acquisition of the company, and continued in that role until he departed Cigna earlier this year. *Id.* ¶ 10. Dr. Wales was integral to the initial design and development of the 360 Exam and oversaw the program in a high-level supervisory role until his departure from Cigna. *Id.* Dr. Wales lives and works in the greater Nashville area. *Id.*
- Dr. Michael Fessenden served as the Senior Medical Director of CCQI from July 2013 to June 2020, and as the Director of MDQO from November 2015 to June 2020. *Id.* ¶ 11. Dr. Fessenden's responsibilities during this time included the day-to-day supervision of the 360 Exam program. *Id.* Dr. Fessenden lives and works in the greater Nashville area. *Id.*
- Dr. Jason Jean is a nurse practitioner, with a doctorate in nursing practice, who served as Cigna's Chronic Care Quality Manager & Educator from June 2014 until December 2018. *Id.* ¶ 12. In that role, Dr. Jean developed clinical training

materials used to educate providers, including those performing 360 Exams. *Id.* Dr. Jean currently serves as Senior Advisor for Cigna Medicare. *Id.* He lives and works in the greater Nashville area. *Id.*

- Mr. Glynn Creech has served as Cigna's Director of Risk Adjustment Coding Operations since September 2014. *Id.* ¶ 13. His responsibilities include managing the coding processes associated with the 360 Exam program. *Id.* Mr. Creech is in the greater Nashville area. *Id.*

All five were both based in Nashville during the relevant times and are currently located there. Other potentially relevant witnesses in Nashville include compliance and operational personnel, and former employees who previously worked in the MDQO or CCQI teams. *Id.* ¶ 8.

In addition, many of the central and individual document custodians and repositories relevant here are located in Nashville. *Id.* ¶ 16. Likewise, many of the electronic systems involved in the operation of the 360 Exam program, such as the databases for storing and reviewing data and documentation about the 360 Exams, were developed by, and are managed by, people based in Nashville. *Id.* ¶ 17.

None of the documents or witnesses are in New York, nor does Relator allege that any operative facts occurred here. Indeed, Cigna does not provide Medicare Advantage insurance in New York; it has never done so.[2] *Id.* ¶¶ 19–20. Finally, as Relator concedes, none of the Cigna

[2] Relator incorrectly suggests that Cigna is an approved Medicare Advantage provider in New York, offering a Medicare Advantage plan to New York City retirees within the state. Am. Compl. ¶ 21. Cigna's Medicare Advantage plans are only available to New York retirees *who relocate to Phoenix, Arizona*. It is there that Cigna offers Medicare Advantage plans. *See* McKeon Decl. ¶ 19; *see also* Cigna-HealthSpring (Arizona only), https://www1.nyc.gov/assets/olr/downloads/pdf/health/medicare-Cigna-HealthSpring.pdf ("available to retirees . . . [who] live in the service area of Maricopa County and the City of Apache Junction and Queen Creek in Pinal County").

entities is even incorporated or maintains a principal place of business in New York. *See* Am. Compl. ¶¶ 8–17.

C. Procedural history

Relator filed this *qui tam* action in October 2017. His amended complaint was unsealed on August 6, 2020, *see* Dkt. 14, after the United States gave notice that it declined to intervene as to some of Relator's claims and was not intervening at the time as to the others. Dkt. 13.

The amended complaint's allegations attack Cigna's 360 Exams, which are annual health exams of Medicare Advantage beneficiaries that can be performed in the beneficiary's home. Relator—whose company, Texas Health Management ("THM"), used to perform these exams for Cigna, *see* Am. Compl. ¶¶ 7, 42—alleges that diagnoses from 360 Exams are *per se* ineligible for submission to the Centers for Medicare & Medicaid Services ("CMS") to establish beneficiaries' health status. He alleges that in-home exams are a "data-gathering" effort, *see id*. ¶¶ 4, 47, 48, 50, 55–57, 87, 92, and supposedly do not involve "treatment" of the beneficiaries' underlying medical conditions. *See id.* ¶¶ 45, 53, 97. Even though his own company employs them for this purpose, Relator also purportedly objects to the fact that nurse practitioners, fully licensed under state law and explicitly permitted to provide these services under the Medicare statute, conduct many of these exams, rather than the beneficiary's primary care physician. *See id.* ¶¶ 36, 41.

Relator filed this lawsuit in the midst of an extended contract dispute between Cigna and THM. Relator owns a part of, and served as general counsel for, THM. *Id*. ¶ 7 (describing Relator as a "former officer" of THM); Keeling Decl. Ex. A at 54:19–56:03 (identifying Mr. Cutler's ownership of THM); *id*. Ex. B at 2 (identifying Mr. Cutler as THM's general counsel).

In 2013, THM contracted with Cigna to perform in-home 360 Exams in Texas and Arizona, not New York. *THM v. HealthSpring Life & Health Ins. Co., Inc*., 05-18-01036-CV, 2020 WL 3071729, at *1 (Tex. App. June 10, 2020) ("*THM Appeal*"). In January 2017, THM and Relator

began demanding more money and, as leverage, withheld some 15,000 completed 360 Exam forms, each reflecting the medical evaluation of a patient and the patient's protected health information, which Cigna would utilize as part of its efforts to properly manage the care of patients. Keeling Decl. Ex. C at 8–9.

This attempt at coercion led to an emergency arbitration in early 2017, a full arbitration hearing in late 2017, and state court proceedings in Texas in early 2018. *THM Appeal,* 2020 WL 3071729, at *2–3. Each tribunal ruled in Cigna's favor. But THM and Relator—who represented THM in the arbitration proceedings—failed to comply with these judgments. *See id.* Instead, they unsuccessfully tried to remove the state court proceeding to federal court. *See HealthSpring Life & Health Ins. Co., Inc. v. THM*, No. 4:18-cv-242, 2018 WL 3105655 (E.D. Tex. Jun. 25, 2018). They also filed a duplicative case in this court, which was transferred back to Texas and then dismissed. *See THM v. HealthSpring Life & Health Ins. Co., Inc.*, 380 F. Supp. 3d 580, 587–89 (E.D. Tex. 2019) (recounting the case's procedural history).

In the state court proceedings, THM was found in contempt, one of Relator's associates was jailed for failing to provide the 360 Exam forms as ordered, and the court threatened Relator with contempt when he refused to give direct answers to questions from a sitting judge about the location and status of these forms. *See id.* at 585; Keeling Decl. Ex. D at 16:6–24 (transcript of state proceedings). In addition, a federal judge in Texas felt compelled to remind Relator of his ethical obligations as an attorney, *see* 380 F. Supp. 3d at 585 n.2, found that Relator had "deliberately misquote[d] Judge Marrero" of the S.D.N.Y., *see id.* at 588, and further determined that the court could no longer "rely on [Relator's] citations as a fair and accurate representation of the cited material," *id.* n.8.

Unable to secure the relief he wanted in the contract case, Relator instead filed this lawsuit, again making baseless allegations, in a forum that has no connection to the operative facts, witnesses, or documents in this case.

LEGAL STANDARD

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . . ." 28 U.S.C. § 1404(a). The § 1404(a) analysis follows two steps. The court first asks "whether there is a transferee forum available with proper jurisdiction and venue." *Nature's Farm,* 2004 WL 1077968, at *3 (quoting *Bristol-Myers Squibb Co. v. Andrx Pharms., LLC*, No. 03 Civ. 2503, 2003 WL 22888804, at *2 (S.D.N.Y. Dec. 5, 2003)). If so, the court considers several factors in deciding whether transfer is warranted:

> (1) the convenience of witnesses; (2) the convenience of the parties; (3) the locus of operative facts; (4) the availability of process to compel the attendance of the unwilling witnesses; (5) the location of relevant documents and the relative ease of access to sources of proof; (6) the relative means of the parties; (7) the forum's familiarity with the governing law; (8) the weight accorded to the plaintiff's choice of forum; (9) trial efficiency; and (10) the interest of justice, based on the totality of circumstances.

Johnson v. Brown, No. 20 Civ. 3280 (KMK), 2020 WL 2904849, at *4 (S.D.N.Y. June 3, 2020). "[W]eighing the balance 'is essentially an equitable task.'" *Indian Harbor Ins. Co.*, 419 F. Supp. 2d at 402 (quoting *Citigroup Inc. v. City Holding Co.,* 97 F. Supp. 2d 549, 561 (S.D.N.Y. 2000)).

In weighing these factors, "the Court looks to the center of gravity of the litigation, as judged primarily by the convenience of witnesses." *Id.* (internal citation omitted). "Convenience of both the party and non-party *witnesses* is probably the single-most important factor in the analysis of whether transfer should be granted." *Fuji Photo*, 415 F. Supp. 2d at 373 (emphasis added) (quoting *Berman v. Informix Corp.*, 30 F. Supp. 2d 653, 657 (S.D.N.Y. 1998)). The "locus of operative facts" is also a "'primary factor,'" *id.* at 375, and "[c]ourts routinely transfer cases

when the principal events occurred, and the principal witnesses are located, in another district," *Viacom Int'l, Inc. v. Melvin Simon Prods., Inc*., 774 F. Supp. 858, 868 (S.D.N.Y. 1991).

ARGUMENT

This case is about events and business decisions in Tennessee, where the most relevant witnesses live and the key documents are located. No relevant witnesses or parties live or work in this District, no material events occurred here, and no relevant evidence is here. The Court should thus transfer this case to the Middle District of Tennessee because (1) Relator could have brought this case in Middle District of Tennessee; and (2) the relevant factors weigh decisively in favor of transfer.

I. Relator could have filed this action in the Middle District of Tennessee.

Relator could have filed this case in the Middle District of Tennessee for the same reasons it was proper to file in this Court. Every district court has subject matter jurisdiction over FCA cases. *United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd*., 110 F.3d 861, 868 (2d Cir. 1997) ("*Thistlethwaite I*"). Because the FCA provides that a summons may be "served at any place within or outside the United States," 31 U.S.C. § 3732(a), the federal courts have nationwide personal jurisdiction in FCA cases. *See United States ex rel. Vallejo v. Investronica, Inc.*, 2 F. Supp. 2d 330, 334 (W.D.N.Y. 1998); *see also, e.g., United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 976 F. Supp. 207, 210 (S.D.N.Y. 1997) ("*Thistlethwaite II*"). Indeed, Relator pled personal jurisdiction in this Court by relying on the nationwide personal jurisdiction conferred by 31 U.S.C. § 3732(a). *See* Am. Compl. ¶ 20. [3]

[3] Venue would be proper in the Middle District of Tennessee because the FCA vests venue wherever "*any one* defendant can be found, resides, transacts business" or where "any act proscribed by [the FCA] occurred," 31 U.S.C. § 3732(a) (emphasis added), and it is undisputed that some of the Cigna defendants (including HealthSpring, Inc., the entity responsible for the development and administration of the 360 Exam) can be found within the Middle District of Tennessee. *See* Am. Compl. ¶¶ 11, 13. By contrast, no defendant can be found in the S.D.N.Y.

Despite his having pled jurisdiction in this case citing 31 U.S.C. § 3732(a), Relator now argues that due process would prevent the Middle District of Tennessee from asserting personal jurisdiction over some of the Cigna defendants. *See* Dkt. 52 at 1. In doing so, Relator fundamentally misstates the applicable jurisdictional law. As it has done in many other statutes, Congress enacted 31 U.S.C. § 3732(a) in 1986 to make clear that the relevant "forum" in an FCA case is the entire United States. In other words, due process is satisfied in an FCA case so long as the defendants have adequate contacts with the *country as a whole*. Because the Cigna entities named in Relator's complaint are all U.S.-based entities, there is no due process issue with respect to filing this case in (or transferring it to) the Middle District of Tennessee.

Relator knows this to be true. As indicated above, the amended complaint does not try to allege state-specific contacts. It instead alleges personal jurisdiction by asserting that the defendants have "minimum contacts *with the United States*." Am. Compl. ¶ 20 (emphasis added). The Court should not allow Relator to change his position on jurisdiction now that Defendants have challenged his unreasonable choice on the separate and distinct issue of venue. Indeed, if the False Claims Act did *not* provide for nationwide personal jurisdiction, this case would have to be dismissed under Rule 12(b)(2), and the Department of Justice ("DOJ") would have to transform how it handles FCA cases.

A. The FCA authorizes nationwide personal jurisdiction so long as the defendant has minimum contacts with the United States as a whole.

Prior to the landmark 1986 amendments, the old FCA had provided that a case could only be heard "in the Judicial district within whose Jurisdictional limits the person charged with a violation is found or the violation occurs." 31 U.S.C. § 3730(b)(1) (1985 ed.). As a result, the test for personal jurisdiction in an FCA case used to be the same as any garden-variety civil litigation. *See, e.g.*, *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 625 F. Supp. 591, 592

(D.N.H. 1985). But Congress specifically changed the statute, creating nationwide personal jurisdiction through the addition of § 3732(a). Under the pre-1986 amendment version of the FCA, the need to establish state-specific minimum contacts "considerably hinder[ed] the Government's litigative effort" by forcing "the Department of Justice to file multiple suits involving the same scheme or pattern or fraudulent conduct against each defendant in the district in which he or she may be found at the time suit is commenced." S. Rep. No. 99-345, at 32 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5297. Multiple suits also had "a comparable impact upon the judicial resources required." *Id.* Congress sought to relieve the burdens on DOJ and the judiciary by repealing the restrictive jurisdictional provisions in old § 3730(b)(1) and replacing them with the language currently found in § 3732(a). *See id*. Congress explicitly intended for these changes to be an "expansion of jurisdiction." *Id.*

Consistent with this purpose of expanding personal jurisdiction, the revised statutory language authorizes service of process "at any place within or outside the United States." 31 U.S.C. § 3732(a). By broadly authorizing service of process, Congress reflected its decision to provide nationwide personal jurisdiction for all FCA cases. *See*, *e.g.*, *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1556 (2017) ("Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process."); *Omni Cap. Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987) (". . . Congress knows how to authorize nationwide service of process when it wants to provide for it."); *Robertson v. R.R. Lab. Bd.*, 268 U.S. 619, 622 (1925) ("Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court. Congress has power, likewise, to provide that the process of every District Court shall run into every part of the United States."); *see also* Fed. R. Civ. P. 4(k)(1)(C) (service of a summons "establishes personal jurisdiction over a defendant when authorized by a federal statute").

Personal jurisdiction must always comport with due process, but the constitutional inquiry changes and is straightforward where, as here, a federal statute authorizes nationwide service of process. As the Second Circuit held decades ago, the due process question in cases such as this is simply whether defendant has sufficient contacts *with the country*:

> It is not the [State] but the United States 'which would exercise its jurisdiction over [the defendants].' And plainly, where, as here, the defendants reside within the territorial boundaries of the United States, the 'minimal contacts' required to justify the federal government's exercise of power over them, are present.

Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974); *see also* 16 *Moore's Federal Practice – Civil* § 108.123(2)(b)(ii) (2020) ("[I]n determining whether personal jurisdiction is proper [where a federal statute allows nationwide service of process], courts look to whether the defendant's contacts with the nation as a whole, rather than with the forum state, are sufficient to satisfy due process."). This is why courts in this District and across the country have held that the "the relevant due process inquiry" in an FCA case "is whether defendant has 'minimum contacts' *with the United States as a whole*." *Vallejo*, 2 F. Supp. 2d at 334 (emphasis added) (quoting *Thistlethwaite II*, 976 F. Supp. at 210); *see United States ex rel. Cook-Reska v. Cmty. Health Sys., Inc.*, No. H-09-1565, 2014 WL 5500710, at *4 (S.D. Tex. Oct. 30, 2014) ("Because the FCA authorizes nationwide service of process, . . . personal jurisdiction is available in any federal court subject only to the nationwide minimum contacts analysis."), *aff'd*, 641 F. App'x 396 (5th Cir. 2016).[4]

[4] *See also United States ex rel. Fadlalla v. DynCorp Int'l LLC*, 402 F. Supp. 3d 162, 177–78 (D. Md. 2019) ("where, as here, a federal statute authorizes nationwide service of process, a 'national contacts' standard applies"); *United States ex rel. McFarland v. Fla. Pharmacy Sols.*, 358 F. Supp. 3d 1316, 1324 (M.D. Fla. 2017) ("when a federal court attempts to exercise personal jurisdiction under Rule 4(k)(1)(C), the 'court must . . . examine a defendant's aggregate contacts with the nation as a whole rather than his contacts with the forum state'") (quoting *Republic of Panama v. BCCI Holdings (Luxembourg), S.A.*, 119 F.3d 935, 946–47 (11th Cir. 1997)); *United States v. St. Joseph's Reg'l Health Ctr.*, 240 F. Supp. 2d 882, 886 n.1 (W.D. Ark. 2002) ("the existence of a provision for nationwide service of process in 31 U.S.C. § 3732(a) confers nationwide personal jurisdiction over False Claims Act defendants"); *United States ex rel. Smith v. Athena Constr. Grp., Inc.*, No. 1:17-cv-60, 2018 WL 4110743, at *3 (M.D. Pa. Aug. 29, 2018) ("Because it is undisputed that Defendant, a Virginia-based company doing business in the United States, has minimum contacts with the United States, this court has personal jurisdiction over Defendant under the FCA."); *United*

We have been unable to locate any contrary authority, and Relator's prior correspondence cited none. Relator purported to rely on the *Thistlethwaite* litigation, but as discussed above, the district court in that case ultimately relied on nationwide personal jurisdiction. *Thistlethwaite II*, 976 F. Supp. at 210–11 (S.D.N.Y. asserted personal jurisdiction over an English defendant based on contacts with Oklahoma and California). Relator also cited *United States v. Universal Fruits & Vegetables Corp.*, 370 F.3d 829, 836 n.13 (9th Cir. 2004), but that case does not even use the phrase "personal jurisdiction."[5] Finally, the court in *United States ex rel. McCarthy v. Straub Clinical and Hosp., Inc.*, 140 F. Supp. 2d 1062, 1071–72 (D. Haw. 2001), found personal jurisdiction based on contacts with Hawaii, and therefore had no cause to consider the availability of nationwide personal jurisdiction. Relator has not identified *any decision* in which personal jurisdiction was found lacking over a U.S.-based defendant in an FCA case.

B. Relator's argument is disingenuous, would defeat jurisdiction in this Court, and would harm the interests of the United States.

Relator's argument should be rejected on the ground that it is inconsistent with his own amended complaint. In his pleading, Relator did not attempt to satisfy due process by identifying contacts between the Defendant and New York. To the contrary, and consistent with the case law described above, Relator pled personal jurisdiction based on alleged "minimum contacts *with the United States*." Am. Compl. ¶ 20 (emphasis added). His attempt to argue that minimum contacts with Tennessee would have to exist to justify transfer is directly contrary to that allegation. It is

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States ex rel. Graziosi v. Accretive Health, Inc., No. 13-CV-1194, 2017 WL 1079190, at *3 (N.D. Ill. Mar. 22, 2017) ("Where a federal statute authorizes nationwide service of process, due process is satisfied 'as long as the defendants have adequate contacts with the United States as a whole,' which Baptist—an Arkansas non-profit with its principal place of business in Little Rock, Arkansas—does.") (quoting *Bd. of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1035 (7th Cir. 2000)).

[5] *Posven, C.A. v. Liberty Mutual Insurance Co.*, 303 F. Supp. 2d 391 (S.D.N.Y. 2004), and *Kidd v. Cigna Corp.*, No. 3:10 Civ. 0020, 2010 WL 4697986 (M.D. Tenn. Nov. 12, 2010), are even further afield. Neither case addressed the FCA at all.

disturbing, but unfortunately not surprising,[6] that Relator is pursuing an argument that conflicts with his own pleading. In any event, Relator cannot disavow his own allegations, which are "'judicial admissions'" by which he is "'bound throughout the course of the proceeding'" *Off. Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand*, 322 F.3d 147, 167 (2d Cir. 2003) (quoting *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528 (2d Cir. 1985)).

Significantly, Relator's argument would defeat personal jurisdiction in this Court, as well, requiring the Court to dismiss this case in its entirety, rather than simply transferring it to the Middle District of Tennessee. The amended complaint concedes that none of the Cigna defendants is incorporated or headquartered in New York. *Id*. ¶¶ 8–17. As a result, only "truly 'exceptional'" circumstances could establish general jurisdiction here, *see Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627 (2d Cir. 2016) (quoting *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 39–41 (2d Cir. 2014)), and the amended complaint does not even try to establish such circumstances.

During the parties' teleconference with the Court, Relator appeared to argue that specific jurisdiction exists in New York because certain arbitration hearings involving THM occurred in Manhattan. As the Court recognized during the call, the location of that arbitration (which is not even mentioned in Relator's pleading) has nothing to do with the alleged FCA violations alleged in the amended complaint. *See Bristol-Myers Squibb Co. v. Sup. Ct. of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1780 (2017) ("'the *suit*' must 'arise out of or relate to the defendant's contacts with the *forum*'") (emphasis in the original; brackets omitted) (quoting *Daimler AG v. Bauman*, 571 U.S.

[6] As noted above, in his other litigation against Cigna, Relator has established a pattern of sharp practices. *See, e.g.*, *THM*, 380 F. Supp. 3d at 588 (finding that Relator had "deliberately misquote[d] Judge Marrero"); *id.* at 589 n.8 (finding that the court cannot "rely on [Relator's] citations as a fair and accurate representation of the cited material").

117, 126 (2014)). Indeed, there is no authority that "supports the proposition that a defendant who briefly visits a state for a legal proceeding may be haled to court in that state for alleged torts taking place outside the forum." *Env't Mfg. Sols., LLC v. Fluid Energy Grp., Ltd.*, No. 6:18 Civ. 156-Orl-40 (KRS), 2018 WL 6264836, at *4 (M.D. Fla. Nov. 30, 2018).[7]

Accordingly, if the Court were to hold that personal jurisdiction would be lacking in the Middle District of Tennessee, the case would then be dismissed pursuant to Rule 12(b)(2).

Finally, we note that Relator's position is contrary to DOJ's position on personal jurisdiction in FCA suits. The jurisdictional requirements of 31 U.S.C. § 3732(a) apply equally to suits where the government is participating as plaintiff, and for such cases, DOJ has specifically adopted the nationwide personal jurisdiction position as articulated above – citing the FCA statute:

> Because Section 3732 of the False Claims Act authorizes worldwide service of process, the United States need only demonstrate that the foreign defendant has sufficient minimum contacts with the United States as a whole rather than with the particular judicial district in which the suit is brought.

Statement of Tony West, Assistant Attorney General, before the Subcommittee on Contract Oversight, Committee on Homeland Security and Governmental Affairs, U.S. Senate (Nov. 18, 2009).[8] If this position is abandoned, the judiciary would be forced to hear multiple cases in multiple districts regarding the same alleged fraud, creating the strain on limited judicial resources that § 3732 was specifically intended to avoid.[9]

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[7] Relator's pre-motion response letter also noted that certain Cigna defendants are licensed to do business and have registered agents in New York and that Cigna Corporation's stock is traded on the New York Stock Exchange. The Second Circuit, however, has rejected both arguments. See *Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 498–99 (2d Cir. 2020); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 97 (2d Cir. 2000).

[8] https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2009/11/18//2009-11-18-civ-west-foreign-contractors.pdf.

[9] While unnecessary due to all of the reasons explained above, Defendants also hereby waive personal jurisdiction in the Middle District of Tennessee for purposes of this case only. *See, e.g., In re Red Barn Motors, Inc.*, 794 F.3d 481, 483 (5th Cir. 2015) ("Because § 1404(a) allows transfer to a venue to which the parties have consented, the court held

II. The relevant factors weigh heavily in favor of transfer.

The "center of gravity" of this litigation—judged primarily by the convenience of the witnesses and the locus of operative facts—points squarely to the Middle District of Tennessee. The other factors either favor transfer or are neutral; no factor cuts against transfer. There is no plausible claim that this District is convenient, let alone the most convenient, for anyone with the possible exception of the Relator. But Relator's preference carries little weight, if any, for a variety of reasons including that this District is not even his home forum.

A. The convenience of the witnesses favors transfer.

"Convenience of both the party and non-party witnesses is probably the single-most important factor in the analysis of whether transfer should be granted." *Fuji Photo*, 415 F. Supp. 2d at 373 (quoting *Berman*, 30 F. Supp. 2d at 657); *accord Indian Harbor Ins.*, 419 F. Supp. 2d at 402 (witness convenience is the "primar[y]" consideration). "When weighing the convenience of the witnesses, courts must consider the materiality, nature, and quality of each witness, not merely the number of witnesses in each district." *Royal & Sunalliance v. British Airways*, 167 F. Supp. 2d 573, 577 (S.D.N.Y. 2001). This factor overwhelmingly favors transfer.

As explained above, the vast majority of Cigna personnel who designed, operated, and supervised the 360 Exam program during the relevant time period are based in the Middle District of Tennessee – none are based in New York. McKeon Decl. ¶¶ 7–13. Cigna has identified multiple witnesses involved in multiple relevant functions based in Nashville. *See supra* pp. 4–5. These witnesses have substantial knowledge about the development and administration of the 360 Exam

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that the case could be transferred to the Southern District of Indiana even though that court probably would not otherwise have personal jurisdiction over First Choice."); *see also James Ventures, L.P. ex rel. Alpert v. Timco Aviation Servs., Inc.*, 315 Fed. App'x. 885, 888 n.2 (11th Cir. 2009). *But see Aguiar v. Natbony,* 10 CIV. 6531 PGG, 2011 WL 1873590, at *3 (S.D.N.Y. May 16, 2011); *Ivy Soc'y Sports Grp, LLC v. Baloncesto Superior Nacional,* No. 08 Civ. 8106 (PGG), 2009 WL 2252116, at *3 (S.D.N.Y. July 28, 2009); *Bayer Schera Pharma AG v. Sandoz, Inc.*, 08 Civ. 03710 (PGG), 2009 WL 440381, at *4 (S.D.N.Y. Feb. 18, 2009).

program, as well as its relationships with vendors like THM. Indeed, the amended complaint mentions two of these people. *See* Am. Compl. ¶¶ 72, 75, 82, 88 (Dr. Fessenden); *id.* ¶ 80 (Jason Jean).[10] And most remaining material witnesses are likely to be found in Nashville, as that is where the business units responsible for the 360 Exam program are located. *See* McKeon Decl. ¶¶ 15–17.

By contrast, none of the current or former Cigna employees who designed and operated the 360 Exam program, or who manage any aspect of Cigna's Medicare Advantage business, live in New York. *Id.* ¶¶ 7–15, 18. In fact, to Cigna's knowledge, not one material witness resides here. *Id.* ¶ 20. If the case proceeds in this District, every single witness, for both parties, will need to travel from some other location.

Indeed, Relator does not show or argue otherwise. He fails to identify a single witness located in New York. Instead, Relator points to Cigna Corporation executives in Bloomfield, Connecticut. *See* Response at 2–3 & Ex. D. But he ignores the difference between Cigna Corporation, the publicly traded parent company, and the subsidiaries that actually *operate* Medicare Advantage plans and arrange for in-home 360 Exams. Indeed, the amended complaint acknowledges that Cigna offers health insurance only "through its subsidiaries." Am. Compl. ¶ 8; *see also* Response Ex. B (stating that all "products and services are provided exclusively by or through operating subsidiaries of Cigna Corporation, and not by Cigna Corporation"). The Connecticut-based executives of Cigna Corporation thus are not connected to this case. And in any event, the "convenience of witnesses who reside in neither the current nor the transferee forum is irrelevant." *Herbert Ltd. P'ship v. Elec. Arts Inc.*, 325 F. Supp. 2d 282, 288 (S.D.N.Y. 2004);

[10] The remaining Cigna current or former employees named by Relator in the amended complaint are either located in Texas or Delaware. *See* McKeon Decl. ¶ 14. None is in New York.

accord Command Arms Accessories, LLC v. ME Tech. Inc., 19 Civ. 6982 (LLS), 2019 WL 5682670, at *6 (S.D.N.Y. Oct. 31, 2019).

In sum, most material witnesses are in Nashville, and none are located here. This key factor thus weighs clearly in favor of transfer.

B. The location of documents and ease of access to proof weighs in favor of transfer.

Document discovery also favors transfer. The relevant document custodians and repositories are in the Nashville area, as documents associated with the 360 Exam program were produced there and are maintained there. *See* McKeon Decl. ¶¶ 16–17. No documents or custodians associated with this case are located in New York. *Id.* Similarly, many of the electronic systems involved in the operation of the 360 Exam program, such as the databases for storing and reviewing data and documentation regarding the 360 Exams, were developed by, and managed by, people based in Nashville. *Id.* Therefore, this factor weighs in favor of transfer. That remains true despite advances in discovery technology. "While technological advances in storing, transferring, and reproducing documents have rendered this factor less important, it cannot be ignored." *See Jackson v. Avis Rent A Car Sys., LLC*, No. 14 Civ. 1658 (LLS), 2015 WL 1004299, at *5 (S.D.N.Y. Mar. 6, 2015) (citing *In re Link A Media Devices Corp.*, 662 F.3d 1221, 1224 (Fed. Cir. 2011)); *accord In re Collins & Aikman Corp. Sec. Litig.*, 438 F. Supp. 2d 392, 396–97 (S.D.N.Y. 2006).

C. The locus of operative facts favors transfer.

For similar reasons, the locus of operative facts favors transfer. "To determine the locus of operative facts, a court must look to the site of the events from which the claim arises." *Dickerson v. Novartis Corp.*, 315 F.R.D. 18, 30 (S.D.N.Y. 2016) (quoting *Ivy Soc'y Sports Grp.*, 2009 WL 2252116, at *6). The amended complaint focuses on the design and implementation of Cigna's 360 Exam program, Am. Compl. ¶¶ 36–47; Cigna's communications with practitioners who

conducted the in-home exams, *id.* ¶¶ 48–56, 69–89; the limits of practitioners' ability to diagnose conditions listed on the in-home exam forms, *id.* ¶¶ 57–68; and Cigna's submission of diagnosis codes generated from 360 Exams to CMS for risk adjustment, *id.* ¶¶ 90–94. All of these events are centered in Tennessee, and *none* has a nexus to New York. Indeed, Relator conceded as much at the pre-motion conference regarding transfer on November 12, 2020. When directed by the court to identify "just one operative fact" that took place in New York, he could not do so. Relator pointed only to arbitration proceedings that post-dated the allegations in his complaint, which the Court correctly dismissed as insufficient for establishing a connection to New York.[11]

As described above, the 360 Exam program was at all relevant times managed from Cigna Medicare's office in the Nashville, Tennessee area, which is the hub for Cigna's Medicare Advantage business. The core events underlying Relator's claims thus took place in the Middle District of Tennessee. Other relevant events alleged in the complaint, like aspects of Cigna's communications with practitioners who conducted in-home exams, *id.* ¶¶ 48–56, 69–89, may have taken place in Arizona or Texas, since that is where THM contractors performed 360 Exams. McKeon Decl. ¶ 18. But THM did not conduct any exams in New York. Indeed, no 360 Exams were *ever* conducted in New York. And no aspect of Cigna's Medicare Advantage business was ever administered in New York. *Id.* ¶¶ 19–20.

Unsurprisingly, then, the amended complaint contains no factual allegations related to this District. Indeed, the complaint mentions New York only in discussing venue. Relator alleges that Cigna maintains an office and sells health insurance here; that Cigna providers operate within this

[11] Even separate from the fact that the arbitration proceedings post-dated the allegations in the complaint, as noted above, there is no authority that "supports the proposition that a defendant who briefly visits a state for a legal proceeding may be haled to court in that state for alleged torts taking place outside the forum." *Env't Mfg. Sols.*, 2018 WL 6264836, at *4.

district; that Cigna is an "approved provider of MA plans to New York City former-employee retirees"; and that Cigna's stock is traded on the New York Stock Exchange. Am. Compl. ¶ 21. But these are not "operative facts" or "events from which the claim arises." *Dickerson*, 315 F.R.D. at 30 (quoting *Ivy Soc'y Sports Grp.*, 2009 WL 2252116, at *6). These allegations are thus irrelevant.

Indeed, Relator's only allegation that touches on Medicare Advantage is his assertion that Medicare Advantage plans are available to New York City retirees. But he fails to mention that these plans are available only to New York retirees *who relocate to Arizona*, where Cigna actually offers Medicare Advantage plans. *See* McKeon Decl. ¶ 19; *see also* Cigna-HealthSpring (Arizona only).[12]

The locus of operative facts in this case is Nashville. The case has no connection to the Southern District of New York.

D. Relator's choice of forum and "convenience" warrant little to no weight.

Both Relator's choice of forum and the convenience of the forum to Relator carry little, if any, weight because (1) Relator is not the true party-in-interest; and (2) this District is neither Relator's home forum nor the locus of operative facts.

Relator's choice of forum carries little weight in a *qui tam* case like this. *See, e.g., Roop*, 2007 WL 844691, at *2 (collecting cases showing "the consensus view among district courts that a plaintiff's choice of forum is entitled to considerably less deference in *qui tam* cases"); *accord United States ex rel. Adrian v. Regents of Univ. of Cal.,* C 99-3864 (TEH), 2002 WL 334915, at *3 (N.D. Cal. Feb. 25, 2002), *aff'd*, 363 F.3d 398 (5th Cir. 2004). Relator's pre-motion response letter concedes this point by stating that he "did not bring this case as a *pro se* litigant as Defendants

[12] https://www1.nyc.gov/assets/olr/downloads/pdf/health/medicare-Cigna-HealthSpring.pdf.

claim, but rather as an attorney-at-law representing the United States' interest." Response at 3. And that does not help him, because "convenience of counsel is not an appropriate factor to consider on a motion to transfer." *Garity v. Tetraphase Pharms. Inc.*, 1:18-cv-06797 (ALC), 2019 WL 2314691, at *5 (S.D.N.Y. May 30, 2019) (quoting *In Vivo Rsch., Inc.*, 119 F. Supp. 2d at 438); *accord Fuji Photo*, 415 F. Supp. 2d at 374. However Relator chooses to present himself, his choice of forum is not significant.

Moreover, any weight accorded to a plaintiff's choice of forum diminishes "where the case's operative facts have little connection with the chosen forum," *800-Flowers, Inc. v. Intercontinental Florist, Inc.*, 860 F. Supp. 128, 134 (S.D.N.Y. 1994), or where the "plaintiff chooses a forum other than [its] place of residence," *Izkhakov v. Educ. Comm'n for Foreign Med. Graduates*, 12 CIV. 348 ALC, 2012 WL 2861338, at *4 (S.D.N.Y. July 10, 2012). Here, both are true. Relator has alleged no facts connecting this case to this District (or state), the amended complaint mentions no witnesses who live here, and Relator does not live here either. Relator's choice of forum thus carries minimal to no weight. *See Nature's Farm*, 2004 WL 1077968, at *3 (giving plaintiff's "artificial" choice of forum "less weight" because it "has only a slight or 'tenuous' connection to the operative facts").[13]

E. Trial efficiency and the interests of justice favor transfer.

Courts in this district typically analyze the trial-efficiency and interests-of-justice factors together. *E.g., Cont'l Cas. Co. v. Hopeman Bros., Inc.*, 17-CV-00688 (ALC), 2018 WL 1581987,

[13] Relator's pre-motion response letter incorrectly alleges that the S.D.N.Y. courthouse in White Plains is the closest federal courthouse to Relator's address in Westport, Connecticut. Response at 3. Instead, the closest federal courthouse to Relator's address in Westport is the District of Connecticut courthouse in Bridgeport (the Brien McMahon Federal Building). And while, as discussed *supra,* the Cigna corporate entities in Connecticut have no connection to the operative facts in this case or to the provision of Medicare Advantage insurance generally, those entities are also significantly closer to the District of Connecticut courthouse in Bridgeport than the S.D.N.Y. courthouse in White Plains.

at *13 (S.D.N.Y. Mar. 27, 2018). The analysis of these factors considers "the totality of the circumstances and relates primarily to issues of judicial economy." *Id.* (internal quotation marks omitted) (quoting *Indian Harbor Ins. Co.*, 419 F. Supp. 2d at 407). Here, these considerations favor transfer.

Cigna moved to transfer promptly, so that no other resources would be invested by the parties or the Court in litigating this case. Other than the amended complaint, *see* Dkt. 12, and the Government's decision not to intervene at this time, *see* Dkt. 13, no developments have occurred and the Court has not yet ruled on any material issues. Thus, the progress of litigation would not be affected by a transfer to the Middle District of Tennessee, especially since the two districts have nearly identical median times to trial and caseloads.[14]

Further, because Cigna conducts business in Tennessee, many of the operative facts occurred there, and many of the key witnesses are located there. Tennessee thus "has a public interest in adjudicating this dispute." *France Telecom S.A. v. Marvell Semiconductor, Inc.*, No. 12 Civ. 4986 (JSR), 2012 WL 6808527, at *3 (S.D.N.Y. Dec. 28, 2012); *see also Indian Harbor*, 419 F. Supp. 2d. at 407 (considering the "local interest in having localized controversies decided at home" (quoting *Sheet Metal Workers' Nat'l Pension Fund v. Gallagher,* 669 F. Supp. 88, 92 (S.D.N.Y. 1987) and noting that a controversy "arising in Pennsylvania, which will determine the rights of a prominent Pennsylvania institution" is "an inherently Pennsylvania-based claim . . . as Pennsylvania is the locus of operative facts and many of the potential witnesses reside in Pennsylvania"); *Everest Cap. Ltd. v. Everest Funds Mgmt., L.L.C.,* 178 F. Supp. 2d 459, 469

[14] *See* U.S. Courts, *Federal Court Management Statistics* (June 2020), at https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2020.pdf (showing, at p. 11, a median of 31.3 months from filing to trial for civil cases in the Southern District of New York, and at p. 45, a median of 31.2 months from filing to trial for civil cases in the Middle District of Tennessee).

(S.D.N.Y. 2002) ("Here, the totality of the circumstances supports transfer of this action to Nebraska" as "Nebraska is the only forum to which any of the parties has a clear connection.").

F. The remaining factors are neutral.

The remaining factors are neutral. The availability of process over witnesses is neutral, as neither party has identified any need for compulsory service. *Rosen v. Ritz-Carlton Hotel Co. LLC*, 14-CV-1385 RJS, 2015 WL 64736, at *4 (S.D.N.Y. Jan. 5, 2015). Likewise, the forum's familiarity with governing law favors neither venue "because the False Claims Act is a federal statute and 'any district court may handle [a federal case] with equal skill.'" *Nature's Farm*, 2004 WL 1077968, at *6 (quoting *Bristol-Myers Squibb Co. v. Andrx Pharms.,* 2003 WL 22888804, at *4). And the parties' relative means are neutral in *qui tam* cases. *See Roop*, 2007 WL 844691, at *2; *Dye v. Mag Instrument, Inc*., 2:10-CV-00167-RDP, 2010 WL 11615034, at *6 (N.D. Ala. Oct. 28, 2010) (finding the relative means of the parties to be a neutral factor where an individual relator sued a corporation in a *qui tam* case).

CONCLUSION

For these reasons, the Court should transfer this case to the Middle District of Tennessee.

Date: December 4, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2020, I electronically filed the foregoing document with the Clerk of Court using this Court's CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Eamon P. Joyce
Eamon P. Joyce

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel*. ROBERT A. CUTLER, Plaintiff, v. CIGNA CORP. *et al*., Defendants.	No. 7:17 Civ. 07515 (KMK) Hon. Kenneth M. Karas

DECLARATION OF CASEY MCKEON IN SUPPORT OF
CIGNA'S MOTION TO TRANSFER UNDER 28 U.S.C. § 1404(a)

I, Casey McKeon, declare as follows:

1. I am President of CareAllies, Inc., which is a wholly-owned, indirect subsidiary of Cigna Corporation. From October 2015 through February 2020, I held the position of General Manager of National Health Services for HealthSpring, Inc., which is also a wholly-owned, indirect subsidiary of Cigna Corporation. My office is located in Nashville, Tennessee. I have been employed by Cigna Corporation (through its subsidiaries) since June 2011, and I have been based in Nashville since 2015.

2. I am authorized to make the statements in this Declaration, which are true based on my personal knowledge, or upon information and belief, including inquiry of relevant Cigna records and employees.

3. I have reviewed the amended complaint filed by Relator Robert A. Cutler in this action (Dkt. 12), as well as Relator's September 14, 2020 letter opposing transfer and the exhibits thereto (Dkt. 52). I understand that Relator's allegations pertain to Cigna's Medicare Advantage

("MA") business and, more specifically, the "360 Exams" provided to Cigna's Medicare Advantage beneficiaries. Through my employment, I am familiar with Cigna's Medicare Advantage line of business and specifically familiar with the 360 Exam program.

4. One of the defendants named in the amended complaint is Cigna Corporation. *See* Am. Compl. ¶ 8. Cigna Corporation is a publicly traded holding company incorporated under the laws of Delaware and headquartered in Bloomfield, Connecticut. Cigna Corporation is the ultimate parent company of the global health service company known as "Cigna." As a holding company, Cigna Corporation does not directly offer any health insurance products and, in particular, does not offer a Medicare Advantage product.

5. Cigna operates its Medicare Advantage business principally through HealthSpring, Inc., and its subsidiaries and affiliates, now commonly known as "Cigna Medicare." HealthSpring was previously an unrelated company and was acquired by Cigna in 2012. Most, though not all, of Cigna's Medicare Advantage operations were acquired through that acquisition.

6. Cigna Medicare maintains its headquarters in Nashville, Tennessee. Since the 2012 acquisition, Cigna Medicare's operational and executive headquarters have been in the greater Nashville area, and since approximately 2015, the primary operating location for all of Cigna's Medicare Advantage business has been 530 Great Circle Road, Nashville, Tennessee, 37228. This includes both operational staff and senior leadership. For instance, the Informatics team that is responsible for collecting and submitting risk adjustment data to the Centers for Medicare & Medicaid Services ("CMS") is located in Nashville.

7. At all times relevant to this action, management of the 360 Exam program was based in the Nashville area. Primary responsibility for the 360 Exam program rests with a department known during the relevant time period as the Medicare Data Quality Operations ("MDQO")

department and a unit within MDQO, the Chronic Care Quality Initiative ("CCQI"). I supervised the MDQO and, accordingly, the CCQI, as part of my role as General Manager of National Health Services for Cigna Medicare.

8. In addition to the MDQO and CCQI teams, other potentially relevant witnesses in Nashville who may have knowledge regarding the 360 Exam program include business, compliance and operational personnel supporting the MDQO and CCQI teams, as well as the former employees who previously held positions within MDQO or CCQI.

9. Tennessee-based current and former Cigna employees who will likely serve as witnesses in this litigation include the former Chief Medical Officer of Cigna Medicare (Dr. Dirk Wales), the former Director of MDQO and Senior Medical Director of the Chronic Care Quality Initiative ("CCQI") (Dr. Michael Fessenden), the former Chronic Care Quality Manager & Educator (Dr. Jason Jean), and the Director of Coding Operations (Mr. Glynn Creech). All four individuals have substantial knowledge regarding the management of the 360 Exam program and the likely claims and defenses in this action. All four were both based in Nashville, Tennessee during the relevant times and are currently located in the Nashville area.

10. Dr. Dirk Wales served as the Chief Medical Officer of HealthSpring prior to Cigna's acquisition of the company, and continued in that role until he departed Cigna earlier this year. Dr. Wales was integral to the initial design and development of the 360 Exam and oversaw the program in a high-level supervisory role until his departure from Cigna. Dr. Wales is located in the greater Nashville area.

11. Dr. Michael Fessenden served as the Senior Medical Director of CCQI from July 2013 to June 2020, and as the Director of MDQO from November 2015 to June 2020. Dr.

Fessenden's responsibilities during this time included the day-to-day supervision of the 360 Exam program. Dr. Fessenden is located in the greater Nashville area.

12. Dr. Jason Jean is a nurse practitioner, with a doctorate in nursing practice, who served as Cigna's Chronic Care Quality Manager & Educator from June 2014 until December 2018. In that role, Dr. Jean was responsible for developing clinical training materials used to educate providers, including those performing 360 Exams. Dr. Jean currently serves as Senior Advisor for Cigna Medicare. He is located in the greater Nashville area.

13. Mr. Glynn Creech has served as Cigna's Director of Risk Adjustment Coding Operations since 2014. His responsibilities include managing the coding processes for the 360 Exam program. Mr. Creech is located in the greater Nashville area.

14. Besides the above individuals, Relator referenced four additional employees of Cigna entities in the amended complaint. *See* Am. Compl. ¶¶ 52, 75, 80. Of those four employees, three are located in Texas (Whitney Horak, Chaun Tatum-Williams, and Leslie Anders) and one is located in Delaware (Shelley Stevens). None is located in New York.

15. It is highly likely that multiple other witnesses in this case will be personnel who work and live in the Nashville, Tennessee area. I know of no relevant witness who lives in New York state.

16. In addition, many of the central and individual document custodians and repositories that are most likely to be related to this case are maintained in Nashville. To the best of my knowledge, none of the documents or document custodians relevant to this case are located in the Southern District of New York or the state of New York.

17. Many of the electronic systems involved in the operation of the 360 Exam program, such as the databases for storing and reviewing data and documentation regarding the 360 Exams, were developed by, and remain managed by, individuals based in Nashville.

18. It is possible that relevant witnesses may be located in Phoenix, Arizona or Houston, Texas, as those are the areas in which THM performed 360 Exams. Should it become necessary for individuals in Phoenix or Houston to participate in this case, Nashville will be a more convenient location for them than New York, as these personnel do, in many cases, travel for work to Nashville where in any event, Cigna would readily have facilities available to them, as needed.

19. Currently, Cigna Medicare "offers Medicare Advantage plans in 18 states, including Alabama, Arkansas, Arizona, Colorado, Delaware, Florida, Georgia, Illinois, Kansas, Missouri, Maryland, Mississippi, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas and the District of Columbia." Cigna Newsroom, *Cigna expands its Medicare Advantage offerings and benefits while minimizing costs to consumers* (Oct. 1, 2019) https://www.cigna.com/newsroom/news-releases/2019/cigna-expands-its-medicare-advantage-offerings-and-benefits-while-minimizing-costs-to-consumers. Cigna Medicare has never operated a Medicare Advantage plan in New York state.

20. To the best of my knowledge, no Cigna entity has ever provided Medicare Advantage coverage to residents of New York. To the best of my knowledge, no resident of New York has ever received a 360 Exam. I do not anticipate there being *any* individuals resident in New York who would be a witness in this case or any documents located in New York that would be produced in this case.

21. For these reasons, I believe that it would be more convenient, less burdensome, and less expensive for the Cigna defendants and the individuals who may potentially be called as witnesses to litigate this action in the Middle District of Tennessee.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 3, 2020, at Nashville, Tennessee.

DocuSigned by:
Casey McKeon
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel*. ROBERT A. CUTLER, Plaintiff, v. CIGNA CORP. *et al*., Defendants.	No. 7:17 Civ. 07515 (KMK) Hon. Kenneth M. Karas

DECLARATION OF ROBERT D. KEELING, ESQ.

1. I, Robert D. Keeling, in support of Defendants' Motion to Transfer The Case To The Middle District of Tennessee pursuant to 28 U.S.C. § 1404(a), declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

2. I am a member of the Bars of the Commonwealth of Virginia and the District of Columbia, and a partner of Sidley Austin LLP, which represents Defendants in the above-captioned case.

3. I have been admitted *pro hac vice* to appear before the United States District Court for the Southern District of New York with respect to this action.

4. A true and correct copy of excerpts from a February 14, 2017 transcript of American Arbitration Association ("AAA") Case No. 01-17-0000-6403, *Texas Health Management LLC v. HealthSpring Life & Health Insurance Co., Inc*., is attached as Exhibit A.

5. A true and correct copy of a March 15, 2017 letter from THM General Counsel Robert A. Cutler to AAA, regarding Case No. 01-17-0000-6403, is attached as Exhibit B.

6. A true and correct copy of excerpts from the March 13, 2018 Final Award in AAA Case No. 01-17-0000-6403, is attached as Exhibit C.

7. A true and correct copy of excerpts from a September 6, 2018 transcript of Texas state court proceedings in *HealthSpring Life & Health Insurance Co., Inc. v. Texas Health Management LLC*, Trial Cause No. 219-00125-2018, Appeal No. 05-18-01036-CV, is attached as Exhibit D.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

December 4, 2020
Date

Robert D. Keeling, Esq.

EXHIBIT A

ARBITRATION AMERICAN ASSOCIATION

TEXAS HEALTH MANAGEMENT LLC,

Claimant,

vs.

HEALTHSPRING LIFE & HEALTH INSURANCE COMPANY, INC.,

Case No. 01-17-0000-6403

FEBRUARY 14, 2017

Hearing proceedings, held at BALLARD SPAHR LLP, 919 Third Avenue, 37th Floor, New York, New York, before Margaret M. Reihl, RPR, CCR, CRR, CLR and Notary Public, on the above date, commencing at 10:09 a.m., there being present:

GOLKOW TECHNOLOGIES, INC.
877.370.3377 ph/917.591.5672 fax
deps@golkow.com

A P P E A R A N C E S:

THE ARBITRATOR:
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- AND -
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Counsel for Respondent

I N D E X

WITNESS	DIRECT	CROSS	REDIR.	RECR.
JOSEPH STROFFOLINO	6	33	--	--
WADE SLOAN	72	75	--	84
MICHAEL FESSENDEN, M.D., M.B.A.	105	123	--	--
SHELLY STEVENS	158	166	--	--

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E X H I B I T S

CLAIMANT'S EXHIBITS		MARKED
C-1	E-mail string, top one dated 1/21/16, with attached Amendment to Business Services Agreement By and Between HealthSpring and Texas Health Management	88
C-2	E-mail string, top one dated 1/22/16	88

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RESPONDENT'S EXHIBITS		
R-1	E-mails dated 12/15/15 with attached Amendment to Business Services Agreement By and Between HealthSpring and Texas Health Management	50
R-2	E-mail string, top one dated 10/22/15	50

A. You're going in and out a little, sorry.

Q. Sorry. You had communicated in that e-mail that we already talked about that there would be a single price inclusive of the exam and lab, correct?

A. Inclusive, yeah. I mean, you're going in and out. I'm sorry, I don't know why.

Q. Is this better now? Can you hear me now?

A. Yeah.

Q. So you communicated in that e-mail, which we've marked as Exhibit 2, that there would be a single price for the exam and the lab, correct?

A. Yes.

Q. Now, did you ever communicate to HealthSpring that that -- that your proposed rates were no longer going to include a single price for the exam and lab?

A. No, I don't believe I did.

Q. Mr. Stroffolino, who was Michael Walton or who is Michael Walton?

A. He was a partner of mine.

Q. A partner -- he was a partner that owned THM?

A. He was a part owner, yes.

Q. And at some point he sold his shares?
A. Yes.
Q. And when was that?
A. June of 2016.
Q. And he negotiated the original agreement with HealthSpring; is that right?
A. In 2013?
Q. Yes.
A. Yes.
Q. And to whom did Mr. Walton sell his shares?
A. Well, back to the company.
Q. So at the time he -- so it was back to the three of you, Mr. Stroffolino, Mr. Cutler and you -- sorry, you, Mr. Sloan and Mr. Cutler?
A. Yes.
Q. Was he -- before that time did he have an equal share in the company?
A. With me, yes.
Q. When you say with you, so you two were the majority shareholders?
A. Yes.
Q. And when did Mr. Sloan become a partner?
A. In 2012.

Q. And when did Mr. Cutler become a partner?

A. 2012.

Q. And was Mr. Walton involved in the amendment, the discussions regarding the amendment?

A. No.

Q. Why not?

A. Because I primarily handled contracts at that time.

Q. How much revenue did THM have in 2015?

A. I don't know off the top of my head. It was somewhere, I think, between 5 and a half, 5.5 and 6 million.

Q. And how about in 2016?

A. Well, it should be --

MR. CUTLER: I'm sorry. Is this relevant?

MR. LECKERMAN: Sure, because you're claiming you're going to go under unless you get your $2 million now, so I'd like to know how much money you've made.

MR. DANIELS: I'm going to allow it.

MR. CUTLER: Is that fair now?

MR. DANIELS: Yeah, I want to hear it,

EXHIBIT B

March 15, 2017

VIA ELECTONIC SUBMISSION

American Arbitration Association
200 State Street, 7th Floor
Boston, MA 02109

RE: Case No. 01-17-0000-6403
Notice of Change of Claim under R-6(b)

Dear Ms. Romeo:

This letter shall serve as written notice pursuant to R-6(b) that Claimant's demand is hereby amended to include additional claims. With the addition of the new claims, the total claims and claim amounts are as follows (new claims are highlighted in yellow):

Count	Claim Description	Claim Amount
I	Breach of Contract - Failure to pay invoices	$2,073,595
II	Breach of Contract - Failure to perform obligations under Section 12 of Business Services Agreement	$3,500,000
III	Breach of Contract - Failure to pay monthly invoice under Section 6.	$393,235
IV	Breach of Contract – Failure to provide minimum business volume under Section 6 of Business Services Agreement	$733,075
V	Breach of Covenant of Good Faith and Fair Dealing	$50,000,000
VI	Common Law Fraudulent Misrepresentation	Included above
VII	Common Law Negligent Misrepresentation	Included above
VIII	Common Law Conversion	Included above
IX	Violation of §2 of Sherman Act	Amount to be determined
X	Violation of Texas Free Enterprise and Antitrust Act of 1983 §15.05	Amount to be determined

XI	Violation of Texas Business and Commerce Code §17.46	Amount to be determined
XII	Violation of Tennessee Code §47-50-109	Amount to be determined
XIII	Violation of False Claims Act	None in this proceeding. Claimant is seeking leave to pursue this claim in court

The breach of contract claim in Count II relates to Respondent's failure to provide the list of plan member names as required under Section 12 so as to allow Claimant to perform Covered Services during the Termination Period.

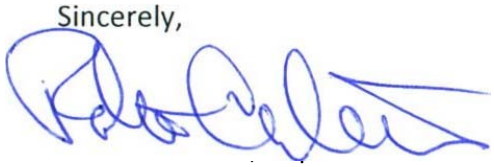
The breach of contract claim in Count III relates to Respondent's failure to make the payment of $393,235 due on February 15, 2017.

The breach of contract claim in Count IV relates to Respondent's failure to provide a sufficient volume of business in Texas in 2016 as described in the second full paragraph on page 2 of the Termination and Demand for Compensation that has previously been delivered to the Respondent.

The facts giving rise to all other claims are described in the aforementioned Notice of Termination and Demand for Compensation.

Taking into account the foregoing, the total amount of monetary relief requested in this matter is hereby increased to $167,849,905.

Sincerely,



General Counsel

*Admitted to practice law in the State of New York

EXHIBIT C

AMERICAN ARBITRATION ASSOCIATION

COMMERCIAL ARBITRATION TRIBUNAL

In the matter of an arbitration between

TEXAS HEALTH MANAGEMENT LLC,

Claimant,

- and -

HEALTHSPRING LIFE & HEALTH INSURANCE COMPANY, INC.,

Respondent.

Case No. 01-17-0000-6403

FINAL AWARD

We the undersigned Arbitrators, having been duly designated in accordance with the arbitration agreement entered into by the above-named parties and dated as of May 1, 2013, and having been duly sworn, and having duly heard the proofs and allegations of the parties, hereby AWARD as follows:

I. INTRODUCTION

The hearing in this arbitration was duly commenced and conducted on October 23, 25, 27 and 30, and November 6, 7 and 15, 2017. Claimant Texas Health Management LLC ("Texas Health") was represented at the hearing by Robert Cutler, Esq. Respondent HealthSpring Life & Health Insurance Company, Inc. ("HealthSpring") was represented by Jason A. Leckerman, Esq., and Brittany M. Wilson, Esq., of Ballard Spahr LLP. Subsequent to the hearing, there were additional communications among the parties and the Panel regarding a matter that arose at the hearing, leading to Order Nos. 6-10. The parties submitted post-hearing briefs and responding briefs and the hearing was declared closed as of February 5, 2018. Pursuant to agreement by the parties, the deadline for issuing the Final Award was set at March 15, 2018.

The Tribunal, having been duly sworn and having heard and considered the proofs presented, including testimony and exhibits; having reviewed and considered the pre-and post-hearing written submissions and legal authorities offered by the parties; and the parties having had a full and complete opportunity to present their evidence in support of their respective positions on the issues submitted for decision;

Now, therefore, upon all of the prior proceedings herein, and due deliberation having been had thereon, and on the facts, the law and in accordance with the Rules, the Tribunal hereby issues this Final Award as follows.[1]

II. BACKGROUND OF THE DISPUTE [2]

Texas Health is an organization providing certain health care services through nurse practitioners and related personnel. HealthSpring is an organization providing health insurance for its enrollees ("members"). In 2013, the parties entered into an agreement (the "2013 Agreement") under which Texas Health was to perform health assessments for members of HealthSpring, and HealthSpring was to pay for those services on a per member basis. As part of the health assessment, Texas Health was required to prepare and deliver to HealthSpring a form for each member ("360 Form") which contained medical information regarding the members that Texas Health derived from interviews and physical examinations of the members. The 2013 Agreement was not geographically limited and applied to all HealthSpring members for whom Texas Health provided services.

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[1] Pursuant to the parties' agreement, the form of this Final Award is a reasoned opinion. Accordingly, the Final Award shall not present detailed findings of fact and conclusions of law, nor recite all the facts and address all arguments and the full body of legal authority presented by the parties. The Tribunal is familiar with and has considered the complete factual record and all of the parties' factual and legal contentions in issuing this Final Award. To the extent any of the parties' arguments are not expressly addressed but are inconsistent with the rulings herein, they were considered to be not persuasive.

[2] This section of the Final Award contains a general description of events giving rise to the parties' dispute in order to put the succeeding sections in context. It is not intended to be a full recitation of events and certain additional facts will be set forth in succeeding sections as needed.

Texas Health's rights under the Agreement, deceptive and unfair trade practices, anti-competitive business conduct and intentional violation of the implied covenants of good faith and fair dealing.

The January 16 letter also asserted claims for underpayment for services in 2015 and 2016. Texas Health expressed its view that the pricing in the Amendment was only for the health assessment and 360 Form, and that Texas Health was entitled to perform and separately charge for HMRs and Labs at $50 for each type of service. Thus, Texas Health demanded that for 2015, in which HealthSpring already had paid for HMRs and Labs, HealthSpring was required to pay an additional charge of $95 for the first 10,000 patients and $45 per patient in excess of 10,000. For 2016, Texas Health stated that HealthSpring paid the proper amount of $295 per health assessment, but owed additional charges of $50 for HMRs and $50 for Labs, depending on the services provided to a particular member. Texas Health enclosed invoices for the additional payments it claimed were owed for 2015 and 2016. This was the first time after the Amendment was executed a year earlier that Texas Health advised HealthSpring that it could charge separately for HMRs and Labs and was owed money under the Agreement.

On January 30, 2017, Texas Health filed a Demand for Arbitration. It also filed an application for emergency relief seeking an immediate monetary award because of its dire financial condition. Also on January 30, HealthSpring demanded that Texas Health deliver to it approximately 15,000 360 Forms that had been completed but not furnished to HealthSpring.[4] On February 10, 2017, HealthSpring sent a letter to Texas Health terminating the Agreement for various breaches of the Agreement, including failure to deliver the 360 Forms. An evidentiary

[4] Approximately 10,000 forms had previously been delivered to HealthSpring but were returned for Texas Health to correct deficient electronic signatures. By January 30, they had been corrected and were ready for delivery. The remaining 5,000 forms had been completed but not delivered.

hearing on Texas Health's request for emergency relief was conducted on February 14 and, on February 17, the Emergency Arbitrator issued a decision denying Texas Health's request. The arbitration continued, resulting in the hearing on the merits and this Final Award.

Texas Health submitted several claims to the Tribunal for resolution:

1. HealthSpring breached the Agreement by failing to pay the invoices sent with the January 16 letter;

2. HealthSpring breached the Agreement by issuing the RFP and was required to send a termination notice at that time;

3. HealthSpring breached the Agreement by failing to timely release names in the last quarter of 2016 and in January 2017;

4. HealthSpring breached the Agreement by failing to adhere to the terms of the wind down;

5. HealthSpring breached the Agreement by not making the monthly payment in February 2017 of $393,235;

6. HealthSpring acted in bad faith and breached the implied covenant of good faith and fair dealing;

7. HealthSpring was liable for violating Texas Code § 47-50-109 by inducing or procuring the breach of several contracts to which Texas Health was a party; and

8. For the various breaches of contract and other wrongful conduct, HealthSpring was liable for amounts due under the Agreement, lost profits, consequential damages for Texas

EXHIBIT D

REPORTER'S RECORD
VOLUME 2 OF 3 VOLUMES
TRIAL COURT CAUSE NO. 219-00125-2018
APPEAL NO. 05-18-01036-CV

HEALTHSPRING LIFE & HEALTH INSURANCE COMPANY, INC., 2900 North Loop West, Suite 1300 Houston, Texas 77092	)	IN THE DISTRICT COURT
vs.	)	COLLIN COUNTY, TEXAS
TEXAS HEALTH MANAGEMENT LLC, 1701 Legacy Drive, Suite 2000 Frisco, Texas 75034	)	219TH JUDICIAL DISTRICT

MOTION TO STAY AND MOTION TO STRIKE

On the 6th day of September, 2018, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Scott J. Becker, Judge Presiding, held in McKinney, Collin County, Texas.

Proceedings reported by computerized stenotype machine.

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ATTORNEY FOR DEFENDANT

10:34

MR. CUTLER: Yes, Your Honor.

ROBERT CUTLER,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

10:34 BY THE COURT:

Q. Where are the forms?

A. I don't know.

Q. Right now you understand that if it comes to light that you know where those forms are as you stand in front

10:34 of me right now you, personally, are in contempt of this Court --

A. Yes, Your Honor.

Q. -- and you know what I do to people that are in contempt.

10:34 A. I understand, Your Honor, if I may explain.

Q. Do you want to take a few minutes to find -- find out where those forms are?

A. I -- I mean.

Q. I've got another hearing this morning. You can

10:34 stick around and -- if you need to make some calls, you can shoot some emails, you can Google it, whatever you have to do. You can come back here after this hearing and then you can update me about your success or lack thereof about not being able to find the forms.

10:34 A. I will do whatever the Court wants me to do. I've