IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA *ex rel*. ROBERT A. CUTLER, Plaintiff, v. CIGNA CORP. *et al.*, Defendants.	Civil Action No. 3:21-cv-00748 JUDGE RICHARDSON MAGISTRATE JUDGE FRENSLEY

UNITED STATES' MOTION TO PARTIALLY INTERVENE

Pursuant to the False Claims Act, 31 U.S.C. § 3730(c)(3), the United States respectfully moves the Court to partially intervene in this *qui tam* action for good cause. Specifically, the United States seeks leave to partially intervene in this matter (on claims that for which it previously made no intervention decision) and assert claims that, from 2012 through 2019, Cigna violated the False Claims Act by knowingly and fraudulently submitting to Medicare for risk adjustment payment purposes invalid diagnoses of certain serious medical conditions that were based only on visits to the beneficiaries' homes conducted by Cigna's vendors' nurse practitioners without conducting the testing, imaging, or other clinical steps necessary to diagnose those conditions. Furthermore, the United States alleges that the beneficiaries did not receive any medical treatment for these conditions during the home visits or from any other medical provider during the year of the home visit. These claims are narrower than Relator's allegations and theories. The United States also respectfully requests that it be given thirty (30) additional days from the date when the Court rules on the motion to file its complaint in intervention. The United States conferred with

counsel for the Relator and Defendants about their position on this motion. Relator consents to this motion, and Defendants oppose it.

As explained in the accompanying memorandum of law, there is good cause to support this motion.

Respectfully submitted,

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UNITED STATES' MEMORANDUM OF LAW
SUPPORTING ITS MOTION TO PARTIALLY INTERVENE

Good cause exists to support the United States' motion to partially intervene in this *qui tam* action pursuant to 31 U.S.C. § 3730(c)(3). Since February 2020, when the government notified the District Court for the Southern District of New York it had made no decision on whether to intervene on certain claims, the government has continued to investigate this matter—including by obtaining new, probative evidence—and engaged in extensive, but ultimately unsuccessful, settlement discussions with Defendants (defined below). Now that the case will proceed in litigation, intervention is in the public interest: if the government intervenes, it will be able to employ its resources and expertise to ensure the recovery of millions of dollars obtained fraudulently from the Medicare Advantage Program, also known as Medicare Part C. Intervention will not prejudice any party: Relator, whose interests the good cause standard protects, consents to the motion. And, because the case is in a very early stage, intervention will not prejudice the Defendants: they have not yet answered the Relator's Complaint, and no discovery has been taken by any party.

If the motion is granted, the United States is prepared to file its Notice of Partial Intervention and Complaint-In-Intervention within 30 days of the date the motion is granted.

BACKGROUND

Relator Robert A. Cutler ("Relator") filed this *qui tam* action pursuant to the False Claims Act ("FCA") on October 2, 2017, under seal in the United States District Court for the Southern District of New York. ECF Nos. 1 & 94 (complaint), 90 (unsealing order). Relator alleged that Defendants, including Cigna Corporation and its various corporate affiliates (together, the "Defendants") that operate Medicare Advantage Organizations ("MAOs"), submitted false risk adjustment data to the Centers for Medicare & Medicaid Services ("CMS"), which operates the Medicare Advantage ("MA")) Program (also known as Part C of the Medicare Program).

Medicare Advantage is an alternative to traditional Medicare Parts A and B fee-for-service coverage for hospital and physician services. Under the MA Program, CMS pays MAOs like Cigna, which operate MA plans. In turn, the MAOs pay healthcare providers, such as doctors and hospitals, for treating beneficiaries enrolled in their MA plans. The amount paid by CMS to MAOs is based on CMS's risk adjustment system, which takes into account demographic factors and the health status of each beneficiary, and relies on the submission of diagnosis codes from MAOs to determine the health status of beneficiaries. Typically, MAOs like Cigna receive higher per beneficiary monthly payments for patients with more serious health conditions. *See generally United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1167-70 (9th Cir. 2016) (providing overview of Medicare Part C program). MAOs therefore "have a financial incentive to exaggerate an enrollee's health risks by reporting diagnosis codes that may not be supported by the enrollee's medical records." *Id*. at 1166.

Here, Relator alleges that Defendants generated false risk adjustment data through home visits made through Defendants' "360 Program," in which Defendants hired nurse practitioners to visit beneficiaries' homes to gather diagnoses. *See* Complaint ¶¶ 28-47. According to the complaint, diagnoses made during in-home visits performed under the 360 Program resulted in the submission of false risk adjustment data that artificially inflated the Medicare payments received by Cigna.[1]

[1] In the Proposed Initial Case Management Order filed with this Court, Relator states that his theory is as follows:

> Defendants have defrauded the United States government through its submission of unsupported, inaccurate and otherwise invalid claims for payment. This scheme continued from at least 2012 to 2017 and violated the False Claims Act through Defendants' submission of false diagnostic codes to the Centers for Medicare & Medicaid Services for medical conditions which Defendants knew had not been properly diagnosed. These conditions were identified by contracted nurses who performed "360 comprehensive assessments" ("360s") on Defendants' behalf in a patient's home. The conditions which were identified during the 360s were not useable for risk adjustment purposes because, among other things, (1) the nurses lacked the equipment necessary to test, and they did not test, for many of the diseases they were diagnosing (including congestive heart failure, renal kidney disease and cancer among other conditions), (2) the nurses did not have the proper credentials to diagnose many of the diseases they were diagnosing, including severe mental disorders (e.g. schizophrenia, bi-polar disorder and major depression to name a few) and other diseases requiring specialized education and training, (3) they were not medical diagnoses, as the findings were not based on actual clinical data but rather medications found in the member's home and information furnished by the member as part of a self-assessment of his or her health, and (4) the 360s were not medical exams, nor were they performed as such, as the nurses intended and expected that their findings would be verified by appropriate follow up testing and examination by the patient's primary care provider. To be clear, Plaintiff is not arguing that medical diagnoses rendered by nurses in a patient's home are per se invalid for risk adjustment purposes.

ECF No. 156 at 2.

Relator filed his complaint proceeding *pro se*. After Relator obtained counsel in 2018, Relator filed the operative amended complaint under seal on June 11, 2019. ECF No. 12. His counsel later withdrew from the representation, and he has since retained new counsel.

After the complaint was filed, the government conducted an extensive investigation into the Relator's allegations. In 2018, the government issued civil investigative demands to the Defendants and other entities, and received and reviewed thousands of pages of documents. The government also took the sworn testimony of a Cigna corporate representative in 2019. Among other things, the investigative team also conferred with the United States Department of Health and Human Services and CMS; retained consultants; and reviewed risk adjustment data. During this time, the government also repeatedly advised the District Court for the Southern District of New York of the investigative steps it had taken to show good cause for further extensions of the sealing order pursuant to 31 U.S.C. § 3730(b)(3).

In February 2020, after the Court indicated that the government would receive no further extensions of the seal pursuant to 31 U.S.C. § 3730(b)(3), the government filed a notice stating that it would decline to intervene as to some of Relator's claims, but that it had not made a decision as to whether to intervene as to other claims. Specifically, the government declined to intervene with respect to a broad allegation that all diagnosis codes generated by nurse practitioner in-home assessments resulted in "per se" violations of the FCA. *See* Notice of the United States (February 25, 2020), ECF No. 13 at 1-2 (noting that "the Government has elected to decline as to the relator's claims insofar as he asserts that when defendants submitted diagnosis codes based on so-called 360 'nurse home visits' to CMS for risk adjustment payment purposes under Medicare Part C, they committed per se violations of the False Claims Act [] because the nurse home visits did not involve the provision of medical treatment."). The notice also stated that, with regard to the

remaining allegations of Relator's amended complaint, the government had decided not to intervene at that time—but had *not declined* to intervene. *Id*. at 2.

The government continued to investigate Relator's remaining allegations—those as to which it had made no decision—after the February 2020 notice was filed, focusing specifically on the validity of certain specific diagnoses that were made through the 360 home-visit program. The government received additional documents and data from Defendants. In addition, the government took sworn testimony from additional witnesses, including of Cigna's former chief medical officer. The government also continued to coordinate with CMS to obtain additional data related to the risk adjustment data submitted by Cigna during the relevant period, and the impact that diagnoses generated by the 360 home-visit program had on the payments Cigna received from CMS. Some of the analysis was aided by consultants outside the government. The government's investigation was slowed by the onset of the COVID-19 pandemic.

Based on the results of its continuing investigation, the government determined that, in order to increase its risk adjustment payments, Cigna had violated the False Claims Act by knowingly and fraudulently submitting to CMS invalid diagnoses of certain serious medical conditions that were based only on visits to the beneficiaries' homes conducted by Cigna's vendors' nurse practitioners without conducting the testing, imaging, or other clinical steps necessary to diagnose those conditions. These serious conditions included chronic kidney disease, congestive heart failure, and rheumatoid arthritis, among others. Defendants submitted these invalid diagnoses even though the beneficiaries did not receive any medical treatment for these conditions during the home visits or from any other medical provider during the year of the home visit. The government presented its findings to Cigna and, at Cigna's request, engaged in settlement discussions to attempt to resolve the government's claims without the need for

litigation. These settlement discussions began early in the fall of 2020 and continued until October 2021.[2]

During these discussions, Defendants requested to make, and made, several presentations to the government related to their positions on various legal and factual questions. Defendants also retained new counsel in the spring of 2021, which further prolonged the settlement discussions. However, although the parties had amicable discussions, it was ultimately not possible to reach a consensual resolution.

While settlement discussions were ongoing, Defendants moved to transfer the case to this District. *See* ECF No. 71. The United States District Court for the Southern District of New York granted that motion over Relator's opposition. *See* September 17, 2021 Minute Entry (documenting that argument was held and the motion to transfer was granted); ECF No. 127 (granting transfer motion).

Finally, as indicated in the government's November 23, 2021 motion to reschedule the initial conference, ECF No. 152, the U.S. Attorneys' Offices for the Southern District of New York and the Middle District of Tennessee made a recommendation to the Civil Division of the Department of Justice to intervene in part in this matter. The government received the necessary approval to seek leave to intervene earlier this week.

ARGUMENT

The Government seeks leave to partially intervene in this matter (on claims on which it previously made no intervention decision) and assert claims that, from 2012 through 2019, Cigna

[2] Based on discussions before this motion was filed, the government understands that Defendants will not argue that the time spent in settlement discussions should be a basis to deny the government's motion. Both for this reason and because the parties' settlement discussions were understood by both sides to be confidential and protected by Federal Rule of Evidence 408, we have not included any details about the substance of those discussions.

violated the False Claims Act by knowingly and fraudulently submitting to CMS for risk adjustment payment purposes invalid diagnoses of certain serious medical conditions that were based only on visits to the beneficiaries' homes conducted by Cigna's vendors' nurse practitioners without conducting the testing, imaging, or other clinical steps necessary to diagnose those conditions. Furthermore, the government alleges that the beneficiaries did not receive any medical treatment for these conditions during the home visits or from any other medical provider during the year of the home visit. These claims are narrower than Relator's allegations and theories.

Good cause exists to permit the United States to intervene: it would be in the public interest for the government to use its resources and expertise to protect the public fisc, and the government has obtained new evidence supporting its claims since filing its February 2020 notice. Moreover, no party will be prejudiced by intervention, given that Relator consents to this motion, Defendants have neither answered nor moved to dismiss, and discovery has not begun.

Under the False Claims Act, a private person, known as a relator, may file a civil action on behalf of the United States. 31 U.S.C. § 3730(b)(1). The complaint must be filed *in camera* and shall remain under seal for at least 60 days. *Id*. § 3730(b)(2). This 60-day period may be extended by the court for good cause shown. *Id*. § 3730(b)(3). Before the intervention deadline, the United States must "proceed with the action, in which case the action shall be conducted by the Government," or "notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." *Id*. § 3730(b)(4).

Regardless of whether the United States intervenes, the action is one for false claims upon the United States, which remains the real party in interest. *United States v. UT Medical Group, Inc*., 2013 WL 12149636, at *2 (W.D. Tenn. Aug. 15, 2013). Thus, even in a non-intervened case, the government is entitled to at least seventy percent of any eventual recovery, *see* 31 U.S.C.

§ 3730(d)(2), and the government retains significant rights over the litigation. For example, the government must consent to a dismissal, *see* 31 U.S.C. § 3730(b)(1); may settle the action over the relator's objection if "the proposed settlement is fair, adequate, and reasonable under all the circumstances," *id.* § 3730(c)(2)(B); and may move for a stay of discovery if the government shows that "actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," *id*. § 3730(c)(4).

The False Claims Act further provides that "the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. § 3730(c)(3); *UT Med. Grp.*, 2013 WL 12149636, at *2 ("Even if the United States elects not to intervene, the United States remains a real party in interest and may re-enter the litigation at any time for good cause."). The statute does not define the term "good cause," but courts have looked to "(1) whether intervention would be in the public interest, (2) whether new, probative evidence has been discovered, particularly as to the magnitude of the fraud, and (3) whether intervention would unfairly prejudice the relator or the defendant." *United States ex rel. Ross v. Indep. Health Corp.*, No. 12-CV-299S, 2021 WL 3492917, at *2 (W.D.N.Y. Aug. 9, 2021) (citations omitted). Ultimately, a court must "balanc[e] the government's justifications for an untimely intervention against any possible prejudice to the relators and defendants caused by such intervention." *Griffith v. Conn*, No. 11-157-ART-EBA, 2016 WL 3156497, at *3 (E.D. Ky. Apr. 22, 2016) (Thapar, J.). Each of these factors supports intervention here, and none weighs against it.

First, intervention would be in the public interest. The government makes many billions of dollars of payments each year under the MA Program and has a very significant interest in

protecting the integrity of payments under this program. The government believes that Cigna's misconduct violated various rules and regulations seeking to protect payment integrity and resulted in the submission and payment of millions of dollars of false claims. In addition, the fraud claims will be most effectively litigated and resolved if the government participates as a party given its particular expertise in the administration of the MA Program—including the regulations applicable to the submission of diagnosis data, the payments to MAOs, and how those payments are calculated. Courts recognize that the government's interest in enforcing program requirements using its resources and expertise is an important public interest supporting a finding of good cause. *Griffith*, No. 2016 WL 3156497, at *3; *U.S. ex rel. Stone v. Rockwell Int'l Corp.*, 950 F. Supp. 1046, 1049 (D. Colo. 1996) (the public interest factor is of "paramount importance" and holding that the government's participation "would add significantly to the completeness and fairness of any trial"); *Indep. Health*, 2021 WL 3492917, at *3 ("The purpose of the [FCA] is to protect the government from fraud, and it is best protected if it fully participates in the litigation, bringing its considerable expertise and resources to bear against those alleged to have defrauded it.").

The government has a strong interest in ensuring compliance with regulatory requirements of the MA Program, including the validity of risk adjustment data submitted under the MA Program. In recent years, the government has intervened in a number of qui tam cases involving the validity of risk adjustment data under the MA Program: in addition to the *Independent Health* case cited above, the government also has intervened in *United States ex rel Poehling v. UnitedHealth Group, Inc., et al.*, cv 16-08697 (C.D. Cal.) and *United States ex rel. Osinek v. Kaiser Permanente, et al.*, 3:13-cv-03891 (N.D. Cal.), both of which remain pending, and *United States ex rel. Ormsby v. Sutter Health, et al.*, 15-cv-01062 (N.D. Cal.), which has settled. The United

States also has brought an MA suit directly under the False Claims Act without a *qui tam* action. *See United States v. Anthem, Inc.*, 20 Civ. 2593 (ALC) (S.D.N.Y.) (pending).

Second, since the government's February 2020 notice, the United States has received additional information and conducted further data analyses that have informed the government's ultimate decision to partially intervene in this matter. The United States has received additional documents and information from Defendants, including through the testimony of senior Cigna personnel and the production of a significant volume of additional documents. In addition, the government conducted further analysis of the risk adjustment data submitted by Cigna during the relevant time period, including data related to how diagnoses generated by the 360 program impacted the payments Cigna received from CMS. Together, this information helped the government determine the scope of the alleged fraud—which meets the "new evidence" prong. *Indep. Health*, 2021 WL 3492917, at *3. More generally, it is not unusual for the government to intervene later, after initially declining to intervene, once it has completed its investigation or gathered additional evidence sufficient to make an informed intervention decision. *See, e.g.*, *United States ex rel. Fry v. Guidant Corp.*, 2008 WL 11510790, at *2 (M.D. Tenn. Jan. 11, 2008) (referencing district court's prior decision to permit the United States to intervene, after an initial declination, when the relator's complaint went on to survive a motion to dismiss and when the United States discovered new evidence demonstrating FCA violations).[3]

[3] Should Defendants point to Chief Judge Crenshaw's decision denying the United States' motion to intervene in *United States ex rel. Odom v. Southeast Eye Specialists, PLLC*, the United States points out that this decision was both unpublished and factually inapposite. *See United States ex rel. Odom v. Southeast Eye Specialists, PLLC*, Case No. 3:17-cv-00689 (M.D. Tenn. Feb. 24, 2021), ECF Nos. 104 & 105. In that case, the Court's remarks from the bench focused on the United States' lack of new evidence and did not address the prejudice part of the good cause standard whatsoever. *See id*., ECF No. 105 at PageID# 753. Further, the *Independent Health* decision came *after* the *Southeast Eye* decision and allowed government intervention under very similar circumstances to those here. *See Indep. Health Corp.*, 2021 WL 3492917, at *2.

Third, intervention at this time would not prejudice either Relator or Defendants. *See Griffith*, 2016 WL 3156497, at *3 ("[T]he purpose of the "good cause" requirement for late intervention must be to provide protection to relators and defendants from unfair prejudice due to an untimely intervention from the government.").

Regarding the Relator, courts have found that the good cause standard "was intended to protect the interests of the relator," since a relator may receive a lower share of recovery in an intervened case than in a non-intervened one. *Rockwell*, 950 F. Supp. at 1049 (citing 31 U.S.C. § 3730(d)). For this reason, courts have found good cause exists when the relator consents to the intervention. *See United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.,* 2011 WL 4480846, at *1 (M.D. Fla. Sept. 27, 2011); *Rockwell* 950 F. Supp. at 1049. Here, the Relator consents to the United States' intervention at this time. That alone may be sufficient basis to find good cause. *See Rockwell*, 950 F. Supp. at 1049.

Regarding the Defendants, this case is still at a "relatively early stage of the proceeding," since Defendants have not yet answered or moved to dismiss, and there will be no undue delay or prejudice from government intervention. *Sharpe ex rel. United States v. Americare Ambulance*, 2017 WL 2986258, *1-2 (M.D. Fla. July 13, 2017) (granting United States' intervention motion when a generous timeframe for discovery remained). Courts regularly find good cause when a motion to intervene is made before discovery. *See, e.g., Sunrise*, 2009 WL 499764, at *1 (granting motion to intervene when no answer had been filed and no formal discovery had begun). Indeed, courts even allow intervention after discovery has begun if the good cause standard is otherwise met. *United States ex rel. Lam v. Tenet Healthcare Corp.*, 481 F. Supp. 2d 689, 694 (W.D. Tex. 2007) (permitting United States to intervene after prior declination where formal discovery had commenced because "the prejudice which would result to the Government if it is not permitted to

intervene far outweighs the prejudice to the Relators if the Government is permitted to intervene"); *United States ex rel. Tyson v. Amerigroup Ill., Inc.*, 2005 WL 2667207, at *3 (N.D. Ill. Oct. 17, 2005) (allowing government's motion to intervene more than two years after filing notice of declination, given "new and significant evidence obtained by the relator during discovery," and given lack of "undue prejudice to the parties or proceeding" caused by late intervention).

Finally, the specific circumstances of this action also merit a good cause finding. Since February 2020, the government has continued to actively investigate the claims as to which it had not yet made an intervention decision, determined the precise scope of the claims with respect to which it would intervene, and engaged in approximately a year of extensive settlement discussions. In addition, the global pandemic affected the pace of the investigation and settlement discussions. In sum, the government has in no way improperly delayed its decision to partially intervene in this matter.

CONCLUSION

For the above reasons, the Court should permit the United States to intervene and to file its Notice of Partial Intervention and Complaint-In-Intervention within thirty days of the Court's order on this motion.

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