

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

UNITED STATES OF AMERICA
ex rel. ROBERT A. CUTLER,

Plaintiff,

v.

THE CIGNA GROUP *et al.*,

Defendants.

Civil Action No. 3:21-cv-00748

District Judge Eli J. Richardson

Magistrate Judge Jeffrey S. Frensley

JURY DEMAND

JOINT MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFS

The United States moves for any leave the Court deems necessary to present the arguments raised in the United States' Notice of Supplemental Authority (Doc. No. 242) regarding the Supreme Court's decision in *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391 (2023). Defendants consent to the filing of the United States' Notice. Defendants request leave to file a supplemental brief (attached as Exhibit A), not to exceed five (5) pages, responding to the United States' Notice, and the United States consents to the filing of such a brief. Good cause exists for leave to file short supplemental filings, as the United States' and Defendants' arguments regarding *SuperValu* may assist the Court in resolving issues or arguments already raised in the pending motions to dismiss (Doc. Nos. 195, 198).

Relator does not oppose the United States' and Defendants' motion for leave.

CONCLUSION

For these reasons, the motion for leave to file supplemental briefs should be granted.

Date: June 20, 2023

Respectfully submitted,

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I hereby certify that on June 20, 2023, 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

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Exhibit A

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JURY DEMAND

**DEFENDANTS’ RESPONSE TO THE GOVERNMENT’S NOTICE
REGARDING *SUPERVALU***

Contrary to the Government’s Notice of Supplemental Authority, *U.S. ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391 (2023), does not “preclude” the “principal” arguments Cigna has made for dismissing the Government’s theory of legal falsity. Doc. No. 242 at 2. To the contrary, *SuperValu* underscores the fundamental deficiencies in the Government’s legal falsity theory that require dismissal here.

The Government has not adequately pled any legal falsity under the False Claims Act (“FCA”) because its allegations do not plausibly suggest that Cigna violated any of the Medicare Advantage program requirements on which the Government now relies. *See* Doc. No. 196 at 33-40; Doc. No. 224 at 22-31. Those requirements were not at issue in *SuperValu*, and the case has no bearing on their meaning here. As explained in its prior briefs, Cigna’s “readings of the ICD Guidelines and data-attestation regulation are correct.” Doc. No. 196 at 41; Doc. No. 224 at 31. Because they are correct, there is no falsity, and the Government’s case must fail.

Moreover, as Cigna argued, even if the Government’s current interpretation of those legal requirements were correct, its legal falsity claims still fail because the Government has not

alleged facts that would establish that Cigna acted with the requisite scienter. Doc. No. 196 at 40-43; *see* Doc. No. 224 at 31-35. While *SuperValu* does address the element of scienter, the Supreme Court’s opinion only highlights the fatal flaws in the Government’s allegations on this element because the Government failed to plead facts *SuperValu* holds are essential—namely, facts showing that Cigna either actually knew or “conscious[ly]” disregarded a “substantial and unjustifiable risk” that its claims were false. 143 S. Ct. at 1400-01.

The Supreme Court granted review in *SuperValu* to address “one discrete legal issue”: “If [a defendant’s] claims were false and [it] *actually thought that [its] claims were false ...*[,] would [it] have ‘knowingly’ submitted a false claim within the FCA’s meaning,” notwithstanding an objectively reasonable reading of the relevant law that supports the defendant’s conduct? 143 S. Ct. at 1399 (emphasis added). On that narrow issue, the Court held that “[t]he FCA’s scienter element refers to [a defendant’s] knowledge and subjective beliefs—not to what an objectively reasonable person may have known or believed.” *Id.*

In so holding, *SuperValu* makes clear that in order to plead *subjective* knowledge, the Government must allege specific facts establishing that a defendant actually knew, or at a minimum was “conscious of a substantial and unjustifiable risk,” that its claims were false. *Id.* at 1400-01. In its submission, the Government conspicuously omits any discussion of whether its allegations meet that standard. There is no mystery why: They do not. Indeed, the Government has pled *no* specific facts regarding Cigna’s *subjective* knowledge of what the Government now claims is the “correct” understanding of the relevant legal requirements. *See id.* at 1402. Nor has the Government pointed to *any* contemporaneous interpretation of the ICD Guidelines or the data-attestation requirement—whether by Cigna, by CMS, or by anyone else—that is consistent with the interpretations that it now advances in this litigation. Absent allegations about Cigna’s subjective knowledge or some contemporaneous notice that Cigna in fact received of the

Government’s view of the law, the Court cannot plausibly infer that Cigna consciously disregarded a substantial and unjustifiable risk that its actions were unlawful.

The Government also overreads *SuperValu* to have “rejected” FCA case law relying on *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007). Doc. No. 242 at 2. What the Court rejected was only the Seventh Circuit’s reading of *Safeco* to create a “purely objective safe harbor,” 143 S. Ct. at 1402, that requires courts to ask, first, whether the alleged misconduct was “consistent with any objectively reasonable interpretation of the relevant law” and, only if not, “to consider the defendant’s actual subjective thoughts,” *id.* at 1398-99. *SuperValu*’s rejection of that aspect of *Safeco* thus forecloses a point Cigna made in a footnote—the contention that (as several courts of appeals had held) subjective intent is “irrelevant” under *Safeco*, *see* Doc. No. 196 at 43 n.9—but the narrow rejection of that footnote point does not help the Government here. *SuperValu* no more permits the Government to rely on novel *post hoc* legal interpretations than it permits a defendant to do so; in fact, *SuperValu* establishes that courts may “not look to legal interpretations that [a defendant] did not believe or have reason to believe at the time [it] submitted [its] claims.” 143 S. Ct. at 1403. As Cigna explained in its prior briefing:

[T]he Government has not alleged subjective bad faith, and while it now accuses Cigna of “*post hoc* interpretation of the relevant legal requirements,” *it is the Government that announces—for the first time in this enforcement posture—novel readings of Medicare Advantage program requirements that conflict with their plain text and CMS’s own guidance and administration of the Medicare Advantage program, including in-home health assessments.*

Doc. No. 224 at 35 (quoting Doc. No. 213 at 42-43) (second emphasis added). For these reasons, the Government fails to plead facts establishing that Cigna acted with “conscious” disregard of a “substantial and unjustifiable risk” that its claims were false. *SuperValu*, 140 S. Ct. at 1400-01.

The stark contrast between the facts here and those in *SuperValu*, which the Government

fails to acknowledge, only confirms the deficiencies of the Government’s pleadings on the element of scienter. In *SuperValu*, the disputed interpretation relevant to scienter concerned whether retail pharmacies’ “usual and customary” drug prices referred to discounted or non-discounted prices. Critically, the relators there alleged that each pharmacy actually “believed” its claims for payment were false when it submitted them, pointing to “notice[s]” the pharmacies received that “‘usual and customary’ refers to discounted prices” and company executives’ internal emails “rais[ing] concerns” about the need to conceal discounts from regulators. *Id.* at 1398. Here, by contrast, despite its pre-intervention government investigation, which spanned many years, the Government has not alleged that Cigna had notice—much less “believed”—that the submitted codes violated either the ICD Guidelines or the data-attestation regulation. Because facts like those the Supreme Court relied on to remand the claims in *SuperValu* are plainly lacking here, the Government’s legal-falsity claims must be dismissed.

Finally, contrary to the Government’s suggestion that the ambiguity of the applicable requirements is “not the relevant analysis,” Doc. No. 242 at 2, Cigna has never claimed that “ambiguity alone” forecloses scienter, *id.* (quoting *SuperValu*, 143 S. Ct. at 1399). Rather, Cigna has argued that in addition to the ambiguity of the provisions, Cigna was *also* not on notice of the Government’s novel interpretations,¹ and that far from providing such notice CMS’s contemporaneous statements were *consistent* with Cigna’s interpretations of the legal requirements and *inconsistent* with the Government’s interpretations here.² That is the opposite

¹ See Doc. No. 196 at 41-42 (“[T]he Government does not allege *any* facts from which it would be reasonable to infer that [Cigna was] ever warned that [it] must second-guess providers’ clinical assessments of their patients rather than accurately code and report to CMS the results of those assessments.”); see also Doc. No. 224 at 31-32.

² See, e.g., Doc. No. 196 at 37 (“CMS guidance also confirms [Cigna’s] common-sense reading.”); *id.* at 42 (“Cigna’s interpretation of the data-attestation requirement in 42 C.F.R.

of the circumstances in *SuperValu* itself. In any event, *SuperValu* does not hold that courts should ignore ambiguity when assessing scienter. Doc. No. 242 at 2. It held only that “ambiguity ... does not *by itself* preclude a finding of scienter under the FCA” in the factually distinct situation where the defendant “received notice” of the “correct meaning” of the relevant law and thus potentially “knew,” or was at least “aware of an unjustifiably high risk,” that its claims for payment were false. 143 S. Ct. at 1402 (emphasis added). Again, the Government nowhere alleges that Cigna “received notice” of the interpretations the Government advances or that Cigna was aware of an unjustifiably high risk that its conduct was unlawful. Those pleading failures are fatal here.

For all of these reasons, *SuperValu* lends no support to the Government’s approach to pleading scienter in this case. The motions to dismiss (Doc. Nos. 195, 196) should be granted.

§ 422.504(1)(2) is rooted in CMS’s own statement in the rulemaking that accuracy is limited to *coding*.”); *id.* (“CMS’s annual advance notices and announcements of MA policies ... state that CMS specifically considered requiring evidence of treatment for diagnoses from in-home exams but then chose *not* to require that.”).

Date: June 20, 2023

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