

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
Before The Honorable Laurel Beeler, Magistrate Judge

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) No. C 15-01062-LB
)
SUTTER HEALTH, et al.,)
)
Defendants.)
_____)

San Francisco, California
Thursday, November 21, 2019

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
RECORDING 10:58 - 11:27 = 29 MINUTES

APPEARANCES:

For Plaintiff:

United States Department
of Justice
Civil Division
Post Office Box 261
Washington, DC 20044
BY: OLGA YEVTUKHOVA, ESQ.
BY: ALBERT T. MORRIS, ESQ.

United States Attorney's
Office
450 Golden Gate Avenue
Ninth Floor
San Francisco, California
94102
BY; BENJAMIN J. WOLINSKY, ESQ.

(APPEARANCES CONTINUED ON NEXT PAGE.)

1 APPEARANCES: (Cont.d)

2 For Defendant:

Latham & Watkins, LLP
505 Montgomery Street
Suite 2000
San Francisco, California
94111

3
4
5 BY: STEVEN M. BAUER, ESQ.

Latham & Watkins, LLP
600 West Broadway, Suite 1800
San Diego, California 92101

6
7
8 BY: KATHERINE A. LAUER, ESQ.

9 For the Relator:

Keller Grover, LLP
1965 Market Street
San Francisco, California
94107

10
11
12 BY: KATHLEEN R. SCANLAN, ESQ.

Kleiman Rajaram
2907 Stanford Avenue
Venice, California 90292

13
14
15 BY: MARK A. KLEIMAN, ESQ.

16 Transcribed by:

Echo Reporting, Inc.
Contracted Court Reporter/
Transcriber
echoreporting@yahoo.com

17
18
19
20
21
22
23
24
25

1 Thursday, November 21, 2019

10:58 a.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: Calling civil action 15-1062, United
5 States of America, et al., versus Sutter Health, et al.
6 Counsel, if you could please step forward and state
7 your appearances for the record.

8 MR. BAUER: Good morning, your Honor. Steve Bauer
9 and Kathy Lauer for Sutter and Palo Alto Medical Foundation.

10 THE COURT: How are you?

11 MS. YEVTUKHOVA: Good morning, your Honor. Olga
12 Yevtukhova for the United States.

13 MS. SCANLAN: Good morning, your Honor. Kathleen
14 Scanlan for the Relator, Kathy Ormsby.

15 MR. MORRIS: Good morning, your Honor. Tom Morris
16 for the United States.

17 MR. WOLINSKY: Good morning, your Honor. Ben
18 Wolinsky, also for the United States.

19 MR. KLEIMAN: The last good morning, your Honor.
20 Mark Kleiman also for the Relator, thank you.

21 UNIDENTIFIED SPEAKER: I don't think I can join a
22 bigger firm, your Honor.

23 THE COURT: I'm sure.

24 So let's -- let me just make sure I have all of my
25 notes here. We had a couple of -- I apologize for changing

1 the start time on you. I had a staggered calendar today. I
2 also have an 11:00 o'clock calendar, but we had a couple of
3 last minute add ons that were time sensitive, which doesn't
4 have to do with you, and I needed to sort of deal with
5 those. And so that's why we ended up kicking things a
6 little bit. And so it's a busy day, so let must just make
7 sure -- and I want to make sure I have all of my notes here.

8 I have -- what I would like to do, is I have some
9 questions -- fact questions -- and I think that a lot of
10 them are for the Defendants. And so I'd like to go through
11 them, just to talk them through, and then given -- although
12 I know one thing I wanted to ask, this is a procedural
13 thing. I think it's unlikely I will get out an order before
14 the CMC on -- I believe it's scheduled for December 5th. I
15 will get out an order in December-ish. And it might be --
16 and so I wanted to know, and this is just for Elaine's
17 purposes, in light of that, I have some skepticism about the
18 actuarial equivalence argument. And I have some fact
19 questions. But I have some work to do, so I can let you
20 know that -- and I -- a big part of the Government's
21 argument is that -- at least at the motion to dismiss stage
22 -- so I think that the case will -- I will consider things,
23 I have some fact questions and I -- but knowing that I won't
24 have an order out on the motion to dismiss, do you want to
25 go forward with the CMC on the 5th of December, or would you

1 prefer to continue it until mid-January?

2 MR. BAUER: From our standpoint, we'd rather
3 continue it, because once we start discovery, it tends to
4 start rolling.

5 THE COURT: Right. Government, is that all right?

6 MR. MORRIS: We would be okay with continuing it
7 as well.

8 THE COURT: Okay. So Elaine, we'll just continue
9 the CMC until maybe mid-January, whatever that date is. Wjy
10 not tell us what that date is?

11 THE CLERK: January the 16th.

12 THE COURT: January the 16th at 11:00.

13 Okay. So I have some questions, things I couldn't
14 figure out easily, and to Mr. Bauer -- I guess to you. So
15 what I'm interested in is, what population and costs are
16 being compared?

17 So, you know, I understand -- I understand the
18 arguments, and I understand how capitation works. I
19 understand the comps and the fees for services and I
20 understand the concept of actuarial equivalence, my question
21 is directed more to the populations. Is it the specific --
22 and I've read -- and when I was reading some of the cases
23 that talks about across the contract -- but so I wondered
24 what the population is, you know, is it the cost you used, I
25 think 1000 people is one of your examples. Like, what are

1 the relevant populations that are being compared?

2 MR. BAUER: My understanding is it's the
3 population for the entire contract.

4 THE COURT: Yes. And that's what I figured from
5 reading the cases.

6 MR. BAUER: Because the Defendants pick up the
7 risk of that whole pool of people.

8 THE COURT: Okay, okay. So it's across the
9 contract.

10 All right. So this is -- I don't want to -- I don't
11 mean this to be a conversation about Sienfur (phonetic),
12 because we can talk about Sienfur. But this is a question
13 to both parties. So suppose the error rate of diagnostic --
14 error rate for diagnosis coding in traditional Medicare, fee
15 for service Medicare, is 30-percent. And -- that's one of
16 the numbers that you guys mentioned -- does that mean that
17 Sutter and Palo Alto Medical Foundation could knowingly add
18 in false codes on 29-percent of its records to increase
19 reimbursements?

20 MR. BAUER: No, we couldn't -- we wouldn't say we
21 could knowingly add false codes. And in fact, if there are
22 -- I wouldn't say false codes, but I'd say unsubstantiated
23 codes -- the Government just says "false" because that's a
24 good word for them, but we're talking about --

25 THE COURT: But they're not arguing -- they're not

1 arguing recoupment, they're arguing -- they're arguing
2 falsity. But I --

3 MR. BAUER: Right.

4 THE COURT: So they're not arguing recoupment. I
5 mean that's -- you're saying, "Fine, have your recruitment
6 remedies, that's fine." But you don't -- so I'm just trying
7 to figure out what the import is of your position.

8 MR. BAUER: No, I understand what you're saying, I
9 was just trying to make the distinction that -- that I'm
10 talking about codes that aren't substantiated as opposed to
11 false. Because that carries Siata (phonetic) with it.

12 THE COURT: Right.

13 MR. BAUER: So it -- when we see codes that aren't
14 supported, as is alleged in the complaint, they were
15 deleted. So as we work with that pool, we're actually
16 lowering the error rate. There's none of that going on on
17 the Government's side. So we're not saying, "Oh, we can
18 just put in anything willy nilly." What we're saying is, if
19 the Government is going to bring a false claims act case and
20 say these are false claims, they have to allege that there
21 was some overpayment. And the way you understand what an
22 overpayment is, is you look at the rules for the program.

23 THE COURT: Isn't that a better summary judgment
24 argument than an argument at the motion to dismiss?

25 MR. BAUER: It doesn't meet any facts, because

1 they didn't allege that it wasn't -- they didn't allege an
2 overpayment. They said, "You have codes that are
3 unsupported, we're going to call them false." But they
4 never made the allegations that they'd have to under the
5 actuarial equivalence, or just the same methodology test.

6 THE COURT: Okay. So your argument is that -- is
7 them to allege that with a requisite fraud under Rule 9(b),
8 that has to be part of what they allege?

9 MR. BAUER: If they were to allege that the error
10 rate is low or over the Medicare fee for services, as
11 compared to our Medicare Advantage, then I don't have a
12 motion anymore if they made that allegation.

13 THE COURT: If they -- so say that again.

14 MR. BAUER: If they made the allegation that the
15 error rate is lower on the Government fee for service side,
16 than it is in our population, then they've side-stepped the
17 argument, but then they have to prove that. And that's the
18 problem. They consciously don't make that allegation,
19 because they don't want to prove it.

20 THE COURT: Well part of the issue is -- all
21 right.

22 Do you want to -- does the Government -- whose going to
23 be doing the lead for the Government? Do you want to
24 respond to that point?

25 MS. YETUKHOVA: Sure, your Honor. I think that

1 one of the things that's going on here is that our entire
2 argument is that actuarial equivalence is completely
3 irrelevant when you're dealing with allegations of knowing
4 fraud. Because the concept -- Defendant's argument is
5 basically that Azar has somehow changed the pleading
6 standard in a false claims act and we completely disagree,
7 because Azar explicitly carved out, knowing fraud from the
8 ruling, that Judge Collyer, when she issued her case,
9 limited it narrowly to other CMS acted beyond its authority
10 in promulgating an overpayment rule and specifically
11 excluded the False Claims Act by saying that Medicare
12 managed organizations can't bill for erroneous codes.

13 So --

14 THE COURT: So you're saying -- well, part of the
15 issue is, from on a year-to-year basis -- let me just think
16 about this. So your argument is not that you can knowingly
17 submit false codes that the Government has to allege that,
18 with respect to the doctrine of actuarial equivalence, that
19 they --

20 MR. BAUER: That's right. For a False Claims Act
21 case.

22 THE COURT: For a False --

23 MR. BAUER: For administrative remedies, for
24 reimbursement, that's a whole different thing.

25 THE COURT: Okay, okay. I guess I understand the

1 argument. The Government's argument is that we've alleged
2 fraud with the requisite particularity. We don't have to
3 prove it up on an actuarial equivalence basis. We're not --
4 they're not relying on the 2014 rule, they're just saying
5 this is a straight up False Claims Act grounded in
6 fraud/reckless disregard, knowing ignorance. And so it was
7 not any different than the standard.

8 MR. BAUER: Right. Their argument is this is a
9 fee for service case.

10 THE COURT: Right.

11 MR. BAUER: And it's not a fee for service case.

12 THE COURT: Well and I know -- they're not arguing
13 that it's a fee for service case, but they're arguing that
14 the services, as -- well I don't want to make your argument
15 for you, but as reflected in the diagnostic codes -- I mean
16 the method of -- the capitation is different, but it's based
17 on diagnosis that result in services so it's not any
18 different, it's just a different model of delivering -- of
19 covering, through insurance plans, the services that are
20 being delivered, with the idea that they need to be
21 actuarial equivalent.

22 And one of the issues is -- I mean I don't -- it's very
23 difficult to ever know, it seems to me, just with the way
24 that the capitation model goes, it's very hard to know just
25 in the actuarial equivalence landscape, why that should be

1 extrapolated to basically eviscerate the Government's
2 ability to allege -- to have some additional responsibility
3 and the Government to allege something more.

4 I don't -- I'm still having a tough time -- tell me
5 exactly what you would expect the Government to have to
6 allege to get around your actuarial equivalence argument.

7 MR. BAUER: They would have to argue that we
8 knowingly and intentionally made submissions to them that
9 are not actually actuarially equivalent to --

10 THE COURT: How could you ever -- you could never
11 -- well, that are not actuarial equivalent --

12 MR. BAUER: Equivalent to their population, which
13 is the proxy for --

14 THE COURT: To their population. But --

15 MR. BAUER: So here's a --

16 THE COURT: You could never -- I mean you could
17 never do that. That would basically say if any Part C case,
18 the Government could never really bring a False Claims Act
19 case against you, because you would never know at the time
20 that you were making submissions that are not actuarial
21 equivalent to the population -- you would never know that.

22 MR. BAUER: Well but that's -- and that's what's
23 interesting with part of the -- that's what part of the Azar
24 analysis was that --

25 THE COURT: But that's a different kind of case.

1 It's a different kind of case. That's a plan -- an
2 insurance company. That's not -- that's not a provider
3 who's -- what are you saying is more important --

4 MR. BAUER: But we only get a percentage of what
5 the plan gets. It's not --

6 THE COURT: No, I know that. I know that.

7 MR. BAUER: It's not that they look at every one
8 of our patients.

9 THE COURT: Right.

10 MR. BAUER: It's not fee for service.

11 THE COURT: Right.

12 MR. BAUER: So here's a --

13 THE COURT: But how would you ever -- the
14 Government could never allege that, because that could never
15 be true. You would never have any idea, in any given
16 period, that whether the submissions were not actuarial
17 equivalent to the population, you just wouldn't know.

18 MR. BAUER: Well here's an interesting --

19 THE COURT: No matter how fraudulent you were.

20 MR. BAUER: Well here's what's interesting -- and
21 the Azar court called it the "Fly in the ointment."

22 THE COURT: Yes.

23 MR. BAUER: And that is back in 2012, CMS used to
24 do audits and they had something that was called an "FFS
25 adjuster" --

1 THE COURT: Right.

2 MR. BAUER: And that adjusted for errors in the
3 database. They were able to do it then.

4 THE COURT: Right, well I --

5 MR. BAUER: That's -- and that's what they --

6 THE COURT: But that case -- wasn't that case --
7 it was much more about -- it's not really fair to
8 extrapolate across the contract, for the insurance. It just
9 wasn't fair. And this is different. I mean you're saying
10 that -- so this is a different context. It's sort of the
11 ramifications of the actuarial equivalence rule and of
12 fairness -- and this by contrast is your expectation that
13 the Government would have to allege something that -- you
14 could never meet that standard.

15 So --

16 MR. BAUER: So think about this. The way the
17 program is set up, is that we all know that there are
18 errors, right? We understand that.

19 THE COURT: Yes.

20 MR. BAUER: There are errors and we can talk about
21 why those occur.

22 THE COURT: And typically they change from year to
23 year and we know that the incentives in traditional Medicare
24 are different, because it's a fee for service and there's
25 not the same incentives where accuracy in diagnosis codes --

1 so we know all of that and one of the issues is the error
2 rate could fluctuate from year to year and it's impossible
3 to know at anytime what the error rate is.

4 MR. BAUER: Well, but they used to try to do that
5 with that adjuster.

6 THE COURT: So they had a methodology which --

7 MR. BAUER: Yes.

8 THE COURT: Well, but you're -- but let's say --
9 well, they're not relying on the new overpayment rule,
10 they're just saying it's irrelevant, it's just a -- and so I
11 understand your point and that makes good sense in the
12 context of the DC case, which I think is distinguishable on
13 those grounds, but I don't know -- because it seems to me
14 your argument means that if it's impossible to know at the
15 time what the error rate is, nothing is ever an overpayment.
16 Which would essentially get rid of the requirement and would
17 insulate Palo Alto Medical Foundation/Sutter from any
18 False Claims Act liability and that just can't be right.

19 MR. BAUER: Well to think of the flip side of
20 that, is that everybody knows that there are errors in this
21 database. So everyone who's involved in this program knows
22 they're submitting errors to the Government. The Government
23 gives us errors and we give it back.

24 So with the Government's argument, if they didn't have
25 to prove any of this, they can just go out and sue everybody

1 for false claims, because the falsity is built into the
2 system.

3 THE COURT: Well I assume the only thing that
4 really matters would be falsity about risk adjusting
5 diagnosis codes; is that right from the Government's
6 perspective?

7 MS. YEVTUKHOVA: Well yes. We're alleging that
8 the submission of false codes, not just errors or typos.
9 We're definitely alleging knowing submission of false
10 claims.

11 MR. BAUER: Let's talk about what a false claim
12 is. They're considering something that someone looked at
13 from one side and said, "There are some diagnosis here that
14 aren't substantiated." So the Government says, that's a
15 false claim. That's an unsubstantiated claim and there are
16 unsubstantiated claims throughout their database as well.

17 THE COURT: Does -- well -- CMS presumably audits
18 traditional Medicare for the services that doctors are
19 ordering for patients, right?

20 MS. YEVTUKHOVA: Correct --

21 THE COURT: You see if they're supported, you
22 don't pay for unnecessary services. I mean it's the
23 classic, right? There's a certain amount of audits.

24 Okay. So one of the issues is -- and this goes back to
25 Sutter -- so supposed the -- CMS, you agree, they audit

1 traditional Medicare and find that 30-percent of the
2 services that traditional Medicare doctors order for
3 diabetes patients were unnecessary and denies the claims.
4 And so that might reduce the costs of caring for diabetes
5 patients under traditional Medicare and under your actuarial
6 equivalence theory, shouldn't that in turn reduce the
7 payments to Medicare Advantage? Why does actuarial
8 equivalence only work one way?

9 I mean, so you don't really even know at any given time
10 -- you know, because of the sort of moving populations and
11 the moving context of -- I mean, I don't know. It's not a
12 one way thing.

13 MR. BAUER: So when they do a fee for service
14 audit though, they say certain procedures -- or certain
15 equipment is not being allowed. And so that therefore
16 lowers what the payments are going to be in Medicare
17 Advantage to those people that have those diagnosis.

18 So it's not a -- their editing fee for service goes
19 their way, goes one way. What we're saying is what they
20 can't do is ignore -- or not audit the diagnostic codes.
21 Because say you have -- say you have 10 patients that are
22 diabetes patients and after they audit it, they say, "You
23 know what, it costs us \$10,000 to take care of those 10
24 patients for that year." They don't audit whether those
25 people are diagnosed as diabetes patients. They audit how

1 much money was spent on them.

2 If you then say, "Okay, we're going to give Medicare
3 Advantage participants \$10,000." And then you go in there
4 and you audit and you say, "Oh you know what, two of those
5 people, they don't -- they have insufficient documentation
6 to prove that they are diabetic. We're only going to give
7 you \$8,000." The problem is, it costs \$10,000, under the
8 Government's audited system, to take care of those people.
9 So that's -- that's why Azar, or the Palin (phonetic) case
10 say if you do this, you are always going to underpay the
11 Medicare providers, because it only goes one way. You're
12 taking away -- you're taking away money that has already
13 been audited and spent over on the Government's side.

14 THE COURT: Okay.

15 MR. BAUER: Does that make sense?

16 THE COURT: Yeah, but I understand the argument.

17 So I have a couple of -- I'm just looking at my clock
18 to see, I just need to look at my overall calendar. I have
19 more questions, so I just wanted double check on some of
20 these things.

21 So, what's the Government's position -- I want to run
22 through my questions and then I want to give you a small --
23 I'll tell you how much extra time I'm going to give anyone
24 to say anything else, given the rest of my calendar. What's
25 the Government's position on whether the relator should be

1 allowed to pursue a complaint now that the Government has
2 intervened?

3 MS. YEVTUKHOVA: My colleague will speak to that.

4 THE COURT: Okay. And then I'm going to pull in
5 on the later -- will later speak to that too, but as a
6 matter of -- right. So I mean I understand that there's a
7 \$30,000,000 that settled in the rest of the Sutter entitles.
8 There's not -- we'll talk about this in a second -- there's
9 not a lot in the later complaint about Sutter -- overall
10 Sutter, as opposed to Palo Alto Medical Foundation, and
11 what's your position on the relator's ability to amend the
12 complaint and pursue, now that Governments --

13 MR. MORRIS: The United State's position is that
14 the relator does have that ability, your Honor. And what we
15 believe -- and the cases that both parties cited, including
16 Public Warehousing, Dresser and Feldman, what you compare is
17 not the Government's notice of intervention versus the
18 relator's complaint.

19 If you look at the claims in the respective Leitis
20 (phonetic) complaints and we're dealing with, as you already
21 noted, PAMF and Sutter as to PAMF, and they're dealing with
22 different affiliates in different geographic locations with
23 different beneficiaries. And we think, just like Judge
24 Donato did in Touch Atek (phonetic), that we don't have a
25 problem with them pursuing those claims.

1 THE COURT: Assuming they stand up. Okay, so
2 that's fine.

3 Let me just -- I'm flipping -- I have my second set of
4 notes on the relator's -- So I -- my next questions are to
5 the relator. So -- and so we'll just talk about this. It's
6 just -- this question is only about the sufficiency of the
7 allegations of the complaint.

8 MS. SCANLAN: Sure.

9 THE COURT: As to the non-Palo Alto Medical --

10 MS. SCANLAN: Okay.

11 THE COURT: Non-PAMF -- Foundation. In the fact
12 the relator says she's bringing claims against all of
13 Sutter's affiliates, but the claims are largely based on her
14 knowledge from her time at Palo Alto Medical Foundation and
15 there's very little first hand knowledge -- so this is my
16 view of what it says. She basically has some sparse
17 allegations that no one at other affiliates was even doing
18 the level of audits that she was doing, so therefore that
19 they must be worst.

20 And so let's assume you get to go -- and I think that
21 you do allege something in the initial complaint that gets
22 you past the argument that you didn't allege it. It might
23 be different if you had literally nothing in the original
24 complaint, but I -- so just let's assume you could go
25 forward in theory, against all of the Sutter affiliates, the

1 question then is rather as a matter of fact, you've pleaded
2 the best that you can in this complaint about the Sutter
3 affiliates.

4 Because it just did strike me, based on the relator's -
5 - she pled what she knew. The question is, can you plead
6 more, and if you can't, then I'll just evaluate it straight
7 up on this complaint. But otherwise, if you -- I tend to
8 agree with the argument that Sutter -- I do agree with the
9 Government -- the argument that Sutter advances -- I mean
10 that doesn't seem to me to be enough. So there's two
11 issues. Do you want to amend to allege more, or do you want
12 to argue to me that it is enough?

13 MS. SCANLAN: Can I give both?

14 THE COURT: You can, but it's -- it's fine, but I
15 -- because the issue is, you know, you can have another
16 crack at it. If you've got more, please take another crack
17 at it after my order issues, but I'd rather -- if you -- I
18 mean what else could your --

19 MS. SCANLAN: We will always take another crack at
20 it. If you want to give us another crack at it, we'll get
21 -- and if that's the way you're leaning --

22 THE COURT: No, I don't want to give you another
23 crack at it, unless you can allege more. But if -- and then
24 I always people file a black-line version of the complaint
25 and so I can see exactly what the new allegations are that

1 are added. And my surmise is that you can't do more. You
2 can think about it. You don't have to tell me today. You
3 can sort of think about it and file something within X
4 period of time, X to be identified --

5 MS. SCANLAN: Sure.

6 THE COURT: -- saying what time -- and then -- and
7 that will be a relatively short period of time. I mean it
8 could be a week or so. But if you can't do more, then I
9 think I should take a crack at addressing whether it's
10 enough and you should make that argument now. But if you do
11 want to -- if you think you can do more, I think you should
12 think about it and then let me know if you can do more,
13 because I'm not sure that you can.

14 MS. SCANLAN: Yes, I would like to think about
15 that.

16 THE COURT: Yes.

17 MS. SCANLAN: And confer with my client and with
18 my colleagues about what we're able to do, because I -- we
19 think that there's enough in there --

20 THE COURT: And why do you think it's enough?

21 MS. SCANLAN: Well because the theory, with regard
22 to Sutter, as to the other affiliates, is slightly different
23 than what she was doing at PAMF.

24 THE COURT: Okay.

25 MS. SCANLAN: She certainly was working at PAMF

1 and doing her own audits there, but what she was seeing,
2 with regard to the other affiliate, was what Sutter was
3 directing. It wasn't that she had to be in the other
4 affiliates to understand the implications of the lack of a
5 compliance program and the lack of trained personnel
6 operating in this other affiliates, to implicate the fact
7 that Sutter knew that the diagnostic codes that were going
8 in from the other affiliate were problematic and
9 unsupported.

10 THE COURT: So say that again, because -- say it
11 again so I can think about it.

12 MS. SCANLAN: So from our perspective, what she
13 was -- PAMF provided her a window to look and see what was
14 happening at these other affiliates. She was having regular
15 meetings with the other affiliates by phone, by webinar, out
16 at Green Valley, and they were contacting her. But the more
17 important part, and this is in section six of the relator's
18 complaint, is the part that becomes the real catalyst for
19 her is at the point in time where she understands that what
20 she's doing at PAMF is different than what is at the other
21 affiliates, when they shut down her audits at PAMF and had
22 her start doing things the way they were doing them at the
23 other affiliates, they were instructing her to only remove
24 the diagnostic codes on the billing side of Epic (phonetic).
25 And what that did, and she -- and when she raised it Julie

1 Chung, who was the RAF (phonetic) manager for Sutter, and
2 she said, "When you remove it only on the billing side, you
3 are leaving what you now have identified as a known false
4 code. You are leaving it in the encounter data and you are
5 submitting that to CMS." Julie Chung admitted it. She
6 admitted it was a problem, admitted it was happening at all
7 of the other affiliates and that was the practice that had
8 predated what they had instructed the relator that she
9 needed to be doing at PAMF.

10 THE COURT: Okay.

11 MS. SCANLAN: So in her mind, and in our position
12 in the complaint, is that what that did was establish the
13 fact that all of these people who were going through and
14 removing those diagnostic codes from the billing side, pre-
15 2005, were identifying what they knew were bad codes.

16 THE COURT: Okay, all right. I understand.

17 Okay, I think it's -- okay, all right. Anything from
18 you, Mr. Bauer?

19 MR. BAUER: Well sure and then maybe someone
20 should allege that there were overpayments.

21 THE COURT: Yeah.

22 MR. BAUER: Right? And that is --

23 THE COURT: I don't know how she -- and I don't
24 know how she could allege -- how could she allege
25 overpayments?

1 MS. SCANLAN: Because those diagnostic codes were
2 going in on the encounter data, and the encounter data was
3 the mechanism she confirmed with Sutter Physician Services
4 that that encounter data was what was going in in order to
5 get CMS paid (sic).

6 THE COURT: Okay.

7 MS. SCANLAN: To get paid from CMS.

8 THE COURT: So I think what I need to do -- I do
9 actually think I will address the argument and then if you
10 decide -- if you can amend, you can amend it, and if you
11 can't, you can't. Okay, that's -- all right.

12 MR. BAUER: And you know, we skipped over point
13 one and point two, right? Point one is the Bennett case and
14 says there's no partial intervention --

15 THE COURT: Yeah --

16 MR. BAUER: -- in the Ninth Circuit --

17 THE COURT: I understand that argument. I do
18 understand the argument. The legal arguments are easier
19 than the factual arguments. At least what we're talking
20 about.

21 MR. BAUER: And then the second step is same
22 defendants, same theories --

23 THE COURT: No, yeah --

24 MR. BAUER: -- same causes of action.

25 THE COURT: No, I --

1 MR. BAUER: It looks like a complete intervention
2 to me.

3 THE COURT: Yeah, I understand. It's not, because
4 -- I understand that you think it's -- I mean I think that
5 there's enough that you skate by it on the first complaint,
6 the underlying complaint issue, to get through the -- but I
7 understand the arguments, and so that's fine.

8 Okay, I do -- I thank you very much for your arguments.
9 I do have a bunch of people I still have to get through, so
10 I'll take the matter under submission.

11 MR. BAUER: Thank you, your Honor.

12 (Proceedings adjourned at 11:27 a.m.)
13
14
15
16
17
18
19
20
21
22
23
24
25

