

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHEM, INC.,

Defendant.

Case No. 1:20-cv-02593-ALC

**REPLY MEMORANDUM OF
LAW IN SUPPORT OF
DEFENDANT ANTHEM, INC.'S
(1) MOTION TO TRANSFER
VENUE, (2) MOTION TO
DISMISS, AND (3) MOTION TO
STRIKE**

Oral Argument Requested

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INTRODUCTION

Plaintiff's opposition fails to rebut Anthem's showing regarding any of its three motions.¹

First, the Court should transfer this action to the Southern District of Ohio pursuant to 28 U.S.C. § 1404(a). In its motion to transfer, Anthem offered detailed evidence showing that the key witnesses who developed, implemented, and managed the business practices that are the crux of Plaintiff's FCA claims live and work in the Southern District of Ohio. Plaintiff tries to diminish the importance of those witnesses, but its own Amended Complaint, and even its opposition, repeatedly describe actions taken by those witnesses in Ohio. Plaintiff ultimately concedes that these witnesses are relevant, but notes the unremarkable point that there are potential witnesses *in other districts* across the country. However, courts in this district consistently hold that the existence of witnesses located outside the original and proposed venues is irrelevant to the transfer analysis.

Plaintiff tries in vain to create some connection—indeed, any connection—between its FCA allegations and this district. Plaintiff focuses on a single internal email exchange at Anthem from 2010 regarding the collection of medical charts from a healthcare provider located in New York; this argument, however, is an obvious attempt to manufacture a *post hoc* connection to this district in response to Anthem's motion to transfer. The email exchange is dated *four years before* the period relevant to this case and Plaintiff did not even bother to include this email exchange in its initial complaint. Notably, during its three-year investigation, Plaintiff sought no discovery about this 2010 chart collection effort in New York and has offered no evidence that any of the individuals involved in this decade-old communication currently live

¹ This reply adopts the same abbreviations and acronyms as Anthem's memorandum of law in support of these motions. Dkt. 37 ("Mot."). Plaintiff's opposition to Anthem's motions (Dkt. 44) is referred to as "Opp."

in this district. Plaintiff's opposition confirms that the Southern District of Ohio is clearly a more convenient forum for this litigation than the Southern District of New York. Thus, this action should be transferred pursuant to § 1404(a).

Second, if the Court does not transfer this case, it should grant Anthem's motion to dismiss Plaintiff's First and Second Claims for Relief ("Claims"), and the portion of its Third Claim based on Anthem's allegedly false risk adjustment data attestations. Those Claims fail to plead materiality under the FCA. Under *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), Plaintiff must plausibly plead that CMS would have denied payment to Anthem if the agency had known how Anthem was operating its corporate chart review program. But notwithstanding prior dismissals in similar cases for failing to make that straightforward allegation, Plaintiff again failed to plead materiality for its Claims based on Anthem's attestations. See *U.S. ex rel. Swoben v. Scan Health Plan*, 2017 WL 4564722 (C.D. Cal. Oct. 5, 2017); *U.S. ex rel. Poehling v. UnitedHealth Grp., Inc.*, 2018 WL 1363487 (C.D. Cal. Feb. 12, 2018). Given the materially similar factual allegations between this case and *Swoben* and *Poehling*, this Court should follow the well-reasoned analysis of those two cases and dismiss Plaintiff's Claims based on Anthem's attestations.

Plaintiff concedes that *Swoben* is on point and does not meaningfully distinguish *Poehling*. Its opposition instead makes a series of excuses for failing to make the straightforward allegation that *Escobar* and those cases plainly require. Plaintiff notes, for example, that *Escobar* envisions a multi-factor, "holistic" inquiry, but ignores that those factors are probative of whether a plaintiff has plausibly pled **that the government's payment decision would have changed**, which Plaintiff undisputedly has not done here. When that key allegation is missing, it is utterly irrelevant what those other "factors" show. Plaintiff's position ultimately reduces to its

assertion that a false representation is material under *Escobar* if it was important enough to spur the government to file an FCA suit. But that is not the law. If it were, as Anthem explained, there would be no materiality requirement in government-filed FCA suits. Plaintiff offers no response at all. The opposition confirms that Plaintiff has not made the simple allegation that *Escobar*, *Swoben*, and *Poehling* require for its attestation-based Claims against Anthem. Those Claims should accordingly be dismissed.

Third, Plaintiff's allegations regarding FCA settlements between the United States and **other MAOs in other cases** should be stricken, as they have no possible bearing on this case.

MOTION TO TRANSFER

Anthem's motion to transfer demonstrated that the most important § 1404(a) factors "clearly and convincingly" favor a transfer to the Southern District of Ohio, where the operative facts occurred and where the most material witnesses reside. *See* Mot. 23-27. Anthem also showed that **no** key witnesses reside in this district and no operative facts occurred here. Plaintiff has done nothing to credibly rebut these core facts.

Plaintiff does not dispute that Anthem's chart review program was designed in and operated from the Southern District of Ohio. *See* Mot. 23-25; Opp. 18. Plaintiff instead makes three primary arguments. First, Plaintiff seeks to minimize the importance of events and witnesses in Ohio, inaccurately characterizing them as ministerial. Second, Plaintiff argues that various Anthem executives across the country—none of whom reside or work in this district—have relevant knowledge and will be important witnesses. Third, Plaintiff strains mightily to identify factual ties between its FCA allegations and this district. Each argument is meritless.

Courts consistently hold that the operative transfer question is whether the proposed venue is a superior location for the suit when compared to the original venue. *See, e.g., Herbert Ltd. P'ship v. Elec. Arts Inc.*, 325 F. Supp. 2d 282, 288 (S.D.N.Y. 2004) (witnesses living outside

original and proposed venue are “irrelevant” when evaluating a transfer motion); *see infra* at 6 (collecting cases). The key question here is whether the Southern District of Ohio is clearly a more appropriate venue than the Southern District of New York. The parties’ submissions prove clearly and convincingly that Ohio is by far the superior venue for this litigation.²

I. Plaintiff Has Not Rebutted Anthem’s Detailed Factual Showing Regarding the Location of Relevant Witnesses and Events

Anthem’s motion made a detailed showing, with supporting evidence, regarding the witnesses who are located in the Southern District of Ohio and their anticipated testimony about Anthem’s chart review program and risk adjustment compliance processes. *See* Mot. 23-26. These business processes, and the witnesses who are knowledgeable about them, are undisputedly relevant to Plaintiff’s FCA claims. *See id.*

Plaintiff seeks to diminish the importance of these witnesses as “lower-level operational staff” who are “less central” to its FCA claims. Opp. 23. But Plaintiff’s pleadings show otherwise: the Amended Complaint repeatedly references documents that were authored by Ohio employees identified in Anthem’s motion (*e.g.*, Brian M. Cogdill, Patricia Cabrera, and Tonya Ries). *See* Mot. 25. The opposition heavily relies on a “flyer” concerning Anthem’s chart review program (Opp. 9, 20), even though this flyer was drafted by Cabrera and other Anthem employees in Ohio and was reviewed by Cogdill before distribution. *See* Reply Declaration of Brian Matthew Cogdill (“Cogdill Reply Decl.”) ¶3. The opposition also cites a “Frequently

² Plaintiff’s insistence that its choice of forum is entitled to “substantial deference” (Opp. 16) is incorrect. Plaintiff cites cases involving suits filed by private plaintiffs, ignoring the case law holding that any deference is diminished when the plaintiff is the federal government. *See* Mot. 33; *see also* *U.S. ex rel. Salomon v. Wolff*, 268 F. Supp. 3d 770, 775 (D. Md. 2017) (transferring FCA case and noting that deference to chosen forum is “diminished further” when “the plaintiff is a government agency”). Deference to a plaintiff’s chosen forum is also “‘significantly diminished’ where ‘the operative facts have no connection to the chosen district.’” *Izhakov v. Educ. Comm’n for Foreign Med. Graduates*, 2012 WL 2861338, at *3 (S.D.N.Y. July 10, 2012) (Carter, J.) (citation omitted); *see also* *U.S. v. Nature’s Farm Prods., Inc.*, 2004 WL 1077968, at *3 (S.D.N.Y. May 13, 2004). This is such a case. *See infra* at 8-10.

Asked Questions” document about the chart review program, but ignores that Cogdill was identified as the point of contact for questions about the program. Opp. 12; AC Ex. 10.

In *Poehling*, which involved very similar allegations, Plaintiff took the exact **opposite** position from its current one, arguing that the case must proceed in the district where the defendant MAO operated its chart review program. Plaintiff now claims that it only sought a transfer in that case because there was a related case pending in California. Opp. 26-27 n.12. This assertion is plainly false: Plaintiff **also** argued for transfer because the relevant chart review practices were conducted in the transferee forum. *See* Mot. 35 (quoting from Plaintiff’s motion).³ And in opposing the MAO’s later effort to transfer the suit out of California, the United States barely mentioned the related suit, arguing instead that the case should proceed in the district where the employees who “designed, implemented, and managed [defendant’s] risk adjustment programs” lived and where those activities occurred. Gov’ts Opp. to Mot. to Transfer 11, *U.S. ex rel. Poehling v. UnitedHealth Grp., Inc.*, No. 2:16-cv-08697 (C.D. Cal. Aug. 28, 2017), Dkt. 138. Plaintiff also emphasized that the employee who “developed and implemented [defendant’s] national Chart Review Program” resided in California, as did the employee who “ran” the defendant’s risk adjustment coding and compliance review program, which it asserted was “the heart of th[e] case.” *Id.* These same arguments require transfer of this case to the Southern District of Ohio: Anthem’s motion and the supporting Declaration of Brian Matthew Cogdill (Dkt. 38) demonstrated that “the Anthem personnel who designed, operated, and supervised the Anthem chart review program and relevant compliance processes live in the

³ Plaintiff’s accusation (Opp. 26-27 n.12) that Anthem gave a “highly misleading” account of *Poehling* is galling for a further reason: Plaintiff astonishingly asserts that its motion to transfer in *Poehling* was “unopposed,” when in fact it was filed *ex parte* while the case was still under seal, meaning, as the court observed, that the “**Defendants had no opportunity to oppose that motion.**” *U.S. ex rel. Poehling v. UnitedHealth Grp., Inc.*, 2017 WL 10316266, at *1 (C.D. Cal. Sept. 28, 2017) (emphasis added). The defendant MAO later objected to the *ex parte* transfer and sought to transfer the case to another district over Plaintiff’s objection.

Southern District of Ohio” (Mot. 30), and the key business processes “were developed, implemented and conducted from Columbus.” *Id.* at 32; *see Poehling*, 2017 WL 10316266, at *6 (emphasizing the location of employees who conducted provider education and “chart review and risk adjustment programs”).

II. Witnesses Who Reside Outside of this Judicial District or the Southern District of Ohio Are Irrelevant to the Motion

Plaintiff concedes, as it must, that “some relevant events relating to implementation of Anthem’s [alleged] risk adjustment scheme occurred in Ohio.” Opp. 18. Nevertheless, Plaintiff asserts that other witnesses, such as “senior executives” who are members of Anthem’s Medicare “policy committee,” are more critical to its FCA claims. Opp. 21-22. Notably, Plaintiff does not allege that any of these other witnesses live or work in this judicial district.

Plaintiff’s argument ignores the fundamental inquiry that courts in this district undertake when deciding motions to transfer: whether the proposed venue is clearly superior to this district based on the relevant factors. For purposes of this analysis, any witnesses who reside outside the two competing jurisdictions are essentially “irrelevant.” *Herbert Ltd.*, 325 F. Supp. 2d at 288; *Command Arms Accessories, LLC v. ME Tech. Inc.*, 2019 WL 5682670, at *6 (S.D.N.Y. Oct. 31, 2019) (same); *Eres N.V. v. Citgo Asphalt Refining Co.*, 605 F. Supp. 2d 473, 480 (S.D.N.Y. 2009) (same). The fact that there are relevant witnesses in *other* districts has no bearing on Anthem’s motion to transfer; the key fact is that Anthem has identified numerous relevant witnesses who reside in Ohio, while Plaintiff has failed to identify a single material witness who currently lives in this district (*see also infra* at 8-10).

Further, by Plaintiff’s own account, these other executives are scattered across the country, with no district other than Ohio having a core group of relevant witnesses. Plaintiff nevertheless argues that these Anthem employees are significant because the true locus of

operative facts is wherever “policy is determined.” Opp. 19 (quotation omitted). But where does Plaintiff think that is? Plaintiff never alleges that relevant policies were developed or promulgated in this district. And while Plaintiff repeatedly emphasizes the importance of a “policy committee,” it never alleges that this committee actually made any of the key decisions at issue, much less that the committee took any action in this judicial district.

Plaintiff’s successful arguments in *Poehling* again refute its arguments here: there, the **defendant MAO** emphasized the importance of key executives, asserting that “the California-based” employees who operated the chart review program “report to executives in Minnesota or other locations,” and asserted that the key “decisions [were] made in Minnesota.” *Poehling*, 2017 WL 10316266, at *6. But the court held that those facts were “not particularly relevant to the comparison between the convenience of litigating in Los Angeles and the convenience of litigation in Washington, D.C.,” the MAO’s proposed venue. *Id.*

Plaintiff’s reliance on the members of the “policy committee” is misplaced for other reasons too. For example, Plaintiff asserts that Anthem’s “chief compliance officer” is a key witness and that she lives in Colorado. Opp. 22. But that Colorado-based witness became chief compliance officer **after** the time period relevant to this action; the chief compliance officer during the relevant time period worked out of an Anthem office **in the Southern District of Ohio** and currently lives in Ohio. Cogdill Reply Decl. ¶4.

Plaintiff also mistakenly argues that, because the former president of Anthem’s Medicare business unit lives and works in Connecticut, his proximity to this district means that New York is a preferable forum for this litigation. Opp. 19. But the fact that one witness, in a case that will necessarily involve dozens of witnesses, lives hours away from here is a thin reed on which to anchor the case in this district. Moreover, this former executive, Marc Russo, has submitted a

declaration in support of Anthem's motion to transfer venue to the Southern District of Ohio. Declaration of Marc Russo ("Russo Decl."). As Russo explains, he directed a broad array of business practices and the chart review program was just one of the many Medicare Advantage business practices that he supervised. *Id.* ¶4. Russo relied heavily on the expertise and views of Anthem's risk adjustment teams based in Ohio. *Id.* ¶5. Given that he may need to consult with several Anthem team members located in the Columbus office and given that the most important documentary materials on which he relied were generated from that office, Russo has no preference for New York and has no objection to traveling to Ohio, if necessary. *Id.* ¶6.

III. Plaintiff Exaggerates the Importance of Irrelevant Events in an Attempt to Establish a Factual Connection Between its FCA Claims and this District

Plaintiff argues that Anthem has disregarded the supposedly "strong connection" between its FCA claims and this judicial district. *Opp.* 17. Notably, Plaintiff does not assert that this "strong connection" consists of anything related to Anthem's "policy committee," nor does it allege any connection between this district and the actions that it asserts are central to its claims. *See id.* at 10-11 (asserting Anthem "skipped over" various allegations).

Instead, Plaintiff relies on four actions that Anthem allegedly took in Manhattan:

- (a) Anthem operated a large Part C plan in New York (*id.* at 17);
- (b) Anthem maintained a regional office at One Liberty Plaza in Manhattan (*id.*);
- (c) Anthem distributed a flyer to healthcare providers in this district to obtain medical records for its chart review program (*id.*);
- and (d) based on an internal Anthem email exchange from 2010, a regional vice president at Anthem, who worked in this district, received "instruction[s]" that Plaintiff contends misrepresented the purpose of Anthem's request for medical charts from a provider group located in this district (*id.* at 10, 18; *see* Reply Declaration of James A. Bowman ("Bowman Reply Decl.") ¶3.).

The first three contentions are easily dispatched and provide no basis for litigating the case here instead of Ohio. While Anthem operates a MA Plan and has an office in this district, it also operates MA plans and has offices in two dozen other states (*see* AC Ex. 1; Dkt. 38 ¶3). In addition, Ohio has consistently been, and remains, a larger MA market for Anthem than New York. *See* Dkt. 38 ¶4. And the flyer that Plaintiff cites was sent to healthcare providers in several states, including Ohio. Cabrera and other Anthem employees in Ohio prepared that flyer and Cogdill reviewed it before it was transmitted. Cogdill Reply Decl. ¶3. The fact that this flyer was distributed nationwide demonstrates that there is nothing unique about the flyer's distribution in this district that would support Plaintiff's argument against transfer. And to the extent that Plaintiff contends that this flyer is important evidence for its FCA claims, that contention only highlights the centrality of Ohio as a venue, as Cogdill and Cabrera would necessarily be essential witnesses who could testify about that document.

Lastly, Plaintiff's contention that the Court should deny transfer based on a single email exchange in 2010 or the provider group referenced in those emails is preposterous and belied by Plaintiff's own conduct in this case. First, the emails were sent four years *before* the time period that Plaintiff alleges is relevant to its claims, and Plaintiff has not explained how this internal communication has any bearing on the scienter or decisions of Anthem executives many years later. *See* AC ¶5 (relevant time period begins in 2014). This email exchange also relates to a specific practice—chart collection—that is plainly not the focus of Plaintiff's FCA theories. According to Plaintiff, this case will focus on what Anthem did with medical charts *after* it received them, rather than a sideshow about how it may have sought to collect those charts from providers. Nor has Plaintiff provided any evidence that anyone involved in this decade-old event even lives here—or that they will be relevant witnesses, let alone essential. Instead, while

Plaintiff emphasizes that the Anthem vice president in New York received instructions on what to tell the provider group regarding chart collection, Plaintiff omits the fact that the instructions were provided by Anthem executives outside of New York *including the Ohio-based chief compliance officer*. Bowman Reply Decl. ¶4.

It is telling that, when faced with Anthem's request to transfer this action to Ohio, Plaintiff amended its complaint to add an allegation regarding this 2010 email exchange, apparently to provide some connection to this district, however tenuous. But Plaintiff's own investigative decisions betray the truth; during its three-year investigation, Plaintiff never sought to depose, interview, or subpoena anyone regarding this communication, nor did it ask any Anthem witnesses about it. *Id.* ¶3. To Anthem's knowledge, Plaintiff took no discovery about these emails at all.⁴ This event is so inconsequential that it was not included in the original complaint; instead, the allegation relating to this email exchange was only added to the Amended Complaint in an obvious attempt to concoct some connection to evade Anthem's transfer motion.

Plaintiff's cases unsurprisingly support Anthem's position. In two of them, the defendants sought to transfer cases from a district where central events occurred to districts with little or no material connection to the relevant issues. *Pippins v. KPMG LLP*, 2011 WL 1143010, at *3 (S.D.N.Y. Mar. 21, 2011); *Dwyer v. Gen. Motors Corp.*, 853 F. Supp. 690, 694 (S.D.N.Y. 1994). Here, the judicial district where Plaintiff filed this case has no meaningful connection to its FCA claims and Anthem instead seeks transfer to a venue where material witnesses reside and operative facts indisputably occurred.⁵

⁴ Plaintiff's limited familiarity with this email exchange is evidenced by the fact that the Amended Complaint erroneously referred to it as having been sent in 2013, when it in fact was sent three years earlier. Opp. 10 n.4.

⁵ Plaintiff asserts that there can be "more than one single locus of operative facts," but that proposition is irrelevant when the transferee district is still clearly superior to the original district, and the cases that Plaintiff cites are readily distinguishable on that basis. Opp. 19-20; *Tianhai Lace USA Inc. v. Forever 21, Inc.*, 2017 WL 4712632,

Nature's Farm and Plaintiff's successful arguments in *Poehling* (see *supra* at 5, 7) offer the most persuasive authority for the facts here. Plaintiff attempts to distinguish *Nature's Farm*, which ordered transfer of an FCA action from this district to the district where "the bulk of the operative facts occurred." 2004 WL 1077968, at *5. But that effort rests on Plaintiff's baseless argument that the 2010 email exchange is somehow crucial to its case and that Anthem's activities in Ohio are not important. Opp. 24-25. The court in *Nature's Farm* transferred that case notwithstanding a much stronger connection to this district; the *Nature's Farm* defendants discussed in New York the "modus operandi" of the alleged fraud and "the funding decisions which made the alleged conspiracy possible" occurred here. 2004 WL 1077968, at *5 (quotation omitted). Under the rationale of *Nature's Farm* and *Poehling*, transfer is warranted here.⁶

MOTION TO DISMISS

If the Court grants Anthem's motion to transfer, it need not address Anthem's remaining motions. See, e.g., *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 260 F. Supp. 3d 401, 413 (S.D.N.Y. 2017) (granting motion to transfer and declining to rule on other motions because "they are properly resolved by the transferee court"). If the Court decides to consider Anthem's motion to dismiss, it should dismiss Plaintiff's attestation-based FCA Claims with prejudice.

at *4 (S.D.N.Y. Sept. 27, 2017) (fact that activity "occurred all over the country" does not itself point to any particular district); *Starr Indem. & Liab. Co. v. Brightstar Corp.*, 324 F. Supp. 3d 421, 433 (S.D.N.Y. 2018) (denying transfer where insurance policy at issue was executed, issued, and delivered in this district).

⁶ Plaintiff also asserts that it is simply too late for this case to be transferred. With all respect, this is not a serious argument. First, Plaintiff emphasizes that it sought to enforce a subpoena in this district during its investigation. Opp. 26. But as the Court knows, a different judge resolved the parties' dispute over the subpoena. Plaintiff cannot bootstrap its own choice to conduct some of its pre-suit investigation here as a reason to deny transfer, especially when it does not dispute that it sought no documents from, and deposed no witnesses who live in, this judicial district. Mot. 36; see *Garity v. Tetrphase Pharm. Inc.*, 2019 WL 2314691, at *5 (S.D.N.Y. May 30, 2019) (Carter, J.) (convenience of counsel is irrelevant under § 1404(a)). Second, Plaintiff notes that the parties have now submitted "multiple filings" with the Court in this district. Opp. 26. But Anthem stated its intention to transfer this case just two weeks after Plaintiff filed its Complaint. Dkt. 15. The Court has yet to rule on any significant motions or invest considerable resources into this case; in contrast, *Nature's Farm* was transferred after the court had resolved numerous early motions, including a motion to dismiss, and the case had been pending for over three years. 2004 WL 1077968, at *7.

I. Plaintiff Fails to Plausibly Allege That CMS Would Have Denied Payment to Anthem if CMS Had Known How Anthem Operated its Chart Review Program

To adequately assert an attestation-based FCA claim, the Supreme Court’s decision in *Escobar* requires Plaintiff to make a straightforward allegation and support that allegation with specific facts: CMS would have denied risk adjustment payments to Anthem if the agency had known of the chart review practices that allegedly rendered false the Company’s annual risk adjustment data attestations. *See* Mot. 36-39. *Escobar* is clear that, for a false attestation to be material under the FCA, the non-disclosed conduct that supposedly renders the attestation false “must be material to *the Government’s payment decision.*” 136 S. Ct. at 2002 (emphasis added). In other words, whether the falsity of an attestation is “material” depends on “the effect on the likely or actual behavior” of the government in making its payment decision. *Id.* If the government’s payment decision would *not* have changed had it known the true facts, then the alleged misrepresentation is not material. *Id.* at 2003 n.5. The Second Circuit and numerous other courts have faithfully applied that requirement to dismiss FCA complaints for failure to plead materiality where they do not include “concrete allegations” that the alleged misrepresentations “caused the Government to make the reimbursement decision” at issue. *Coyne v. Amgen, Inc.*, 717 F. App’x 26, 29 (2d Cir. 2017); *see* Mot. 37 & n.10 (collecting cases). In its opposition, Plaintiff does not acknowledge any of those decisions; not even the Second Circuit’s decision in *Coyne*. Plaintiff’s assertion that “Anthem offers no basis” for its statement of the governing standard (Opp. 30) is plainly incorrect.

Indeed, *Poehling* and *Swoben* both applied *Escobar* in materially similar circumstances to dismiss attestation-based claims premised on the defendant MAO’s chart review practices because Plaintiff failed to plead that “CMS would have refused to make risk adjustment payments if it had known the [a]ttestations were false.” *Poehling*, 2018 WL 1363487, at *10;

Swoben, 2017 WL 4564722, at *6; *see* Mot. 38-40 (detailing the facts and holdings in *Poehling* and *Swoben*). Although those decisions are not binding on this Court, they are certainly persuasive authority; after all, these are the only two decisions to address similar attestation-based claims against MAOs, and the Plaintiff's allegations are indistinguishable from this suit.

Plaintiff does not and cannot dispute that it fails to make the straightforward allegation that those two cases require. Instead, the best that Plaintiff can muster is a carefully hedged statement that if CMS had known that "Anthem knew that specific diagnosis codes it had submitted for payment and never deleted were inaccurate, CMS would have taken appropriate actions . . . including" one of three things: (1) recouping payment through administrative processes; (2) adjusting reconciliation payments; *or* (3) obtaining repayments in enforcement actions. AC ¶¶162, 167. As Anthem explained in its motion, however, this allegation is insufficient as a matter of law for three independent reasons.⁷

First, this allegation is entirely untethered from the conduct that allegedly made Anthem's attestations false. Plaintiff alleges three potential steps that CMS would have taken if it had known that Anthem was aware of "specific diagnosis codes" that "were inaccurate," AC ¶¶162, 167, but that is not the undisclosed conduct that allegedly rendered the attestations false. This allegation does not address what CMS would have done had it known how Anthem operated its chart review program. In fact, Plaintiff *never* directly addresses the materiality of Anthem's chart review program, which is the explicit basis of its attestation-based Claims. *See* AC ¶¶160, 165 (alleging attestations were false because of Anthem's "chart review program"); *see also U.S. ex rel. Gohil v. Sanofi U.S. Servs., Inc.*, 2020 WL 1888966, at *2 (E.D. Pa. April

⁷ As Anthem noted in its motion, Plaintiff makes no allegation at all regarding the materiality of the attestation portion of its Third Claim. Mot. 40-41 n.11; Mot. 48-49 n.13. The opposition offers no response and, thus, that portion of Plaintiff's Third Claim should be dismissed.

16, 2020) (materiality turns on the specific “falsity” at issue); *infra* at 21.

Plaintiff’s contention that CMS would have taken one of three steps if the agency had known that Anthem was aware of specific unsupported diagnosis codes is also contradicted by its other allegations. The Amended Complaint expressly alleges that Anthem ***did not*** identify potentially unsupported diagnosis codes through its chart review program. *See* Mot. 21-23, 41-42; AC ¶¶5, 7, 8, 156.⁸

Plaintiff does not respond to this argument. The opposition suggests in a footnote that Anthem is contesting “scienter.” Opp. 27 n.13. But that is incorrect. To satisfy *Escobar*, the ***alleged falsity*** must be material to the government’s payment decision. Plaintiff’s key materiality allegation, however, states that CMS would have taken action only if it was aware that Anthem “***knew*** that ***specific diagnosis codes***” were inaccurate. AC ¶¶162, 167. The *Poehling* court specifically analyzed and rejected the exact argument that Plaintiff asserts here—that alleging the materiality of specific false codes is sufficient to show the materiality of the false attestations themselves. *Poehling*, 2018 WL 1363487, at *10 (finding Plaintiff failed to plead “that the [a]ttestations” as opposed to individual diagnosis codes are material to CMS’s payment decision).

Second, Anthem explained that Plaintiff’s allegation that CMS “would have” done ***one of three*** different things effectively amounts to an allegation that the agency ***might not*** have done any particular one of those things. Mot. 44-46. Plaintiff misunderstands this argument as well,

⁸ The opposition states that, as a result of Anthem’s chart review program, Anthem “came into possession of information that showed which specific groups of diagnosis codes that Anthem had previously submitted to CMS were inaccurate and should be deleted.” Opp. 7 (citing AC ¶¶6-7, 120-133). But the cited allegations do not support Plaintiff’s assertion: one is explicit that the very reason Plaintiff contends Anthem’s chart review program was problematic is that Anthem “did not” “identify diagnosis codes that had previously been submitted but . . . were likely inaccurate.” AC ¶130; *see also* AC ¶¶5, 7, 8, 156 (similarly stating that Anthem’s chart review program did ***not*** make it aware of specific diagnosis codes that were unsupported by the underlying medical records).

insisting that it never used the word “might.” Opp. 35-36. But Plaintiff fails to grapple with the fact that by listing an explicitly non-exclusive set of actions that CMS would have taken, without alleging that it would have pursued *each of them*, Plaintiff carefully left open the possibility that CMS would not have taken any action affecting its *payment decision*. Specifically, Plaintiff’s allegation expressly allows for the possibility that all CMS would have done is authorized an FCA action like this one. As detailed *infra* at 16-18, that allegation is insufficient as a matter of law. Because Plaintiff’s allegations leave open the possibility that CMS might have authorized an FCA suit *and nothing more*, Plaintiff has at most pleaded that CMS’s payment decision *might have* changed—that CMS had “the option to decline to pay”—which is insufficient under *Escobar*. 136 S. Ct. at 2003.

Third, Anthem explained that, even if Plaintiff had asserted that the alleged falsity in Anthem’s attestation likely or actually affected CMS’s payment decision, it still failed to support that contention with any factual allegations, as it must do. Mot. 46-48. Anthem cited many cases—which Plaintiff again ignored—holding that an allegation that the agency’s payment decision would have changed must be supported by factual contentions. Mot. 47-48 & n.12. (collecting cases). Plaintiff does not, and cannot, dispute this point. Here, factual support is especially important because similar chart review practices have long been common in the MA industry. Yet far from being able to allege that CMS has refused payment to MAOs based on chart review practices “in the mine run of cases,” as *Escobar* envisions, 136 S. Ct. at 2003, this is now the third case, after *Swoben* and *Poehling*, where Plaintiff is unable to point to *any instance* in which CMS’s payment decision has changed after learning of similar practices.⁹

⁹ Plaintiff’s failure to make the required allegation is unsurprising given the nature of CMS’s MA payment model and the fact that CMS specifically *declined* to impose a regulation in 2014 requiring Anthem and other MAOs to conduct chart reviews in the manner that Plaintiff now contends was required. See Mot. 16-21, 48.

Plaintiff seizes on this argument and attempts to caricature Anthem's position as depending entirely on "CMS's conduct in light of its alleged general awareness about chart reviews by MAOs." Opp. 30. Plaintiff is incorrect. It is certainly telling that Plaintiff cannot dispute that it had general awareness of other MAOs' chart review practices and has never adjusted payment to any MAO. *See, e.g., U.S. ex rel. Ferris v. Afognak Native Corp.*, 2016 WL 9088706, at *3 (D. Alaska Sept. 28, 2016). But there are other specific flaws here too: On three occasions—in *Swoben*, *Poehling*, and now in this case—the government has fully investigated and filed suit to challenge a chart review practice like the one at issue here, and yet has never been able to bring itself to make the simple and essential allegation that if CMS had known the full facts when making its payment decision that decision would have changed. As the *Poehling* court observed, if this were a mere technicality—the omission of “magic words”—Plaintiff would have remedied it. Mot. 48 (quoting *Poehling*, 2018 WL 1363487, at *10).

At bottom, Plaintiff's position on materiality depends on the patently incorrect proposition that it is sufficient that the relevant agency would have authorized an enforcement action such as an FCA lawsuit, even if the agency would *not* have changed its payment decision. *See, e.g.,* Opp. 36 (focusing on government's prior FCA lawsuits as sole example of CMS taking action in the past in response to allegations involving false MA risk adjustment data). But as Anthem explained, and as multiple courts have held, a history of filing FCA lawsuits over similar conduct simply cannot be enough to prove materiality under *Escobar*. Mot. 45. If filing a lawsuit were enough, there would effectively be no materiality requirement in government-filed cases, “thus working an end-run around *Escobar*.” *U.S. ex rel. Mei Ling v. City of L.A.*, 2018 WL 3814498, at *20 (C.D. Cal. July 25, 2018). There is necessarily a distinction under *Escobar* between a falsity that is important enough to spur an agency to file an FCA suit and a

falsity that was also material to the agency’s “payment decision.” A contract or tort plaintiff does not show that a misrepresentation was material by pointing to the always-present fact that the misrepresentation has spurred her to file suit. *See Escobar*, 136 S. Ct. at 2003 (noting common-law basis of FCA materiality). And *Poehling* and *Swoben* confirm this truism in two separate FCA cases just like this one: the government sued in both cases, yet both were dismissed for failure to plead materiality. And in *Poehling*, it was utterly irrelevant that the government had previously sued over the same conduct in *Swoben*.

Plaintiff does not identify any contrary authority. Instead, Plaintiff only cites cases observing that, at the pleading stage in a suit filed *by a qui tam relator*, a history of prior government enforcement actions can be relevant as part of an effort to plausibly plead the required conclusion that the misrepresentation would have affected the government’s payment decision. Opp. 34-35 (citing exclusively pleading-stage decisions involving suits filed by relators). That rationale may make sense in a case where a relator, rather than the government, has filed suit. As the First Circuit explained on remand in *Escobar*, there is “no reason to require Relators at the Motion to Dismiss phase to learn, and then to allege, the government’s payment practices . . . Indeed . . . it is highly questionable whether Relators could have even accessed such information.” *U.S. ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 112 (1st Cir. 2016). But that rationale is plainly inapplicable here, where the plaintiff *is* the government, and yet steadfastly refuses to plausibly allege that its payment decision would have changed if it knew the true facts about how Anthem operated its chart review program.

Further still, the particular prior enforcement efforts that Plaintiff identifies certainly cannot support a finding of materiality here. The only two settlements Plaintiff identifies that involved chart review practices both stem *from the Swoben case*. *See* AC ¶¶99, 101. Plaintiff is

thus attempting to support the materiality of its attestation-based Claims by pointing to two settlements in a case where *the analogous claims were dismissed for failure to plead materiality*—indeed, one of the settlements (described in AC ¶101) was reached *after* the attestation-based claims were dismissed in *Swoben*.

Finally, Plaintiff offers a tortured reading of *Poehling* in an attempt to evade its clear holding. Opp. 38-41. Plaintiff’s main contention appears to be that the dismissal of the FCA claims in *Poehling* was somehow not based on its failure to allege that CMS’s “payment decision” would have been different if it knew the true facts about the MAO’s chart review program; instead, Plaintiff contends that the court dismissed the attestation-based claims because Plaintiff simply failed to allege that the attestations had a “direct impact on CMS’s risk adjustment payments,” which Plaintiff suggests is something less than an allegation that the payment decision would have changed. Opp. 40 (quoting *Poehling*, 2018 WL 1363487, at *9). But this characterization of *Poehling* cannot be squared with the plain language of the court’s order. *Poehling* is unequivocal about what the government must allege to demonstrate that the misrepresentation had a “direct impact” on CMS’s payments: the United States must “specifically allege . . . that CMS’s risk adjustment payments . . . would have changed if CMS knew Defendant[’s] [a]ttestations were false,” *Poehling*, 2018 WL 1363487, at *9 (emphasis omitted), or, as the court also put it, “that CMS would have refused to make risk adjustment payments if it had known the [a]ttestations were false,” *id.* at *10. While Plaintiff tries to distinguish *Poehling* by pointing to its allegation here that Anthem’s attestations caused CMS “to disburse reconciliation payments” (Opp. 40), it ignores the fact that its complaint in *Poehling*

repeatedly made *the same allegation*.¹⁰

Plaintiff's attempt to distinguish *Poehling* is all the more mystifying because Plaintiff concedes that it cannot distinguish *Swoben*, see Opp. 39 n.15, yet *Poehling* was explicit that its result followed directly from *Swoben*. *Poehling*, 2018 WL 1363487, at *10 (observing that, “as in *Swoben*, the Government has failed to allege that CMS would have refused to make risk adjustment payments if it had known” of the challenged chart review practices). *Poehling* also explicitly follows the Second Circuit's clear rule in *Coyne*, which, again, Plaintiff ignores. *Id.* at *9 (citing *Coyne*, 717 F. App'x at 29). Therefore, this Court should follow the persuasive reasoning of *Swoben* and *Poehling* and dismiss Plaintiff's attestation-based Claims.

II. Plaintiff's Remaining Arguments Are Meritless

Plaintiff's opposition also offers three excuses for its failure to make the simple allegation that CMS's payment decision would have changed if it were aware of Anthem's challenged chart review practices. Each lacks merit.

First, Plaintiff asserts that Anthem has overlooked that *Escobar* discusses a number of factors that may bear on materiality and requires a “holistic” inquiry. Opp. 29-30. But Plaintiff ignores the crucial foundational question that Anthem's motion addressed: a holistic inquiry *into what?* The opposition reads as if the only question is whether the misrepresentation at issue would have *any effect at all* “on the likely or actual behavior of the recipient of the misrepresentation,” but *Escobar* is quite clear that this inquiry is focused on the likely or actual effect on “*the Government's payment decision*” specifically. 136 S. Ct. at 2002 (emphasis

¹⁰ Am. Compl. ¶99, *Poehling*, No. 2:16-cv-08697 (Nov. 11, 2017), Dkt. 171 (“submission of this Attestation is a condition of receiving Risk Adjustment payments”); *id.* ¶98 (“before their receipt of their final reconciliation payments . . . , [MAOs] must attest to the validity of their risk adjustment data”); *id.* ¶¶345-46 (defendants submitted “Attestation claiming risk adjustment payments” causing Plaintiff to “incur[] damages”).

added).

The entire purpose of *Escobar*'s "factors," in other words, is to determine whether a misstatement materially affected *the government's payment decision*, not whether the misstatement is generally concerning to the government. The factors that the Court identified in *Escobar* are, as Plaintiff correctly acknowledges, "examples [used] to illustrate what types of evidence constitute 'proof of materiality.'" Opp. 29 (quoting *Escobar*, 136 S. Ct. at 2003). There *always* needs to be an allegation or plausible inference that the government would have changed its payment decision. The "factors" identified in *Escobar* are probative of whether there is a plausible basis for that allegation.

Several of Plaintiff's own authorities employing the "holistic" approach make this clear. In one case, the court explained that the government alleged that if the state agency at issue "had become aware of" the defendant's alleged fraud, it "would have referred the matter to law enforcement and stopped payment," before going on to explain that this essential assertion was "supported by a number of specific factual allegations." *U.S. v. Spectrum Painting Corp.*, 2020 WL 5026815, at *12 (S.D.N.Y. Aug. 25, 2020). Another case cited by Plaintiff made clear that the relator had provided adequate support for the essential proposition "that CMS may cancel participation in the Medicare program—to say nothing of payment for any particular claim—for" making the type of misrepresentation at issue. *U.S. v. Visiting Nurse Serv. of N.Y.*, 2017 WL 5515860, at *6 (S.D.N.Y. Sept. 26, 2017). Similarly, the relator in *Escobar* itself made the allegation that the government "would not have paid these claims," 136 S. Ct. at 2004, and on remand, the First Circuit relied on the multi-factor analysis to determine whether that allegation was plausible, *see* 842 F.3d at 110-12. That is also the import of the many cases that Anthem cited, but which Plaintiff ignores; those cases hold that an assertion that the government would

not have paid a claim must be supported by allegations that “explain why the government would not have paid.” *U.S. v. CalPortland Constr.*, 2018 WL 6262877, at *5 (C.D. Cal. Mar. 9, 2018) (quotation omitted); *see also* Mot. 47-48 & n.12. Here, as in *Swoben* and *Poehling*, Plaintiff has simply not alleged the essential fact that CMS’s payment decision would have been affected if it knew of Anthem’s chart review practices. Even if Plaintiff had properly pled other “factors,” those factors could not by themselves adequately allege materiality.

Second, Plaintiff only addresses the materiality of the attestation *generally* when it purports to apply its “holistic approach”—not the materiality of the chart review practices that purportedly render the attestation false. Plaintiff asserts, for example, that “the attestation requirement went to the very ‘essence of the bargain’ between Anthem and CMS,” that “the risk adjustment attestation” is “central to the integrity of the . . . risk adjustment payment system,” and that this requirement has a long “regulatory history.” Opp. 12-13, 32-33.

As Anthem’s cases make clear, however, that is not the relevant question. The relevant question is whether the specific alleged falsity is of the type that would influence the government’s payment decision. *See* Mot. 41; *Gohil*, 2020 WL 1888966, at *2. Here, that means that Plaintiff must allege facts showing that Anthem’s chart review practices were material to *CMS’s payment decision*, not merely that the attestation itself is important in some abstract sense. *See supra* at 12-13. For example, it would support Plaintiff’s materiality argument if Plaintiff could allege that CMS has a history of denying payment to MAOs upon learning that they conducted a one-way chart review program, but Plaintiff cannot do so.

This makes sense. If Plaintiff’s approach were correct, then *any* purported falsity related to the attestation would be automatically material, because according to Plaintiff, the attestation would always go to the “essence of the bargain” and would “cause[] CMS to . . . disburse

reconciliation payments.” Opp. 31 (quotation omitted). But that is not the law: “the [FCA] is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations.” *Escobar*, 136 S. Ct. at 2004. *Poehling* specifically addressed and rejected this argument. The court explained that it was insufficient that the government alleged that the attestations went to the “essence of the bargain” with CMS or that “Defendants were obligated by various regulations to comply with the [a]ttestation requirements,” because, for whatever reason, Plaintiff failed to plausibly allege that CMS’s payment decision would have changed if it knew of the MAO’s chart review practices. 2018 WL 1363487, at *9. A case on which Plaintiff relies makes a similar point. In *U.S. ex rel. Raffington v. Bon Secours Health Sys.*, 405 F. Supp. 3d 549 (S.D.N.Y. 2019), a relator brought a false certification claim based on an alleged failure to sign (or the use of forged signatures on) physician certifications. The court distinguished between evidence relevant to the materiality of the *certifications* and evidence relevant to the materiality of the *signatures*. *Id.* at 575. For example, while “[t]he federal Medicare requirements . . . do make physician certification and recertification express conditions of payment,” the “signatures *themselves* are not made an express condition.” *Id.* (emphasis added). And while federal guidance made clear that certifications were important to the program, that guidance said nothing about *signatures*.

Third, and finally, Plaintiff asserts that Anthem is arguing that Plaintiff must show that CMS would have “stop[ped] all payments” to the Company if it had known of Anthem’s chart review practices. Opp. 37. That is not Anthem’s argument. Plaintiff must show that if CMS knew the true facts regarding Anthem’s chart review program it would have changed its *payment decision* regarding the attestations. Plaintiff has not plausibly alleged that CMS would have denied Anthem one cent if it had known how Anthem conducted its chart review program. It

instead has pleaded at the very most that it would have taken action to recover payment for *specific unsupported diagnosis codes*, which supports the materiality of the separate code-based claim that Anthem is not moving to dismiss. *See* Mot. 41-44. A case relied on by Plaintiff makes clear that even if “the misrepresentation does not have to be so grievous that the government would have completely denied payment upon discovering the truth,” the plaintiff still must show that “the omission would have affected the government’s payment decision” on the claim at issue. *U.S. ex rel. Hussain v. CDM Smith, Inc.*, 2017 WL 4326523, at *8 (S.D.N.Y. Sept. 27, 2017).

In summary, because the Amended Complaint does not allege facts showing that Anthem’s chart review practices are material to CMS’s payment decision, Anthem respectfully requests that the Court dismiss with prejudice Plaintiff’s First and Second Claims, as well as the portion of its Third Claim based on Anthem’s allegedly false risk adjustment data attestations.

MOTION TO STRIKE

Plaintiff’s opposition to Anthem’s motion to strike is without merit. First, the allegations referencing Plaintiff’s prior settlements with other MAOs or healthcare providers are impermissible because, since *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887 (2d Cir. 1976), it has been “well settled under Second Circuit law that allegations in a complaint that . . . rely on[] complaints in other actions that have been dismissed, settled, or otherwise not resolved, are, as a matter of law, immaterial within the meaning of Fed. R. Civ. P. 12(f).” *Low v. Robb*, 2012 WL 173472, at *9 (S.D.N.Y. Jan. 20, 2012) (quotation omitted); *see* Mot. 50-51 & n.14 (collecting cases). Plaintiff asserts that Anthem did not identify cases striking allegations regarding settlements or suits against third parties rather than the defendant itself (Opp. 43), but

Anthem did identify several such cases.¹¹ Plaintiff has no response to those authorities.¹²

Second, these allegations must be stricken because they are not relevant, and because any possible relevance is outweighed by undue prejudice to Anthem and the inevitable waste of resources that will be required to litigate the details of these other settlements. Mot. 52-55. The settlements are irrelevant to materiality. *See supra* at 16-18. They are also irrelevant to Anthem's scienter.¹³ Settlements with third parties do not bear on the legality, or Anthem's knowledge of the legality, of Anthem's chart review program. The fact that the United States sued other MAOs or healthcare providers and later *settled* says nothing probative even about whether the other defendant's actions were unlawful—as *Lipsky* makes clear, settlements (especially settlements involving numerous different claims), by definition, do not give Anthem or other MAOs any reason to believe they must adjust their own practices. *Lipsky*, 551 F.2d at 893-94 (prior settlements are irrelevant because they “are not true adjudications of the underlying issues”). That is especially true here given that the only two chart review settlements stemmed from *Swoben*, where the chart-review-based claims *were dismissed* for failure to plead materiality. *Supra* at 17-18.

The allegations are also plainly prejudicial, because they gratuitously highlight that the defendants in those prior suits settled and paid substantial sums of money. *See* Mot. 54-55 & n.17 (citing cases striking similarly prejudicial allegations). The complaints in the two FCA

¹¹ *See* Mot. 51 (citing *Corr. Officers Benevolent Ass'n v. Kralik*, 226 F.R.D. 175, 177 (S.D.N.Y. 2005); *In re Trilegiant Corp., Inc.*, 11 F. Supp. 3d 82, 99, 131 (D. Conn. 2014), *aff'd sub nom. Williams v. Affinion Grp., LLC*, 889 F.3d 116 (2d Cir. 2018); *Shahzad v. Meyers*, 1997 WL 47817, at *13-14 (S.D.N.Y. Feb. 6, 1997)).

¹² Plaintiff does not cite a single case denying a motion to strike in similar circumstances. Instead, Plaintiff cites *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 136 (2d Cir. 2008), which held that a consent decree involving the defendant could be introduced at trial to show the defendant's awareness of its legal obligations. *Brady* is irrelevant to Plaintiff's position that a settlement with *unrelated third parties* is properly referenced in a complaint.

¹³ Plaintiff oddly claims that Anthem did not address paragraphs 103-105 of the Amended Complaint (Opp. 44 n.17) just before *addressing* Anthem's argument about those very paragraphs. Opp. 44-46 (citing Mot. 54).

cases that Plaintiff cites (Opp. 42) did not refer to prior settlements.

Allowing these allegations to remain in the Amended Complaint would also waste the Court's time on needless discovery disputes. Plaintiff argues that this concern is irrelevant (Opp. 47), but again ignores the authority that Anthem cited, including a decision of this Court, holding that the burden of discovery into ancillary issues can support a motion to strike. Mot. 55. Plaintiff reiterates its refusal to waive privilege regarding its prior settlements (Opp. 47), but it would plainly be relevant if, for example, the government settled those suits for a small proportion of the recovery sought because it no longer believed the suits meritorious. Anthem will be forced to seek that discovery if the allegations are not stricken and, because Plaintiff will contest that discovery, the Court's docket will be needlessly burdened with motions practice over these irrelevant settlements.

CONCLUSION

This Court should transfer this suit to the Southern District of Ohio. If the Court addresses Anthem's remaining motions, it should dismiss Plaintiff's First and Second Claims, and the portion of Claim Three that is based on Anthem's risk adjustment data attestations, and strike paragraphs 99 through 105 from the Amended Complaint.

Dated: November 20, 2020

By: /s/ K. Lee Blalack, II

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHEM, INC.,

Defendant.

Case No. 1:20-cv-02593-ALC

**REPLY DECLARATION OF
JAMES A. BOWMAN IN
SUPPORT OF DEFENDANT
ANTHEM, INC.'S MOTION TO
TRANSFER VENUE**

I, James A. Bowman, declare and state as follows:

1. I am a partner of O'Melveny & Myers LLP and I represent Defendant, Anthem, Inc. ("Anthem" or "Company"), in the above-captioned matter. I previously submitted a declaration in support of Anthem's Motion to Transfer Venue.

2. I submit this further Declaration in support of Anthem's Motion to Transfer Venue. I have personal knowledge of the matters set forth in this declaration, and if called to testify to the facts below, I could and would do so competently.

3. I have represented Anthem during the entirety of the investigation that preceded Plaintiff's filing of the Complaint and the subsequently filed Amended Complaint. To the best of my knowledge, Plaintiff sought neither testimony nor documents from any witness concerning the 2010 internal Anthem email exchange, referred to in paragraphs 117 through 119 of Plaintiff's Amended Complaint, nor any alleged 2010 conversation between a New York-based Anthem vice president and New York healthcare providers. Nor, to the best of my knowledge, did Plaintiff seek testimony or documents on any topic from either the Anthem vice president or

the healthcare providers with whom Plaintiff alleges the vice president spoke in paragraph 119 of the Amended Complaint.

4. Based on my review of the Anthem documents produced to the Plaintiff in the investigation that preceded this action, the 2010 email exchange that Plaintiff references in paragraph 119 of the Amended Complaint involves, among others, Ed Stubbers, Vice President of Compliance, who was involved in providing instructions to the New York-based Anthem vice president.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on November 16, 2020 in Goleta, California.

By: 
James A. Bowman

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHEM, INC.,

Defendant.

Case No. 1:20-cv-02593-ALC

**REPLY DECLARATION OF
BRIAN MATTHEW COGDILL
IN SUPPORT OF DEFENDANT
ANTHEM, INC.'S MOTION TO
TRANSFER VENUE**

I, Brian Matthew Cogdill, declare and state as follows:

1. I am the Manager of Risk Adjustment Quality Control in the Medicare Risk & Recovery department at Anthem, Inc. (“Anthem”). I previously submitted a declaration in support of Anthem’s Motion to Transfer Venue.

2. I submit this further declaration in support of Defendant Anthem’s Motion to Transfer Venue. I have personal knowledge of the matters set forth in this declaration, and if called to testify to the facts below, I could and would do so competently.

3. Exhibit 10 to Plaintiff’s Amended Complaint in this action, a “frequently asked questions” sheet about the chart review collection program, and Exhibit 11, a flyer describing the program to healthcare providers in Anthem’s Empire MediBlue Medicare Part C Plan, were drafted by Patricia Cabrera and other employees at Anthem’s Columbus office and reviewed by me before circulation. Anthem distributed both Exhibit 10 and Exhibit 11 in the states where Anthem operates Medicare Advantage plans in connection with Anthem’s chart collection efforts. In the case of Exhibit 11, the same flyer template was slightly modified to reflect the particular branding of Anthem’s respective Part C plans before it was distributed to healthcare

providers in the various Anthem markets across the country, but the content of the message was materially the same for each market.

4. Anthem’s chief compliance officer from August 2015 to October 2018 was Ed Stubbers. Mr. Stubbers worked in Anthem’s Mason, Ohio office near Cincinnati. Mr. Stubbers left Anthem in 2018 and, from my review of publicly-available information regarding his employment, currently works in Cincinnati, Ohio.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on 11/19/2020 in Dublin, Ohio.

By: Brian M. Cogdill
Brian Matthew Cogdill

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHEM, INC.,

Defendant.

Case No. 1:20-cv-02593-ALC

**DECLARATION OF MARC
RUSSO IN SUPPORT OF
DEFENDANT ANTHEM, INC.’S
MOTION TO TRANSFER
VENUE**

I, Marc Russo, declare and state as follows:

1. I am currently Executive Vice President, Health Plans, at Molina Healthcare (“Molina”). From August 2013 to October 2019, I served as President, Medicare at Anthem, Inc. (“Anthem”).

2. I submit this declaration in support of Defendant Anthem’s Motion to Transfer Venue. I have personal knowledge of the matters set forth in this declaration, and if called to testify to the facts below, I could and would do so competently.

3. I currently live in Connecticut. My work obligations generally require a significant amount of nationwide travel. While the coronavirus pandemic is currently limiting my travel, when the pandemic subsides, I anticipate consistently traveling outside Connecticut for extended periods of time, including to Molina’s offices in Columbus, Ohio where one of Molina’s largest health plans are headquartered due to it currently going through a re-procurement.

4. While serving as President of Anthem's Medicare business unit, I directed a broad array of business practices and programs. Anthem's retrospective chart review program was just one of the many Medicare Advantage programs operated in the Medicare business unit.

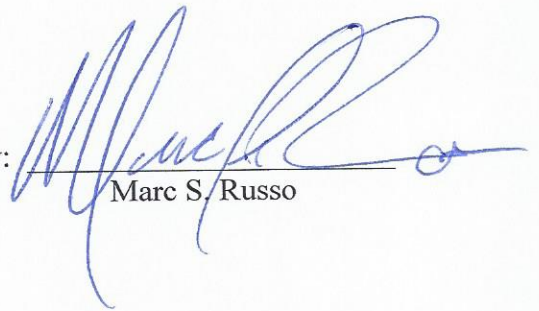
5. In making decisions related to the chart review program, and the Medicare Advantage business, I relied heavily on the expertise and views of the risk adjustment teams in Anthem's offices in Ohio. To the best of my knowledge, many of the key team members for the chart review program lived and worked in the Columbus area, and the rest were dispersed across the country.

6. To effectively prepare and address issues in this case, I may need to consult with Anthem team members located in the Columbus, Ohio office and review materials that were generated and stored at that location. As a result, I have no preference for litigating this case in New York, nor would I object to traveling to Ohio for this case, if that becomes necessary.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on 11/19/2020 in [Wilton], Connecticut.

By:



Marc S. Russo