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September 30, 2021

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**VIA ELECTRONIC DELIVERY & COURT FILING**

The Honorable Andrew L. Carter, Jr.  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, New York 10007

**Re: United States v. Anthem, Inc., 1:20-cv-02593-ALC**

Dear Judge Carter:

We represent the Defendant in this case, Anthem, Inc. (“Anthem”). We write to alert the Court to Judge Kenneth M. Karas’s September 29, 2021 Order (Dkt. 127) in *United States ex rel. Cutler v. Cigna Corp.*, No. 17-cv-07515 (S.D.N.Y.), granting Defendant Cigna Corporation’s motion to transfer the matter to the Middle District of Tennessee. We submit this letter in connection to Anthem’s pending Motion to Transfer this action to the Southern District of Ohio (Dkt. 36). Judge Karas’s September 29, 2021 Order is attached hereto as Attachment A, and the transcript of the September 17, 2021 hearing in which Judge Karas stated his reasoning for granting the motion to transfer is attached hereto as Attachment B.

Like this action, *Cutler v. Cigna* involves a False Claims Act claim against a Medicare Advantage Organization (“MAO”) concerning the defendant’s Medicare risk adjustment data submissions to the Centers for Medicare and Medicaid Services. In granting Cigna’s motion to transfer the case from this Judicial District to the Middle District of Tennessee, Judge Karas noted the following:

- “[T]he majority of the Cigna personnel who would serve as some of the key witnesses in the case, they designed, they operated, they supervised the 360 program at issue here during the relevant time period are based in the Middle District of Tennessee.” Attachment B (Tr. 61:16-20). These witnesses included those with responsibilities for “the day-to-day supervision of the” program (*id.* 63:9-10); for “develop[ing] critical training materials used to educate providers” (*id.* 63:15-16) and “managing the coding processes associated with the” program (*id.* 63:22-23).
- While the plaintiff identified “some witnesses that might be relevant” in the Southern District of New York (*id.* 64:15-16), Judge Karas held that “the critical witnesses in the case” were located “in the Nashville area” (*id.* 65:1-6).
- “Cigna’s connections generally to New York” are “really not relevant because of the specific allegations” concerning the business practices at issue, and because of those practices’ “genesis and the management” from Tennessee; for those reasons, “it’s pretty clear that the locus of operative facts is in Tennessee.” *Id.* 67:5-9.



Should the Court find it useful, Anthem will gladly address the relevance of the *Cutler* decision in supplemental briefing. We thank the Court for its consideration of this letter.

Dated: September 30, 2021

Respectfully submitted,

By: /s/ K. Lee Blalack, II

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*Attorneys for Defendant Anthem, Inc.*

cc: Assistant United States Attorney Peter Aronoff, Esq.

# **Attachment A**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA  
*ex rel.* ROBERT A. CUTLER,  
  
Plaintiff,  
  
v.  
  
CIGNA CORP. *et al.*,  
  
Defendant.

17-CV-7515 (KMK)

ORDER

KENNETH M. KARAS, United States District Judge:

For the reasons stated on the record at the Oral Argument on September 17, 2021, the Court grants Defendants' Motion To Transfer. The Clerk of the Court is respectfully directed to terminate the pending Motion. (Dkt. No. 71).

SO ORDERED.

Dated: September 29, 2021  
White Plains, New York



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KENNETH M. KARAS  
United States District Judge

# **Attachment B**

1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 UNITED STATES of AMERIA, EX REL.  
ROBERT A. CUTLER,

4  
5 Plaintiff,

6 -against- 17 Civ. 7515 (KMK)  
Bench ruling

7 CIGNA CORP., et al.,

8 Defendants.

9 -----x

10 United States Courthouse  
11 White Plains, New York

12 September 17, 2021

13 THE HONORABLE KENNETH M. KARAS,  
14 District Judge

15  
16  
17 LAW OFFICE of ROBERT A. CUTLER  
Attorneys for Plaintiff  
18 BY: ROBERT A. CUTLER

19 UNITED STATES ATTORNEY'S OFFICE for SDNY  
20 Attorneys for USA  
21 BY: PETER M. ARONOFF

22 WILMER CUTLER PICKERING HALE & DORR LLP  
Attorneys for Defendants  
23 BY: CHARLES SPETH  
24 DAVID OGDEN  
KEVIN LAMB

25

1 THE COURT: Good morning.

2 THE DEPUTY CLERK: Good morning, Judge, this. Is  
3 United States of America versus Cigna Corp. et al, 17CV7515.

4 Counsel for plaintiffs, please state your appearance.

5 MR. CUTLER: Robert A. Cutler for the Relator. Law  
6 Office of Robert A. Cutler.

7 MR. ARONOFF: And this is Peter Aronoff from the  
8 US Attorney's Office, Southern District of New York for the  
9 United States.

10 THE COURT: All right, anybody else?

11 THE DEPUTY CLERK: For defendants.

12 MR. SPETH: Thank you. Charles Speth of Wilmer Hale  
13 for the defendants, and I'm joined by my colleagues, David  
14 Ogden and Kevin Lamb.

15 THE DEPUTY CLERK: Thank you.

16 THE COURT: Good morning, again, everybody. So we  
17 are gathered telephonically to have argument on Cigna's motion  
18 to transfer. So I've read the papers. I don't know who wants  
19 to speak on behalf of Cigna, but the digital floor is yours.

20 MR. SPETH: Thank you, your Honor. It's Charles  
21 Speth on behalf of defendants.

22 In light of Mr. Cutler's letter to the Court  
23 indicating that he no longer disputes this case could have been  
24 filed initially in the Middle District of Tennessee, I'm going  
25 to turn right to the 1404(a) factors that we believe decisively

1 favor transfer.

2           The case is principally about Cigna's Medicare  
3 Advantage business, and specifically it's 360 program pursuant  
4 to which Cigna conducts annual health exams of its Medicare  
5 Advantage Plan members, including exams conducted in the  
6 members' homes. And Mr. Cutler alleges that the diagnoses  
7 reported by nurse practitioners during these in-home exams  
8 cannot be used to establish the health status of the members,  
9 and thus, that Cigna made false claims to the government when  
10 it submitted diagnosis codes from these 360 exams to CMS for  
11 the purpose of obtaining risk-adjustment payments.

12           And specifically, Mr. Cutler alleges that the 360  
13 exams were designed and intended to be an improper  
14 data-gathering exercise and that the 360 program exam  
15 supposedly did not involve any medical treatment or care of the  
16 Cigna plan members. And as a result, and as Mr. Cutler himself  
17 acknowledges, this is a direct quote from his opposition brief,  
18 the most significant testimony in the case will concern key  
19 decisions that were made with respect to the 360 program,  
20 including the decision to implement the program, including its  
21 goals, objectives, and performance expectations, as well as the  
22 specific approvals granted as to code submissions, program  
23 design, management structure, and the protocols and procedures  
24 for performing the 360 visits. None of the key events related  
25 to the design, operation, implementation of the 360 program

1 occurred in New York. None of the key witnesses who designed  
2 and supervised the 360 program are located in New York, and  
3 none of the annual 360 exams that occurred in members' homes  
4 occurred in New York. Instead, the locus of operative facts  
5 concerning Cigna's 360 program is Nashville, Tennessee. The  
6 program was designed and managed from Tennessee, the key  
7 witnesses who designed and operated the program were and remain  
8 in Tennessee. And the relevant document custodians and  
9 repositories are in Tennessee.

10           So starting with the locus of operative facts, which  
11 is a primary factor in the analysis, the amended complaint  
12 focuses largely on the design and implementation of the 360  
13 program, and it's Cigna's communications with and training of  
14 the practitioners who conducted the in-home 360 exams, and of  
15 course, Cigna's submission of diagnosis codes that were  
16 generated from the 360 exams. These events are centered in the  
17 Middle District of Tennessee. None has a nexus to New York.  
18 Cigna operates its Medicare Advantage business and its 360  
19 Program through which it offers the in-home exams principally  
20 through a company known as Cigna HealthSpring Inc. and its  
21 subsidiaries. Cigna HealthSpring Inc., was previously an  
22 independent company called HealthSpring which Cigna acquired  
23 along with HealthSpring's subsidiaries and affiliates in 2012.  
24 And it was HealthSpring that initially designed 360 program,  
25 and it was Cigna HealthSpring that continued the program's

1 management and operation. And this business, what was  
2 HealthSpring before 2012, became Cigna HealthSpring after 2012  
3 and is now called, internally referred to within Cigna as Cigna  
4 Medicare, has been and remains based in Nashville.

5 In addition, within HealthSpring and what's now Cigna  
6 HealthSpring or became Cigna HealthSpring, the primary  
7 responsibility through the 360 program fell to a department  
8 that was referred to as the Medicare Data Quality Operations  
9 department, or MDQO, and to a specific unit within that  
10 department called the Chronic Care Quality Initiative, or CCQI.  
11 Both the MDQO and CCQI teams were located in Nashville. And  
12 consistent with that history, the key employees who  
13 participated in the design implementation and operation of the  
14 program were all based in Nashville. So Dirk Wales was  
15 HealthSpring's chief medical officer before Cigna's acquisition  
16 of HealthSpring in 2012, and he continued in that role for  
17 Cigna Medicare until he left Cigna last year.

18 Dr. Wales was primarily involved in the initial  
19 design and development of the 360 program, again, for  
20 HealthSpring's acquisition by Cigna. And after the  
21 acquisition, he continued to supervise the 360 program.

22 Dr. Michael Fessenden served as a senior director of  
23 CCQI from July 2013 to June 2020, and he was the director of  
24 MDQO of from November 2015 to June 2020. As director of MDQO,  
25 senior direction of CCQI, Dr. Fessenden was responsible for the

1 day-to-day supervision of the 360 program and the Cigna  
2 employees with responsibility related the day-to-day operations  
3 of it.

4 Dr. Fessenden also had regular contact with  
5 third-party vendors that conducted the in-home exams, and he  
6 helped Cigna manage those relationships with those vendors.

7 Dr. Jason Jean, the nurse practitioner with a  
8 doctorate in nursing, was Cigna's Chronic Care Quality Manager  
9 and educator from 2014 through 2018. Dr. Jean worked in CCQI,  
10 he reported to Dr. Fessenden, and he was responsible for  
11 developing training materials used to educate the providers who  
12 conducted the in-home exams. He met with the third-party  
13 vendors who supplied those providers, the clinicians, and he  
14 has knowledge of the training and the communications of those  
15 providers.

16 Casey McKeon, the general manager of Cigna's National  
17 Health Services, its Medicare business, National Health  
18 Services, from 2016 through 2020. In that role, he had sort of  
19 general supervisory responsibility for MDQO.

20 And finally, Glynn Creech, he was the director of  
21 Risk Adjustment Coding, he has been since 2014. And his  
22 responsibilities include managing the codings process specific  
23 to the 360 exams.

24 Each of these employees performed the work I've just  
25 described during the relevant period in the Nashville area. As

1 Dr. Wales, Dr. Fessenden, Dr. Jean, as well as Mr. McKeon have  
2 all testified, the 360 program was designed, managed, and  
3 operated from the Nashville area, and the key decisions  
4 concerning the 360 program were made in the Nashville area.

5 Mr. Culter tends to discount the significance of  
6 Tennessee as the center of events by arguing that Cigna has not  
7 claimed that it submitted codes from the 360 program to CMS  
8 from its offices or from its system in Nashville, but he  
9 concedes that the center of gravity is actually where the  
10 principal decisions were made that resulted in the alleged  
11 false claims, and Cigna submitted unrebutted declarations from  
12 Dr. Fessenden, Dr. Wales, Dr. Jean, Mr. McKeon, that the key  
13 personnel involved in the program and those decisions were made  
14 in Nashville.

15 In comparison, or by contrast, Mr. Cutler's complaint  
16 contains no substantive factual allegations related to this  
17 district. It mentions New York only in discussing venue, and  
18 none of the allegations that Mr. Cutler makes for purposes of  
19 establishing venue, for example, that Cigna maintains an office  
20 and sells insurance in New York, that Cigna providers operate  
21 within the district, that Cigna stock is traded on the New York  
22 Stock Exchange, none of those facts or allegation is an  
23 operative fact for purposes of the legal claims that are at  
24 issue in this case, none of the events from which the claim  
25 under the FCA arises.

1           And likewise the arbitration proceeding that occurred  
2 in New York is not an operative fact or an event from which the  
3 claims here arise. The arbitration proceeding postdated the  
4 allegation in Mr. Cutler's complaint, and it's not even  
5 mentioned in his complaint. What occurred during the  
6 arbitration is simply irrelevant to the transfer analysis.

7           Finally, unable to show that the locus of operative  
8 facts is New York, Mr. Cutler suggests that center of events is  
9 Philadelphia based on the volume of 360 exams that occurred in  
10 the surrounding market or perhaps Bloomfield, Connecticut,  
11 because Cigna has a corporate headquarters there. Of course  
12 neither of those places is New York, and again, Mr. Cutler's  
13 legal claims are not about where the 360 exams were conducted,  
14 but as he acknowledges, again, to quote him, the key decisions  
15 that were made with respect to the 360 program.

16           Mr. Cutler also engages in unsupported speculation  
17 that key decisions would only have been made by the highest  
18 decision makers within Cigna, who presumably would be based in  
19 Cigna's principal offices in Bloomfield and/or Philadelphia.  
20 But this type of speculation is not evidence, it shouldn't be  
21 credited, and in any event, there's no reason to engage in the  
22 speculation because each of the employees who actually worked  
23 on the 360 program has confirmed that, in fact, those key  
24 decisions were made in Nashville.

25           So turning to the convenience of the witnesses, this

1 factor is recognized as probably a single most important factor  
2 in the analysis of whether transfer should be granted, and  
3 because, as Mr. Cutler himself acknowledges, the issue is the  
4 program, the 360 program, among the most critical witnesses are  
5 those Cigna employees who designed and operated and oversaw  
6 that program. And those people are in Tennessee. None are in  
7 New York. They include Dr. Wales, Dr. Fessenden, Dr. Jean,  
8 Mr. McKeon, and Mr. Creech.

9 As Dr. Wales and Dr. Fessenden both declared or  
10 testified in their declaration, the day-to-day operational and  
11 strategic decisions related to the 360 program were generally  
12 made by or involved one or both of them.

13 All five of these key witnesses are currently located  
14 in Tennessee in the Nashville area, and it is not just these  
15 five witnesses who are located in the Nashville area. In  
16 addition, likely witnesses include other MDQO and CCQI  
17 employees who live, who work and continue to live in Nashville.

18 And as Dr. Fessenden testified, the vast majority of  
19 the individuals involved in the management of the 360 program  
20 during the relevant time period were based in Nashville.

21 Other likely Nashville-based witnesses include those  
22 employees who manage the electronic systems involved in the  
23 operation of the 360 program, such as the databases for  
24 storing, reviewing data, and documentation from the program,  
25 and Cigna's informatics team that's responsible for collecting

1 and submitting risk adjustment data to CMS, which is located in  
2 Nashville, the informatics team.

3 By contrast, none of the current or former employees  
4 who designed and operated the 360 program or who managed any  
5 aspect of Cigna's Medicare Advantage business lives in  
6 New York. We're not aware of one single material witness who  
7 resides in this district, and Mr. Cutler hasn't shown  
8 otherwise.

9 He points to Cigna corporation executives in  
10 Bloomfield, but the Connecticut-based executives, high-level  
11 executives in the corporation are not connected to the case,  
12 and his suggestion otherwise is speculation.

13 He's also named several other people who he claims  
14 live near New York, but the witnesses he points to cannot  
15 fairly be described as having any involvement in the design or  
16 operation of the program. He referred to Dr. Alan Muney. He  
17 referred to Dr. Julian Harris. Both of them subsequently  
18 submitted declarations saying -- Dr. Muney saying he didn't  
19 have any substantive involvement in the program, Dr. Harris  
20 saying he was not involved in the decision to implement the  
21 program, the setting of its goals, objectives, or performance  
22 expectations, or the specific approvals granted at the program  
23 submission or program design.

24 Finally, Mr. Cutler points to Mark Blackburn, the  
25 former CEO of another 360 exam vendor. But in support of his

1 assertion about Mr. Blackburn and what he might testify to,  
2 Mr. Cutler cites only to his own amended complaint, which  
3 doesn't mention Mr. Blackburn or his company. And in any case  
4 Mr. Blackburn was not involved in the implementation or design  
5 of the 360 program. Importantly, no vendor ever performed a  
6 360 exam in the State of New York.

7           Lastly on this point, with respect to the witnesses  
8 outside of Tennessee, Texas, Arizona, Delaware, Connecticut,  
9 Pennsylvania, the convenience of witnesses who reside in  
10 neither the current nor the transferee forum is a relevant  
11 consideration.

12           Turning to the location of documents and ease of  
13 proof. Document discovery also favors transfer here. The  
14 relevant document custodians and repositories are in Tennessee.  
15 The documents associated with the 360 program were created  
16 there and are maintained there. No relevant document  
17 repositories associated with the case are located in New York.

18           Both Mr. Cutler's choice of forum and the convenience  
19 of the forum to him carry little if any weight here because  
20 Mr. Cutler is not the true party in interest. United States  
21 is. And this district is neither Mr. Cutler's home forum or  
22 locus operative facts.

23           Because the case law is clear, but because the United  
24 States is this real party in interest, a Relator's choice of  
25 forum in the *qui tam* action carries no weight. And Mr. Cutler

1 implicitly acknowledged that point in his pre-motion letter  
2 arguing that he did not bring this case as *pro se* litigant but  
3 rather as an attorney at law representing the United States.  
4 And that doesn't help it, because it's well settled the  
5 convenience of counsel is not an appropriate factor to consider  
6 on a transfer motion. So however Mr. Cutler chooses to present  
7 himself, his choice of forum and his convenience is not to be  
8 given significant weight. Moreover, any weight accorded to a  
9 plaintiff's choice of forum diminishes either where the case's  
10 operative facts have little connection with the chosen forum or  
11 where the plaintiff chooses a forum other than his or her place  
12 of residence. And here both are true. Mr. Cutler has alleged  
13 no facts connecting this case to this district or to the State  
14 of New York, and the amended complaint mentions no witnesses  
15 who live here, and Mr. Cutler does not live here either. So  
16 his choice of forum should carry no weight.

17           The interests of judicial economy, that's trial  
18 efficiency, the interests of justice, also favor transfer.  
19 Cigna moved to transfer promptly so that no other resources  
20 would be invested by the parties or the Court in litigating  
21 this case. Other than the amended complaint, no developments  
22 have occurred and the Court has not yet ruled on any material  
23 issues.

24           The progress of litigation would not be affected by  
25 transfer to the Middle District of Tennessee, especially since

1 the two districts have nearly identical caseloads and median  
2 times to trial.

3 Mr. Cutler argues that Cigna failed to show that this  
4 district is an inconvenient forum, but that simply is not the  
5 case. Cigna has demonstrated that key witnesses and documents  
6 are located in the Middle District of Tennessee and none are in  
7 New York. Requiring Cigna to defend its 360 program in this  
8 district and to make witnesses who operate that program  
9 available for trial in this district rather than in the  
10 district in which they work and are located is inconvenient.

11 And Mr. Cutler's argument about the economic  
12 disparity between the parties is also not persuasive. First,  
13 Mr. Cutler offers little, except for his own self-serving  
14 declaration, to show that his financial condition would prevent  
15 him from litigating this case in Tennessee.

16 Second, the relative means of parties is considered a  
17 neutral factor in a *qui tam* action.

18 And third, his argument at bottom is that because  
19 he's an individual and Cigna is a large corporation it's okay  
20 to impose financial burden and inconvenience on Cigna.

21 But the issue here is not the convenience of  
22 Mr. Cutler, who the case law recognizes is not the real party  
23 in interest but the convenience of the witnesses who would be  
24 required to attend trial. And as discussed, the convenience  
25 of those witnesses, including certain former employees such as

1 Dr. Wales and Dr. Jean who have moved on from Cigna to other  
2 careers in the Nashville area, strongly favors transfer.

3 The remaining factors we submit are neutral in the  
4 availability of process and the forum's familiarity with the  
5 governing law.

6 So your Honor, Mr. Cutler sued here and opposes  
7 transfer simply for his own convenience. But a Relator's  
8 choice of forum in a false claims act is not entitled to  
9 significant weight, nor is the convenience of counsel. The  
10 operative facts giving rise to its litigation has no material  
11 connection to this district. The most important 1404(a)  
12 factors, the convenience of witnesses and the locus of  
13 operative events, strongly favor transfer.

14 Thank you, your Honor. I'm happy to answer any  
15 questions.

16 THE COURT: You have thoroughly covered the issues.  
17 As I said, I've read the papers, so I fully understand your  
18 position, but thank you.

19 Mr. Cutler. Mr. Cutler?

20 MR. CUTLER: Sorry, I accidentally hit my mute  
21 button. It's absolutely ridiculous to say that this case  
22 belongs in Tennessee. The defendants operate under the name  
23 Cigna, both individually and collectively, and Cigna, as it's  
24 very clear from their annual report, is a Connecticut-based  
25 business. The headquarters are in Connecticut. It has two

1 other principal offices, one of which is in Philadelphia, and  
2 that's relevant to this case, and there's another office in  
3 Missouri related to the Express Scripts business, which is not  
4 relevant in this case. But the two offices in Bloomfield and  
5 Philadelphia are significant, and I will get into that in a  
6 little bit.

7           There was an entity, sorry, a business named,  
8 operating under the name HealthSpring in Tennessee at one  
9 point. And as the defendants acknowledge, that entity was  
10 purchased in 2012 and over time has been integrated into  
11 Cigna's enterprise. And now that business no longer operates  
12 as HealthSpring, it's part of Cigna. The name is not used on  
13 any of the plans that -- any of the Cigna plans, and over the  
14 last few years, Cigna has been shutting down offices in various  
15 locations. And as I noted, there is an office in Houston that  
16 was shut down that was used by two of the entities which are  
17 defendants in this case, and that's since the filing of the  
18 complaint in 2017.

19           And as the defendants point out, the operation in  
20 Nashville is a department called Medicare Data Quality  
21 Operations, and then a business unit called the Chronic Care  
22 Quality Initiative. Well, these are obviously, just from their  
23 names, these are very specific functions and obviously are part  
24 of a larger operation. That operation being Cigna overall,  
25 which, again, is based in Connecticut with a major office in

1 Philadelphia. So as I'll show, this was really a multi-state  
2 operation. This is not relegated to Nashville. And even if  
3 there may be some witnesses in Tennessee, this does not make  
4 Tennessee the center of gravity here. The brains of the  
5 operation of Cigna are in the northeast, and Cigna, again, as a  
6 northeast enterprise.

7 So let's turn to now, I'm going to turn to the  
8 factors that have to be weighed in evaluating the motion to  
9 transfer. There's nine factors, and I'm sure the Court is  
10 aware what they are, but I'm just going to briefly recite them:  
11 First is convenience of the witnesses; locus of the operative  
12 facts; trial efficiency; and interests of justice, sometimes  
13 the courts separate that out into two factors; the availability  
14 of process; the relative financial means of the parties;  
15 convenience of the parties; the location of the documents; the  
16 forum's familiarity with the law; and the weight of the  
17 plaintiff, or in this case Relator's, forum choice.

18 Now it should be pointed out that defendant has the  
19 burden of proof here to prove by clear and convincing evidence  
20 that the transfer is warranted, and a strong case needs to be  
21 made. It's not that Relator has to prove that the case belongs  
22 in New York as defendants have argued, it's that they have to  
23 prove that the case should be transferred to Tennessee. Yet,  
24 as I will explain, the Relator can clearly show that the case  
25 belongs in New York and that all of the factors, in fact, favor

1 keeping the case in New York.

2           So of the nine factors that I just identified, two of  
3 them are clearly neutral, and I'm actually surprised that the  
4 defendants would argue that the location of the documents is a  
5 factor that is really, has any weight in this analysis. And  
6 there are number of cases that address that in the Southern  
7 District of New York the location of the documents is neutral  
8 because in this day and age of technology, the ability to  
9 transfer documents is very easy, you have emails, you have  
10 faxes, and things like that. And I'll just cite a case for  
11 that, *Winter v. American Institution of Medical Sciences and*  
12 *Education*, and the cite for that is 242 F.Supp. 3d 206. And so  
13 that factor is clearly neutral, and I believe that they also --  
14 they may not have even raised the forum's familiarity with the  
15 law, but that is also a neutral factor because it's presumed  
16 that both forums are familiar with federal law and can rule  
17 with familiarity on the false claims act.

18           So I'm going to now turn to the seven factors that  
19 really can weigh either way. And the most important factor, as  
20 the courts have repeatedly said, is the convenience of the  
21 witnesses. And in order for the Court to evaluate this  
22 particular factor, there's really three things that has to be  
23 looked at.

24           The first is did the defendants identify specific  
25 witnesses. You know, general statements like the employees are

1 all located in Tennessee, it's not acceptable. There have to  
2 be specific witnesses identified. Then the Court has to look  
3 at the residency of where those witnesses are located and then  
4 examine the substance of the testimony.

5           So on the first point, defendants do identify  
6 specific witnesses, but they do in many places throughout their  
7 brief, refer to many witnesses in Tennessee, dozens of  
8 witnesses in Tennessee, operational personnel based in  
9 Tennessee, multiple personnel. Even on this call defendants  
10 have said there were employees, many employees who manage  
11 databases and informatics teams in Nashville. These are very  
12 general statements and they're not to be taken into account in  
13 evaluating the convenience of the witnesses. You have to look  
14 at the specific witnesses.

15           So now turning to those witnesses that defendants  
16 have identified, and those are, again, Dr. Wales,  
17 Dr. Fessenden, Glynn Creech, Jason Jean. Now they also have  
18 pointed out Casey McKeon as an additional witness; however,  
19 Mr. McKeon does not identify, does not say in his declaration  
20 that he is a resident of Tennessee. Nowhere does he say that.  
21 He doesn't even say that he could testify or what he would  
22 testify to. So on that basis, I think -- and the fact that in  
23 the defendant's reply they only talk about four witnesses and  
24 in McKeon's affidavit it talks about, sorry, declaration they  
25 talk about four witnesses. So I'm not sure how I understand

1 there's a fifth witness now, but in any event, there are the  
2 four that were specifically identified.

3           Now if we look at the residency of those four,  
4 there's only one of them that actually identifies himself as  
5 being a resident of Tennessee and that's Jason Jean. The  
6 remaining three don't identify themselves as Tennessee  
7 residents, they say they live in the Nashville area, but in  
8 fact, Nashville is within 50 miles of the Kentucky border and  
9 the Nashville Chamber of Commerce has stated that its business  
10 zone runs right up to the border with Kentucky. So one could  
11 very easily or justifiably argue or state that they live in the  
12 Nashville area yet not be within the state of Tennessee. One  
13 could easily live in the state of Kentucky and still live  
14 within the Nashville area.

15           So the Court has to -- if the Court is to adopt the  
16 defendant's rationale that you have to look at the state and  
17 not necessarily the proximity to the forum district, then, in  
18 fact, the Court needs to disregard three of the four witnesses  
19 that defendants have identified.

20           So if I just turn to the one witness who has  
21 unequivocally identified himself as being a resident of  
22 Tennessee, his relevance to this case is -- well, let me first  
23 say, the area of testimony that he would give, the area he  
24 would testify to is very limited, and it's just on the subject  
25 of training materials. And this witness has not identified in

1 his declaration what those training materials pertain to. He  
2 said that they're training materials that he used in connection  
3 with the 360s and that he was training nurses, including those  
4 who performed 360s, but there's lots of different types of  
5 training that nurses receive. For example, he may have been  
6 training them on HIPAA regulations. There's no connection  
7 between -- that he's stated between the type of training he was  
8 providing and the way that the 360s were actually performed.

9           And in any event, defendants claim he reports to  
10 Dr. Fessenden. That's not accurate. As I have pointed out in  
11 my brief, he reports to Shelley Stevens, who is located in  
12 Philadelphia. She is the clinical manager of the entire  
13 program. So that is his superior. And she would be more  
14 familiar with the training than he would. She is also a nurse  
15 practitioner, and so his testimony would clearly be duplicative  
16 of her testimony.

17           Now, if I just turn, if I then turn to the other  
18 individuals who, again, if the Court adopts defendants'  
19 reasoning would not be included, but let's just for the sake of  
20 argument go through it, I think there's also some question  
21 about their relevance or not necessarily -- some, I would say  
22 Dr. Fessenden, for example, may be relevant as a witness;  
23 however, defendants have clearly overstated his importance.  
24 They state that he was responsible for the day-to-day  
25 supervision of the 360 program. However, that's not true. And

1 the Relator has produced testimony that Dr. Fessenden provided  
2 during the arbitration in 2017 that clearly contradicts what  
3 defendants are saying now. He said that Shelley Stevens is the  
4 one who's in charge of the 360 program and that he receives  
5 updates every two months or so. And he also claims that he was  
6 in regular conduct with vendors. That is also not true. There  
7 are statements that he made during the arbitration, again,  
8 under oath, that contradicts this. And as I provided a  
9 declaration from Texas Health Management from the president who  
10 indicated very clearly he did not recognize Dr. Fessenden as an  
11 executive of the 360 program and had very little communication  
12 with him.

13 So in any event, to the extent Dr. Fessenden is  
14 relevant, he has very little credibility because he's making  
15 contradictory statements, and in any event, because Shelley  
16 Stevens was really the one in charge of the program, she would  
17 be a far more important witness than him. And presumably  
18 whatever testimony he could give, if he's testifying simply as  
19 to the operation of the program, she could provide as well.

20 Dr. Wales, according to the defendants, stated he's  
21 important because he was involved with the initial 360 design  
22 prior to 2012 when HealthSpring was acquired. But the claims  
23 in this case relate to filings that from 2012 forward, from  
24 2012 to 2017. So his involvement in the initial design isn't  
25 really relevant to that. What matters is what the design was

1 in that time period. And it isn't clear, apparently claims to  
2 have some supervisory role, doesn't explain what that is  
3 exactly. Defendants make this broad claim all the principal  
4 decisions were made in Tennessee without really identifying the  
5 types of decisions that were made, but also Dr. Wales doesn't  
6 explain what the difference is between the decisions he made  
7 and the decisions that Dr. Fessenden made and the decisions  
8 that Shelley Stevens made. And that's a very important point  
9 because Shelley Stevens, again, was in charge of the  
10 operations. It could very well be that Dr. Fessenden and  
11 Dr. Wales would provide duplicative testimony of Shelley  
12 Stevens. Both parties recognize that Shelley Stevens is a very  
13 important witness, maybe one of the most, if not the most  
14 important witness, because of her knowledge of the program and  
15 how it operated. And again, the defendants have the burden of  
16 proof here, not the Relator.

17 Now turning to Glynn Creech. He was, according to  
18 his declaration, responsible for supervising overall coding  
19 processes. The defendants don't really say how that's  
20 relevant. He's not an individual named in the complaint, and  
21 coding, which is what he does, apparently, is simply the  
22 process of assigning diagnostic codes to diagnoses that were  
23 recorded in the 360 forms. So how that really relates to the  
24 design and the decisions isn't really clear. He doesn't say --  
25 well, it's actually not him that says this. It's not Glynn

1 Creech that actually makes in declaration, it's Casey McKeon,  
2 so there is hearsay involved here. And it isn't clear how  
3 Casey McKeon would know some of these facts, but according to  
4 Casey McKeon, it was the coding, so Mr. Creech was providing  
5 coding, and coding is just the process of assigning ICE codes  
6 to specific diagnoses. It doesn't say in this declaration that  
7 Mr. Creech actually submitted any codes. It doesn't say that  
8 he supervised the submission of any codes. It doesn't say that  
9 he made any decisions about which codes should be submitted,  
10 and even if he did, there were coders in many locations that  
11 perform this very same function, essentially just putting --  
12 assigning codes to diagnoses. It's just a ministerial act.

13           And just to give an example, Jeff Cox in  
14 Philadelphia, he also coded specific diagnoses, and he was  
15 dealing with the Philadelphia market, which is far larger than  
16 Nashville. And as I have pointed out, 86 percent of the 360s  
17 were performed outside of Tennessee. Defendants are  
18 overstating the importance of Nashville here.

19           So in conclusion, with respect to defendants'  
20 witnesses, either their testimony is duplicative or it's  
21 unclear or how material they are is unclear.

22           Now, if we turn to -- oh, and I just also want to say  
23 what's very troubling here is that the defendants don't  
24 identify any executive officers, who was making the business  
25 actual business decisions. What they identify here are people,

1 doctors, clinicians, and as I mentioned, the business unit is  
2 the Chronic Care Quality Initiative. Dr. Wales is the chief  
3 medical officer. How does that relate to the executive  
4 decision? There are no senior executives named here.

5 HealthSpring is a corporation; where's the Board of  
6 Directors?

7 These are important decisions that would not have  
8 been made by these individuals because they were not the senior  
9 executives and that has to -- the Court needs to take that into  
10 consideration. This was a billion-dollar program here. This  
11 was not some clinical thing that could be put together, sort of  
12 small-time operation put together in Nashville. This was a  
13 major undertaking.

14 Now turning to the New York witnesses, because there  
15 are many, and defendants just skip over those witnesses by  
16 saying that they just deny having any involvement.

17 I turn first to Dr. Julian Harris, there's no  
18 question that he is a New York resident. He lives in  
19 Larchmont, which is in the same county where the court is  
20 located, and he is an extremely important witness. And why is  
21 that? Because he is the founder and CEO of a company called  
22 CareAllies.

23 Let me just point out, first of all, Casey McKeon,  
24 who gave one of the declarations in this case, works for  
25 CareAllies. So there's obviously a connection to CareAllies.

1 But I will explain in more detail what that connection is.

2 CareAllies manages physician practices within the  
3 Medicare Advantage Plan. It was CareAllies that pitched 360s  
4 to the physicians as a way to close gaps in care for those  
5 physicians' patients. They manage this process for the  
6 physicians from the beginning to the end. As I state in the  
7 complaint, the 360s is a process of interrelated steps that  
8 began with the doctors and ended with the vendors. And the  
9 physicians have the opportunity to either opt into the program  
10 or not. This was communicated not to Nashville, this was  
11 communicated to CareAllies, which was, as the name sounds,  
12 they're allies with the care providers.

13 So when we refer to the 360 program, we're not  
14 talking about a stand-alone operation with a separate  
15 leadership and headquarters like the defendants are portraying  
16 here, we're talking about a program that was part of the  
17 management of the plan and the manager of the plan was  
18 CareAllies. The 360 was pitched as a benefit for the doctors.

19 Just to make this a little bit clearer. The  
20 connection between the management arm and the performance of  
21 360s can really be understood if I get -- just explained how it  
22 is that Cigna gets paid from CMS and how the doctors in turn  
23 get paid. So let me just address that briefly if I can.

24 So Cigna gets paid from Medicare to operate Medicare  
25 Advantage Plan, which is an alternative to traditional

1 Medicare. And Cigna gets paid is a flat, capitated rate.  
2 That's opposed to a fee for service.

3           So for example, if a patient went into their doctor's  
4 office and had a colonoscopy, just as an example, in a  
5 fee-for-service model, that physician would charge the plan a  
6 fee for that and the plan would then get reimbursed from  
7 Medicare. Now, that's no longer how these Medicare Advantage  
8 plans work. They work based on a flat fee where Cigna gets  
9 paid a flat fee and then it still has to pay its doctors.  
10 Well, how does it pay its doctors? It could be a fee for  
11 service or it could be flat. If you're Cigna, you want that to  
12 be flat, because if you're flat and they're not, potentially  
13 you could end up losing money on this if the fees, the doctor's  
14 fees, exceed the flat rate that you're receiving.

15           So Cigna's goal has been, and this is very clear from  
16 their annual report, it's to move the doctors to this  
17 accountable care model, what we call the ACO model or  
18 accountable care model, which is spearheaded by Dr. Muney, who  
19 I will talk about in a little bit. The goal of this model was  
20 to move the doctors onto it in order to limit Cigna's risks.  
21 And this is precisely where CareAllies comes in. They were  
22 transitioning the doctors to this ACO model and then once the  
23 doctors are transitioned, they would manage their businesses.  
24 And now how did they do this exactly? Because if you're a  
25 doctor, you wouldn't be too crazy about this concept. The way

1 that they pitched it was this will be a way to keep the cost  
2 down by keeping patients out of the hospital. You keep the  
3 patients out of the hospital, the doctors work less, the  
4 patients of healthier, and the doctors will make more money  
5 because they work less and they get paid this flat rate that's  
6 tied to health conditions.

7           So the way that -- so CareAllies performs a number of  
8 functions for these medical practices. They track patient data  
9 and they embed nurses. A lot of this -- sorry, just to  
10 clarify. So in order to keep patients out of the hospital, the  
11 idea is to give the doctors a very transparent view of what  
12 their patient's health conditions are, and in that way the  
13 doctors can be proactive about issues with their patients, and  
14 to the extent that they require support, CareAllies will  
15 provide some clinical support by embedding nurses in the office  
16 for example. And another -- so another way that they do this  
17 also is to do the 360s. And so as you could see, your Honor,  
18 there's a very clear connection here between the 360s and the  
19 way that the plans were operated. 360 program is not the way  
20 that defendants have portrayed it, which they're saying is  
21 relegated to in-home exams. But that's not the case. It's an  
22 entire process that at the -- towards the end, towards the end  
23 would have names, member names, members who were not seen by  
24 their doctors, released to these third-party vendors who would  
25 perform these exams in the patient's home. And that was, by

1 the way, done in order to -- for the profit of the plan not for  
2 the doctors.

3           So CareAllies is a very important aspect, plays a  
4 very important role in this, rather, and CareAllies is based in  
5 Philadelphia. So not only did they work with the physicians to  
6 get 360s completed, so again the process started with the  
7 physicians, but then after the physicians determined whether --  
8 they're not going to do the exams, for example, it was  
9 CareAllies that ran a report using a piece of software called  
10 Predilytics in coordinating with people at Cigna in  
11 Philadelphia in order to determine which patients would be most  
12 likely to have the diseases that return the highest amount of  
13 revenue to Cigna. After that was completed, they would then,  
14 with the doctors, because they worked with the doctors, would  
15 get the names of the members who they wanted to be seen, who  
16 Cigna and AlliesCares wanted -- CareAllies rather, wanted to  
17 have seen by these third-party vendors in order to profit from  
18 the 360s.

19           Now Dr. Harris admits he was the president of  
20 CareAllies, but he denies any connection to the 360 program,  
21 which is completely ridiculous. And one would ask, wonder why  
22 would he make a misrepresentation? Well, I think, it should  
23 be, this is a fraud case and it's very understandable -- I  
24 mean, not that it's right, but one could understand why he  
25 might make a misrepresentation to the Court because he's trying

1 to distance himself from the program and he wants to get this  
2 case out of New York. He is a doctor with a reputation, and  
3 you know, this could be very bad for him. But as I've shown in  
4 the surrepley, his own employees testified during the  
5 arbitration that they worked for CareAllies. They admitted  
6 they were coordinating the process to get the members' names  
7 turned over to Cigna, what they would call the market, so the  
8 individual states where the 360s are performed so that the 360s  
9 could be completed as soon as possible. And they were focused  
10 on disease, retention, and completion rates. This was the  
11 managing company, not Nashville. So there clearly were  
12 decisions made not in Nashville but rather in Philadelphia  
13 where this management company was based, where Dr. Harris was  
14 working that major decisions that related to the program. It's  
15 interesting that he doesn't dispute, even though he disputes  
16 some of the statements that Relator has made in his opposition  
17 memorandum, he doesn't dispute other statements. For example,  
18 he doesn't dispute that CareAllies' transitions physicians to a  
19 flat rate. That's their business. He doesn't dispute that he  
20 developed the use of analytics tools to screen member  
21 population for health risks. He also doesn't deny that he  
22 would testify that he could provide testimony that CareAllies  
23 worked with the vendors using Predilytics to data mine patient  
24 health records in order to predict which patients were at risk  
25 and which yield the highest revenue for Cigna. He does not

1 dispute that he could give testimony that Predilytics was  
2 programmed to find diseases which Cigna was actively training  
3 providers to diagnose. He doesn't dispute that Predilytics  
4 ranked members based on revenue potential and flagged the  
5 highest revenue members to undergo 360s. He also doesn't  
6 dispute that he could provide testimony that CareAllies  
7 compiled the lists to farm out to providers in the geographic  
8 markets for the 360s. So in short, Dr. Harris is an extremely  
9 important witness.

10           Turning to Mark Blackburn, who is also based in  
11 New York. There is no question that he resides in Manhattan  
12 and that the company that he founded, Chronic Care Solutions,  
13 or CCS I'll refer to it, is a New York company based in  
14 Manhattan. And it is a very -- it handled a very large portion  
15 of the 360s. CCS was the third highest volume of 360s  
16 approximately 15,000 per year, and 15,000 exams, that is, per  
17 year. And it is from these exams that defendants submitted  
18 codes. So they have a direct connection to this case, and he  
19 can testify, I think very easily, that the 360s were nothing  
20 more than informal interviews, that his nurses were not  
21 diagnosing diseases. He would have knowledge of what his  
22 company was being tasked to do by Cigna, and defendants claim  
23 that there wasn't contact between him and Cigna to their  
24 knowledge, Dr. Fessenden's knowledge, but the truth is, he had  
25 had contact with Cigna and he would be knowledgeable of the

1 protocols and procedures that were received from Cigna on how  
2 to do the exam. He would be knowledgeable with what those  
3 procedures and protocol are. And he can testify whether the  
4 nurses, what their understanding was in terms of what they were  
5 doing there. And if he couldn't personally testify, there  
6 would be nurses and -- you know, Relator can't name specific  
7 nurses because I don't have enough information on CCS, however,  
8 I am certain that those witnesses could be identified as  
9 residing in New York.

10 I also just want to point out, and I think this is a  
11 very important point, is that CCS is the highest, did the  
12 highest number of 360s. The vendor with the highest number of  
13 360s who is also independent was CCS. So in other words, the  
14 top two vendors, number one was Alegis, well, Alegis is a  
15 defendant in this case, it's a Cigna affiliate. The number two  
16 defendant is Texas Health Management, it's the company I worked  
17 for. So Mr. Blackburn is an extremely important witness with  
18 respect to what the vendors were doing. He is more credible  
19 than any of the other -- than the top two vendors because they  
20 are connected to the parties in this case.

21 So just to summarize, Mr. Blackburn works for a  
22 vendor that handled a very high percentage of the 360s, and he  
23 is in New York and his company is, too.

24 Now the next witness that's significant here is  
25 Dr. Alan Muney. He said he lives in Darien. There's some --

1 there may be --

2 THE COURT: If I could just interject, Mr. Cutler.  
3 Just so know, I actually have a TRO hearing at 12:30. I've  
4 given both sides plenty of time. I mean, I've read the papers,  
5 so if you could just get to the point that you think you need  
6 to absolutely address that hasn't been covered by the papers,  
7 that would be helpful.

8 And just as a heads up to defense counsel, I'll give  
9 you a chance to reply, but I'm going to ask you to be succinct.  
10 Okay?

11 Go ahead, Mr. Cutler.

12 MR. CUTLER: Okay, I understand, your Honor. Most of  
13 this is actually is related to the convenience of the witness  
14 because it is the most important factor. So let me just see,  
15 maybe I could skip ahead a little bit here.

16 THE COURT: Look, like I said, I'm not saying you  
17 have to wrap it up. I'm giving you a little bit of a heads up  
18 because I don't want people to get sore at me when I say at  
19 12:15, we've got to wrap this up. Okay?

20 MR. CUTLER: I understand, your Honor.

21 THE COURT: Okay.

22 MR. CUTLER: So Dr. Muney, I'll just say briefly  
23 because I think I've touched on the fact that he developed the  
24 ACO model, he oversaw all the plans in the programs within  
25 Cigna and its subsidiaries not just the parent company. He is

1 the highest executive officer that has been named between the  
2 parties, and because he worked for Cigna, it's very significant  
3 that Cigna is a defendant here, and according to the  
4 defendants, the buck stopped at HealthSpring and that people  
5 above HealthSpring had no relevance. Well, Dr. Muney is  
6 connected. Clearly his testimony will be important. He says  
7 he doesn't have any connection, or sorry substantive  
8 involvement, yet he was promoting 360s that were performed at  
9 these LivingWell Centers, which are, essentially they're  
10 clinics where members can get 360s performed. And there's no  
11 meaningful distinction between those 360s and the 360s that are  
12 performed by the vendors.

13 So it is ludicrous for him to say he was not  
14 substantially involved. As with Dr. Harris, there are reasons  
15 for him to distance himself from the program. And just like  
16 Dr. Harris, he's not denying that he could give testimony that  
17 executives knew that nurse practitioners weren't capable of  
18 diagnosing diseases, the ones that they were diagnosing, and  
19 that the executives knew that 360s were 45 minute, informal  
20 health screenings, but they were not used that way. He doesn't  
21 deny that, despite denying other parts of what Relator has  
22 said.

23 And I'm going to turn to the arbitration. There were  
24 three arbitrators that could be potentially called as  
25 witnesses. Al Appel is a very important witness because he

1 connects Cigna, the parent, the highest parent company that  
2 defendants say have no bearing, has no involvement in this  
3 case, he connects them to the submission of the codes but also  
4 in New York, and this relates to the locus of the operative  
5 facts, New York is connected very clearly because it is in  
6 New York because of actions and conduct that happened in  
7 New York that defendants were able to submit codes for the 2016  
8 service here. And the other two -- so just the defendants have  
9 said that Mr. Appel's misconduct is not relevant. It does go  
10 to the point of the intent. It was fraud, there has to be  
11 intent. So Mr. Appel, whatever interactions they had, clearly  
12 there was some interaction behind the scenes, would point to  
13 what the intentions were in getting those forms.

14           Why was Mr. Appel hired to work on this other case  
15 for Cigna Corp.? What is the relationship there? And those  
16 communications will be very significant.

17           And so now the other two arbitrators I kind of just  
18 mentioned briefly. They could have information as well. It's  
19 unclear whether or not they may have also interacted with Cigna  
20 behind the scenes but certainly they would be called as,  
21 potentially called as witnesses, but certainly deposed.

22           Now, just finally on the witnesses, I will say that  
23 there were other people in the northeast that defendants have  
24 not focused on, for example, Shelley Stevens, who was involved  
25 in the day-to-day operation. Jeff Cox, who was a coder. Linda

1 Small, she's a very important witness because she was involved  
2 in compliance and the audits. She is based in Philadelphia.  
3 And if the Court is going to say, well, we can look outside the  
4 state of New York and look at witnesses outside the state of  
5 New York, well, then you have to look at the boards of  
6 directors for all of these subsidiaries, which most of them  
7 were based in Connecticut, and Philadelphia was a very large  
8 operation involved in the Medicare Advantage plans.

9           So on the whole, if you look at this, it's really  
10 about the northeast, not Tennessee. And so that leads into the  
11 locus of operative facts. And I've pointed out some of these  
12 points. I will say they're alleging that there's an entity  
13 called Cigna Medicare business. There's no record of any such  
14 entity. There's no operation of any sort mentioned in any  
15 report. HealthSpring they're saying the HealthSpring business  
16 or legacy HealthSpring is not a stand-alone operation, and they  
17 even acknowledge that in their papers. And they don't say what  
18 operations were actually performed in Tennessee. They make  
19 these vague statements about supervisory functions and so  
20 forth. But the actual operation of the plan occurred in  
21 Philadelphia. And I had produced documents that show a  
22 multi-state cooperative effort across different offices.

23           But the operations aren't the key issue, and as the  
24 defendants point out, what matters is where the fraud  
25 originates from.

1           So the decision to engage in the fraud, to submit the  
2 codes, ultimately what the purpose of -- what the program was  
3 being charged to do and what would result in for Cigna as a  
4 whole had to have come from an executive office and for the  
5 case that is relevant here, and that's *In re Collins & Aikman*  
6 *Corp. Securities Litigation*, and the cite for that is 438  
7 F.Supp. 2d 392 (S.D.N.Y, 2006), and in that case there were  
8 executives that, and it was a fraud case, and the Court  
9 presumed that it was the executives who had knowledge of the  
10 operations that were underneath the parent company. So that is  
11 extremely relevant here. Because the case says that's really  
12 about the executive decisions not the operation of the  
13 ministerial or administrative aspects of the 360 program.

14           Now turning to the trial efficiency and the interests  
15 of justice. As I mentioned, I have an issue with my *pro hac*  
16 *vice* admission. I'm admitted to this case in this court;  
17 however, if the case transfers to Tennessee, I will have to  
18 retain local counsel, and that's expenses I just can't afford.  
19 One of the reasons I brought it here in New York is because I  
20 can maintain this case, represent the interests in this case on  
21 my own and not have to hire counsel. And that decision I think  
22 was a good one because my counsel withdrew, so I picked it up  
23 and it was fine. Obviously, that wouldn't be able to continue  
24 if this case transfers.

25           Also, though, I think we have an issue with costs.

1 And I counted the witnesses, excluding the directors and  
2 officers in Connecticut, because there are a number of them,  
3 I'm just going to look at the witnesses that outside of that  
4 have been identified. There are 13 witnesses, and four are  
5 around Tennessee, three around Philadelphia, and six around  
6 New York. So you're talking about nine individuals in the  
7 northeast versus four in Tennessee.

8 So if you were to weigh how many witnesses would  
9 incur costs, it's clearly more than double the number of  
10 witnesses in Tennessee that would incur costs, and as well as  
11 the Relator. I haven't included myself. And in the northeast,  
12 whether it be Philadelphia or Bloomfield, one could travel back  
13 and forth within the same day, so it makes Southern District of  
14 New York a very convenient forum.

15 Turning to the availability of process. As I  
16 mentioned, Dr. Harris, Dr. Muney, and at least Al Appel are all  
17 being implicated in fraud, and therefore, the Court needs to be  
18 able to exercise subpoena powers, and if the case moves to  
19 Tennessee, the Court down there will not have those subpoena  
20 powers. You know, this is probably one of the most significant  
21 factors to consider and may not be in other cases, but because  
22 of the fraud here, it is very important.

23 Turning to relative financial means. As I have  
24 pointed out, financially Cigna ruined the company that I worked  
25 for, put us out of business, and that had a catastrophic effect

1 on me personally. I was unemployed for two years. I racked up  
2 a tremendous amount of credit card debt. I couldn't pay my  
3 mortgage. My house is still in foreclose. The defendants say  
4 it's a self-serving affidavit. Well, there is a case, I  
5 provided to the citation for the Court to see, in fact, my  
6 house is in foreclose and I am struggling financially. And I  
7 spent all my 401K funds, so I'm really left with nothing, and  
8 this is versus the company that is pulling in billions and  
9 billions of dollars a year. I don't think there's any  
10 comparison. It's kind of comical that defendants would even  
11 say that this doesn't, factor doesn't favor the Relator.

12 Turning to the convenience of the parties. Almost  
13 done, your Honor. On the convenience of the parties, what's  
14 very clear here is that defendants have not shown how the  
15 Southern District of New York would be inconvenient for them.  
16 They've pointed out how, now and in their papers, pointed out  
17 that the Relator doesn't live in New York, and that that  
18 doesn't -- shouldn't favor him on that basis. All right, well,  
19 how does that translate to the defendants in terms of how  
20 Southern District of New York relates to them and whether it  
21 would be convenient for them? They have the burden of proof.  
22 I don't have the burden of proof.

23 There's an instructive case here, which is *Royal &*  
24 *Sun Alliance Insurance PLC v. Nippon Express*, 202 F.Supp. 3d  
25 399 (S.D.N.Y, 2016). This case shows what the standard is and

1 for evaluating this particular factor. What has to be looked  
2 at is where do the defendants do business? Where is their  
3 principal place of business? Connecticut, certainly is their  
4 headquarters and their other major office is in Philadelphia.  
5 Very clearly this would be a convenient venue for the  
6 defendants.

7 And then finally, your Honor, because all of these  
8 factors favor the Relator, the Relator's choice of forum has to  
9 be respected. And that is all the factors, so I am finished,  
10 your Honor.

11 THE COURT: Okay. Thank you very much, Mr. Cutler.  
12 Anything from the government?

13 MR. ARONOFF: Your Honor, this is Peter Aronoff. We  
14 have no, we've taken no position and filed no papers on the  
15 merits of the argument today. I did just want to, and I don't  
16 want to sidetrack things, but I'll just take a minute.

17 The United States has been in discussions with the  
18 defendant about a potential resolution of a subset of the  
19 claims in this case. I don't want to go into any detail about  
20 the nature or exact status on the public record, but it would,  
21 I think, be disruptive to those discussions if the case were  
22 transferred in the very near future, and so we would  
23 respectfully request that the Court defer ruling on the motion  
24 for at least two weeks from today's date.

25 THE COURT: I'm not inclined to do that. You know, a

1 motion gets fully submitted, and once it's ready to be  
2 resolved, I need to resolve it. I mean, unless the movants  
3 want to temporarily withdraw the motion, because the motion  
4 stays on our docket.

5 MR. ARONOFF: Yes, your Honor, I understand, and I  
6 don't want to burden the Court, but I do think that it would  
7 be, it would be helpful for the discussions that we've been  
8 having for the case to remain in this district, at least in the  
9 immediate future.

10 THE COURT: Well, okay. I mean, if the case belongs  
11 here, that easy, right? If I end up denying the motion, then  
12 that's easy.

13 MR. ARONOFF: Yes.

14 THE COURT: If the case doesn't belong here, then I  
15 don't see what the argument would be for keeping it here.

16 MR. ARONOFF: It's the administrative convenience.  
17 This office has been representing the United States for several  
18 years now. Obviously, if the case were transferred, United  
19 States remains the party in interest, and discussions would be  
20 possible to continue, I mean, this is a motion to transfer, not  
21 to dismiss, nonetheless, it would be -- there's considerable  
22 administrative overhead that would be incurred for the parties  
23 and for the government.

24 THE COURT: I don't understand. I understand you  
25 work for the Southern District US Attorney's Office, but since

1 you've been the one representing the United States government,  
2 because you don't just represent the Southern District, you  
3 represent the government.

4 MR. ARONOFF: Yes.

5 THE COURT: If the case were transferred, then you  
6 could still represent the government. I mean, you could be  
7 designated a special and continue the conversations with  
8 defendants. And if there's an avenue to resolve the case, I  
9 don't see how that doesn't continue.

10 MR. ARONOFF: Yes, your Honor, it would be possible  
11 for me or other AUSAs from my office to continue to work on the  
12 case. It's just that there would be delay in the internal  
13 government process for us to get the kind of approval if the  
14 case were transferred. There would also be delay and  
15 uncertainty in what the next step in the case itself would be.  
16 So that's why we make the request.

17 THE COURT: Defendants.

18 MR. SPETH: Your Honor, can I respond to that point?  
19 Just on that point, the convenience of government counsel is  
20 not to be considered. It's not -- the case law is pretty clear  
21 that it is not an appropriate factor to consider in connection  
22 with transfer. As your Honor suggests, the cases recognize and  
23 we think as a practical matter, if the case is transferred, we  
24 of course remain willing to discuss with the SDNY team, and  
25 they can work with our colleagues in the Middle District of

1 Tennessee as necessary. And just as convenience of private  
2 counsel is not a factor, convenience of government counsel is  
3 not a factor as well. So that's just on that point.

4 THE COURT: Look, I'm not unsympathetic to the  
5 practicalities of what government counsel is saying, but I  
6 think there are ways to address that. Having worked in the  
7 US Attorney's Office back in the horse-and-buggy era, there are  
8 mechanisms that can be employed here to keep continuity of  
9 counsel. And the fact that there might be some bureaucratic  
10 delay, I think is something the government -- that just  
11 shouldn't factor into this motion. But, okay, all right.

12 In terms of responding to what it is that we heard  
13 from Relator, do you want to go ahead and address certain  
14 points?

15 MR. SPETH: Yes, and I will try to be as brief as  
16 possible, and also to sort of, to kind of crystallize around a  
17 few of the -- because there are a number of I think threads  
18 throughout Mr. Cutler's argument.

19 First, Mr. Cutler obviously is pointing to Bloomfield  
20 and Philadelphia as places where the corporation, Cigna, has  
21 offices, headquarters. Of course, as a major corporation, it's  
22 going to have those locations, but obviously, as a major  
23 corporation, it also has particular offices that do certain  
24 things, and the management and the operation of the 360 program  
25 was and is based in Tennessee.

1           Mr. Cutler really concedes that HealthSpring was the  
2 genesis of the 360 program, continued to operate the program  
3 based in Nashville. He argues that HealthSpring is going away  
4 as a corporate entity or brand, and I think that's really  
5 irrelevant. What's relevant is that the key individuals who  
6 work there and continue to work on Medicare Advantage and on  
7 the 360 program are in Tennessee, and it's their convenience  
8 that matters. With respect to -- he also acknowledges  
9 repeatedly that CCQI, this unit within MDQO is important. And  
10 I don't think there's dispute that Dr. Fessenden was the senior  
11 director of CCQI, he was responsible for the day-to-day  
12 operations. If your Honor reviews the many exhibits that  
13 Mr. Cutler submitted, Dr. Fessenden appears most, his name  
14 appears far and away most in the complaint. Very critical  
15 witness.

16           With respect to Shelley Stevens and the notion that  
17 some of these witnesses may be duplicative, we don't think they  
18 are. We think they're going to be key witnesses. Shelley  
19 Stevens will be a witness. The relator said she's in  
20 Philadelphia. She actually resides in Delaware. Which, of  
21 course, this is another sort of point that cuts across, it's  
22 not New York. If you look at the ledger, there's a lot of  
23 activity, people, documents that counsel in favor of Tennessee,  
24 and there are some that counsel in favor of perhaps other  
25 places, Texas, Delaware, Connecticut, Pennsylvania, Arizona,

1 but really not with respect to New York.

2           And that's really true with respect to the  
3 arbitration. The arbitration is simply not relevant. The case  
4 concerned allegations that it was improper for Cigna to submit  
5 diagnosis codes from the in-home 360 exam, and that area of  
6 misconduct has nothing to do with the arbitration. The  
7 contractual dispute mechanism through which Cigna recovered  
8 electronic funds that it was entitled to has nothing to do with  
9 the validity of the coding that was submitted to CMS itself.  
10 And that is really a basis for Relator's position that  
11 New York, it is the correct forum.

12           Also, with respect to the assertion that Philadelphia  
13 market was large OR 86 percent of the in-home 360 exams  
14 occurred outside of Tennessee, of course none of those occurred  
15 in New York. And there are -- Cigna operates, and this is in  
16 Casey McKeon's declaration, operates Medicare Advantage in 18  
17 different states. And those states include Arizona, Colorado,  
18 Kansas, Texas, Arkansas, Mississippi, Alabama, Georgia,  
19 Florida, South Carolina, North Carolina. They are -- it's a  
20 wide-ranging group. We think that what matters is the design  
21 and operation of the program and where the witnesses and the  
22 documents are located related to design and operation.

23           But to the extent it was in fact the exams themselves  
24 that matter, you're looking at a very big geographic footprint,  
25 and I submit that Tennessee is in fact a more convenient

1 location than New York.

2 With respect to Dr. Harris and CareAllies, putting  
3 aside the fact that Dr. Harris, who has moved on from Cigna, is  
4 at Deerfield Management, was in the White House, OMB, has put  
5 in a declaration essentially disputing everything Mr. Cutler  
6 said, I think it's also just important a little bit to unpack  
7 what Mr. Cutler is saying about the entity CareAllies.

8 CareAllies is a management service company, it  
9 supports physician groups. It's irrelevant to the allegations  
10 concerning in-home exams here. It had many ways in which it  
11 tried to ensure that 360 exams by physicians, by actual  
12 physicians in offices were done. But that is a different issue  
13 360 exams by primary care physicians than what Mr. Cutler has  
14 alleged in his complaint, which is 360 exams done by nurse  
15 practitioners in the home setting. That's with that issue in  
16 his complaint. And as we've shown, I think, that program was  
17 managed from Nashville and the people who managed it resided in  
18 Nashville and continue to reside in Nashville.

19 With respect to the residency issue, your Honor, I'm  
20 not sure if I should address it. They all testified that they  
21 live in the Nashville area. All five live in Tennessee in the  
22 Nashville area. I don't -- they wouldn't have testified that  
23 they lived in the Nashville area if they lived in Kentucky or  
24 Georgia or some other state, as Mr. Cutler speculates.

25 THE COURT: And even if they did live across the

1 border in Kentucky, it's still closer to Tennessee than  
2 New York.

3 MR. SPETH: That's true, your Honor. There is case  
4 law saying that the convenience of a witness who resides  
5 neither the forum district nor the transferee district should  
6 not be given weight. But you're right. But they do, in any  
7 event, reside in Tennessee.

8 THE COURT: And they work in Tennessee.

9 MR. SPETH: Correct.

10 THE COURT: All right.

11 MR. SPETH: And you know, with respect to  
12 Mr. Blackburn, again, as Mr. Cutler says, he ran a vendor who  
13 performed the 360 exams, contracted with Cigna and performed  
14 the 360 exams. There are many vendors who would do that.  
15 Again, across a wide geographic area.

16 And most importantly what he will testify to, whether  
17 he will ultimately be a witness at trial is pure speculation on  
18 the part of Mr. Cutler. He doesn't point to anything other  
19 than his own say-so on that.

20 I'll conclude. That's all, your Honor. I appreciate  
21 the time.

22 THE COURT: Mr. Cutler, I'll give you one last  
23 chance. Is there anything else you want to add to what's  
24 already been said or briefed?

25 MR. CUTLER: Yes, your Honor. So I just want to

1 point out that the defendants are kind of speaking out of both  
2 sides of their mouth by saying that Shelley Stevens doesn't  
3 matter for purposes of determining convenience of witnesses  
4 because she's not in New York, but at the same time conceding  
5 that this is a multi-state enterprise and that proximity to  
6 where people work and where people live is relevant. You can't  
7 have it both ways. If the analysis is that proximity matters,  
8 well, there are more witnesses that are in the proximity of the  
9 Southern District of New York. If the state matters, there's  
10 still more witnesses in New York than in Tennessee.

11 I just want to point out also on the arbitration that  
12 what matters here is that there's a causal connection between  
13 what happened in the arbitration or -- the actions in the  
14 arbitration and the submission of the code. There's no  
15 question that the forms that were held and were ordered to be  
16 released were forms that were used to file codes that are the  
17 subject of this case.

18 And in terms of I think the defendant said whether  
19 the validity of the coding, that was a point. That actually  
20 the complaint that the petitioner raised during the proceedings  
21 that, in fact, those codes were invalid and could not be used.  
22 Nevertheless, after being informed of that, the defendants  
23 proceeded to take those forms and submit codes for them. So  
24 clearly there is a connection there. And just -- just to point  
25 out that defendants are trying to make a distinction between

1 the exams in the home and the exams that were performed in the  
2 doctor's office, and this was not -- you can't separate the  
3 two. They're part of the same thing, which is the management  
4 of the doctor's practice. These are the doctor's patients.  
5 The same patients that belong to the doctors are the ones that  
6 ended up, many of them, getting 360s. The doctors had a first  
7 crack, and if they didn't do it, then it went to the vendors.  
8 It was part of a plan to, okay, start here and then it ends up,  
9 starts with the doctor, and the doctor didn't do them, well, we  
10 need to make money off these people, so let's do these exams  
11 with the vendors, they're not doctors, but let's have them do  
12 what doctors can do in order to find diseases that we can get  
13 paid on. That's a process. Somebody came up with that  
14 process, and because the managing company's in Philadelphia, it  
15 would be the management company that came up with that idea.  
16 They were the ones running that.

17 Those are the only points, your Honor.

18 THE COURT: Okay, anything from anybody else? All  
19 right.

20 So I think it's clear, but I'll just make clear for  
21 the record, this is a *qui tam* action brought by Mr. Cutler, the  
22 Relator, on behalf of the US against defendants, and what's  
23 pending is the motion to transfer the case to the Middle  
24 District of Tennessee pursuant to 28 U.S.C., Section 1404(a).

25 What I'll do is I'll go through some of the

1 allegations in the amended complaint, which are largely assumed  
2 to be true for purposes of this motion. And what this case is  
3 really about is the allegations of Cigna's fraud on Medicare  
4 Part C commonly known as Medicare Advantage Plan, I'll call it  
5 the MA Plan, through its submission of unsupported, inaccurate,  
6 and otherwise invalid payment claims.

7           From at least 2012 until 2017 and allegedly  
8 continuing thereafter, Cigna knowingly violated the false  
9 claims act through a widespread scheme to improperly increase  
10 its revenue by submitting false information to the CMS, the  
11 Centers for Medicare and Medicaid Services, related to the  
12 health status of beneficiaries enrolled in its MA plans. MA  
13 rules require Cigna to ensure that each diagnosis it submits to  
14 CMS is supported in the beneficiary's medical record as derived  
15 from a face-to-face encounter with a qualified provider in the  
16 relevant service year.

17           CMS rules also require that diagnoses submitted as a  
18 part of MA Plan's payment scheme were cared for, treated,  
19 managed, assessed, or impacted the beneficiary's care during  
20 the encounter in which a diagnosis was recorded.

21           The allegation is that Cigna was aware of the  
22 requirements for participation in MA and of the relevant rules  
23 governing the submission of claims for risk-adjustment  
24 reimbursement, but that it knowingly violated those rules and  
25 requirements by designating and implementing the 360 program in

1 which contracted nurse practitioners, NPs I'll call, and RNs,  
2 registered nurses, conducted "data-gathering" health assessment  
3 in plan members' homes based primarily on patient-reported  
4 information, documented suspected, possible, and otherwise  
5 unsupported, invalid health conditions that Cigna then  
6 submitted to CMS as false claims for payment.

7 Now the allegation is that by submitting these false  
8 claims for payment to CMS based on diagnosis information Cigna  
9 knew was invalid for risk adjustment, Cigna received billions  
10 in overpayments from the federal government in violation of the  
11 FCA.

12 Relator is a US citizen residing in Connecticut and a  
13 former officer of a company called THM, it was a service  
14 provider for Cigna between 2012 and 2017.

15 Cigna itself is a Delaware corporation with its  
16 principal place of business in Bloomfield, Connecticut.

17 Now, venue exists in this case in the Southern  
18 District of New York pursuant to 31 U.S.C. Section 3732(a) and  
19 3730(b) (1) because although all the defendants have at least  
20 minimal contacts with the United States, and one or more of  
21 defendants can be found in, resides in, or has transacted  
22 business in the Southern District of New York.

23 Cigna has offices here in White Plains and in New  
24 York City, it does marketing of products within Westchester and  
25 New York counties, and there's others. But there's certainly

1 plenty of contacts between defendants and the Southern District  
2 of New York.

3 Now I'm not going to get into the structure of the  
4 Medicare program or the risk adjustment model, but I'm going to  
5 provide an overview just in terms of the context of this  
6 particular motion.

7 According to the amended complaint, in 2012,  
8 following Cigna's merger with HealthSpring Inc., Cigna  
9 introduced its "360 program" which essentially was designed for  
10 primary care providers, or PCPs, to conduct annual health  
11 assessments for Part C beneficiaries enrolled in Cigna's  
12 insurance plans.

13 Now in practice, many of these annual assessments  
14 were completed not by PCPs but by third-party contracted  
15 providers who conducted the short screening visits in plan  
16 members' homes. This spelled out at paragraph 36 of the  
17 amended complaint.

18 Now, Cigna 360 assessment was designed as an  
19 "enhanced" version of an annual wellness visit, AWVs they're  
20 called. An AWVs is a Medicare benefit that entitled each  
21 beneficiary to an annual face-to-face, preventive health  
22 consultation in which a qualified provider evaluates the  
23 patient primarily based on the patient's self-assessment of his  
24 or her health status.

25 But the allegation is that functionally speaking the

1 360 assessment is a mere data-gathering exercise used to  
2 improperly record lucrative diagnoses to fraudulently raise  
3 risk scores and increase payments from CMS.

4           The allegation is the program, the 360 program,  
5 consisted of several interrelated steps and efforts by  
6 carefully targeting plan members likely to yield the greatest  
7 return on investment, incentivizing PCP participation in the  
8 program, contracting with third parties to perform the 360  
9 visits in plan members' homes, and encouraging both PCPs and  
10 contractors to "capture" and record probable diagnoses that  
11 Cigna would then submit to CMS. Paragraph 38.

12           The first step in implementing the 360 program Cigna  
13 allegedly prioritized plan members that its analytics predicted  
14 would likely yield the highest risk scores increases and thus  
15 the greatest returns to Cigna. That's paragraph 39.

16           Also in paragraph 39 the allegation is that to  
17 achieve this goal, analysts working within Cigna's affiliate,  
18 including Gulf Quest, employed a data-mining tool known as  
19 Predilytics to search plan members' medical histories and then  
20 organize members into different priority categories like  
21 critical or very low.

22           And that Cigna would then assign a highest priorities  
23 to plan members with chronic diseases and those who had not  
24 received a 360 assessment with the relevant service year.

25           Now allegedly after targeting and prioritizing plan

1 members, Cigna sought to recruit PCPs to perform the 360  
2 assessments in priority order. To incentivize PCPs to perform  
3 these 360 assessments, Cigna offered bonuses.

4 So for example, Cigna offered \$150 bonus per  
5 completed exam for PCPs and performed a certain volume of 360  
6 assessments each year.

7 And Cigna allegedly offered PCPs \$1,000 each time  
8 they attended one of Cigna's 360 training seminars which were  
9 aimed at teaching PCPs how to find and record high-revenue  
10 diagnoses. That's paragraph 40.

11 Now, allegedly, in spite of these efforts to recruit  
12 PCPs to complete these assessments, many PCPs declined to  
13 perform the assessments for their patients.

14 Allegedly, because it was determined to complete as  
15 many 360 assessments as possible, Cigna turned to third-party  
16 contractors to conduct and document the 360 assessments in each  
17 plan member's homes. Paragraph 41.

18 For the most part, and as Cigna endorsed, contractors  
19 hired NPs to complete and document in-home 360 assessments.  
20 Some contractors also hired RNs to complete the 360 visits.  
21 Also paragraph 41.

22 What the Relator alleges is that Cigna used six  
23 contractors nationwide to complete the 360 assessments,  
24 including THM, that's where Relator worked, and Alegis, a Cigna  
25 affiliate.

1           These two companies between 2012 and 2017 accounted  
2 for more than half of all the 360 visits performed for Cigna's  
3 MA Plan.

4           Now when a PCP declined to perform a 360 assessment,  
5 Cigna added the plan member's name and contract information to  
6 a "target list." That's paragraph 43. And then it divided the  
7 target list by geographic market and distributed the  
8 appropriate list to the contractor that operated that market.

9           So beginning in 2012, Cigna included a document they  
10 called "health management report," which will be designated as  
11 HMR, historical HMR. And these HMRS included a list of the  
12 beneficiary's medication and the date on which they were last  
13 reviewed and also a list of diagnoses previously reported to  
14 CMS by Cigna. And the idea here was to create a sort of  
15 cheat-sheet list of conditions and diagnoses that it expected  
16 360 contractors to capture during the in-home visit.

17           Once in receipt of this target list, contractors  
18 generally reached out to targeted plan members to schedule the  
19 in-home 360 visit. Once the appointment was scheduled, the  
20 contractors sent an NP or an RN to the beneficiary's home to  
21 conduct the visit, which Cigna made clear to contractors was  
22 for "data-gathering." Paragraph 44.

23           During these visits, the MPs and RNs fill out that  
24 sort of check-the-box 360 form with certain information  
25 regarding medical data.

1           And Cigna instructed NPs to document diagnoses on the  
2 360 form by checking boxes or recording additional notes and  
3 expected NPs to record 20 or more diagnoses per visit.

4           And the NPs and RNs would primarily rely on the  
5 patient's self assessment to fill out this form.

6           Cigna did not permit NPs and RNs conducting home  
7 visits to provide any medical care to beneficiaries, including  
8 treatment, medication management, or referrals to specialists.  
9 Paragraph 45.

10           Cigna submitted diagnoses data gathered on 360 forms  
11 to CMS. Depending on the service year, the allegation is that  
12 Cigna submitted this information to CMS in the form of either  
13 risk adjustment processing system, which is called RAPS, files  
14 or Encounter Data Processing System files, or EDPS.

15           Cigna designated its 360 program as a data-gathering  
16 exercise rather than a legitimate medical encounter, according  
17 to Relator, and required NPs and RNs to perform the visits  
18 according to Cigna's specific instruction. So it's spelled out  
19 in paragraphs 46 and 47.

20           Diagnoses documented during these 360 visits  
21 allegedly were invalid for risk adjustment reimbursement  
22 because the reported diagnoses did not represent conditions  
23 that required or affected patient care or treatment or  
24 management during the relevant service year, could not have  
25 been treated or assessed during 360 visits, or lacked medical

1 record support or otherwise violated CMS coding rules.

2 So for a number of reasons described in the amended  
3 complaint, diagnoses documented by MPs and RNs during the 360  
4 assessments were ineligible for submission to CMS.

5 And contractors generally understood that Cigna  
6 confined contractors' role in completing the in-home 360 visit  
7 to data-gathering. And again, the NPs and RNs were not to  
8 provide medical care except in rare emergency situations. This  
9 is all spelled out in paragraphs 47 to 56.

10 And paragraphs 85 and 89 generally describe how Cigna  
11 knowingly and intentionally pushed contractors to code  
12 conditions that lacked medical record support or otherwise  
13 violated CMS coding rules.

14 Ultimately, Relator alleges, that Cigna submitted  
15 risk-adjustment data, including diagnosis codes gathered during  
16 in-home 360 visits, to CMS through CMS' RAPS and later EDPS.

17 Now each submission of a RAPS or EDPS is a claim for  
18 payment. Cigna allegedly bundled those invalid diagnoses into  
19 RAPS and EDPS files and submitted this file for CMS, the  
20 allegation is that CMS submitted false claims within the  
21 meaning of the FCA.

22 In particular at paragraph 91 the allegation is that  
23 Cigna directly submitted to CMS the invalid diagnoses its  
24 contractors captured via in-home 360 visits.

25 As a result of the scheme, Relator expects or alleges

1 that Cigna knowingly submitted hundreds of thousands of false  
2 claims from its six contractors related to the 360 assessment  
3 during the relevant period resulting in billions of dollars of  
4 improper, inflated payments to defendants under the MA Plan as  
5 a result.

6 All right. Getting into the analysis here. Of  
7 course the standard of review, we'll start with that.

8 Venue for FCA actions is governed by 31 U.S.C.  
9 Section 3732(a), and this is also discussed in the  
10 *Thistlethwaite I* case, 110 F.3d 861, 865-66.

11 So under section 3732, an FCA action may be brought  
12 "in any judicial district in which the defendant resides,  
13 transacts business, or in which any act proscribed by section  
14 3729 occurred."

15 Now under 1404 "for the convenience of the parties  
16 and witnesses, in the interest of justice, a district court may  
17 transfer any civil action to any other district or division  
18 where it might have been brought."

19 "The statute has a broad purpose: To prevent the  
20 waste of time, energy, and money, and to protect litigants,  
21 witnesses, and the public against unnecessary inconvenience and  
22 expense." That's from *Schoenefeld v. New York*, 2009 WL 1069159  
23 at \*2.

24 "The threshold question in deciding transfer of venue  
25 is whether the action could have been brought in the transferee

1 forum." That's from *Atlanta Recording Corp. v. Project*  
2 *Playlist Inc.*, 603 F.Supp. 2d 690, 695.

3           Once this element is established, then the Court is  
4 to evaluate the nine factors that the parties have clearly  
5 discussed here today. Among other cases, this is all spelled  
6 out in *Everlast World's Boxing Headquarters Corp. v. Ringside*  
7 *Inc.*, 928 F.Supp. 2d 735, 743.

8           And as Relator has repeatedly pointed out, the burden  
9 rests on the moving party to make a clear and convincing  
10 showing that transfer under section 1404(a) is proper. *Atlanta*  
11 *Recording* at page 695.

12           Now, to begin, I don't think this is contested  
13 anymore, but every district court has subject matters over FCA  
14 cases. That's *Thistlethwaite I* at 868.

15           The federal courts also have nationwide personal  
16 jurisdiction over FCA cases. That's from, among others,  
17 *Vallejo v. Investronica*, 2 F.Supp 2d 330, 334.

18           Now, Relator acknowledged this in the amended  
19 complaint noting that "this Court has personal jurisdiction  
20 over defendants pursuant to Section 3732(a) because that  
21 section authorizes nationwide service of process and because  
22 defendants have at least minimum contacts with the United  
23 States."

24           Now the argument that Relator has made is that due  
25 process would prevent the Middle District of Tennessee from

1 asserting personal jurisdiction over some of the defendants.

2 But the Court is not persuaded.

3           The law is clear that under Section 3732(a), the  
4 relevant forum for an FCA case is the United States as long as  
5 the defendants have adequate contacts with the United States as  
6 a whole. In fact, the language of the statute authorizes  
7 service of process "at any place within or outside the United  
8 States."

9           In broadly authorizing this level of service of  
10 process, Congress reflected its decision to provide nationwide  
11 personal jurisdiction for all FCA cases. This is spelled out  
12 in the Supreme Court's decision in *BNSF Railway Company v.*  
13 *Tyrrell*, 137 S. Ct. 1546.

14           Just last month the Sixth Circuit in a case called  
15 *Canaday v. The Anthem Companies Inc.*, 9 F.4d -- first time  
16 citing an F.4d case -- 392, for which defendant flags for the  
17 Court in a letter of supplemental authority. The Sixth Circuit  
18 held that a district court lacked personal jurisdiction over a  
19 defendant under the Fair Labor Standards Act because it does  
20 not include a nationwide service of process provision that  
21 permits plaintiffs to sue a defendant in any of the districts  
22 in the country. The Sixth Circuit pointed out other prominent  
23 statutes, including the FCA, noting in contrast that the FCA  
24 authorizes nationwide service of process and therefore only  
25 requires "minimum contacts with the United States," not with

1 the forum state for purposes of personal jurisdiction.

2           So the relevant inquiry, the relevant due process  
3 inquiry is whether the defendant has minimum contacts with the  
4 United States as a whole. That's *Vallejo* at page 334. "In  
5 determining whether personal jurisdiction is proper [where a  
6 federal statute allows nationwide service of process], courts  
7 look to whether a defendant's contacts with the nation as a  
8 whole, rather than with the forum state, are sufficient to  
9 satisfy due process." That's spelled out in *Moore's Federal*  
10 *Practice*, Section 108.123(2) (b) (ii).

11           So because the Cigna entities involved are all US  
12 based, there's no due process concern with respect to filing or  
13 transferring the case to Tennessee because of the nationwide  
14 service of process and the contacts with the United States are  
15 obvious.

16           Now starting with the 1404 factors and beginning with  
17 the convenience of witnesses. This is considered the single  
18 most important factor. That's noted in, among other cases,  
19 *Aerotel Limited v. Sprint Corp.* 100 F.Supp. 2d 189, 197.

20           "A motion to transfer under Section 1404(a) must be  
21 accompanied by an affidavit containing detailed factual  
22 statements identifying the potential principal witnesses  
23 expected to be called and a general statement of the substance  
24 of their testimony. Absent such a showing, the motion should  
25 be denied." That's from *American Eagle Outfitters Inc. v. Tala*

1 *Brothers Corp.*, 457 F.Supp. 2d 474, 478.

2           Now a defense argument here is that the action could  
3 have been brought originally in the Middle District of  
4 Tennessee because it's "the center of gravity of the  
5 litigation" where the relevant business operations, documents  
6 and witnesses are located. And then the sort of  
7 counterargument or supplemental argument is the case does not  
8 have a connection to the Southern District of New York. And  
9 this is vehemently disputed by the Relator. Among other  
10 things, Relator identifies the existence of "Cigna Medicare" as  
11 a complete fabrication and that to call that business the  
12 headquarters is "absurd." That's from pages one and two of the  
13 Relator's memorandum of law.

14           Now I should note the defendants have satisfied their  
15 procedural obligation to provide the affidavit, and the Court  
16 finds the majority of the Cigna personnel who would serve as  
17 some of the key witnesses in the case, they designed, they  
18 operated, they supervised the 360 program at issue here during  
19 the relevant time period are based in the Middle District of  
20 Tennessee. There's been no witnesses, such witness who is as  
21 critical as the ones identified by defendants who's located in  
22 the Southern District of New York.

23           So starting with the McKeon declaration, paragraph 7  
24 McKeon has averred that the 360 program's management is based  
25 in the Nashville area. The primary department responsible for

1 the 360 program during the relevant time is the Medicare Data  
2 Quality Operations department, which I'll call the MDQO.  
3 Another unit within the department, the Chronic Care Quality  
4 Initiative, the CCQI, both of which are run out of Tennessee.

5 Plus, the current and former employees who would  
6 likely serve as key witnesses are all based in Tennessee.

7 So Casey McKeon served as General Manager of National  
8 Health Services for Cigna Medicare from October 2015 to  
9 February 2020. In that role, this is all spelled out in the  
10 affidavit, excuse me, the declaration. McKeon had general  
11 supervisory responsibility for the MDQO which included the 360  
12 program. McKeon is currently the president of CareAllies Inc.,  
13 a wholly owned and indirect subsidiary of Cigna and lives and  
14 works in the greater Nashville area.

15 There is a counterargument here; well, that could  
16 mean Kentucky, that could mean other states. That's pure  
17 speculation. The representation is that these folks live in  
18 Tennessee, and even if they live just over the border, well,  
19 it's true that there is case law that if they don't live in the  
20 district, then it's not dispositive. Certainly if they live  
21 just across the water, and that water being a river, it's a lot  
22 more compelling than if they were living say, for example, in  
23 the Southern District of New York.

24 Dr. Dirk Wales served as Chief Medical Officer of  
25 HealthSpring before Cigna's acquisition of the company and

1 continued in the role until he left Cigna in 2020. Dr. Wales  
2 was integral to the initial design and development of the 360  
3 exam and oversaw the program in a high-level supervisory role  
4 until his departure. Dr. Wales lives and works in the greater  
5 Nashville area. That's from paragraph 10.

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

9 Dr. Fessenden's responsibilities included the day-to-day  
10 supervision of the 360 program. Dr. Fessenden lives and works  
11 in the greater Nashville area.

12 Dr. Jason Jean is a nurse practitioner, with a  
13 doctorate in nursing practice, who served as Cigna's Chronic  
14 Care Quality Manager and Educator from June 2014 until December  
15 of 2018. In that role, Dr. Jean developed critical training  
16 materials used to educate providers, including those performing  
17 360 exams. Dr. Jean currently serves as Senior Advisor for  
18 Cigna Medicare. Dr. Jean lives and works in the Nashville  
19 area.

20 Mr. Glynn Creech has served as Cigna's Director of  
21 Risk Adjustment Coding Operations since September of 2014. His  
22 responsibilities include managing the coding processes  
23 associated with the 360 program. And Mr. Creech is from the  
24 greater Nashville area.

25 Other potentially relevant witnesses in compliance

1 and operations and former employees who previously worked in  
2 the MDQO and CCQI teams also reside in Nashville. That's  
3 paragraph 8.

4 The declarations of Wales, Fessenden, and Jean  
5 describe each of their respective roles in the decision to  
6 implement the 360 program, including the program's goals,  
7 objectives, and performance expectations, as well as their  
8 roles in the program's design, management, structure, and the  
9 protocols and procedures for performing the 360 visit and how  
10 each of those decisions was based or centered in Nashville. If  
11 called to testify, each would discuss these topics. And,  
12 again, their declarations are quite specific in this regard.

13 And I just don't think Relator has identified  
14 similarly critical witnesses who reside in the Southern  
15 District of New York. There are some witnesses that might be  
16 relevant. I don't think anywhere near as relevant as the  
17 Tennessee witnesses who are located in Philadelphia, which is  
18 not in the Southern District of New York.

19 And so there's no question that if the case were to  
20 proceed to trial in the Southern District of New York, all of  
21 these Tennessee-based witnesses would be greatly  
22 inconvenienced.

23 There's also much said about Cigna having its  
24 headquarters in Bloomfield, Connecticut. It's a publicly  
25 traded company. And there's a little bit of David and Goliath

1 going on here, frankly. But I don't think any of that really  
2 addresses the heart of the matter, which is the convenience of  
3 the witnesses, the critical witnesses in the case, and I think  
4 the defense has identified these witnesses and has persuasively  
5 explained not only their relevance but the inconvenience to  
6 them because they're all in the Nashville area. So this weighs  
7 in favor of the transfer.

8 Convenience of the parties. As Relator points out,  
9 Cigna and its entities are all over the place; they're in  
10 Connecticut, they're in Delaware, Texas, Illinois, they have  
11 offices in New York, they have an office here in White Plains.  
12 Relator is located in Connecticut. So Relator does argue that  
13 the Southern District of New York will be more convenient to  
14 him, but the convenience of counsel is not a very weighty  
15 factor. In fact, it's not considered a factor at all. And  
16 anyway, Relator does not live in the Southern District of New  
17 York.

18 To the extent there's this *pro hac* argument that  
19 Relator has *pro hac* status here, there's no reason Relator  
20 couldn't get *pro hac* status in Tennessee.

21 Location of relevant documents and the ease of access  
22 to sources of proof. This is a pretty neutral factor.  
23 Basically, in a world of digital technology, especially as we  
24 all had to learn to work remotely, the location of documents is  
25 not a particularly compelling consideration. That's been the

1 case law for a number of years. So even though there may be a  
2 lot of documents in the Nashville area, and that might have  
3 been relevant in 1970 or more relevant here to the extent that  
4 there is an ability for storage and digital transfer, I don't  
5 think that this factor gets all that weighty. It weighs  
6 somewhat in favor of transfer, but this motion doesn't depend  
7 on this factor.

8 Location of the operative events is obviously a major  
9 factor. The courts have said it substantially favors transfer.  
10 To the extent that the operative facts don't arise in the  
11 chosen forum, this is all laid out in *Everlast World's Boxing*  
12 *Headquarters*, 928 F.Supp. 2d at 745.

13 "To determine the locus of operative facts the Court  
14 has to look to the site of the events from which the claim  
15 arises." That's from *Dickerson v. Environments Corp.*, 315  
16 F.R.D. 18, 30.

17 The crux of the complaint is on the design and  
18 implementation of Cigna's 360 program.

19 Cigna's communications with the practitioners and  
20 contractors who conducted the 360 in-home exams.

21 The limits of practitioners' expertise and ability to  
22 diagnose conditions listed on the 360 exam forms, and then  
23 Cigna's submission of diagnosis codes generated from the 360  
24 exams to CMS for risk adjustment.

25 This occurred in Tennessee. In fact, going back to

1 the pre-motion conference, Relator couldn't identify a single  
2 operative fact that took place in New York, and I just don't  
3 think that that gap has been filled in the briefing of the  
4 argument here today. A lot is said about Cigna's connections  
5 generally to New York, but that's really not relevant because  
6 of the specific allegations that have been brought regarding  
7 the 360 program. And given its genesis and the management of  
8 it from Tennessee, it's pretty clear that the locus of  
9 operative facts is in Tennessee.

10 Now there are some allegations about some events  
11 taking place in Arizona or Texas, but that's not the Southern  
12 District of New York. In fact, it's not clear for the record,  
13 that there were ever, ever any 360 exams conducted in New York,  
14 and there's no evidence of the Medicare Advantage business that  
15 Cigna has. So regardless of all the other businesses that  
16 Cigna has in the world, that Cigna's Medicare Advantage  
17 business was administered in New York.

18 Now Relator also makes an argument about Cigna  
19 Medicare as a "imaginary business" because it's not a separate  
20 corporate entity, but in fact, Cigna Medicare is an internal  
21 term for Cigna's Medicare Advantage business, which is mainly  
22 running through HealthSpring, the entity that Relator himself  
23 identified as the parent company of the entities at the heart  
24 of his allegations.

25 And there's a concession that three of the named

1 defendants transact business in Tennessee and that 1200 Cigna  
2 employees work there. And this is all spelled out in the  
3 Fessenden, Wales, and Jean declarations as well.

4 And I think it's also worth noting the amended  
5 complaint only mentions New York in the context of discussing  
6 venue, just generally that venue is appropriate here, citing  
7 that Cigna maintains an office and sells health insurance in  
8 the Southern District of New York, Cigna providers operate  
9 within this district, and that Cigna is an "approved provider  
10 of MA plans to New York City former-employee retirees," and  
11 that Cigna's stock is traded on the New York Stock Exchange.

12 These are the operative facts, they're not the basis  
13 for the claims that Relator has brought here in this case, they  
14 are just general facts about Cigna. So the Court's finding is  
15 that the locus of operative facts is Tennessee and that this  
16 weighed in favor of transfer.

17 Compulsory process doesn't really seem to be a factor  
18 either way.

19 Relative means of the parties. "A party arguing for  
20 or against transfer because of inadequate means must offer  
21 documentation to show the transfer, or lack thereof, would be  
22 unduly burdensome to his finances." *American's Eagle*  
23 *Outfitters*, at page 478.

24 Of course Relator notes that Cigna is a multi-billion  
25 dollar enterprise, that he is an individual with limited

1 economic means. He notes that THM was abruptly forced out  
2 business in 2017, and he's been unable to secure employment,  
3 and as a result, has been unable to pay his mortgage or credit  
4 card and is deeply in debt with a foreclosure pending against  
5 him. So Relator alleges that he "cannot afford any unnecessary  
6 cost in this case, including the cost of air travel to and from  
7 hotel accommodations in the Middle District of Tennessee, nor  
8 can he afford the cost to retain local counsel." Those are  
9 relevant points, and they are factors that I think that do cut  
10 against transfer. As I said, I think things like *pro hac vice*  
11 I think can be managed, and in a world where more remote work  
12 is being done, I don't think that every single conference is  
13 going to require Relator to get on a plane and stay at a hotel  
14 in Tennessee.

15 The forum's familiarity with governing law. It's one  
16 of the least important factors. Especially given here that the  
17 FCA is a federal statute, so presumably that is something that  
18 can be handled by any judge in any district.

19 Choice of forum. A plaintiff's choice is accorded  
20 considerable weight in the 1404 balancing test. It gets less  
21 deference where the connection between the case and chosen  
22 forum is minimal. Also, there's less deference if it's not the  
23 home state of the person who chose the forum, in this case  
24 Relator. And there's also case law that says plaintiff's  
25 choice of forum is also given less deference in *qui tam* cases.

1 *Roop v. Arkray USA Inc.*, 2007 WL 844691, collecting cases,  
2 explaining that "the consensus view among district courts that  
3 a plaintiff's choice of forum is entitled to considerably less  
4 deference in *qui tam* cases."

5 Relator doesn't reside in the Southern District of  
6 New York. The operative facts, as I said, arise out of  
7 Tennessee. So the choice of forum here has very little weight.

8 Trial efficiency, interests of justice. This has to  
9 do with judicial economy. I think it's fair to say that Cigna  
10 moved fairly promptly to transfer this case to Tennessee.  
11 There's not been a considerable amount of resource spent  
12 litigating the case.

13 Today I learned that the government says it's been  
14 involved in some discussions. I see no reason why those  
15 discussions can't continue. The Southern District  
16 US Attorney's office can stay involved and it can work out  
17 whatever internal paperwork they need to to continue that. So  
18 I don't think that's going to be particularly disruptive. So I  
19 think this factor weights in favor of transfer.

20 So in the Court's view, balancing all the 1404  
21 factors, I think transfer is appropriate in this case, the  
22 locus of operate facts, the key witnesses are all in Tennessee,  
23 Relator is not in the Southern District of New York. There  
24 really isn't anything in the Southern District of New York to  
25 connect this case at all and argues for it being here. While

1 I'm not unsympathetic to Relator's personal situation, I think  
2 on balance the other factors outweigh that, and so the Court  
3 grants the application to transfer the case to the Middle  
4 District of Tennessee.

5 Is there anything else?

6 MR. SPETH: Your Honor, there is one just, and I  
7 apologize, but there is one housekeeping item that I just  
8 wanted to raise.

9 We had, after Mr. Cutler filed his surreply, Cigna  
10 submitted a pre-letter motion, or a pre-motion letter, excuse  
11 me, requested a pre-motion conference on a motion to seal  
12 certain documents that Mr. Cutler placed on the public docket  
13 in connection with his opposition to the transfer motion. Each  
14 of those documents we believe should be sealed. They were  
15 designated confidential under the protective order under the  
16 arbitration in a very similar proceeding in front of Judge  
17 Marrero involving Mr. Cutler. Judge Marrero ordered similar  
18 materials sealed. So I don't know the procedure we would --  
19 whether would have to move forward. But notwithstanding the  
20 transfer, we'd simply request that the documents that we  
21 identified in our pre-motion letter, which is at docket number  
22 98, be sealed.

23 THE COURT: Mr. Cutler, any opposition to that?

24 MR. CUTLER: Yes, your Honor.

25 THE COURT: Why? I mean, if Judge Marrero sealed the

1 documents, what would be the argument?

2 MR. CUTLER: I'll explain because that was a separate  
3 proceeding, first of all. But in that proceedings -- they're  
4 not the same documents. But in that proceeding I guess we were  
5 defendant, I can't remember defendant or plaintiff, there's  
6 been so many proceedings. But in any event, our side waived  
7 our objection to it because in that particular proceeding it  
8 made sense for it to remain under confidential seal. These are  
9 different documents, and my position is that since that time  
10 the defendants have, in fact, waived confidentiality to those  
11 particular documents. So yes, I'm opposing that.

12 THE COURT: All right, let's do this. So Cigna, why  
13 don't you file -- when do you want to get your motion in by? I  
14 assume you want to get it in quickly, right?

15 MR. SPETH: Yes. We'd be happy to get it in as  
16 quickly as possible.

17 THE COURT: Tell me what that means. I don't want to  
18 speak for people whose weekends are going to be ruined by your  
19 bravado. So you tell me when you think your team will be able  
20 to get the motion papers in by.

21 MR. SPETH: Could we have a week, your Honor?

22 THE COURT: Sure. And then, Mr. Cutler, I'll give  
23 you a week to respond.

24 MR. CUTLER: Okay.

25 THE COURT: And in the meantime what I'll do is maybe

1 file my order formally transferring this case. I'll wait a  
2 little bit, that way it will help the US Attorney's Office do  
3 what it's got to do. Because if I transfer the case, I can't  
4 decide the motion.

5 MR. SPETH: Understood.

6 THE COURT: Okay? So I'm going the transfer the case  
7 no later than September 30, just so you know. Let's do this,  
8 let's say Cigna papers are due next Thursday. Mr. Cutler, your  
9 papers are going to be due the following Thursday by no later  
10 than noon. No, actually, let's do this, Wednesday/Wednesday.  
11 Sorry to do this to you all. Cigna you're going to have to get  
12 it done by Wednesday, and Mr. Cutler you have to respond by  
13 Wednesday the 29th.

14 MR. JARRET: Okay.

15 THE COURT: Okay?

16 MR. CUTLER: Understood.

17 THE COURT: Anything else?

18 MR. SPETH: No. Thank you, your Honor.

19 MR. CUTLER: Thank you, your Honor.

20 THE COURT: We're adjourned. Have a good weekend.  
21 Stay healthy.

22 MR. CUTLER: Thank you.

23 MR. SPETH: You too.

24 (Proceedings concluded)

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