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VIA ECF

Hon. Catherine O'Hagan Wolfe, Clerk of the Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Sq., New York NY 10007

Re: *U.S. ex rel. SW Challenger v. eviCore Healthcare MSI, LLC, No. 22-530*

Dear Ms. Wolfe:

On behalf of eviCore healthcare MSI, LLC (“eviCore”), we respond to Appellants’ February 13, 2023 letter (“Letter”) submitted pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure (“FRAP”). In their eleventh-hour submission, Appellants mischaracterize their pleadings, and the supplemental authority they cite is irrelevant and thus not “pertinent and significant” to the issues before this Court.

First, Appellants misstate the allegations in their Second Amendment Complaint (“SAC”). Appellants do not allege in the SAC, as they claim in the Letter, a theory related to “risk data” used to compute capitated payments to Managed Care Organizations (“MCOs”). They also do not allege any facts to support such a theory. The SAC does not contain any allegations or facts regarding risk adjustment data that MCOs submit to the Centers for Medicare & Medicaid Services (“CMS”), and does not allege that eviCore is involved in or somehow caused the submission of risk adjustment data. In fact, the SAC does not even use the terms “risk data” or risk adjustment. As eviCore explained in its Brief, Appellants are trying to add this “risk data” theory for the first time on appeal. (Appellee Br. 46).

Second, the only SAC paragraph cited in the Letter as the reason for the late submission refers to a regulation that does not apply to eviCore or risk adjustment. (Letter citing A-148, ¶ 69). This regulation merely states that the functions that “Medicare program integrity contractors” perform “*may include*” utilization reviews and certain other functions, none of which involve risk adjustment. (42 C.F.R. 421.304) (emphasis added). But these regulations do not apply to eviCore. (eviCore’s Reply Br., Dkt. 42, at 6).

Third, the new CMS Final Rule that Appellants submitted is irrelevant to the allegations in this case or the issues on appeal. As the Final Rule states, “[t]he purpose of this final rule is to outline [CMS’s] audit methodology and related policies for the contract-level MA Risk Adjustment Data Validation (RADV) program.” This case does not involve RADV audits, and the statements cited from the Final Rule relate to MCOs, not eviCore.

Very truly yours,

/s/ Brian P. Dunphy
Brian P. Dunphy

cc: All Counsel of Record (ECF)