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 13 **UNITED STATES DISTRICT COURT**  
 14 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

17 UNITED STATES OF AMERICA ex rel.  
 RONDA OSINEK,

18 Plaintiff,

19 v.

20 KAISER PERMANENTE, et al.,

21 Defendants.

Case No. 3:13-cv-03891-EMC

**REPLY IN SUPPORT OF MOTION TO  
 DISMISS RELATOR TAYLOR'S THIRD  
 AMENDED COMPLAINT**

Hearing Date: May 4, 2023  
 Time: 1:30 PM  
 Judge: Hon. Edward M. Chen  
 Courtroom: 5, 17th Floor

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UNITED STATES OF AMERICA ex rel.  
GLORYANNE BRYANT and VICTORIA  
HERNANDEZ,  
  
Plaintiff,  
  
v.  
  
KAISER PERMANENTE, et al.,  
  
Defendants.

Case No. 3:18-cv-01347-EMC

**REPLY IN SUPPORT OF MOTION TO  
DISMISS RELATOR TAYLOR'S  
THIRD AMENDED COMPLAINT**

Hearing Date: May 4, 2023  
Time: 1:30 PM  
Judge: Hon. Edward M. Chen  
Courtroom: 5, 17th Floor

UNITED STATES OF AMERICA ex rel.  
JAMES M. TAYLOR,  
  
Plaintiff,  
  
v.  
  
KAISER PERMANENTE, et al.,  
  
Defendants.

Case No. 3:21-cv-03894-EMC

**REPLY IN SUPPORT OF MOTION TO  
DISMISS RELATOR TAYLOR'S  
THIRD AMENDED COMPLAINT**

Hearing Date: May 4, 2023  
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Judge: Hon. Edward M. Chen  
Courtroom: 5, 17th Floor

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1 **I. INTRODUCTION<sup>1</sup>**

2 Despite the benefit of this Court’s guidance, Relator James Taylor again fails to allege  
3 materiality for claims premised on alleged violations of diagnosis coding guidance rather than on  
4 clinical falsity. It should be clear by now that he cannot do so. In dismissing the SAC’s claims  
5 for relief based on alleged violations of coding guidance for failure to plead materiality under the  
6 FCA, the Court offered Taylor a simple instruction for curing his pleading deficiencies: plead the  
7 “facts” of the alleged violations. Taylor’s TAC has not done so for his FCA claims based on (i)  
8 “error rates” in alleged audits of internal and external healthcare provider diagnostic data or (ii)  
9 “errors” in NLP results from the Colorado region. He gives the Court no reason to depart from its  
10 prior holding.

11 As an initial matter, Taylor continues to frame the materiality inquiry incorrectly, relying  
12 on the same expansive premise the Court has already rejected. He contends that diagnosis codes  
13 are “definitionally” material because they factor into CMS’s payment decision. But that says  
14 nothing about materiality under the FCA, which requires a relator to show how the alleged falsity  
15 would have affected CMS’s payment decision to Defendants. Like his prior complaints, Taylor’s  
16 TAC still has not alleged any facts to make this showing. Critically, Taylor fails to appreciate the  
17 difference between clinically false diagnosis codes and diagnosis codes that are clinically  
18 accurate but otherwise violate some coding guidance—conflating obviously material violations  
19 with alleged violations of coding guidance that may not have been material to CMS’s payment  
20 decision.

21 Taylor’s new allegations about the categories of errors identified in several of Defendants’  
22 own audits of internal and external healthcare provider data do not help him satisfy the FCA’s  
23 demanding materiality requirement. They do not plead the who, what, when, where, and how of  
24 the errors, instead reciting in broad strokes the general categories of errors identified in the audits.  
25 But merely summarizing alleged legal requirements from CMS manuals and coding guidelines  
26 without alleging what the supposed errors were and how each type of error would have affected

---

27 <sup>1</sup> Defined terms and acronyms have the same meaning as in Defendants’ Motion to Dismiss  
28 (“Motion”), unless otherwise specified.

1 CMS's payment decision does not satisfy Rule 9(b)'s particularity requirement that applies in  
2 fraud cases such as this one. Taylor also does not explain why Defendants' internal audits say  
3 anything about CMS's payment decisions.

4 Taylor also fails to show how he has pleaded materiality in support of his NLP  
5 allegations. His Opposition does not point to a single new allegation or even acknowledge that  
6 his NLP allegations remain substantively unchanged from those the Court already dismissed for  
7 failure to specify the underlying "errors," so the Court has no reason to depart from its prior  
8 holding that Taylor must support his NLP allegations with additional facts. Rather than allege  
9 those facts, Taylor's Opposition grasps at an irrelevant NLP audit *in Hawaii*, even though he has  
10 already conceded that all non-Colorado defendants have been dismissed.<sup>2</sup>

11 Finally, Taylor has provided no reason for the Court to grant leave to amend. He has  
12 amended his complaint three times already, and has received specific guidance from the Court on  
13 the factual allegations that he must assert to correct his pleading deficiencies. If he has not done  
14 so thus far, there is no reason to believe he can do so on the fourth try.

15 For the reasons discussed here and in the Motion, the Court should grant the Motion.

## 16 **II. ARGUMENT**

### 17 **A. Taylor Fails to Plead Materiality for FCA Claims Based on Alleged Violations** 18 **of Diagnosis Coding Guidance**

19 The Court previously dismissed Taylor's claims based on alleged violations of diagnosis  
20 coding guidance because he did not allege facts showing that the alleged violations were material  
21 to CMS's decision to pay Defendants. November 14 Order at 13. The Court held that Taylor had  
22 not "expressly limited" his allegations about "diagnosis code errors to violations of specific  
23 coding guidance." *Id.* The Court also was "not persuaded" that Taylor provided sufficient  
24 information to assess materiality based on his allegation that Defendants' internal audits mimic  
25 CMS Risk Adjustment Data Validation ("RADV") audits. *Id.* The Court gave Taylor leave to  
26 amend to "plead *facts* regarding the errors underlying the error rates." *Id.* at 14 (emphasis added).

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27 <sup>2</sup> Taylor concedes that the Court's prior orders dismissed KFHP, TPMG, and SCPMG, Opp'n at 1  
28 n.1, leaving only two Defendants: KFHP-Colorado and Colorado Permanente.

1 Even with this instruction, Taylor’s new attempts to plead materiality fail.

2 As Defendants explained in the Motion, Taylor fails to plead materiality in his TAC  
3 because he simply fails to allege the *facts* that the Court instructed him to include. Instead,  
4 Taylor merely lists categories of “errors” that he asserts Defendants’ own audits identified in  
5 diagnoses recorded by internal and external providers. *See, e.g.*, TAC ¶¶ 121, 123, 125–26. But  
6 these categories are not themselves errors: They merely parrot alleged legal requirements from  
7 CMS manuals and diagnosis coding guidelines without alleging what the supposed errors were  
8 and how each type of error would have affected CMS’s payment decision. *See Mot.* at 9–12. In  
9 other words, Taylor fails to take that additional step and allege facts supporting the plausible  
10 inference that CMS would have denied payment to Defendants based on the type of error alleged.  
11 In a superficial attempt to show materiality, the TAC also sprinkles in the words “material” and  
12 “materiality” to existing factual allegations that the Court previously determined were insufficient  
13 to establish materiality. *Id.* at 12. Finally, Taylor makes implausible, overbroad assertions that  
14 the violation of any binding rule would be material to CMS—an untenable theory given the  
15 Supreme Court’s guidance in *Escobar*. *Id.* at 12–14.<sup>3</sup>

16 Rather than explain these continued deficiencies and point the Court to the facts, Taylor’s  
17 Opposition exposes his flawed understanding of the FCA’s materiality standard. Taylor insists  
18 that, for purposes of the materiality inquiry, there is no difference between diagnosis codes  
19 submitted for medical conditions that did not exist as a clinical matter and diagnosis codes  
20 submitted in violation of some alleged coding requirement. *See Opp’n* at 6. As the Motion  
21 explained, the distinction is significant: CMS obviously would deny payment for a medical  
22 condition that does not exist, which is why Defendants concede that such a violation would be  
23 material. But Defendants maintain that Taylor has not pleaded materiality for diagnosis codes  
24 submitted in violation of an alleged coding requirement.<sup>4</sup> *Mot.* at 8–9. Taylor’s failure to

25 \_\_\_\_\_  
26 <sup>3</sup> Taylor’s failure to plead materiality affects his Medicare Advantage allegations as well as any  
27 “analogous allegations under Medicare Part D” that Taylor has purportedly set forth. *See Opp’n*  
28 at 8 n.10.

<sup>4</sup> CMS’s payment decision is not clear for the “process-based” coding violations that Taylor

1 acknowledge this distinction in his Opposition underscores the folly of his materiality argument.  
2 In fact, Taylor’s Opposition and portions of his TAC oddly imply that a diagnosis code submitted  
3 for a medical condition a member did not have **would not** be material to CMS since “[t]he MA  
4 program is built on accurate documentation not clinical evaluation.” *See* Opp’n at 6, 11–12; Mot.  
5 at 15 n.9; TAC ¶ 73 (“CMS does not engage in any review of, and **does not pay based upon,**  
6 **underlying clinical realities.**” (emphasis added)). This assertion defies common sense. In  
7 addition, Taylor made this same point in opposing Defendants’ last motion to dismiss, *see* Dkt.  
8 No. 196 at 3–4, but that did not prevent the Court from dismissing his claims premised on  
9 violations of diagnosis coding guidance for failure to allege materiality.

10 Not only does Taylor fail to appreciate the difference between clinically false diagnosis  
11 codes and diagnosis codes that otherwise allegedly violate some coding guidance, but Taylor also  
12 frames the materiality standard incorrectly. Taylor argues that diagnosis codes submitted by a  
13 Medicare Advantage Organization to CMS are “plainly—and definitionally—material” because  
14 they affect the amount a Medicare Advantage Organization is paid and are at the “heart of the  
15 Medicare program.” Opp’n at 10, 12. But this statement misses the point of the materiality  
16 inquiry. Defendants do not dispute that CMS relies on diagnosis coding to determine payment.  
17 If that were enough to satisfy the FCA’s materiality requirement, then materiality would be a  
18 foregone conclusion in every Medicare Advantage FCA case. That is not the law, and courts  
19 frequently grant motions to dismiss for failure to plead materiality in such cases. *United States ex*

20  
21 alleges, including if CMS would treat all “process-based” coding violations the same. *See* TAC  
22 ¶ 169. Case in point, the ICD Guidelines that Taylor alleges that Defendants violated is over 100  
23 pages and contains numerous minute requirements that clearly have no impact on whether the  
24 member has a condition. *See* Dkt. No. 179-1, Request for Judicial Notice (“RJN”), Ex. D. For  
25 example, the ICD Guidelines state that certain ICD categories “have applicable 7<sup>th</sup> characters.”  
26 *Id.* at 434. This character is “**required**” for codes within these categories and “**must always**” be  
27 the “7<sup>th</sup> character in the data field.” *Id.* (emphases added). In other words, if a defendant reported  
28 this character as the fifth character in the code—instead of the seventh—this error would violate  
the Guidelines, but whether this error would impact CMS’s payment decision is unclear. Taylor’s  
citation to CMS’s recent RADV rule and other CMS publications also confuses the issue, *see*  
Opp’n at 7, 10–12. That CMS’s auditors look only at medical record documentation in  
conducting their audits does not mean that CMS finds clinical accuracy irrelevant to payment  
decisions.

1 *rel. Poehling v. UnitedHealth Grp., Inc.*, 2018 WL 1363487, at \*9–10 (C.D. Cal. Feb. 12, 2018)  
2 (failure to allege the materiality of Medicare Advantage attestations in a Medicare Advantage  
3 FCA case based on allegedly false risk adjustment attestations); *United States v. Scan Health*  
4 *Plan*, 2017 WL 4564722, at \*6 (C.D. Cal. Oct. 5, 2017) (“*Swoben IP*”) (failure to allege  
5 materiality in a Medicare Advantage FCA case based on allegedly false risk adjustment  
6 attestations).

7 Contrary to Taylor’s argument, the materiality analysis turns on whether CMS would have  
8 refused to pay the underlying claims had it known of the **falsity** at issue. In other words, the  
9 “misrepresentation about compliance with a statutory, regulatory, or contractual requirement must  
10 be material to the Government’s payment decision.” *Universal Health Servs., Inc. v. United*  
11 *States ex rel. Escobar*, 579 U.S. 176, 181 (2016). Simply because Taylor’s allegations implicate  
12 diagnosis codes generally does not mean he satisfies the FCA’s “demanding” materiality  
13 standard. *See id.* at 194. Instead, as Defendants have explained, Taylor must allege with  
14 reference to **facts** that the **type of falsity** at issue would have caused CMS to deny payment to  
15 Defendants, not just that the supposed falsity lies at the “heart” of the Medicare Advantage  
16 program. *See Opp’n* at 13. This is why the Court directed Taylor to allege the “facts” underlying  
17 his blanket assertions of materiality.

18 Taylor contends that “[e]very court that has evaluated the materiality of unsupported  
19 diagnosis codes to CMS” has found them to be material, *see Opp’n* at 5–6, but to support this  
20 statement, he has merely cherry-picks quotes from cases that do not discuss materiality in any  
21 depth or at all. *See United States ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667, 673 (9th Cir.  
22 2018) (no materiality holding); *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1167  
23 (9th Cir. 2016) (“*Swoben*”) (no materiality holding); *United States ex rel. Ormsby v. Sutter*  
24 *Health*, 444 F. Supp. 3d 1010, 1086 n.506 (N.D. Cal. 2020) (parties did not “meaningfully  
25 challenge” materiality of diagnosis codes); *United States ex rel. Ross v. Indep. Health Corp.*,  
26 2023 WL 24055, at \*8–9 (W.D.N.Y. Jan. 3, 2023) (no materiality holding). While the court in  
27 *Zafirov* found materiality satisfied, that case involved allegations of clinical falsity, not  
28 allegations that the submission of diagnosis codes merely violated coding guidance. *United*

1 *States ex rel. Zafirov v. Fla. Med. Assocs. LLC*, 2022 WL 4134611, at \*2, \*7 (M.D. Fla. Sept. 12,  
 2 2022) (materiality satisfied where complaint alleged that defendants submitted diagnosis codes  
 3 “without regard to the actual physical condition of the patient”). *Anthem* had a particularly thin  
 4 discussion of materiality that conspicuously did not address decisions in this Circuit with  
 5 conflicting reasoning, as explained *infra* at 9–10. *United States v. Anthem Inc.*, 2022 WL  
 6 4815978, at \*4–6 (S.D.N.Y. Sept. 30, 2022). And while this Court found that the United States  
 7 adequately pleaded materiality based on the specific facts alleged in the United States’ complaint-  
 8 in-intervention, Dkt. No. 223 at 23–24, the Court found materiality lacking in Taylor’s last  
 9 complaint, which is similar to his most recent TAC for all the reasons discussed.

10 Viewed through the correct materiality inquiry, Taylor’s TAC fails to set forth sufficient  
 11 facts to plead materiality. His new allegations do not allege materiality for his FCA claims based  
 12 on (i) “error rates” from Defendants’ audits of diagnoses recorded by internal and external  
 13 providers and (ii) “errors” that resulted from the NLP program that used computer programs to  
 14 search members’ medical records for medical conditions that had not previously been reported to  
 15 CMS. *See* November 14 Order at 14.<sup>5</sup>

### 16 **1. Taylor’s Error Rate Allegations Do Not Adequately Plead Materiality**

17 Taylor fails to plead materiality for his allegations based on “error rates” from  
 18 Defendants’ internal audits of internal and external provider data. Instead of pleading the “facts  
 19 regarding the errors underlying the error rates,” *id.*, Taylor merely lists categories of “errors” that  
 20 paraphrase coding guidance mentioned in the ICD Guidelines and other sources, *see, e.g.*, TAC  
 21 ¶¶ 121–25, dresses up existing allegations with the term “material,” *see, e.g., id.* ¶¶ 83–84, and  
 22 makes broad and implausible allegations that *any* violation of CMS rules gives rise to FCA  
 23 liability, *id.* ¶ 160.

24 Taylor incorrectly argues that these new allegations sufficiently plead materiality because  
 25 they are “drawn from [Defendants’] own audits, which identified the[] [alleged] categories of  
 26 \_\_\_\_\_

27 <sup>5</sup> Taylor’s failure to plead sufficient facts to establish materiality impacts both his diagnosis code-  
 28 based and attestation-based claims to the extent they are premised on alleged violations of coding  
 guidance.

1 errors using criteria from CMS RADV audits.” Opp’n at 14. Again, that Defendants’ audits  
 2 allegedly were similar to CMS RADV audits cannot help Taylor’s materiality allegations. *See*  
 3 Mot. at 11–12. The Court concluded that Taylor’s RADV assertion, which appeared in the SAC  
 4 and remains substantively unchanged, *see* Mot., Ex. A ¶ 98 (redline), did not “provide[] sufficient  
 5 information” to assess materiality. November 14 Order at 13.<sup>6</sup>

6 Taylor also fails to point to the “who, what, when, where, and how”—the facts—  
 7 underlying these errors as Rule 9(b) requires. *See Ebeid ex rel. United States v. Lungwitz*, 616  
 8 F.3d 993, 998 (9th Cir. 2010) (citations omitted) (describing Rule 9(b)’s pleading requirements).  
 9 Taylor’s new allegations state that various audits that Defendants conducted of diagnosis codes  
 10 from internal and external provider data found certain “categories” allegedly showing  
 11 Defendants’ “failures to follow material CMS and/or ICD requirements.” *See, e.g.*, TAC ¶¶ 123,  
 12 140. For example, these categories allegedly included “[c]oding from documentation arising  
 13 from a non face-to-face encounter,” coding with an “inadequate link” to the medical condition,  
 14 “[i]nappropriate addendum,”<sup>7</sup> “no documentation supporting the patient having the condition,”  
 15 and “[c]onditions documented off of probabilistic language.” *Id.*

16 These assertions—which are emblematic of Taylor’s new allegations—contain no facts  
 17 that address the who, what, when, where, and how of the fraud charged to assess whether CMS

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18 <sup>6</sup> Defendants also argued that Taylor does not allege what a single CMS RADV audit actually  
 19 concluded about diagnosis codes submitted from the Colorado region. Mot. at 11–12. In  
 20 response, Taylor contends that CMS “has not recovered based on RADV audit findings for audit  
 21 years after PY 2007,” citing CMS’s recent final rule about the audit methodology for the RADV  
 22 program. Opp’n at 14 (citing 88 Fed. Reg. 6643, 6646 (Feb. 1, 2023)). While CMS technically  
 23 has not recovered for audit years after payment year 2007, it has conducted audits since then, and  
 24 the final rule published in February 2023 describes how CMS intends to seek recovery based on  
 25 more recent audit findings. *See* 88 Fed. Reg. at 6643–44. In short, Taylor has provided no reason  
 26 to conclude that CMS has not conducted audits of the Colorado region (in fact, CMS has done  
 27 so), yet Taylor includes no allegations about those audits in his complaint.

28 <sup>7</sup> Taylor fails to address Defendants’ argument that the United States’ complaint-in-intervention  
 may have superseded his allegations about audit errors associated with “inappropriate” addenda.  
 Mot. at 10 n.8; *see United States ex rel. Sansbury v. LB & B Assocs., Inc.*, 58 F. Supp. 3d 37, 47  
 (D.D.C. 2014). As Defendants previously noted, it is impossible to determine to what extent the  
 United States’ complaint already supersedes Taylor’s new and still vague allegations given his  
 failure to specify what he believes is “inappropriate” about the addenda. *See* TAC ¶¶ 139(c),  
 140(d).

1 would have denied payments based on the errors. They do not explain whether the alleged errors  
2 in the audits pertained to data from internal as opposed to external providers; what the scope of  
3 the allegedly improper coding was; why a diagnosis was not properly supported; what diagnoses  
4 fall into each of these broad categories; how many diagnoses fall into each of these broad  
5 categories; how many diagnosis codes were impacted by these errors; or if these errors are  
6 associated with diagnosis codes that “uniquely trigger[ed] an HCC,” which Taylor asserts  
7 “directly affects” the amount a Medicare Advantage Organization is paid. *See* Opp’n at 12. The  
8 new allegations just recycle the alleged legal standards that Taylor believes Defendants have  
9 violated.

10 Taylor contends that CMS considers each of the alleged errors material, but for support  
11 cites only his own conclusory say-so. Opp’n at 13 (citing TAC ¶¶ 264, 268, 272). Indeed, the  
12 allegations he cites already appeared in the original complaint and merely state that “CMS would  
13 have refused to make risk-adjustment payments based on the improper coding and/or taken other  
14 appropriate actions to ensure that Defendants did not receive or retain risk-adjustment payments  
15 to which they were not entitled, including by recouping payments through administrative  
16 processes, payment adjustments, or obtaining payments in enforcement actions.” Mot., Ex. A  
17 ¶¶ 264, 268, 272 (redline comparing complaints). As Defendants’ Motion and prior briefing  
18 explained, this assertion lacks specific facts and cannot satisfy Taylor’s pleading burden. *See*  
19 Mot. at 13; Dkt. No. 203 at 10–11.

20 And in any event, this type of equivocal allegation—which does not even say what CMS  
21 would have actually done—is insufficient to plead materiality. As Judge Fitzgerald explained in  
22 *Poehling*, “It is not enough to allege that Defendants were obligated by various regulations and  
23 contracts to comply with the . . . requirements” or that CMS would “have had the option to  
24 decline to pay” if it were aware of a failure to comply with such requirements. *Poehling*, 2018  
25 WL 1363487, at \*9 (quotations omitted). And as Judge Walter explained in *Swoben II*, “the  
26 complaint must allege that the violations at issue ‘are so central . . . that the [Government] would  
27 not have paid these claims had it known of these violations.’” *Swoben II*, 2017 WL 4564722, at  
28 \*6 (citations omitted).

1           The caselaw Taylor cites about chart-review programs also does not save his materiality  
2 allegations. *See* Opp’n at 14 (citing *Swoben*, *Poehling*, and *Anthem*). As Defendants explained in  
3 their prior motion, the Ninth Circuit’s *Swoben* decision is irrelevant to materiality. The Ninth  
4 Circuit considered whether the relator’s retrospective chart-review allegations plausibly alleged  
5 *fulsity*; it did not consider the FCA’s materiality element, which is at issue here. *See* 848 F.3d at  
6 1173 (“defendants challenge *Swoben*’s theory that the manner in which they designed and  
7 conducted their retrospective reviews rendered their certifications . . . false”), 1175 (holding that  
8 one-sided retrospective chart review can “result in false certifications”).

9           The reasoning in *Poehling* also should persuade this Court to reject Taylor’s insufficient  
10 attempts to show materiality. In *Poehling*, the court held that the United States adequately  
11 pleaded the materiality of the allegedly false diagnosis codes at issue but failed to plead  
12 materiality of the allegedly false attestations. 2018 WL 1363487, at \*9–10. Without describing  
13 the United States’ allegations in detail, the *Poehling* court held that the United States set forth  
14 “enough factual allegations” about the materiality of submitted diagnosis codes. *Id.* at \*12. But  
15 for the allegedly false attestations, the United States alleged no more than that the diagnosis codes  
16 and attestations were “intertwined,” which did not support a conclusion that false attestations  
17 were material. *Id.* at \*10. Taylor brings both diagnosis code- and attestation-based FCA claims,  
18 but his factual allegations are lacking for both. The Court explicitly asked Taylor to plead more  
19 “facts” to explain why diagnosis codes were allegedly false. *Poehling*’s materiality discussion  
20 cannot help him do that.

21           *Anthem*, an out-of-circuit decision, also does not change the materiality analysis. *Anthem*  
22 ignores *Swoben II* and *Poehling*, in-circuit precedent that dismissed government complaints for a  
23 failure to sufficiently plead materiality. *See Anthem*, 2022 WL 4815978, at \*4–6. *Anthem*’s  
24 materiality reasoning is also thin and adopts a reading of *Escobar* that is at odds with in-circuit  
25 precedent. In *Anthem*, the court determined that *Escobar* requires the government to show only  
26 that CMS “would attach importance to . . . information when making a decision.” *Id.* at \*5. But  
27 *Swoben II* found that *Escobar* requires but-for allegations—“that [CMS] would not have paid  
28 these claims had it known of these violations.” *Swoben II*, 2017 WL 4564722, at \*6 (quotations

1 omitted). And *Anthem* focuses only on attestation-based claims and does not speak to the  
2 sufficiency of materiality allegations for diagnosis code-based claims, which Taylor brings and  
3 which Defendants are challenging for a failure to plead materiality. *See Anthem*, 2022 WL  
4 4815978, at \*4–6.

5 Taylor also does not substantively respond to Defendants’ argument that he merely  
6 embellishes existing factual allegations with the word “material” or “materiality” in an attempt to  
7 establish materiality. Mot. at 12; *see, e.g.*, TAC ¶¶ 83–84, 89, 99, 167. He claims that  
8 Defendants are “flyspecking the language” of his TAC, Opp’n at 1, and insists that he need not  
9 plead representative examples of false claims or identify every allegedly false claim at issue, *see*  
10 *id.* at 15–16. Defendants do not argue that Taylor must allege representative examples or identify  
11 every single false claim in order to plead materiality. But he must still plead particularized facts  
12 that make his allegations of materiality plausible. Taylor fails to explain how simply tacking  
13 “material” and “materiality” to allegations from his SAC and identifying “categories” of errors in  
14 Defendants’ internal audits in the broadest possible terms make his TAC anything more than  
15 vague and conclusory.<sup>8</sup>

16 In addition, while acknowledging that “not all errors in submissions to CMS give rise to  
17 an FCA violation,” Taylor argues that he has not alleged “mere negligent errors” (arguing the  
18 errors are “known false diagnoses”). *Id.* at 16. This argument focuses not on materiality—the  
19 relevant FCA element to the Motion—but on scienter, which is not at issue. He does not address  
20 Defendants’ point that CMS is aware that there will be some errors in diagnosis data submitted to  
21 the agency, so without more specific facts pleaded about the errors, the Court cannot conclude  
22 that CMS would have refused payment based on the errors. *See* Mot. at 11 (citing 64 Fed. Reg.  
23 61893, 61900 (Nov. 15, 1999)).

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24 <sup>8</sup> Taylor’s Opposition also concedes that the revenue from Defendants’ chart-review program is  
25 proper “provided that those diagnosis [*sic*] fall into CMS rules and requirements governing [the]  
26 MA program.” *See* Opp’n at 15 n.16. This acknowledgment eviscerates the TAC’s allegation  
27 that the “magnitude” of revenue from the chart-review program “demonstrates the materiality of  
28 the amounts of improper payments” received by Defendants. TAC ¶ 153. By Taylor’s own  
admission, it is not even clear how much of this revenue Taylor believes is implicated here, so the  
“magnitude” of chart-review revenue does not support a finding of materiality.

1 Finally, Taylor argues in his Opposition that he does not assert that “any” violation of  
2 CMS rules gives rise to FCA liability. *See* Opp’n at 17. But his new allegations directly  
3 contradict this assertion. TAC ¶ 160 (“CMS would not pay for diagnosis codes that violated *any*  
4 of its binding rules.” (emphasis added)). For all the reasons explained in the Motion, these  
5 overbroad assertions do not amount to plausible and particularized allegations of materiality.  
6 Mot. at 12–14.

## 7 2. Taylor’s NLP Allegations Do Not Adequately Plead Materiality

8 Taylor also does not allege materiality in support of his NLP allegations, which remain  
9 largely unchanged from the SAC. Mot., Ex. A ¶¶ 248–59 (redline). In his Opposition, he does  
10 not acknowledge that his NLP allegations are virtually the same as those the Court dismissed for  
11 failure to specify the underlying “errors.” *See* Opp’n at 20–21; November 14 Order at 13.  
12 Instead, the Opposition relies on superfluous allegations about the Hawaii region and implicitly  
13 urges reconsideration by citing an out-of-circuit case. Both attempts fail.

14 Taylor’s allegations about the Hawaii region’s NLP audits have no bearing on this case.  
15 Opp’n at 21 (citing TAC ¶ 255). He argues that an audit of the NLP True Positive results in  
16 Hawaii yielded a high error rate. *Id.*; TAC ¶ 255. Not only does that still say nothing at all about  
17 the facts underlying the errors the audit allegedly identified, *see* November 14 Order at 13, but  
18 Taylor has conceded that the only Defendants that remain in this case are KFHP-Colorado and  
19 Colorado Permanente, Opp’n at 1 n.1. Thus, his case concerns Colorado only, and what may or  
20 may not have happened in Hawaii does not matter.

21 Taylor’s citation to the decade-old decision in *Lakeshore* is also unpersuasive. *See United*  
22 *States v. Lakeshore Med. Clinic, Ltd.*, 2013 WL 1307013, at \*3 (E.D. Wis. Mar. 28, 2013).  
23 Again, Taylor has cited a case that does not have any holding related to FCA materiality. In  
24 *Lakeshore*, the court held that a relator’s allegations about overbilling were sufficient when she  
25 alleged that annual audits conducted over many years revealed that physicians selected higher  
26 Current Procedural Terminology codes than were warranted and cited specific error rates and  
27 specific amounts of allegedly upcoded consultations. *Id.* The court did not address materiality  
28 when assessing these allegations. *See id.* Further, the allegations in *Lakeshore* about multiple

1 audits over multiple years are far different from the single example Taylor provides for his NLP  
2 allegations: namely, that he found a 10% “error rate” in his review of just 100 True Positive  
3 results for the Colorado region and that some unidentified number of that 10% were coded from  
4 problem lists in a way that may not have violated any binding rules. *See* TAC ¶ 256–57.

5 Taylor is left with his allegation that he identified a total of ten erroneous True Positive  
6 diagnoses from the Colorado region, without any allegation about what those alleged errors were.  
7 That allegation did not suffice to plead materiality in the SAC nor does it suffice here. *See*  
8 November 14 Order at 13–14.

9 **B. The FCA’s Demanding Materiality Standard Applies to Taylor’s Reverse**  
10 **False Claims**

11 Taylor asserts that Defendants’ materiality arguments do not apply “at all” to his claims  
12 that Defendants concealed overpayments for false diagnosis codes to CMS in violation of the  
13 reverse FCA. *Opp’n* at 18. This is incorrect.

14 Taylor argues that *Escobar* did not address materiality under the reverse FCA and instead  
15 *United States v. Bourseau* controls. *Id.* at 18–19. As Defendants explained in prior briefing,  
16 *Bourseau* does not compel a different conclusion for Taylor’s reverse false claims. *See United*  
17 *States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008). The cases Taylor cites elsewhere in his  
18 Opposition make this clear. In *Poehling*, the court recognized that *Bourseau* “applied a  
19 materiality standard quite similar to the one articulated by the Supreme Court in *Escobar*.” 2018  
20 WL 1363487, at \*11. In *Ormsby*, a magistrate judge in this District similarly noted that the  
21 materiality standards “are the same for the reverse-FCA provision and the direct-FCA provision.”  
22 *Ormsby*, 444 F. Supp. 3d at 1056. Both *Escobar* and *Bourseau* “suggest that a claim must be  
23 based on a violation that is likely to affect whether and how much the Government would have  
24 paid to a defendant.” *Poehling*, 2018 WL 1363487, at \*11. Whether under *Escobar* or *Bourseau*,  
25 Taylor—who asserts that the “legitimacy of Defendants’ coding” is the “centerpiece” of both his  
26 direct and reverse false claims, *see Opp’n* at 19—fails to allege materiality because he does not  
27 provide sufficient facts, as required by Rule 9(b), for his allegations based on “error rates” from  
28 Defendants’ audits of diagnoses made by internal and external providers and for his allegations

1 based on “errors” from the NLP program.

2 **C. The Court Should Deny Leave to Amend**

3 The Court should reject Taylor’s request for yet another opportunity to amend his  
4 complaint. As Taylor admits, he has had multiple opportunities to amend his pleadings, Opp’n at  
5 21 n.21, and his last amendment had the benefit of the Court’s specific instructions about the  
6 factual allegations that Taylor needed to add to cure his pleading deficiencies. November 14  
7 Order at 13–14. Given the Court’s instructions and Taylor’s longtime employment at Colorado  
8 Permanente, his TAC makes clear that he has no additional facts to plead.

9 The cases Taylor cites to support his request for leave to amend are also inapposite. *See*  
10 Opp’n at 21–22. In *Sloan*, this Court permitted leave to amend where the plaintiffs sought to  
11 substitute a putative class member in the place of current class representatives who were no  
12 longer able to participate in the litigation and, unlike here, the defendants did not argue that the  
13 amendment would be futile. *Sloan v. Gen. Motors LLC*, 2019 WL 2775631, at \*1–2 (N.D. Cal.  
14 July 2, 2019) (Chen, J.). In *Eminence*, the Ninth Circuit found the district court abused its  
15 discretion in denying leave to amend where it appeared the “plaintiffs had a reasonable chance of  
16 successfully stating a claim if given another opportunity.” *Eminence Cap., LLC v. Aspeon, Inc.*,  
17 316 F.3d 1048, 1053 (9th Cir. 2003) (per curiam). But as explained in the Motion, the Ninth  
18 Circuit does not require unlimited opportunities to amend. *Zucco Partners, LLC v. Digimarc*  
19 *Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (“[W]here the plaintiff has previously been granted  
20 leave to amend and has subsequently failed to add the requisite particularity to its claims, ‘[t]he  
21 district court’s discretion to deny leave to amend is particularly broad.’” (citations omitted)). And  
22 the Ninth Circuit does not require leave to amend where, as here, it is clear that the plaintiff has  
23 “no additional facts to plead.” *Id.* (quotations omitted).

24 **III. CONCLUSION**

25 For the foregoing reasons, the Court should dismiss with prejudice Taylor’s complaint  
26 except to the extent he alleges that KFHP-Colorado and Colorado Permanente submitted or  
27 caused to be submitted false diagnosis codes to CMS that reflected medical conditions that did  
28 not exist as a clinical matter or concealed overpayments based on such submissions.

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Dated: March 31, 2023

Respectfully submitted,

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