

1 UNITED STATES DISTRICT COURT  
2 IN THE NORTHERN DISTRICT OF CALIFORNIA  
3 SAN FRANCISCO DIVISION  
4

5 UNITED STATES OF AMERICA )  
6 ex rel. RONDA OSINEK, ) Case No. 3:13-cv-03891-EMC  
7 Plaintiffs, )  
8 vs. ) San Francisco, California  
9 KAISER PERMANENTE, et al., ) May 4, 2023  
10 Defendants. ) 3:11 p.m.  
11

12 BEFORE: THE HONORABLE EDWARD M. CHEN, JUDGE  
13

14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 MOTIONS TO DISMISS  
16  
17  
18  
19  
20

21 Official Court Reporter:  
22 Scott M. Coniam, RDR, CRR  
23 Sandra Day O'Connor U.S. Courthouse, Suite 312  
24 401 West Washington Street, Spc 43  
25 Phoenix, Arizona 85003-2151  
(602) 322-7257

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**APPEARANCES**

For the Plaintiffs:

UNITED STATES DEPARTMENT OF JUSTICE

By: **Mr. David Moskowitz, Esq.**

1801 California Street #1600

Denver, Colorado 80202

UNITED STATES DEPARTMENT OF JUSTICE

By: **Mr. Shiwon Choe, Esq.**

450 Golden Gate Avenue

San Francisco, California 94102

GOLDBERG KOHN LTD.

By: **Mr. Roger A. Lewis, Esq.**

55 East Monroe Street, Suite 3300

Chicago, Illinois 60603

CONSTANTINE CANNON

By: **Mr. Max Voldman, Esq.**

1001 Pennsylvania Avenue, NW, Suite 1300N

Washington, DC, 20004

GIBBS LAW GROUP LLP

By: **Ms. Amy Zeman, Esq.**

1111 Broadway, Suite 2100

Oakland, California 94607

For the Defendants:

O'MELVENY & MYERS LLP

By: **Mr. K. Lee Blalack, II, Esq.**

1625 Eye Street, N.W.

Washington, D.C. 20006

O'MELVENY & MYERS LLP

By: **Mr. Dimitri Portnoi, Esq.**

400 South Hope Street

Los Angeles, California 90071

**PROCEEDINGS**

(Proceedings commenced at 3:11 p.m.)

THE CLERK: Case is Osinek, et al., v. Kaiser  
Permanente, Case Number 13-3891.

Counsel, please state your appearance for the record,  
beginning with the plaintiff.

MR. CHOE: Good afternoon, Your Honor. Shiwon Choe on  
behalf of the United States.

THE COURT: All right. Thank you, Mr. Choe.

MR. MOSKOWTIZ: Good afternoon, Your Honor. David  
Moskowitz on behalf of the United States.

THE COURT: All right. Thank you, Mr. Moskowitz.

MR. LEWIS: Good afternoon, Your Honor. Roger Lewis  
on behalf of Bryant and Hernandez relators.

THE COURT: All right.

MR. VOLDMAN: Hi, Your Honor. Max Voldman on behalf  
of relator Taylor.

THE COURT: All right. Thank you.

MS. ZEMAN: Good afternoon, Your Honor. Amy Zeman on  
behalf of relator Osinek.

THE COURT: All right. Thank you.

MR. BLALACK: Afternoon, Your Honor. Lee Blalack,  
lead counsel for defendants, along with my partner, Dimitri  
Portnoi, who will be doing the argument for us today.

THE COURT: All right. Great. Thank you.

1 All right. I'm not going to be able to cover 03:12:11  
2 everything today but I have a few questions. 03:12:18

3 Let me ask -- given that the -- that we're still at 03:12:20  
4 the motion to dismiss stage here and that all presumptions and 03:12:28  
5 facts are reasonably construed, all inferences reasonably can 03:12:31  
6 be drawn -- are to be drawn in favor of the plaintiff, why 03:12:36  
7 isn't there enough here -- we sort of talked about this before, 03:12:41  
8 but I -- I don't know if there's any new arguments about why 03:12:43  
9 the United States has not sufficiently alleged a systemic 03:12:46  
10 scheme to defraud, putting aside the question about conspiracy 03:12:52  
11 and scope of conspiracy for a moment which I do want to talk 03:12:55  
12 about, but especially, you know, given the specific allegations 03:12:58  
13 here about the systemic nature of the risk adjustment program, 03:13:03  
14 the refresh program, which as I understand it is a systematic 03:13:07  
15 way of using algorithms to mine the records and then querying 03:13:13  
16 physicians and pressuring physicians to add the diagnosis via 03:13:19  
17 addenda, as I recall, through requiring justification if they 03:13:24  
18 refuse to -- they fail to add an addendum. I don't know if 03:13:33  
19 there's some forms of financial pressure, et cetera, et cetera, 03:13:39  
20 but the idea that this was -- this was a systematic program -- 03:13:42  
21 and whether it's true or not I guess we'll find out at some 03:13:48  
22 point if we get to that point, but why isn't that enough to at 03:13:51  
23 least allege a systemic scheme to defraud here? 03:13:54

24 MR. PORTNOI: Well -- Your Honor, thank you for that 03:14:01  
25 question. Dimitri Portnoi on behalf of Kaiser. 03:14:02

1           Your Honor, the allegations in the complaint don't  
2 reach what Your Honor asked the plaintiff, the United States,  
3 to do here which is that we don't have -- while we have a few  
4 more specific instances of potentially contradictory,  
5 potentially false diagnoses, those aren't connected in a way  
6 that makes them emblematic of a broader scheme. Emblematic  
7 being the standard that Your Honor used in the order.

8           What we have here is a few more allegations regarding  
9 the -- regarding some new diagnoses. We have a few allegations  
10 that are very similar to the original ones regarding audit.

11           I hope I can clarify with respect to refresh which is  
12 that refresh, even as alleged in the complaint at paragraph  
13 178, is not a program that is in any way specifically related  
14 to addenda. And, in fact, as we review some of the case  
15 diagnoses that are present in the complaint, we see that  
16 refresh occurs sometimes at the -- sometimes at the -- at the  
17 patient visit itself. So it's actually not something that is  
18 part of the addendum scheme that is alleged here. I'm  
19 specifically referring to -- well, yes, some of the specific  
20 diagnoses that come later, but what I wanted --

21           THE COURT: Well, even if it's not exclusive doesn't  
22 mean it's not related to part of the larger --

23           MR. PORTNOI: It may be but it doesn't demonstrate a  
24 scheme or something with scienter. Refresh was obviously  
25 not -- refresh was obviously not created in order to -- in

1 order to promote addendum and there's no allegation of that. 03:15:51

2 THE COURT: What about the allegation in paragraph 162 03:15:54  
3 that if the physicians fail to rediagnose these conditions on a 03:15:56  
4 patient visit, then a query is sent to them and then, quote, 03:16:02  
5 systematically pressured the physician to add the diagnosis via 03:16:06  
6 addenda. I mean, that may be true, may be false, but why isn't 03:16:11  
7 that a pretty systemic kind of allegation there? 03:16:14

8 MR. PORTNOI: Well, Your Honor, as with almost all of 03:16:17  
9 the refresh allegations, 162 is in the last complaint. And 03:16:20  
10 Your Honor held that it did not demonstrate something that was 03:16:24  
11 emblematic. 03:16:27

12 I would also emphasize that allegations like 162 -- 03:16:28  
13 allegations that there was pressure, allegations that there 03:16:32  
14 were leading queries or inappropriate queries, this is all 03:16:36  
15 directly in the Ninth Circuit's decision in Integra where we 03:16:40  
16 saw similar allegations to those and that was found to not give 03:16:44  
17 rise because -- and for a very important reason, because what 03:16:48  
18 is missing in all of those is that, as the Ninth Circuit held, 03:16:52  
19 in order to credit such a broad scheme, you need to find that 03:16:57  
20 it is plausible that thousands of doctors participated in the 03:17:01  
21 conspiracy or participated in the scheme, whether through 03:17:07  
22 knowledge or reckless disregard but, nonetheless, you have to 03:17:10  
23 find the doctors vitiated and did not comply with their duty to 03:17:13  
24 exercise independent judgment when they looked at the records 03:17:18  
25 and that's something that is broadly missing throughout the 03:17:21

1 complaint. It's as if the plaintiffs had written something 03:17:24  
2 that said -- or as if the United States had alleged something 03:17:27  
3 that said, well, there's all this stuff that happens and then 03:17:31  
4 something occurs in a black box and then a diagnosis is 03:17:35  
5 submitted. That -- 03:17:38

6 THE COURT: Well, but then there's -- there's 03:17:39  
7 systematic evidence in terms of some statistical presentations, 03:17:41  
8 the results of some of the audits that were done, so it's not 03:17:45  
9 just a narrative of, well, doctors were pressured and we don't 03:17:48  
10 know what came out on the output end of things. 03:17:52

11 MR. PORTNOI: Well -- 03:17:54

12 THE COURT: There's some indication of that, isn't 03:17:55  
13 there? 03:17:56

14 MR. PORTNOI: We certainly know some of what came out 03:17:56  
15 on the outcome, which is that we have allegations that doctors 03:17:58  
16 objected to the queries and did not comply with them and did 03:18:00  
17 not -- did not do so and that's at 274 that -- for instance, 03:18:03  
18 where we see something like that. 03:18:07

19 We do have audits. But, Your Honor, most of these 03:18:09  
20 audits were present in the prior complaint. And Your Honor, 03:18:12  
21 focusing on the cachexia allegations, noted that for those 03:18:16  
22 audits, there were audits that specifically showed an increased 03:18:20  
23 rate of unsupported or false cachexia diagnoses in one region. 03:18:25  
24 And that provided a link between the examples of the three 03:18:31  
25 diagnoses that were there that made them emblematic of the 03:18:35

1 scheme that was being alleged, that along with other things 03:18:38  
2 such as being cachexia being uniquely vulnerable to 03:18:41  
3 exploitation, as well as the routine nature of those particular 03:18:44  
4 queries, the specific audit, that created what Your Honor 03:18:48  
5 referred to and what the complaint refers to as the cachexia 03:18:51  
6 initiative in Northern California. 03:18:54

7 Broad audits that honestly do know more than state 03:18:56  
8 that there were times when there were problems -- when we look 03:19:00  
9 at the 2015 and 2016 Northern California audit, for instance, 03:19:05  
10 we don't know -- there we're talking about a single region in a 03:19:09  
11 single year, the same region that Your Honor has already found 03:19:14  
12 that was sufficient for the cachexia initiative, and there's no 03:19:17  
13 information about how many errors were found. Was it two? Was 03:19:20  
14 it five? Was it 20? 03:19:23

15 When we look at the other new audits that exist in 03:19:25  
16 this complaint, when we look at the 2012 root cause analysis, 03:19:28  
17 that fails to even identify what region that is in. It could 03:19:33  
18 be in Hawaii. It could be in Puerto Rico. We don't know how 03:19:35  
19 many diagnoses codes were reviewed. We don't know if any of 03:19:39  
20 those -- if those diagnosis codes have any relevance to this 03:19:42  
21 complaint. 03:19:46

22 And then with respect to the NCO audits, that shows 03:19:47  
23 that the medical -- that speaks only to a certain narrow 03:19:50  
24 category, but it also says nothing about what was reviewed and 03:19:54  
25 when. And, again, we're in a Rule 90(b) world and we have 03:19:58

1 audits that simply don't say anything about who, what, where,  
2 when. This is all information that is in the government's  
3 possession. The United States is not like a typical litigant.  
4 The typical plaintiff does not have eight years with subpoena  
5 power. They have the -- if they have these documents, if they  
6 have these audits, then they can allege what is in them. The  
7 fact that they don't gives rise to the possibility that they  
8 don't really support anything.

9 THE COURT: All right. Well, let me put the burden on  
10 the U.S. to tell me what's different this time to allow for  
11 more expansive complaint to go forward beyond what I --

12 MR. MOSKOWITZ: Thank you, Your Honor.

13 As we understood it last time, our complaint -- and I  
14 think, you know, fairly so, we had given three examples and we  
15 had not tied those examples in toward what was going on with  
16 the refresh and the data mining and the other risk adjustment  
17 program.

18 So what we've done here is twofold. We now have seven  
19 examples, none of which Kaiser contests. Right. They don't  
20 actually contest any of those. So we're in a world where --  
21 that's completely different than any other case they've ever  
22 cited -- where there are seven representative examples of false  
23 claims that they don't contest. And so we're starting from  
24 there where we have representative examples. And then we've  
25 added a significant number of allegations that explain why

1 those examples are representative and how they fit into the 03:21:30  
2 overall systematic issue why there's a pattern here. Because 03:21:33  
3 as we understood, it was that Your Honor was concerned that 03:21:37  
4 these were just essentially three isolated incidents; they 03:21:39  
5 don't have any connection to each other. 03:21:43

6 And so what we've alleged here is a pattern of 03:21:45  
7 behavior and that pattern of behavior starts with a medical 03:21:47  
8 record where the provider does not diagnose a particular 03:21:53  
9 diagnosis at issue. The provider had their -- exercised their 03:21:57  
10 medical judgment and they chose not to diagnose this issue or 03:22:00  
11 this particular diagnosis, condition. 03:22:05

12 And what happens then is that Kaiser engages in a 03:22:07  
13 pressure campaign afterwards, through the refresh and the data 03:22:12  
14 mining program, where they send queries to the providers trying 03:22:16  
15 to get the provider to add those diagnoses. 03:22:20

16 We presented all sorts of allegations showing that 03:22:24  
17 Kaiser knew that there were all sorts of flaws with the queries 03:22:27  
18 that they were sending and with the information that were 03:22:30  
19 coming up in the data mining and refresh program. They knew 03:22:33  
20 that those programs had flaws that were repeatedly generating 03:22:36  
21 queries for conditions that were contradicted by the medical 03:22:41  
22 records of the visit. And the overall issue is that these 03:22:44  
23 programs, they go look through history. They look at things 03:22:48  
24 that happened way in the past and they might come up with 03:22:53  
25 something that they're looking about the patient's medical 03:22:55

1 record at some point in time. But there's a data lag problem 03:22:58  
2 that Kaiser itself has identified as a huge problem, as a flaw, 03:23:02  
3 a red flag that they identified because the programs don't then 03:23:05  
4 look at what happened at the visit. They generally ignore what 03:23:11  
5 occurred at the visit. And so that leaves this issue of 03:23:15  
6 diagnoses that Kaiser is querying doctors to add these 03:23:19  
7 diagnoses, without actually looking at the visit. And Kaiser 03:23:25  
8 knew that they were generating queries that were not -- you 03:23:30  
9 know, that were inaccurate, but then they further knew that 03:23:33  
10 many physicians receiving these queries were just adding on the 03:23:38  
11 requested query and they knew it was resulting in repeated 03:23:41  
12 submission of inaccurate diagnoses. 03:23:45

13 THE COURT: And that allegation that they knew -- 03:23:47  
14 first of all, the allegation of systemic nature and the 03:23:49  
15 breadth, that's in the 161 et seq section of the complaint? 03:23:54

16 MR. MOSKOWTIZ: Yes. So that's -- I mean, generally 03:24:00  
17 speaking, it's in the 161, but it's also 141 to 142. 03:24:02

18 You know, the -- there's a whole bunch of different 03:24:07  
19 areas where we've kind of -- you know, there's a lot of 03:24:13  
20 different things going on and so it's hard to point to one 03:24:16  
21 single area, but that is generally where it is, is this is a 03:24:18  
22 systematic program and -- 03:24:22

23 THE COURT: And where would I find the best paragraph 03:24:26  
24 or two that alleges this was systematic, this was not 03:24:29  
25 particular to, you know, some region or some -- you know, some 03:24:35

1 local program, but this was a more system wide program? 03:24:42

2 Is there a set of paragraphs that -- I see -- you 03:24:46  
3 know, I understand what the effect was, et cetera, et cetera, 03:24:53  
4 but what tells me the scope and the regularity of this -- 03:24:56

5 MR. MOSKOWTIZ: I don't think in here there's a 03:25:02  
6 particular paragraph that I would say point to for the scope 03:25:03  
7 that -- other than these programs were not region specific and 03:25:08  
8 so the issue here is the data lag issue, right. So if they 03:25:15  
9 were running these programs in real time, like at the time of 03:25:18  
10 the visit, none of these things would pop up because you would 03:25:22  
11 say, in fact, you know, there's -- the records show they didn't 03:25:27  
12 have this, so we're not going to ask them to add it. The 03:25:33  
13 problem is, as we've explained, like the way the data mining 03:25:37  
14 worked -- and they all were running like a giant data mining 03:25:41  
15 working group together. They all are doing the same thing and 03:25:44  
16 so -- 03:25:47

17 THE COURT: When you say "all," who's the all? 03:25:50

18 MR. MOSKOWTIZ: Sorry. All is all of the defendants. 03:25:52  
19 It also includes other regions as well, but all of the 03:25:55  
20 defendants. There are representatives from every defendant. 03:25:58  
21 They're all in a data mining working group. They're all in 03:26:01  
22 a -- they're all participating in the regional reporting group. 03:26:04  
23 They're all participating as part of the National Kaiser 03:26:08  
24 Permanente Risk Adjustment Initiative. Refresh is not 03:26:14  
25 something that is -- for example, that's not a thing in the 03:26:14

1 medical world. That's a thing in the Kaiser world. Right. So  
2 Kaiser Permanente came up with a plan on a national scope to  
3 run the refresh program. And that's how they identify these  
4 particular diagnoses. They look at things in the past and they  
5 send things in the future. And so --

6 THE COURT: The participants you're accusing would  
7 include the physicians groups; right?

8 MR. MOSKOWTIZ: Yes.

9 THE COURT: What -- explain to me -- I understand  
10 Kaiser's incentive, but the pressure being placed on  
11 physicians -- they almost seem adverse to a certain extent, I  
12 mean, one could argue. And there's some evidence, I guess, of  
13 that that some physicians resisted.

14 Why would they -- what's in the interest -- why would  
15 the physicians groups like the TPMG go ahead and conspire along  
16 with this program?

17 MR. MOSKOWTIZ: Sure. So the more money -- I mean,  
18 it's an integrated consortium, so the more money that Kaiser  
19 Permanente gets, the more money boils down to TPMG and to the  
20 Permanente medical groups. And there's a chart of this in  
21 our -- from Kaiser itself that explains this in our complaint,  
22 for example, at paragraph 109 that they're reporting on this at  
23 the regional reporting group, right. The regional reporting  
24 group is everyone from all of these different defendants  
25 working together as part of the National Kaiser Permanente Risk

1 Adjustment Initiative and they're talking about this is how it 03:27:51  
2 works. We're going to get more money and then that all helps 03:27:53  
3 everyone because they view themselves as operating as a single 03:27:56  
4 enterprise under one roof and that they say we operate 03:28:00  
5 seamlessly as one enterprise and -- 03:28:04

6 THE COURT: Do the physician groups -- maybe you 03:28:08  
7 can -- maybe it's in here and I missed it. Do the physician 03:28:11  
8 groups like TPMG and the Colorado Medical Group -- is it a 03:28:15  
9 negotiated, like, contract by vendor with respect to the 03:28:21  
10 provider and the health care organization or is it a 03:28:28  
11 partnership where there's money that accrues to KPF -- KFHP, 03:28:32  
12 sort of automatically then gets distributed to the medical 03:28:41  
13 groups, doctor groups? 03:28:48

14 MR. MOSKOWTIZ: There's a contract. It's an extremely 03:28:48  
15 complicated contract. There's the incentives and things like 03:28:52  
16 that. But there's a contract and essentially all of the money 03:28:56  
17 that operates TPMG or CPMG or any of the other Permanente 03:29:00  
18 medical groups comes from Kaiser Permanente, from the health 03:29:06  
19 plan. So they're like interconnected in a way that if the 03:29:09  
20 health plan -- something goes wrong with the health plan, they 03:29:13  
21 don't have any other -- that's their, essentially, sole source 03:29:15  
22 of money. 03:29:18

23 THE COURT: But if the health plan increases their 03:29:19  
24 profits by 20 percent, does that automatically translate into 03:29:22  
25 some kind of bonus or share? 03:29:27

1 MR. MOSKOWTIZ: So it essentially works -- part of 03:29:31  
2 this risk adjustment program works is that when you submit a 03:29:33  
3 diagnosis code, you're not actually getting paid directly for 03:29:36  
4 that diagnosis in that year. It's fitting into the -- what you 03:29:41  
5 get paid in the following year for that patient. And so every 03:29:46  
6 year the health plan and the medical groups negotiate an amount 03:29:52  
7 of payment for the beneficiary. So it's a capitated rate. And 03:29:59  
8 the higher the risk score, the better off they are to get a 03:30:06  
9 higher capitated rate. So if Kaiser Permanente is doing 03:30:10  
10 better, then that's more money for the medical group. 03:30:14

11 THE COURT: So the medical group negotiates a 03:30:18  
12 capitated rate with the health foundation -- with the -- 03:30:20

13 MR. MOSKOWTIZ: Health plan, yes. 03:30:24

14 THE COURT: So you're saying they -- by submitting to 03:30:26  
15 this pressure or exceeding to this pressure and essentially 03:30:30  
16 lining the pockets of the health plan, they will get benefits 03:30:36  
17 because they're going to get a higher capitation rate as well? 03:30:40  
18 Is that -- 03:30:44

19 MR. MOSKOWTIZ: That's generally the framework, yes. 03:30:45

20 So the health of everyone benefits the health of 03:30:48  
21 everyone. All -- this is a shared money, one source, and the 03:30:51  
22 pot of money is all coming from the health plan and so the 03:30:56  
23 better that the health plan is doing, the better off everyone 03:31:00  
24 is. 03:31:02

25 THE COURT: And that is one of the basis of your 03:31:04

1 conspiracy that there's a motive here, there's parallel motives  
2 to engage in this risk adjustment program because everybody  
3 benefits in the end?

4 MR. MOSKOWTIZ: Yes. Certainly -- and I do have to  
5 clarify. We are generally -- we don't need to prove that the  
6 individual providers, a particular state of mind of them, but  
7 the people who are running these programs and running the  
8 medical groups, right, who are the business side, the business  
9 people, they're the ones who -- they understand this. They  
10 understand everything and they're the ones who are creating  
11 these programs to push the doctors -- along with the health  
12 plan to push the doctors to add the diagnoses.

13 THE COURT: And that is -- but that is sort of core to  
14 the larger conspiracy theory, which I want to talk about in a  
15 minute, that there are incentives to engage in this  
16 conspiratorial agreement according to your -- if the doctors  
17 didn't benefit, why would they -- you know, they get a flat  
18 rate. Why would they care.

19 MR. MOSKOWTIZ: Right. There are certainly incentives  
20 because we're talking about the way things are negotiated and  
21 how it all works out. There are incentives that everyone's  
22 incentives here are aligned. In fact, that's what -- one of  
23 the particular things -- like, for example, in paragraph 111  
24 where they talk about that Kaiser viewed it had a strategic  
25 advantage over all of the other MAOs because of this integrated

1 structure. That they had control over everyone and every  
2 process. The health plan controls all of the dollars going to  
3 the medical group and with that comes a -- you know, they say  
4 they're operating under one roof. They are one integrated  
5 consortium. Their incentives are all aligned. And I think,  
6 you know, one thing that we see here is all of these different  
7 groups are represented by the same counsel because they're  
8 effectively one consortium. They're one entity.

9 THE COURT: What's your response to the Integra case?  
10 I know it's unpublished, but why is this case that much  
11 different? There was similar allegations about queries and  
12 incentivizing doctors, et cetera. Why is this case different?

13 MR. MOSKOWTIZ: So our case is completely different  
14 than Integra. And other than there's a sentence about leading  
15 queries and incentives, besides that, we have nothing alike.

16 Integra -- the relator had never looked at a single  
17 medical record. They didn't have access to any medical  
18 records. They simply ran a statistical analysis and they said  
19 based on that statistical analysis, because you are submitting  
20 more of these particular claims, we think that that's likely a  
21 false claim. And it's even worse because it actually turns out  
22 that all of the competitors in the industry caught up, you  
23 know, a couple of years later and were submitting at the exact  
24 same rate. And the court essentially there said is you have  
25 not alleged anything that would remotely suggest that there is

1 falsity here. What you've alleged is that they submitted more  
2 claims for these conditions than other hospitals but then the  
3 other hospitals caught up to them so that doesn't give rise to  
4 an inference that these claims are false. And they in a  
5 footnote said statistical analysis is not irrelevant and that  
6 you could rely on it in conjunction with allegations about  
7 particular false claims.

8 Well, we have allegations here about particular false  
9 claims. We also have allegations about insider information,  
10 which they don't have in Integra. We have all sorts of  
11 allegations where Kaiser's own documents show that they knew  
12 that they were continually submitting false claims.

13 THE COURT: What are the most -- what are the most  
14 powerful on point paragraphs in there?

15 MR. MOSKOWTIZ: If you look at paragraph 323, they're  
16 identified that, "Internally, Kaiser recognized that many times  
17 the physicians were not properly reviewing the diagnoses..."  
18 because physicians are being inundated with these. They're  
19 being constantly asked to change things. So they're not --  
20 they're just adding them at Kaiser's request.

21 The one document identifies this program as a weakness  
22 and say "some clinicians refresh the diagnoses without proper  
23 and detailed review of the medical record, and as a result  
24 incorrect diagnoses keep being reported."

25 That's Kaiser's own statement.

1 THE COURT: Sometime. We don't know if that means  
2 1 percent of the time or 90 percent of the time.

3 MR. MOSKOWTIZ: Sure. But it doesn't matter if it's a  
4 small number of the time or any. It's they know it's  
5 happening. And it's really important here, right, that none of  
6 these errors existed in the original record. All of these  
7 errors are generated at Kaiser's request. And they know that  
8 when they're generating these queries that there's a whole  
9 bunch of inaccurate diagnosis codes in there. And they're just  
10 disclaiming any obligation to check the accuracy of it. So  
11 take simple inquiries to make sure that we're not asking  
12 physicians to add inaccurate diagnosis codes. And doing that  
13 when they know that some clinicians keep reporting these things  
14 inaccurately, we know now that there are some false claims.

15 A big difference between Integra and here and the  
16 other cases that Kaiser cites is Integra -- there's no  
17 allegation of a single false claim. Right. So the problem  
18 that the Ninth Circuit had was we don't know that any of these  
19 at all are false. If Integra had included allegations of  
20 representative false claims, I have little doubt that the Ninth  
21 Circuit would have said you can go forward because the number  
22 of false claims, well, that's something to deal with at summary  
23 judgment and at trial. The question is are there any and in  
24 this case there definitely are. And the only question that  
25 they're saying is, well, there might not be as many as the

1 government says. And we just think that like that's an issue  
2 for summary judgment and trial.

3 And, you know, we know, for example, that Kaiser did  
4 an addenda audit and in a short period of time they found  
5 hundreds of these exact same errors. So it's not just a these  
6 happen to be three things that got through. We now have a  
7 bunch of them. We've cited the representative types of claims  
8 we're bringing and we've explained a significant reason to  
9 believe that these are representative of a broader set of  
10 diagnosis codes that were inaccurate because the condition did  
11 not exist at the time.

12 THE COURT: All right. Let me give the defense a  
13 chance to respond quickly and I want to move on to the question  
14 about the conspiracy.

15 MR. PORTNOI: I'll do my best, Your Honor. There's a  
16 lot to respond to there and there's a lot that, honestly, was  
17 just stated that contradicts both the Ninth Circuit and the  
18 complaint itself.

19 So let's reset to point out that what we're talking  
20 about here is the clinically inaccurate diagnoses. There's a  
21 lot that went in here about inappropriate addenda or  
22 inappropriate queries which would go to the second category of  
23 false claims that Your Honor identified as being both legally  
24 and factually false.

25 Very important, my point that I made earlier and the

1 incentive point that I think Your Honor was making with counsel  
2 for the United States, it's not about the particular -- the  
3 provider groups, it's about the individual doctors. It is  
4 about the fact that we're not talking about just the defendants  
5 that are the provider groups. This has to, as it would have in  
6 Integra, required thousands of doctors, maybe tens of thousands  
7 of doctors to commit what is more or less what would be a  
8 violation of their ethical duty and to not use any clinical  
9 judgment when making diagnosis. That is the claim that  
10 Your Honor has to find plausible in order to make this happen.  
11 And we've asked the government point blank about that  
12 allegation, what evidence they have for it, and they flatly  
13 refuse to provide any discovery on that point at all, stating  
14 that they don't have to disclose anything on that point until  
15 after trial has begun.

16 Let me also point out something about refresh. What I  
17 just heard is that refresh is something that only occurs after  
18 the patient visit. That's not true as a matter of fact. And  
19 that's not true -- it directly contradicts the complaint  
20 itself. At paragraphs 133, 134, 138 we have specific  
21 allegations that refresh actually is a process that begins  
22 before the patient visit. It is something that the physicians  
23 look over during the patient visit. So that simply is a  
24 situation where we're creating new facts and contradicting the  
25 complaint in order to get around it.

1           Also heard some information about Integra that frankly  
2           is a gross misrepresentation --

3           THE COURT: Well, let me -- hold on for a second.

4           Looking at paragraph 133, 134, where does it say that  
5           refresh only occurred during the patient visit?

6           MR. PORTNOI: I'm not saying that it only occurs, but  
7           what I heard from the counsel for the United States is that  
8           part of the design of this scheme is that refresh we don't give  
9           to doctors at visits on purpose so it can be done only after  
10          the visit in addenda and --

11          MR. MOSKOWTIZ: Your Honor, if I could just chime in  
12          on that. That's not what we said.

13          THE COURT: I didn't hear that and I think that's a  
14          mischaracterization.

15          MR. PORTNOI: Then we need to be clear that the  
16          refresh program has nothing to do with an addendum conspiracy  
17          or an addendum scheme. I heard it that way, but if I didn't --  
18          if that wasn't stated correctly, then I'll move on and talk  
19          about Integra, because I just wanted to correct that point in  
20          the record.

21          Integra is not a case in which there was only  
22          allegations of statistical analysis. In fact, at 842 there's  
23          specific allegations that diagnoses of delirium were changed to  
24          diagnoses of encephalopathy -- I'm not great at that word,  
25          Your Honor. So as a result, there were, in fact, specific

1 information that they -- specific diagnoses. There was also 03:41:43  
2 information about contradictions in the record that there was 03:41:47  
3 evidence that the medical records contradicted the diagnoses 03:41:52  
4 that were submitted to CMS. 03:41:57

5 There is -- there were allegations about a higher 03:41:58  
6 rate, specifically they're twice or higher than the national 03:42:02  
7 average for some diagnoses and also, yes, the analysis that was 03:42:06  
8 not the result of chance or variations in patient population. 03:42:09  
9 There was allegations of pressuring doctors. There was 03:42:14  
10 allegations of incentivizing doctors. There was allegations of 03:42:16  
11 improper queries and leading queries. And the Ninth Circuit 03:42:20  
12 said we accept all of those factual allegations -- this is at 03:42:24  
13 844 -- and then they stated, after summarizing all of those 03:42:29  
14 allegations one by one: We need not and cannot accept the 03:42:32  
15 conclusion that these allegations resulted from fraud or that 03:42:36  
16 doctors recorded unsupported medical conditions. 03:42:41

17 And doctors recording unsupported medical conditions, 03:42:44  
18 that's in that black box, that thing that the government does 03:42:47  
19 not want to allege and does not want to provide discovery on 03:42:50  
20 that is extremely important. 03:42:54

21 I also want to respond to the point, Your Honor, about 03:42:55  
22 this being a single enterprise. This is not a single 03:42:57  
23 enterprise. And, in fact, the complaint alleges that when -- 03:43:02  
24 for instance, when the cachexia initiative was going on in 03:43:05  
25 Northern California, in Southern California and in Colorado 03:43:09

1 they disagreed with that and they did a different thing. 03:43:13

2 So there's allegations that Your Honor has to take as 03:43:16  
3 true that show that the various different regions operated 03:43:19  
4 independently and that they actually disagreed with them and 03:43:23  
5 engaged in different practices. This is why Rule 9(b) requires 03:43:26  
6 not just who, what, and when but where conduct occurred and why 03:43:30  
7 Your Honor correctly limited the cachexia allegations to 03:43:36  
8 Northern California because they do differ from region to 03:43:39  
9 region and that just simply stating everybody does the same 03:43:45  
10 thing is insufficient as a matter of group pleading and as a 03:43:47  
11 matter of alleging under 9(b) that some -- that there was 03:43:50  
12 actually fraud across the board. 03:43:55

13 THE COURT: Let me ask the United States to respond to 03:43:57  
14 two questions. One is there's things about what doctors are 03:44:03  
15 incentivized to do, what they're instructed to do, pretty 03:44:09  
16 explicit, but what about the point that, well, where's the 03:44:13  
17 beef? Where are examples of a doctor doing X? A sampling of 03:44:20  
18 doctors, you know, using refresh to add diagnoses that were no 03:44:26  
19 longer current for instance? And what about the idea that is 03:44:29  
20 it really plausible that thousands or hundreds -- tens of 03:44:33  
21 thousands or hundreds of thousands of doctors would violate the 03:44:38  
22 ICD guidelines and whatever codes of ethics there are to go 03:44:42  
23 along with this program? Is that plausible? 03:44:47

24 MR. MOSKOWTIZ: I want to be clear that our complaint 03:44:49  
25 is not based on that this is a doctor run program. 03:44:52

1 THE COURT: But it requires doctor -- in order for it 03:44:57  
2 to happen, you need the doctors to cooperate. 03:45:00

3 MR. MOSKOWTIZ: You need some cooperation, but what 03:45:01  
4 happens is they're being inundated with these queries. They're 03:45:05  
5 getting huge amounts of queries. They're being told don't 03:45:09  
6 spend anytime on it. We've already done the work for you. 03:45:13  
7 Don't spend anytime on it. One doctor, I think in the 03:45:15  
8 allegation, they're saying you shouldn't spend more than 03:45:19  
9 30 seconds or a minute on one of these things. So they're 03:45:22  
10 being told we're not going to give you time to do this. We 03:45:26  
11 want you to actually do your job. This is just a coding for 03:45:29  
12 dollars thing. Right. And so the issue is, is they have to 03:45:32  
13 hit crazy high refresh rates, like 99 percent or something. 03:45:36  
14 And that's alleged in the complaint. They're being tracked on 03:45:42  
15 all of these things. And Kaiser, the one who's doing this, 03:45:45  
16 they're not looking at and finding these issues and alerting 03:45:51  
17 the doctor and saying, hey, you know, for example, if you look 03:45:54  
18 at -- we have a bunch of representative examples in the 03:45:59  
19 complaint where the doctors are adding these things and it very 03:46:04  
20 well could be that the doctor just didn't notice that there was 03:46:07  
21 something in the record because they were told not to spend 03:46:10  
22 anytime on it and -- 03:46:12

23 THE COURT: So what's the -- can you give me a 03:46:14  
24 paragraph where there's a good example -- a concrete example of 03:46:16  
25 a doctor -- 03:46:19

1 MR. MOSKOWTIZ: Sure. 03:46:20

2 THE COURT: -- admitting to this? 03:46:20

3 MR. MOSKOWTIZ: So, for example, we had paragraph 366 03:46:22

4 where the doctor adds a severe obesity diagnosis, but the BMI 03:46:30

5 at that visit is too low to met the definition of that 03:46:39

6 diagnosis for that visit. Likely they assumed Kaiser wouldn't 03:46:44

7 have queried them if the BMI was within the right range. And 03:46:53

8 so I think, you know -- and this doctor, they were asked to add 03:46:58

9 12 or 13 different diagnoses via addenda. They're just being 03:47:02

10 asked to refresh all of these things. And part of the whole 03:47:08

11 overall marketing from Kaiser is you're not actually being 03:47:11

12 asked to diagnose this, you're just asking to refresh a 03:47:14

13 diagnosis that's already been made. Well, the problem is, is 03:47:18

14 that oftentimes for these certain types of things clinical 03:47:21

15 indicators change over time and the doctor very well may just 03:47:27

16 have not noticed that in this visit. But Kaiser knew that was 03:47:30

17 a problem because they knew that a lot of clinicians, because 03:47:34

18 they told them not to spend anytime, a bunch that they would 03:47:37

19 just go through and add all the diagnoses that Kaiser 03:47:40

20 requested. And Kaiser, as we allege, labeled this as a red 03:47:44

21 flag. They knew this was a problem and they knew that that was 03:47:48

22 resulting in inaccurate diagnoses being reported. 03:47:52

23 There are other ones where the -- there's another 03:47:56

24 example in paragraphs 155, 157 involving obesity 03:47:59

25 hypoventilation syndrome. Again, another condition that 03:48:04

1 requires that you be obese and yet the record for the visit 03:48:08  
2 shows the patient was, in fact, under weight. And so they 03:48:12  
3 didn't have this condition. Again, whether or not the 03:48:17  
4 doctor -- their state of mind just doesn't matter here. It's 03:48:20  
5 the fact that -- and this gets to what the Ninth Circuit ruled 03:48:24  
6 in Swoben, right. If you look at the Swoben case, they said 03:48:28  
7 when an organization turns a blind eye to overreporting here, 03:48:34  
8 it exhibits reckless disregard and deliberate ignorance towards 03:48:39  
9 the truth or falsity of the data submitted to CMS. Swoben does 03:48:43  
10 not require there that there be some type of effort on the part 03:48:49  
11 of the clinician to add diagnoses that didn't exist and to say 03:48:52  
12 that the state of mind of those doctors mattered. It doesn't. 03:48:57  
13 The issue is, is when Kaiser, the entity, do the people running 03:49:01  
14 these programs know of a problem, which they definitely do and 03:49:06  
15 we've alleged in numerous ways how they were aware of that 03:49:10  
16 problem, they then can't turn a blind eye to it, but that's 03:49:14  
17 exactly what they did. 03:49:17

18 THE COURT: All right. Okay. I understand. 03:49:18

19 Let me just get -- we've got to move on. Let me ask 03:49:20  
20 you about the conspiracy allegations here. 03:49:23

21 What -- I mean, I kind of covered this a little bit 03:49:26  
22 here. I wanted to figure out what exactly is the incentive for 03:49:30  
23 all five groups, including physician groups, to go along and 03:49:35  
24 agree to join this alleged conspiracy. 03:49:38

25 Is the conspiracy here one that's just alleged based 03:49:42

1 on implication, circumstantial evidence? What is the evidence  
2 that there was an agreement across the board, not just  
3 bilateral agreements in one state, one region, but really one  
4 that goes across the board?

5 MR. MOSKOWTIZ: Right. So these risk adjustment  
6 programs only function by everyone being involved in it. And  
7 so the allegations -- and I would point Your Honor to a lot of  
8 the background allegations in paragraph 30 to 42 and 105 to 25  
9 and 146 to 49. These are the -- there's an agreement to run  
10 these programs jointly. They're having weekly meetings  
11 together steering information --

12 THE COURT: "They" being?

13 MR. MOSKOWTIZ: They being all of the defendants,  
14 representatives from all of the defendants.

15 My apologies for not being specific there.

16 THE COURT: Yeah.

17 MR. MOSKOWTIZ: All of the defendants are part of  
18 these groups, so the -- the data mining working group which  
19 handles the operations of data mining and refresh and shares  
20 the information and runs the algorithm, this is all being done  
21 through that. There's a group called National Medicare Finance  
22 that is in the health plan that is tasked with working with all  
23 of the groups together to come up with -- they tell them here's  
24 the risk score you're going to meet this year and then they  
25 work with them to -- how they're going to reach that risk

1 score. 03:51:26

2 They have a shared reporting tracking and metrics. 03:51:28

3 They have a national risk adjustment initiative that all of the 03:51:32

4 defendant are involved in. There's a regional reporting group 03:51:38

5 that meets several times a year. Again, all of the defendants 03:51:44

6 are meeting together where they're talking about how to run 03:51:48

7 these programs. And so there are very minor variations in 03:51:52

8 the -- in how on the programs are run, but there's a reason why 03:51:58

9 refresh is national in scope and that's because Kaiser, at the 03:52:01

10 national level, required it. 03:52:09

11 And so, for example, there's an allegation that Kaiser 03:52:11

12 required every region to lower in multiple years the number of 03:52:15

13 unrefreshed diagnoses. And they did it -- said you will -- in 03:52:20

14 2006, you will lower the number of unrefreshed diagnoses by 03:52:26

15 two-thirds. And in 2007, you will lower that number again by 03:52:29

16 two-thirds. This is a national in scope program. It is not 03:52:34

17 specific to Northern California or Southern California or 03:52:40

18 Colorado. There's a reason why they are all running the exact 03:52:44

19 same program and for the most part running the exact same 03:52:48

20 algorithms in the exact same way, because they're sharing that 03:52:51

21 information and working together to run it because they say the 03:52:55

22 interconnectedness and the interdependence of the hospital 03:53:01

23 health plans and medical groups that make up Kaiser Permanente 03:53:03

24 have advanced their efforts to operate seamlessly as an 03:53:06

25 enterprise under one roof. 03:53:10

1 THE COURT: All right. Let me hear the response  
2 briefly.

3 MR. PORTNOI: Your Honor, let me start with the  
4 allegations regarding the doctors before. It isn't, as  
5 Your Honor just said, that this is something that where the  
6 doctors enter false diagnoses that this violates the ICD  
7 guidelines. This is something that the doctor has to do that  
8 may cause the doctor to lose their license. This may be  
9 something that subjects the doctor to criminal sanctions in  
10 some states for issuing false diagnoses. These are not things  
11 that just violate the ICD guidelines. This is deciding to  
12 diagnose somebody with a diagnosis like diabetes or depression  
13 when you have -- either know for a fact that there's not going  
14 to be a -- that the diagnosis is not supported or where you  
15 just decide to do it without any -- without looking at the  
16 records and without verifying it at all. That is an immense  
17 and defamatory allegation against the thousands of physicians  
18 and it is implausible that thousands of physicians did that.  
19 What we heard instead is, oh, it's likely that they assumed  
20 Kaiser verified it or the allegation they thought or assumed  
21 that it was there. That is not something -- that still  
22 requires a reckless disregard at a minimum, if not knowledge,  
23 on behalf of the doctor -- individual doctors with names and  
24 licenses who are dealing with individual patients.

25 THE COURT: Right. So you're reiterating your

1 plausibility point. I've heard that. Go on. 03:54:44

2 MR. PORTNOI: Well, then -- but that also leads to the 03:54:46  
3 fact that, again, we have to follow Integra which -- or which 03:54:49  
4 leads to -- cites to the -- cites to -- excuse me -- published 03:54:53  
5 authority that where we see an obvious alternative explanation, 03:54:59  
6 there needs to be facts that go against that. When there's two 03:55:03  
7 possibilities, one -- both of which are possible, one of which 03:55:06  
8 leads to liability, the other one of which doesn't, the fact 03:55:10  
9 that there are allegations consistent with the one that lead to 03:55:13  
10 liability you cannot get past a motion to dismiss under not 03:55:16  
11 just Rule 9(b) but even Rule 12(b)(6) unless you have 03:55:21  
12 allegations that tend to exclude the possibility. 03:55:25

13 THE COURT: Well, your opponent would argue that there 03:55:30  
14 are such allegations here. I mean, given all the -- both the 03:55:33  
15 examples and now the seven examples of conditions where there 03:55:36  
16 were problems, at some point you can say, well, that tends to 03:55:41  
17 exclude it because how many times do we have to prove that it's 03:55:44  
18 a problem? 03:55:48

19 MR. PORTNOI: Seven examples out of -- five of which 03:55:49  
20 were in the original complaint. The two new ones both come 03:55:51  
21 from the same region and they have to do with the same 03:55:54  
22 diagnosis which is extremely similar to cachexia. You look at 03:55:57  
23 155 and -- 03:56:01

24 THE COURT: So but how did that happen? If you're 03:56:02  
25 saying you can't get doctors to do this, they'd lose their 03:56:04

1 license, how do we even get those five examples? 03:56:07

2 MR. PORTNOI: Your Honor -- 03:56:10

3 THE COURT: Doesn't that tell you something? 03:56:11

4 MR. PORTNOI: Your Honor, CMS acknowledges that this 03:56:13  
5 is a massive program and, as a result, there are always going 03:56:15  
6 to be some amount of error rates -- 03:56:18

7 THE COURT: Some amount of errors but not 03:56:20  
8 systematically in one direction and not for which there's an 03:56:22  
9 allegation of a cause. These are not just random errors. 03:56:25

10 MR. PORTNOI: Your Honor -- 03:56:29

11 THE COURT: So -- wait a minute. 03:56:29

12 So you're saying this whole thing is implausible and 03:56:31  
13 the obvious counter to that is we've given seven examples, even 03:56:34  
14 if it's just regional, it's not one physician, two physicians. 03:56:38  
15 And there's -- there's documentation of a systematic 03:56:43  
16 explanation for that, so that does tend to exclude. That 03:56:47  
17 doesn't win the case. We're talking 12(b)(6). 03:56:50

18 MR. PORTNOI: We're talking 12(b)(6) and we're talking 03:56:54  
19 about 9(b) where we do have to care about the when, what years 03:56:56  
20 are we talking about, and the regions. 03:56:59

21 But also we are talking -- we're talking about seven 03:57:01  
22 diagnoses across three geographic regions, across a decade-long 03:57:04  
23 period. We're not even talking about one example per year, 03:57:11  
24 Your Honor. 03:57:13

25 There's citation to 155 and 157 as paragraphs in here. 03:57:14

1 Those are situations where -- those are examples where there 03:57:19  
2 are -- where no diagnosis was even alleged to have ever been 03:57:24  
3 made. There's no allegation that doctor salaries are impacted 03:57:28  
4 by this. And, furthermore, again, after eight years not only 03:57:32  
5 were there subpoenas but there were depositions of individual 03:57:37  
6 doctors, there is not one allegation that they could find one 03:57:39  
7 doctor who said you know what, you're right, that diagnosis was 03:57:44  
8 wrong. Not one instance where a doctor said that. That's the 03:57:48  
9 point. There's that black box -- 03:57:54

10 THE COURT: What about what Mr. Moskowitz quoted in 03:57:55  
11 paragraph three -- the three hundreds, the examples, the case 03:57:59  
12 examples?

13 MR. PORTNOI: Those are examples where they are making 03:58:05  
14 assumptions based off of the medical records that because 03:58:07  
15 there's a contradiction, there's clinical falsity, but we don't 03:58:10  
16 have individual doctors who say I was not just pressured, but I 03:58:14  
17 know that I entered diagnoses that are false, not one. 03:58:20

18 MR. MOSKOWTIZ: To be clear, there is no requirement 03:58:24  
19 in the False Claims Act that a doctor had to specifically 03:58:26  
20 intend to defraud the United States. And we're not alleging -- 03:58:30  
21 we don't need to allege or prove that the doctors acted 03:58:33  
22 knowingly if the -- 03:58:36

23 THE COURT: No, no. Well, but the claim of 03:58:37  
24 Mr. Portnoi is that it's not plausible, you know, that there's 03:58:40  
25 widespread -- because your theory assumes that there's going 03:58:45

1 to have to be some doctor complicity for this to be a 03:58:48  
2 systemic -- 03:58:51

3 MR. MOSKOWTIZ: Right. 03:58:52

4 THE COURT: -- program and he's saying it's not 03:58:52  
5 plausible because doctors wouldn't do such a thing. 03:58:54

6 MR. MOSKOWTIZ: Right. And our point back is that 03:58:56  
7 they may have done it accidentally. They might not have spent 03:58:58  
8 as much time as Kaiser would say they're required to, but I 03:59:02  
9 can't imagine that anyone would criminally prosecute this 03:59:07  
10 doctor because they submitted the false submission that the 03:59:12  
11 diagnosis was inaccurate. The cause here was Kaiser. It's not 03:59:18  
12 the doctor's fault. If it was up to the doctor and they had 03:59:22  
13 left the doctor alone, he didn't diagnose it at the time of the 03:59:25  
14 visit. His visit had nothing to do with it. And this is part 03:59:30  
15 of the problem is that they're pushing doctors to add diagnoses 03:59:32  
16 to the visits that have nothing to do with it and the results 03:59:35  
17 of that is inevitable. They know it's going to lead to error. 03:59:37  
18 And they saw it themselves when they looked at it -- 03:59:41

19 THE COURT: But Mr. Portnoi's point is how could you 03:59:44  
20 assume that the doctors would be such poor gatekeepers they 03:59:47  
21 would just allow this to go on? 03:59:50

22 MR. MOSKOWTIZ: They're not necessarily poor 03:59:52  
23 gatekeepers. There are hundreds of thousands of diagnoses 03:59:54  
24 potentially that are not supposed to be added and they very 03:59:59  
25 well may be -- you know, they're playing goalie here because 04:00:03

1 Kaiser's running an incredibly reckless program that doesn't  
2 monitor in any way what actually happened at the visit and some  
3 things may get through. And, in fact, we know some things get  
4 through because we found it. We presented some examples that  
5 they don't actually contest. They found it. They found it in  
6 internal documents that say they know that inaccurate diagnoses  
7 keep being reported through these programs because of this  
8 issue. And there are audits of the addenda, right, so those  
9 audits were specifically of -- not of just all the codes going  
10 through. They specifically were looking at the addenda, the  
11 things that Kaiser was pushing the doctors to add and they  
12 found hundreds of instances in a short period of time of the  
13 exact error we're talking about.

14 Now, again, it doesn't matter here if this is  
15 happening a few hundred times or a thousand times. The point  
16 of it is all of those are false claims. Kaiser knew there was  
17 a problem and they didn't take the simple inquiries which would  
18 be done at -- as we allege in paragraph 376 -- right there are  
19 several simple inquiries they could have done to just stop  
20 this. They could have insured that when they queried the  
21 physician for physician, that they looked at what was in the  
22 medical record for the visit and said this is contradicted. We  
23 shouldn't be querying for it. They could have informed the  
24 physician about the contradictory information; they didn't.  
25 And then they could have reviewed the addenda at the end just

1 to double-check and make sure that there wasn't a problem here 04:01:39  
2 with the contradictory information, but they didn't do that. 04:01:44

3 And so all of these things together -- these are the 04:01:48  
4 simple inquiries that were on Kaiser. And so Kaiser's 04:01:50  
5 defense -- I mean, they're effectively -- it's their defense 04:01:55  
6 which is to blame the doctors. Our view is it's not the 04:01:57  
7 doctors, it's Kaiser. Kaiser shouldn't have been doing this to 04:02:00  
8 the doctors. And they didn't give the doctors time to look at 04:02:04  
9 these and they pressured the doctors to just add it and they 04:02:07  
10 told them you're not really diagnosing things, you're just 04:02:09  
11 refreshing them. All these things combined, that's what leads 04:02:11  
12 to the inevitable result here. And Kaiser knew that they had 04:02:17  
13 this problem but they didn't fix it. 04:02:20

14 MR. PORTNOI: Your Honor, what I hear now is that 04:02:23  
15 possibly the doctors just did this by accident and now we're 04:02:25  
16 talking about a scheme, a conspiracy where multiple entities 04:02:28  
17 got together and the whole premise of this scheme is maybe the 04:02:32  
18 doctors will hit "A" when they meant to hit "B" it's going to 04:02:35  
19 be by accident. That's not the way doctors look at records. 04:02:38

20 With respect to time, that's one paragraph that 04:02:41  
21 describes one instance in which one doctor told another doctor 04:02:45  
22 that for these specific addendum -- for these specific queries, 04:02:49  
23 you should be able to get them done in a minute. It has 04:02:53  
24 nothing to do with multiple regions. It has nothing to do with 04:02:55  
25 multiple years. And it's a communication between one doctor 04:02:57

1 and another doctor. 04:03:01

2 We also -- to be clear, we do contest the seven 04:03:03  
3 examples that are in the complaint. We can't do so on a motion 04:03:05  
4 to dismiss because we have to take the allegations as true. I 04:03:08  
5 heard it said that we don't contest them but we absolutely do, 04:03:11  
6 to be absolute -- to be clear. 04:03:16

7 The -- and finally, again, Your Honor said it exactly 04:03:18  
8 correct, the complaint assumes doctor complicity. It assumes 04:03:23  
9 doctors abdicating their duty. That is on all fours with 04:03:27  
10 Integra. There needs to be more. 04:03:32

11 Your Honor looked at most of these examples and 04:03:34  
12 substantially the same allegations on the first complaint and 04:03:39  
13 found that there could only be an adequately pled scheme for 04:03:43  
14 cachexia in Northern California and there's -- nothing has been 04:03:48  
15 added to this complaint to change that. We don't have 04:03:51  
16 something that plausibly gets at the doctors. 04:03:54

17 The government wants to have its cake and eat it, too. 04:03:57  
18 It wants to say, well, the doctors did this. The doctors 04:03:59  
19 addend the records, hundreds of thousands of times, and they 04:04:04  
20 did so and they did it for diagnoses that the -- for diagnoses 04:04:06  
21 that were not true. But they also want to say this isn't a 04:04:11  
22 case about doctors. That this isn't a case where they have to 04:04:14  
23 provide one page of discovery with respect to doctors. 04:04:17

24 Your Honor noted in the -- that this is an important 04:04:20  
25 point because the scope of this scheme that is going to go 04:04:23

1 forward defines the scope of discovery that is going to go 04:04:26  
2 forward as well. And if this is the case that we're talking 04:04:29  
3 about hundreds of thousands of diagnoses for clinical 04:04:32  
4 inaccuracy and with tens of thousands or thousands of doctors, 04:04:35  
5 that is going to be thousands or tens of thousands of 04:04:40  
6 depositions. That is going to be potentially going to the 04:04:42  
7 patients to find out if the -- if there's a clinical 04:04:46  
8 inaccuracy. If something is clinically inaccurate, presumably 04:04:51  
9 it will be swept up in the existing allegations that have been 04:04:53  
10 permitted to go forward about noncompliance with the ICD 04:04:58  
11 guidelines. But going to clinical inaccuracy and asking the 04:05:01  
12 company to defend in this lawsuit and asking the United 04:05:05  
13 States -- and allowing the United States to impugn the 04:05:10  
14 integrity of these thousands of doctors, that simply is not 04:05:13  
15 justified by the pleading that we have in front of us. 04:05:17

16 THE COURT: Let me ask, Mr. Moskowitz, if you don't 04:05:18  
17 have to demonstrate purposeful conduct by the -- by doctors, 04:05:23  
18 some of this could be just, you know, because of the pressure, 04:05:30  
19 succumbing to the pressure, how does that square with the 04:05:34  
20 conspiracy theory naming the doctor groups, the physician 04:05:36  
21 groups, the -- you know, if they're not doing this conspiring 04:05:39  
22 purposefully but they're acting under pressure, under pressure 04:05:45  
23 of time, et cetera, et cetera, how is their inclusion in a 04:05:47  
24 conspiracy justified? 04:05:53

25 MR. MOSKOWTIZ: So it's important to understand that 04:05:53

1 the doctors groups and the people that we're talking about in 04:05:55  
2 the doctors groups are part of the conspiracy are not like 04:05:59  
3 you're line level doctor. They're the people at these groups 04:06:03  
4 who are running these programs who are aware of the problem. 04:06:07  
5 So they're the ones who know that there's an issue, know that 04:06:10  
6 they're repeatedly reporting inaccurate diagnoses, but then 04:06:13  
7 failing to do the things that I talked about, the simple 04:06:17  
8 inquiries, that would prevent it. 04:06:20

9 And so this case is exactly something like Swoben, 04:06:22  
10 right, where the doctor -- we're talking about all sorts of 04:06:25  
11 things. Their allegation there is all sorts of inaccurate 04:06:28  
12 diagnoses. And nobody is talking about, well, then you're 04:06:31  
13 alleging that all the doctors must have done this. That's just 04:06:36  
14 not necessary because the issue is once the MAO or the doctors 04:06:40  
15 group, the people running this program, are aware of an 04:06:45  
16 overreporting error, they need to take the simple inquiries to 04:06:48  
17 fix it. 04:06:52

18 And it is really important to acknowledge here that 04:06:53  
19 none of these were things that existed in the original record. 04:06:55  
20 The people running these groups pushed these diagnoses onto the 04:06:59  
21 doctors and now they're just, you know, proclaiming they have 04:07:03  
22 no responsibility for what the result is, even though they know 04:07:06  
23 that the result is that some amount of inaccurate diagnoses are 04:07:10  
24 coming through. 04:07:14

25 I wanted to make one more point which is that half 04:07:15

1 of -- only one part of the inaccurate diagnoses here even have 04:07:17  
2 anything to do with doctors documenting something inaccurately. 04:07:23  
3 A significant part of our complaint is that the doctors were 04:07:26  
4 diagnosing things that's historical, including in the addenda, 04:07:31  
5 but Kaiser was then reporting them as active, accurate 04:07:35  
6 conditions. And so we have an example of that in paragraph 220 04:07:39  
7 where Kaiser asked the doctor to amend the record to add 04:07:45  
8 thrombocytopenia, which is a low blood platelet condition that 04:07:51  
9 can come and go, and the doctor documented that the patient had 04:07:57  
10 a history of thrombocytopenia and yet Kaiser submitted the 04:08:00  
11 active condition. And that's important because under the HCC 04:08:03  
12 model, the MAO only gets paid for the active condition. And so 04:08:10  
13 notwithstanding that the doctors were many times in response to 04:08:16  
14 these programs documenting them as historical, Kaiser would 04:08:20  
15 submit it as active and get paid and that's a false claim. 04:08:24

16 THE COURT: What's the evidence that this was a 04:08:27  
17 systemic practice, the latter? 04:08:30

18 MR. MOSKOWTIZ: Sure. So there are numerous -- so 04:08:33  
19 paragraphs 178 to 179 and paragraph 345 all deal with this. 04:08:36  
20 The audits showed for each of these regions over a lengthy 04:08:41  
21 period of time starting before even the dates of these 04:08:45  
22 allegations that there is an issue that Kaiser knew about with 04:08:50  
23 this historical versus active condition. 04:08:54

24 Paragraphs 178 to 179 talk about internal documents 04:08:59  
25 where they recognize that this was a continuous issue. 04:09:02

1 And that the other paragraph where it's alleged that 04:09:06  
2 they knew that the refresh kept capturing these active 04:09:15  
3 diagnoses when they were documented to be historical. So 04:09:20  
4 there's knowledge throughout. I mean, this is one of the 04:09:24  
5 clearest things that they -- that every region everywhere 04:09:27  
6 everyone knew about. 04:09:30

7 MR. PORTNOI: Your Honor, now this is a fundamentally 04:09:34  
8 different complaint. So now we're hearing, oh, well, we have 04:09:37  
9 allegations in the complaint that show that when the doctors 04:09:39  
10 were queried, they were actually -- they actually put the 04:09:42  
11 correct diagnosis in so we have -- there's a request to put in 04:09:45  
12 thrombocytopenia; the doctor said no. 04:09:50

13 Now something happened after that for sure that -- 04:09:52  
14 well, for sure depending if the facts bear out what's in the 04:09:56  
15 complaint, but that doesn't support a conspiracy to get doctors 04:09:58  
16 to addend medical records with clinically inaccurate diagnoses. 04:10:02  
17 It does the opposite. It's one of the many internal 04:10:07  
18 contradictions of the complaint. And where the complaint makes 04:10:11  
19 allegations that completely violate the premise of the scheme 04:10:13  
20 and the premise of the conspiracy, we don't have a clear idea 04:10:17  
21 of the scheme or -- 04:10:19

22 THE COURT: Well, a conspiracy could exist with 04:10:20  
23 respect to one kind of practice but not necessarily with all 04:10:23  
24 practices. 04:10:25

25 MR. PORTNOI: Absolutely. And that's why the 04:10:27

1 practices have to be narrowly drawn so we understand. Again,  
2 that's what Rule 9(b) is, the how of the practices, the --

3 THE COURT: Right. Let me ask, Mr. Moskowitz, are you  
4 claiming that this latter practice is part of the  
5 conspiratorial agreement?

6 MR. MOSKOWTIZ: So the overall agreement was to  
7 operate these programs knowing that they resulted in false  
8 claims.

9 And the Supreme Court -- or -- my apologies.  
10 Congress, through FERA, they overruled Allison Engine, which  
11 has previously required a specific intent to defraud. And they  
12 modified the language of the statute to remove any words that  
13 would require an intent to defraud because all you have to have  
14 is a conspiracy to violate. Well, violating occurs if you  
15 knowingly submit false claims or rely upon false statements  
16 that are material to false claims. And knowingly can be done  
17 through reckless disregard or deliberate indifference. And so  
18 if you are for two -- for over a decade agreeing to operate  
19 these programs knowing that they are resulting in false claims  
20 for diagnoses that didn't exist in the original record but  
21 you're asking the doctors to add, that is sufficient to satisfy  
22 the conspiracy requirements of this particular statute.

23 THE COURT: So your allegation --

24 MR. MOSKOWTIZ: I'd be happy to brief this more if  
25 that would be useful.

1 THE COURT: Well, are you alleging that the doctor  
2 groups -- not the individual doctors but you're basically  
3 placing it in the hands of upper management, the money people,  
4 knew about this other problem, this active --

5 MR. MOSKOWTIZ: Yes.

6 THE COURT: -- historic thing?

7 MR. MOSKOWTIZ: Yes. So everyone knew about -- what  
8 we're pleading is that representatives from each of these  
9 groups knew about these problems. They knew about the problems  
10 of the historic versus active. They knew about the problems  
11 with some inaccurate diagnoses being added because of the way  
12 that the program runs. They knew about these things and yet  
13 they all failed to act to correct them and they continued to  
14 jointly -- they all agreed to jointly operate this program  
15 knowing about these flaws. That's sufficient for a False  
16 Claims Act conspiracy.

17 MR. PORTNOI: Your Honor --

18 THE COURT: Let me -- we got to move on. It's now  
19 4:12.

20 I want to ask questions about the ACA claim and the  
21 Bryant and Hernandez theory -- complaint here.

22 What I want to know from the plaintiffs is -- I guess  
23 there are two theories here. There's a claim for payment --  
24 it's really kind of a reverse false claim, as I understand it.

25 MR. LEWIS: That's right.

1 THE COURT: Now, I guess it doesn't matter whether the  
2 overpayment -- or not paying enough in the pool, et cetera,  
3 et cetera, et cetera -- it doesn't matter that in the end it's  
4 a readjustment between various insurers so much as it went  
5 through the treasury and that's enough if there's an  
6 inaccuracy. Am I correct that's your position?

7 MR. LEWIS: With respect to that -- with respect to  
8 that issue, yes, Your Honor. Even if it's budget neutral to  
9 the United States, it can still give rise to a false claim.  
10 And of course the second half of our theory is on tax credits  
11 and that is not budget neutral to the United States.

12 THE COURT: Okay. I understand that. And I take it  
13 you have cited, rely upon section 18033(a)(6)(a) which sort of  
14 emphasizes the fact that as long as you participate in the  
15 exchange and you make some false statements, whether it's a  
16 reverse false claim or a positive false claim, that is -- falls  
17 under the auspices of the False Claims Act?

18 MR. LEWIS: That's right, Your Honor. And Congress in  
19 passing the ACA was entirely clear of its intent and that was  
20 to make these insurance pools work and they only work to the  
21 benefit of the citizens of the United States and to the  
22 government if the insurers are being honest about their risk  
23 adjustment data.

24 THE COURT: All right. So --

25 MR. LEWIS: Our allegations is they were not.

1 THE COURT: All right. So I understand that theory. 04:14:51

2 Why do you need theory number two, the tax credits? I 04:14:52

3 mean, does that make a difference if you -- if you are able to 04:14:56

4 succeed on the first theory, which it seems a little more 04:14:59

5 straightforward and has statutory language to support that, is 04:15:01

6 this superfluous? This is sort of like icing on the cake or 04:15:06

7 this does have implications that are separate and distinct from 04:15:10

8 the first theory? 04:15:13

9 MR. LEWIS: Well, I wouldn't say it's superfluous, 04:15:15

10 Your Honor. I think it actually resounds to the detriment of 04:15:17

11 the government that the tax credits are being overcharged or 04:15:21

12 causing the insurers in other parts -- in other plans to 04:15:25

13 overcharge due to Kaiser's fraud. So this is real money to the 04:15:28

14 government. 04:15:33

15 The other scheme may be budget neutral. So, no, I 04:15:34

16 don't think it's superfluous, but I think we allege both and we 04:15:39

17 would like to pursue both if we can. 04:15:42

18 THE COURT: All right. So let me finish asking a 04:15:43

19 question. So it's not budget neutral, has different 04:15:48

20 implications but of course it's more complicated? 04:15:50

21 MR. LEWIS: That's correct. I would agree with that. 04:15:53

22 THE COURT: And the causal chain has several links to 04:15:55

23 it. And so my -- I guess my question I -- I guess there's not 04:15:57

24 exactly a lot of case law on this, but if you borrow from RICO, 04:16:02

25 from other areas -- as you know, the courts have been more and 04:16:07

1 more skeptical about causation issues. The City of Oakland  
2 case, the en banc case which reversed me, is an example of  
3 that. And the Supreme Court litany of cases that talk about,  
4 you know, only direct injury, not derivative injury, et cetera,  
5 et cetera. Why wouldn't that genre of causation which kind of  
6 borrows from -- I forget historic tort law or something -- why  
7 wouldn't that -- shouldn't that be imported into the ACA?

8 MR. LEWIS: I think, Your Honor, the answer is that  
9 this is not guesswork as to causation. It's actually rather  
10 mechanical. It's complicated, granted, but it's rather  
11 mechanical. If the risk adjustment data of one insurer -- a  
12 large insurer in the pool is false, that is showing the other  
13 insurers and the government that it has a healthier patient  
14 base than -- I'm sorry -- a sicker patient base than is in  
15 reality true, the other insurers mechanically think that they  
16 are going to get less out of the insurance pool and  
17 mechanically will set their premiums higher. And mechanically  
18 when the benchmark is set on one of those plans, the government  
19 and the beneficiary, the taxpayer, pay more in premiums. So  
20 this is not guesswork. It's not supposition. It's just math,  
21 Your Honor.

22 THE COURT: Well, but somewhat complicated math and  
23 that's one of the things that drives some of these cases, that  
24 one policy basis for requiring that very tight causation chain  
25 is having to make a lot of inferences and using regression

1 analysis and everything else which the courts don't seem to  
2 like.

3 MR. LEWIS: Your Honor, I don't know if any of that  
4 would be necessary here. I think, you know, the facts will  
5 show that insurers, in fact, do this work. They have to do  
6 this work. It's mechanical. Yes, they have professionals that  
7 have to do it because it's complicated but it's explainable and  
8 it happens in the real world.

9 THE COURT: All right. Mr. Portnoi, your response.

10 MR. PORTNOI: Your Honor, there is, quite frankly, no  
11 claim with respect to either theory. Whether you're in reverse  
12 false claims or you're not in reverse false claims, you  
13 nonetheless need to have at some point had a request or demand  
14 for money or property and then for the government to have paid  
15 money or property. There's not one case cited by the Bryant  
16 relators of any type in the history of the False Claims Act  
17 since the Civil War where somebody has gotten a successful  
18 False Claims Act when they have not asked for a penny from the  
19 government or received a penny from the government and that  
20 goes to both.

21 That also means that when we think about the risk  
22 adjustment transfer theory, that means that we have -- we don't  
23 have any kind of distinctions. We look across each of these  
24 various different defendants and each of these years.

25 The ACA operates in part on a state by state level so

1 that various different entities in the different states are 04:19:31  
2 going to either request money or pay money at a different level 04:19:34  
3 for each entity. There are 15 different defendant entities 04:19:40  
4 here across many states and across -- and in some years, they 04:19:44  
5 may be payers and in some years they may receive money. And we 04:19:48  
6 don't have an allegation that in one year and for one defendant 04:19:52  
7 Kaiser received or any Kaiser entity received one penny of 04:19:57  
8 money here. That also means that there's also -- even if we 04:20:01  
9 assume the attestation is a request for payment, there's no 04:20:05  
10 allegation that any individual entity submitted an attestation 04:20:09  
11 here. 04:20:14

12 When we go to the tax credit theory, the document 04:20:14  
13 that's being purported -- and I would also point out that I 04:20:17  
14 don't believe the tax credit theory was within the scope of 04:20:20  
15 leave to amend, it's a completely new claim that was filed 04:20:23  
16 without leave to amend. The document that is being cited is 04:20:26  
17 the Unified Rate Review Template. It's the URRT. That's a 04:20:29  
18 form completed by health insurers offering plans on individual, 04:20:34  
19 small group, and combined markets that explain the rates that 04:20:38  
20 insurers charge. It's not a request for payment. It's not a 04:20:43  
21 demand for payment. Across the entire tax credit theory there 04:20:45  
22 is no statement that there is a request or demand for payment 04:20:49  
23 that ever occurred and as a result before -- 04:20:53

24 THE COURT: Well, is it the lack of a demand for 04:20:56  
25 payment or the lack of payment you're alleging here? 04:20:59

1 MR. PORTNOI: It is both, Your Honor. It is both -- 04:21:01

2 THE COURT: Well, what about paragraph -- 04:21:03

3 MR. PORTNOI: Oh. Go ahead, Your Honor. 04:21:05

4 THE COURT: What about paragraph 56 that says: After 04:21:06

5 completion of the risk adjustment process for a given benefit 04:21:11

6 year, the government shifts funds by issuing invoices to those 04:21:14

7 insurers who owe risk adjustment payments and those insurers 04:21:17

8 who then submit due funds directly from the government and 04:21:21

9 issues payments from the treasury to those who are due risk 04:21:25

10 adjustment factors. 04:21:27

11 MR. PORTNOI: That is how the program generally works. 04:21:29

12 That does not allege that any of the 15 defendants ever 04:21:31

13 actually were any position to request money and receive money. 04:21:36

14 That's the key. It is not -- you can't simply say -- this 04:21:41

15 is -- Your Honor, this is a little bit like if you had a claim 04:21:43

16 for trespass and you said, look, there's a family of ten people 04:21:46

17 across the road and I think between zero and three of them have 04:21:50

18 crossed over and have trespassed on my land. So in other 04:21:54

19 words, what I'm saying is, yes, of course it would be a 04:21:58

20 violation if they trespassed, but I can't possibly allege that 04:22:00

21 even one of them has but maybe up to three of them have. And 04:22:03

22 so I'm going to sue ten of them and ask a court to let them get 04:22:07

23 past -- let that get past a motion to dismiss. 04:22:10

24 THE COURT: So what's missing is specific allegations 04:22:13

25 that money were either received or demand made or something of 04:22:16

1 federal funds through the exchange program that went to the -- 04:22:23  
2 resounded to the benefit of any of the defendants. 04:22:28

3 MR. PORTNOI: Of an actual defendant. That would 04:22:30  
4 still -- that would be getting at your claim. That's the 04:22:33  
5 fundamental -- where I can make arguments about falsity, 04:22:33  
6 materiality -- 04:22:36

7 THE COURT: I know. I understand. I understand. 04:22:37

8 MR. PORTNOI: -- that would get you to an allegation 04:22:40  
9 of a claim. 04:22:42

10 THE COURT: All right. Then let me ask, Mr. Lewis, 04:22:42  
11 what about that? 04:22:47

12 MR. LEWIS: Yeah. Your Honor, we allege 208, 209 that 04:22:47  
13 in the aggregate, Kaiser was a net payor into the program and 04:22:51  
14 to the tune of over \$6 billion. We allege that that payment is 04:22:56  
15 grossly understated because if it were actually submitting 04:23:00  
16 appropriate risk adjustment data, it would be paying much more 04:23:05  
17 into it. That is a classic reverse false claim. It owed more 04:23:09  
18 to the government than it paid. It was participating and a 04:23:18  
19 condition of participation in the program was submission of 04:23:21  
20 risk attestation forms which attested to the idea that the 04:23:24  
21 information submitted was accurate and which stated that -- in 04:23:30  
22 the attestation itself that the data submitted is the basis 04:23:34  
23 upon which final risk adjustment transfers are calculated and 04:23:38  
24 may be subject to False Claims Act. It's right there in the 04:23:42  
25 attestation. They had to submit them every year. Every single 04:23:45

1 one of the health plans had to. And in the aggregate we have a 04:23:49  
2 significant dollar value on what they did, Your Honor. 04:23:53

3 THE COURT: So the paragraph that contains the amounts 04:23:56  
4 that were paid or should have been paid, what number is that 04:24:02  
5 again? 04:24:06

6 MR. LEWIS: 208, 209, Your Honor. 04:24:07

7 THE COURT: Just look here. 04:24:09

8 These are long paragraphs. 04:24:23

9 MR. LEWIS: I apologize, Your Honor. 04:24:25

10 THE COURT: All right. So rather than identifying a 04:24:30  
11 specific instance, it is sort of in the aggregate and there's a 04:24:32  
12 figure and the allegation is that Kaiser would have paid more 04:24:37  
13 to the risk pools had it not been for the inaccuracies. 04:24:46

14 MR. PORTNOI: And that is not a classic reverse false 04:24:54  
15 claims theory, Your Honor. A classic reverse false claims 04:24:58  
16 theory is when a company has -- when any entity or person has 04:25:00  
17 received money and realizes later it received too much. 04:25:04

18 THE COURT: Well, that may be the classic but I 04:25:07  
19 mean -- it seems to me now you're exalting form over substance. 04:25:10  
20 If somebody owed a bunch of money to the federal government and 04:25:12  
21 they lied and ended up paying less to the federal government 04:25:15  
22 they should have, I -- why -- as a matter of policy -- I mean, 04:25:18  
23 why should that matter? Why shouldn't that be a false claim 04:25:22  
24 if they made a false attestation in order to get out of paying 04:25:25  
25 what they should have paid? 04:25:28

1 MR. PORTNOI: Well, because a fundamental element of 04:25:29  
2 the False Claims Act is that you have to have a request or 04:25:32  
3 demand for money or property that is successful. It is not the 04:25:35  
4 case that everybody that -- 04:25:39

5 THE COURT: Well, it was successful. They paid less 04:25:41  
6 than they should have paid. That was success. 04:25:43

7 MR. PORTNOI: A request or demand for money or 04:25:45  
8 property. It's called the False Claims Act. You have to -- 04:25:47

9 THE COURT: Yeah, but the ACA also says something 04:25:51  
10 different, doesn't it. The ACA doesn't just simply echo the 04:25:53  
11 False Claims Act. It says payments made by, through, or in 04:25:56  
12 connection with an exchange are subject to the False Claims 04:25:59  
13 Act, if those payments include any federal funds. 04:26:05

14 MR. PORTNOI: Right. Payments, Your Honor. If 04:26:08  
15 payments are made. They cannot amend -- they do not -- 04:26:10  
16 Congress did not amend the False Claims Act when it passed the 04:26:13  
17 Affordable Care Act, Your Honor. 04:26:16

18 And, again, if you want -- to be very clear, if 04:26:17  
19 somebody hasn't paid enough money to the United States, the 04:26:20  
20 United States has a panoply of ways of recovering that. The 04:26:22  
21 False Claims Act is not an all purpose recovery mechanism as -- 04:26:26  
22 there are common law claims that are statutory claims. If 04:26:31  
23 somebody has not paid enough taxes, that doesn't mean that you 04:26:34  
24 need the False Claims Act. The IRS knows how to go get that 04:26:38  
25 money. 04:26:42

1 THE COURT: Well, but does that preclude it? I mean,  
2 section 3729(a)(1)(g) provides for liability any person who  
3 knowingly conceals or knowingly and improperly avoids or  
4 decreases an obligation to pay or transmit money or property to  
5 the government.

6 Why doesn't that literally apply here?

7 MR. PORTNOI: I'm sorry. What was the -- where were  
8 you?

9 THE COURT: 3729(a)(1)(G) talks about a person who  
10 knowingly conceals or knowingly and improperly avoids or  
11 decreases an obligation to pay or transmit money or property to  
12 the government, why isn't that what we have here at least as  
13 alleged?

14 MR. PORTNOI: What we have here, Your Honor, is we  
15 don't have a record or statement material to that obligation.

16 The attestation of the Medicare Advantage Program  
17 states that -- states that it is a request for payment, demand  
18 for payment. We don't have that here. But even if we don't,  
19 we also don't have false claims as well. And we also don't --

20 THE COURT: All right. I understand that. I mean,  
21 I -- I'm running out of time, so I'm not going to -- I  
22 understand. I got the papers on that.

23 I'll give you one chance to comment on the second  
24 theory, the tax credit theory. Do you have any comment about  
25 the causation chain or if there's any other case law I should

1 be aware of?

04:28:06

2 MR. PORTNOI: I certainly -- there's very little case  
3 law in this area because there have been no relator claims  
4 under the ACA and it's obviously relevant to materiality. And  
5 I don't think there's any reasons regardless to reverse  
6 Your Honor's ruling before that section 18033(a)(6)(A) is  
7 insufficient under Escobar's plead materiality.

04:28:07

04:28:10

04:28:14

04:28:19

04:28:21

04:28:27

8 I think that's simply, to be honest, enough.

04:28:30

9 Your Honor commanded or gave leave to amend to allege facts  
10 related to materiality. How many times has HHS pursued money,  
11 for instance, in the past? The facts that are outlined in  
12 Escobar. Your Honor already had law but Your Honor asked for  
13 there to be facts added to the complaint and they were not.  
14 This is almost precisely the same allegation that existed that  
15 Your Honor rejected in your order at pages 8 to 9.

04:28:32

04:28:37

04:28:43

04:28:45

04:28:49

04:28:53

04:28:57

16 THE COURT: All right. Let me -- that's an important  
17 point, Mr. Lewis, I'd like you to respond to that materiality  
18 argument.

04:29:00

04:29:03

04:29:06

19 MR. LEWIS: Certainly, Your Honor. Yeah. I think  
20 I -- started talking about tax credits and went to materiality,  
21 so I don't think he wound up getting very far on tax credits.

04:29:07

04:29:12

04:29:16

22 THE COURT: I'll -- let's go to materiality.

04:29:18

23 That's --

04:29:21

24 MR. LEWIS: Sure. You know, again, the attestation  
25 itself is a new allegation and it goes directly to materiality.

04:29:22

04:29:24

1 With respect to our theories on the ACA, it says expressly that  
2 risk adjustment data is the basis upon which final risk  
3 adjustment transfers are calculated and may be subject to the  
4 False Claims Act. It's right there. The government cares  
5 about this. The government has investigatory powers and, in  
6 fact, has investigated it, risk adjustment fraud in the ACA,  
7 and we allege that in our complaint, among other things,  
8 Your Honor.

9 Turning to the materiality section of our complaint  
10 under the Affordable Care Act at paragraph 224 all the way  
11 through 232. You know, we cite Congress explicitly stating  
12 that the violations of material conditions of participation in  
13 the ACA subject the defendants to the False Claim Act  
14 liability. And they necessarily affect government payments.  
15 And when tax credits are inflated because of this conduct, it  
16 is almost per se material, Your Honor, when the government  
17 overpays. Of course they care. They have to. And it's not by  
18 trivial amounts but by amounts across the board that would  
19 impact significant dollars to the government.

20 THE COURT: Does that rely on your tax credit theory  
21 of the ACA?

22 MR. LEWIS: The latter does but the other points are  
23 both. Just because it might be budget neutral, the government  
24 has made it entirely clear that they care about the function of  
25 the risk adjustment pool, how insurers deal with one another

1 and, in fact, take the money into the treasury as a token of  
2 them caring because they want to manage this program. They  
3 want it to be done correctly and they say exactly that in the  
4 attestation program -- attestation form itself.

5 MR. PORTNOI: Your Honor, that's entirely general. If  
6 it was the case that any attestation because of the existence  
7 of an attestation provided materiality, there would never be  
8 either an ACA case or a Medicare Advantage case that would lack  
9 materiality. If we -- and so as a result, what we're talking  
10 about here is there has to be a link between the alleged  
11 falsity and the particular -- and the materiality. And there  
12 isn't one. We have some information that HHS has some ability  
13 to investigate, but there are -- but we don't have allegations  
14 that they've engaged in enforcement actions with -- enforcement  
15 actions in support of that that are similar, factually similar  
16 to the ones here. This is not a new program and these are not  
17 new claims. They've existed for a long time and we've made it  
18 all the way to the third amended complaint.

19 With respect to the tax credit theory, I certainly  
20 have more to say about that. I want to make clear, yes,  
21 there's a massive causal chain problem here.

22 Let's just understand what we're talking about when we  
23 talk about this theory. This suggests that somebody could use  
24 the False Claims Act anytime some relator thinks an insurance  
25 company has made insurance rates too affordable under the

1 Affordable Care Act that it violates the False Claims Act to  
2 charge insureds too little for insurance. And that under the  
3 False Claims Act, presumably it is possible for Your Honor or  
4 another judge to order higher insurance rates under the False  
5 Claims Act because it was fraudulent to not charge individual  
6 citizens more money.

7 That simply -- is an implausible idea and that's the  
8 entire theory of this. And, again, the URRT is not a claim.  
9 There's nothing on the URRT that constitutes a claim or request  
10 for money. This is a situation where what we're talking about  
11 is getting funds from individuals who pay for insurance on the  
12 exchanges.

13 THE COURT: All right. Give you the last word.  
14 30 seconds, Mr. Lewis.

15 MR. LEWIS: Thank you, Your Honor.

16 This is not about a plan that is charging too little.  
17 Kaiser is able to manipulate its risk adjustment data and  
18 charge less because they're expecting to get a windfall from  
19 the insurance pool and they can charge less and still -- and  
20 benefit greatly because they're now at a competitive advantage  
21 over their competitors who had to charge higher because they're  
22 getting underpaid by the insurance pool. So when the Kaiser  
23 plan is not the benchmark, the benchmark is one of these other  
24 plans, Kaiser's the only one that benefits. They got a  
25 competitive advantage, but the government and the taxpayer, the

1 recipient of health care, they're overpaying. And that's what  
2 this is about.

3 THE COURT: All right. Thank you, Counsel. I will  
4 take the matter under submission.

5 Thank you.

6 (Proceedings adjourned at 4:34 p.m.)  
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C E R T I F I C A T E

I, SCOTT M. CONIAM, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United State District Court.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED this 5th day of May 2023.

s/Scott M. Coniam  
SCOTT M. CONIAM, RDR, CRR

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
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