UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.
BENJAMIN POEHLING,

Plaintiff,

-v-

UNITEDHEALTH GROUP, INC., WELLMED MEDICAL MANAGEMENT, INC., HEALTH NET, INC., ARCADIAN MANAGEMENT SERVICES, INC., AND TUFTS ASSOCIATED HEALTH PLANS, INC., AETNA INC., BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., BLUE CROSS AND BLUE SHIELD OF MICHIGAN, BRAVO HEALTH, INC., EMBLEMHEALTH, INC., MANAGED HEALTH, INC., d/b/a HEALTHFIRST NEW YORK, HUMANA, INC., MEDICA HOLDING COMPANY, WELLCARE HEALTH PLANS, INC., and MEDASSURANT, INC.,

11-CV-0258(A)

Defendants.

UNOPPOSED MOTION OF THE UNITED STATES TO TRANSFER VENUE

Pursuant to 28 U.S.C. § 1404(a), the United States of America respectfully requests that the Court order this sealed *qui tam* action transferred to the United States District Court for the Central District of California. The transfer will enable the United States to relate or consolidate this matter with another *qui tam* action that was filed in the Central District of California that contains related or overlapping allegations against three of the same defendants named in this matter. In addition, this matter should be transferred to the Central District of California for the convenience of the parties and witnesses and in the interests of justice. This is a civil *qui tam* action brought by Relator Benjamin Poehling under the federal False Claims Act, 31 U.S.C. §§ 3730 et seq. ("FCA"). Relator and his counsel consent to this motion to transfer venue to the Central District of California.

In addition, the United States further requests that the Court, in its transfer order, suggest to the transferee Court that this action be deemed related to the qui tam action captioned United States ex rel. Swoben v. United Healthcare Ins. Co. et al., CV 09-5013 (C.D. Cal.), and that it request that the transferee Court maintain this action under seal until January 31, 2017, the next deadline for the United States to intervene in his matter.

A Proposed Order is included with this motion.

DATED: Buffalo, New York, November 7, 2016

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UNITEDHEALTH GROUP, INC., WELLMED MEDICAL MANAGEMENT, INC., HEALTH NET, INC., ARCADIAN MANAGEMENT SERVICES, INC., AND TUFTS ASSOCIATED HEALTH PLANS, INC., AETNA INC., BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., BLUE CROSS AND BLUE SHIELD OF MICHIGAN, BRAVO HEALTH, INC., EMBLEMHEALTH, INC., MANAGED HEALTH, INC., d/b/a HEALTHFIRST NEW YORK, HUMANA, INC., MEDICA HOLDING COMPANY, WELLCARE HEALTH PLANS, INC., and MEDASSURANT, INC.,

11-CV-0258(A)

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION OF THE UNITED STATES TO TRANSFER VENUE

Pursuant to 28 U.S.C. § 1404(a), the United States of America respectfully requests that the Court order this sealed *qui tam* action brought by Relator Benjamin Poehling under the federal False Claims Act, 31 U.S.C. §§ 3730 *et seq.* ("FCA"), be transferred to the United States District Court for the Central District of California. The transfer will enable the United States to relate or consolidate this matter with another *qui tam* action that was filed in the Central District of California that contains related or overlapping allegations against three of the same defendants named in this matter. In addition, this matter should be transferred to the Central District of California for the convenience of the parties and witnesses and in the interests of justice. Relator and his counsel consent to this motion to transfer venue to the Central District of California.

The United States further requests that the Court, in its transfer order, suggest to the transferee Court that this action be deemed related to the *qui tam* action captioned *United States ex rel. Swoben v. United Healthcare Ins. Co. et al.*, CV 09-5013 (C.D. Cal.), and that it request that the transferee Court maintain this action under seal until January 31, 2017, the next deadline for the United States to intervene in his matter.

In 2009, James Swoben filed his *qui tam* action against United and its California Medicare Advantage plan in the Central District of California. In 2011, Swoben filed an amended complaint adding Aetna and Health Net as defendants. In his complaint, Swoben alleges that United, United's California Medicare Advantage plan, Aetna, Health Net and a number of other entities violated the FCA by knowingly presenting or causing to be presented false claims to the Government for risk adjustment payments under Parts C and D of the Medicare Program, knowingly making or using or causing to be made or used false records or false statements material to these false claims, and knowingly and improperly avoiding or decreasing their obligations to repay monies owed the Government due to these false claims. In 2013, the district court dismissed Swoben's *qui tam* action pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. In August 2016, the Court of Appeals for the Ninth Circuit reversed and remanded. It held that Swoben's theory of liability was cognizable under the FCA and that his proposed amended complaint satisfied Rule 9(b). *United States ex rel. Swoben v. United Healthcare Insurance Company, et al.*, 2016 WL 4205941

(9th Cir. August 10, 2016). The defendants have petitioned the Ninth Circuit for a rehearing *en banc* as to that part of the panel's decision relating to the Rule 9(b) issue. The Ninth Circuit has not yet decided whether to rehear that issue.

United, Health Net and Aetna are Medicare Advantage Organizations (MAOs).[1] They contract with the Centers for Medicare & Medicaid Services (CMS), a component of the United States Department of Health and Human Services (HHS), to provide healthcare services to beneficiaries under Part C of the Medicare Program known as the Medicare Advantage Program and under Part D, the prescription drug benefit program. Mr. Poehling's complaint and Mr. Swoben's proposed amended complaint challenge the legality of reviews by United, Health Net and Aetna of the medical records of the Medicare beneficiaries in their Medicare Advantage and Part D plans. The Ninth Circuit provides a comprehensive description of the legal issue in its opinion in *Swoben*.

On February 19, 2016, this Court granted the Government's motion for a partial lifting of the seal of Mr. Poehling's *qui tam* action so that the Government or Mr. Poehling's

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[1] With two exceptions, the other defendants named by Poehling are also MAOs. None of them have their principal place of business in the Western District of New York. Defendant WellMed Medical Management, Inc. is a provider of healthcare services in the States of Florida and Texas. Defendant MedAssurant, Inc. is a company that provides risk adjustment services such as medical record review services to MAOs. MedAssurant's principal place of business is in Maryland.

counsel could disclose Mr. Poehling's action and his allegations to Mr. Swoben and his counsel. As explained in the Government's memorandum in support of its motion, the Government requested the partial unsealing to allow both Relators, through their counsel, the opportunity to discern whether they share overlapping allegations as to the same defendants. The Government hoped that this would facilitate an amicable resolution of any potential dispute between them under the FCA's first-to-file rule.

After the Court issued its February 19, 2016 Order, counsel for Mr. Poehling met with counsel for Mr. Swoben to disclose Mr. Poehling's allegations in his *qui tam* action. After this meeting, counsel for Mr. Poehling informed the Government that a first-to-file dispute exists regarding the medical record review FCA claims against the common defendants. There has not been an amicable resolution of this dispute.

I. POINTS AND AUTHORITIES

Pursuant to 28 U.S.C. § 1404(a), a Court may transfer a civil case to any other district where it may originally have been brought "[f]or the convenience of parties and witnesses [and] in the interest of justice." Mr. Poehling's action could have been originally brought in the Central District of California. Mr. Poehling agrees. Under the FCA, venue is appropriate "in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by [the FCA] occurred." 31 U.S.C. § 3732(a). United and most, if not all, of the other defendants named by Mr. Poehling can be found or transact business in the Central

District of California. Some defendants also reside in that district. In addition, some of the allegedly unlawful conduct occurred in that district.

In addition, the "interest of justice" is best served by transferring this matter to the Central District of California because of the related *qui tam* action there. This is especially true because of the unresolved first-to-file issue here.

The FCA prohibits persons other than the Government from bringing a related action based on the same facts underlying a pending *qui tam* action. 31 U.S.C. § 3730(b)(5). This "first-to-file" rule in some instances allows the first relator who brings a claim under the FCA to preclude other relators from recovering on similar allegations. Accordingly, the first-to-file rule can produce disputes as to which relator has the right to proceed with his action and share in the recovery of damages under the FCA. *See, e.g., United States ex rel. Campbell v. Redding Med. Ctr.*, 421 F.3d 817 (9th Cir. 2005). Mr. Poehling and Mr. Swoben dispute whether their claims are based on the same underlying facts and, if they are, which of the two relators was first to assert those claims and has the right to proceed and share in the recovery of damages.

When there are two or more related *qui tam* actions in different federal district courts, the Government often moves to transfer them to one district and to relate or consolidate the actions. Actions are transferred to one district even when the relators amicably resolve their first-to-file dispute. However, there is an even greater need to transfer the actions to one district when the relators have not resolved their first-to-file dispute and when both relators contend that they are entitled to proceed with their related or overlapping *qui tam* actions and to the proceeds of the recoveries in both actions.

Absent a transfer in this matter, both this Court and the Central District of California will be handling *qui tam* actions with related or overlapping allegations against the same defendants and will be called upon to decide the same first-to-file dispute. Such a result could lead to duplicative litigation, including discovery and trial, and to inconsistent judicial decisions. Moreover, such a result would unnecessarily burden judicial and government resources.

Finally, the "convenience of parties and witnesses" would also be very well-served by transferring this matter to the Central District of California. United's largest Medicare Advantage plan is located in California and there are many Medicare beneficiaries in the Central District of California who are enrolled in that plan. Although United's corporate headquarters is in Minneapolis, Minnesota, it has a large office in Santa Ana in the Central District of California that performed a substantial portion of the work related to United's submission of risk adjustment claims and its medical record review programs. Importantly, through its pre-intervention investigation, the Government has also determined that United's office in Santa Ana, California, was involved in the alleged unlawful conduct, there are numerous witnesses who work or worked at that office with relevant knowledge, and many of the relevant documents are located there. Specifically, as part of its investigation, the Government took testimony from five witnesses who work in the Central District of California. Four of those witnesses work at United's office in Santa Ana. The fifth witness is the owner of a medical record review company located in Los Angeles, California. That contractor performed many of the medical record reviews at issue.

In contrast, United does not have offices located in the Western District of New York. In addition, as part of its investigation, the Government did not take testimony from any witnesses located in this District or obtain documents from any person or entity located in this District.[2] As part of its investigation, the Government has not learned about any key witnesses located in this District.

Furthermore, defendant Aetna's principal place of business is in Hartford, Connecticut and defendant Health Net's principal place of business is in Los Angeles, which is in the Central District of California. Defendant Health Net also does not have a Medicare Advantage plan in the Western District of New York. Health Net's Medicare Advantage plans are in California, Arizona, Oregon and Washington.

II. CONCLUSION

For the foregoing reasons, the United States respectfully requests that this action be transferred to the United States District Court for the Central District of California. The Government further requests that the Court, in its transfer order, suggest to the transferee

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[2] The other witnesses from whom the Government took testimony work or reside in various States, including Minnesota, Tennessee, Massachusetts, and Arizona. The potential government witnesses work in Maryland and the District of Columbia.

Court that this matter be deemed related to *United States ex rel. Swoben v. United Healthcare Ins. Co. et al.*, CV 09-5013 (C.D. Cal.), and that this matter continue to be subject to this Court's Order of July 25, 2016 providing that this matter remain under seal and that the United States have until January 31, 2017 to intervene in this matter or file a notice of declination. A proposed order has been filed with this motion.

DATED: Buffalo, New York, November 7, 2016

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