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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* BENJAMIN POEHLING,

Plaintiffs,

v.

UNITEDHEALTH GROUP, INC., *et al.*,

Defendants.

CASE NO. CV 16-08697 MWF (SSx)

REPLY IN SUPPORT OF MOTION TO TRANSFER

[Declarations of Jeffery Dumcum, Karen Erickson, and Daniel Meron filed concurrently herewith]

Hon. Michael W. Fitzgerald
Courtroom: 5A

Hearing Date: September 25, 2017
Hearing Time: 10:00 a.m.

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INTRODUCTION

DOJ's opposition confirms that this case does not belong in this District. Rather than acknowledge that its motivation for transferring this case to the Central District was to try to take advantage of the Ninth Circuit's decision in the *Swoben* case (*i.e.*, that it has engaged in forum-shopping), DOJ instead suggests (Opp. at 1) that, after investigating the case for more than five years, DOJ and the relator realized that the Central District of California actually is "the factual center" of much of this case and that it would be in the interests of judicial economy to have this case heard in the same district as *Swoben*.

The facts belie DOJ's contrived explanation for why it transferred this case here. No one suggested that this case had any connection whatsoever to this District when it was filed in the Western District of New York in 2011. The suit was brought by a Minnesota-based relator against a Minnesota-based company, and concerns federal program rules and decisions made in Minnesota and communicated to an administrative agency in the Washington, D.C. area. And, at least until the Ninth Circuit issued its decision, no one suggested that it should be sent here to be consolidated with *Swoben*, either. *Swoben* has been pending here since 2009. DOJ partially intervened in that case in 2012 and actively participated in the Ninth Circuit proceedings beginning in February 2016. Yet it was not until after the Ninth Circuit issued its decision that DOJ moved to transfer the case here. These facts reflect blatant forum-shopping.

The facts also reveal the questionable tactics that DOJ employed to prevent the Western District of New York from having all the facts at its disposal when ruling on DOJ's transfer motion. DOJ filed an *ex parte* "unopposed" transfer motion under seal without providing United any opportunity to oppose it, even though DOJ already had disclosed the existence of the complaint and the identity of the relator to United, and thus had no reason to conceal the transfer motion from United *other than* to deny it a chance to respond. The Western District of New

York, presented with an ostensibly unopposed motion, and deprived of important material facts including the existence of United's Administrative Procedure Act (APA) case in Washington, D.C., summarily granted the motion the very next day.

Now subject for the first time to adversarial proceedings on the matter, DOJ fails to show that this case has a strong connection to this District—let alone a stronger one than to Washington, D.C. The fundamental decisions and communications at issue in this case were made in Minnesota and Washington, D.C., not California. The witnesses who would be likely to testify at trial—and *especially* the witnesses whose testimony will be most important at trial—are located exclusively in or near those two venues. By contrast, *no* key witnesses reside in California. DOJ discounts the inconvenience of cross-country travel as either minimal (in the case of United's employees) or acceptable (in the case of the government's), but Section 1404(a) looks at actual inconvenience to the witnesses, not just the lawyers' willingness to brush aside those inconveniences in pursuit of a perceived litigation advantage.

United is not alone in asserting that this case has a tenuous connection to the Central District. Judge Walter concluded that this case and *Swoben* are not even sufficiently similar to warrant related case status (a decision DOJ ignores), and later noted that this case has "minimal connections to the Central District of California." Statement of Decision Denying the United States of America's Motion to Consolidate 8, *United States ex rel. Swoben v. Scan Health Plan*, No. 09-cv-05013-JFW (April 27, 2017), ECF No. 295 ("*Swoben* Consolidation Decision"). Instead, the case with a real connection to this one is United's APA suit pending in the District of Columbia. DOJ tries to downplay that connection based on a separate denial of its motion to stay the APA action pending resolution of this case, but cannot overcome its own prior assertion that the two matters share "identical" and "central" issues.

Finally, DOJ insists that as a plaintiff it is entitled to its choice of forum.

But DOJ's desire to have this case heard here (after having had the case transferred out of the Western District of New York via an *ex parte* motion) is entitled to no deference, just as DOJ would have received no deference in the Western District of New York if United had been able to oppose DOJ's motion there. Courts routinely refuse to give *any* deference to a plaintiff's transfer request, recognizing that doing so would invite precisely the sort of forum shopping that already has taken place here.

In the end, the Court should grant United's motion to transfer and allow the case to be resolved in a forum that is more convenient for the parties, witnesses, and judiciary, and that is not the result of *ex parte* forum shopping.

ARGUMENT

I. The Result Of DOJ's *Ex Parte* Transfer Motion, Which DOJ Made Five Years After The Case Was Filed, Merits No Deference

A. This Case Is Pending In This District Only Because Of DOJ's Ex Parte Forum Shopping

As set forth in United's memorandum (at 5-7), this case is in this District because DOJ sought to take advantage of the Ninth Circuit's decision in *Swoben* by filing an *ex parte* motion to transfer in the Western District of New York that was styled "unopposed" and that failed to alert Judge Arcara to the pendency of an APA case in Washington, D.C., presenting issues that DOJ has acknowledged are "identical" to "central" issues in this case, U.S. Mot. to Stay 1-2, *UnitedHealthcare Ins. Co. v. Price*, No. 16-cv-157 (D.D.C. April 14, 2017), ECF No. 28 (hereinafter "U.S. Mot. to Stay").

DOJ's opposition all but concedes these facts. DOJ fails to deny that (1) its transfer decision was motivated by the perceived advantage of litigating in a jurisdiction where *Swoben* was in effect; (2) it knew about but failed to disclose to Judge Arcara the pendency of United's APA suit in the District of Columbia; and (3) it could represent that its motion was "unopposed" only because it gave United no opportunity to oppose it. Instead, DOJ asserts (at 19) that such motions are "an accepted practice" in sealed FCA cases, and that it had no obligation to "consult[]" United because United was "not yet a party"—even though it was the *named defendant*. DOJ offers no support for the former point,[1] and for the latter point its only citation is a personal jurisdiction case that never even *hints* that a named defendant is not a party before service. On the contrary, "[t]he fact that it is the plaintiff who commences the suit does not mean that the other parties named in the complaint do not count as 'parties' prior to service of process." *Coleman v. Labor & Indus. Review Comm'n of Wisc.*, 860 F.3d 461, 471 (7th Cir. 2017). "[N]o one thinks, for example, that the plaintiff alone has the right to consent to the district court's adjudication of the plaintiff's motion for summary judgment, which can be filed before the defendant is served . . . ." *Id.* at 470-71.

DOJ should not have been the lone voice informing Judge Arcara on the purported benefits of transferring the case to this District or the lone voice choosing not to advise the court of possible alternatives, including Washington, D.C.[2] "'[O]ur entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *Granny Goose Foods, Inc. v. Bhd. of Teamsters et al.*, 415 U.S. 423, 439 (1974). In False Claims Act cases, no less than other cases, "'[e]x

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[1] The purpose of the seal requirement is to permit DOJ to investigate and decide whether to *pursue* a case, *see* 31 U.S.C. § 3730(a)), not to begin *litigating* the case without the defendant's involvement.

[2] DOJ had several options available to it under which United would have been provided notice and an opportunity to be heard. It could have intervened in this case before filing its motion to transfer. The case would then have been unsealed and United would have been served. *See* 31 U.S.C. § 3730(b)(2)-(4). It also could have moved to have the seal lifted for the limited purpose of serving its motion to transfer on United. As DOJ has admitted, United already was aware by then of the existence of a sealed complaint by Poehling, U.S. Motion to Stay at 4, so that partial lifting of the seal would not have harmed DOJ's investigation.

parte proceedings pose a threat to the adversary system,' a system that '[b]y allowing both sides to have their say . . . promotes accuracy, fairness, and consistency—the hallmarks of our system of justice.'" *United States ex rel. Lafond v. L-3 Communications SSG Tinsley, Inc.*, No. 09–10231, 2013 WL 1414235, at *1 (D. Mass. April 8, 2013) (quoting *In re Intermagnetics Am., Inc.*, 101 B.R. 191, 192 (C.D. Cal. 1989)); *see also United States ex rel. Fisher v. Bank of America, N.A.*, 204 F. Supp. 3d 618, 625 (S.D.N.Y. 2016) (noting the "threat to the adversary system" posed by an *ex parte* transfer motion filed by a *qui tam* relator, with the government's consent, before a False Claims Act complaint had been served on the defendant, but finding that threat adequately addressed on the facts before it because "the Bank was made aware of the Motion . . . and thus had an opportunity to file its opposition in response"). Here, DOJ's incomplete depiction of the relevant factors and failure to disclose the existence of a closely related case in a different jurisdiction allowed it to obtain a transfer to the Central District that, United respectfully submits, would not have been granted if the Western District of New York had been presented with adversarial briefing.

B. Under Well-Settled Principles, A Plaintiff's Choice Of Forum When Moving To Transfer Is Entitled To No Weight.

DOJ asserts that the "most important[]" reason to deny United's motion is the "substantial weight" that should "be accorded the United States' decision to file this FCA case in this District." Opp. 1. But this case was *not* filed in this District—it was filed "for the United States Government" and "in the name of the Government," 31 U.S.C. § 3730(b)(1), in the Western District of New York, then *transferred* here without any notice to United. A plaintiff (DOJ or otherwise) is entitled to no weight whatsoever on its choice to transfer a case to a new jurisdiction.

The citations DOJ offers (at 9-10) are not to the contrary, because those cases address only a plaintiff's original choice of forum. None of those cases suggests that a court should show deference to a plaintiff's decision after filing the complaint to move for a transfer to some other district the plaintiff believes to be more favorable. To the contrary, "plaintiffs face a heavier burden than defendants" in moving for transfer," and "[t]he 'usual presumptions as to a plaintiff's choice of forum are not appropriate' in this posture." *United States ex rel. Fisher*, 204 F. Supp. 3d at 623. The reason is straightforward and directly applicable here: "If [plaintiff's subsequent choices for venue] were accorded . . . favored status, a motion to transfer venue could become an unchecked tool for the plaintiff to shop among forums and between judges." *Huggins v. Stryker Corp.*, 932 F. Supp. 2d 972, 982 (D. Minn. 2013) (quoting *Leiker v. Jarvis Prods. Corp.*, No. 90–1179–C, 1990 WL 112974, at *2 (D. Kan. July 10, 1990)); *see also Health Discovery Corp. v. Ciphergen Biosystems, Inc.*, No. CIVA 2:06CV260 TJW, 2007 WL 128283, at *2–3 (E.D. Tex. Jan. 11, 2007).

Nor is DOJ aided by its citations (at 19-20) to the False Claims Act's nationwide venue provision, 31 U.S.C. § 3731(a), and its provision charging DOJ with primary responsibility for prosecuting an action once it intervenes, *id.* § 3730(c)(1). As DOJ notes (at 19), those provisions gave it the option to file a *new* complaint in the District it believed most appropriate. But DOJ did not do so here, because if it had, then the five years it had taken investigating the claims under seal would have rendered most of its claims already time-barred under the False Claims Act's 6-year statute of limitations. *See* 31 U.S.C. § 3731(b)(1). By instead seeking an *ex parte* transfer, DOJ sought to obtain the benefits of the relation-back doctrine to the original Western District of New York complaint under 31 U.S.C. § 3731(c), while still allowing itself a years-long window in which it could engage in unfettered forum shopping. DOJ points to *no* case suggesting that such maneuvering is entitled to any deference, and United is aware of none.

This Court should decide this motion in the same way that the court would have decided it if United had been able to bring it in opposition to DOJ's motion in the Western District of New York, assigning no weight whatsoever to the fact that the case is pending in this District or to DOJ's preference as to venue.[3]

II. Under A *De Novo* Assessment Of The Relevant Factors, The Most Appropriate Forum For This Case Is The District Of Columbia

Even if DOJ's tactics warranted any deference, the Section 1404(a) factors overwhelmingly demonstrate that the District of Columbia is a more convenient forum for this case than the Central District of California.

Far from the "factual center of much of the conduct at issue" (Opp. 1), this District is peripheral to the theories DOJ alleges in its Complaint. Instead, the case is much more closely tied to the District of Columbia area, where crucial meetings and communications occurred and the relevant government policies were formulated, implemented, evaluated, and—through the pending APA case—challenged. Because this case has little to do with the Central District and much to do with Washington, D.C., a trial in Washington also would be more convenient for far more of the likely trial witnesses than would a trial here in the Central District.

A. This Case Has Virtually No Connection To This District

As United explained in its motion, this case was brought by a Minnesota relator concerning policy decisions made in Minnesota by a Minnesota-based company that were communicated to federal officials in the Washington, D.C.

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[3] DOJ asserts (at 4) that it is "speculative and presumptuous for United to assume that the Western District of New York would have transferred this action to the District of Columbia," but DOJ's actions reflect its concern about just that outcome: If DOJ was convinced this case truly belonged in California, there would have been no reason for it to proceed *ex parte*, and no reason for DOJ to fail to alert the Western District of New York to the pendency of the APA case in Washington, D.C.

area. It has, as Judge Walter put it, "minimal connections to the Central District of California." *Swoben* Consolidation Decision 8, ECF No. 295.[4]

That lack of connection is particularly obvious from Relator Poehling's First Amended Complaint. *See First Am. Compl.* ECF No. 8 (W.D.N.Y. Oct. 27. 2011) (hereinafter "FAC"). If the Central District of California really was, as DOJ now claims, the "factual center" of Poehling's case against United, then surely Poehling (who served as Director of Finance for the UnitedHealthcare Medicare & Retirement subsidiary) would have at least *mentioned* United's connection to the Central District somewhere in his complaint. There is no such mention. In contrast, the FAC is replete with allegations demonstrating that the policies in question originated at United's Minnesota headquarters. *See, e.g.*, FAC ¶¶ 89-95 & 191-97; *see* also Declaration of Jeffery Dumcum ("Dumcum Decl.") ¶¶ 3, 6-15 (describing the locations where key decisions were made and the location of individuals highlighted in ¶ 191 of the FAC).

Even DOJ's own Complaint-in-Intervention, filed with an eye toward this imminent transfer motion and thus filled with gratuitous references to California, *see* United Memorandum in Support 19, shows that this case is about decisions and communications made in Minnesota and the Washington, D.C. area, not California. The Complaint is focused on DOJ's understanding of the roles and obligations of Medicare Advantage Organizations, the certifications MA Organizations are required to provide, and the risk adjustment process for MA Organizations. *See* Complaint-in-Intervention, ECF No. 114 ¶¶ 1-10, 49-79 (hereinafter "Compl.").

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[4] DOJ asserts (at 5 n.4) that Judge Walter's opinion on this issue is entitled to less persuasive force because Judge Walter requested proposed statements of decision from both United and DOJ, then modified United's proposed statement to conform to his own conclusions. But, to state the obvious, decisions of federal courts remain decisions of federal courts even if they are modified versions of proposed orders submitted by parties.

Yet, as United pointed out (at 17-18) and DOJ does not dispute, the Complaint does not name a single employee of the MA Organization defendants who is located in California. Nor did DOJ even depose any such employees. *Id*.

Unable to point to a single employee or office of UnitedHealthcare with any relevance to this case located in California, DOJ strains mightily (at 12-13) to claim that the Santa Ana office of UHC's affiliate, Optum (which neither owns nor operates any MA plans), plays a central role in the conduct challenged by DOJ. DOJ argues (at 1) that "[t]he genesis of United's Chart Review Program . . . was in this District." It makes that claim based on United's acquisition, in 2005, of PacifiCare, which DOJ asserts (at 11) had a "Risk Adjustment group" located in this District. But "[a]t the time it was acquired by UHG in 2005, PacifiCare did not have an internal chart review operation." Dumcum Decl. ¶ 5. External vendors instead performed *all* chart reviews, and while PacifiCare had a team that provided some analytic support and vendor oversight, the actual diagnosis coding was done through external parties. *Id.*

DOJ also suggests that the national Chart Review Program *remained* in this District during the periods covered by the Complaint as part of Optum's predecessor, Ingenix. DOJ asserts (at 11) that "[a]fter the acquisition, . . . PacifiCare employees designed, implemented, and managed United's risk adjustment programs and risk adjustment data submission and deletion systems and processes. In particular, [Stephanie] Will, who pioneered PacifiCare's Chart Review Program prior to the acquisition, developed and implemented United's national Chart Review Program, which is at the factual center of this case." But DOJ omits that "[t]he three key individuals who managed chart review and related risk adjustment activities within PacifiCare—[Jeffery Dumcum], Stephanie Gardner (previously Will), and Paul Bihm—moved to Minnesota after the acquisition" and reported to Minnesota-based executives. Dumcum Decl. ¶ 6.[5] Thus, following the acquisition, "the decision- and policy-makers for the risk adjustment program were all located in Minnesota, where both UnitedHealthcare and Optum are headquartered," *id.* ¶ 3, and from at least 2007 on "all policy and program decisions were made by UnitedHealthcare, not by Optum," *id.* ¶ 11. "For example, the decision whether to conduct one- or two-way looks," decisions about "[t]he criteria and scope of the Risk Adjustment Coding Compliance Review ('RACCR') program," "[t]he decision to implement the claims verification program," and "[t]he decision to discontinue the claims verification program" were all "made by UnitedHealthcare in Minnesota," not by individuals in this District. *Id.* ¶ 12. Even the coding and review of the medical charts was overseen by Optum's office in Tennessee, not California, and the Optum coders were located in Tennessee and oversees, not in California. *Id.* ¶ 13.

As the declaration of Mr. Dumcum and the original and supplemental declarations of Ms. Erickson explain (and DOJ's declarations do not dispute), "Optum's California office performed only limited functions relating to chart review and claims verification. These functions consisted of data analytics (for example, algorithms for selecting which patients' charts to review) and financial calculations and projections, as well as back office support, such as the processing of deleted codes that the plan authorized for deletion." *Id.* at ¶ 14; *see also* Supplemental Declaration of Karen Erickson ¶ 3. But DOJ's complaint does not challenge the manner in which Optum identified which charts to review, or the accuracy or conduct of its financial calculations and projections. DOJ thus

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[5] Stephanie Gardner (formerly Will) lived in Arizona from November 2012 until earlier this year, while continuing to report to Minnesota-based executives. *See* Dumcum Decl. ¶ 10; Supplemental Declaration of Daniel Meron ¶ 3 (hereinafter "Meron Suppl. Decl.").

dramatically overstates the significance of those functions, which have little to do with DOJ's claims.

By contrast, the relevant facts are tightly connected to Minnesota and Washington, D.C. DOJ challenges United's decisions concerning its national Chart Review Program, its discontinuance of its Claims Verification program following communications with CMS officials, and the scope and criteria it adopted when conducting audits of its capitated providers under the RACCR program. *See* Compl. ¶¶ 121-134, 194-229. *All* of those decisions were made in Minnesota. *See* Dumcum Decl. ¶ 12. The attestations United submitted in support of its claims for payment—the "*sine qua non* of an FCA violation," *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 333 (9th Cir. 2017) (citation omitted)—were all executed in Minnesota and directed to the Washington, D.C., area. So, too, were the extensive communications with senior CMS officials about United's understanding of its legal obligations and the meaning of the attestations—communications that are at the heart of United's factual defense. *See* Mem. 14-15. And, of course, the Medicare Advantage program and its risk adjustment policies were and are developed, managed, and executed from the Washington, D.C. area. Against that backdrop, DOJ's argument that this case finds its factual center here is entirely unconvincing.

B. The Convenience Of The **Likely** *Witnesses Favors A Transfer*

Given the case's tenuous connection to California and much stronger ties to Washington, D.C., and Minnesota, a trial in California would be inconvenient for a significant majority of the likely witnesses. Because "[t]he convenience of the witnesses is often the most important factor considered by the court when deciding a motion to transfer for convenience," *Steelcase Inc. v. Haworth, Inc.*, No. CV 96–1964 JGD, 1996 WL 806026, at *3 (C.D. Cal. May 15, 1996), this factor, too, strongly supports a transfer. *See, e.g.*, *Storm Mfg. Grp., Inc. v. Weather Tec Corp.*, No. CV 12-10849-CAS (FFMx), 2013 WL 12129620, at *5 (C.D. Cal. Apr. 15, 2013).

As United explained (at 14-15), the factual testimony of several former high-ranking government officials who now reside in or near Washington is so important to United's defense that United anticipates subpoenaing them to testify regardless of where the trial is held. The same is true of at least three current CMS employees who were present at a key meeting with United employees. Those current and former CMS officials will testify about communications in which United employees explained United's understanding of its legal obligations with respect to data accuracy, and were told by the CMS officials that United was permitted under then-existing CMS rules to utilize one-way-look chart reviews. That understanding is directly contrary to the theory of DOJ's complaint, and will thus be a central factual issue—indeed, perhaps *the* central factual issue—at trial.[6] In assessing the importance of testimony from various witnesses, therefore, that testimony is paramount: Even DOJ acknowledges (at 14) that "not only the quantity of the witnesses, but also the substantive contributions of their anticipated testimony," factors into the weighing, *Saylor v. Saylor Publ'ns, Inc.*, CV-12-7268-MWF, 2012 WL 12893759, at *2 (C.D. Cal. Dec. 4, 2014).

DOJ's primary response (at 16) is that DOJ attorneys reached out to those former government officials and obtained statements from them "that they would

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[6] The government appears to argue here (at 16), and claims in the Complaint (at ¶ 182), that the CMS officials' guidance would not be relevant to this case because DOJ, rather than CMS, is responsible for prosecuting suits under the False Claims Act. The False Claims Act, however, simply provides a cause of action by which the government can recover for the knowing submission of claims that are false under some external statutory, regulatory, or contractual standard—it does not itself dictate whether a particular claim is "false." If United was advised that its attestations were true under CMS's understanding of CMS's own regulations, therefore, then there would be no knowingly false submission to CMS that could support DOJ's False Claims Act allegations.

not be inconvenienced by traveling to this District to testify at trial and that doing so would be fine with them." But that assertion falls of its own weight: *Of course* it will be less convenient for D.C.-based witnesses to fly to Los Angeles to testify than it would be for them to take a short car ride to testify in D.C. The fact that this inconvenience would be (in DOJ's words) "fine with them" just means that they are *willing* witnesses—but "the appropriate analysis under § 1404(a) takes into account the costs involved in obtaining the attendance of willing witnesses," too, and it is "far more convenient" for such witnesses to testify near their homes. *Kawamoto v. CB Richard Ellis, Inc.*, 225 F. Supp. 2d 1209, 1214 (D. Haw. 2002); *see also In re Funeral Consumers Antitrust Litig.*, No. C 05-01804 WHA, 2005 WL 2334362, at *4 (N.D. Cal. Sept. 23, 2005) ("As for the willing, the convenience-of-witnesses factor looms large."); 15 Wright & Miller Fed. Prac. & Procedure § 3851 (4th ed. 2013).

In addition, the reality is that "scheduling fact witnesses so as to minimize the time when they are removed from their regular work or home responsibilities gets increasingly difficult and complicated when the travel time from their home or work site to the court facility is five or six hours one-way as opposed to 30 minutes or an hour." *In re Volkswagen AG*, 371 F.3d 201, 204–05 (5th Cir. 2004). Here, for example, United anticipates that if this case goes to trial in this District, DOJ would claim that it requires several days, or even a week's, notice of when United intends to call DOJ-represented, D.C.-area-based witnesses in order to orchestrate their cross-country travel—leading to either delays of trial if other testimony takes more or less time than expected, or requiring United to change the presentation of its defense in order to accommodate those travel demands. If the case were tried in D.C., by contrast, those witnesses would likely be available on much shorter notice and at much less inconvenience not only to the witnesses themselves but also the parties, the Court, and the jury.

DOJ offers a similar argument as to *current* government employees, claiming (at 1-2) that "[s]uch travel is part of their job responsibilities" and acknowledging that "by filing this action in this District, it has consented to its employees traveling to this District to provide testimony at trial." But "[e]ven where a witness is an employee of a party and will be paid, the disruption is still a hard fact." *In re Funeral Consumers Antitrust Litig.*, 2005 WL 2334362, at *4. "These individuals must take time out of their work and private time to travel to and from the place of trial, to live away from home and to wait around windowless corridors on call to testify." *Id.* Employees or not, "they have children to get to school, elderly parents to care for, jobs to do and lives to lead-all of which must be managed somehow or put on hold. Although lawyers tend to underestimate this burden, it is genuine, all the more so in a distant city." *Id.* DOJ is willing to sacrifice their convenience in pursuit of a perceived forum-shopping advantage, but under a proper Section 1404(a) analysis, their convenience matters as well.

DOJ also argues (at 17 & n.8) that this Court should discount the government officials United predicts will be witnesses because United "does not even know who they are" and has not yet had the opportunity to depose them. But DOJ has recognized that "[t]he potential government witnesses work in Maryland and the District of Columbia," ECF No. 49 at 7, and although DOJ has not yet provided discovery that would allow United to identify the specific witnesses by name, United has described half-a-dozen of the topics and areas of responsibility about which it intends to call those D.C.-area-based witnesses to testify, *see* Mem. 16-17. DOJ does not dispute that each of those issues would be relevant at trial and the subject of testimony by a government witness, and though it says (at 17) it is "extremely doubtful that United will call 'at least two dozen' government witnesses to testify at trial" about those topics, it ignores the fact that its own allegations span nearly a decade, and include multiple administrations and significant changes in regulatory requirements.

DOJ also claims (at 17) that "[i]f and when United deposes any such government employees, it will more fully understand that their testimony does not support, but rather undermines, United's defenses." Based on the limited picture of CMS's decision-making process United has been able to obtain to date through reviewing Freedom of Information Act disclosures and the Administrative Record recently filed in United's APA case, United respectfully disagrees. But more to the point, even if DOJ were correct, that would just mean that DOJ itself would be likely to call those witnesses—and the fact that it would be more convenient for them to testify in D.C. than in this District would still weigh in favor of hearing the case there.

DOJ dismisses out of hand (at 17) the greater convenience of a trial in Washington, D.C., for witnesses from United's Minnesota headquarters (whom DOJ does not dispute are likely to make up the bulk of DOJ's witnesses at trial, just as they have made up the bulk of the people whom DOJ has deposed during its investigation). In essence, it argues that flying to *either* Los Angeles *or* Washington would be inconvenient, and that the Court thus should call it a wash. But courts routinely compare the *relative* convenience of the two forums in cases in which the witnesses must travel a reasonably long distance to either potential site of trial. For example, in *Kannar v. Alticor, Inc.*, C-08-5505 MMC, 2009 WL 975426, at *2 (N.D. Cal. April 9, 2009), the court held that a trial in California would be "significantly more convenient" for witnesses traveling from Australia than a trial in Michigan.

Courts sometimes have made those comparisons using a so-called "'100-mile' rule," under which "[w]hen the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320 (Fed. Cir. 2008) (quoting *In re Volkswagen AG*, 371 F.3d 201, 204-05 (5th Cir.

2004)). Here, as United noted (at 18), the relative distance gap is much greater than that. In fact, the distance from Minnesota to this District would be more than 60 percent farther than from Minnesota to Washington, D.C., directly and substantially increasing the inconvenience to United employees called to testify by either DOJ or United. That is not a "small difference," as DOJ claims (at 17), and—especially when multiplied by the large number of witnesses who would be likely to have to travel to a trial from Minnesota—merits substantial weight in this court's assessment of the relative convenience of the two forums.

In the face of the overwhelming number of trial witnesses from Minnesota and the Washington, D.C. area for whom a trial in Washington would be significantly more convenient, DOJ offers (at 14) "eight key witnesses residing in or near California whom it presently anticipates calling as witnesses to testify at trial." After DOJ filed its response, United learned that one of those witnesses, Stephanie Gardner (previously Will), has moved to Ohio. *See* Dumcum Decl. ¶ 10; Meron Suppl. Decl. ¶ 3. Trial in Washington, D.C. thus would be significantly more convenient for her, as well. As for the other seven witnesses on DOJ's list, their testimony goes largely to questions about *implementation* of United's chart review programs through, for example, "training healthcare providers about Medicare's medical record documentation and accurate coding requirements," Opp. 15, which are, at most, marginally relevant peripheral issues to the core questions about United's Minnesota-based policy decisions following discussions with CMS officials. In any event, seven witnesses in or near California is a paltry number that is overwhelmed by the three to four times as many combined United-related witnesses who are based in Minnesota or locations even closer to Washington, D.C., and the numerous current and former government witnesses located in the Washington, D.C. metropolitan area. *See supra* at 11-16. In both "quantity" and "substantive contributions," *Saylor*, 2012 WL 12893759, at

*2, the seven witnesses DOJ identifies pale in comparison to the witnesses for whom Washington would be more convenient.

Finally, DOJ also identifies a secondary group of "witnesses" whose only unifying factors are DOJ's assertions that they "have knowledge relevant to this action" and that they "reside in or near California." Declaration of Carol Wallack, ECF No. 138-1 ¶ 15. DOJ asserts that it is "very likely" that it will call "at least some, if not many" of those witnesses to testify. *Id.* But especially when set off from DOJ's primary group of witnesses whom it actually "anticipates calling as witnesses to testify at trial," Opp. 14, this latter category is nothing but make-weight, designed to create the appearance for purposes of this transfer decision that more than a handful of California witnesses might be present at trial without in fact *saying* that.[7] At most, DOJ might call two or three of these witnesses—and even then, their testimony is unlikely to make a "substantive contribution," *Saylor*, 2012 WL 12893759, at *2, or else DOJ would explain further what those witnesses have to say.[8]

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[7] DOJ also asserts that it is likely to "call at least some" witnesses from the capitated provider groups located in California that were audited by United through its RACCR program. DOJ's allegations in the Complaint concerning RACCR are focused on decisions made by United regarding the scope of those reviews, *see, e.g.*, Compl. ¶ 201-229, and not decisions or actions made by any of the provider groups. DOJ is unlikely to call as witnesses specific physicians or their administrative employees, just as it does not even allege that it would call any of the physicians or staff whose charts were reviewed as part of United's national chart review program.

[8] For example, the only person in this list DOJ says is "likely" to testify is Patty Hermanns, an Assistant to the Chairperson and CEO of ICE, whom DOJ suggests "likely will be called to authenticate various ICE documents." Wallack Decl. ¶ 15. As the Court is aware, parties typically stipulate to the authenticity of documents.

C. The Substantial Overlap Between This Case And The APA Case Makes Transfer Particularly Appropriate

Because of this case's substantial connections to both Minnesota and Washington, D.C., a strong case could have been made for transferring it to *either* of those jurisdictions. After United first mentioned the possibility of a transfer, however, DOJ objected that United was seeking a "home turf" advantage in Minnesota. *Swoben*, U.S. Mot. For Order Consolidating Actions 17, ECF No. 271. Accordingly, United has moved here only for a transfer to Washington, D.C., and DOJ surely cannot claim *that* venue would offer an unfair advantage to United.

Beyond the appropriateness of resolving these important questions about the Medicare Advantage program's requirements near where that program was and is designed, managed, and implemented, hearing this case in the District of Columbia would also facilitate coordination with United's pending APA suit there. As DOJ previously argued and United explained at length (at 8-10), "identical arguments" will "play[] a central role" in this case and the APA suit. U.S. Mot. to Stay 1-2, ECF No. 28. Courts routinely give such considerations significant weight, recognizing that "transferr[ing a case] to a forum in which other actions arising from the same transaction or event, or which were otherwise related, [are] pending" can "facilitate judicial economy and avoid multiplicity of litigation." *Avalon Glass and Mirror Co*, No. 2:16-cv-06444, 2016 WL 7217579, at *3 (C.D. Cal. Dec. 12, 2016) (quoting Alan Wright et al., 15 Fed. Prac. & Proc. Juris. § 3854, n.5 (4th ed. 2013)).

Despite its earlier representation that these two cases involve "identical arguments," U.S. Mot. to Stay 1-2, DOJ now backtracks on the connection between them. It points to Judge Collyer's decision declining to stay the APA action in order to allow DOJ's False Claims Act suits to play out, *see UnitedHealthCare Insurance Co. v. Price*, No. 16–cv–157, 2017 WL 2623783 (D.D.C. June 14, 2017), and argues (at 21-22) that because Judge Collyer concluded that DOJ had not shown that a stay of the APA action was warranted, there necessarily would be no benefits to coordinating the cases together. In doing so, however, it ignores the crucial differences between the factors relevant to a stay and the factors relevant to a transfer motion.

Judge Collyer's decision denying DOJ's stay motion emphasized that the APA action may be resolved on a much shorter time-frame than this case. 2017 WL 2623783, at *3 ("The two FCA Cases will require considerable discovery and take much longer to bring to conclusion."). Judge Collyer found that it would have been inequitable to enter a stay that would significantly delay any decision in the APA case, especially in light of the "industry-wide implications" of the APA challenge and the uncertainty about whether "a future decision in the FCA Cases would address, much less resolve, the APA challenge here." *Id.* The ultimate questions in the two cases, Judge Collyer held, "are simply too different from one another to warrant a stay, even if such lawsuits may touch upon similar questions of statutory interpretation," because "[t]he equitable considerations [advanced by DOJ for a stay] are not so strong that all matters potentially implicating similar legal issues, with otherwise separate facts and claims, should be heard sequentially throughout the federal court system." *Id.*

That holding does not support DOJ's position here. United is not asking that either this case or the APA case be delayed and, if anything, transferring this case to the District of Columbia may facilitate a faster resolution. Of course, it is possible that this case will be resolved in a way that does not implicate the APA case (if, for example, the Court holds that DOJ has inadequately pled that the supposedly false attestations were material to CMS's decisions to pay, given that CMS has continued to pay United notwithstanding its awareness of United's understanding of those attestations[9]). And it is likewise possible that the APA case may be resolved in a way that does not determine the outcome here (if DOJ's interpretation of the "actuarial equivalence" requirement prevails there, leaving questions such as knowledge and materiality for resolution in this case). But in order for DOJ to *prevail* here, at least, it *must* prevail on the arguments that are also at issue in the APA case; conversely, if the APA court decides that United is correct that it may not lawfully be required to use or attest to a higher standard of verification and accuracy than CMS uses, then United will also prevail in this FCA suit (where DOJ's claim is that United's attestations were false regardless of whether United's data was just as accurate as CMS's). That threshold legal issue could resolve both cases at an early stage, and considerations of judicial economy and consistency therefore weigh strongly in favor of resolving the two cases together. *See, e.g.*, *Evans v. Arizona Cardinals Football Club, LLC*, Civ. No. WMN-15-1457, 2016 WL 759208, at *3 (D. Md. Feb. 25, 2016) (concluding that the ability to assign a case to a judge who is already addressing the relevant legal questions "weighs very strongly in favor of transferring" because it "would 'promote judicial economy and avoid the possibility of inconsisten[cy]'").

DOJ also argues that any benefit from potential coordination with the APA case if this case were transferred is matched by the benefit of coordinating this case with *Swoben* if it remains here. It repeatedly insists that *Swoben* "is a related action," Opp. 4; *see also id.* at 6, 20-21, and claims that "Judge Walter did not conclude that *Swoben* and this case were unrelated." *Id.* at 5 n.4. That is

[9] *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 n.5 (2016) (recognizing that in order to prove that a false statement was material to the government's decision to pay for purposes of the False Claims Act, a plaintiff must show that if the statement "had not been made, the party complaining of fraud would not have taken the action alleged to have been induced by the misrepresentation"—i.e., would not have paid the claim).

demonstrably wrong. As United explained (at 7-8), DOJ asked Judge Walter to designate this matter as a "related case" to *Swoben* immediately after it was transferred to this District, while the case was still under seal. If Judge Walter had granted that motion, then this case would now be pending before him. But even without the benefit of adversarial briefing, Judge Walter—who, unlike Judge Arcara in the Western District of New York, was familiar with the allegations in the *Swoben* case—decided that the cases were *not* related. *See* ECF No. 59. DOJ entirely ignores that Court order, which squarely refutes its repeated representation that the cases are related. And DOJ also acknowledges (at 6 n.5) that while it told Judge Arcara that the relationship between the two cases was sufficiently close that a dispute might arise about which of the two relators had asserted common claims first, "that potential no longer exists." That recognition, too, undercuts its claim that this case has more in common with *Swoben* than it does with United's APA suit.[10]

CONCLUSION

For all of these reasons, this case should be transferred to the District of Columbia.

Dated: September 11, 2017

LATHAM & WATKINS LLP

DAVID J. SCHINDLER
DANIEL MERON
ABID R. QURESHI

By /s/ David J. Schindler
David J. Schindler
Attorneys for United Defendants

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[10] In a recent letter to United setting forth objections to United's discovery, DOJ estimated that the *Swoben* case involves less than $10 million dollars in damages. By contrast, its complaint in this case alleges far greater amounts in damages. *See* Compl. ¶ 11.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* BENJAMIN POEHLING,

Plaintiffs,

v.

UNITEDHEALTH GROUP, *et al.*,

Defendants.

CASE NO. CV 16-08697 MWF (SSx)

DECLARATION OF JEFFERY DUMCUM IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER

Hon. Michael W. Fitzgerald
Courtroom: 5A

Hearing Date: September 25, 2017
Hearing Time: 10:00 a.m.

I, Jeffery Dumcum, declare and state as follows:

1. I am a Senior Vice President at Optum, Inc. ("Optum"). I submit this declaration to provide background information relevant to the Defendants' Reply to Motion to Transfer. I have personal knowledge of the facts stated here and/or have verified facts using the best information available to Optum.

2. From 1999 through 2005, I was employed by PacifiCare Health Systems Inc. ("PacifiCare") as Vice President of Medicare Finance. In this role, I oversaw PacifiCare's risk adjustment program for Medicare Advantage Plans since the inception of that program.

3. UnitedHealth Group Inc. ("UHG") acquired PacifiCare in 2005. After the acquisition, the PacifiCare Medicare Advantage business, including its risk adjustment programs, were integrated into UnitedHealthcare's Medicare Advantage business, known as Ovations—not into Optum's predecessor, Ingenix. Following the completion of the integration, the decision- and policy-makers for the risk adjustment program were all located in Minnesota, where both UnitedHealthcare and Optum are headquartered. Following the acquisition of PacifiCare by UHG in 2005, I continued to oversee its risk adjustment program in my role as Vice President for UHG's Ovations business and reported to individuals located in Minnesota.

4. From 2007 through 2014, I was a Senior Vice President of Ingenix Inc. ("Ingenix"), which later became Optum, and continued to oversee aspects of the Medicare Advantage risk adjustment services for UnitedHealthcare. I left Optum in 2014 and rejoined the company in 2016. In 2016, I returned as a Senior Vice President of Optum and now oversee aspects of Medicare Advantage risk adjustment services for clients other than UnitedHealthcare. This declaration covers the time period from PacifiCare's acquisition in 2005 through 2014, when I left my position at Optum overseeing aspects of UnitedHealthcare's Medicare Advantage risk adjustment services.

5. At the time it was acquired by UHG in 2005, PacifiCare did not have an internal chart review program. External vendors performed all chart reviews. PacifiCare had a team that provided some analytic support and vendor oversight, but the actual diagnosis coding was done through external parties.

6. The three key individuals who managed chart review and related risk adjustment activities within PacifiCare—myself, Stephanie Gardner (previously Will), and Paul Bihm—moved to Minnesota after the acquisition. Stephanie Gardner, Paul Bihm, and I each moved to Minnesota in 2007. Throughout the relevant time period, our group reported to supervisors in Minnesota.

7. In 2007, UHG shifted responsibility for executing the mechanics of the chart review program functions from UnitedHealthcare to Ingenix/Optum because there was an opportunity to market these services to competing Medicare Advantage Plans.

8. Optum is headquartered in Minnesota, and all of Optum's senior executives are located in or about Minneapolis, Minnesota (or points equally close, or even closer, to Washington, D.C. than Minnesota).

9. Paul Bihm moved to California in 2013. At that point, he no longer worked on any risk adjustment services for UnitedHealthcare. He only did such work for other unrelated plans.

10. Stephanie Gardner moved to Arizona in November 2012, but she continued to report to me in Minnesota. She currently resides in Ohio.

11. In and after 2007, although the execution of the risk adjustment program as directed by UnitedHealthcare shifted to Ingenix/Optum, all policy and program decisions were made by UnitedHealthcare, not by Optum—just as Optum takes direction from unaffiliated plan customers.

12. For example, the decision whether to conduct one- or two-way looks was made by UnitedHealthcare in Minnesota, not by Optum. The criteria and scope of the Risk Adjustment Coding Compliance Review ("RACCR") program

were all established by UnitedHealthcare in Minnesota, not by Optum. The decision to implement the claims verification program was made by UnitedHealthcare in Minnesota, not by Optum. Changes to the claims verification program were made by UnitedHealthcare in Minnesota, not by Optum. The decision to discontinue the claims verification program was made by UnitedHealthcare in Minnesota, not by Optum.

13. Even with respect to the execution of the programs, the reviewing and coding of medical charts for United's chart review and claims verification programs was overseen by managers located in Brentwood, Tennessee, not California, with ultimate oversight by more senior executives in Minnesota. Optum performed the actual coding of charts in Tennessee and points outside the United States, not California.

14. Optum's California office performed only limited functions relating to chart review and claims verification. These functions consisted of data analytics (for example, algorithms for selecting which patients' charts to review) and financial calculations and projections, as well as back office support, such as the processing of deleted codes that the plan authorized for deletion. For the entire duration of my involvement (i.e., from 2005 to 2014), employees in Optum's California office reported directly or indirectly to senior executives located in Minneapolis or points equally or even closer to Washington, D.C.

15. As of 2011, which I am informed is the year in which Mr. Poehling filed his complaint, the following individuals were based in Minneapolis, Minnesota (or, in the case of Larry Renfro, Boston, Massachusetts): myself; Stephen Hemsley, UHG Chief Executive Officer; Gail Boudreaux, UHG Executive Vice President and CEO of UnitedHealthcare; Larry Renfro, Optum CEO; Tom Paul, UnitedHealthcare Medicare & Retirement ("UHMR") Chief Executive Officer; Lee Valenta, Ingenix's former Chief Operating Officer (and current President of Ingenix's Life Sciences Division); Jack Larsen, former Chief

Financial Officer of UHG's Public & Senior Markets Group ("PSMG"); Scott Theisen, former UHMR Senior Vice President of Finance; and David Orbuch, former PSMG Chief Compliance Officer. At that time, Cindy Polich, former UHMR President, was located in California, although she subsequently moved to Arizona.

16. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 8, 2017, in Eden Prairie, Minnesota.

By Jeff Dumcum
Jeffery Dumcum
Senior Vice President, Optum

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* BENJAMIN POEHLING, Plaintiffs, v. UNITEDHEALTH GROUP, *et al.*, Defendants.	CASE NO. CV 16-08697 MWF (SSx) **SUPPLEMENTAL DECLARATION OF KAREN ERICKSON IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER** Hon. Michael W. Fitzgerald Courtroom: 5A Hearing Date: September 25, 2017 Hearing Time: 10:00 a.m.

I, Karen Erickson, declare and state as follows:

1. I am an Executive Vice President at Optum, Inc. ("Optum"). I have served in this role since 2011. I submit this supplemental declaration to provide additional information relevant to United's[1] Motion to Transfer. I have personal knowledge of the facts stated here and/or have verified facts using the best information available to Optum.

2. I understand that Jeffrey Dumcum is concurrently submitting a declaration that primarily focuses on the time period prior to and during 2014, and I have reviewed that declaration.

3. Since 2014, employees located in Optum's California office have continued to report to executives in Minneapolis, Minnesota. There have been no changes to the division of functions set forth in Jeffrey Dumcum's declaration as between Optum and UnitedHealthcare, Inc. and as between functions occurring in California versus Tennessee and Minnesota.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 8, 2017, in Minnetonka, Minnesota.

By______________________
Karen Erickson
Executive Vice President – Optum

[1] This Declaration utilizes the name "United" to refer to the following Defendants: UnitedHealth Group, Inc.; United Healthcare Services, Inc.; United Healthcare, Inc.; UnitedHealthcare Insurance Company; UHIC Holdings, Inc.; Ovations, Inc.; Optum, Inc.; OptumInsight, Inc.; and Defendant Medicare Advantage Organizations and Plans listed on Exhibit 1 to the United States' Complaint-In-Partial-Intervention and Demand for Jury Trial.

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Attorneys for UnitedHealth Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* BENJAMIN POEHLING, Plaintiffs, v. UNITEDHEALTH GROUP, *et al.*, Defendants.	CASE NO. CV 16-08697 MWF (SSx) **SUPPLEMENTAL DECLARATION OF DANIEL MERON IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER** Hon. Michael W. Fitzgerald Courtroom: 5A Hearing Date: September 25, 2017 Hearing Time: 10:00 a.m.

I, Daniel Meron, declare and state as follows:

1. I am a partner at Latham & Watkins LLP. I represent United[1] in the above-captioned matter. I submit this supplemental declaration to provide additional information relevant to United's Motion to Transfer.

2. On July 17, 2017, I executed a declaration in support of United's Motion to Transfer, filed on July 17, 2017. That declaration stated that "to the beset of my knowledge" at the time, Stephanie Will resided in Arizona.

3. Subsequent to the filing of the United States' and Relator's Consolidated Opposition to United's Motion to Transfer, I learned, and have since confirmed, that in or prior to April 2017, the former Stephanie Will remarried, and that in connection with her remarriage, in April 2017 she legally changed her name to Stephanie Gardner and moved to Dayton, Ohio, where she now resides. She remains employed by Optum.

4. I regret the error in my prior declaration, which was true to the best of my knowledge at the time. I note that the more recent declaration executed by Maria Marsh, an investigator in the United States Attorney's Office for the Central District of California in support of the Plaintiffs' Consolidated Opposition, contains the same error.

5. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 11, 2017, in Washington, DC.

By Daniel Meron

Daniel Meron

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[1] This Declaration utilizes the name "United" to refer to the following Defendants: UnitedHealth Group, Inc.; United Healthcare Services, Inc.; United Healthcare, Inc.; UnitedHealthcare Insurance Company; UHIC Holdings, Inc.; Ovations, Inc.; Optum, Inc.; OptumInsight, Inc.; and Defendant Medicare Advantage Organizations and Plans listed on Exhibit 1 to the United States' Complaint-In-Partial-Intervention and Demand for Jury Trial.