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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

Plaintiffs,

v.

UNITEDHEALTH GROUP, INC. *et al.*,

Defendants.

No. CV 16-08697 MWF (SSx)

JOINT RULE 26(f) REPORT

DATE: [TBD]
TIME: [TBD]
COURTROOM: 5A

The Parties submit this Joint Report to the Court regarding the Rule 26(f) conference that counsel for the Parties conducted by telephone on December 8, 2017. In this action, the Court has not yet issued an order setting a scheduling conference pursuant to Rule 16(b). However, Magistrate Judge Segal requested that the parties hold a Rule 26(f) conference because of Defendants' pending Motion for Early Deposition Discovery filed on November 15, 2017, Dkt. No. 167, and Rule 26(f)(2) requires that, 14 days after the conference, the parties submit a written report outlining a proposed discovery plan.

The United States and Relator (hereinafter collectively referred to as "Plaintiffs") request that the Court set the Rule 16(b) scheduling conference for February 5, 2018, the same date that the United States will notice its Motion for Partial Summary Judgment for hearing.. The United States asked Defendants to stipulate to scheduling the Rule 16(b) conference for February 5, 2018, and to consolidate argument on the parties' dispositive motions, but Defendants refused to do so. The United States thus intends to file a motion to have the Rule 16(b) conference held on February 5, 2018, and to have the parties' dispositive motions heard on the same date. Pursuant to Rule 16(b)(1) & (2), regardless of whether the Court holds a Rule 16(b) conference on February 5, the scheduling order must be issued as soon as practicable unless the Court finds good cause for delay, which the Plaintiffs respectfully submit does not exist. As the Advisory Committee notes observe, it would be most efficient for both the Court and parties if the scheduling conference occurred on the same date as the hearing on the parties' dispositive motions so that the Court and the parties can meet in person to discuss a discovery plan and the Court can determine the scope of discovery under Rule 26(b)(1). In the event that the Court finds good cause for delay under Rule 16(b)(2), then the Plaintiffs ask that discovery be limited to the written discovery permitted by the Court's July 17, 2017 Order until such time as the Court holds a scheduling conference and issues a scheduling order.

UnitedHealth believes that it is premature to hold a Rule 16(b) conference at the

same time as the hearing on the pending Motion to Dismiss as the Motion to Dismiss may dispose of the case in its entirety. UnitedHealth further believes that it is more appropriate to employ the Court's normal procedure: namely, to set a date for the scheduling conference only if any Motion to Dismiss is denied and the Court has had an opportunity to review any Answer (and potential counterclaims) that UnitedHealth may file.

UnitedHealth additionally objects to the United States' noticing of a motion for partial summary judgment for February 5, 2018. It would be inefficient and a waste of judicial resources to brief and to ask the Court to rule on summary judgment before UnitedHealth's pending Motion to Dismiss is resolved. Nor does the United States have any legitimate reason to force UnitedHealth to assemble its brief in opposition to that partial summary judgment motion in a single week (or on late notice over the holidays), as its February 5, 2018 hearing date—on a motion that has yet to be filed and that the United States has now informed UnitedHealth it plans to file on January 8—would require. This condensed briefing schedule, which will take place concurrently with the Parties' briefing on UnitedHealth's pending Motion to Dismiss, is plainly unreasonable.[1]

At the Rule 26(f) conference, the Parties discussed the topics set forth in Rule 26(f), along with the topics set forth in the Court's standard "Order Setting Scheduling Conference." The Parties' respective positions regarding each topic are set forth in detail below.

A. Statement of the Case

United States and Relator's Position: This is a civil fraud action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, as well as for restitution and common law damages, for monies unlawfully obtained and retained by Defendant UnitedHealth Group, Inc. and various of its direct and indirect subsidiaries ("Defendants") involved in Parts C and D of the Medicare Program. The United States alleges that Defendants

[1] Although the Parties did not discuss the February 5, 2018 date at the meet-and-confer, the United States proposed this date in a follow-up email, to which UnitedHealth disagreed.

knowingly submitted false claims and made false statements to the Medicare Program and that Defendants also knowingly and improperly avoided their obligations to repay significant sums of money to the Medicare Program. The United States alleges that the false claims were the invalid diagnoses that Defendants submitted for risk adjustment payments and Defendants' annual Risk Adjustment Attestations claiming entitlement to risk adjustment payments from Medicare. The United States also alleges that the Risk Adjustment Attestations were false statements.

The United States' claims relate to Defendants' very large national Chart Review Program, which they have conducted annually since 2005. The United States alleges that Defendants systematically ignored the results of their chart reviews that would have led to decreased payments to them under the Medicare Program, *i.e.*, results showing that diagnoses submitted by them for risk adjustment payments were not supported by their beneficiaries' medical records and, thus, that Defendants were not entitled to the payments based on these diagnoses. The United States Court of Appeals for the Ninth Circuit, in *United States ex rel. Swoben v. UnitedHealthcare Ins. Co.*, 848 F.3d 1161, 1175-76 (9th Cir. 2016), held that the type of conduct alleged in this case – turning a blind eye to information about unsupported diagnoses – constitutes reckless disregard and deliberate ignorance toward the truth or falsity of the data submitted to CMS and renders Defendants' Risk Adjustment Attestations false. In addition, the United States' claims relate to Defendants' disregard of information from their Risk Adjustment Coding Compliance Review ("RACCR") Program about invalid diagnoses reported to them by capitated and gainsharing providers. The United States alleges that Defendants knew that these providers had a financial incentive to report invalid diagnoses to increase risk adjustment payments and that, based on the RACCR Program, the providers actually or likely over-reported diagnoses, but Defendants nonetheless continued to submit diagnoses from these providers and knowingly and improperly avoided repaying Medicare for risk adjustment payments based on invalid diagnoses from these providers.

UnitedHealth's Position: This case arises from the United States and Relator's

effort to change the rules governing obligations of Medicare Advantage ("MA") plans to verify data submitted by third-party healthcare providers. The United States claims that UnitedHealth was obligated to undertake efforts to verify diagnostic data from third-party healthcare providers that the government itself does not undertake with respect to beneficiaries it insures under traditional Medicare.

UnitedHealth believes that the United States is seeking to impose obligations that simply did not, and do not, exist and, disputes that it ever submitted a false claim for payment. UnitedHealth submitted bids to care for a population of beneficiaries based on a set of rules promulgated by the Centers for Medicare and Medicaid Services ("CMS"), and it was paid in conformity with those rules. UnitedHealth was transparent with CMS about the extent to which it was reviewing diagnosis codes submitted to it by providers, and CMS officials confirmed that UnitedHealth was not required to do so-called "two-way looks" to double-check those provider submissions. The lawsuit is a misguided attempt to second guess that agency guidance and CMS' oversight of the MA program, pursuing a windfall for the United States and Relator by forcing UnitedHealth to suffer a loss for playing by the rules CMS originally set up more than a decade after the fact.

In a separate action, Judge Walter dismissed the United States' case on the same legal theories on the ground that the DOJ failed "to allege that CMS would have refused to make risk adjustment payments to the United Defendants if it had known the facts." *U.S. ex rel. Swoben v. Scan*, 2017 WL 4564722, at *6 (C.D. Cal. Oct. 5, 2017).

In addition to its Motion to Dismiss arguments, UnitedHealth anticipates asserting defenses such as: (1) any alleged regulatory violations by UnitedHealth were not material to the CMS' decision to pay UnitedHealth, and (2) UnitedHealth did not knowingly present CMS certifications that falsely represented the accuracy of plan data. Additional anticipated defenses related to falsity, government knowledge, damages, and counterclaims are described below at the end of Section C.

B. Subject Matter Jurisdiction

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345, &

1367(a) and 31 U.S.C. § 3732(a)-(b). The Parties do not contest the Court's subject matter jurisdiction.

C. Legal Issues

United States and Relator's Position: Many, if not most, of the key legal issues presented by this case have already been decided by the Ninth Circuit in its *Swoben* opinion, including the following issues:

(i) Whether Defendants were entitled to risk adjustment payments for diagnoses unsubstantiated by their beneficiaries' medical records, 848 F.3d at 1168 (concluding that they were not);

(ii) Whether Defendants' submission of false Risk Adjustment Attestations was material to their false claims, *i.e.*, claims for payment based on unsubstantiated and thus invalid diagnoses, *id*. (concluding that Defendants were not entitled to risk adjustment payments based on unsubstantiated and thus invalid diagnoses and characterizing the Attestation as a "bulwark against" the fraudulent submission of inaccurate and untruthful diagnoses, including diagnoses unsubstantiated by beneficiaries' medical records);

(iii) Whether Defendants were required to exercise due diligence to ensure the accuracy and truthfulness of the diagnoses they submitted for risk adjustment payments and to exercise good faith in certifying the accuracy and truthfulness of this data, *id*. at 1169 & 1174 (concluding that they were);

(iv) Whether Defendants' submission of false Risk Adjustment Attestations with actual knowledge, deliberate ignorance of, or reckless disregard of the negative results of their chart reviews showing that diagnoses reported by providers were unsubstantiated (and, thus, invalidated) by their beneficiaries' medical records, and Defendants' subsequent failure to withdraw their submission of these invalid diagnoses to CMS, constitutes the knowing submission of false statements under the FCA, *id*. at 1175-76

(concluding that such conduct results in the knowing submission of false certifications if through the exercise of reasonable diligence Defendants could have identified the diagnoses submitted to CMS that were unsupported by the results of the chart reviews); and,

(v) Whether Defendants were legally entitled to ignore the negative results of their chart reviews and to not withdraw the unsubstantiated diagnoses because CMS does not verify diagnoses submitted to it by providers under Parts A and B of the Medicare Program, which pays based on services rendered and not diagnoses submitted, *id*. at 1179 (rejecting this argument, which Defendants characterize as their "actuarial equivalence" or "FFS Adjuster" argument, for "multiple reasons").

In addition to issues identified elsewhere in this Report, including Section M, Plaintiffs anticipate that other legal issues may arise as discovery continues and after Defendants file their answers to the Amended Complaint.

UnitedHealth's Position:

At its heart, this case presents a dispute about the reciprocal contractual, regulatory, and statutory obligations of MA plans and CMS in the MA program. As the Parties, as well as this Court, have previously recognized, the "central" issues in the dispute are currently being litigated in an Administrative Procedures Act suit in the District of Columbia. *See* Order Denying Motion to Transfer at 4, ECF No. 154 (noting the government's agreement that "'identical arguments'. . . are 'central' to the cases"); *see also UnitedhealthCare Ins. Co. v. Hargan*, No. CV-16-RMC (D.D.C.).[2] Those issues include:

(i) Whether MA plans are required to attempt to delete all unsupported diagnosis codes submitted to them by providers, even though the model CMS uses to determine payment amounts is based in part on unsupported codes that CMS itself collects in the

[2] Upon the resignation of former Secretary of Health and Human Services Thomas Price, UnitedHealth's APA action was automatically re-captioned with the name of Acting Secretary Eric Hargan.

Medicare Part A and B programs. CMS has acknowledged in the APA suit that it knowingly uses unsupported diagnosis codes to estimate its expected costs for Medicare patients whose care it pays for directly under Medicare Parts A and B. UnitedHealth has argued that CMS' choice has direct implications for the types of risk adjustment data it collects from MA plans. Specifically, Congress has required CMS to use the "same methodology" to determine payment amounts in the MA program, 42 U.S.C. § 1395w-23(b)(4), and has directed CMS to "ensure actuarial equivalence" between the two programs, 42 U.S.C. § 1395w-23(a)(1)(C)(i). In light of those statutory requirements, UnitedHealth believes that CMS cannot require MA plans to use a different approach to the diagnosis codes they submit than the one CMS itself uses, such as by requiring MA plans to delete all unsupported codes, unless CMS also provides a means of adjusting for the different methodologies.

(ii) What standard of accuracy MA plans certify to in the attestations they submit to CMS. The Parties also dispute the meaning of the risk adjustment attestations that the United States has pointed to as the "false claims" or "false statements" in this case. In the past, CMS has acknowledged in a related context that "MA organizations are coding 'accurately' when they are coding in a manner similar to [Medicare Part A and B] coding"—coding that, as the government has acknowledged, contains an undisclosed percentage of unsupported codes.[3] But the CMS rule at issue in the APA suit, as well as the United States' later Complaint-In-Intervention in this case, seem to take the position that by signing the attestation, an MA plan certifies its "belief" that the data it has submitted contains *no* unsupported codes—even though CMS itself has recognized that the presence of unsupported codes is "inevitable." 2001 Medicare Managed Care Manual § 110.2. UnitedHealth believes that CMS' earlier understanding of "accuracy" was the correct one, and that requiring the attestation would be unlawful (as a violation

[3] *See* CMS, *Announcement of Calendar Year (CY) 2010 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies* 20 (Apr. 6, 2009), https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/downloads/Announcement2010.pdf

of the "same methodology" and "actuarial equivalence" statutory standards) if it were interpreted in the way the government now proposes.

UnitedHealth and the government have already filed cross-motions for summary judgment in the APA case addressing those issues, which are also among the central questions in this case. UnitedHealth believes it would be inappropriate, inefficient, and a waste of judicial resources to attempt to litigate those same issues here, and to the extent that the APA court upholds the validity of the regulation there, UnitedHealth will not seek to re-litigate the regulation's validity here. Depending on how the APA case is resolved, however, there may still be other FCA- and fact-specific issues to resolve in this case (if this Court denies UnitedHealth's pending Motion to Dismiss), including:

(iii) Whether a physician's subjective clinical judgment regarding diagnostic coding may give rise to a false claim under the FCA;

(iv) Whether any regulatory or contractual violations UnitedHealth did commit were committed "knowingly," in light of the regulatory landscape and the government's knowledge and approval of UnitedHealth's chart review processes;

(v) Whether any alleged noncompliance was material to payment under the FCA or the United States' unjust enrichment or payment by mistake claims;

(vi) Whether the acts of UnitedHealth resulted in damages actionable under the FCA or claims of unjust enrichment and payment by mistake; and

(vii) Whether the United States can sustain claims for unjust enrichment and payment by mistake when valid contracts between the parties existed.

Finally, depending on the resolution of the APA suit, UnitedHealth may also have counterclaims to assert against the government concerning its obligations under the MA program.

The United States has taken the position here, as it did on remand in *Swoben*, that the Ninth Circuit's *Swoben* decision resolves many of these questions in the United States' favor. That is incorrect. The Ninth Circuit's decision arose following a dismissal on Rule 8 and 9(b) grounds, and resolved only the narrow set of issues that were actually

at issue there. Specifically, the Parties there disputed the extent of detail that Rule 9(b) requires at the pleading stage in a case like this one, and also the extent of the verification obligations imposed by the "best knowledge, information, and belief" standard contained in the contractual attestation. *See Swoben*, 848 F.3d 1178-79. To the extent that the Ninth Circuit *assumed* that other aspects of the relator's theory were true, given that UnitedHealth and the other MA plan defendants had not raised those other issues at the pleading stage, that assumption was not even binding at subsequent stages of the same case (as the unappealed dismissal of the government's complaint on remand in that case demonstrates)—let alone in other cases like this one.

D. Parties, Evidence, etc.

1. Parties

The Parties are Plaintiff United States of America, Relator Benjamin Poehling, and Defendants UnitedHealth Group Incorporated, United HealthCare Services, Inc., UnitedHealthcare, Inc., Ovations, Inc., Optum, Inc., and OptumInsight, Inc., as well as the numerous Medicare Advantage Organizations identified in paragraph 26 of the Amended Complaint. The full list of Defendants' parents and subsidiaries is available in UnitedHealth's Corporate Disclosure Statement, Dkt. No. 129, and UnitedHealth's Notice of Interested Parties, Dkt. 130.

2. Percipient Witnesses

United States and Relator's Position: Plaintiffs, at this early stage of the litigation and subject to the factual record developed during discovery, identify the following potential percipient witnesses in this case: Relator Benjamin Poehling; the current and former executives and employees of Defendants identified in paragraph 42 of the Amended Complaint; the individuals identified and/or described in the Declaration of Carol Wallack in Support of the United States' Opposition to United's Motion to Transfer, Dkt. No. 138-1; the current and former employees of the incentivized providers listed in Exhibits 14 and 15 of the Amended Complaint; the chart reviewers and diagnosis coders who reviewed charts and coded diagnoses as part of Defendants' Chart

Review, Claims Verification, and RACCR Programs; certain current and former employees of the CMS and its contractors, including Palmetto and ARDX; and certain current and former participants in a managed care industry group called the Industry Collaboration Effort ("ICE"). The Parties have exchanged or soon will exchange initial disclosures that identify each individual likely to have discoverable information that may be used to support claims and defenses.

UnitedHealth's Position:

In addition to the witnesses identified by the United States, UnitedHealth anticipates, subject to the factual record developed during discovery, that the following may be key witnesses in this action: (1) Marilyn Tavenner, the former Administrator of CMS; (2) Jonathan Blum, the former Principal Deputy Administrator and Director of CMS; (3) Sean Cavanaugh, the former Deputy Administrator and Director of CMS; (4) Cheri Rice, the Acting Deputy Director of the Center for Medicare at CMS; (5) Jeffrey Grant, the former Division Director, Capitated Payment; (6) Dan Farmer, the former Special Assistant at CMS; (7) Julia Gorner, Director, Division of Capitated Plan Audits at CMS; (8) Cynthia Tudor, Deputy Center Director, Parts C and D at CMS; (9) current and former government officials who (a) devised the MA risk adjustment methodology; (b) reviewed UnitedHealth's annual MA plan bids setting forth its proposed capitated payment amounts; (c) established CMS' average cost and risk calculations within specific geographic regions; (d) developed the methodology CMS uses for its own audits of MA plans; (e) set forth diagnosis coding and medical documentation criteria used by the government itself in auditing health plans; and (f) reviewed MA plans' certifications of data accuracy; and (10) UnitedHealth employees who will testify to the fact that they believed, and still believe, that UnitedHealth was paid properly and never submitted false statements or claims and did not knowingly and improperly retain any overpayments or avoid or decrease any obligations.

3. Key Documents

United States and Relator's Position: Plaintiffs, at this early stage of the litigation

and subject to the factual record developed during discovery, identify the following potential key categories of documents in this case: Documents referenced in the Amended Complaint; documents relating to Defendants' Chart Review, Claims Verification, and RACCR Programs; documents relating to Defendants' knowledge (as that term is defined by the FCA) about inaccurate or untruthful diagnoses submitted by providers, including diagnoses unsubstantiated by the providers' medical records; documents relating to Defendants' obligation to submit accurate and truthful risk adjustment data to Medicare for risk adjustment payments, including the obligation to submit diagnoses substantiated by beneficiaries' medical records; documents relating to Defendants' obligation to retract, withdraw, or delete inaccurate or untruthful risk adjustment data submitted to Medicare, including the obligation to retract, withdraw, or delete diagnoses unsubstantiated by beneficiaries' medical records; documents relating to Defendants' submission of inaccurate or untruthful risk adjustment data to Medicare; documents relating to Defendants' failure to retract, withdraw, or delete inaccurate or untruthful risk adjustment data; documents related to Defendants' contracts and other agreements with CMS and their Risk Adjustment Attestations; medical records from the RACCR "financially incentivized" providers relating to the beneficiaries whose diagnoses are at issue; documents regarding revenue liability accruals and reserves that one or more of the Defendants took relating to their Chart Review, Claims Verification, and RACCR Programs; documents relating to Defendants' communications with CMS about the above-mentioned issues; and documents related to damages.

UnitedHealth's Position:

UnitedHealth anticipates, subject to the factual record developed during discovery, that the key categories of documents in this action include: (1) documents demonstrating that UnitedHealth was transparent with the government about its claims verification program; (2) documents demonstrating that there was no statutory or regulatory requirement for MA plans to "look both ways"; (3) documents demonstrating that UnitedHealth's attestations were not false and signatories believed they were true; and

(4) documents demonstrating that the allegedly fraudulent conduct was not material to payment.

E. Damages

United States and Relator's Position:

Chart Review Damages: As alleged in paragraph 237 of the Amended Complaint, for the 2011 to 2014 payment years (2010 to 2013 date of service years), Defendants failed to repay the Medicare Program at least $1.1 billion by failing to look both ways and delete diagnoses invalidated by their Chart Review Program. These damages are based on a comparison of the results of Defendants' chart reviews for those four years with the diagnoses they submitted for payment for those years in order to identify the unsubstantiated diagnoses that should have been deleted, as alleged in paragraph 235 of the Amended Complaint, and a computation of the risk adjustment payments made to Defendants based on those invalid diagnoses.

On October 5, 2017, the United States served Defendants with its First Request for Production of Documents, which includes specific requests for the chart review and other data required in order to conduct the damages analyses for other years during the time period (2006 to present) in which Defendants have conducted their Chart Review Program. After the requested documents and data are produced, the United States will conduct the damages analysis for these other years. Plaintiffs propose that Defendants complete the production of documents and data requested to compute damages before August 31, 2018 in order for Plaintiffs to make the initial expert disclosures by June 15, 2019. The United States' damages will be presented pursuant to Rule 26(a)(2) relating to the disclosure of expert testimony.

RACCR Damages: At this stage of discovery, Plaintiffs do not have sufficient information to estimate damages resulting from Defendants' conduct with respect to the RACCR Program, but have served Defendants with document requests to commence the process of obtaining this information. Plaintiffs note that Defendants themselves estimated the amount of the overpayments they would have to return to the United

States as a result of the RACCR Program in the tens of millions of dollars per year during the time period before they started phasing out the program.

UnitedHealth's Position:

UnitedHealth denies that it owes any damages alleged in the First Amended Complaint-In-Intervention. UnitedHealth will have an alternate theory as to how damages should be calculated if liability is established in light of the contracts and reimbursement methodology and the FCA measure of damages, which take into account the benefit already conferred on the government. UnitedHealth anticipates challenging the propriety of sampling and extrapolation and asserting that a fee-for-service adjustor must be applied to account for unsupported codes in the diagnostic data of fee-for-service beneficiaries.

At this point in the litigation, UnitedHealth does not have sufficient information to estimate damages associated with its possible counterclaims against the government regarding its obligations under the MA program.

F. Insurance

Coverage is available to UnitedHealth for certain claims in the First Amended Complaint-In-Intervention under UnitedHealth's insurance policies, and UnitedHealth will make those policies available once a protective order is entered in this case.

G. Motions

On September 28, 2017, this Court denied UnitedHealth's Motion to Transfer. (ECF No. 154.)

The United States reserves the right to seek leave to (i) revise its Amended Complaint if necessary as a result of the Court's resolution of Defendants' Motion to Dismiss or any other motions filed by Defendants; (ii) add any Medicare Advantage Organizations (or Part D Sponsors) directly or indirectly owned, affiliated with, or controlled by UnitedHealth Group that should be included in the list of such organizations set forth in paragraph 26 of the Amended Complaint; and, (iii) if necessary to recover its damages, to add any other entities affiliated with UnitedHealth Group that

owned, controlled, or managed the Medicare Advantage Organizations.

In addition to the motions identified in Section M, Plaintiffs anticipate considering additional motions upon the filing of Defendants' answer(s) to the Amended Complaint and as issues arise throughout the litigation. Plaintiffs may also file motions to exclude certain documents as evidence for both use in supporting summary judgment motions and at trial.

UnitedHealth reserves the right to file non-dispositive pretrial motions, including but not limited to motions related to discovery disputes, motions *in limine*, and motions to exclude experts.

Dispositive motions are addressed below.

H. Manual for Complex Litigation

The Parties do not believe the Manual for Complex Litigation should be utilized in this case.

I. Status of Discovery

Document Discovery: On July 17, 2017, the Court provided that "the parties may engage in written discovery (document requests and interrogatories) and may do so before a Rule 26(f) conference." Dkt. No. 133. On August 24, 2017, Defendants served Requests for Production of Documents to the Government (Set No. One), and the Government served Responses and Objections on September 25, 2017. The Government served its First Request for Production of Documents to Defendants on October 5, 2017, and Defendants served Responses and Objections on November 6, 2017. UnitedHealth made its first production of over 26,000 documents on December 8, 2017. *United States' collection and production of documents*: To date, in response to Defendants' document requests, the United States has collected over 3.6 terabytes of data, constituting 29,201,945 pages of documents and 3,395,575 documents, from 153 custodians at CMS and the Office of the Inspector General for the Department of Health and Human Services (HHS-OIG), including multi-access email accounts. The United States must review all of these documents for responsiveness, confidentiality, and

privilege. To expedite the task of reviewing and producing responsive, non-privileged documents, the United States is utilizing targeted searches, Technology Assisted Review ("TAR"), and manual review. Even utilizing these methods, however, the task of identifying responsive, non-privileged documents is enormous. The United States has already provided some responsive documents to Defendants. During the first quarter of 2018, the United States expects to begin producing larger numbers of documents on a rolling basis.

The United States has provided Defendants with information about its document collection efforts and document review protocols. On November 22, 2017, the United States sent Defendants a letter identifying the numerous custodians, multi-access email accounts, and other files from which it has collected documents and the United States also will be providing each custodian's relevant job title(s) and dates of employment. The letter also identified the search terms used to collect potentially responsive documents in the custodian's electronic files and stated that, once the Government has completed the collection of documents from all identified custodians, it will provide more information about hit counts. In addition, the letter provided detailed information about the TAR protocol that the Government is using to identify the responsive documents in the enormous collection. It further notes that, once responsive documents are identified, the Government will then need to review them to determine which are privileged and which need to be marked as confidential pursuant to the protective order, which the parties will soon submit to the Court for its review and approval. Finally, the letter explains that, even utilizing target searches and TAR, the task of identifying responsive documents and conducting a privilege and confidentiality review will take thousands of hours of Government attorneys' time over at least the next six to nine months. Because the collections include privileged and confidential documents, these are tasks that must be performed by Government attorneys only (*i.e.*, without utilizing assistance from Relator's counsel).

The Government voluntarily provided Defendants with detailed information about

its collection and review of documents in the spirit of cooperation and transparency. We believe the information we provided gives Defendants a good understanding of our collection, review, and production processes. We have asked Defendants for their feedback at this time. Because of the enormous burdens and costs involved in collecting, reviewing, and producing documents, we cannot make changes to these processes or redo this work later on.

In addition, the Government has been working cooperatively with Defendants to address Defendants' concerns. The Government has responded in writing to Defendants' concerns and has met twice with Defendants' counsel to discuss these concerns. The Government has also compromised on the production of documents relating to certain issues even though it believes that Defendants are burdening it in seeking production of documents irrelevant to this case and/or disproportionate to the needs of this case. The United States may file one or more motions as necessary to limit or prevent such irrelevant discovery. At Defendants' request, the Government has also agreed to inquire whether there are other custodians with documents responsive to Defendants' request and, if so, produce relevant documents from their files.

Furthermore, the United States has sent Defendants a letter concerning their responses and objections to our document requests and, on December 14, conferred with Defendants' about their responses and objections. We will continue to work cooperatively with Defendants in obtaining the documents and data that we requested and in minimalizing any issues that need to be resolved by the Court. Over the last several months, the United States has also spent considerable time working cooperatively with Defendants in the drafting of mutually-agreeable proposed protective orders relating to the treatment of confidential documents and other information and relating to the non-waiver of privilege and protected documents.

United States' statement relating to Defendants' premature requests to depose Government witnesses: Plaintiffs propose that fact witness depositions by both parties commence after the Court considers their phased discovery plan set forth in Section J.2

of this Report and issues a Scheduling Order pursuant to Rule 16(b) specifying when fact witness depositions should begin. On November 20, 2017, Magistrate Judge Segal issued an Order continuing the hearing on Defendants' Motion for Early Depositions until January 22, 2018. Dkt. No. 172. However, on December 13, 2017, Defendants served the United States with two deposition notices. The parties had an informal discovery conference with Judge Segal on December 18, 2017 to discuss the timing of these depositions and the United States' contemplated protective order. As explained in that conference, rulings on the United States' motion for partial summary judgment are likely to limit the scope of discovery regarding materiality and actuarial equivalence. During the December 18 conference, Judge Segal suggested that the parties work cooperatively to reschedule the depositions should the United States need to file a properly noticed motion for a protective order regarding the scope of such depositions after the Court rules on the government's motion. The United States will follow Judge Segal's direction in that regard.

UnitedHealth's statement on the collection and production of documents: Prior to filing the First Amended Complaint-In-Intervention, DOJ investigated this matter for more than five years. During that time, UnitedHealth produced over 600,000 documents, compiled detailed responses to dozens of complex interrogatories, and produced more than twenty witnesses for Civil Investigative Demand oral examinations.

In *United States ex rel. Swoben v. Secure Horizons*, Case No. CV-09-5013 JFW (JEMx), UnitedHealth produced over 34,000 documents, which are also responsive in this case. The United States, in contrast, made two small productions totaling less than 600 documents, the majority of which were publically available and re-produced from another action.

In response to the United States' Complaint in this case, UnitedHealth is currently collecting documents from 105 custodians and 7 email distribution lists and has collected 32 million documents to date. In addition to the more than 600,000 documents produced during the investigative phase, UnitedHealth has produced over 26,000 documents in this

litigation. In contrast, **the United States has not yet produced a single document**.

UnitedHealth has also provided the United States with information regarding its document collection efforts and document review protocols and will continue to work cooperatively with the United States on discovery. While UnitedHealth proposed that the parties exchange additional information regarding custodians on December 20, 2017, the government was not prepared to do so.

UnitedHealth's statement regarding its requests to depose Government witnesses:

UnitedHealth has had no opportunity to conduct affirmative discovery to defend itself from the United States' baseless claims. UnitedHealth is entitled to begin the process of reaching symmetry in the discovery of factual information through depositions. During the December 18, 2017 telephonic conference before Judge Segal regarding The United States Motion for a Protective Order, Judge Segal stated that the government had not made a showing of undue burden for the two proposed deponents or good cause sufficient to prevent UnitedHealth from proceeding with the depositions as laid out in the Federal Rules of Civil Procedure. Judge Segal also stated that a pending motion for partial summary judgment generally does not justify postponing depositions and that would be "the exception and not the common practice."

J. Discovery Plan

1. Rule 26(a) Initial Disclosures – Rule 26(f)(3)(A)

The Parties made their initial disclosures on December 22, 2017.

United States and Relator's Position: In their initial disclosures, Plaintiffs provided Defendants with the results of their computation/estimation of damages for the four payment years (2011 to 2014) for their violations of the False Claims Act relating to their Chart Review Program. These results are also described in paragraphs 235 and 237 of the Amended Complaint. The computation/estimate of at least $1.1 billion in damages for these four years is based on documents and data provided by Defendants to the United States in the investigation of this matter. At this time, Plaintiffs claim a work product privilege with respect to the analyses underlying this damages estimate. In

accordance with Rule 26(a)(2), the United States and Relator will make their expert damages disclosures at the time set forth in the Schedule entered by the Court.

As previously explained, Defendants have not produced documents and data required to compute damages for six of the more than ten years during which they conducted their Chart Review Program and they have not produced the documents and data required to compute damages relating to the RACCR claims. (Also, if Defendants continued to conduct their one-sided Chart Review Program after 2016, the United States will seek documents and data to compute damages for the years after 2016.) The United States proposes that it will comply with the requirements imposed by Rule 26(a)(1)(A)(iii) when it makes its damages expert witness(es) disclosures pursuant to Rule 26(a)(2)(B). The United States needs sufficient time (approximately nine months) to perform all the work, including, but not limited to, the document review and data analyses, necessary in order to compute damages and make its damages expert witness(es) disclosures after Defendants complete their production of the required documents and data (assuming that the Defendants also cooperate in producing the data in a usable format).

2. Subjects and Timing of Discovery – Rule 26(f)(3)(B)

The Parties' positions as to the specific dates for Non-Expert and Expert Discovery Cut-Off are set forth below and in Exhibit A. The Parties' positions as to the subjects on which discovery may be needed, and whether discovery should be conducted in phases or be limited to or focused on particular issues, are as follows:

United States and Relator's Position:

Many of the key issues in this case are purely legal issues because the underlying facts are undisputed and most of those legal issues have already been decided by the Ninth Circuit in *Swoben*. Discovery is therefore unnecessary to resolve these legal issues. In particular, the "materiality" of Defendants' submission of false risk adjustment data and false Risk Adjustment Attestations (pursuant to which they certified that the diagnoses they submitted for payment were accurate and truthful) are purely

legal issues and the Ninth Circuit has already recognized the materiality of the attestations. In addition, Defendants' "actuarial equivalence" affirmative defense raises a purely legal issue about the meaning of that term as used in Part C of Medicare Statute. Accordingly, discovery relating to the "materiality" and "actuarial equivalence" issues should be precluded or, at a minimum, limited by the Court pursuant to Rule 26(b)(1).

Plaintiffs believe that discovery, including third party discovery, should focus on the results of Defendants' medical record reviews conducted as part of their Chart Review, Claims Verification, and RACCR Programs; Defendants' knowledge (as that term is defined by the FCA) about inaccurate or untruthful diagnoses submitted by providers, including diagnoses unsubstantiated by the providers' medical records; Defendants' knowledge (as that term is defined by the FCA) about their obligation to submit accurate and truthful risk adjustment data to Medicare for risk adjustment payments, including the obligation to submit diagnoses substantiated by beneficiaries' medical records; Defendants' knowledge (as that term is defined by the FCA) about their obligation to retract, withdraw, or delete inaccurate or untruthful risk adjustment data submitted to Medicare, including the obligation to retract, withdraw, or delete diagnoses unsubstantiated by beneficiaries' medical records; Defendants' submission of inaccurate or untruthful risk adjustment data to the Medicare; Defendants' processes and procedures for submitting risk adjustment data to CMS and for withdrawing, retracting, or deleting such data; Defendants' failure to retract, withdraw, or delete inaccurate or untruthful risk adjustment data; Defendants' communications with CMS about the above-mentioned issues; Defendants' contractual and financial relationship with their "incentivized" capitated and gainsharing providers; the unsubstantiated and invalid diagnoses that incentivized providers reported to Defendants and Defendants submitted to CMS for risk adjustment payments; any affirmative defenses asserted by Defendants that cannot be addressed as a matter of law (*e.g.*, advice-of-counsel, good faith reliance); and damages.

Plaintiffs propose that discovery proceed in phases and we describe these phases in detail below. We believe that this approach is warranted to ensure that this very large

case be conducted in the most efficient manner both for the Court, the parties, third parties, and witnesses. We also strongly believe that fact witness depositions should begin after (i) the Court resolves Defendants' Motion to Dismiss this action and any other initial or early-phase dispositive motions on any aspect of the Parties' claims, arguments, and/or defenses; (ii) the parties produce substantially all relevant documents to each other relating to the fact witnesses; and (iii) privilege issues and issues relating to the appropriate scope of discovery are resolved. Otherwise, there is a significant risk that the same witnesses will be deposed multiple times and that the Court will be unnecessarily burdened with multiple motions for protective orders and motions to compel.

Plaintiffs also do not believe that Defendants' proposal that non-expert discovery be cut-off on December 17, 2018, is realistic. Defendants previously represented that they will not even complete their production of documents in response to Plaintiffs' first set of document requests until January 2019 and, the depositions of fact witnesses should not proceed until their production is at least substantially completed. Plaintiffs should not be required to depose fact witnesses before Defendants produce their documents.

Phase One:

- The parties should focus on the completion of production of documents; the resolution of objections to the production of documents based on relevancy, burden, etc.; and the resolution of privileges being asserted to withhold the production of documents. It is likely that the Court's intervention may be required to resolve objections and privilege issues and, thus, that the parties will need to brief these issues. Resolution of these objections and privilege issues before fact witness depositions will streamline such depositions and ensure that they are conducted appropriately.
- By March 30, 2018, Defendants must disclose in writing whether they will rely on an advice of counsel, and/or good faith reliance defense, and describe their defense(s) in sufficient detail to permit Plaintiffs to conduct relevant discovery.

Disclosure of this information under the proposed deadline will permit Plaintiffs to seek additional discovery on these issues during phase 1, including documents over which Defendants waive privilege, as applicable, through assertion of the defense(s).

- By April 27, 2018, Defendants must complete their production of documents and data responsive to damages-related discovery requests and subpoena that have been served. After the production of the data, Defendants must work cooperatively with Plaintiffs to explain and answer questions concerning the data produced, including explaining the format and source of the data, and any abbreviations. The Court's imposition of this intermediate deadline on Defendants ensures that Plaintiffs will have sufficient time to review Defendants' production of documents and data needed to compute damages, to clarify or resolve any issues, to take depositions of fact witnesses knowledgeable about such documents and data, and to prepare the required disclosures of damages expert witness(es) before opening expert reports are due.
- The parties may take discovery relating to the preservation, collection, and production of documents, including the Defendants' production of data requested by the United States and Relator in order to compute damages.
- The parties may serve subpoenas on third parties in order to obtain documents from them. For example, based on objections that Defendants have asserted to Plaintiffs' document requests for information about the results of their Chart Review Program, Plaintiffs may need to serve third party subpoenas on companies and individuals that Defendants employed to review medical records as part of its Chart Review Program in order to obtain the results of these reviews. At this time, it is unclear to Plaintiffs why Defendants do not possess the results of these reviews as it submitted numerous diagnoses to CMS based on these results. As another example, the United States and Relator will seek medical records from incentivized providers who were outliers (i.e., diagnosed certain medical

conditions at unusually high rates) and whose diagnoses had high invalidation rates based on the results of Defendants' RACCR reviews. Plaintiffs are seeking information (through interrogatories) from Defendants identifying the beneficiaries whom those incentivized providers diagnosed with those conditions in order to serve the providers with subpoenas for those beneficiaries' medical records. Until Defendants produce the information identify these beneficiaries, we cannot serve the providers with the subpoenas requesting their medical records. Review of those medical records will enable the United States and Relator to identify the unsubstantiated diagnoses that Defendants submitted to the Medicare Program but deliberately ignored or recklessly disregarded.

- The parties may also propound interrogatories on each other. Plaintiffs propose that each side may, without taking leave of Court, serve up to 30 interrogatories.
- The parties may also serve requests for admissions, which number should not be limited.
- Plaintiffs anticipate that Phase I will be the principal phase for written and document discovery, although the parties will not be precluded, prior to the close of fact discovery, from submitting additional discovery requests to address discrete issues that arise or become clear later in the litigation, or to establish the authenticity and admissibility of documentary evidence if those evidentiary issues cannot be resolved cooperatively. Plaintiffs estimate that the first phase of discovery can be completed by October 2018. This would provide the parties with six months to depose fact witnesses and complete non-expert discovery by May 3, 2019 (18 weeks before the proposed trial date of December 3, 2019).

Phase Two:

- During this phase, the parties should focus on conducting fact witness depositions. Plaintiffs estimate that they will need 100 hours for depositions of fact witnesses and an additional 14 hours for depositions of corporate entities conducted pursuant to Rule 30(b)(6) (such depositions and topics may be the subject of more than one

notice) and estimate that this phase of discovery can be completed in approximately six months, starting in November 2018 and ending by May 3, 2019. This estimate is based on the assumptions that (i) Defendants will work informally and cooperatively with Plaintiffs to provide the information necessary for us to understand the documents and data that they provide necessary to compute damages, which would require additional time to depose fact witnesses knowledgeable about the data; and (ii) there are no major issues concerning the authenticity and admissibility of documents, which would also require additional time to depose fact witnesses. We agree that the customary limitations regarding the duration of depositions (seven hours) should remain, and that no individual will be deposed more than once without a showing of good cause and leave of court.

Phase Three:

- By June 15, 2019, approximately six weeks after the close of fact witness depositions, the Parties should make expert testimony disclosures pursuant to Rule 26(a)(2) addressing issues on which they bear the burden of proof. At this time, Plaintiffs anticipate that their disclosures will include experts on risk adjustment under Parts C and D of the Medicare Program; experts on diagnosis coding; and damages experts. However, because the Court has not yet ruled on various issues, Plaintiffs' disclosures may include other types of experts. Because of this uncertainty, it is also difficult to estimate the amount of time needed to conduct expert discovery, but Plaintiffs' current estimate is that responsive expert reports would be due by July 31, 2019, approximately six weeks after the opening expert reports, and expert depositions would be completed by August 27, 2019, approximately four weeks after the service of responsive reports and 14 weeks before the proposed trial date of December 3, 2019. Accordingly, at this time, we estimate that expert discovery can be completed by August 27, 2019. Expert depositions should also be limited to 7 hours for each expert. In addition, as

previously stated, Plaintiffs' ability to make their initial damages expert disclosures will depend on Defendants' production of the requested documents and data by August 2018.

Both Rule 16(c)(2)(F) and Rule 26(d)(3) provide that the Court may properly entertain a proposal to sequence or phase discovery, and Judge Fitzgerald's standard Order Setting Scheduling Conference contemplates the use of phased discovery. The Court should therefore consider the Plaintiffs' proposal set forth above.

UnitedHealth's Position:

The staged discovery process proposed by the United States appears intended to prevent UnitedHealth from obtaining the evidence it believes necessary to defend this case: the proposed restrictions and controls on discovery advocated by the United States will frustrate UnitedHealth from securing relevant and necessary evidence promptly. In this case, the United States already possesses a vast amount of documentary and testimonial information it obtained from UnitedHealth and other sources. UnitedHealth anticipates needing extensive discovery from the United States in order to prepare its defenses, including discovery relating to: the manner in which risk adjustment factors are calculated; CMS' knowledge of UnitedHealth's and other MA Plans' chart reviews and its awareness of industry-wide diagnostic coding error rates and data verification practices during the relevant time period; any attempts by the United States to calculate a Medicare fee-for-service error rate; information concerning what those error rates are and their impact on payment calculations; the United States' analysis of the assumptions and disclosures contained in UnitedHealth's bids; the meaning of the "reasonable diligence" standard; the decision not to finalize the medical record review rule; meetings and communications between UnitedHealth and CMS regarding its obligations to perform a "two-way-look" in light of this proposed rule; and the May 2014 overpayment rule. UnitedHealth will also seek discovery, including third-party discovery, to identify what information, if any, Relator possesses, how Relator obtained that information, and the source of that information. UnitedHealth expressly reserves the right to conduct

discovery on additional subjects and from additional persons or entities as necessary and appropriate, and to make appropriate objections to discovery requests.

UnitedHealth does not believe that phasing of discovery is necessary or appropriate in this case and respectfully submits that it is an improper attempt by the United States to impede UnitedHealth's efforts to defend itself. Rather than lead to a more efficient discovery process, the United States' proposal would prejudice UnitedHealth, and lead to both protracted discovery and increased costs. For example, if UnitedHealth is unable to depose certain witnesses at the outset, it will suffer delay in its attempt to effectively outline the scope of necessary documents and other materials it may need.

Moreover, phased discovery would further delay UnitedHealth's access to key fact witnesses and prejudice its ability to mount an effective defense in this action. As noted above, for over five years, UnitedHealth has produced over 600,000 documents, compiled detailed responses to dozens of complex interrogatories, and produced more than twenty witnesses for Civil Investigative Demand oral examinations. While document productions are ongoing,[4] UnitedHealth requires the ability to take testimony of a number of current and former government executives to effectively begin the defense of this action and to identify potential other sources of documents and relevant information. However, by the United States' proposal, UnitedHealth would be precluded from doing so for another *ten months*. Such an imbalance in the parties' access to witnesses is antithetical to the spirit and purpose of the discovery rules, which advocate for liberal and expeditious discovery and mutual knowledge of all relevant facts. For similar reasons, Judge Segal noted during the Parties' informal discovery conference on November 20, 2017, that there is no such rule in the Federal Rules that

[4] Contrary to the United States' assertion that UnitedHealth previously represented that it would not complete its production of documents in response to the United States' first set of document requests until January 2019, during the Parties' meet and confer on December 14, 2017, UnitedHealth stated that it anticipated finishing productions *well in advance* of January 2019. UnitedHealth clarified the record on this point during the 26(f) process but the United States persists in misrepresenting UnitedHealth's position.

says a party is entitled to complete written discovery or to resolve written discovery prior to the beginning of depositions. And, indeed, the Federal Rules of Civil Procedure do not contemplate the proposed phasing of discovery the government advocates.

The United States' suggestion that depositions should only begin after the Court resolves UnitedHealth's pending Motion to Dismiss is similarly unjustified. The United States in essence seeks a stay of depositions during the pendency of the Motion, which is not provided for in the Federal Rules—otherwise, a case could be pending for months before significant progress in the litigation is made. Similarly, the United States' conclusory and generalized assertion that there will be privilege issues does not justify postponing the commencement of depositions. Privilege issues exist in most cases, yet most cases do not stall the commencement of depositions for close to a year and a half after a complaint is filed, particularly where one side has already had access to more than twenty witnesses. The propriety of a privilege assertion cannot be addressed in a vacuum; it needs to be addressed in the context of a specific question and the assertion of privilege in response. The ordinary course is to resolve questions about the assertion of privilege in the specific contexts in which they arise, so that the Court has a specific topic to address. Phased discovery would also introduce significant disputes regarding whether certain discovery should or should not have been conducted during a particular phase – disputes for which there is no case law or guidance in the Federal Rules. Moreover, UnitedHealth does not agree to disclose whether it will rely on any specific defense by any date unilaterally imposed by the United States. Such a deadline is not mandated by the Federal Rules of Civil Procedure.

Finally, the United States' proposed imposition of a unilateral deadline on UnitedHealth to complete production of documents responsive to damages-related discovery requests by April 2018 is unreasonable and inequitable, particularly in light of the fact that the United States has itself failed to produce a single document in this matter. UnitedHealth is willing to work cooperatively with the United States to engage in mutual exchanges of information and to comply with is obligations under the Federal

Rules.

3. Electronically Stored Information – Rule 26(f)(3)(C)

The Parties are aware of their duties regarding the preservation of discoverable information. The Parties have taken reasonable measures to comply with those duties as required by the Federal Rules of Civil Procedure and the Local Rules. The Parties have met and conferred pursuant to Federal Rule of Civil Procedure 26(f), and each represented that steps have been taken to preserve evidence relevant to this litigation. The Parties have agreed to a protocol for the exchange of Electronically Stored Information that is being filed simultaneously with this Rule 26(f) report.

4. Privilege Issues – Rule 26(f)(3)(D)

The Parties are negotiating a proposed protective order governing non-waiver of privilege and protected material. Once an agreement is reached, the Parties will request that the Magistrate Judge enter an order pursuant to Federal Rule of Evidence 502(d).

5. Changes to Federal and Local Rules – Rule 26(f)(3)(E)

United States and Relator's Position: The changes that we propose are set forth in our proposed discovery plan set forth in Section J.2 above.

UnitedHealth's Position: UnitedHealth reiterates that phased discovery is inappropriate in this case. Exhibit A, and Subsections K and L below, address UnitedHealth's position on the timing of discovery and proposed discovery deadlines. UnitedHealth disagrees with the government's hour-based calculation of depositions. UnitedHealth's position is that each side will likely need more than the 10 depositions permitted by the Federal Rules without leave, and that the Parties should meet-and-confer as the need for additional depositions matures. UnitedHealth agrees with the government's proposal of 30 interrogatories by the United States and Relator jointly and 30 interrogatories by UnitedHealth.

6. Other Orders – Rule 26(f)(3)(F)

United States and Relator's Position: As discussed above, we request that the Court issue an order, pursuant to Rule 16(b)(3)(B)(i) and 16(c)(2)(F), modifying the

timing of initial disclosures under Rule 26(a)(1)(A)(iii) relating to damages. Pursuant to Rule 16(b)(3(B)(ii), we also request that the Court limit the scope of discovery to only factual issues and preclude discovery relating to purely legal issues, including materiality and actuarial equivalence. In addition, pursuant to Rule 16(c)(2)(C), we believe it may benefit the case to make rulings in advance on the authenticity and admissibility of certain evidence. This would include evidence that may be relied upon for summary judgment motions as well as trial. Accordingly, Plaintiffs request that the parties be permitted to file motions relating to authenticity and admissibility of documents any time six weeks before the trial date.

In addition, the parties are negotiating a proposed order under Federal Rule of Evidence 502(d). The Parties are also in the process of preparing a stipulated protective order regarding confidentiality. The Parties will submit this proposed order for the Magistrate Judge's consideration and approval.

UnitedHealth's Position: UnitedHealth objects to the limiting of discovery pursuant to Rule 16(b)(3)(B)(ii). UnitedHealth believes that any supposed regulatory violations were not material to the CMS' decision to pay UnitedHealth and is entitled to discovery on this topic, including discovery of facts which are relevant to UnitedHealth's ability to establish this and other defenses, including the views of CMS employees about the ambiguous regulatory requirements here at issue, which is relevant to scienter.

K. Discovery Cut-Off

United States and Relator's Position:

Plaintiffs propose that the non-expert discovery cut-off date be May 3, 2019.

UnitedHealth's Position:

UnitedHealth proposes that the non-expert discovery cut-off date be December 17, 2018.

L. Expert Discovery

The Parties agree to disclose expert witnesses consistent with the Federal Rules of Civil Procedure, the Local Rules, and any order entered by this Court. Plaintiffs'

position with respect to the timing of expert witness disclosures (initial and rebuttal) and the expert discovery cut-off date (August 26, 2019) are set forth in Section J.2 above (its discovery plan) and Exhibit A.

UnitedHealth proposes the following dates for expert witness disclosures and expert discovery cut-off under Rule 26(a)(2).

Expert Disclosure – Initial	January 7, 2019
Expert Disclosure – Rebuttal	January 21, 2019
Completion of Expert Discovery	February 4, 2019

M. Dispositive Motions

On December 8, 2017, Defendants filed a motion to dismiss the United States' Amended Complaint. Pursuant to a stipulation filed by the parties, the Court issued an Order scheduling a hearing on this motion on January 29, 2018. One of Defendants' grounds for dismissal is that the United States has failed to adequately allege materiality. The United States will oppose this motion and also intends to file a motion for partial summary judgment on materiality because it is a purely legal issue. The United States also intends to file a motion for partial summary judgment on the "actuarial equivalence," as that, too, presents a purely legal issue. The United States may file other motions, including motions for summary judgment or partial summary judgment, on other issues concerning liability, damages, and issues raised in Defendants' answer to the Amended Complaint. Plaintiffs may also file motions *in limine* because certain issues or defenses may be determined earlier on by such motions, especially with respect to the authenticity and/or admissibility of certain documents created by Defendants for purposes of litigation.

UnitedHealth anticipates filing motions or cross motions for summary judgment, at the appropriate time and after the Parties have had the opportunity to conduct meaningful discovery. As noted above in Section J, the United States has not yet produced a single document in this case. Moreover, UnitedHealth's Motion to Dismiss is pending and no Answer or defenses have been filed in this matter. The filing of any

summary judgment motion is drastically premature at this point in the litigation.

UnitedHealth proposes the last date to hear summary judgment motions be February 11, 2019.

N. Settlement/Alternative Dispute Resolution (ADR)

In October 2016, pursuant to a request made by Defendants, the United States made a presentation to Defendants about their liability under the False Claims Act. After this presentation, Defendants' counsel notified the United States that it was not interested in discussing a settlement of this matter.

UnitedHealth's Position: In October 2016, the United States made a presentation concerning this case in which it refused even to acknowledge UnitedHealth's myriad defenses and asserted no formal settlement demand; accordingly, UnitedHealth did not make any settlement offer either. Based on the one-sided presentation the United States made in October 2016 and other discussions, UnitedHealth respectfully believes that settlement discussions are unlikely to be productive at this time.

A Notice to the Parties of Court-Directed ADR Program was entered on November 22, 2016, when this action was transferred to this Court. Dkt. No. 54. Pursuant to Local Rule 16-15.2, the Parties are filing concurrently a Request: ADR Procedure Selection. The Parties have agreed on ADR Procedure No. 3 (private dispute resolution).

O. Trial Estimate

Plaintiffs estimate that their presentation of the case at trial will take approximately 10 days and include approximately 20 witnesses (including experts), depending on whether the Court agrees that certain key issues are purely legal issues, the Court's resolution of dispositive motions, the Court's resolution of evidentiary issues prior to trial, the parties' stipulation to the authenticity and admissible of documents, and the parties admission of undisputable facts. Plaintiffs estimate that Defendants' presentation of their defenses should take an equal or less number of days. Accordingly, Plaintiffs have estimated a total of 20 days.

Defendants estimate that the trial will take 24 to 32 days, including presentations by both sides. UnitedHealth anticipates calling 25-30 witnesses at trial, including experts.

The Parties reserve their rights to modify these estimate as the case progresses and to ask for additional time for rebuttal witnesses.

P. Trial Counsel

United States: Carol Wallack, Justin Draycott, Paul Freeborne, John Lee, Jessica Krieg, and Paul Perkins from the U.S. Department of Justice.

Relator: Eric R. Havian, Jessica T. Moore, Henry C. Su, from Constantine Cannon; William Christopher Carmody, Arun Subramanian, from Susman Godfrey; and Stephen S. Hasegawa from Phillips & Cohen.

Defendants: David J. Schindler, Daniel Meron, Kathryn H. Ruemmler, and Abid R. Qureshi.

Q. Independent Expert or Master

At this time, the Parties do not anticipate a need for an independent expert or master.

R. Timetable

The Parties' completed Schedule of Pretrial and Trial Dates is attached as Exhibit A.

S. Other Issues

At this time, the Parties do not have other issues.

Respectfully submitted,

Dated: December 22, 2017

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Attestation

I hereby attest that the other signatories listed, on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

Dated: December 22, 2017

/S/ John E. Lee

JOHN E. LEE
Assistant United States Attorney

JUDGE MICHAEL W. FITZGERALD
SCHEDULE OF PRETRIAL AND TRIAL DATES WORKSHEET

Case No.	16-08697
Case Name	United States ex rel. Poehling v. UnitedHealth Group, Inc. et al

Matter	Plaintiff(s)' Date mo / day / year	Defendant(s)' Date mo / day / year	Court Order
[☑] Jury Trial *or* [☐] Court Trial **(Tuesday at 8:30 a.m.)** Duration Estimate: _____ Days	12/3/2019; duration estimate - 20 days	5/28/2019; duration estimate - 24-32 days	
Final Pretrial Conference [LR 16] and Hearing on Motions *In Limine* **(Monday at 11:00 a.m. -- three (3) weeks before trial date)** Motions *In Limine* must be filed **three (3) weeks** before this date; oppositions are due **two (2) weeks** before this date; no reply briefs.	11/4/2019	5/6/2019	

Event	Weeks Before Trial	Plaintiff(s)' Date mo / day / year	Defendant(s)' Date mo / day / year	Court Order
Last Date to Hear Motion to Amend Pleadings / Add Parties		10/29/2018	10/29/2018	
Non-Expert Discovery Cut-Off (at least 4 weeks before last date to hear motions)	18	5/3/2019	12/17/2018	
Expert Disclosure (Initial)		6/15/2019	1/7/2019	
Expert Disclosure (Rebuttal)		7/31/2019	1/21/2019	
Expert Discovery Cut-Off	14 *	8/26/2019	2/4/2019	
Last Date to ***Hear*** Motions (**Monday at 10:00 a.m.**)	14	8/26/2019	2/11/2019	
Last Date to Conduct Settlement Conference	12	9/9/2019	3/4/2019	
For Jury Trial ♦ File Memorandum of Contentions of Fact and Law, LR 16-4 ♦ File Exhibit and Witness Lists, LR 16-5.6 ♦ File Status Report Regarding Settlement ♦ File Motions *In Limine*	6	10/14/2019	4/15/2019	
For Jury Trial ♦ Lodge Pretrial Conference Order, LR 16-7 ♦ File Agreed Set of Jury Instructions and Verdict Forms ♦ File Statement Regarding Disputed Instructions, Verdicts, etc. ♦ File Oppositions to Motions *In LImine*	5	10/21/2019	4/22/2019	
For Court Trial ♦ Lodge Findings of Fact and Conclusions of Law, LR 52, and Summaries of Direct Testimony	3			

* The parties may choose to cut off expert discovery prior to MSJ briefing.

ADR [LR 16-15] Selection:

☐ Attorney Settlement Officer Panel ☑ Private Mediation ☐ Magistrate Judge (with Court approval)

EXHIBIT A