

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
3 HONORABLE MICHAEL FITZGERALD U.S. DISTRICT JUDGE
4

5 UNITED STATES ex rel)
6 BENJAMIN POEHLING,)
7)
8 Plaintiffs) CV-16-8697-MWF
9 VS)
10)
11 UNITEDHEALTH GROUP, INC.,)
12 et al,)
13)
14 Defendants)
15

16 REPORTER'S TRANSCRIPT OF PROCEEDINGS
17

18 LOS ANGELES, CALIFORNIA
19

20 Monday, January 29, 2018
21

22
23 Amy C. Diaz, RPR, CRR, FCRR
24 U.S. Official Court Reporter
25 350 W. 1st Street, #4455
Los Angeles, CA 90012
www.amydiazfedreporter.com

APPEARANCES OF COUNSEL:

For the Plaintiffs

CAROL WALLACK
U.S. Department of Justice
P.O. Box 261
Washington, D.C. 20044

JOHN E. LEE
U.S. Department of Justice
Central District of California
300 North Los Angeles Street
Suite 7516
Los Angeles, CA 90012

EDWARD CROOKE
U.S. Department of Justice
175 N Street NE 12410-202
Washington, DC 20002

MARK JUSTIN DRAYCOTT, ESQ.
U.S. Department of Justice
601 D Street NW Room 9135
Washington, DC 20004

ARUN SUBRAMANIAN, ESQ.
Susman Godfrey LLP
1301 Avenue of the Americas
32nd Floor
New York, NY 10019

CATRIONA LAVERY, ESQ.
Susman Godfrey LLP
Suite 1400
1900 Avenue of the Start
Los Angeles, CA 90067

For the Defendant
UnitedHealth Group

DAVID SCHINDLER, ESQ.
Latham & Watkins LLP
355 South Grand Avenue
Los Angeles, CA 90071

DANIEL MERON, ESQ.
Latham & Watkins LLP
555 Eleventh Street NW
Suite 1000
Washington, D.C. 20004

1 THE CLERK: Calling item number three, *United States*
2 *of America ex rel. Benjamin Poehling vs. UnitedHealth Group,*
3 *Inc., et al.*

4 Counsel, state your appearances, please.

5 MR. LEE: Good morning, Your Honor. John Lee on
6 behalf of the United States.

7 MR. CROOKE: Good morning, Your Honor. I'm Ed Crooke
8 on behalf of the United States.

9 MR. SUBRAMANIAN: Good morning, Your Honor. Arun
10 Subramanian from Susman Godfrey on behalf of the Relator
11 Benjamin Poehling.

12 MR. DRAYCOTT: Good morning, Your Honor, Justin
13 Draycott on behalf of the United States.

14 THE COURT: Good morning, counsel.

15 MR. SCHINDLER: Good morning, Your Honor. David
16 Schindler on behalf of Defendant United.

17 MR. MERON: And good morning. It's Daniel Meron on
18 behalf of United.

19 THE COURT: Counsel, let me compliment both sides,
20 and in particular the defendants, on the quality of the
21 briefing. I -- it's clearly a complicated factual situation
22 reflecting a complicated regulatory regime. And when I first
23 started looking at the briefs, the idea that the argument
24 that was being made about materiality in regard to the
25 second, third and fourth claims, just was not something I was

1 terribly sympathetic to. And it -- it would -- it definitely
2 was -- the briefs kind of force me, I felt, into a corner
3 where that just seemed to be the case that was reluctant -- I
4 reluctantly came to that conclusion.

5 So with that, let me hear first from the plaintiff,
6 I guess, the Government first, and then Mr. Poehling, if his
7 counsel wishes to be heard, and then I'll hear from the
8 defense. Obviously, the defense is free to argue as well
9 about the First Amended -- the first claim and the actual
10 alleged misrepresentations in the data.

11 So go ahead, counsel.

12 MR. CROOKE: Thank you, Your Honor.

13 At page 16, it seems that your concern is stated as
14 that the First Amendment Complaint does not specifically
15 allege that CMS's risk adjustment payments to defendant would
16 have changed if CMS had known that the defendant's
17 attestations were false.

18 The focus of the inquiry, Your Honor, is the
19 specific regulatory violation that underlies those
20 attestations. The Government -- it's not enough for the
21 Government to just know generally that the attestation is
22 false. The attestation is false because the defendants
23 violated their underlying contractual obligation to submit
24 accurate diagnosis data. And if they had information about
25 diagnosis codes that were invalid and they failed to delete

1 those diagnosis codes, then their attestation is inaccurate.

2 THE COURT: Let me respond to that this way: It's
3 an interesting thing where, you know, as a former litigator I
4 like to know, or at least anticipate what the consequences
5 are of my rulings. Although here I guess the argument could
6 be made that this is really a pure decision of law, because
7 frankly, I really just don't know whether, in making this
8 ruling, it's -- it's a word game and you are going to
9 immediately file another Complaint which recites the magic
10 words, or whether there is, as at least the defense hints,
11 and is lurking in the background, it's just for some reason
12 impossible for you to do so. Because I would have thought,
13 frankly, based on what is happening, and what has happened in
14 the related cases, for that matter, that you would have -- it
15 would already have been taken care of. And you don't
16 necessarily have to answer that. It could almost at some
17 point, I guess, be seen as like a work product thing, or
18 making a concession that might not prove too helpful in the
19 Ninth Circuit.

20 But I really -- it's just -- I'm kind of curious as
21 to why this wasn't done the first time, or whether -- what is
22 your sense of this. Are these -- is this just asking you to
23 go through the motions and everything is going to be fine, or
24 am I asking you to do something which you, in fact, are
25 incapable of doing and this is tantamount to the complete

1 dismissal on legal grounds of the second and third and fourth
2 claims?

3 MR. CROOKE: Your Honor, Judge Walter in his decision
4 made it -- identified one factor that the Court should
5 consider of the *Escobar* test. That was whether the
6 Government would pay, if it had known that -- about the
7 underlying false claims that -- I'm sorry -- that the -- if
8 the Government had known about their chart review program.

9 Just knowing -- and the Government addressed that in
10 its Complaint. We don't have to speculate about what the
11 Government would have done if it had known about their chart
12 review program. Just days before their attestation was due
13 in 2014, United came to the Government and said that it was
14 discontinuing its chart review program. And at that time the
15 Government told United to delete the invalid diagnosis codes.
16 They followed up and made clear to United that if they failed
17 to delete invalid diagnosis codes, those obligations could
18 give rise to a False Claims Act case.

19 THE COURT: Why wouldn't that be the first claim
20 instead of the second, third and fourth claims?

21 MR. CROOKE: Why wouldn't the -- I'm sorry?

22 THE COURT: I'm just saying -- I hear what you are
23 saying, but I'm not sure why that is getting to the issue
24 which was identified as to the second, third and fourth
25 claims.

1 MR. CROOKE: Once the Government had knowledge about
2 the specific reason that the attestations were false --
3 again, just generally knowing that the attestations are false
4 is not enough for the Government to take action. Once the
5 Government knows that there are specific diagnosis codes that
6 have not been deleted, which is the obligation, which is what
7 the attestation is saying, it's saying they don't have
8 information that there are specific diagnosis codes that need
9 to be deleted. Once they have that information, once they
10 knew what the underlying regulatory violation was and the
11 specific implications of it, well, then it just explains
12 that, you know, the Complaint is clear that they would have
13 either not paid for those diagnosis codes or, as in this case
14 where it's that the time of the attestation would have
15 recouped the money associated with those diagnosis codes. We
16 are very clear on that. And so once the Government has that
17 sufficient knowledge that there is the underlying -- that
18 there is -- the attestation is false and the reason it's
19 false, the reason it's false is because the diagnosis codes
20 are invalid, then the Government can recover that amount of
21 money.

22 Moreover, it's not just a binary, will the
23 Government pay or would not the -- would the Government not
24 pay? The attestation itself states that United -- in the
25 attestation United acknowledges that the underlying data it's

1 submitting affects the Government's payment, and that
2 inaccuracies regarding that data could lead to FCA liability.

3 It's not a coincidence that United was, in speaking
4 to the Government days before their attestation, was due to
5 talk about what their obligations were under the false --
6 under the Medicare rules, and their concern was the
7 possibility of FCA liability if they submitted an inaccurate
8 attestation.

9 It's clear from the -- the preamble to the
10 regulations that establish the attestation that the agency
11 viewed the attestation as a claim. They identified it as a
12 claim. They align the knowledge requirement of the
13 attestation information knowledge and belief with the
14 requirement -- the intent requirement under the False Claims
15 Act.

16 So it's very clear -- and that is what happened in
17 this case. The Government continued to investigate. Once it
18 determined the manner in which the attestations were false,
19 the specific diagnosis codes, it brought this action to
20 recover single damages, trebles and penalties. And there is
21 no requirement that the agency do both, that the agency both
22 pursue an administrative recovery of that amount of money and
23 a False Claims Act action. This is a full and complete
24 remedy in this Court.

25 THE COURT: What you are arguing, then, is -- which

1 of course you are perfectly free to do, and you did in the
2 briefs -- that what is currently in front of me is sufficient
3 to show the materiality of the attestations. That is not the
4 same as answering the question I asked you. But I also said
5 you don't have to answer it, which is am I asking you to do
6 something which you are incapable of doing in the next
7 Amended Complaint in regard to the second, third and fourth
8 claims?

9 So is -- is there anything else that you would like
10 to say, then, going to the materiality of the attestations
11 themselves, and not slopping over, which I think I deal with
12 in the tentative, as to why there is a different result as to
13 the actual underlying data in the first claim?

14 MR. CROOKE: I think the point that I would make,
15 Your Honor, is the attestation is identified, as Your Honor
16 recognizes, as a bulwark against fraud. The attestation has
17 specific consequences that are identified both in the
18 attestation itself, that civil liability is a potential
19 result of the attestation, and that the Government has
20 alleged that if it were aware of the specific diagnosis
21 codes, that it would not have paid those diagnosis codes.

22 The discussion that the defendants raise about how
23 the Government would not have -- could not make the
24 attestation requirement because of this side issue of actuary
25 equivalence, that truly is a side show. The defendants argue

1 that the Government is obligated to -- that the -- the
2 defendants argue -- point to a separate provision of the
3 Medicare statute and argue that because of that, the
4 Government is required to pay on an actuarial equivalent
5 basis with fee-for-service providers. And if they were
6 required to submit an attestation and delete invalid codes
7 and that they would somehow be violating the sanctity or the
8 integrity of the data that they receive from their providers,
9 and submit to CMS in order to establish their risk adjustment
10 rates. But that is truly a side show, Your Honor. They were
11 already reviewing those diagnosis codes and submitting
12 additional diagnosis codes. They were mining those records
13 for additional diagnosis codes. So the argument that somehow
14 they were unable to make deletes or were not required to make
15 deletes is just not accurate.

16 The requirement that they submit diagnosis codes
17 that are supported by the medical record and that they file
18 attestations attesting to the validity of their data, the
19 accuracy, truthfulness and completeness of the data are
20 long-standing regulatory requirements, and CMS has never said
21 to United that they are relieved of those obligations, and
22 they certainly haven't done so with respect to the separate
23 actuarial equivalence requirement.

24 United raised a similar argument in front of the
25 Ninth Circuit in *Swoben* pointing to data submission

1 requirements, and the Ninth Circuit rejected that argument
2 out of hand. The Ninth Circuit's arguments -- decision in
3 *Swoben* focused almost exclusively on the attestation and
4 found that the claims were a valid claim for relief. The
5 Ninth Circuit made it very clear that if United knew that it
6 had diagnosis codes that were not supported by the medical
7 record, and did not delete those diagnosis codes, its
8 attestation was false. We recognize that the Court didn't
9 specifically address materiality in the *Swoben* decision, but
10 this -- it lays the groundwork and the foundation for finding
11 a ruling that the attestations are material in this case,
12 certainly material to the Government's action, which in this
13 case was to investigate the validity of those attestations
14 and to bring this action to recover money that resulted from
15 the underlying violation, the diagnosis codes, and those
16 attestations that were related -- that it related to.

17 THE COURT: Thank you.

18 Very briefly, does Mr. Poehling's counsel have
19 anything to add?

20 MR. SUBRAMANIAN: As brief as I can be, Your Honor,
21 thank you.

22 Really the only point that I want to make is that
23 the Complaint alleges that the false attestations and
24 diagnosis codes were inextricably linked. Because the
25 attestations were at least one way in which United was

1 concealing its scheme from the Government. And that is what
2 is alleged in paragraphs 293 to 295 of the Complaint, also in
3 paragraph 335. So it can't be that the codes are material,
4 but lying about those codes is somehow not material. And
5 there is no case that United has cited in these proceedings
6 that would support that ruling. And the implications of it
7 would be that defendants would have a green light to submit
8 knowingly false attestations to the Government to cover up a
9 scheme of failing to delete codes that are directly linked to
10 payment.

11 THE COURT: Well, counsel -- please, when I speak,
12 please be quiet.

13 MR. SUBRAMANIAN: Absolutely.

14 THE COURT: First of all, this is a rather strange
15 set of facts which are set forth, though, in a way which is
16 cognizable at this point, as the briefing has made clear.

17 The other point in regard to that is if everything
18 you were saying was so true, then I'm still not entirely
19 clear why the Government and the relator are not saying,
20 Fine, do what you want, grant this thing and we are going to
21 come back with another Amended Complaint which is going to
22 give you exactly what you are asking for. If they are -- the
23 very reason that there seems to be a reluctance to make
24 certain explicit representations or allegations in a
25 Complaint suggests to me that there is, in fact, something

1 really here going on.

2 So what is your response to that?

3 MR. SUBRAMANIAN: I hear you, and it may be that the
4 allegations need to be tailored specifically to Your Honor's
5 ruling as you are suggesting.

6 The only thing that I will note is, for instance, if
7 we look at paragraph 336 of the Complaint, the Complaint
8 actually specifically says that by failing to delete these
9 codes, United was unable to represent that their data was
10 accurate, complete and truthful as the attestations require.
11 So it's not that inextricable link between the attestations
12 and the claims are somehow not pleaded in this Complaint.
13 Now, that isn't something that is addressed in the tentative
14 Order, but it is in paragraph 336 of the Complaint.

15 I would also note that paragraph 340 of the
16 Complaint also gets to this point, which when it says: "The
17 attestations required United to make deletes based on
18 information available to it about the negative results of
19 chart reviews."

20 So there are instances in which this Complaint does
21 say, look, if these attestations were truthful, United would
22 have had to delete codes. And in fact, they were aware that
23 that was the implications of this whole process.

24 Now, if that needs to be put together in a more
25 direct way -- because I understand there are a lot of

1 different allegations in the Complaint, I think could do
2 that, but that is something that I think separates this case
3 and the attestations from a lot of the other decisions that
4 United has relied on in this case.

5 THE COURT: All right. Thank you.

6 I'll hear from the defendants and I'll give the
7 Government or the relator a chance to respond to the
8 defendant's arguments in regard to the first claim.

9 Mr. Schindler, let me hear you in regard to the
10 attestations. And then after that, let's deal with the
11 alleged misrepresentations in regard to the underlying
12 diagnosis codes.

13 MR. SCHINDLER: Thank you, Your Honor.

14 First, I would be remiss if I didn't say thank you
15 for your kind comments about the briefing. There are a lot
16 of associates and people who worked very hard who will
17 appreciate that.

18 THE COURT: For the reasons that we've just heard in
19 the argument, it's a somewhat uncounterintuitive, if not
20 silly ruling to make. So if the tentative changes, don't
21 feel it's in any way based on your argument. It is not
22 something which is intuitively obvious. And I'm sure you are
23 going to use that in saying that is all the more reason that
24 the first claim should be dismissed, as well.

25 But go ahead and let me hear about the attestations,

1 as I said, and then I'll hear about the underlying diagnosis
2 codes.

3 MR. SCHINDLER: Sure.

4 First, Your Honor, I think it's important -- you've
5 hit the nail on the head. The question -- and *Escobar* talks
6 about this specifically -- the materiality as to the payment
7 decision by the Government. Would it -- was it material to
8 the payment decision? All the argument that you've heard
9 this morning doesn't go to that question. It dances around
10 it, as you've said. And that is the fundamental crux of what
11 is lacking here and what the plaintiffs have failed to allege
12 and cannot.

13 And indeed, I think in some senses, this goes
14 ultimately to the question of leave to amend. This issue has
15 been teed up with the Government, with Relator, not for the
16 first time today. It was teed up in *Swoben*. It was teed up
17 in our meet and confer. We had the same conversations with
18 them that you've had with them today, which is, look, it's
19 quite clear in *Escobar* what you need to plead to satisfy
20 materiality. You need to plead that if the Government had
21 known about the violation here, the violation, the
22 attestations were false, the Government would not have paid.
23 Can't be anymore direct and any simpler. But it is exactly
24 as you've latched on to here, as you've acknowledged, they
25 cannot do that. And it's for that reason that your decision

1 with respect to Counts Two, Three, and Four is correct. And
2 frankly, it's why I would suggest to you that the decision --
3 the dismissal should be without leave to amend.

4 You've asked them the question, and so in some
5 senses, it's not a hard question to answer. And they've
6 essentially conceded to you here today, albeit not directly
7 in a way that I think you were asking, that they cannot meet
8 that obligation. And it's for that reason, at least with
9 respect to Counts 2, 3 and 4 we would submit that the
10 dismissal should be with prejudice, because nothing is going
11 to change.

12 And it's an important distinction here, because this
13 case has been going on, as you know, for us for more than
14 four, five years. And the dragging out, if you will, is
15 simply going to continue, albeit now until the middle of
16 February under the Court's Order. And if, in fact, there was
17 some sense that something was going to change, I appreciate
18 entirely that the notion of granting leave to amend should be
19 liberally applied. I accept that entirely. Except where you
20 are confronted, and essentially know at this point that
21 nothing is going to change, at that point we respectfully
22 submit that the dismissal should be with prejudice, given the
23 Government's inability to answer directly a very simple
24 question. Which, by the way is, of course, what *Escobar*
25 stands for.

1 Which is a segue into Count One, which I want to get
2 to, but can I, before I get to that, just do a little other
3 housekeeping with you? Because I don't want it to fall by
4 the wayside.

5 THE COURT: Yes.

6 MR. SCHINDLER: With respect to all of the
7 allegations pertaining to payment years 2004 through 2008, if
8 you go to your opinion at page 20, you indicate that the
9 parties seem to be in agreement there. We would ask that you
10 make explicit there for that any claims predicated on payment
11 years 2004 through 2008 are dismissed, they are out of this
12 case, so there is no ambiguity on that front. It's important
13 for the reasons I suspect the Court understands. So that is
14 one housekeeping matter that we would ask you to make
15 explicit.

16 I want to go now to Count One, because
17 essentially -- and I'm turning now in your opinion to page
18 19. And I think there is two things that I would ask you to
19 consider, and there is a section of the plaintiff's brief in
20 opposition that I would like you to consider in that regard.

21 And essentially, the concern that we have, Your
22 Honor, is that, as you note, predates *Escobar*. But the
23 Court's opinion here essentially suggests that there is a
24 distinction between reverse False Claims Act and direct False
25 Claims Act as it relates to what *Escobar* held vis-a-vis

1 materiality.

2 And that is the point that we think the Court should
3 reconsider. Because when you read *Escobar*, there is no such
4 distinction between what kind of False Claims Act case is
5 involved. The materiality discussion in *Escobar* applies with
6 equal force to reverse False Claims Act cases.

7 And in fact, the mischief inherent with trying to
8 parse out reverse False Claims Act from a straight false
9 claims or direct False Claims Act case as it relates to
10 materiality is evident here. And indeed, the Court in
11 *Escobar* was quite clear about the fact they were trying to
12 rein in an effort to overreach on the Government's part.

13 And essentially what happens, and what the
14 Government is urging this Court to conclude, is that you
15 could take any direct False Claims Act case and turn it on
16 its head, make it a reverse False Claims Act case, and
17 somehow not have to plead materiality.

18 *Bourseau* predated *Escobar*. And in your formulation,
19 even when you talk about the fact at the bottom of the, what
20 is the large paragraph in the center, and you indicate,
21 "Although the case is pre-*Escobar*, the Ninth Circuit applied
22 a materiality standard quite similar to the one articulated
23 by the Supreme Court in *Escobar* and concluded that the cost
24 reports were material because they had the potential effect
25 or natural tendency." That is not the standard in *Escobar*.

1 *Escobar* has a much higher standard than potential affect.
2 And that distinction is key. It's crucial.

3 It segues into the questions you were asking on
4 Counts Two, Three and Four. *Escobar* says to be material, the
5 Government has to allege that the violations would have
6 impacted the payment decision.

7 Now, there is another part here that is quite
8 significant, and it's, as you asked, this notion of, you
9 know, is this sort of a silly opinion? Are the issues silly?
10 Does the codes versus the attestation -- all the questions,
11 and they are fair questions because it gets a little
12 confusing. But it's important here to recognize the
13 distinction between the violations versus having codes that
14 are unsupported. Because it gets mushed together, and the
15 plaintiffs want to mush them together, and it's significant
16 to pull them apart.

17 And indeed, if you go to their opposition to our
18 motion, and you look at page 13, what does the plaintiff say
19 there? First they say -- and this is starting at line 14 --
20 "Instead, under *Escobar* and *Campie*, the issue is how the
21 Government may have responded if it had specific knowledge of
22 the violations" -- now this is key -- "of the violations.
23 Here, the pertinent violations are defendant's knowing
24 failure to delete the invalid diagnosis codes."

25 There is our violations. This is the standard that

1 the Government enunciates at page 13 of its opposition.

2 And then there is some slight of hand. And this is
3 the problem in how these -- how the Government is trying to
4 essentially engineer or reverse engineer out of the problem
5 they have.

6 Because you go to page 17, where they are now
7 discussing how they supposedly meet the standard that is
8 enunciated that even they have picked up. When you go to
9 page 17, starting at line 16, the Government alleges as
10 follows, or says as follows: "The Amended Complaint also
11 alleges that if defendants had complied with their
12 obligation" -- now we are not talking about violations, now
13 we are saying if the defendants had complied, and they've
14 taken and done kind of a slight of hand. They've changed
15 what the standard is. And that is a big, big distinction,
16 and it speaks to the heart of why the first claim here also
17 cannot survive.

18 Essentially what they are doing is trying to read
19 out of Count One what *Escobar* says about materiality. And
20 nothing in *Escobar* supports that proposition. Now, to be
21 sure, there have not been decisions that have come out post
22 *Escobar* that specifically consider materiality in a reverse
23 False Claims Act setting, but I submit if you go back and
24 look at --

25 THE COURT: I understand. Mr. Schindler, you know,

1 I acknowledged this in the tentative. First of all, one
2 straightforward way of dealing with this is that we are so,
3 as Ninth Circuit law, it controls, it still controls, neither
4 the -- *Escobar* does not directly invalidate it. Of course I
5 have to follow the Supreme Court and not the Ninth Circuit,
6 but ideally I am going to follow both. And here in the
7 absence of any Ninth Circuit case acknowledging that *Bourseau*
8 is not the law that applies here, it applies.

9 The other thing -- but even say I was more
10 sympathetic to your *Escobar* argument than that, the problem
11 here is the very nuanced way in which the defendants have
12 separated out the attestations from the codes is working
13 against you here. I mean, I think the -- frankly, if I were
14 as persuaded by some of your arguments as much as you feel I
15 should be, I think it would more incline me to think that
16 maybe I should allow the second, third and fourth ones to
17 stand instead of the reverse, because it's precisely by that
18 you've made -- gotten me to at least tentatively see the
19 wisdom of your approach is by being so relentlessly
20 logical-based about both the assumed facts, the alleged facts
21 on the one hand, and *Escobar* on the other.

22 So when you retreat from that, you are potentially
23 making problems for how I would view overall the case. It's
24 kind of walking in to the point that was made by
25 Mr. Poehling's lawyer, that at some point the two things are

1 so inextricably intertwined it doesn't make sense not to have
2 the rulings rise and fall together.

3 MR. SCHINDLER: In fact, Your Honor -- and to the
4 contrary, I'm not looking to merge them together. Indeed,
5 I'm suggesting to you that what is concrete in two, three and
6 four is equally concrete in one. It's not that they merge
7 together at all. The attestations are exactly what is pled
8 with respect to two, three and four. They are distinct.
9 They are severable, all those things. There is no effort on
10 our part to suggest that that somehow merges into one. If
11 I've in any way even hinted at that, then rewind the tape
12 because I got it wrong, and I'm not communicating to you
13 articulately. I absolutely agree with you. There is indeed
14 an important distinction as to what is pled here.

15 All I'm saying is when you look -- and I'm not
16 suggesting either that you need to disregard Ninth Circuit
17 authority in *Bourseau*. That is not what we are saying,
18 either. We are simply suggesting that with respect to a
19 reverse False Claims Act, that's all I'm suggesting is the
20 same set of analysis. It's not a question of merging codes
21 and attestations. It's simply the same question applies with
22 respect to what happened here.

23 THE COURT: But unlike what the issues that we have
24 previously raised for the attestations, isn't it fair to say
25 that giving the Government and the Relator the benefit of

1 every doubt, and looking at the natural inferences arising
2 from what is alleged in the current version of the Complaint,
3 that there is -- that -- whichever is -- I mean, that
4 whatever the *Escobar* standard of materiality is, in fact, met
5 in a way for the codes in a way that is not met for the
6 attestations?

7 MR. SCHINDLER: If I understand the question, I mean,
8 and --

9 THE COURT: What you were suggesting is -- and I
10 guess this is in part the way in regard to the tentative --
11 you are saying that *Bourseau* and *Escobar* are setting out
12 pretty different standards of materiality. And that if I
13 adopt -- if I was consistent in how *Escobar* was being
14 interpreted, it applied in this case. It applies just as
15 much to the first claim as to the second.

16 And I'm saying let's -- putting *Bourseau* entirely to
17 the side, is that really true? I mean, isn't -- aren't the
18 allegations supporting the first claim much stronger than
19 they are for the second, third and fourth claims as the
20 current version of the Complaint now stands?

21 MR. SCHINDLER: And I understand the question, and I
22 appreciate that it's a confusing, difficult thing. And I
23 think the answer to that would be no.

24 And the reason I say that they are not is because of
25 that distinction that I highlighted for you when you go back

1 and start considering, look back at the distinction between
2 how they frame what the violation is verses how they
3 articulate how the First Amended Complaint actually -- what
4 it actually pleads.

5 And I think with respect to the question you've just
6 asked me, if you go back and start with what they have
7 alleged is the violation on page 13 and juxtapose it to what
8 they say the Complaint alleges, you will see the distinction
9 that we are talking about between the violation and then what
10 is simply a defendant's complied with obligation. And that
11 is the distinction that we are pointing to as it relates to
12 the first claim here.

13 To be sure, what I said to you earlier in terms of
14 *Escobar's* materiality, standard applying equally, not
15 retreating from that. But I understand your question, which
16 is essentially, isn't there something different about
17 allegations that speak only to codes versus allegations that
18 speak to attestations? And I understand that to be the
19 question. What I'm suggesting to you is that Count One isn't
20 really -- doesn't allege in a way that lines up with the
21 formulation that you have here.

22 THE COURT: All right. Thank you, Mr. Schindler.

23 Let me hear from the Government in response.

24 MR. CROOKE: Thank you, Your Honor.

25 Mr. Schindler identified that the Government -- what

1 you are asking about is what -- if the Government knew about
2 the violation. And he identified -- states that that
3 violation is that the attestations were false. But the
4 Government needed more than that in order to take action in
5 this case. It needed to know that the attestations were
6 false because United violated its underlying obligation to
7 delete specific diagnosis codes that it had information were
8 invalid.

9 And that, if the Government had that knowledge, it's
10 very clear from the Complaint that it would have taken
11 action. More than that, there is no requirement that that
12 action needed to be that the Government would not have paid.

13 The preamble, as I mentioned, to the 2000
14 regulations makes it clear that the attestation is a claim,
15 and specifically references False Claims Act liability. The
16 attestation itself notes that the one result, if there is
17 inaccurate data, is that there will be civil enforcement
18 actions. And that is exactly -- and then the agency reminded
19 United when it came in before it was filing its attestation
20 that there was a possibility that their obligations could
21 give rise to False Claims Act liability.

22 So what is going on here where the Government is
23 bringing an action based on those false attestations is
24 exactly the remedy that is contemplated in the regulations --

25 THE COURT: I understand that. We've discussed

1 that. It's dealt with in the briefs.

2 Let's go to -- what -- I presume that even if I
3 ultimately don't agree with you on the attestations that you
4 would like to keep the first claim. So what -- and I presume
5 that you have something to say, which, you know, I feel that
6 you are on stronger factual grounds in terms of the
7 allegations in regard to the first claim than you are from
8 claims two, three and four. What can you say to support that
9 view?

10 MR. CROOKE: Your Honor, Mr. Schindler suggested that
11 *Escobar* had overruled *Bourseau*, and that it stated a
12 different standard than potential effect or natural tendency.
13 We agree with Your Honor that it did not state a different
14 standard, that it was limited to -- it was specifically
15 addressing an affirmative False Claims Act case.

16 In this case, the claims were already paid. But if
17 Your Honor is applying a materiality standard to a reverse
18 false claim where there is no case law relating to that post
19 *Escobar*, that the same holistic approach where a number of
20 factors would be at play would apply in the context of a
21 reverse false claim, and you would be looking at the natural
22 tendency to effect the Government's action, not merely
23 whether the Government would have paid at the time that the
24 claims were paid, but looking also, or even more at the
25 defendant's actions and its obligation to return the money,

1 the overpayments that it has received to the Government.

2 So I don't -- we don't see any inconsistency in our
3 briefing, and we believe that defendants are attempting to
4 impose a standard on the FCA that neither *Escobar* nor
5 *Bourseau* intended to be applied there.

6 And just to address the technical issues that
7 Mr. Schindler raised, we -- in the briefing we were clear
8 about our stance on the later claims, and that there was some
9 question of fact with regard to some limited subset of those
10 claims, and so we would argue that Your Honor's ruling on
11 those issues is appropriate.

12 THE COURT: All right. Thank you.

13 Let me briefly hear from Mr. Poehling's counsel.

14 MR. SUBRAMANIAN: Your Honor, so just on the legal
15 point, obviously as Your Honor pointed out in the tentative
16 Order at page 19, the nature of the claimed violation as
17 between the first claim and the second through fourth claims
18 is different. It focuses on the defendant's knowing
19 concealment or retention of an overpayment as opposed to the
20 submission of a claim for payment.

21 But going past the law, Your Honor also pointed out
22 that the First Amended Complaint extensively alleges how
23 central the diagnostic data is to the risk adjustment payment
24 CMS made to the defendants.

25 THE COURT: Let's just put *Bourseau* aside for a

1 moment. When you last spoke to me, you mentioned
2 specifically paragraphs 336 and 340. Do you have any other
3 specific references where in your view it is currently clear
4 in the First Amended Complaint that the -- as to the reverse
5 claims that -- that there is liability based on the existing
6 allegations? Putting aside -- let's not even get into
7 whether *Escobar* and *Bourseau* have different standards or what
8 they were, or which applies and all of this. What in your
9 view is the portions of the current operative First Amended
10 Complaint in Intervention, which are strongest in support of
11 the argument that there are sufficient allegations as it
12 stands that the Government -- that there is materiality for
13 those claims based on the underlying diagnostic codes?

14 MR. SUBRAMANIAN: I would point to paragraphs 12,
15 103, 272, and then I'll summarize what these say.

16 THE COURT: Go ahead.

17 MR. SUBRAMANIAN: 328. And in particular, paragraphs
18 330 and 332. And finally, paragraph 360. And these are just
19 examples.

20 And let me now summarize kind of what these
21 paragraphs say. So these paragraphs go directly to what
22 *Escobar* would require if it applied in the same manner here,
23 which I don't think is the case, as we've pointed out in the
24 briefs, but let's jut assume that it does.

25 In these paragraphs, the Complaint makes clear that

1 if the codes had been deleted, the Government would not have
2 made the risk adjustment payments or it would have recovered
3 the risk adjustment payments from the defendant
4 organizations. In paragraph 328, the Complaint says that
5 "The diagnoses are the sole determinant" --

6 THE COURT: If you could please slow down while you
7 are reading for the court reporter.

8 MR. SUBRAMANIAN: Sorry about that.

9 "The diagnoses are the sole determinate in the
10 calculation of any risk adjustment payment."

11 And I want to focus on paragraph 330, because here
12 the Complaint alleges that, "When MA organizations provide
13 CMS with information identifying specific diagnosis codes
14 that were submitted for payment, and thus CMS has actual
15 knowledge about the specific invalid diagnoses that were
16 submitted for payment, Medicare recovers the associated
17 overpayments."

18 And that is exactly -- I mean, that is well beyond
19 what *Escobar* would require, even if that ruling were directly
20 on point, in a reverse False Claims Act claim.

21 Finally, in paragraph 360, the Complaint alleges
22 that, "Had the United States known the truth, it would not
23 have paid such claims."

24 So I think that that covers the waterfront in terms
25 of the factual allegations.

1 THE COURT: All right. Counsel, I appreciate the
2 arguments. As I said, I appreciate the briefing. This is my
3 first day back on the bench after surgery, so it's obviously
4 a lot to take in, but I appreciate your putting up with me.

5 The matter is taken under submission.

6 MR. SCHINDLER: There is just two typos that I meant
7 to clean up that I think you would want to know about.

8 THE COURT: Okay. Which are those?

9 MR. SCHINDLER: They are on page -- two places where
10 I think the Court has inadvertently used defendants rather
11 than plaintiff. One is page 17 at the first paragraph
12 begins, "Here, unlike in *Swoben*, defendants have pled." I
13 think, right? And the second on page 18 in that first
14 paragraph that says, so here you will see about halfway down
15 it says, "As defendants argue." I think, again --

16 THE COURT: Right.

17 MR. SCHINDLER: I thought you would want to know.

18 THE COURT: Thank you, Mr. Schindler.

19 *****

20

21

22

23

24

25

1
2 I certify that the foregoing is a correct transcript from the
3 record of proceedings in the above-titled matter.
4
5
6

7 -----
8

9 Amy C. Diaz, RPR, CRR

January 30, 2018

10 S/ Amy Diaz
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25