CHAD A. READLER
Acting Assistant Attorney General, Civil Division
NICOLA T. HANNA
United States Attorney
DAVID M. HARRIS
DAVID K. BARRETT
JOHN E. LEE (CBN 128696)
Assistant United States Attorneys
300 N. Los Angeles Street, Room 7516
Los Angeles, California 90012
Tel: (213) 894-3995; Fax: (213) 894-7819
Email: john.lee2@usdoj.gov
MICHAEL D. GRANSTON
DANIEL R. ANDERSON
EDWARD CROOKE
CAROL L. WALLACK
JUSTIN DRAYCOTT
PAUL G. FREEBORNE
JESSICA KRIEG
PAUL PERKINS
Attorneys, Civil Division
United States Department of Justice
P.O. Box 261, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 307-0486; Fax: (202) 307-3852
Email: carol.wallack@usdoj.gov
JAMES P. KENNEDY, JR.
Acting United States Attorney
KATHLEEN ANN LYNCH
Assistant United States Attorney (Admitted PHV)
138 Delaware Avenue
Buffalo, New York 14201
Tel: (716) 843-5830; Fax: (716) 551-3052
Email: kathleen.lynch@usdoj.gov
Attorneys for the United States of America

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) UNITED STATES' NOTICE OF MOTION AND MOTION TO DISMISS COUNTER-PLAINTIFFS' COUNTERCLAIMS Date: July 30, 2018 Time: 10:00 a.m. Court: 5A, Hon. Michael W. Fitzgerald

PLEASE TAKE NOTICE that, on July 30, 2018, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Michael W. Fitzgerald, United States District Judge, Courtroom 5A, United States Courthouse, 350 West First Street, Los Angeles, California 90012, the United States of America will and hereby does move for an order dismissing Defendant and Counter-Plaintiff Medicare Advantage Organizations' Counterclaim in this action.

This motion is and will be made pursuant to Rules 12(b)(1), (b)(6), and (f), Fed. R. Civ. P., on the grounds that this Court lacks subject matter jurisdiction over all five counts of the Counterclaim, all five counts fail to state a claim for relief, and all five counts contain, insufficient, redundant, immaterial, and impertinent matter; and pursuant to Rule 9(b) on the ground that the Counterclaim fails to allege fraud and mistake with particularity.

This motion is based upon the accompanying Memorandum of Points and Authorities, [proposed] Order, the pleadings and other papers on file herein, and such evidence and argument as may be presented in connection with the hearing of this motion.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on May 9, 2018.

Respectfully submitted,

Dated: May 22, 2018

CHAD A. READLER
Acting Assistant Attorney General
NICOLA T. HANNA
United States Attorney
DAVID M. HARRIS
DAVID K. BARRETT
Assistant United States Attorneys

MICHAEL D. GRANSTON
DANIEL R. ANDERSON
EDWARD CROOKE
CAROL L. WALLACK
JUSTIN DRAYCOTT
PAUL G. FREEBORNE
JESSICA KRIEG
PAUL PERKINS
Civil Division, Department of Justice

JAMES P. KENNEDY, JR.
Acting United States Attorney
KATHLEEN ANN LYNCH
Assistant United States Attorney

/S/ John E. Lee

JOHN E. LEE
Assistant United States Attorney
Attorneys for the United States of America

CHAD A. READLER
Acting Assistant Attorney General, Civil Division
NICOLA T. HANNA
United States Attorney
DAVID M. HARRIS
DAVID K. BARRETT
JOHN E. LEE (CBN 128696)
Assistant United States Attorneys
300 N. Los Angeles Street, Room 7516
Los Angeles, California 90012
Tel: (213) 894-3995; Fax: (213) 894-7819
Email: john.lee2@usdoj.gov
MICHAEL D. GRANSTON
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PAUL G. FREEBORNE
JESSICA KRIEG
PAUL PERKINS
Attorneys, Civil Division
United States Department of Justice
P.O. Box 261, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 307-0486; Fax: (202) 307-3852
Email: carol.wallack@usdoj.gov
JAMES P. KENNEDY, JR.
United States Attorney
KATHLEEN ANN LYNCH
Assistant United States Attorney (Admitted PHV)
138 Delaware Avenue
Buffalo, New York 14201
Tel: (716) 843-5830; Fax: (716) 551-3052
Email: kathleen.lynch@usdoj.gov
Attorneys for the United States of America

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UNITED STATES OF AMERICA *ex rel.* BENJAMIN POEHLING, Plaintiffs, v. UNITEDHEALTH GROUP, INC., *et al.*, Defendants.	No. CV 16-08697 MWF (SSx) UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS Date: July 30, 2018 Time: 10:00 a.m. Court: 5A. Hon. Michael W. Fitzgerald

MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION

In this False Claims Act ("FCA") action, the United States seeks to recover Medicare funds improperly obtained and retained by UnitedHealth Group, Inc. and its affiliates and Medicare Advantage Organizations ("MAOs") (hereinafter collectively "United"). The United States alleges, first, that United reviewed millions of its beneficiaries' medical records looking for diagnoses that its providers had not reported so that it could submit additional diagnosis codes and thereby obtain increased payments from Medicare Part C (the Medicare Advantage or "MA" Program) and Medicare Part D (the Prescription Drug or "PD" Program). Second, the United States contends that when United's medical record reviews also revealed that its prior data submissions to Medicare Parts C and D contained unsubstantiated diagnosis codes, United was legally obliged to correct its data, and that by failing to do so, United improperly retained payments based on invalid diagnoses.

The second contention above – premised on United's legal obligation to correct invalid diagnosis data – is the primary target of United's Counterclaim: "DOJ now claims that United Health MA plans 'were obligated to 'look both ways' at the results of their chart reviews and delete unsupported provider-diagnoses.'" UnitedHealth's Answer and Counterclaim ("Counterclaim") (Dkt. 223), ¶ 38 at 96. United seeks, in effect, a declaratory judgment holding that the government's contention is erroneous because that legal obligation, it contends, does not exist.[1]

Notably, however, United is not claiming (nor could it claim) that the government, at this juncture, has withheld payment or reduced the payment amount for any beneficiary based on the government's contention. Indeed, the contrary is true. This FCA action is the vehicle by which the government seeks to reduce such payments by recovering its damages resulting from United's knowing avoidance of its obligation

[1] By a separate motion, the United States is moving for summary judgment on the legal issue that United was legally required to correct diagnosis data unsupported by its beneficiaries' medical records. United has already litigated this point in the Ninth Circuit in the *Swoben* case and lost. *See United States ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1168-70 (9th Cir. 2016).

to correct invalid diagnosis data submitted to Medicare. Simply put, at this point, United has suffered no "damages" because this Court has not yet awarded the United States any damages.

In this situation, the Counterclaim is inexplicable. United's pleading appears to be premised on the notion that a judgment against United and its affiliates for FCA violations and an award of damages to the United States based on those violations can give rise to a cause of action by them against the United States. There is no precedent for such a novel cause of action, and United's Counterclaim (including all five counts) should be summarily rejected by this Court. First, there has been no waiver of sovereign immunity or conferral of jurisdiction in this Court for the breach of contract and tort claims stated in the Counterclaim. Second, each of the separate counts fails as a matter of law in any event because (assuming they could proceed) they fail to allege basic elements of the contract and tort claims pled. Third, there is complete identity of factual and legal issues between the government's Amended Complaint and the Counterclaim such that the Counterclaim is redundant and immaterial. Accordingly, the Counterclaim must be dismissed under Federal Rule of Civil Procedure 12(b)(1) or, alternatively, 12(b)(6) or 12(f). In addition, United has failed to allege fraud or mistake with particularity as required by Rule 9(b) and has failed to adequately allege damages as required by Rule 8(a)(2).

Three of United's counts sound in contract or quasi-contract: breach of contract (Count One), breach of the covenant of good faith and fair dealing (Count Two), and promissory estoppel (Count Five). The other two appear to be alleged torts: fraudulent inducement (Count Three) and negligent misrepresentation (Count Four). Sovereign immunity precludes this Court's jurisdiction over all claims. Indeed, United has utterly failed to plead any basis for a sovereign immunity waiver, and none of the limited waivers typically used by litigants apply to the Counterclaim. Where, as here, a party fails to explicitly waive damages in excess of $10,000, the Little Tucker Act, 28 U.S.C. § 1346, which confers jurisdiction on district courts to hear contract claims seeking

damages for less than $10,000, does not confer jurisdiction in this Court. 28 U.S.C. § 1346(a)(2) (2012). Also, United's promissory estoppel claim is an implied-in-law claim that cannot proceed under any applicable waiver of sovereign immunity in any federal court. Nor has there been an applicable waiver of sovereign immunity under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, *et seq*. (2012), that would permit United's claims of fraudulent inducement and negligent misrepresentation to proceed in any federal court.

Moreover, even if jurisdiction existed, United's Counterclaim fails to state a claim upon which relief may granted. The counts are premised on the allegation that the government made representations about United's Part C and D obligations, and then violated them by filing this FCA action seeking damages for United's knowing avoidance of its repayment obligation – the obligation to withdraw diagnoses unsupported by its beneficiaries' medical records. However, as the Ninth Circuit has already confirmed, the obligation to delete unsupported diagnoses is imposed by requirements of the MA Program. *See Swoben*, 848 F.3d at 1174. These requirements exist for the PD Program as well. Each MAO Counterclaim-Plaintiff promised to comply with these requirements when it executed its annual contracts with the government. These contracts and the risk adjustment certifications that are part of these contracts referenced liability, including FCA liability, for retaining Medicare payments based on invalid risk adjustment data, including diagnoses. Nothing alleged by United (even if its allegations are accepted as true) can modify the contracts or establish alternative obligations that conflict with their express terms. And, even if the contracts could be altered, United has not alleged (and cannot allege) damages, a necessary element of its claims, because United's purported damages are premised on this Court ultimately awarding damages to the United States.

II. BACKGROUND

A. Part C and D Payment Data Integrity Requirements[2]

MAOs have a financial incentive to submit as many risk-adjusting diagnoses as possible to generate maximum payment from Medicare. Accordingly, to ensure that payments are based on valid diagnosis data and are not improperly inflated, the Center for Medicare and Medicaid Services (CMS) imposes certain payment integrity requirements and obligations on MAOs. These requirements and obligations are contractual as well as regulatory, and they apply to all United MAOs and to entities related to these MAOs, including the non-MAO United Defendants in this action. *See* Section D(5) of Article V of the MA Contract (Exhibit 1)[3] (if any MAO responsibility is delegated to another entity, "all contracts or written agreements must specify that the related entity, contractor or subcontractor must comply with all applicable Medicare laws, regulations, and CMS instructions"); *see also* 42 C.F.R. §§ 422.504(*i*)(3)(iii), (4)(v) (Part C) (requiring related entities and contractors to comply with the MAO's contractual obligations to CMS and to comply with all applicable Medicare laws, regulations, and CMS instructions); 42 C.F.R. §§ 423.505(*i*)(3)(iii), (iv) (Part D) (same).

One of the most fundamental payment integrity requirements is that diagnoses must be substantiated by the beneficiaries' medical records to be valid. And one of the most important payment integrity obligations is that MAOs and their related entities and contractors withdraw diagnoses that they know are invalid based on information available to them. To participate in the Part C and Part D programs, the Defendant MAOs were required to agree in writing to comply with Part C and D regulations and

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[2] Medicare's risk adjustment payment system is described in *Swoben*, 848 F.3d at 1167-70, the United States' Amended Complaint, previous Orders of this Court, and the government's partial summary judgment brief. Accordingly, it is not described in detail, but certain requirements relevant to United's Counterclaim are set out again below.

[3] Exhibit 1 refers to the contract appended to the Declaration of Cheri Rice in Support of United States' Motion for Partial Summary Judgment (being filed concurrently with this brief). *See* footnote 3 to the government's partial summary judgment brief describing this contract and explaining that all MAO contracts during the time period at issue, 2009 to 2017, included the same terms. Rice Decl., ¶ 3.

other terms and conditions. 42 C.F.R. § 422.504 (Part C); 42 C.F.R. §§ 423.504, 423.505 (Part D). Each year, one or more executives of Defendant UnitedHealthcare, Inc. or its affiliates or predecessors entered into these contracts with CMS on behalf of the Defendant MAOs. *See e.g.* Signature Attestation page at the end of Exhibit 1.

During the payment years at issue in this case,[4] the contracts obligated defendants to operate their Part C and D plans "in compliance with the requirements of [the] contract[s] and applicable Federal statutes, regulations, and policies (*e.g.*, policies as described in the Call Letter, Medicare Managed Care Manual, etc.)" and to comply with "Federal laws and regulations designed to prevent or ameliorate fraud, waste, and abuse," including the False Claims Act. *See, e.g.*, Section A of Article II and Section A(1) of Article IX of the Part C contract, which is part of Exhibit 1.[5] The contracts also required defendants to implement an effective compliance program in accordance with the Part C and D regulations. *See, e.g.,* Section F of Art. III of the MA Contract and Section J of Art. II of the Part D Addendum, also part of Exhibit 1.

Since 2005, the Part C compliance regulation itself has obligated United to monitor for noncompliance with CMS requirements, identify compliance risks, and respond to and correct compliance problems, including taking "affirmative steps to address errors" in the data it submitted for payments. *Swoben*, 848 F.3d at 1174 (citing 42 C.F.R. §§ 422.503(b)(4)(vi), (vi)(F), (vi)(G) (2005)); *see also* 42 C.F.R. §§ 423.504(b)(4)(vi), (vi)(F), (vi)(G) (2007) (Part D). The regulations state that the MAO "must conduct appropriate corrective actions (for example, repayment of overpayments . . .)." 42 C.F.R. § 422.503(b)(4)(vi)(G)(2); s*ee also* 42 C.F.R., § 423.504(b)(4)(G)(2) (Part D) (same). In 2013, the obligation to withdraw erroneous risk adjustment data was

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[4] This action seeks damages for payment years 2009-17. Defendants, however, continue to refrain from correcting invalid diagnoses revealed by their chart reviews. The United States reserves its rights to recover damages for payment years after 2017.

[5] The Attestation of Benefit Plan, which is part of the contract, also requires compliance with the Medicare Managed Care Manual and other documents issued by CMS. This Attestation is included as part of Exhibit 1 to the Rice Declaration.

reiterated in the Medicare Managed Care Manual, which, as noted, was expressly incorporated into all of the contracts. *See, e.g.*, 2013 Medicare Managed Care Manual, Pub. 100-16, chapter 7 at § 40 (Exhibit 5) ("If upon conducting an internal review of submitted diagnosis codes, the plan sponsor [or MAO] determines that any ICD-9-CM diagnosis codes that have been submitted do not meet risk adjustment submission requirements, the plan sponsor [or MAO] is responsible for deleting the submitted ICD-9-CM diagnosis codes as soon as possible"). In addition, in accordance with 42 C.F.R. § 422.504(*l*) (Part C), the contracts require an officer of each United MAO to annually attest to the accuracy, completeness, and truthfulness of the diagnosis data submitted for risk adjustment payments based on best knowledge, information, and belief. *See* Section D.2 of Article IV of the MA Contract (Exhibit 1);[6] *see also Swoben*, 848 F.3d at 1174 ("as CMS made clear, [MAOs] have always had a duty to take actions to ensure the accuracy, completeness, and truthfulness of the encounter data and an obligation to undertake due diligence to ensure the accuracy, completeness, and truthfulness of the encounter data submitted to CMS") (internal quotes omitted) (citing 65 Fed. Reg. at 40,268); 2004 Manual (Exhibit 4), § 111.7 (discussing this requirement).

The Medicare Managed Care Manual has long specified that diagnosis data must be substantiated by the beneficiaries' medical records. This requirement that has been in every version of the Manual since at least 2001. *See*, *e.g.*, 2001 Manual (Exhibit 3), §§ 110.3, 110.4 (requiring diagnosis data to "be substantiated by the hospital's medical record"); 2004 Manual (Exhibit 4), §§ 111.1, 111.4, 111.8 and Exhibit 30 [to Manual] (Aug. 13, 2004) ("a medical record must substantiate all diagnostic information provided to CMS"); 2013 Manual (Exhibit 5), § 40 ("All diagnosis codes submitted must be documented in the medical record").

[6] The Part D regulations include a similar attestation requirement for diagnoses submitted for risk adjustment payments under the prescription drug program. These attestations are referred to as certifications. *See* 42 C.F.R. § 423.505(k).

Moreover, by their MA Contracts, the Defendant MAOs agreed "to comply with the requirements in § 422.310 for submitting risk adjustment data to CMS" and could be terminated if they "fail[ed] to provide CMS with valid risk adjustment data as required under § 422.310 and 423.329(b)(3)." *See* Section B.7 of Art. VI and Section B.1(a)(vii) of Article VIII of the MA Contract.[7] One of the requirements of § 422.310 (a Part C regulation) pertains to the "[v]alidation of risk adjustment data." It also establishes the medical record as the source for determining the validity of risk adjustment data: "MA organizations and their providers and practitioners will be required to submit a sample of medical records for the validation of risk adjustment data, as required by CMS. There may be penalties for submission of false data." 42 C.F.R. § 422.310(e).[8] Similarly, the regulation specifically relating to CMS' risk adjustment data validation (RADV) audits refers to medical records as the source for validating diagnoses in order "to ensure risk adjusted payment integrity and accuracy." 42 C.F.R. § 422.311(a). And, United's MA Contracts, in accordance with 42 C.F.R. § 422.504(e)(2), allow the government to audit "medical records . . . in the possession or control of the MAOs that relate to the "determination of amounts payable under the contract[s]." *See, e.g.*, Section A.2(b), (d) of Article VI of the MA Contract (Exhibit 1).

During the relevant time period, United was also bound by the terms of Electronic Data Interchange ("EDI") Agreements. The United MAOs and any related entity that submitted risk adjustment data on their behalf had to execute these agreements in order to submit data, including diagnoses, to CMS' RAPS and EDS and to receive payments. *See, e.g.*, Electronic Data Interchange Agreement between United and CMS (Exhibit 2),[9]

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[7] The contracts are also subject to termination when "[t]here is credible evidence that the MA Organization committed or participated in false, fraudulent or abusive activities affecting the Medicare program, including the submission of false or fraudulent data." *See, e.g.*, Section B.1(a)(iv) of Article VIII of the MA Contract (Exhibit 1).

[8] Section 423.329(b)(3) addresses the collection of data for Part D risk adjustment based on health status. It references the requirements of section 422.310.

[9] Exhibit 2 to the Rice Declaration is a United EDI Agreement dated May 10, 2011, but is substantially similar to other EDI agreements with CMS during 2004 to 2017. *See* Rice Decl., ¶ 3.

see also 2004 Manual (Exhibit 4), § 111.6.1 (discussing this requirement). Pursuant to the EDI Agreements, the MAOs assumed responsibility for all risk adjustment data submitted by themselves, their employees, and agents and "[b]ased on best knowledge, information, and belief, [agreed to] submit risk adjustment data that are accurate, complete, and truthful." *Id*. at Sections A.1 and 5. Moreover, they agreed to "correct risk adjustment data discrepancies." *Id*. at Section A.11. Pursuant to the EDI Agreements, United also gave the government the right to "audit and confirm" the data it submitted, along with access to "medical records related to the eligible organization's submissions" so the government could confirm that submitted-diagnosis were supported by medical records. *Id*. at Section A.4.

B. Defendants' Counterclaims

Notwithstanding its contractual promises to comply with the data integrity requirements and obligations discussed above, United now contends that the government breached the MA Contracts by filing this FCA action seeking damages for United's knowing failure to comply with these requirements and obligations. However, it is United which breached the contracts, not the government. United's contract claims are premised on its purported "assumption" when it developed its bids that it was not obligated to delete invalid diagnosis data and that this "assumption" was somehow built into the written contracts between the parties and overrode the other terms of the contracts (as well as the regulations). Counterclaim ¶¶ 42-43. United contends that the United States breached United's "assumption." The other counts, which sound in tort, are based on allegations that CMS purportedly made statements that relieved United from its contractual promises and regulatory obligations and/or somehow caused United to make those promises and agree to comply with those regulations under allegedly false pretenses.[10]

[10] Count Three attempts to plead "fraudulent inducement" because the government purportedly made "representations to [United] regarding the terms of the [United] contracts" that United purportedly relied upon in deciding to participate in the MA and PD Programs. *Id*. ¶ 54. And Count Four attempts to plead "negligent

III. ARGUMENT

A. This Court Lacks Jurisdiction over the Counterclaims

"The federal government is not your typical defendant – a party . . . needs permission from Congress to sue the government." *Hajro v. U.S. Citizenship and Immigration Servs.*, 811 F.3d 1086, 1100 (9th Cir. 2016). "This is true of a counterclaim as well as of an original suit." *United States v. Lockheed L-188 Aircraft*, 656 F.2d 390, 393 (9th Cir. 1979); *see also Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 143 (9th Cir. 1987) (holding that the United States does not consent to be sued on a counterclaim "merely by instituting a suit"). Furthermore, "[t]he theory of sovereign immunity under which a court entertains a suit for money damages against the government may limit, or perhaps even determine, the venues in which there is subject matter jurisdiction." *United States v. Park Place Assoc., Ltd.*, 563 F.3d 907, 923 (9th Cir. 2009) (explaining that "in addition to a waiver of sovereign immunity, there must be a statutory authority vesting a district court with subject matter jurisdiction"). Thus, a court must consider both *whether* the United States has consented to be sued and *where* that suit may proceed. These inquiries are intertwined. *Id.* at 924 (court must "inevitably address subject matter jurisdiction" as "sovereign immunity and subject matter jurisdiction are so closely linked in suits against the government").

As "the party asserting a claim against the United States . . . [United] has the burden of demonstrating an unequivocal waiver of immunity" from suit. *Id.* (internal quotes omitted). Similarly, United, as the party seeking to invoke this Court's subject matter jurisdiction over its counterclaims, "bears the burden of establishing that jurisdiction exists." *Strong v. Cty. of Los Angeles*, 2013 WL 272957, at *2 (C.D. Cal. Jan. 23, 2013) (Fitzgerald, J.). United has failed to plead any applicable waiver of

misrepresentation" based on statements purportedly made by CMS officials regarding the obligations of MAOs with respect to their payment integrity obligations. *See id.* ¶ 62. Count Five, captioned "Promissory Estoppel," is based on the same allegations as the tort claims, and contends that the United MAOs relied on certain alleged CMS promises in preparing to contract with CMS.

sovereign immunity that would permit the contract and tort claims in the Counterclaim to proceed in this Court.

United cites only 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1367 (supplemental jurisdiction), and Rule 13 of the Federal Rules of Civil Procedure (counterclaim practice). Counterclaim ¶ 2. None of these contain a congressional waiver of sovereign immunity for United's Counterclaim. While Section 1331 grants district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," the Ninth Circuit has held that "*it does not waive sovereign immunity*." *Park Place*, 563 F.3d at 924 (emphasis added). The Ninth Circuit has made equally clear that Section 1367 does not "constitute a waiver of the United States' sovereign immunity." *Id*. at 934. And Rule 13 explicitly states that it "do[es] not expand the right to assert a counterclaim – or to claim a credit – against the United States or a United States officer or agency." Fed. R. Civ. P. 13(d). Having failed to establish that the United States consents to be sued, United's failure to plead any basis for jurisdiction in this Court over its claims warrants dismissal under Federal Rule of Civil Procedure 12(b)(1).

1. There is No Waiver of Sovereign Immunity for Contract Claims Exceeding $10,000 in Federal District Courts

Both the Tucker Act and the Little Tucker Act sometimes apply to waive sovereign immunity over contract-based claims against the United States, but neither statute helps United here (even if United had pleaded them). First, although "[t]he Tucker Act supplies both a basis for the exercise of jurisdiction for contract claims and a concomitant waiver of sovereign immunity in the Court of Federal Claims," this "package deal" creates subject matter jurisdiction in the Court of Federal Claims *only*. *Park Place*, 563 F.3d at 927 ("[T]he waiver of sovereign immunity is coextensive with the jurisdiction the statute confers."). Accordingly, even if defendants were to attempt

to rely on the Tucker Act to establish waiver for their contract-based claims,[11] the Ninth Circuit directs that the "Tucker Act . . . neither waives sovereign immunity for suit in, nor confers jurisdiction on, the Central District of California." *Id*.

Second, the Little Tucker Act (LTA), 28 U.S.C. § 1346, "confers concurrent jurisdiction in the district courts for certain contract claims against the United States, but the [LTA's] jurisdictional grant is limited to claims for money damages 'not exceeding $10,000 in amount.'" *Park Place*, 563 F.3d at 927 (citing 28 U.S.C. § 1346(a)(2)). To establish jurisdiction under the LTA, however, United must affirmatively waive any claims in excess of $10,000. *Id.* at 928; *Stone v. United States*, 683 F.2d 449, 454 n.8 (D.C. Cir. 1982); *Wiggins v. Powell*, 2005 WL 555417, at *11-12 (D.D.C. March 7, 2005). United has not pled this jurisdictional prerequisite for its contract counts. In fact, United does not state any particular amount or range of damages, only vaguely asserting that it has incurred unspecified damages because of this FCA action. A claimant's waiver of damages exceeding $10,000 should be set forth in the initial pleadings. United's failure to include such a waiver or to allege damages of a specific amount less than $10,000 warrants dismissal under Rule 12(b)(1). *See Pub. Lands for the People, Inc. v. USDA*, 733 F. Supp. 2d 1172, 1195 (E.D. Cal. 2010) (dismissing takings and damages claims for failure to "waive the right to recover greater than $10,000 in damages per claim" with instructions to cure the jurisdictional deficiency).

Finally, United appears to be under the mistaken impression that 28 U.S.C. § 1367 permits its Counterclaim to proceed because the government initiated this action. But as the Ninth Circuit explained in *Park Place*, where the government had similarly initiated district court litigation, section 1367 has no bearing on sovereign immunity. 563 F.3d at 934 ("[Section] 1367 . . . does not constitute a waiver of the United States' sovereign

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[11] This is the case as to both Count One and Count Two. The Court of Federal Claims regularly adjudicates claims alleging breaches of covenants of good faith pursuant to Tucker Act jurisdiction. *See, e.g., Metcalf Constr. Co., Inc. v. United States*, 742 F.3d 984, 994 (Fed. Cir. 2014); *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 828 (Fed. Cir. 2010); *Centex Corp. v. United States*, 395 F.3d 1283, 1305 (Fed. Cir. 2005). Thus, there is also no jurisdiction for Count Two in this district court.

immunity . . . ."). As to United's contractual counterclaims specifically, section 1367 is particularly inapt as every circuit to have considered the issue has rejected the argument that "the exclusive jurisdiction granted to the Court of Federal Claims by the Tucker Act may be overridden by the general grant set forth in §1367." *Id*. at 933 (noting the weight of authority without deciding the issue). And so, in *Park Place*, the Ninth Circuit held that a cross motion by the defendant for entry of a monetary award against the United States was barred even in a suit initiated by the Department of Justice. *Id.* at 932-34 (explaining that only "Congress can waive the United States' sovereign immunity"). The same principle applies here. Intervention by the government in an FCA suit cannot be deemed a congressional waiver of sovereign immunity as to counterclaims by an FCA defendant. *See United States v. 40.60 Acres of Land, More or Less,* 483 F.2d 927, 928 n.1 (9th Cir. 1973) ("[T]here is no question *that a counterclaim* cannot be maintained in the District Court if the amount sought exceeds $10,000.") (emphasis added).

2. No Waiver of Sovereign Immunity for Promissory Estoppel

United's promissory estoppel count likewise cannot proceed under the Tucker Act, the only waiver of sovereign immunity even loosely related to this quasi-contractual claim. With respect to a potential immunity waiver under the Tucker Act, the Supreme Court has held that the Act does not provide a basis for jurisdiction over contracts implied in law, only for contracts implied in fact. *Hercules, Inc. v. United States,* 516 U.S. 417, 423 (1996); *accord Trauma Serv. Group v. United States,* 104 F.3d 1321, 1324-25 (Fed. Cir. 1997) (Court of Federal Claims' jurisdiction, conferred by Tucker Act, to hear claims against the United States founded upon express or implied contract with the United States extends only to contracts either express or implied in fact and not to claims on contracts implied in law). The Ninth Circuit has held that promissory estoppel claims are claims for a contract implied in law and, accordingly, there is no Tucker Act waiver of immunity or conferral of jurisdiction. *Jablon v. United States,* 657 F.2d 1064, 1069-70 (9th Cir. 1981); *accord Harris v. Sec'y of Housing & Urban Dev.*, 2014 WL 6060171, at *7 (E.D. Cal. Nov. 12, 2014) (dismissing promissory estoppel

count). The Court of Federal Claims has reached the same conclusion. *See, e.g., XP Vehicles, Inc. v. United States*, 121 Fed. Cl. 770, 782-83 (2015); *Carter v. United States*, 98 Fed. Cl. 632, 638-39 (2011) ("As with other forms of equitable relief, [Court of Federal Claims has] no jurisdiction over claims of promissory estoppel") (and cases cited therein); *Bell BCI Co. v. United States*, 72 Fed. Cl. 164, 167-68 (2006).

3. There is No Waiver of Sovereign Immunity for Fraud or Misrepresentation

United's fraud and misrepresentation counts also cannot proceed against the government under any applicable waiver of sovereign immunity. Although the Federal Torts Claims Act ("FTCA"), 28 U.S.C. § 1346(b), waives the sovereign immunity of the United States for certain torts committed by Federal employees, both of United's tort-based counts fall within one of the FTCA's thirteen enumerated exceptions. *See Kosak v. United States*, 465 U.S. 848, 852 (1984); 28 U.S.C. § 2680(a)-(n). If a plaintiff's claims "fall within one or more of these exceptions, then the federal courts lack subject matter jurisdiction to hear [the] claims." *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000); *see O'Toole v. United States*, 295 F.3d 1029, 1033 (9th Cir. 2002) ("Where an exception to the FTCA under § 2680 applies, the United States has elected not to waive its immunity from suit, and courts are without jurisdiction over such claims.").

Section 2680(h) excludes from the coverage of the FTCA "[a]ny claim arising out of . . . misrepresentation, [or] deceit . . . ." 28 U.S.C. § 2680(h). This FTCA exception preserves the United States' sovereign immunity with respect to "both claims of negligent misrepresentation and claims of fraudulent misrepresentation." *Pauly v. United States Dep't of Agric.*, 348 F.3d 1143, 1151 (9th Cir. 2003) (citing *United States v. Neustadt*, 366 U.S. 696, 702 (1961)); *see also Lawrence v. United States*, 340 F.3d 952, 958 (9th Cir. 2003) ("The misrepresentation exception shields government employees from tort liability for failure to communicate information, whether negligent, or intentional.") (citing *Neustadt*, 366 U.S. at 705-06). Section 2680(h), accordingly, forecloses United from establishing any waiver of sovereign immunity as to Counts

Three and Four under the FTCA.

4. There Is No Jurisdiction for a Declaratory Judgment Excusing United from Compliance with the FCA

Although United purports to seek money damages, in actuality, it seeks a declaratory judgment about its legal obligation to correct the invalid data it submitted for Medicare payments. All five counts turn on the government's filing of this FCA case based on United's knowing failure to comply with its obligation to withdraw invalid diagnoses. *See, e.g.*, Counterclaim ¶ 45 (pleading breach due to "[t]he instant lawsuit"); *id.* ¶ 51 (pleading breach due to "pursuing treble-damages recovery"); *id.* ¶ 56 (alleging that "DOJ's assertion" in this action caused prior statements to be fraudulent).

Notably, United is not claiming that it has already suffered actual damages because of the allegations against it in this FCA action. Indeed, United's theory of liability cannot be based on actual damages because this Court has not resolved United's liability and awarded damages to the United States. Having suffered no damages to date, the relief United seeks by way of its Counterclaim is declaratory in nature. United is attempting to recast the centerpiece of its defense to the FCA action as a request for a declaration that the Government's legal contention regarding the obligation to withdraw invalid diagnoses is erroneous, thus freeing United to continue to retain inflated Medicare payments and to continue to receive inflated payments in the future.

Viewed through this lens, United's Counterclaim is improper on its face as a defense presented under the guise of a counterclaim. But even as a counterclaim, it is nonetheless deficient as United still has not and cannot identify a statutory source of sovereign immunity waiver or subject matter jurisdiction. The Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, does not itself create an independent basis for a district court to exercise subject matter jurisdiction; it only allows courts to issue declaratory relief in cases that *otherwise* are within the court's jurisdiction. *See* 28 U.S.C. §

2201(a)*; see also Fid. & Cas. Co. v. Reserve Ins. Co.*, 596 F.2d 914, 916 (9th Cir. 1979) (holding that the DJA does not itself confer federal subject matter jurisdiction)*; Aralac, Inc. v. Hat Corp. of Am.*, 166 F.2d 286, 291 (3d Cir. 1948). Other possible sources of waiver already discussed – the Tucker Act, LTA, and FTCA – likewise do not provide such a waiver or jurisdiction. Immunity waiver under the Tucker Act and FTCA is limited to claims for money damages. Meanwhile, the LTA creates limited concurrent jurisdiction for this Court and effectively places the district court in the shoes of the Court of Federal Claims, which does not have equitable powers. *See United States v. Sherwood*, 312 U.S. 584, 589-91 (1941). If this Court were to exercise jurisdiction under the LTA, it would have only authority to award monetary relief. The limited waiver of sovereign immunity granted by the LTA does not provide any consent to suit for actions seeking declaratory or equitable relief. *See Lee v. Thornton*, 420 U.S. 139, 140 (1975) (per curiam) (no declaratory or injunctive relief)*; see also Halim v. United States*, 106 Fed. Cl. 677, 684 (2012) (Declaratory Judgment Act does not apply to the Court of Federal Claims). Consequently, this Court, like the Court of Federal Claims, has no jurisdiction to issue a declaratory judgment under either the Tucker Act, LTA, or FTCA, and the Court therefore must dismiss with prejudice all counts of United's Counterclaim for lack of subject matter jurisdiction.

B. The Counterclaim Should be Dismissed Under Fed. R. Civ. P. 12(b)(6)

Even if this Court possessed jurisdiction over United's Counterclaim, it should dismiss all five counts because they fail to state valid claims for relief under the common law. "Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations [unless it is for fraud or mistake and Rule 9(b) applies]," it must state a claim to relief that is plausible on its face, and the claimant's "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic

recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014). And, "[w]here the facts as pleaded in the Complaint indicate that there are two alternative explanations, only one of which would result in liability, 'plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible.'" *Gray v. United of Omaha Life Ins. Co.*, 251 F. Supp. 3d 1317, 1321 (C.D. Cal. 2017) (quoting *Eclectic Props.*, 751 F.3d at 996-97).

1. United Fails to Plead a Breach of Contract Claim

"To recover for a breach of contract, a party must allege and establish: (1) a valid contract between the parties, (2) an obligation or duty arising under the contract, (3) a breach of that duty, and (4) damages caused by the breach." *Steinberg v. United States*, 90 Fed. Cl. 435, 444 (2009). United fails to plead all of these essential elements.

a. The Counterclaim Does Not Allege Breach of Any Valid Contract

As pleaded, United's breach of contract claims arise from the government's intervention and filing of the Amended Complaint in this FCA action. *See* Counterclaim ¶¶ 35-38, 44, 45, 50, 56, 59. But United's novel theory that this *litigation* is a breach of its contracts with CMS is factually implausible. United identifies no agreement or provision (because there is none) by which the United States has contracted away its right to enforce the FCA in this matter or by which CMS waived United's compliance with its contractual promises to CMS and with Parts C and D regulations. Indeed, United fails to identify any agreements to support its contract-based counts, let alone explain what provision within those unidentified agreements was allegedly breached. Failure to plead these basic elements of a claim for breach of contract is grounds for dismissal. *See James M. Fogg Farms, Inc. v. United States*, 134 Fed. Cl. 363, 366

(2017) ("Therefore, because Plaintiffs have failed to allege a contractual *term* entitling them to relief, their claim must be dismissed.") (emphasis added).

In addition, United cannot state claims for breach of contract based on the contracts attached to the *government's* Amended Complaint. Those contracts make clear that United's knowing and improper failure to correct invalid payment data could be the subject of FCA liability. In particular, pursuant to those contracts, United agreed to "comply with [f]ederal laws and regulations designed to prevent or ameliorate fraud, waste, and abuse, including, but not limited to, . . . the False Claims Act" and they acknowledged that "misrepresentations to CMS about the accuracy of [risk adjustment data] information may result in Federal civil action[.]" *See, e.g.* Exhibit 1 to the Rice Declaration (MA Contract, Art. IX, Sec. A, & Attachment B); 42 C.F.R. § 422.504(h)(1) & 422.504(*l*) (requiring these provisions in all MA contracts). Far from being a breach of these contracts, this FCA action appropriately seeks to enforce those express terms that impose upon MAOs the obligation to correct invalid diagnostic data.

Seeking to avoid these express contractual provisions, United makes vague allegations concerning an oral "understanding" with CMS that purportedly immunizes it from this litigation. These allegations are ineffectual as a matter of law. Whatever the "understanding" United thinks it had with CMS that would allow it to retain overpayments for invalid diagnosis data, failure to reduce such an "understanding" to writing in the contracts themselves forecloses any remedy for breach. *See* 42 C.F.R. § 422.508(a) (providing that MA contracts may be modified only "by *written* mutual consent") (emphasis added); *see also* 42 C.F.R. § 423.508(a) (same under Part D). "Federal law applies the traditional parol evidence rule: a court first considers the plain language of the contract, and if the language is not ambiguous on its face, parol evidence is never considered." *Arizona v. Tohono O'odham Nation*, 944 F. Supp. 2d 748, 759 (D. Ariz. 2013); *see also Nehmer v. United States Dep't of Vet. Affairs*, 494 F.3d 846, 861 (9th Cir. 2007); *Precision Pine & Timber*, 596 F.3d at 824 ("Contract terms are given their plain and ordinary meaning, unless the provisions are ambiguous.").

United's attempt to package its unsupported "understanding" as "fundamental *assumptions* built into [United's] bids [to Part C] and, thus, their contracts with CMS" does not legitimize its Counterclaim. Counterclaim ¶ 44 (emphasis supplied). The purported "assumptions" under which United may have operated when developing Part C bids cannot be used to amend the terms of the contracts and/or relieve United and its MAOs from their contractual and regulatory obligations. *See* Exhibit 1 to the Rice Declaration (MA Contract, Art. XI, Sec. B) ("The MA Organization agrees that it has not altered in any way the terms of this contract presented for signature by CMS. The MA Organization agrees that any alterations to the original text the MA Organization may make to this contract shall not be binding on the parties."); *Nehmer*, 494 F.3d at 861; *Pauly*, 348 F.3d at 1148-49 (holding that plaintiffs' "reasonable belief" regarding interpretation of Department of Agriculture agreement did not override unambiguous terms). Indeed, United's argument now that it understood the contracts to mean one thing, while the *contracts themselves hold differently*, is the very scenario that the parol evidence rule was designed to foreclose. Because the contracts plainly allow the United States to sue United under the FCA, United fails to state any plausible theory of breach.

To the extent United suggests that express contractual provisions have implicitly been rescinded based on alleged statements or inaction by CMS (although, again, United identifies no express contractual agreement between the parties to support this rescission theory), that argument is also legally deficient. According to United, CMS never advised United that "its failure to validate provider submitted codes was inappropriate." Counterclaim ¶ 29. Rather, United claims that it was told by CMS that "unless and until a proposed rule governing review of medical records became final, MA plans did not, and do not, have an affirmative obligation to confirm whether diagnosis codes . . . are supported in the medical records." *Id.* ¶ 31.[12] Although the United States disputes the

[12] United mischaracterizes the nature of this FCA case, just as it did in its appellate briefing in *Swoben*. 848 F.3d at 1173-74. This action is not about how United designed its medical record reviews (for example, whether it used informed or blind coding),

truth of United's allegations, even if they were accepted as true in the context of this motion, the Supreme Court has recognized that "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 63 (1984). Furthermore, CMS cannot abrogate the Department of Justice's exclusive authority to "administer, settle, or determine claims or disputes under the [FCA]." *Martin J. Simko Constr., Inc. v. United States*, 852 F.2d 540, 548 (Fed. Cir. 1988). Nor is the United States bound by "the acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *United States v. Fowler*, 913 F.2d 1382, 1386-87 (9th Cir. 1990) (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1917)).

For similar reasons, United's allegations do not plausibly support a claim for breach of a covenant of good faith and fair dealing. The "covenant of good faith and fair dealing cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement; thus if [a party's decisions administering a contract], however arbitrary, do not breach such a substantive contract provision, they are not precluded by the covenant.'" *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 779 (9th Cir. 2003) (citations omitted) (quoting *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317 (2000), *cited in T. K. v. Adobe Sys., Inc.*, 2018 WL 1812200, at *8 (N.D. Cal. Apr. 17, 2018) ("[B]reach of the implied covenant of good faith and fair dealing . . . only covers 'the express covenants or promises of the contract.'") (citations omitted); *see also Precision Pine & Timber*, 596 F.3d at 831 ("The implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in express

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which is what the proposed rule addressed. Rather this action is about United's knowing failure to withdraw invalid diagnoses based on the results of its medical record reviews. United had either actual knowledge of those invalid diagnoses based on its medical record reviews or acted with intentional indifference and reckless disregard of the results of its medical record reviews showing that the data it had submitted was invalid. As explained by the Ninth Circuit, such conduct is actionable under the FCA. *Id*. at 1175-76 & 1179. Also as explained by the Ninth Circuit, that the proposed rule was not made final is immaterial. *Id*. at 1169-70.

contract or create duties inconsistent with contract's provisions.") (citing *Centex Corp. v. United States*, 395 F.3d 1283 **(**Fed. Cir. 2005)); *Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014) (same).

The United States has not breached a contract term by filing this FCA action. On the contrary, the government's contentions against United are entirely consistent with the terms of United's MA Contracts (and the decision in *Swoben*), which contemplate that the United States may file a civil action seeking relief under the FCA. The Counterclaim, premised on the government's alleged breach of contract by filing this action, fails as a matter of law and should be dismissed pursuant to Rule 12(b)(6).

b. The Counterclaims Fail to Specify Damages

United's Counterclaim also fails to sufficiently plead contract damages. A party must adequately plead damages as a component of a breach of contract claim. *Indian Mich. Power Co. v. United States*, 422 F.3d. 1369, 1373 (Fed. Cir. 2005) ("Damages for breach of contract are recoverable where: (1) the damages were reasonably foreseeable by the breaching party at the time of contracting; (2) the breach is a substantial causal factor in the damages; and (3) the damages are shown with reasonable certainty."). While the amount of damages need not be alleged with absolute exactness or mathematical precision, recovery for uncertain or speculative damages is insufficient. *See Dias v. Fed. Nat. Mortg. Ass'n.*, 990 F. Supp. 2d 1042, 1055 (D. Haw. 2013) ("Plaintiff's vague allegation of damages contains insufficient factual detail to meet the Rule 8 pleading standard.").

United has merely asserted a conclusory allegation that it incurred "damages in an amount to be determined at trial." Counterclaim ¶¶ 46, 52. One cannot even tell from the Counterclaim what United's theory of damages is. Moreover, as previously stated, United cannot sufficiently plead damages at this time because it has not suffered any damages at this time.

2. The Fraud and Misrepresentation Counts Fail to State Claims

As noted above, the United States is immune from suits alleging fraud and misrepresentation. Accordingly, federal common law does not specify the contours of such claims. In any event, state cases, which arguably provide an analogue, limit the reach of this theory even if it could be properly pleaded here. United's count for fraudulent inducement, like its contract counts, is at odds with the parol evidence rule. The fraud exception to the parol evidence rule only applies where the plaintiff is induced to enter into a contract based on promises that are "independent of or consistent with the written instrument," not when the prior representations are "directly at variance with the promise of the writing." *Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 873 (2002) (internal quotation marks and citation omitted) (affirming dismissal of fraudulent inducement claim where the representation by defendant alleged by plaintiffs was "directly at variance with the express terms of the" written agreement).

As explained with respect to other counts in the Counterclaim, United is obligated to delete invalid diagnoses that it submitted for payment. That obligation is imposed by the MA Contracts and the Part C and D regulations, and it is set forth in other program policy and instructional materials (such as the Medicare Managed Care Manual), which are incorporated into the MA Contracts. United's allegations that CMS somehow represented to United that it did not have to comply with this contractual and regulatory obligation is at odds with the legal terms governing the relationship. Not only are these allegations not true but they cannot plausibly support the fraud or misrepresentation claims.[13]

[13] Because United's fraud and misrepresentation claims are implausible, United is unable to allege fraud and misrepresentation with the particularity required by Rule 9(b). Rule 9(b) requires that United allege the who, what, when, where, and how of the alleged fraud or misrepresentation. *Swoben*, 848 F.3d at 1180. This requirement protects a defendant from being falsely accused of fraud and misrepresentation, as is the case here. *Id*. United, for example, fails to identify the auditors mentioned in paragraph 27 of the Counterclaim or describe the audit that was performed.

3. United's Promissory Estoppel Count Fails to State a Claim

As noted above with respect to the government's motion to dismiss under Rule 12(b)(1), the United States has not waived sovereign immunity with respect to suits alleging promissory estoppel. That said, Count Five, pleading promissory estoppel, fails to state a claim. "Promissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove a breach of contract." *Walker v. KFC Corp.*, 728 F.2d 1215, 1220 (9th Cir. 1984) (construing California law). "'The purpose of [the doctrine of promissory estoppel] is to make a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange. If the promisee's performance was requested at the time the promisor made his promise and that performance was bargained for, the doctrine is inapplicable.'" *Id.* at 1218 (quoting *Youngman v. Nev. Irrigation Dist.*, 70 Cal. 2d 240, 249-50 (1969), *cited in Horne v. Harley-Davidson, Inc.*, 660 F. Supp. 2d 1152, 1163 **(**C.D. Cal. 2009) ("Plaintiffs cannot state a cause of action for promissory estoppel because a valid contract, supported by consideration, governs the same subject matter as the alleged promise.").

Even if United's claim were not precluded by the existence of a valid contract, it nonetheless fails to sufficiently plead the elements of promissory estoppel: "'(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.'" *Melendez v. U.S. Bank Nat'l Ass'n*, 2015 WL 12866246, at *5 (C.D. Cal. Dec. 3, 2015) (quoting *Aceves v. U.S. Bank N.A.*, 192 Cal. App. 4th 218, 225 (2011)). The only *affirmative* promise alleged by United relates to "conversations" in 2014 in which CMS purportedly said that "multiple times that 'two-way' looks were not required." Counterclaim ¶ 30. But the Supreme Court has held that reliance on a government agent's oral promise is *per se* unreasonable, explaining that "the possibility of fraud . . . undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument." *Heckler*,

467 U.S. at 65*; see also Pauly*, 348 F.3d at 1150 (government employees "cannot bind the Government beyond the scope of the statute giving them authority" and "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority . . ."). (citations omitted). Moreover, requiring government agents to reduce their advice to writing not only "subjects that advice to the possibility of review, criticism, and reexamination," but also serves the important public need of "ensuring that governmental agents stay within the lawful scope of their authority, and that those who seek public funds act with scrupulous exactitude." *Heckler*, 467 U.S. at 65. United's' purported reliance on oral "conversations" that were never confirmed by CMS in writing cannot be justified under *Heckler*, particularly in the context of "a complex program such as Medicare . . . , in which the need for written records is manifest." *Id.*

In addition, United's promissory estoppel claim must fail because "the Government may not be estopped on the same terms as any other litigant." *Heckler*, 467 U.S. at 60; *see also Int'l Paper Co. v. Farm Credit Corp.*, 760 F. Supp. 13, 22 (D.P.R. 1991) (promissory estoppel is a "'species' of equitable estoppel," subject to the same heightened burden as equitable estoppel when pled against the Government). In the Ninth Circuit, claims of estoppel against the Government require that the plaintiff plead and prove that "the public's interest will not suffer undue damage" as a result of the estoppel, and that the Government "engaged in 'affirmative conduct going beyond mere negligence ….'" *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995) (quoting *Watkins v. United States Army*, 875 F.2d 699, 707 (9th Cir. 1989)). "Affirmative misconduct" requires "a 'deliberate lie' or 'pattern of false promises.'" *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1185 (9th Cir. 2001) (*en banc*) (quoting *Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir. 1986)). Mere misstatements or failures to inform the defendant of the law do not constitute "affirmative misconduct." *Mukherjee*, 793 F.2d at 1009. In this case, Defendants have not pled and cannot plead any facts supporting either of these elements.

Finally, for the reasons set forth in greater detail at pages 5-9 of Plaintiffs' Memorandum in Support of Motion to Strike Affirmative Defenses, the doctrine of estoppel cannot apply in this case, where United seeks to employ that doctrine to compel the payment of money that Congress has not appropriated.

For these reasons, the Court should dismiss Defendants' promissory estoppel claim.

C. The Counterclaim Should be Dismissed Under Fed. R. Civ. P. 12(f)

"Under Rule 12(f) the Court may strike from a pleading any 'insufficient defense' or any material that is 'redundant [or] immaterial'." *Stickrath v. Globalstar, Inc.*, 2008 WL 2050990, at *2 (N.D. Cal. May 13, 2008). "Numerous courts have used that discretion to dismiss counterclaims under Fed. Rule Civ. Pro. 12(f) where they are either the 'mirror image' of claims in the complaint or redundant of affirmative defenses." *Id.* at *3. "The label 'counterclaim' has no magic. What is really an answer or defense to a suit does not become an independent piece of litigation because of its label." *Id.* (quoting *Tenneco Inc. v. Saxony Bar & Tube, Inc.*, 776 F.2d 1375, 1379 (7th Cir. 1985)). A court "should dismiss or strike a redundant counterclaim . . . when it is clear that there is a complete identity of factual and legal issues between the complaint and the counterclaim." *Id.* at * 3 (citation omitted).

The core contention raised by United's Counterclaim – that United was not obligated to delete invalid diagnosis codes – is the mirror image of the core contention in the FCA complaint – that United was required to delete such codes. United has merely repackaged its disagreement with this contention and its attempt to negate FCA liability as its Counterclaim. Resolution of the government's claims will determine the merits of this contention. Accordingly, the Counterclaim is redundant and immaterial and should be stricken. This is especially true considering that, until this contention is decided against United in the main case and an award has been made in favor of the government, United has not been "damaged" and its Counterclaim is in effect a request for a declaratory judgment, which the Court does not have jurisdiction to hear.

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant its motion to dismiss United's Counterclaim.

Dated: May 22, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
NICOLA T. HANNA
United States Attorney
DAVID M. HARRIS
DAVID K. BARRETT
Assistant United States Attorneys

MICHAEL D. GRANSTON
DANIEL R. ANDERSON
EDWARD CROOKE
CAROL L. WALLACK
JUSTIN DRAYCOTT
PAUL G. FREEBORNE
JESSICA KRIEG
PAUL PERKINS
Civil Division, Department of Justice

JAMES P. KENNEDY, JR.
United States Attorney
KATHLEEN ANN LYNCH
Assistant United States Attorney

/S/ John E. Lee

JOHN E. LEE
Assistant United States Attorney
Attornevs for the United States of America

CHAD A. READLER
Acting Assistant Attorney General, Civil Division
NICOLA T. HANNA
United States Attorney
DAVID M. HARRIS
DAVID K. BARRETT
JOHN E. LEE (CBN 128696)
Assistant United States Attorneys
300 N. Los Angeles Street, Room 7516
Los Angeles, California 90012
Tel: (213) 894-3995; Fax: (213) 894-7819
Email: john.lee2@usdoj.gov
MICHAEL D. GRANSTON
DANIEL R. ANDERSON
EDWARD CROOKE
CAROL L. WALLACK
JUSTIN DRAYCOTT
PAUL G. FREEBORNE
JESSICA KRIEG
PAUL PERKINS
Attorneys, Civil Division
United States Department of Justice
P.O. Box 261, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 307-0486; Fax: (202) 307-3852
Email: carol.wallack@usdoj.gov
JAMES P. KENNEDY, JR.
Acting United States Attorney
KATHLEEN ANN LYNCH
Assistant United States Attorney (Admitted PHV)
138 Delaware Avenue
Buffalo, New York 14201
Tel: (716) 843-5830; Fax: (716) 551-3052
Email: kathleen.lynch@usdoj.gov
Attorneys for the United States of America

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) [PROPOSED] ORDER GRANTING UNITED STATES' MOTION TO DISMISS COUNTER-PLAINTIFFS' COUNTERCLAIMS Date: July 30, 2018 Time: 10:00 a.m. Court: 5A, Hon. Michael W. Fitzgerald

The motion of the United States of America to dismiss the five counts of the Counterclaim of Defendant and Counter-Plaintiff Medicare Advantage Organizations (all of which are identified in paragraph four of the Counterclaim, which is appended to Defendants' Answer to the United States' Amended Complaint-in-Partial-Intervention (Dkt. 223)) came on regularly for hearing. Upon consideration of the United States' moving and reply papers, the opposition of the Defendant and Counter-Plaintiff Medicare Advantage Organizations, and the arguments of counsel, and good cause appearing, the Court hereby GRANTS the motion. Accordingly,

IT IS HEREBY ORDERED that the five counts of the Counterclaim of Defendant and Counter-Plaintiff Medicare Advantage Organizations are dismissed with prejudice.

IT IS SO ORDERED.

Dated:_____

_____
UNITED STATES DISTRICT JUDGE