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Attorneys for United Defendants

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

UNITEDHEALTH GROUP, INC. *et al.*,

Defendants.

CASE NO. 2:16-cv-08697-MWF(SSx)

**UNITED'S RESPONSE TO
UNITED STATES' MOTION TO
DISMISS COUNTERCLAIMS**

*[Declaration of David J. Schindler
filed concurrently herewith]*

Date: September 17, 2018
Time: 10:00 a.m.
Courtroom: 5A
Judge: Hon. Michael W. Fitzgerald

1 **I. INTRODUCTION**

2 In this motion, the government asks (at 9-15) this Court to find that it lacks
3 jurisdiction over United's counterclaims. United does not oppose that aspect of the
4 government's request. United is willing to litigate its counterclaims before the
5 Court of Federal Claims (along with related claims it did not file here). United
6 filed its claims here out of an abundance of caution, concerned that if it did not
7 assert them here and instead asserted them as part of a stand-alone suit there, the
8 government would seek to dismiss *that* suit on the ground that the claims qualified
9 as "compulsory counterclaims" that could only be brought here. See Fed. R. Civ.
10 P. 13(a).

11 In an effort to avoid imposing on this Court, United twice requested
12 assurances from the government that if United voluntarily dismissed its
13 counterclaims and re-filed them as a suit in the Court of Federal Claims, the
14 government would not argue that these were compulsory counterclaims that United
15 could and should have brought here. It cannot be the case that both (1) this Court
16 lacks jurisdiction over the counterclaims and (2) the counterclaims are compulsory
17 and thus *must* be brought here. Without explaining its reasoning, the government
18 twice refused to provide such assurances.

19 Accordingly, United respectfully requests that this Court hold that it lacks
20 jurisdiction over the counterclaims, and then sever and transfer them, under 28
21 U.S.C. § 1631, to the Court of Federal Claims. That will avoid any possibility of
22 the government playing a game of procedural whipsaw, since the counterclaims
23 will be transferred rather than dismissed. United will then revise its pleadings as
24 appropriate for that forum, and the parties can litigate the claims on the merits in a
25 court that has jurisdiction over them.

26 **II. BACKGROUND**

27 This case concerns a nearly decade-old dispute about the statutory
28 requirements applicable to the Medicare Advantage ("MA") program operated by

1 the Centers for Medicare and Medicaid Services (“CMS”). United describes that
2 dispute at length in its contemporaneously filed Opposition to Plaintiffs’ Motion
3 for Partial Summary Judgment. For purposes of this motion, the important point is
4 that United and other MA plans have maintained since at least 2008 that they
5 would be underpaid if they were required to measure the risk of the Medicare
6 beneficiaries they insure using a different methodology than CMS uses to measure
7 comparable beneficiaries in the traditional Medicare program and by which it sets
8 MA payment adjustment amounts. If MA plans are required to delete diagnosis
9 codes that CMS does not delete in traditional Medicare, then the beneficiaries
10 enrolled in MA plans will appear artificially healthier than the identical
11 beneficiaries in the traditional Medicare program, and the MA plans will be paid
12 less than they should. United thus has argued that CMS should adopt an “adjuster”
13 mechanism that would compare the presence of unsupported diagnosis codes in an
14 MA plan’s data with the presence of such codes in the traditional Medicare data
15 and account for the difference. *See generally* United’s Opp’n to Pls.’ Mot. for
16 Partial Summ. J. at 20-29.

17 United has pressed its argument vocally and consistently over the last
18 decade. It has done so in administrative comments on notice-and-comment
19 rulemakings, in meetings with CMS officials, in its currently pending
20 Administrative Procedure Act challenge to a 2014 CMS regulation, and in its briefs
21 in this case. And United intends to continue asserting that position in other fora,
22 too, because CMS’s refusal to adopt an adjuster *already* has resulted in United
23 being paid less than it should have been under its contracts with CMS and the
24 payment requirements of the Medicare Act.

25 United asserted its counterclaims here as part of its effort to ensure it is paid
26 correctly. United has no desire to litigate those counterclaims here, where the
27 government has tried to turn a longstanding administrative dispute over the
28 requirements of the Medicare Act into a “fraud” case, with all of the associated

1 rhetoric. But United was concerned that if it did *not* file its counterclaims in this
 2 suit, and instead initiated a suit of its own in the Court of Federal Claims, the
 3 government might argue that *those* claims were “compulsory counterclaims” under
 4 Rule 13(a) that had to be filed in this case. See Fed. R. Civ. P. 13(a) (“[A]
 5 pleading must state as a counterclaim any claim that—at the time of its service—
 6 the pleader has against an opposing party if the claim . . . arises out of the
 7 transaction or occurrence that is the subject matter of the opposing party’s claim;
 8 and . . . does not require adding another party over whom the court cannot acquire
 9 jurisdiction.”). Out of an abundance of caution, therefore, United asserted its
 10 claims as counterclaims here.

11 After the government filed its Motion to Dismiss the counterclaims on
 12 jurisdictional grounds, United reached out on two different occasions to request
 13 assurances that if United were voluntarily to dismiss its counterclaims and re-file
 14 them as a stand-alone suit in the Court of Federal Claims, the government would
 15 not seek to dismiss them there on the ground that they were compulsory
 16 counterclaims that could and should be litigated in this case. See Ex. A to Decl. of
 17 David Schindler, attached hereto. The government refused to provide any such
 18 assurances. Without taking any position one way or the other on whether United’s
 19 counterclaims are “compulsory counterclaims” under Rule 13(a), it responded only
 20 that it would “reserve our rights to assert arguments as appropriate.” See *id.*

21 **III. THE COURT SHOULD SEVER UNITED’S COUNTERCLAIMS AND** 22 **TRANSFER THEM TO THE COURT OF FEDERAL CLAIMS**

23 Because the government has been unwilling to resolve this issue by
 24 stipulation or otherwise clarify its position, United asks that this Court resolve the
 25 issue in a manner that will ensure fairness to both parties. United does not oppose
 26 the government’s request that the Court hold it lacks jurisdiction over United’s
 27 counterclaims. And United recognizes that an order dismissing United’s
 28 counterclaims without prejudice for lack of jurisdiction would be an appropriate

1 remedy in some circumstances. But these are not those circumstances. If the
 2 Court simply dismisses the counterclaims, and the government never explains why
 3 it refused to provide United the assurances just described, then United is concerned
 4 that the government will later contend in the Court of Federal Claims that these
 5 were compulsory counterclaims that now have been dismissed and cannot be
 6 reasserted there.¹

7 Rather than dismissing the counterclaims, the Court instead should sever
 8 them and transfer them to the Court of Federal Claims. The Court clearly has
 9 authority to do so under 28 U.S.C. § 1631. Section 1631 provides that
 10 “[w]henever a civil action is filed in a court . . . and that court finds that there is a
 11 want of jurisdiction, the court shall, if it is in the interest of justice, transfer such
 12 action . . . to any other such court in which the action . . . could have been brought
 13 at the time it was filed.” *Id.* In addition, when a transferring court has jurisdiction
 14 over some but not all of the claims (as the Court indisputably does here with the
 15 government’s affirmative claims), it is appropriate to sever the claims as to which
 16 the court lacks jurisdiction and transfer them as a separate “civil action.” *See, e.g.,*
 17 *FDIC v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996); *Johnson v. Mitchell*, No.
 18 2:10-cv-1968 GEB GGH PS, 2012 WL 2446098, at *5-7 (E.D. Cal. June 26,
 19 2012); *see also Baeta v. Sonchik*, 273 F.3d 1261, 1264 (9th Cir. 2001) (transferring
 20 single claim without addressing need for severance).

21 For three reasons, transfer is in the interest of justice here.

22 *First*, the government itself has indicated that the counterclaims are
 23 appropriately severed from its affirmative claims. *See* Joint Report Rule 26(f)
 24 Disc. Plan (Am.) at 54, ECF No. 224 (Apr. 2, 2018) (“If the Court does not dismiss
 25

26
 27 ¹ If it comes to that, United will respond accordingly and assert any arguments
 28 available to it at that time. But there is no need or warrant for creating any
 uncertainty when transfer would eliminate it.

1 all of Defendants' counterclaims prior to trial, Plaintiffs request that any trial
2 relating to any of those claims be severed and separate . . .").²

3 *Second*, the Ninth Circuit has recognized that, under Section 1631,
4 "[n]ormally transfer will be in the interest of justice because normally dismissal of
5 an action that could be brought elsewhere is time consuming and justice-
6 defeating." *Baeta*, 273 F.3d at 1264 (citation omitted). That ordinary rule
7 certainly applies here, given the government's failure to give United basic
8 assurances that it will not do an about-face on whether these claims should have
9 been brought here after the case is transferred.

10 *Third*, the government has recognized (at 11 n.11) that the Court of Federal
11 Claims has jurisdiction over some of counterclaims under the Tucker Act, which
12 provides that court with jurisdiction over "any claim against the United States
13 founded . . . upon any express or implied contract with the United States."
14 28 U.S.C. § 1491(a)(1).³ While the government disputes that the Court of Federal
15 Claims will have jurisdiction over all five of the counterclaims, Section 1631
16 provides for the transfer of the entire severed "action," 28 U.S.C. § 1631, and the
17 government concedes the Court of Federal Claims would have jurisdiction over
18 that transferred "action."

19 Given that concession, it makes no sense for this Court to resolve whether
20 particular claims United will assert on transfer are jurisdictionally barred. Upon
21 transfer United would by necessity seek leave to amend in order to conform its
22

23 ² While United previously indicated that it would be opposed to severing the
24 counterclaims for trial if they were to proceed in this Court, see Joint Report Rule
25 26(f) Disc. Plan (Am.) at 54, United is not opposed to severing the counterclaims
26 so that they can be transferred to the Court of Federal Claims.

27 ³ The government is incorrect in arguing (at 14-15) that United's contract-based
28 counterclaims seek declaratory relief. United pleaded that its Medicare Advantage
plans "have suffered damages and are entitled to recover for these damages in an
amount to be determined at trial." Defs.' Answer & Counterclaim ¶¶ 46, 52. The
government disagrees with that well-pleaded allegation, but at this stage of the case
the allegations must be accepted as true in resolving jurisdictional questions.

claims with Court of Federal Claims pleading requirements and provide detail that they lack as currently drafted (because of the context already provided in this case by the government’s lengthy complaint), and to add additional contract-based theories not pled in this Court. In doing so, United will allege that all five of its counterclaims are so closely founded upon United’s contractual relationship with the government that their “adjudication outside the Tucker Act’s grant of jurisdiction would be an unjustified incursion on the presumptive commitment of contract matters to the forums designated in the Tucker Act.” *U.S. Marine, Inc. v. United States*, 722 F.3d 1360, 1368 (Fed. Cir. 2013); *see also U.S. Marine, Inc. v. United States*, 478 F. App’x 106, 108, 109 (5th Cir. 2012) (per curiam) (approving transfer of counterclaim for “tort of misappropriation of trade secrets” to the Court of Federal Claims because it was closely related to contract with the United States, and noting that “[o]ur approach is consistent with the majority of courts which interpret the ‘founded upon’ language broadly”). If the government believes then that the Court of Federal Claims lacks jurisdiction over one or more of the claims as re-pleaded, it can file a motion asking that court to address the issue.⁴

IV. CONCLUSION

The Court should reject the government’s attempts to ensure that United has no forum for adjudicating its counterclaims. The Court should find that it lacks jurisdiction, then sever United’s counterclaims and transfer them to the Court of Federal Claims under 28 U.S.C. § 1631.

⁴ Because both parties agree that this Court lacks jurisdiction over the counterclaims, United does not address, and the Court should not reach, the government’s arguments about the counterclaims’ merits. As United’s contemporaneously filed Oppositions to Plaintiffs’ Motion for Partial Summary Judgment and Plaintiffs’ Motion to Strike make clear, however, United disagrees with the government’s assessment of the merits, too. If the Court desires additional briefing on that subject notwithstanding the parties’ agreement about the jurisdictional issue, United would be pleased to provide it.

1 Dated: July 23, 2018

LATHAM & WATKINS LLP
DAVID J. SCHINDLER
DANIEL MERON
KATHRYN H. RUEMLER
ABID R. QURESHI

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6 By /s/ David J. Schindler
David J. Schindler
7 Attorneys for United Defendants
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UNITED STATES DISTRICT COURT
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BENJAMIN POEHLING,

Plaintiff,

v.

UNITEDHEALTH GROUP, INC. *et al.*,

Defendants.

CASE NO. 2:16-cv-08697-MWF(SSx)

**DECLARATION OF DAVID J.
SCHINDLER IN SUPPORT OF
UNITED'S RESPONSE TO
PLAINTIFF'S MOTION TO
DISMISS UNITED'S
COUNTERCLAIMS**

*[United's Response to United States'
Motion to Dismiss Counterclaims filed
concurrently herewith]*

Date: September 17, 2018
Time: 10:00 a.m.
Courtroom: 5A
Judge: Hon. Michael W. Fitzgerald

DECLARATION OF DAVID J. SCHINDLER

I, David J. Schindler, hereby declare as follows:

1. I am a partner at Latham & Watkins LLP, the law firm which represents Defendant UnitedHealth Group, Inc. and its affiliated entities named as Defendants in this action (collectively, "United"). I have personal knowledge, information, or belief of the facts stated herein and, if called as a witness, I could and would testify competently thereto.

2. I submit this Declaration in support of United's Response to Plaintiff's Motion to Dismiss United's Counterclaims, filed concurrently.

3. Attached hereto as Exhibit A is a true and correct copy of a chain of email correspondence between myself and Plaintiffs' counsel, beginning on June 21, 2018, and concluding on July 9, 2018, regarding United's requested assurances from the government that if it were voluntarily to dismiss its counterclaims and re-file them as a suit in the Court of Federal Claims, the government would not argue that they were barred under Rule 13.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: July 23, 2018, at Los Angeles, California.

/s/ David J. Schindler

David J. Schindler

EXHIBIT A

From: Lee, John (USACAC) <John.Lee2@usdoj.gov>
Sent: Monday, July 09, 2018 10:23 AM
To: Schindler, David (LA); Meron, Daniel (DC); Do, Kirstin Scheffler (CH)
Cc: Wallack, Carol (CIV); Draycott, Justin (CIV); Freeborne, Paul G. (CIV);
hsu@constantinecannon.com
Subject: RE: United States ex rel Poehling v. UnitedHealth: counterclaims

David,

Thanks for your email. We continue to believe that our position on the validity of UnitedHealth's Counterclaim is sufficiently stated in our briefs to the court.

John

From: David.Schindler@lw.com <David.Schindler@lw.com>
Sent: Saturday, June 30, 2018 5:11 PM
To: Lee, John (USACAC) <JLee1@usa.doj.gov>; Daniel.Meron@lw.com; Kirstin.SchefflerDo@lw.com
Cc: Draycott, Justin (CIV) <Justin.Draycott@usdoj.gov>; Wallack, Carol (CIV) <Carol.Wallack@usdoj.gov>;
hsu@constantinecannon.com
Subject: RE: United States ex rel Poehling v. UnitedHealth: counterclaims

John

We are at a loss to understand the government's failure to answer our simple question. We would like to avoid burdening the Court with unnecessary motion practice, and hope therefore that we can arrive at a mutually agreeable resolution of your motion to dismiss our counterclaims. You have taken the position in your motion that the Central District lacks jurisdiction over our counterclaims. It seems quite obvious to us that if the Central District lacks jurisdiction over those counterclaims, then it cannot also be the case that we were *required* to bring them here—i.e., they cannot be compulsory counterclaims. We are simply seeking assurances from you that if we rely on your jurisdictional arguments and voluntarily dismiss our claims in this court, you will not turn around and argue that the claims cannot be brought in some other court because they had to be brought here (i.e., that they were compulsory counterclaims). We do not understand why you would be unwilling to provide that assurance, and ask again that you do so. In the event that you continue to "reserve all rights" rather than attempt in good faith to resolve this dispute, we will have no choice but to burden the Court with a request for an appropriate order.

Please get back to us by Tuesday on this issue.

Thank you,

David

From: Lee, John (USACAC) <John.Lee2@usdoj.gov>
Sent: Wednesday, June 27, 2018 3:35 PM
To: Schindler, David (LA) <David.Schindler@lw.com>; Meron, Daniel (DC) <Daniel.Meron@lw.com>; Do, Kirstin Scheffler (CH) <Kirstin.SchefflerDo@lw.com>

Cc: Draycott, Justin (CIV) <Justin.Draycott@usdoj.gov>; Wallack, Carol (CIV) <Carol.Wallack@usdoj.gov>; hsu@constantinecannon.com

Subject: RE: United States ex rel Poehling v. UnitedHealth: counterclaims

David,

Thanks for your email. We believe that our position with respect to the validity of UnitedHealth's Counterclaim is sufficiently stated in our papers filed with the court and reserve our rights to assert arguments as appropriate.

John

From: David.Schindler@lw.com <David.Schindler@lw.com>

Sent: Thursday, June 21, 2018 8:57 AM

To: Lee, John (USACAC) <JLee1@usa.doj.gov>; Draycott, Justin (CIV) <Justin.Draycott@usdoj.gov>; hsu@constantinecannon.com

Cc: Daniel.Meron@lw.com; Kirstin.SchefflerDo@lw.com

Subject: United States ex rel Poehling v. UnitedHealth: counterclaims

John:

As you know, we have been working on our response to the government's motion to dismiss UnitedHealth's counterclaims and have been considering the government's argument that the Central District of California lacks jurisdiction over the counterclaims. The government appears to be arguing that UnitedHealth's counterclaims can be properly brought only before the Court of Federal Claims. Accordingly, we assume that, if UnitedHealth were to re-file the counterclaims in the Court of Federal Claims, the government would not attempt to assert that the claims are improper there on the ground that they are compulsory counterclaims that could and should have been brought in this action. If we misunderstand your position on that issue, we would appreciate hearing from you by next Thursday, June 28.

Thanks,

David

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