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18 UNITED STATES DISTRICT COURT
19 FOR THE CENTRAL DISTRICT OF CALIFORNIA
20 WESTERN DIVISION

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

23 Plaintiffs,

24 v.

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

26 Defendants.

No. CV 16-08697 MWF (SSx)

PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS
DEFENDANTS' COUNTERCLAIM

Date: September 17, 2018

Time: 10:00 a.m.

Court: 5A. Hon. Michael W. Fitzgerald

I. INTRODUCTION

UnitedHealth Group, Inc. defendants (“United”) admits that the Court lacks jurisdiction over its Counterclaim. Accordingly, the Court should dismiss without prejudice the Counterclaim under Fed. R. Civ. P. 12(b)(1)—a straightforward and pragmatic remedy that even United recognizes as an appropriate result (Opp. at 3:27-4:1). But rather than agree, United wants this Court to transfer a set of unknown and unarticulated claims to another court that may or may not have jurisdiction over those claims. United’s senseless approach should be rejected.

United invokes 28 U.S.C. § 1631 as grounds for severance and transfer. But United’s request to transfer the Counterclaim must be denied because United cannot demonstrate that the Counterclaim “could have been brought” in the United States Court of Federal Claims (“CFC”) “at the time it was filed or noticed” or that transfer “is in the interest of justice” as 28 U.S.C. § 1631 requires. Because United cannot make either of the required showings, the only course of action is for this Court to dismiss without prejudice the Counterclaim for lack of subject-matter jurisdiction.

Furthermore, putting aside the undisputed jurisdictional defect, all five counts of the Counterclaim fail to state claims for relief and must be dismissed under Rules 12(b)(6) and (f). In its opposition, United does not even attempt to demonstrate why the claims presented in the Counterclaim should survive dismissal. United asks this Court to transfer claims that it recognizes have no legal merit based on a pledge that it will amend the complaint upon transfer to conform to pleading requirements. Because “the interest of justice” would not be served by transferring legally-deficient and indeterminate claims, transfer should be denied. Dismissal for lack of jurisdiction is the only appropriate course of action.

II. ARGUMENT

Where, as here, the Court lacks subject-matter jurisdiction to proceed, section 1631 permits transfer only when the following two conditions are satisfied: (1) a court exists in which the case could have been brought in originally, and (2) the interests of

1 justice would be served by the transfer. *Kolek v. Engren*, 869 F.2d 1281, 1284 (9th Cir.
2 1989). United’s request fails both conditions of the section 1631 analysis.

3 As a threshold point, United reframes its Counterclaim in a manner that is not
4 wholly consistent with the Counterclaim as alleged. In its Opposition to the Motion to
5 Dismiss, United says:

6 For purposes of this motion, the important point is that United and other
7 MA plans have maintained since at least 2008 that they would be underpaid
8 if they were required to measure the risk of the Medicare beneficiaries they
9 insure using a different methodology than CMS uses to measure
10 comparable beneficiaries in the traditional Medicare program and by which
11 it sets MA payment adjustment amounts.

12 Opp. at 2:3-8.

13 However, in its March 23, 2018 Counterclaim, United brought causes of action for
14 breach of contract, breach of the covenant of good faith and fair dealing, fraudulent
15 inducement, negligent misrepresentation, and promissory estoppel based on the notion
16 that United was not required to “look both ways” or perform “two-way looks” and that
17 seeking damages contrary to that notion amounts to a breach of express and implied
18 contracts by the United States. In either case, severance and transfer under section 1631
19 is not warranted.

20 **A. United Has Not Demonstrated that its Counterclaims Could Have Been**
21 **Originally Brought in the CFC**

22 Federal court jurisdiction must be established by the party that would invoke it.
23 *See, e.g., Haroutunian v. INS*, 87 F.3d 374, 376 (9th Cir. 1996) (citing *Kokkonen v.*
24 *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)). And under 28 U.S.C.
25 §1500, the CFC lacks jurisdiction “of any claim for or in respect to which the plaintiff
26 . . . has pending in any other court any suit or process against the United States.”
27 Designed to curb duplicative lawsuits, section 1500 sets forth a “broad prohibition” that
28 “bars jurisdiction in the CFC not only [of a lawsuit] on an identical claim elsewhere—a

1 suit ‘for’ the same claim—but also if the [suit] is related although not identical—a suit ‘in
 2 respect to’ the same claim.” *United States v. Tohono O’Odham Nation*, 563 U.S. 307,
 3 312 (2011). *Id.*

4 In *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013), the Federal Circuit,
 5 which exercises appellate review over the CFC, reiterated that “simultaneous actions
 6 against the government in separate forums” are prohibited when (1) “there is an earlier-
 7 filed ‘suit or process’ pending in another court” and (2) “the claims asserted in the
 8 earlier-filed case are ‘for or in respect to’ the same claim(s) asserted in the latter-filed
 9 [CFC] action.” *Id.* at 1374 (quoting 28 U.S.C. § 1500). If both conditions are satisfied,
 10 then the CFC will be required to dismiss the Counterclaim upon transfer under Rule
 11 12(b)(1).

12 The APA action filed on January 29, 2016 in the District Court for the District of
 13 Columbia is clearly an earlier-filed suit pending in another court. *UnitedCare Ins. Co. v.*
 14 *Burwell*, No. 16-cv-00157-RMC, Dkt. 1 (filed Jan. 29, 2016). United filed its
 15 Counterclaim over two years later. See United’s Answer to United States’ Am. Compl.-
 16 In-Partial Intervention and Counterclaim, Dkt. 223 (filed Mar. 23, 2018).

17 As to the second prong of the section 1500 test, in the earlier-filed APA action
 18 United has already pressed the same theory it advances in its Counterclaims: that the
 19 insurer would be underpaid if it were required to delete diagnoses that are unsupported
 20 by its beneficiaries’ medical records and repay the government undeserved and unearned
 21 premiums. United submits the same fanciful theory in its Counterclaim in this case.
 22 Compare, e.g., Compl., *UnitedHealthCare Ins. Co. v. Burwell*, No. 16-CV-00157-RMC,
 23 Dkt. 1, ¶ 12 (claiming that “the plan’s payment will be retroactively reduced, simply
 24 because CMS imposed on plans a validation criterion it did not impose on its own
 25 corresponding data”), with Counterclaim, Dkt. 223, ¶ 11 (“If CMS also required MA
 26 plans to delete all codes that are unsupported in provider-submitted codes, such that they
 27 received payments for supported codes as CMS continued calculating payment amounts
 28 using both its supported and unsupported FFS codes, CMS would receive a windfall and

1 the MA plans would be improperly underpaid”).

2 In its Opposition, United concedes that it has pressed this “underpayment”
3 argument, *inter alia*, “in its currently pending [APA] challenge to a 2014 CMS
4 regulation, and in its briefs in this case.” Opp. at 2:17-21. Because United intends to
5 raise claims before the CFC that it is already pursuing in parallel proceedings, the CFC
6 lacks jurisdiction over such duplicative claims.

7 United argues that “the government has recognized (at 11 n.11) that the [CFC] has
8 jurisdiction over some of [sic] counterclaims under the Tucker Act” and that “the
9 government concedes the Court of Federal Claims would have jurisdiction over that
10 transferred ‘action.’” Opp. at 5:10-11, 17-18. “Given that concession,” United argues,
11 “it makes no sense for this Court to resolve whether particular claim United will assert
12 on transfer are jurisdictionally barred.” Opp. at 5:19-20. United is wrong on all
13 accounts. First, at footnote 11, the United States merely noted that the CFC “regularly
14 adjudicates claims alleging breaches of covenants of good faith pursuant to the Tucker
15 Act.” United cannot commandeer that general statement as support for its notion that the
16 CFC has jurisdiction for any part of its Counterclaim. Second, this Court cannot sever
17 and transfer an action under section 1631 unless the transferee court has jurisdiction,
18 which necessarily requires this Court, as the transferor, to make that determination. “A
19 case may be transferred under section 1631 only to a court that has subject matter
20 jurisdiction.” *Jan’s Helicopter Service, Inc. v. FAA*, 525 F.3d 1299, 1303 (Fed. Cir.
21 2008); *see also McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 591 (9th Cir. 1983)
22 (declining to transfer under 1631 because “case could not originally brought in the
23 Claims Court”); *Munns v. Kerry*, 782 F.3d 402, 414 (9th Cir. 2015) (finding that
24 transferee court could exercise jurisdiction). In fact, even if United’s contention that the
25 United States admitted that the CFC had jurisdiction had merit, this Court would still be
26 required to resolve independently the threshold jurisdictional question to ensure that it
27 could proceed. *See Ruiz v. Mukasey*, 552 F.3d 269, 273 (2d. Cir. 2009) (conducting full
28 section 1631 analysis despite the parties’ agreement that transferee district court had

1 jurisdiction). In short, contrary to United’s suggestion, this Court cannot simply pass the
2 jurisdictional buck to the CFC.

3 United’s failure to establish the jurisdiction of this Court or the CFC is not the
4 product of some “game of procedural whipsaw,” as it incorrectly suggests in its
5 response. Opp at 1:22. Rather, it is a function of its own imprudent attempt to pursue in
6 two courts at the same time parallel actions against the United States.

7 **B. Transfer Would Not Serve the Interests of Justice**

8 Regardless of any overlap between United’s Counterclaim and the APA action
9 that would undo CFC jurisdiction, the interests of justice are not served by severing and
10 transferring legally deficient claims to the CFC. As explained at pages 15-24 of the
11 memorandum of points and authorities in support of the motion to dismiss, United fails
12 to plead facts that would make out a cognizable claim of breach of an express or implied
13 contract, fraud and misrepresentation, or promissory estoppel. In response, United does
14 not defend its Counterclaims, implicitly acknowledging that its claims lack legal merit.
15 It would not be “in the interest of justice” to sever and transfer claims that would likely
16 be found deficient in the CFC. The Ninth Circuit has recognized that transfer is not in
17 the interest of justice “where no colorable claim for relief has been shown.” *Clark v.*
18 *Busey*, 959 F.2d 808, 814 (9th Cir. 1992). The Court should not transfer claims that
19 United did not even muster the energy to defend.

20 United argues (Opp. at 5:21-6:4) that it will “seek leave to amend in order to
21 conform its claims with the [CFC] pleading requirements and provide detail that they
22 lack as currently drafted . . . and to add additional contract-based theories not pled in this
23 Court.” It would not serve the interests of justice for this Court to sever and transfer an
24 action that includes “theories not pled in this Court.” And the Court cannot determine
25 whether CFC jurisdiction exists for claims based on theories not pled in this Court. To
26 the extent United seeks to refile the claims presented in the Counterclaim in the CFC,
27 those claims should be taken up in the first instance by that court when (and if) they are
28 fully developed by United. The same is, of course, true for any new claims. United

suffers absolutely no prejudice by dismissing claims that likely will require amended pleading.

United's concession that it will need to amend its claims confirms that United will not be prejudiced by dismissal. After dismissal, United can marshal its jurisdictional facts and assert the appropriate claims in a new pleading in the CFC.

III. CONCLUSION

For the foregoing reasons, United's Counterclaim should be dismissed for lack of subject-matter jurisdiction and United's request that the Counterclaim be transferred to the CFC should be denied.

Dated: August 27, 2018

Respectfully submitted,

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