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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

UNITEDHEALTH GROUP, INC. *et al.*,

Defendants.

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

UNITED'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING RE MOTION FOR ISSUANCE OF SCHEDULING ORDER MODIFYING EXTENT OF DISCOVERY

Date: March 18, 2019
Time: 10:00 a.m.
Courtroom: 5A
Judge: Hon. Michael W. Fitzgerald

The government's request to file a supplemental brief is just the latest tactical maneuver designed to prevent United from gaining access to evidence that is critical to United's defense. The government fails to provide any legitimate reason why supplemental briefing would be helpful to this Court in ruling on the government's pending Motion Pursuant to Rule 16(b)(3) for Issuance of a Scheduling Order (Dkt. 261) ("Rule 16 Motion"). Indeed, it is clear that the true purpose of the government's filing is not to "supplement" its Rule 16 Motion with new authority or explain new significant events, but rather to greatly expand the scope of, and relief sought in, its Rule 16 Motion. The Court should, therefore, deny the government's Motion for Leave to File Supplemental Briefing Re Motion For Scheduling Order Modifying Extent of Discovery ("Motion for Leave") (Dkt. 336).

The government's only explanation as to why the Court should grant leave to file supplemental briefing relates to discovery requests issued by UnitedHealth since the government filed its Rule 16 Motion in August 2018. But the government fails to explain how the basis for its objections to those discovery requests—i.e., relevance—is not already addressed in its Rule 16 Motion or its recently filed Motion for Review of Discovery Order (Dkt. 334). The government provides no new authority, case law, or events that would impact this Court's decision on the Rule 16 Motion. Nor does it explain why its pending motions do not address, or could not have adequately addressed, the issues raised in its supplemental brief. Thus, the government provides no justification for re-opening briefing on its Rule 16 Motion.

The closest the government comes to such an argument is its claim that, since the filing of the government's Rule 16 Motion, United has "expanded [its] 'actuarial equivalence' argument from a defense to [its] legal obligation . . . to an affirmative attempt to redefine what constitutes an overpayment and damages." Mot. for Leave at 2. That claim is preposterous. United has consistently argued—

since at least its Motion to Dismiss filed in December 2017 and throughout its Summary Judgment Opposition that was filed a month *before* the government's Rule 16 Motion—that the discovery it seeks is relevant to, among other things, showing that United did not receive any overpayment (and would be underpaid if DOJ's theory were to prevail) and to damages. *See, e.g.*, United's Mot. to Dismiss United States' First Am. Compl.-in-Partial Intervention 1–2 (Dkt. 182) ("During that time, senior officials at CMS have acknowledged that the theory DOJ is pressing here would, if correct, result in Medicare Advantage plans being *under*paid for the insurance risk they assume from CMS.") (emphasis in original); *id.* at 6 ("Insurance providers have argued that unsupported codes submitted by MA plans simply offset the unsupported codes similarly submitted by providers in the FFS program, such that MA plans would actually be underpaid if they were required to delete codes that lacked support in their members' charts."); *id.* at 7 ("More concretely, doing so would result in a windfall to CMS, which reduces its per-code payments in the first place because of the presence of unsupported codes, and would then recover essentially that same money a second time by requiring plans to delete any codes that are not supported."); *id.* at 8 ("Internally, [CMS's] Division of Payment Validation determined that MA plans would be undercompensated unless CMS accounted for its own use of diagnosis codes"); Partial Summ. J. Opp'n 2 (Dkt. 250) ("[D]etermining whether a plan has been overpaid therefore requires measuring actuarial risk . . . ."); *id.* ("The same discovery into the government's rate of unsupported codes, the impact of those codes on the calculation of United's payments, and numerous other related issues . . . clearly is relevant to . . . show that United did not receive any overpayments . . . .").[1]

[1] *See also id.* at 9 ("[I]n determining whether a plan has received an overpayment, the *relative* accuracy of diagnostic coding in FFS and MA claims is the key

Perhaps even more shocking, the government's argument as to why supplemental briefing is necessary entirely ignores United's opposition to the very Rule 16 Motion the government seeks to "supplement"—to which the government already had the opportunity to respond—where United's first substantive argument regarding relevance was that "The Discovery the Government Seeks to Foreclose is Relevant to Whether United Received an Overpayment." *See* United's Opp'n to Pls.' Rule 16 Mot. 9–11 (Dkt. 274).[2] That the government needs to resort to clear misrepresentations regarding United's actuarial equivalence argument speaks volumes.

The government also argues that supplemental briefing is necessary to address United's allegedly irrelevant discovery requests related to a recently proposed regulation and accompanying draft empirical study. But the government *itself* filed a notice in this matter when HHS issued the proposed regulation and draft study, expressly stating that "HHS' conclusions and findings relating to the FFS Adjuster issue *are relevant* to the 'actuarial equivalence' and other issues currently before this Court." Notice of Recent Proposed Medicare Part C Regulation Relating to Fee-For-Service Adjuster Issue at 2 (Dkt. 307) (emphasis added). Having put the proposed regulation and accompanying study directly at issue and representing that they are relevant to issues already pending before

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metric.") (emphasis in original); *id.* at 13–15 (discussing what rightfully constitutes an overpayment in a section of the brief entitled "Administrative Challenges To The Government's Current Overpayment Theory"); *id.* at 20 ("[E]vidence that CMS itself recognized that plans would be underpaid if they were required to delete all unsupported codes also would be relevant to whether the government had proven an 'overpayment' . . . . Such evidence would likewise weigh on questions like materiality, and should the case ever comes to it, damages."); *id.* at 45–46 ("Evidence about the rate of unsupported codes in CMS's own data and the effect that such codes have on CMS's payments to MA plans, for example, would help demonstrates . . . that United certainly did not retain an overpayment.").

[2] Not only has United consistently argued it was not overpaid, but the government itself has expressly conceded that it pleaded retention of an overpayment "in the alternative" and did "not waive the right to make that alternative argument if necessary." *See* Pls.' Rule 16 Reply (Dkt. 278).

Court, the government cannot now use United's discovery into that very regulation and the accompanying empirical study as a basis for supplementing its Rule 16 Motion.

In reality, the government is not seeking to file a supplemental brief, which, if proper, would entail discussing new case law or new facts that had arisen since the original filing and that supported the pending motion. The government instead is using the guise of a supplemental brief as a shortcut for vastly altering and expanding its pending Rule 16 Motion. Indeed, the revised proposed order that the government submits with its "supplemental" briefing makes clear that the motivation behind the government's filing is that its original proposed order is much narrower and does not cover the vast majority of documents that Magistrate Judge Segal recently ordered the government to produce. For example, the original proposed order only sought to preclude discovery related to (1) internal agency deliberations regarding MA plans' alleged obligations to delete unsupported codes and (2) investigations of other MA plans' compliance with such alleged obligations. However, its revised proposed order now seeks to preclude discovery into additional, far broader categories, including, but not limited to, discovery related to: (1) "the Risk Adjustment Data Validation ('RADV') Fee-for-Service issue, the 'actuarial equivalence' requirement in the Medicare Act, the development and implementation of the CMS-HCC risk adjustment model, and the calibration or recalibration of the coefficients for the model"; (2) "the materiality of valid diagnosis data" (with limited exceptions); and (3) "communications between CMS and other entities other than Defendants about the obligation to delete or the other entities' possible or actual deletions." The government's object in seeking to "supplement" its earlier motion is plainly an attempt to paper over, through a nunc pro tunc procedural gimmick, the fact that Judge Segal's conclusion that all of these categories of documents are relevant would have been entirely consistent with the government's then-pending Rule 16(b) Motion, *even if* it had been granted.

Finally, the case law cited by the government is inapposite and does not support granting leave to file a supplemental brief here. Those cases involved instances where, for example, parties jointly requested supplemental briefing, new information not previously known to the movant came to light after briefing had closed, and potentially new arguments were raised in a reply brief that warranted additional briefing. *See Boeing Co. v. Yuzhnoye*, No. CV 13-730 AB (AJWx), 2015 WL 12805148, at *3 (C.D. Cal. Oct. 30, 2015) (allowing supplemental briefing to address "new potentially relevant information *previously unknown* to plaintiffs concerning a pending motion") (emphasis added); *Cummings v. Starbucks Corp.*, No. CV 12-06345 MWF (FFMx), 2014 WL 1379119, at *2 (C.D. Cal. Mar. 17, 2016) (parties *jointly* submitted a stipulation requesting the opportunity to file supplemental briefing on a motion on which the parties previously had asked this Court to stay a decision and after the parties unsuccessfully attempted to mediate their dispute); *Nomadix v. Hewlitt-Packard Co.*, 838 F. Supp. 2d 962, 963 n.2 (C.D. Cal. 2012) (allowing a sur-reply "in the interest of having a complete record" because there was an issue of whether the plaintiff raised new arguments in its reply brief); *Reiffin v. Microsoft Corp.*, 270 F. Supp. 2d 1132, 1159 (N.D. Cal. 2003) (matter did not involve supplemental briefing on a pending motion, both parties separately requested leave to file briefing on a narrow issue related to a proposed amended complaint, and neither party opposed the other's request); *Mulato v. Wells Fargo Bank, N.A.*, 76 F. Supp. 3d 929, 941 (N.D. Cal. 2014) (finding that the plaintiff's request to file supplemental briefs "lack[ed] good cause" but considering the supplemental brief in part because the defendant already had responded to the new arguments made by the plaintiff); *Pineda v. Target Corp.*, No. SACV 08-0315 AG (RNBx), 2009 WL

3244995, at *1 (C.D. Cal. Oct. 5, 2009) (allowing the plaintiff a sur-reply to help resolve new issues raised by the defendant in reply).

Accordingly, the Court should deny the government's Motion for Leave.

Dated: February 25, 2019

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