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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 RESPONSE TO PLAINTIFFS' MOTION FOR REVIEW OF DISCOVERY ORDER

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

Date: April 8, 2019
Time: 10:00 a.m.
Courtroom: 5A
Judge: Hon. Michael W. Fitzgerald

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I. INTRODUCTION

The government's motion stems from its decision to withhold more than 20,000 documents on the basis of the deliberative process privilege. After substantial briefing, a telephonic discovery conference, and a separate hearing in open court, Magistrate Judge Segal issued a 47-page opinion holding that: (a) the privilege does not apply to the documents; (b) the government employed a wholly defective process for invoking the privilege; (c) the documents are relevant; and (d) the documents are such an "essential component" of the case that United's need for them would override the qualified privilege even if it did apply.

The government comes nowhere close to establishing clear error in any aspect of that decision. It does not even try to show that the documents are "privileged," though it continues (inexplicably) to describe them as such. Nor does it try to defend the government's shoddy process for asserting the privilege. It likewise does not contend that producing the documents (which already have been collected) would be burdensome. The *only* objection it musters is that not one of the more than 20,000 documents at issue from its privilege logs is relevant to this case. That is absurd. The government cannot show any error (let alone clear error) in Judge Segal's conclusion that these documents "easily fall" within the bounds of discovery, particularly in a case of such high stakes the government itself initiated.

Judge Segal's decision carefully explains many of the ways in which United established that the documents at issue are relevant to this case. *See* Order Granting United's Mot. to Compel ("Order") 28–34, Dkt. 324. The only remaining False Claims Act count, for example, is a "reverse" false claim theory, which requires the government to prove that United received an "overpayment" or "improperly avoid[ed]" an "obligation to pay or transmit money or property to the Government." 31 U.S.C. §§ 3729(b)(3), (a)(1)(G). Materials concerning whether United was overpaid or had any obligation to return money clearly are relevant to that count. And those materials are just as clearly relevant to the government's common law

claims for Unjust Enrichment and Payment by Mistake.

The government's own actions show that it understands the relevance of these materials. Just three days before filing this motion, the government served subpoenas in this case on two third parties—a professional association of actuaries and a trade association for health insurance plans—seeking years of internal documents addressing issues like the statutory "actuarial equivalence" mandate and the adoption of the so-called "Fee-For-Service Adjuster." To turn around and argue that the government's *own* documents on those same issues are irrelevant—and that Judge Segal clearly erred in holding otherwise—is untenable.

In reality, this motion is just a backdoor attempt by the government to submit supplemental briefing on its pending Motion for Partial Summary Judgment. Following oral argument on that motion, and having viewed the Court's tentative ruling, the government apparently wanted another shot at making its case. But even taken for what it really is—a post-argument brief on the merits of its summary judgment motion—the government's attempt fails.

For one thing, the government's motion depends on a mischaracterization of United's position in this litigation. As Judge Segal explained, "[i]n contrast to the Government's characterization of this case, United's defense challenges whether, by failing to delete known unsupported diagnosis codes, *it was overpaid*." Order 31 (emphasis added). The government's continued assertion that United seeks to "invalidate or recalibrate the entire MA payment model," Gov. Br. 1, Dkt. 334-1, is simply wrong. United has argued that precisely because the MA payment model is built on a mix of supported and unsupported diagnosis codes from the Fee-For-Service ("FFS") Program, United's receipt of payments based on unsupported codes is not improper. They show the system is working correctly. And it is the *government's* theory here—in which every diagnosis code that a plan identifies as unsupported must be deleted, regardless of whether CMS has an equal rate of unsupported codes—that would require invalidating or recalibrating the payment

model. Judge Collyer of the U.S. District Court for the District of Columbia recently recognized just that. She held that CMS's 2014 decision to define any unsupported code as an "overpayment" without accounting for the rate of unsupported diagnosis codes in CMS's own data—the same methodology that DOJ developed as a litigating position while investigating this case—is both prohibited by law and an arbitrary departure from past practice.

The government insists that none of this matters because the invalidity of requirements imposed by an agency, or the absence of an overpayment, "is no defense to a charge of filing false statements." *Id*. at 11 (quoting *United States v. Weiss*, 914 F.2d 1514, 1522–23 (2d Cir. 1990)). But, most simply, this is not even a "false statements" case at all—those claims were dismissed at the pleading stage, and the government chose not to amend them. The government's remaining claims all depend on showing that United actually *received an overpayment* and improperly avoided a valid obligation to repay those funds. Of course it would be a defense to those claims to show that no such obligation or overpayment existed.

Finally, the government again contends that the key issues in this case were all decided by the Ninth Circuit in *United States ex rel. Silingo v. Wellpoint, Inc.*, 904 F.3d 667 (9th Cir. 2018) and *United States ex rel. Swoben v. United Healthcare Insurance Co.*, 848 F.3d 1161 (9th Cir. 2016). But the Ninth Circuit emphasized that neither case involved "reverse false claim" allegations like the ones at issue here; instead, they were both "false statement" cases. And the Ninth Circuit had no occasion to address the questions about either the scope or the validity of obligations to delete unsupported codes that are central to this case.

For all of these reasons, and others addressed below, Judge Segal's order was plainly correct—and certainly was not clearly erroneous.

II. BACKGROUND

A. The Medicare Advantage Risk Adjustment Model

The parties have described the statutory and regulatory background of this

case before, and this Court has authored multiple opinions addressing many of the key principles. *See, e.g.*, Partial Summ. J. Opp'n 5–13, Dkt. 250. Accordingly, United sets forth the backdrop for this motion in abbreviated form.

CMS uses a risk adjustment model that pays MA plans predetermined monthly amounts based on the diagnosis codes submitted by the patients' health care providers and the demographic characteristics of the patients. By statute, CMS is required to apply that model "using the same methodology" as it uses in the FFS program, and to ensure "actuarial equivalence" between its payments to MA plans and what Medicare pays directly to care for similar patients in the traditional FFS Medicare program. 42 U.S.C. §§ 1395w-23(b)(4), (a)(1)(C)(i).

CMS determines the predicted added cost to attribute to each diagnosis code by analyzing the cost and diagnosis data from the claims of traditional FFS beneficiaries. In traditional Medicare (as in MA), providers often submit diagnosis codes on claims for a condition that the patient does not have or that is not adequately documented in the patient's charts. So FFS data includes a mix of supported and unsupported diagnosis codes, and when CMS assigns values to the diagnosis codes in its risk adjustment model using FFS data, it makes no effort to check for or delete unsupported codes. The payment model thus accounts for the existence of some unsupported codes, and determines payment amounts that are accurate when applied to data containing a similar rate of unsupported codes.

B. The Government's Claims And United's Defenses

The government's Amended Complaint-In-Intervention, as narrowed by this Court's February 12, 2018 ruling, alleges one reverse False Claims Act claim and two common law claims: Payment By Mistake and Unjust Enrichment. Central to each of these claims is the government's argument that because United received payments based on allegedly unsupported codes, United was overpaid and had an obligation to return those payments to the government. *See infra* at 11–13, 16–18 (describing in more detail the legal theory behind the government's claims).

The government's theory ignores the key fact that, in light of the way CMS's risk adjustment model is structured, an MA plan is paid appropriately if the diagnostic data it submits to CMS contains a rate of unsupported diagnosis codes that is comparable to the rate of unsupported diagnosis codes in FFS data. United has acknowledged that if the unsupported codes are more prevalent (and have a greater effect on payment) in the MA plan's data than in the FFS data, an MA plan could theoretically be overpaid. However, the mere fact that an MA plan has submitted an unsupported code is insufficient to establish that the MA plan was overpaid or that it has an obligation to return the payment associated with that code; instead, it is necessary, among other things, to know more about the rate of unsupported diagnosis codes in the MA plan's data and how it compares to the rate of unsupported codes in the FFS data and their impact on the plan's payments.

C. The Discovery Proceedings At Issue

The documents improperly withheld by the government go directly to these questions. United has sought discovery showing, among other things, that: (1) CMS officials historically have understood that MA plans are paid appropriately when they have a rate of unsupported diagnosis codes similar to the rate of such codes in the FFS program; (2) MA plans are not overpaid when they receive payments based on unsupported codes, so long as the rate and payment impact of those codes is similar to the rate and payment impact of unsupported codes in the FFS program; (3) the rate of unsupported codes in the FFS data used to calibrate the current payment model is such that requiring MA plans to delete all unsupported codes they identify would result in substantial *under*payment; and (4) CMS itself has recognized it is proper to use chart review processes that do not identify whether previously submitted codes were unsupported.

The government has resisted that discovery at every turn. Initially, it argued that it should not be required to make CMS officials available for depositions until several early motions had been resolved. *See* Tr. of Dec. 18, 2017 Conf. at 4:22–5:4

(Ex. 1 to Rule 16 Opp'n, Dkt. 275-1). After that proposal was rejected, *see id.* at 10:12–11:15, 13:14–14:2, 14:7–20, United was able to depose two senior CMS officials. As discussed below, *see infra* at 14 n.7, the depositions revealed that during the time in question, at least some CMS officials disagreed with key aspects of DOJ's theory here. Little wonder the government had resisted.

Following those depositions, the government doubled down on its efforts to deny United access to helpful material. Apparently hoping that it can hold out until after this Court has resolved questions about "actuarial equivalence" and other issues on which it knows the documents would bolster United's defense, the government has employed incredibly broad assertions of the deliberative process privilege and slowly dribbled out documents. Since United issued its first document requests in August 2017, the government claims to have collected over 7,000,000 documents, but has turned over fewer than 60,000—in contrast to the more than 590,000 documents that United has produced to the government during that time (on top of the more than 600,000 documents United had provided previously). During the same period, the government has withheld 30,791 documents as privileged, with 25,441 of those documents—roughly 83 percent—being withheld *solely* on the basis of the deliberative process privilege.[1]

United eventually brought the issue before Judge Segal at an informal discovery conference on August 16, 2018. During that hearing, the government argued that it did not have to continue producing privilege logs until this Court ruled on its Rule 16(b) Motion and Motion for Partial Summary Judgment. Tr. of Aug 16, 2018 Conf. at 10:23–11:16, 17:18–20, Dkt. 268. Judge Segal told the government

[1] The government has only produced one privilege log since Judge Segal's order on this motion. While the government had asserted the deliberative process privilege over approximately 85% of the documents on its prior nine privilege logs, its most recent log did not contain a single assertion of that privilege. This strongly suggests the government has unilaterally decided that such documents are not relevant and need not be logged pending the outcome of this Court's rulings on its pending motions—directly contradicting repeated instructions by this Court and Judge Segal that discovery is to proceed even when motions are pending.

that it could not simply refuse to participate in discovery and that "if it was a situation where [the government] knew [it was] going to need a stay until certain fundamental issues were resolved, that Stay Motion needed to be filed a long time ago." *Id.* at 19:23–21:22. The government then agreed to provide declarations from agency officials supporting its privilege assertions by September 28, having failed (improperly) to secure such declarations at the time it actually asserted the privilege. *See* A. Likoff Sept. 4, 2018 Email to D. Schindler (Ex. 14 to Joint Stip., Dkt. 310-5). But on September 24, after buying itself another month, the government reneged on its agreement and said it would not provide the declarations until this Court ruled on all four of the government's pending motions. *See* P. Freeborne Sept. 24, 2018 Email to D. Schindler (*id.*).

At that point, United finally moved to compel production of the withheld documents. Days later, in yet another attempt to stall production, the government filed an *ex parte* application to stay briefing on United's motion to compel pending resolution of the government's substantive motions before this Court. The government provided no explanation for why it failed to seek a stay of discovery earlier through a regularly noticed motion, and after this Court referred the stay application to Judge Segal, she denied the government's motion on the ground that it had not established the irreparable harm necessary to proceed *ex parte*. *See* Mem. Decision & Order Den. United States' *Ex Parte* Appl. for Temporary Stay of Mot. to Compel Disc. Pending Issuance of Rulings (Oct. 23, 2018), Dkt. 304 ("*Ex Parte* Order"). As Judge Segal explained, the government would have the full opportunity to assert its substantive bases for withholding the documents in briefing on the motion to compel; the only thing at issue in the *ex parte* motion was whether that briefing could move forward at all, and the government would not be irreparably harmed by having to respond to a motion to compel. *See id.* at 16–19.

The parties then submitted full briefing on United's motion to compel. On December 14, 2018, after hearing argument, Judge Segal granted United's motion

to compel.[2] In a well-reasoned 47-page opinion, Judge Segal rejected the government's "attempts to constrict the scope of 'relevant' information in this case to its narrowest possible definition," concluding that "the documents United seeks easily fall within the broad parameters of 'relevance' for discovery purposes" because United had "adequately demonstrated that the documents withheld by the Government may assist" with its defense. Order 29, 31.

Judge Segal also catalogued the numerous deficiencies with the government's privilege assertions, explaining that "[t]he government's privilege log and agency declarations fail to establish the applicability of the Deliberative Process Privilege." *Id.* at 34. Judge Segal noted the government's "utter[] fail[ure] to establish that the specific documents withheld were predecisional," adding that it "ma[de] no attempt to identify a specific decision or decision-making process, or to explain whether a document concerns a particular decision that was eventually adopted," and "d[id] not provide a non-conclusory, non-boilerplate description of the pre-decisional nature of any of the withheld materials." *Id.* at 37, 39–40. She also held that the log failed to establish the deliberative nature of any of the documents or assure the Court that the withheld information was not purely factual in nature, as would have been required for the documents to be protected under the privilege. *Id.* at 40–42. Judge Segal further faulted the government for failing to "involv[e] agency personnel in the initial assertion of the privilege," noting that "the [agency] declarants ha[d] not reviewed any more than a miniscule fraction of the documents on the log and c[ould not] personally attest to their contents." *Id.* at 35, 37. And finally, Judge Segal held

[2] The government faults Judge Segal (at 22) for ruling on United's motion to compel before this Court resolved the government's pending Rule 16 Motion, and seems to suggest that she refused to consider their arguments against doing so. But Judge Segal gave the government a full and fair opportunity to make all arguments it wished in opposition to United's motion to compel, then found that "the unique circumstances of this case warrant immediate consideration of United's discovery request." Order 29. That Judge Segal found the government's arguments for delaying production of these documents *unpersuasive* does not mean she refused to consider them.

that United had shown the documents were so "essential" to "its anticipated defense" that even if the deliberative process privilege did apply, production would still be warranted. *Id.* at 45.

The government filed its Motion for Review on February 4, 2019.

III. STANDARD OF REVIEW

This Court will set aside a magistrate judge's decision on a discovery issue only if it is "clearly erroneous or contrary to law." *Almont Ambulatory Surgery Ctr. v. UnitedHealth Grp., Inc.*, No. CV-14-3053-MWF, 2015 WL 12781594, at *2 (C.D. Cal. Feb. 12, 2015). This standard is "significantly deferential, requiring a definite and firm conviction that a mistake has been committed." *Id.* (quoting *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 971 (C.D. Cal. 2010)) (internal quotation marks omitted).

IV. ARGUMENT

A. The Government Does Not Even Attempt To Show Error In Magistrate Judge Segal's Well-Reasoned Determination That The Materials In Question Are Not Privileged

The discovery dispute now before this Court originated with the government's assertion of privilege over more than 20,000 documents. Judge Segal concluded, for the numerous reasons described above, that the assertion was improper and that the documents in question are not entitled to privilege.

The government continues to describe the withheld materials as "privileged," but it makes no effort to show that Judge Segal committed any error in holding otherwise—let alone show error in each of the multiple independently sufficient bases for her decision.[3] *See* Order 34–44. Having failed to offer any argument on

[3] The government asserts in passing (at 3) that Judge Segal "place[d] new demands on the government for perfecting privilege." It points to no authority whatsoever on this point, and does not even mention the point in the argument section of its brief. In any event, the requirement that an appropriate agency official personally review the documents at issue before invoking the privilege is well-established, and serves the important purpose of "ensur[ing] that the privilege is invoked by an informed executive official of sufficient authority and responsibility to warrant the court

this central aspect of her decision, the government has waived any right to object to Judge Segal's privilege determination. *See, e.g.*, *Stanley v. Novartis Pharm. Corp.*, 11 F. Supp. 3d 987, 1004 n.6 (C.D. Cal. 2014) ("It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers.") (internal quotation marks omitted). Accordingly, the documents at issue are *not* privileged.

B. Magistrate Judge Segal Correctly Held That The Materials Listed On The Government's Privilege Logs Are Relevant To This Case

Because this discovery dispute no longer involves any assertion of privilege, all that remains is the government's assertion that of these more than 20,000 documents already identified as responsive and recorded on its privilege logs, *not one* is relevant.

That assertion borders on the frivolous, even without the deference owed to Judge Segal's determination.[4] The relevancy standard of Rule 26 is "intentionally broad," *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992), and in a case where the government seeks damages as significant as the ones it seeks here, proportionality does nothing to narrow it, *see* Order 24–25. Indeed, if anything, the size of the recovery the government is seeking here makes it especially important to allow United a full opportunity to prepare its defense. And as Judge

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relying on his or her judgment." *Yang v. Reno*, 157 F.R.D. 625, 632 (M.D. Pa. 1994); *see also* United's Suppl. Mem. Regarding Mot. to Compel 4–6, Dkt. 318. And the government's assertion (at 3) that it "cannot comply" with this settled requirement because it would take "a year of full-time work" to review "each and every" document it is withholding speaks more powerfully to the overbreadth of the government's privilege assertions than to anything else. *See* Order 3 ("The sheer volume of documents over which the Government is asserting the privilege strongly suggests that the withheld documents include a potentially significant amount of factual information.").

[4] The government seeks to undercut Judge Segal's decision by asserting (at 2) that she "appears to have incorrectly placed the burden on the government to establish the lack of relevance of documents." That is incorrect: Judge Segal recognized that the "requesting party bears [the] burden of showing relevance," Order 45, and held that United had done so here: "United is entitled to test the Government's claims, and has adequately demonstrated that the documents withheld by the Government may assist in that effort. Accordingly, the Court finds that the materials withheld . . . are relevant for purposes of discovery." *Id.* at 33–34.

Segal recognized, the documents in question are so "essential" to addressing the government's remaining claims under the False Claims Act and common law theories of Unjust Enrichment and Payment by Mistake that United would be entitled to them even if the government *had* shown that the qualified deliberative process privilege applied. *Id.* at 45.

False Claims Act. To prevail on its reverse False Claims Act count, the government must show, among other things, that United "knowingly and improperly avoid[ed] or decrease[d] an obligation to pay . . . money . . . to the Government." 31 U.S.C. § 3729(a)(1)(G); *see id.* § 3729(b)(3) (an "obligation" is "an established duty . . . arising from . . . the retention of any *overpayment*" (emphasis added)). Evidence about whether United was "overpa[id]," whether it had an "obligation to . . . transmit money . . . to the Government," and whether its retention of payments it had previously received was "improper" therefore goes to the heart of the government's case (and United's defenses).

The documents at issue are relevant to this threshold element. Judge Collyer has held that the statutory requirement of "actuarial equivalence between Medicare Advantage and traditional Medicare" means that "an 'overpayment' [exists] when, and only when, the error rate for a Medicare Advantage contract is greater than the CMS error rate" in the FFS program. *UnitedHealthcare Ins. Co. v. Azar*, 330 F. Supp. 3d 173, 186 (D.D.C. 2018). When CMS adopted a rule stating that "*any* diagnostic code that is inadequately documented in a patient's medical chart results in an 'overpayment,'" Judge Collyer held that it was invalid because it "establishes a system where 'actuarial equivalence' cannot be achieved." *Id.* at 182, 187.

That understanding not only is legally correct, but is now binding against the government here as a matter of issue preclusion. *See, e.g.*, *United States v. Mendoza*, 464 U.S. 154, 163–64 (1984) (recognizing issue preclusion is appropriate against the government "when the government is litigating the same issue with the same

party").[5] That means that the government cannot establish that an "overpayment" exists in this case, or that United "improperly avoided . . . an obligation" to return money to the government, 31 U.S.C. § 3729(a)(1)(G), without showing (among other things) that United's rate of unsupported codes exceeds the rate of unsupported codes in the FFS program. Evidence about the rate of unsupported codes in the FFS program, and CMS's assessment of the significance of that rate, thus is directly relevant here.

For similar reasons, CMS's discussions of a FFS Adjuster for use in performing Risk Adjustment Data Validation audits (under which CMS's own rate of unsupported codes is used to offset a plan's rate when determining if a plan has been overpaid) are also relevant to the first element of the government's reverse false claim count. Among other things, CMS has stated that the FFS Adjuster was intended to establish "a permissible level of payment error" for MA plans. *Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program of All-Inclusive Care for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for Years 2020 and 2021*, 83 Fed. Reg. 54,982, 55,038 (Nov. 1, 2018).[6] In deciding

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[5] The government has filed a Notice of Appeal to the D.C. Circuit, as well as a Rule 60(b) motion with Judge Collyer. Neither alters the issue-preclusive effect of Judge Collyer's decision. *See, e.g.*, *Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993) ("[T]he preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided.") (citation omitted); *Tripati v. Henman*, 857 F.2d 1366, 1367 & n.1 (9th Cir. 1988) (per curiam) (similar); *Pharmacia & Upjohn Co. v. Mylan Pharm., Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999) ("[T]he fact that post-trial motions are pending does not affect the finality of a judgment and thus does not prevent its preclusive effect."). Nor does the fact that Judge Collyer identified additional reasons, beyond the statutory requirement of actuarial equivalence, for finding the Overpayment Rule invalid. *See, e.g.*, *In re Westgate-Cal. Corp.*, 642 F.2d 1174, 1176 (9th Cir. 1981) (following "the established rule" that "[e]ven though the court rests its judgment alternatively upon two or more grounds, the judgment concludes each adjudicated issue that is necessary to support any of the grounds upon which the judgment is rested"); *Irving Nat'l Bank v. Law*, 10 F.2d 721, 724 (2d Cir. 1926) (L. Hand, J.) ("[I]f a court decides a case on two grounds, each is a good estoppel.").

[6] CMS has requested comment on whether to do away with the FFS Adjuster it agreed to adopt in 2012, but has not reached a final decision about whether to do so.

whether United's retention of payments was "improper," 31 U.S.C. § 3729(a)(1)(G), evidence that the agency itself recognized a "permissible level of payment error," and how it calculated it, would clearly be relevant.

Evidence about CMS's decision in 2014 not to adopt a rule requiring MA plans to use their existing chart reviews to identify unsupported diagnosis codes they had previously submitted would likewise be relevant to whether United had "improperly avoid[ed]" any obligation to return overpayments. When MA plans commission chart reviews to identify conditions documented in their beneficiaries' charts so that they can submit the appropriate diagnosis codes for those conditions, the reviews are generally performed "blind," meaning that the reviewers are not told what conditions other coders have previously identified (or not identified) from those charts. Part of the government's theory in this case is that if an MA plan enlists such a review and the person reviewing the chart fails to identify a condition that the provider's own coder had previously identified from that chart, the MA plan acts improperly if it does not withdraw the provider-submitted diagnosis code. CMS itself, however, considered *and rejected* a requirement that MA plans review and delete codes in that circumstance. Evidence about why the agency did so could help show that United did not have an obligation to delete diagnosis codes just because one of its chart reviewers failed to identify a condition that a previous reviewer had submitted, and that United's actions in that circumstance were not "improper." *Id.*

The government is also withholding many documents relevant to scienter, another of the elements it must prove. For example, the government has contended that "United's actuarial equivalence argument [i]s an after-the-fact attempt to justify its fraudulent conduct based on a tortured reading of a statutory phrase." Mot. for Partial Summ. J. 24, Dkt. 234-1. That amounts to an argument that during the period in question, United did not hold the beliefs it has articulated in this case, and that if

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In any event, any revision of the agency's policies in 2019 could not be applied retroactively to the years at issue in this case using reverse false claims, Payment by Mistake, or Unjust Enrichment theories.

it did, they would have been objectively unreasonable. It would be highly probative to be able to show that, *during the period in question*, many of the government's own officials held the same supposedly "tortured reading," which suggests it is hardly the unreasonable view the government now claims. United already has obtained some evidence of this through the limited discovery it has obtained to date, including in the depositions mentioned above.[7] And it is likely that the thousands of documents the government is withholding related to topics like "FFS adjuster," "RADV audit methodology," "Calculation of RA error rate," "Medical record review rule," and "overpayments" contain additional instances in which government officials acknowledged the legitimacy of United's interpretation. *See* United States' Consolidated Privilege Logs, (Ex. A to Joint Stip., Dkt. 310-7). Indeed, one suspects that is why the government has gone to such lengths to withhold the documents even now that it has abandoned any assertion of privilege and would face no burden in producing these already-collected materials.

Documents related to the government's knowledge of United's and other MA plans' coding practices also are relevant to the False Claims Act's "demanding" materiality standard, which "look[s] to the effect on the likely or actual behavior of

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[7] One CMS official who oversaw the creation of the risk adjustment program testified that, assuming the coding intensity adjustment fully offsets any activities that an MA plan undertakes to code more completely, a plan would be underpaid if it deleted unsupported codes identified through audits of twenty-five percent (or perhaps fewer) of its members' charts unless CMS performed comparable audits of the FFS program data. *See* Grant Dep. Tr. at 274:22–277:25 (Ex. 24 to Joint Stip., Dkt. 310-5); Partial Summ. J. Opp'n 44–45. The same official testified that he believed an MA plan's submission of an unsupported code would not be improper unless it was making the "very specific submission of a very specific data element . . . that [it] know[s] is wrong," and that performing one-way reviews that add diagnosis codes without looking at whether previously-submitted codes lack support would not create the requisite knowledge. Grant Dep. Tr. at 321:21–23, 322:18–323:15 (Ex. 24 to Joint Stip.). Similarly, in documents obtained through FOIA, CMS experts advised agency leadership about the need to account for CMS's own rate of unsupported codes when determining overpayments, and told them that adopting an FFS adjuster "from a technical point of view is the right thing to do" and would "put[] us in the best position to withstand litigation challenges." *See* Agenda at CMS0006201 (Ex. 22 to Joint Stip., Dkt. 310-5); *see also* Presentation from Division of Payment Validation (Ex. 21 to Joint Stip., Dkt. 310-5).

the recipient of the alleged misrepresentation." *United Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2002 (2016) (citation omitted). To prevail on its reverse false claim count, the government must show that knowing of previously submitted codes that were unsupported would have been material to the government's decision about whether to seek repayment. *See, e.g.*, Order on Mot. to Dismiss 19, Dkt. 212. At the motion to dismiss stage, the government made allegations on this point sufficient to allow the case to proceed. *See* Gov. Br. 18–19 (citing this Court's statements at the motion to dismiss stage about the sufficiency of the government's materiality allegations).[8] But United now has the right to challenge the truth of those allegations as the case proceeds. If there were times when the government learned of specific unsupported codes and decided not to recover the associated payments, for example, that would tend to undermine the government's claim that it always, and automatically, recouped such payments. *See, e.g.*, Rule 16 Mot. 9, Dkt. 261-1 (claiming "automatic causation").[9] So too would evidence that the government knew specific MA plans had submitted unsupported codes, but decided not to ask which specific codes were unsupported so that it could recover payments. *See, e.g.*, *United States ex rel. Worthy v. E. Me. Healthcare Sys.*, No. 2:14-cv-00184-JAW, 2017 WL 211609, at *24 (D. Me. Jan. 18, 2017) (evidence regarding government's prior investigations of similar allegations and prior actions to prevent the same type of conduct at issue relevant for materiality purposes).

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[8] The government also suggests that the Ninth Circuit held that diagnosis codes are categorically material in *Swoben*. *See id.* at 18–19. That is wrong: The Ninth Circuit expressly noted that materiality was *not* at issue and that it was merely "assum[ing]" that materiality was established. *Swoben*, 848 F.3d at 1173 n.7.

[9] Among other things, the parties disagree about the extent to which CMS's system for deleting diagnosis codes is "automatic." United has presented evidence that certain deletes involve much more than merely submitting "delete files" to CMS—they involve affirmative decisions by CMS officials to process the deletes and adjust prior payments based on reconciliation of the submitted data. *E.g.*, Rule 16 Opp'n 15–16, Dkt. 274. United has requested documents related to the processes, policies, and guidance relating to deletes and the government's refusal or failure to process submitted deletes. *See* United's RFPs (Set Two) Nos. 2–4.

Common Law Claims. The documents that Judge Segal ordered the government to produce also are directly relevant to the government's common law claims for Payment by Mistake and Unjust Enrichment.

To prevail on its Payment by Mistake claim, the government must prove that CMS was unaware of any of the allegedly unsupported codes on which the government seeks damages, and what CMS would have done differently had it been aware of them. *See, e.g.*, *Cal. Dep't of Educ. v. Bennett*, 829 F.2d 795, 798 (9th Cir. 1987); *United States v. Mead*, 426 F.2d 118, 124 (9th Cir. 1970). Accordingly, evidence would be relevant if it showed: (1) the government's knowledge of unsupported codes; (2) how the government reacted, or failed to react, when it learned of unsupported codes; and (3) the government's assessment of whether it *could* or *should* demand repayment in connection with unsupported codes notwithstanding the presence of unsupported codes in its own FFS data. (As Judge Segal pointed out, material touching on these issues also could be useful as "impeachment evidence" if the government put on witnesses who testified that the government would have recouped payments if only it had known about specific unsupported codes. *See* Order 33.)

Remarkably, the government's brief ignores its Payment by Mistake claim entirely. That is no accident. United has repeatedly pointed out that the government was ignoring this claim. *See, e.g.*, Rule 16 Opp'n 8–9; Partial Summ. J. Opp'n 19; Mot. to Strike Opp'n 2, 16, Dkt. 248. In the face of all those explicit promptings, the only plausible explanation for the government's continued silence is that it has nothing to say—there is no way to dispute that evidence about the government's knowledge and internal policies would be relevant to this claim. And because that encompasses literally *all* of the documents at issue, the Court could resolve this entire discovery motion based just on the government's failure to address the Payment by Mistake claim.

As Judge Segal pointed out, the government all but ignores its own Unjust Enrichment claim, too. *See* Order 33. CMS is required by law to measure the risk of United's member population in a manner actuarially equivalent to the way it measures risk in the FFS program, and to pay United accordingly. *See* 42 U.S.C. § 1395w23(a)(1)(C)(i). In the past, CMS has recognized that MA plans would be underpaid if they were required to delete unsupported diagnosis codes without first implementing an adjuster to account for the presence of unsupported codes in the FFS data. *See UnitedHealthcare Ins. Co.*, 330 F. Supp. 3d at 187 ("CMS recognized the actuarial need to apply an FFS Adjuster to the RADV audit program because of its failure, as proposed, to maintain actuarial equivalence in payments between traditional Medicare and Medicare Advantage . . . ."). If United would be underpaid, in violation of CMS's statutory obligations, if it were forced to return payments it received for the allegedly unsupported codes at issue here, that would plainly be relevant to whether *not* returning those payments earlier had led United to be "unjustly enriched."[10] Evidence about whether and to what extent those underpayments would result is thus relevant to the government's Unjust Enrichment claim. Similarly, evidence about whether United would have been required to return the payments if the government had conducted a Risk Adjustment Data Validation audit and applied the FFS adjuster (rather than suing) could also help to show that United was not unjustly enriched.

The government's only response (at 14–15) is to claim that if it *prevailed* on its Unjust Enrichment claim, it would advocate for a measure of damages that does not account for the presence of unsupported diagnosis codes in the government's FFS data. But that response puts the cart before the horse, ignoring entirely the relevance of the documents to the predicate question of liability on the Unjust

[10] The government's Payment by Mistake claim likewise requires it to establish that United was unjustly enriched. *See United States v. Systron-Donner Corp.*, 486 F.2d 249, 251–52 (9th Cir. 1973).

Enrichment claim. In addition, the government incorrectly assumes that there is only one possible measure of damages in this case. If the case ever came to the calculation of damages, United would be free to propose an alternative test for damages on the government's False Claims Act and common law claims that turned on the government's actual loss (if any). As Judge Segal recognized, therefore, "United is entitled at the *discovery* stage of this case to information that may challenge the Government's actual loss." Order 33.[11]

C. The Government's Own Actions Confirm The Relevance Of Materials Like The Documents It Is Currently Withholding

The conclusion that the materials at issue are relevant becomes all the more obvious when one considers two of the government's recent actions in this case.

First, on October 29, 2018, the government filed with this Court a "Notice of Recent Proposed Medicare Part C Regulation Relating to Fee-For-Service Adjuster Issue." Dkt. 307 ("Notice"). The government attached to the Notice a recent rulemaking proceeding in which CMS is contemplating the repeal of the FFS Adjuster that it agreed to adopt for Risk Adjustment Data Validation audits in 2012, as well as an empirical study in which CMS purported to analyze the effect of unsupported diagnosis codes on the MA risk adjustment payment system. *See id.* at 2 n.1. The government indicated that "HHS' conclusions and findings relating to

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[11] The government suggests that Judge Segal's discussion of damages pertained to damages on United's counterclaims, and that her discussion of unjust enrichment pertained to United's counterclaim for unjust enrichment. *See* Gov. Br. 6 ("Although United now concedes that this Court lacks subject-matter jurisdiction to hear any such counterclaim, the Judge permitted United to undertake discovery on that claim . . . ."). That is incorrect: Judge Segal explained that "for purposes of the instant discovery dispute, the Court will assume that the only claims at issue . . . are the Government's surviving 'reverse' False Claims Act claim and its common law claims." Order 3 n.3. Her relevancy determination rested on the *government's* damages if it should establish liability, and the *government*'s Unjust Enrichment claim. It was appropriate for Judge Segal to consider both. And the fact that this Court lacks jurisdiction to adjudicate counterclaims *for damages* against the United States has nothing to do with this Court's ability to adjudicate valid *defenses* to the government's own claims.

the FFS Adjuster issue are relevant to the 'actuarial equivalence' and other issues currently before this Court." *Id.* at 2.

The comment period on that proposal will not close until April 30, 2019. *See Medicare and Medicaid Programs; Risk Adjustment Data Validation*, 83 Fed. Reg. 66,661 (Dec. 27, 2018) (extending comment period). So the relevant "conclusions and findings" to which the government's Notice referred were not CMS's proposal, but rather the empirical conclusions described in the attached study about the rate of unsupported codes in the FFS program and the effect those codes have on payment amounts. United strongly disagrees with the methodology and conclusions of that study, as it will explain in comments in the rulemaking proceeding (which it will provide to this Court once they are filed, as a counterbalance to the government's submission of findings by its own personnel). For this discovery motion, however, the key point is that the government recognized—when it suited its purposes—that empirical analysis of the effects of unsupported codes in the FFS program was directly relevant to "the 'actuarial equivalence' and other issues currently before this Court." Notice 2. There is no principled basis for saying that evidence on that issue is only "relevant" if the government likes the "conclusions and findings" it purports to support.[12]

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[12] The government suggests (at 20) that United is not entitled to discovery on these issues because CMS has "already published and produced an abundance of information on each of these points" in the study the agency released in October. That is meritless. What the agency published was a made-for-litigation advocacy piece, assembled not by actuarial experts but by agency enforcement officials (and, one suspects, DOJ lawyers) that employed indefensible methodologies to produce implausible results. The "study" concluded that even though more than a third of the diagnosis codes for metastatic cancer or acute leukemia in the FFS program are unsupported, removing all those unsupported codes would reduce the number of patients in the FFS program with a metastatic cancer or acute leukemia diagnosis by just 0.05 percent. *See* 83 Fed. Reg. at 55,040 n.30, n.31. Its authors arrived at that conclusion by using a series of completely unverified assumptions, such as an assumption that all patients diagnosed with the condition have the same number of diagnosis codes for that condition. United is entitled to discovery that will allow it to actually *test* those assumptions and show that they are disconnected from reality.

Second, on February 1, 2019, the government served subpoenas in this case on two third-party entities, the American Academy of Actuaries (a non-profit public policy organization that has previously been retained by CMS to assess the MA risk adjustment system) and America's Health Insurance Plans ("AHIP," a trade association that includes many participants in the MA program, though not United). *See* Schindler Decl.[13] Ex. 1, AAA Subpoena; *id.* Ex. 2, AHIP Subpoena. The subpoena to the Academy sought "All Documents relating to or constituting Communications between the Academy and HHS or CMS relating to," among other things, "the term 'actuarial equivalence'" and "any FFS Adjuster," as well as "All Documents relating to the effect of the use of 'FFS data that . . . were not validated or audited for accuracy' . . . on the payments made to Medicare Advantage Organizations." *See id.* Ex. 1, AAA Subpoena RFPs 6, 11. The subpoena to AHIP sought similar documents, as well as "All Documents relating to or constituting any Communications or anticipated Communications . . . with CMS or HHS relating to any FFS Adjuster," and "All Documents relating to any FFS Adjuster, Including all Documents relating to whether CMS or HHS should or should not apply an FFS Adjuster in any context and all Documents relating to the manner or method of calculating and applying any such FFS Adjuster." *See id.* Ex. 2, AHIP Subpoena RFPs 3, 4, 11.

Three days later, the government filed its brief in this discovery dispute taking the position that equivalent documents *from the government itself* are categorically irrelevant. The government cannot possibly reconcile those two positions—that the views and communications of independent, third-party entities about the appropriateness of a FFS Adjuster and the meaning of the "actuarial equivalence" mandate are relevant to this case (and must be produced in discovery) but the views and communications of the *plaintiff* are not.

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[13] Citations to "Schindler Decl." materials refer to exhibits to the Declaration of David J. Schindler filed concurrently herewith.

D. The Government's Attempts To Reframe The Case All Fail

The government must realize that its relevancy argument is implausible. Instead, its real goal in filing objections is to obtain another shot at influencing this Court's consideration of its pending Motion for Partial Summary Judgment. Regardless of whether the government's brief is treated as a borderline-frivolous set of objections to a thorough discovery ruling or a supplemental brief on pending substantive motions, though, the bottom line is that the three overarching arguments it offers about the case are meritless.

1. The Government Misrepresents United's Position

The government argues repeatedly that United is trying to "challenge[] the entire payment methodology of the Medicare Advantage ('MA') program." Gov. Br. 1. But the opposite is true: It is the *government*'s theories in this case that would require "invalidat[ing] or recalibrat[ing] the entire MA payment model." *Id.*

As described above, CMS determines the values to assign to the diagnostic conditions in its risk adjustment model using a mix of supported and unsupported diagnosis codes from the FFS program. *See supra* at 4; *see also, e.g.*, *UnitedHealthcare Ins. Co.*, 330 F. Supp. 3d at 185. Having been calibrated with a mix of supported and unsupported diagnosis codes, the payment model functions properly when it is applied to data from MA plans that contains a comparable rate of unsupported codes. As CMS put it a decade ago, "[t]his means that [MA plans] are coding 'accurately' when they are coding in a manner similar to fee-for-service coding used on the beneficiaries to whom MA plan enrollees are being compared." 2010 Rate Announcement (Ex. 1 to Partial Summ. J. Opp'n, Dkt. 254-1. United's position—in this case and elsewhere—is that it is paid appropriately (and does not receive any overpayments) so long as the rate of unsupported codes in its data is comparable to the rate of unsupported codes in the FFS data. By contrast, because the payment model is built with a mix of unsupported and supported codes, applying it to only the *supported* codes submitted by MA plans would make it "inevitable"

that MA "insurers will be paid less to provide the same healthcare coverage to their beneficiaries than CMS itself pays for comparable patients," violating the statute. *UnitedHealthcare Ins. Co.*, 330 F. Supp. 3d at 184–85.

Because of this, when CMS sought to identify overpayments in the past, it agreed to use a FFS adjuster that would compare the payment effects of unsupported codes in an MA plan's data to the effects of the unsupported codes in the FFS data and calculate an overpayment amount only if (and to the extent that) the effects of the MA plan's unsupported codes were greater than those of the FFS plan's unsupported codes. *See id.* at 180–81. United has argued that a similar approach is necessary here to determine whether United has been overpaid (and has argued that, under that approach, United has *not* been overpaid).

In the 2014 Overpayment Rule and in this case, however, the government has advanced a new approach. It argues that CMS should still use a mix of supported and unsupported codes to calibrate its payment model, but can require MA plans to delete all of their unsupported diagnosis codes such that the model is *applied* only to *supported* codes. As Judge Collyer recognized, the government's approach represents a change from the current payment system, and is impermissible for multiple reasons, including not only that it violates the statutory requirement of "actuarial equivalence" (as discussed above, *see supra* at 11) but also that it represents an "arbitrary and capricious . . . departure from prior policy." *Id.* at 190. Against that backdrop, the government's suggestion that it is *United* that is somehow trying to "invalidate" the existing MA payment structure is simply not credible. The problem is not United's defense, but the government's new enforcement theory.

2. The Government Cannot Use The False Claims Act Or Common Law Theories To Impose Obligations That It Could Not (And Did Not) Impose Directly

The government also argues that even if requiring MA plans to delete unsupported codes without accounting for unsupported codes in the FFS data would

violate the statutory "actuarial equivalence" requirement, that is an "invalid defense" because this is a "fraud" suit. *See* Gov. Br. 10–15.

The government is wrong.[14] As United explained above, *see supra* at 11–13, 16–18, the government's claims in this case depend on showing that United was overpaid or had an "obligation to pay or transmit money or property to the Government" that it "improperly avoid[ed]." 31 U.S.C. § 3729(a)(1)(G). Because no statute or regulation creates any obligation for United to delete unsupported diagnosis codes,[15] the government claims that this obligation comes from United's contract with CMS, which it argues requires United to comply with all government instructions regarding payment (including in otherwise non-binding guidance like the Medicare Managed Care Manual). *See* Mot. for Partial Summ. J. at 8–13. But as United explained in briefing on the government's Motion for Partial Summary Judgment, the contract imposes no such obligation: Not only does it carve out issues related to payment from the topics as to which United is required to comply with the Manual and other sub-regulatory instructions, but it also specifically requires CMS to pay United in accordance with the statutory actuarial equivalence mandate, and provides that to the extent that any requirement imposed under the contract is inconsistent with the statute, the statute supersedes. *See* Partial Summ. J. Opp'n 26–27, 33–39. There is thus no basis for the government's argument that United agreed to delete any and all unsupported codes it identified, regardless of whether doing so would violate the actuarial equivalence mandate.

Cases like *Dennis v. United States*, 384 U.S. 855 (1966), and *Bryson v. United States*, 396 U.S. 64 (1969), do not help the government. Each of those cases

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[14] The government previously argued to Judge Collyer that the proper way of litigating the "actuarial equivalence" issues was as a defense in this suit, because this Court would "benefit from a full factual record" of those issues. Mot. for Stay 7 (Ex. 54 to Partial Summ. J. Opp'n, Dkt. 254-3). Remarkably, the government now contends that those issues are not even *relevant* here.

[15] To the extent the 2014 Overpayment Rule established such a requirement, it has been held invalid. *UnitedHealthcare Ins. Co.*, 330 F. Supp. 3d at 192.

(including the others the government cites alongside them) involved liability for factually *false statements*, which the government could prosecute without any reference at all to the underlying obligation that was challenged as invalid. In *Dennis*, for example, the Court emphasized that "[t]his is a prosecution directed at petitioners' fraud. *It is not an action to enforce the statute claimed to be unconstitutional.*" 384 U.S. at 867 (emphasis added); *see also Bryson*, 396 U.S. at 68–69 ("First, none of the elements of proof necessary for petitioner's conviction . . . depend[s] on the validity of 9(h)."). Here, by contrast, the government is *not* seeking to hold United liable for false statements, but instead is seeking to enforce "obligations" it claims exist by virtue of contract and that it must show United "improperly avoid[ed]." 31 U.S.C. § 3729(a)(1)(G). Of course it would be a defense to show that no such obligation existed in the first place or that, if it did, it was an obligation CMS could not legally require an MA plan to comply with.

3. The Government's Reliance On* Swoben *And* Silingo *Is Misplaced

Finally, the government continues to rely on the Ninth Circuit's decisions in *Swoben* and *Silingo*, which it claims have already conclusively held that an MA organization has an "obligation to delete known unsupported diagnosis codes," regardless of whether doing so would be consistent with the actuarial equivalence mandate. Gov. Br. 12. But neither case involved reverse false claims allegations like the one at issue here—a point the Ninth Circuit emphasized in both decisions. *See Silingo*, 904 F.3d at 681; *Swoben*, 848 F.3d at 1172 n.6. Nor did either case give the Ninth Circuit occasion to consider the scope or validity of an obligation to delete unsupported codes in circumstances where CMS has established payment amounts using a mix of supported and unsupported codes (a fact unsurprisingly left out of the complaints in both cases). Nor did either case even mention the Medicare statute's "actuarial equivalence" requirement, 42 U.S.C. § 1395w-23(a)(1)(C)(i), let alone consider it and find it immaterial.

That the government is willing to argue that the Ninth Circuit resolved these issues in cases that did not even mention or involve them speaks volumes. At most, the decisions in those appeals (both of which arose on motions to dismiss) show that these are issues best reviewed and resolved after the development of a factual record—which is exactly what the government is seeking to prevent here.

V. CONCLUSION

The limited discovery United has taken to date has confirmed its suspicions that contemporaneous understandings held by CMS officials are contrary to DOJ's retrospective litigating position here. It is well past time for the government to produce documents that will allow United to test those suspicions further and defend itself meaningfully in this substantial case the government decided to bring. The Court should affirm Judge Segal's decisions that the documents in question are not privileged, are relevant, and must be produced in short order.

Dated: February 25, 2019

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UNITED STATES DISTRICT COURT

FOR THE 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)

DECLARATION OF DAVID J. SCHINDLER IN SUPPORT OF UNITED'S RESPONSE TO PLAINTIFFS' MOTION FOR REVIEW OF DISCOVERY ORDER

Date: April 8, 2019
Time: 10:00 a.m.
Courtroom: 5A
Judge: Hon. Michael W. Fitzgerald

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

1. I am a partner at Latham & Watkins LLP, the law firm that represents Defendant UnitedHealth Group Incorporated and its affiliated entities named as Defendants in this action (collectively, "United"). I submit this Declaration in support of United's Response to Plaintiffs' Motion for Review of Discovery Order. 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. Attached as **Exhibit 1** is a true and correct copy of a Notice of Subpoena and Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action issued by the United States to the American Academy of Actuaries ("AAA Subpoena"), dated February 1, 2019.

3. Attached as **Exhibit 2** is a true and correct copy of a Notice of Subpoena and Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action issued by the United States to America's Health Insurance Plans ("AHIP Subpoena"), dated February 1, 2019.

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

Executed: February 25, 2019 in Los Angeles, California.

/s/ David J. Schindler
David J. Schindler

Exhibit 1

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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) NOTICE OF SUBPOENA TO AMERICAN ACADEMY OF ACTUARIES DISCOVERY MATTER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Rule 45 of the Federal Rules of Civil Procedure, and the Local Rules of the United States District Court for the Central District of California, plaintiff United States of America, by and through its undersigned attorneys, will seek the production of documents by issuance of a subpoena in a civil action upon the American Academy of Actuaries, a copy of which is attached.

PLEASE TAKE FURTHER NOTICE that the subpoena compels the production of documents, information, or objects described in Attachments A-C. The documents shall be produced at the time and location specified in the subpoena to produce documents, or at such alternative time and location as may be mutually agreed upon.

Dated: February 1, 2019

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/s/ Jack D. Ross

Jack D. Ross
Assistant United States Attorney
Attorneys for the United States of America

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

Central District of California

UNITED STATES OF AMERICA ex rel. POEHLING,
Plaintiff
v.
UNITEDHEALTH GROUP, INC., et al.,
Defendant

Civil Action No. 16-08697 MWF (SSx)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: American Academy of Actuaries
1850 M Street, N.W., Washington D.C. 20036
(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachments A-C.

Place:	Date and Time:
U.S. Department of Justice, Civil Division, Fraud. Sect. 175 N Street, N.E. Washington, D.C. 20530	03/01/2019 10:00 am

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 02/01/2019

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* the UNITED STATES OF AMERICA, who issues or requests this subpoena, are:

JACK D. ROSS; 300 N. Los Angeles St., Room 7516, Los Angeles, CA 90012; jack.ross@usdoj.gov; (213) 894-7395

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 16-08697 MWF (SSx)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* American Academy of Actuaries

on *(date)* _____ .

☑ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A TO SUBPOENA

Definitions

In connection with responding to this subpoena for Documents, You should use the following definitions and comply with the following instructions:

1. "You" or "Academy" means the American Academy of Actuaries, which is a Washington D.C.-based professional association located at 1850 M Street, N.W., Washington D.C. 20036 according to its website at www.actuary.org., and includes, but is not limited to, its past and present officers and directors (*e.g.*, its past and present presidents, directors, executive directors, deputy directors, assistant directors, members of its board of directors, and attorneys), and its past and present employees (*e.g.*, analysts and fellows), agents, contractors, and persons doing work on its behalf; and "Your" shall mean the possessive form of "You."
2. The "Academy's January 21, 2011 Letter" means and refers to the Academy's January 21, 2011 letter to Cheri Rice, Acting Director, Medicare Plan Payment Group, Centers for Medicare & Medicaid Services, Re: Comment on RADV Sampling and Error Calculation Methodology.
3. "CMS" means the Centers for Medicare and Medicaid Services and all of its components and past and present employees and contractors.
4. "HHS" means the United States Department of Health and Human Services and all of its components and past and present employees and contractors.
5. "Communications" means any transmission or exchange of information between two or more persons, orally or in writing, and includes without limitation any conversation or discussion, whether face-to-face or by means of telephone, teleconference, letter, telegraph, telex, electronic mail, or other media and any written Documents constituting or memorializing the communication, including, but not limited to, letters, emails, notes of

meetings, agendas for meeting, minutes of meetings, attendance records, and presentations made at meetings.

6. "Document" and "Documents" are used in the broadest sense permitted by Federal Rules of Civil Procedure 26 and 34 and means any and all writings and recorded material in any form, including, but not limited to, any written, printed, typed, photographed, recorded, electronic, or otherwise reproduced or stored communication or representation, whether comprised of letters, words, numbers, pictures, sounds, or symbols, and any copies of documents, contemporaneously or subsequently created, which have any non-conforming or additional notes or other markings, and the reverse side of any communication or representation that also contains any of the above.

(a) By way of example, "Document(s)" includes: ledgers, books of account, payroll ledgers, financial statements, checks, check stubs and registers, bank statements, wire transfers, powers of attorney, receipts, vouchers, invoices, journals, appointment books or calendars, diaries, reports, correspondence, notes, newsletters, memoranda, minutes of meetings, working papers, directives, manuals, contracts, charts, graphs, drawings, marketing materials, bulletins, training and compliance materials, and other materials, information, and data stored in any database or data storage system or on any media. This also includes electronic storage media, which incorporates electronic mail, voicemail messages, facsimiles, videotapes, audiotapes, photographs, magnetic tapes, computer discs (including floppy disks, hard drives, hard disks, jump drives, flash memory devices, and writeable or recordable CDs and DVDs of all types), Personal Digital Assistants, BlackBerrys, cell phones, backup media, all programming instructions, record layouts, and other material necessary for the retrieval of all electronic or word processing material and printouts of data or information stored or maintained by electronic means.

(b) The term "document(s)" also includes preliminary drafts or revisions, any attachments or enclosures, as well as copies or duplicates that are not identical to the original because of additions, deletions, alterations, or notations.

7. When used in connection with data, "Fee-For-Service" and "FFS" mean diagnosis codes included by health care providers in their claims for payments submitted to CMS under Parts A and B of the Medicare Program.

8. "FFS Adjuster" means a Fee-For-Service adjuster, Fee-For-Service adjustment, or other potential method to account for any unsubstantiated diagnosis codes in the FFS claims data used to calibrate the coefficients for CMS' risk adjustment payment model (the CMS-HCC model). Unsubstantiated diagnosis codes means diagnosis codes that are unsupported by the patients' medical records.

9. "Including" and all forms of the word "Include" shall be giving the broadest meaning possible and shall mean "without any limitation."

10. "Related to" and "relating to" mean, referring to, analyzing, evaluating, discussing, describing, showing, reflecting, identifying, dealing with, consisting of, or in any way pertaining, in whole or in part, to the subject matter at issue.

11. Unless stated otherwise with respect to a particular document request (*e.g.*, Request No. 17), the "Relevant Time Period" for this request is January 1, 2009 through May 1, 2017, in order to ensure all responsive documents and information are produced. All responsive documents that were created, generated, dated, sent, received, altered, in effect, or which came into existence during this time period or which are related to this time period are to be produced.

12. The singular form of a noun or pronoun shall be considered to include within its meaning the plural form as well, and vice versa.

13. All present tenses of verbs or verb forms shall be considered to include within their meaning the future and past tenses as well, and vice versa.

14. "Or" as well as "and" shall be construed interchangeably in a manner that gives the document requests the broadest reading.

ATTACHMENT B TO SUBPOENA

Instructions

In addition to the definitions above, the following instructions also apply to each request:

1. If you contend that any document or information sought by these requests is subject to any privilege, provide a log or other document (i) describing the subject matter of the document or information in as much detail as possible and, if a document, the type of document and any linked documents such as cover letters, emails and attachments; and (ii) identifying the date of creation and transmission of a document or the date of any oral communications such as meetings alleged to be privileged, each person having knowledge of the information or document, the author(s), sender(s) and recipient(s) if a document; and (iii) identify the privilege asserted and its legal and factual basis. Also, please specify if the document was created by, received from or provided to any contractors, consultants, auditors or accountants and, if so, identify that person or entity and describe in detail the reason(s) why the document was created by, received from or provided to the person or entity and the reason(s) why the privilege was not waived.

2. If you at any time had possession or control of a document requested by this discovery request and such document has been lost, destroyed or is not presently in Your possession, custody or control, please describe the document, the date of loss, destruction, purge or separation from possession or control, and the circumstances surrounding its loss, destruction, purge or separation from possession, custody or control.

3. All electronically stored documents and information should be produced in accordance with the attached Specifications for Production of ESI and Digitized ("Scanned") Images.

ATTACHMENT C TO SUBPOENA

Description of Documents Sought

REQUEST NO. 1:

All Documents relating to the Academy's January 21, 2011 Letter, Including Documents relating to the drafting of the letter (*e.g.*, all drafts), the review and approval of the letter, the reason(s) why the letter was drafted and sent, and all Documents relating to or constituting Communications relating to the letter between or among any persons, Including persons within and outside of the Academy.

REQUEST NO. 2:

Documents sufficient to identify the members of or participants in the Academy's Health Practice Council in January 2011, Including their full names, names of their employers, home and business addresses, home and business email addresses, and home and business phone numbers.

REQUEST NO. 3:

All Documents relating to, supporting, contradicting, or on which the Academy relied when making each of the following statements in the Academy's January 21, 2011 Letter: (1) "If, as a result of the RADV audit, for example, certain lower-cost enrollees no longer are considered diabetic but would have been considered diabetic in the FFS data used to develop the risk scores, then the payment for diabetic members in the payment year could be inadequate"; (2) "In this example, the risk score factor associated with diabetes would be understated relative to the factor that would have resulted from using only substantiated diagnoses, because the lower-cost patients would have lowered the average spending amounts among those identified as diabetics in the FFS data"; (3) "When

that factor is applied to similarly non-validated data, the total payments for those with diabetes would be adequate"; and (4) "When that same factor is applied only to those with substantiated data, however, the total payments could be too low."

REQUEST NO. 4:

All Documents relating to, supporting, contradicting, or on which the Academy relied when making each of the following statements in the Academy's January 21, 2011 Letter: (1) "This type of data inconsistency not only creates uncertainty, it also may create systematic underpayment, undermining the purpose of the risk-adjustment system and potentially resulting in payment inequities"; and (2) "In addition, the uncertainty related to a plan's ultimate post-audit risk score could make it difficult for actuaries to estimate the plan's risk score and certify the plan bid."

REQUEST NO. 5:

All Documents relating to, supporting, contradicting, or on which the Academy relied when making the statement in the Academy's January 21, 2011 Letter that "the resulting modified payment methodology may not appropriately reflect the relative risk profile of enrollees in the affected MA plans."

REQUEST NO. 6:

All Documents relating to or constituting Communications between the Academy and HHS or CMS relating to (1) the Academy's January 21, 2011 Letter; (2) the term "actuarial equivalence"; (3) any FFS Adjuster; (4) the differences in coding patterns or coding intensity between Medicare Advantage Organizations with respect to the diagnosis codes that they submit to CMS for risk-adjusted payments under Part C of the Medicare Program and providers (*e.g.*, physicians, hospitals) with respect to the diagnosis codes that they include in their claims for payments under Parts A and B of the Medicare Program; and (5) the Coding Intensity Adjuster or Coding Intensity Adjustment applied by CMS when determining risk scores under Part C of the Medicare Program.

REQUEST NO. 7:

All Documents relating to or constituting Communications between or among the Academy and any Medicare Advantage Organization, any insurer, or the America's Health Insurance Plans relating to (1) the Academy's January 21, 2011 Letter; (2) the term "actuarial equivalence"; (3) any FFS Adjuster; (4) the differences in coding patterns or coding intensity between Medicare Advantage Organizations with respect to the diagnosis codes that they submit to CMS for risk-adjusted payments under Part C of the Medicare Program and providers (*e.g.*, physicians, hospitals) with respect to the diagnosis codes that they include in their claims for payments under Parts A and B of the Medicare Program; and (5) the Coding Intensity Adjuster or Coding Intensity Adjustment applied by CMS when determining risk scores under Part C of the Medicare Program.

REQUEST NO. 8:

All Documents relating to the effect of the use of "FFS data that … were not validated or audited for accuracy," as that phrase is used in the Academy's January 21, 2011 Letter, on the payments made to Medicare Advantage Organizations under Part C of the Medicare Program, Including all Documents calculating, analyzing, or estimating any such effect.

REQUEST NO. 9:

All Documents relating to the involvement of Heather Jerbi, the Academy's senior health policy analyst identified in the Academy's January 21, 2011 Letter, in drafting, reviewing, or approving the letter and all Documents relating to her knowledge about the subject matter of and statements made in the letter.

REQUEST NO. 10:

All Documents relating to the involvement of Thomas F. Wildsmith, the Vice President of the Academy's Health Practice Council, who is identified as the sender of the Academy's January 21, 2011 Letter, in drafting, reviewing, or approving the

letter and all Documents relating to his knowledge about the subject matter of and statements made in the letter.

REQUEST NO. 11:

All Documents relating to the proposed use of any FFS Adjuster or any other type of adjuster or adjustment to address the use of "FFS data that … were not validated or audited for accuracy," as that phrase is used in the Academy's January 21, 2011 Letter, including all documents calculating, analyzing, or estimating any adjuster or adjustment to be used for the purpose of determining payments or overpayments to Medicare Advantage Organizations.

REQUEST NO. 12:

All Documents relating to the under-reporting of diagnoses by providers (*e.g.*, physicians, hospitals) with respect to the diagnosis codes that they include in their claims for payments under Parts A and B of the Medicare Program, Including any possible, potential, or actual effect of such under-reporting on (i) the calibration of the coefficients for medical conditions and demographic factors for CMS' risk adjustment payment model (the CMS-HCC model), (ii) risk adjustment scores for Medicare Advantage beneficiaries, or (iii) risk-adjusted payments to Medicare Advantage Organizations. For the purpose of this request, "under-reporting of diagnoses" refers to providers not including in their claims for payments diagnoses that are supported by their patients' medical records.

REQUEST NO. 13:

All Documents relating to, calculating, analyzing, or summarizing the differences in diagnosis coding (*e.g.*, coding patterns and coding intensity) between Medicare Advantage Organizations with respect to the diagnosis codes that they submit to CMS for risk-adjusted payments under Part C of the Medicare Program and providers (*e.g.*, physicians, hospitals) with respect to the diagnosis codes that they include in their claims for payments under Parts A and B of the Medicare Program.

REQUEST NO. 14:

All Documents relating to the Coding Intensity Adjuster or Coding Intensity Adjustment applied by CMS when determining Medicare Advantage beneficiaries' risk scores and risk-adjusted payments to Medicare Advantage Organizations under Part C of the Medicare Program.

REQUEST NO. 15:

All Documents relating to the term "actuarial equivalence," as that term is used in 42 U.S.C. § 1395w-23(a)(1)(C)(i) or as that term is used in any other context relating to healthcare or healthcare insurance.

REQUEST NO. 16:

All Documents relating to any "systematic underpayment" to Medicare Advantage Organizations due to or because of a "data inconsistency" between non-validated diagnosis codes included by providers (*e.g.*, physicians, hospitals) in their claims for payments under Parts A and B of the Medicare Program and validated diagnosis codes submitted by Medicare Advantage Organizations to CMS for risk-adjusted payments under Part C of the Medicare Program, as those terms are used in the Academy's January 21, 2011 Letter, Including all documents calculating, analyzing, estimating or summarizing any such "systematic underpayment."

REQUEST NO. 17:

All Documents relating to possible or actual difficulties, problems, or other issues in or with estimating risk scores and developing or certifying a bid to participate in Part C of the Medicare Program due to "the uncertainty related to a plan's ultimate post-audit risk score," as referenced in the Academy's January 21, 2011 Letter.

REQUEST NO. 18:

All Documents relating to "Actuarial Equivalence Concepts" as that phrase is used in the Public Policy Practice Note: Actuarial Equivalence for Prescription Drug Plans and Medicare Prescription Drug Plans under the Medicare Drug Program, March 2008.

REQUEST NO. 19:

Your document retention policies, including Your policies for retaining data, electronic documents and emails.

ATTACHMENT
Specifications for Production of ESI and Digitized ("Scanned") Images
United States *ex rel.* Poehling v. UnitedHealth Group., Inc.

Collection of Electronically Stored Information (ESI)

1. Specification Modifications

Any modifications or deviations from the Production Specifications may be done only with the express written agreement of the parties. Any responsive data or documents that exist in locations or native forms not discussed in these Production Specifications remain responsive and, therefore, arrangements should be made with the receiving party to facilitate their production.

2. Production Format of ESI and Imaged Hard Copy

Responsive ESI and imaged hard copy shall be produced in the format outlined below. All ESI, except as outlined below in sections 5 – 20, shall be rendered to TIFF image format, and accompanied by a Concordance® Image Cross Reference file. All applicable metadata (see section 3 below) shall be extracted and provided in Concordance® load file format.

a. Image File Format:

All images, paper documents scanned to images, or rendered ESI, shall be produced as 300 dpi single-page TIFF files, CCITT Group IV (2D Compression). Images should be uniquely and sequentially Bates numbered and unless otherwise specified, Bates numbers should be an endorsement on each image.

- All TIFF file names shall include the unique Bates number burned into the image.
- Each Bates number shall be a standard length, include leading zeros in the number, and be unique for each produced page.
- All TIFF image files shall be stored with the ".tif" extension.
- Images shall be OCR'd using standard COTS products.
    - An exception report shall be provided when limitations of paper digitization software/hardware or attribute conversion do not allow for OCR text conversion of certain images. The report shall include the DOCID or Bates number(s) corresponding to each such image.
- All pages of a document or all pages of a collection of documents that comprise a folder or other logical grouping, including a box, shall be delivered on a single piece of media.
- No image folder shall contain more than 2000 images.

b. Concordance® Image Cross Reference file: Images should be accompanied by a Concordance® Image Cross Reference file that associates each Bates number with its corresponding single-page TIFF image file. The Cross Reference file should also contain the image file path for each Bates numbered page.

- Image Cross Reference Sample Format:

ABC00000001,OLS,D:\DatabaseName\Images\001\ ABC00000001.TIF,Y,,,
ABC00000002,OLS,D:\DatabaseName\Images\001\ ABC00000002.TIF,,,,
ABC00000003,OLS,D:\DatabaseName\Images\001\ ABC00000003.TIF,,,,
ABC00000004,OLS,D:\DatabaseName\Images\001\ ABC00000004.TIF,Y,,,

c. Concordance® Load File: Images should also be accompanied by a "text load file" containing delimited text that will populate fields in a searchable, flat database environment. The file should contain the required fields listed below in section 3.

- Text delimited load files are defined using the standard Concordance delimiters. For example:

Field Separator	¶ *or Code 020*
Text Qualifier	þ *or Code 254*

- The text file should also contain hyperlinks to applicable native files, such as Microsoft Excel or PowerPoint files.
- There should be one line for every record in a collection.
- The load file must contain a field map/key listing the metadata/database fields in the order they appear within the data file. For example, if the data file consists of a First Page of a Record (starting Bates), Last Page of a Record (ending Bates), DOCID, DOCDate, File Name, and a Title, then the structure may appear as follows:

þBEGDOCþ¶þENDDOCþ¶þDOCIDþ¶þDOCDATEþ¶þFILENAMEþ¶þTITLEþ

d. The extracted/OCR text for each document should be provided as a separate single text file. The file name should match the BEGDOC# or DOCID for that specific record and be accompanied by the .txt extension.

e. Directory and folder structure: The directory structure for productions should be:

*CaseName***LoadFiles**
*CaseName***Images** < For supporting images (can include subfolders as needed)
*CaseName***Natives** <Native Files location (can include subfolders as needed)
*CaseName***Text** <Extracted Text files location (can include subfolders as needed)

3. Required Metadata/Database Fields

- A "✓" denotes that the indicated field should be present in the load file produced.
- "Other ESI" includes data discussed in sections 5 – 20 below, but does not include email, email repositories (section 11), "stand alone" items (section 11), and imaged hard copy material (section 9). Email, email repositories, and "stand alone" materials (section 11) should comply with "Email" column below. Imaged hard copy materials should comply with the "Hard Copy" column.

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Specifications for Production of ESI and Digitized ("Scanned") Images
United States *ex rel.* Poehling v. UnitedHealth Group., Inc.

Field name	Field Description	Field Type	Field Value	Hard Copy	E-mail	Other ESI
COLLECTION SOURCE	Name of the Company/Organization data was collected from	Text	160	✓	✓	✓
SOURCE ID (BOX #)	Submission/volume/box number	Text	10	✓	✓	✓
CUSTODIAN	Custodian/Source - format: Last, First or ABC Dept.	Text	160	✓	✓	✓
ALL CUSTODIANS	All Custodians that had a version of the MD5 Hash Duplicate - format: Last, First; separated by semi colons			✓		✓
AUTHOR	Creator of the document	Text	500			✓
BEGDOC#	Start Bates (including prefix) - No spaces	Text	60	✓	✓	✓
ENDDOC#	End Bates (including prefix) - No spaces	Text	60	✓	✓	✓
DOCID	Unique document Bates # or populate with the same value as Start Bates (DOCID = BEGDOC#)	Text	60	✓	✓	✓
PGCOUNT	Page Count	Number	10	✓	✓	✓
GROUPID	Contains the Group Identifier for the family, in order to group files with their attachments	Text	60		✓	✓
PARENTID	Contains the Document Identifier of an attachment's parent	Text	60		✓	✓
ATTACHIDS	Child document list; Child DOCID or Child Start Bates	Text – semicolon delimited	Unlimited	✓	✓	✓
ATTACHLIST	List of Attachment filenames	Text – semicolon delimited	Unlimited		✓	✓
BEGATTACH	Start Bates number of first attachment	Text	60	✓	✓	✓
ENDATTACH	End Bates number of last attachment	Text	60	✓	✓	✓

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Specifications for Production of ESI and Digitized ("Scanned") Images
United States *ex rel.* Poehling v. UnitedHealth Group., Inc.

Field name	Field Description	Field Type	Field Value	Hard Copy	E-mail	Other ESI
PROPERTIES	Privilege notations, Redacted, Document Withheld Based On Privilege	Text – semicolon delimited	Unlimited	✓	✓	✓
RECORD TYPE	Use the following choices: Image, Loose E-mail, E-mail, E-Doc, Attachment, Hard Copy or Other. If using Other, please specify what type after Other	Text	60	✓	✓	✓
FROM	Author - format: Last name, First name.	Text	160		✓	✓
TO	Recipient - format: Last name, First name.	Text – semicolon delimited	Unlimited		✓	✓
CC	Carbon Copy Recipients - format: Last name, First name.	Text – semicolon delimited	Unlimited		✓	✓
BCC	Blind Carbon Copy Recipients - format: Last name, First name.	Text – semicolon delimited	Unlimited		✓	✓
SUBJECT	Subject line/Document Title	Text	Unlimited		✓	✓
CONVINDEX	E-mail system ID used to track replies, forwards, etc.	Text	Unlimited		✓	
DOCDATE	Last Modified Date for files and Sent date for e-mail, this field inherits the date for attachments from their parent.	Date	MM/DD/YYYY		✓	✓
TEXT FILEPATH	Relative file path of the text file associated with either the extracted text or the OCR	Text	Unlimited	✓	✓	✓
DATE TIME SENT	Date Sent (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	✓
DATE TIME CRTD	Date Created (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	✓

ATTACHMENT
Specifications for Production of ESI and Digitized ("Scanned") Images
United States *ex rel.* Poehling v. UnitedHealth Group., Inc.

Field name	Field Description	Field Type	Field Value	Hard Copy	E-mail	Other ESI
DATE TIME SVD	Date Saved (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	✓
DATE TIME MOD	Date Last Modified (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	✓
DATE TIME RCVD	Date Received (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	
DATE TIME ACCD	Date Accessed (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	✓
FILE SIZE	Native File Size in bytes	Number	10			✓
FILE NAME	File name - name of file as it appeared in its original location	Text	Unlimited			✓
APPLICATION	Application used to create native file (e.g. Excel, Outlook, Word)	Text	160		✓	✓
FILE EXTENSION	Extension for the file (e.g. .doc, .pdf, .wpd)	Text	10		✓	✓
FILEPATH	Data's original source full folder path	Text	Unlimited		✓	✓
NATIVE LINK	Relative file path location to the native file	Text	Unlimited		✓	✓
FOLDER ID	Complete E-mail folder path (e.g. Inbox\Active) or Hard Copy container information (e.g. folder or binder name)	Text	Unlimited	✓	✓	✓
MD5 HASH	MD5 Hash value (used for deduplication or other processing) (e-mail hash values must be run with the e-mail and all of its attachments)	Text	Unlimited		✓	✓
MESSAGEHEADER	E-mail header. Can contain IP address	Text	Unlimited		✓	

ATTACHMENT
Specifications for Production of ESI and Digitized ("Scanned") Images
United States *ex rel.* Poehling v. UnitedHealth Group., Inc.

Field name	Field Description	Field Type	Field Value	Hard Copy	E-mail	Other ESI
ATTACHMCOUNT	Number of attachments (any level child document) associated with a ParentID	Text	10		✓	
FILE TYPE	Identifies the application that created the file Type of file, not to be confused with file extension	Text	160		✓	✓
COMMENTS	Identifies whether the document has comments associated with it	Text	10		✓	✓
MESSAGE TYPE	Exchange Message class or equivalent	Text	60		✓	
EXTENDED PROPERTIES	For PDFs Only	Text	600		✓	✓
CONFIDENTIAL DESIGNATION	Identifies whether the document is Confidential or Attorneys' Eyes Only	Text	60	✓	✓	✓

4. Search, De-Duplication, Near-Duplicate Identification, E-mail Conversation Threading and Other Culling Procedures

De-duplication of exact copies across all custodian data (i.e., globally) is required in accordance with the following parameters: all custodians must be provided in the load file "ALL CUSTODIANS" field for duplicate documents that are either (1) hard copy images (as detailed in Section 9) or (2) ESI documents that are not Emails or "Stand alone" documents (as detailed in Section 11). Additionally, parties will work collaboratively to address requests for file path and/or custodian metadata on other documents.

The producing party shall not use any other procedure to cull, filter, group, separate or de-duplicate, or near-deduplicate, etc. (i.e., reduce the volume of) responsive material before discussing with and obtaining the written approval of the receiving party. All objective coding (e.g., near duplicate ID or e-mail thread ID) shall be discussed and produced to the receiving party as additional metadata fields. The producing party will not employ analytic software or technology to search, identify, or review potentially responsive material, including but not limited to technology assisted review (TAR) or predictive coding, without first discussing with the receiving party.

5. Hidden Text

All hidden text (e.g., track changes, hidden columns, mark-ups, notes) shall be expanded and rendered in the image file. For files that cannot be expanded the native files shall be produced with the image file.

6. Embedded Files

All non-graphic embedded objects (Word documents, Excel spreadsheets, .wav files, etc.) that are found within a file shall be extracted and produced. For purposes of production, the embedded files shall be treated as attachments to the original file, with the parent/child relationship preserved.

7. Image-Only Files

All image-only files (non-searchable .pdfs, multi-page .tiffs, Snipping Tool and other screenshots, etc., as well as all other images that contain text) shall be produced with associated OCR text and metadata/database fields identified in section 3 for "Other ESI."

8. Encrypted Files

The producing party will use reasonable efforts to decrypt any data (whether individual files or digital containers) that is protected by a password, encryption key, digital rights management, or other encryption scheme, prior to processing for production.

a. The unencrypted text shall be extracted and provided per section 2.c. The unencrypted files shall be used to render images and provided per sections 2.a and 2.b. The unencrypted native file shall be produced pursuant to sections 10-20.
b. If such protected data is encountered but unable to be processed, each file or container shall be reported as an exception in the accompanying Exception Report (pursuant to section 26) and shall include all available metadata associated with the data, including custodian information.

9. Production of Imaged Hard Copy Records

All imaged hard copy material shall reflect accurate document unitization including all attachments and container information (to be reflected in the PARENTID, ATTACHID, BEGATTACH, ENDATTACH and FOLDERID).

a. Unitization in this context refers to identifying and marking the boundaries of documents within the collection, where a document is defined as the smallest physical fastened unit within a bundle. (e.g., staples, paperclips, rubber bands, folders, or tabs in a binder).
b. The first document in the collection represents the parent document and all other documents will represent the children.
c. All documents shall be produced in black and white TIFF format unless the image requires color. An image requires color when color in the document adds emphasis to information in the document or is itself information that would not be readily apparent on the face of a black and white image. Images identified as requiring color shall be produced as color 300 dpi single-page JPEG files.
d. All objective coding (e.g., document date or document author) should be discussed and produced to the receiving party as additional metadata/database fields.

10. Production of Spreadsheets and Presentation Files

All spreadsheet and presentation files (e.g. Excel, PowerPoint) shall be produced in the unprocessed "as kept in the ordinary course of business" state (i.e., in native format), with an associated placeholder image and endorsed with a unique Bates number. *See* section 19 below. The file produced should maintain the integrity of all source, custodian, application, embedded

and related file system metadata. No alteration shall be made to file names or extensions for responsive native electronic files in the File Name field.

11. Production of Items Originally Generated in E-mail Repositories but Found and Collected Outside of E-mail Repositories, i.e., "Stand-alone" Items

Any parent e-mail or other parent items (e.g., calendar, contacts, tasks, notes, etc.) found and collected outside of e-mail repositories (e.g., items having extensions .msg, .htm, .mht, etc.), shall be produced with the "Loose E-mail" metadata fields outlined in section 3, including but not limited to any attachments, maintaining the family (parent/child) relationship.

12. Production of Instant Messenger (IM), Voicemail Data, Audio Data, Video Data, etc.

The producing party shall identify, collect, and produce any and all data which is responsive to the requests which may be stored in audio or video recordings, cell phone/PDA/Blackberry/smart phone data, tablet data, voicemail messaging data, instant messaging, text messaging, conference call data, video/audio conferencing (e.g., GoTo Meeting, WebEx), and related/similar technologies. However, such data, logs, metadata or other files related thereto, as well as other less common but similar data types, shall be produced after consultation with and written consent of the receiving party about the format for the production of such data.

13. Production of Social Media

Prior to any production of responsive data from social media (e.g., Twitter, Facebook, Google+, LinkedIn, etc.) the producing party shall first discuss with the receiving party the potential export formats before collecting the information.

14. Production of Structured Data

If responsive data exists in a structured database (e.g., Oracle, SAP, SQL, MySQL, QuickBooks, etc.), the producing party and receiving party shall discuss what additional information, if any, need be provided with that production.

15. Production of Structured Data from Proprietary Applications

Prior to any production of structured data from proprietary applications (e.g., proprietary timekeeping, accounting, sales rep call notes, CRMs, SharePoint etc.) the producing party and receiving party discuss what additional information, if any, need be provided with that production.

16. Production of Photographs with Native File or Digitized ESI

Photographs shall be produced as single-page JPEG files with a resolution equivalent to the original image as they were captured/created. All JPEG files shall have extracted metadata/database fields provided in a Concordance® load file format as outlined in section 3 for "Other ESI."

17. Production of Images from which Text Cannot be OCR Converted

An exception report shall be provided when limitations of paper digitization software/hardware or attribute conversion do not allow for OCR text conversion of certain images. The report shall include the DOCID or Bates number(s) corresponding to each such image.

18. Production of ESI from Non-PC or Non-Windows-based Systems

If responsive ESI is in non-PC or non-Windows-based Systems (e.g., Apple, IBM mainframes, and UNIX machines, Android device, etc.), the ESI shall be produced after discussion with and written consent of the receiving party about the format for the production of such data.

19. Production of Native Files (When Applicable Pursuant to These Specifications)

Production of native files, as called for in these specifications, shall have extracted metadata/database fields provided in a Concordance® load file format as defined in the field specifications for "Other ESI" as outlined in section 3.

ESI shall be produced in a manner which is functionally usable by the receiving party. The following are examples:

a. AutoCAD data, e.g., DWG and DXF files, shall be processed/converted and produced as single-page JPG image files and accompanied by a Concordance® Image formatted load file as described above. The native files shall be placed in a separate folder on the production media and linked by a hyperlink within the text load file.
b. GIS data shall be produced in its native format and be accompanied by a viewer such that the mapping or other data can be reviewed in a manner that does not detract from its ability to be reasonably understood.
c. Audio and video recordings shall be produced in native format and be accompanied by a viewer if such recordings do not play in a generic application (e.g., Windows Media Player).

20. Bates Number Convention

All images should be assigned Bates numbers before production to the receiving party. The numbers should be endorsed on the actual images. Native files should be assigned a single Bates number for the entire file. The Bates number shall not exceed 30 characters in length and shall include leading zeros in the numeric portion. The Bates number shall be a unique number given to each page (when assigned to an image) or to each document (when assigned to a native file). The numbering convention shall remain consistent throughout the entire production. There shall be no spaces between the prefix and numeric value. If suffixes are required, please use "dot notation." Below is a sample of dot notation:

PREFIX0000001	PREFIX0000003
PREFIX0000001.001	PREFIX0000003.001
PREFIX0000001.002	PREFIX0000003.002

21. Media Formats for Storage and Delivery of Production Data

Electronic documents and data shall be delivered on any of the following media:

a. CD-ROMs and/or DVD-R (+/-) formatted to ISO/IEC 13346 and Universal Disk Format 1.02 specifications; Blu-ray.
b. External hard drives (USB 3.0 or higher, Firewire or eSATA, formatted to NTFS format specifications) or flash drives.
c. Storage media used to deliver ESI shall be appropriate to the size of the data in the production.

d. Media should be labeled with the case name, production date, Bates range, and producing party.

22. Virus Protection and Security for Delivery of Production Data

Production data shall be free of computer viruses. Any files found to include a virus shall be quarantined by the producing party and noted in a log to be provided to the receiving party. Password protected or encrypted files or media shall be provided with corresponding passwords and specific decryption instructions. No encryption software shall be used without the written consent of the receiving party.

23. Compliance and Adherence to Generally Accepted Technical Standards

Production shall be in conformance with standards and practices established by the National Institute of Standards and Technology ("NIST" at www.nist.gov), U.S. National Archives & Records Administration ("NARA" at www.archives.gov), American Records Management Association ("ARMA International" at www.arma.org), American National Standards Institute ("ANSI" at www.ansi.org), International Organization for Standardization ("ISO" at www.iso.org), and/or other U.S. Government or professional organizations.

24. Read Me Text File

All deliverables shall include a "read me" text file at the root directory containing: total number of records, total number of images/pages or files, mapping of fields to plainly identify field names, types, lengths, and formats. The file shall also indicate the field name to which images will be linked for viewing, date and time format, and confirmation that the number of files in load files matches the number of files produced.

25. Transmittal Letter to Accompany Deliverables

All deliverables should be accompanied by a transmittal letter including the production date, case name and number, producing party name, and Bates number range produced.

-XXX-

DECLARATION OF CUSTODIAN OF RECORDS

I, the undersigned, being the duly authorized Custodian of Records for

American Academy of Actuaries

and having personal knowledge and an understanding of the record-keeping system declare under the penalty of perjury the following: (CHECK ONE)

CERTIFICATE OF RECORDS

☐ Attached are true and correct copies of the records described in the Subpoena. The records were made at or near the time of occurrence of the matters set forth therein by, or from information transmitted by, a person with knowledge of those matters, and kept and made in the course of regularly conducted activities. The produced documents or other tangible things constitute all the documents or tangible things in existence which are responsive to this Subpoena.

OR

CERTIFICATE OF NO RECORDS

☐ That a thorough search of our files reveals no documents, records or other material called for in the Subpoena and that no such records exist with the information provided. An explanation is attached to this declaration if the requested records existed at some time but have since been purged.

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

Executed at_____, on _____
(CITY/STATE) (DATE)

_____ _____
PRINT NAME SIGNATURE

American Academy of Actuaries
_____
ON BEHALF OF

U.S. ex rel. Poehling v. UnitedHealth Group, Inc. CV 16-08697 MWF (SSx)
_____
CASE NAME/NUMBER

PROOF OF SERVICE BY ELECTRONIC MAIL

I am over the age of 18 and not a party to the action entitled U.S. *ex rel.* Poehling v. UnitedHealth Group, Inc., CV 16-8697 MWF (SSx). I am employed by the United States Attorney's Office for the Central District of California. My business address is 300 N. Los Angeles Street, Room 7516, Los Angeles, California 90012.

On February 1, 2019, I served the foregoing NOTICE OF SUBPOENA TO AMERICAN ACADEMY OF ACTUARIES on each person or entity named below by electronic mail, pursuant to written consent under Federal Rule of Civil Procedure 5(b)(2)(E).

Date of e-mailing: February 1, 2019

Place of e-mailing: Los Angeles, California

Person(s) and/or Entity(s) to whom e-mailed:

See attached page

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

Executed on February 1, 2019, at Los Angeles, California.

/s/ Jack D. Ross

JACK D. ROSS

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Exhibit 2

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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)

NOTICE OF SUBPOENA TO AMERICA'S HEALTH INSURANCE PLANS

DISCOVERY MATTER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Rule 45 of the Federal Rules of Civil Procedure, and the Local Rules of the United States District Court for the Central District of California, plaintiff United States of America, by and through its undersigned attorneys, will seek the production of documents by issuance of a subpoena in a civil action upon America's Health Insurance Plans, a copy of which is attached.

PLEASE TAKE FURTHER NOTICE that the subpoena compels the production of documents, information, or objects described in Attachments A-C. The documents shall be produced at the time and location specified in the subpoena to produce documents, or at such alternative time and location as may be mutually agreed upon.

Dated: February 1, 2019

JOSEPH H. HUNT
Assistant Attorney General
NICOLA T. HANNA
United States Attorney
DAVID M. HARRIS
DAVID K. BARRETT
ABRAHAM C. MELTZER
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Civil Division, Department of Justice

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

/s/ Jack D. Ross

Jack D. Ross
Assistant United States Attorney
Attorneys for the United States of America

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

Central District of California

UNITED STATES OF AMERICA ex rel. POEHLING,
Plaintiff
v.
UNITEDHEALTH GROUP, INC., et al.,
Defendant

Civil Action No. 16-08697 MWF (SSx)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: America's Health Insurance Plans
601 Pennsylvania Avenue, N.W., Washington D.C. 20004
(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachments A-C.

Place:	Date and Time:
U.S. Department of Justice, Civil Division, Fraud. Sect. 175 N Street, N.E. Washington, D.C. 20530	03/01/2019 10:00 am

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 02/01/2019

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* the UNITED STATES OF AMERICA, who issues or requests this subpoena, are:

JACK D. ROSS; 300 N. Los Angeles St., Room 7516, Los Angeles, CA 90012; jack.ross@usdoj.gov; (213) 894-7395

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 16-08697 MWF (SSx)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* America's Health Insurance Plans

on *(date)* _____ .

☑ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A TO SUBPOENA

Definitions

In connection with responding to this subpoena for Documents, You should use the following definitions and comply with the following instructions:

1. "You" and "AHIP" mean America's Health Insurance Plans (AHIP), a national association representing health insurers located at 601 Pennsylvania Avenue, N.W., Washington, D.C., and all of its past and present officers, directors (*e.g.* members of its board of directors), employees, agents, contractors, and persons doing work on its behalf; and "Your" shall mean the possessive form of "You."
2. "CMS" means the Centers for Medicare and Medicaid Services and all of its components and past and present officials, employees, and contractors.
3. "HHS" means the United States Department of Health and Human Services and all of its components and past and present officials, employees, and contractors.
4. "Communications" means any transmission or exchange of information between two or more persons, orally or in writing, and includes without limitation any conversation or discussion, whether face-to-face or by means of telephone, teleconference, letter, telegraph, telex, electronic mail, or other media and any written Documents memorializing the communication, including, but not limited to, notes of meetings, agendas for meeting, minutes of meetings, attendance records, and presentations made at meetings.
5. "Document" and "Documents" are used in the broadest sense permitted by Federal Rules of Civil Procedure 26 and 34 and means any and all writings and recorded material in any form, including, but not limited to, any written, printed, typed, photographed, recorded, electronic, or otherwise reproduced

or stored communication or representation, whether comprised of letters, words, numbers, pictures, sounds, or symbols, and any copies of documents, contemporaneously or subsequently created, which have any non-conforming or additional notes or other markings, and the reverse side of any communication or representation that also contains any of the above.

(a) By way of example, "Document(s)" includes: ledgers, books of account, payroll ledgers, financial statements, checks, check stubs and registers, bank statements, wire transfers, powers of attorney, receipts, vouchers, invoices, journals, appointment books or calendars, diaries, reports, correspondence, notes, newsletters, memoranda, minutes of meetings, working papers, directives, manuals, contracts, charts, graphs, drawings, marketing materials, bulletins, training and compliance materials, and other materials, information, and data stored in any database or data storage system or on any media. This also includes electronic storage media, which incorporates electronic mail, voicemail messages, facsimiles, videotapes, audiotapes, photographs, magnetic tapes, computer discs (including floppy disks, hard drives, hard disks, jump drives, flash memory devices, and writeable or recordable CDs and DVDs of all types), Personal Digital Assistants, BlackBerrys, cell phones, backup media, all programming instructions, record layouts, and other material necessary for the retrieval of all electronic or word processing material and printouts of data or information stored or maintained by electronic means.

(b) The term "Document(s)" also includes preliminary drafts or revisions, any attachments or enclosures, as well as copies or duplicates that are not identical to the original because of additions, deletions, alterations, or notations.

6. When used in connection with data, "Fee-For-Service" and "FFS" mean diagnosis codes included by health care providers in their claims for payments submitted to CMS under Parts A and B of the Medicare Program.

7. "FFS Adjuster" means a Fee-For-Service adjuster, Fee-For-Service adjustment, or other potential method to account for any unsubstantiated diagnosis codes in the FFS claims data used to calibrate the coefficients for CMS' risk adjustment payment model (the CMS-HCC model). Unsubstantiated diagnosis codes means diagnosis codes that are unsupported by the patients' medical records.

8. "Including" and all forms of the word "include" shall be given the broadest meaning possible and shall mean "without any limitation."

9. "MA" means Medicare Advantage, which is Part C of the Medicare Program.

10. "RADV Audit" means a Risk Adjustment Data Validation audit.

11. "Related to" and "relating to" mean referring to, analyzing, evaluating, discussing, describing, showing, reflecting, identifying, dealing with, consisting of, or in any way pertaining, in whole or in part, to the subject matter at issue.

12. Unless stated otherwise with respect to a particular document request, the "Relevant Time Period" for this request is January 1, 2009 through the date of this subpoena, in order to ensure all responsive documents and information are produced. All responsive documents that were created, generated, dated, sent, received, altered, in effect, or which came into existence during this time period or which are related to this time period are to be produced.

13. "United" means UnitedHealth Group, Inc. and all of its past and present subsidiaries, affiliates, related entities, officers, directors, employees. contractors, consultants, and agents, any of these other entities' past or present employees, officers, directors, contractors, consultants and agents,

any Medicare Advantage Organizations that UnitedHealth Group or any of its past or present subsidiaries or affiliates owned and/or operated in whole and or part, and any Management Service Organization or other entity with which UnitedHealth Group, its past or present subsidiaries, affiliates, or Medicare Advantage Organizations entered into contracts for the provision of either healthcare or administrative services.

14. The singular form of a noun or pronoun shall be considered to include within its meaning the plural form as well, and vice versa.

15. All present tenses of verbs or verb forms shall be considered to include within their meaning the future and past tenses as well, and vice versa.

16. "Or" as well as "and" shall be construed interchangeably in a manner that gives the interrogatories and document requests the broadest reading.

17. "AHIP's January 21, 2011 Letter" means the January 21, 2011 letter that Candace Schaller, Senior Vice President of Federal Programs at AHIP, sent to Cheri Rice, Acting Director of the Medicare Plan Payment Group at CMS, responding to the "Invitation to Comment on Risk Adjustment Data Validation (RADV) Sampling and Payment Error-Calculation Methodology."

ATTACHMENT B TO SUBPOENA

Instructions

In addition to the definitions above, the following instructions also apply to each request:

1. If You contend that any document or information sought by these requests is subject to any privilege, provide a log or other document (i) describing the subject matter of the document or information in as much detail as possible and, if a document, the type of document and any linked documents such as cover letters, emails and attachments; and (ii) identifying the date of creation

and transmission of a document or the date of any oral communications such as meetings alleged to be privileged, each person having knowledge of the information or document, the author(s), sender(s) and recipient(s) if a document; and (iii) identify the privilege asserted and its legal and factual basis. Also, please specify if the document was created by, received from or provided to any contractors, consultants, auditors or accountants and, if so, identify that person or entity and describe in detail the reason(s) why the document was created by, received from or provided to the person or entity and the reason(s) why the privilege was not waived.

2. If You at any time had possession or control of a document requested by this discovery request and such document has been lost, destroyed or is not presently in Your possession, custody or control, please describe the document, the date of loss, destruction, purge or separation from possession or control, and the circumstances surrounding its loss, destruction, purge or separation from possession, custody or control.

3. All electronically stored documents and information should be produced in accordance with the attached Specifications for Production of ESI and Digitized ("Scanned") Images.

ATTACHMENT C TO SUBPOENA

Description of Documents Sought

REQUEST NO. 1:

All Documents relating to AHIP's January 21, 2011 Letter, Including Documents relating to the drafting of the letter (*e.g.*, all drafts), the review and approval of the letter, the reason(s) why the letter was drafted and sent, and all Documents relating to or constituting Communications relating to the letter between or among any persons, Including persons within and outside of AHIP.

REQUEST NO. 2:

All Documents relating to an AHIP Issue Paper concerning Risk Adjustment Data Validation: Policy and Payment Implications (dated January 6, 2010), Including (i) Documents relating to the drafting, review, discussion, debate, or approval of that issue paper; (ii) Documents relating to the reasons why it was drafted; and (iii) Documents relating to or constituting any Communications relating to that issue paper, Including Communications between or among any persons within or outside of AHIP.

REQUEST NO. 3:

All Documents relating to or constituting any Communications or anticipated Communications (*e.g.*, talking points for anticipated Communications) with CMS or HHS relating to any FFS Adjuster, Including any notes or memoranda pertaining to such Communications, any Documents relating to issues for discussion with CMS or HHS concerning any adjustment methodologies, and any Documents relating to the drafting, review, discussion, debate, or approval of such documents.

REQUEST NO. 4:

All Documents relating to any FFS Adjuster, Including all Documents relating to whether CMS or HHS should or should not apply an FFS Adjuster in any context and all Documents relating to the manner or method of calculating and applying any such FFS Adjuster.

REQUEST NO. 5:

All Documents calculating, analyzing, summarizing, or estimating "the underlying error in the Medicare fee-for-service (FFS) data used to calibrate the MA risk adjustment model" and the "impact of this inherent error on the coefficients in the model" as those phrases are used on Page 4 of AHIP's January 21, 2011 Letter.

REQUEST NO. 6:

All Documents relating to, supporting, contradicting, or on which AHIP relied for the following statements at page 5 of AHIP's January 21, 2011 Letter: (i) "If diagnoses reported by an MA organization contain the same degree of error that is reflected in the Medicare FFS data used to construct the MA risk adjustment model, the MA Organization would receive the payment intended under the model"; (ii) "The MA organization would be paid accurately because the errors offset one another"; and (iii) "[I]f the MA Organization reports diagnoses that have a lower degree of error than the Medicare FFS data used to calibrate the risk adjustment model, the payment calculation under the model would underpay the MA Organization."

REQUEST NO. 7:

All Documents calculating, analyzing, summarizing, or estimating "the anticipated result under the [Medicare Advantage risk adjustment] methodology absent … errors [in fee-for-service data used to calibrate the Medicare Advantage risk adjustment model]," as that phrase is used on Page 1 of the AHIP Issue Paper concerning Risk Adjustment Data Validation: Policy and Payment Implications, and all Documents relating to any method for calculating or estimating any such anticipated result.

REQUEST NO. 8:

All Documents relating to, supporting, contradicting, or on which AHIP relied for the statement at page 1 of the AHIP Issue Paper concerning Risk Adjustment Data Validation: Policy and Payment Implications that "in evaluating whether error rates in MA risk adjustment data materially impact the accuracy of risk adjusted payments at the MA contract level, it is necessary to account for the impact of the Medicare fee-for-service error rate."

REQUEST NO. 9:

All Documents relating to, supporting, contradicting, or on which AHIP relied when it made the statement at page 2 of the AHIP Issue Paper concerning Risk Adjustment Data Validation: Policy and Payment Implications that "[a]bsent inclusion of an element in any MA payment adjustment methodology to account for the imperfections in documentation that exist within the Medicare fee-for-service program, translation of RADV audits results into contract-level payment adjustments would not provide comparability of population-based risk scores between the MA and Medicare fee-for-service populations, undermining the basis for the CMS HCC risk adjustment methodology."

REQUEST NO. 10:

All Documents relating to the under-reporting of diagnoses by providers (*e.g.*, physicians, hospitals) with respect to the diagnosis codes that they include in their claims for payments under Parts A and B of the Medicare Program, Including any possible, potential, or actual effect of such under-reporting on (i) the calibration of the coefficients for medical conditions and demographic factors for CMS' risk adjustment payment model (the CMS-HCC model), (ii) risk adjustment scores for Medicare Advantage beneficiaries, or (iii) risk-adjusted payments to Medicare Advantage Organizations. For the purpose of this request, "under-reporting of diagnoses" refers to providers not including in their claims for payments diagnoses that are supported by their patients' medical records.

REQUEST NO. 11:

All Documents relating to or constituting Communications between AHIP and HHS or CMS relating to (1) the AHIP's January 21, 2011 Letter; (2) the term "actuarial equivalence"; (3) any FFS Adjuster; (4) the differences in coding patterns or coding intensity between Medicare Advantage Organizations with respect to the diagnosis codes that they submit to CMS for risk-adjusted payments under Part C

of the Medicare Program and providers (*e.g.*, physicians, hospitals) with respect to the diagnosis codes that they include in their claims for payments under Parts A and B of the Medicare Program; and (5) the Coding Intensity Adjuster or Coding Intensity Adjustment applied by CMS when determining risk scores under Part C of the Medicare Program.

REQUEST NO. 12:

All Documents relating to or constituting Communications between or among AHIP and any Medicare Advantage Organization, any insurer (*e.g.* United), or the American Academy of Actuaries relating to (1) AHIP's January 21, 2011 Letter; (2) the term "actuarial equivalence"; (3) any FFS Adjuster; (4) the differences in coding patterns or coding intensity between Medicare Advantage Organizations with respect to the diagnosis codes that they submit to CMS for risk-adjusted payments under Part C of the Medicare Program and providers (*e.g.*, physicians, hospitals) with respect to the diagnosis codes that they include in their claims for payments under Parts A and B of the Medicare Program; and (5) the Coding Intensity Adjuster or Coding Intensity Adjustment applied by CMS when determining risk scores under Part C of the Medicare Program.

REQUEST NO. 13:

All Documents relating to, calculating, analyzing, or summarizing the differences in coding patterns or coding intensity between Medicare Advantage Organizations and providers under Parts A and B of the Medicare Program, including all Documents relating to differences in coding patterns and coding intensity between Medicare Advantage Organizations with respect to the diagnosis codes that they submit to CMS for risk-adjusted payments under Part C of the Medicare Program and providers (*e.g.*, physicians, hospitals) with respect to the diagnosis codes that they include in their claims for payments under Parts A and B of the Medicare Program.

REQUEST NO. 14:

All Documents relating to the Coding Intensity Adjuster or Coding Intensity Adjustment applied by CMS when determining Medicare Advantage beneficiaries' risk scores and risk-adjusted payments to Medicare Advantage Organizations under Part C of the Medicare Program.

REQUEST NO. 15:

All Documents relating to the term "actuarial equivalence," as that term is used in 42 U.S.C. § 1395w-23(a)(1)(C)(i) or as that term is used in any other context relating to healthcare or healthcare insurance.

REQUEST NO. 16:

All Documents relating to or constituting Communications with United relating to (i) *United States ex rel. Benjamin Poehling v. UnitedHealth Group, Inc., et al.*, No. CV 16-08697 (C.D.Cal.); or *UnitedHealthcare Insurance Company, et al., v. Azar*, Case No. 1:16-cv-00157-RMC (D.D.C.).

REQUEST NO. 17:

All Documents relating to medical record reviews conducted by Medicare Advantage Organizations for the purpose of either (i) identifying additional diagnosis codes that were not reported to them by providers, or (ii) validating the diagnosis codes that were reported to them by providers.

REQUEST NO. 18:

All Documents relating to whether Medicare Advantage Organizations are required to or should delete or withdraw diagnosis codes that they have submitted to CMS for payments under Part C of the Medicare Program when they subsequently learn of or come into possession of information that the diagnosis codes are unsubstantiated by the medical records of the enrollees in their MA plans.

REQUEST NO. 19:

Your document retention policies, including Your policies for retaining data, electronic documents and emails.

ATTACHMENT
Specifications for Production of ESI and Digitized ("Scanned") Images
United States *ex rel.* Poehling v. UnitedHealth Group., Inc.

Collection of Electronically Stored Information (ESI)

1. Specification Modifications

Any modifications or deviations from the Production Specifications may be done only with the express written agreement of the parties. Any responsive data or documents that exist in locations or native forms not discussed in these Production Specifications remain responsive and, therefore, arrangements should be made with the receiving party to facilitate their production.

2. Production Format of ESI and Imaged Hard Copy

Responsive ESI and imaged hard copy shall be produced in the format outlined below. All ESI, except as outlined below in sections 5 – 20, shall be rendered to TIFF image format, and accompanied by a Concordance® Image Cross Reference file. All applicable metadata (see section 3 below) shall be extracted and provided in Concordance® load file format.

a. Image File Format:

All images, paper documents scanned to images, or rendered ESI, shall be produced as 300 dpi single-page TIFF files, CCITT Group IV (2D Compression). Images should be uniquely and sequentially Bates numbered and unless otherwise specified, Bates numbers should be an endorsement on each image.

- All TIFF file names shall include the unique Bates number burned into the image.
- Each Bates number shall be a standard length, include leading zeros in the number, and be unique for each produced page.
- All TIFF image files shall be stored with the ".tif" extension.
- Images shall be OCR'd using standard COTS products.
    - An exception report shall be provided when limitations of paper digitization software/hardware or attribute conversion do not allow for OCR text conversion of certain images. The report shall include the DOCID or Bates number(s) corresponding to each such image.
- All pages of a document or all pages of a collection of documents that comprise a folder or other logical grouping, including a box, shall be delivered on a single piece of media.
- No image folder shall contain more than 2000 images.

b. Concordance® Image Cross Reference file: Images should be accompanied by a Concordance® Image Cross Reference file that associates each Bates number with its corresponding single-page TIFF image file. The Cross Reference file should also contain the image file path for each Bates numbered page.

- Image Cross Reference Sample Format:

ABC00000001,OLS,D:\DatabaseName\Images\001\ ABC00000001.TIF,Y,,,
ABC00000002,OLS,D:\DatabaseName\Images\001\ ABC00000002.TIF,,,,
ABC00000003,OLS,D:\DatabaseName\Images\001\ ABC00000003.TIF,,,,
ABC00000004,OLS,D:\DatabaseName\Images\001\ ABC00000004.TIF,Y,,,

c. Concordance® Load File: Images should also be accompanied by a "text load file" containing delimited text that will populate fields in a searchable, flat database environment. The file should contain the required fields listed below in section 3.

- Text delimited load files are defined using the standard Concordance delimiters. For example:

Field Separator	¶ *or Code 020*
Text Qualifier	þ *or Code 254*

- The text file should also contain hyperlinks to applicable native files, such as Microsoft Excel or PowerPoint files.
- There should be one line for every record in a collection.
- The load file must contain a field map/key listing the metadata/database fields in the order they appear within the data file. For example, if the data file consists of a First Page of a Record (starting Bates), Last Page of a Record (ending Bates), DOCID, DOCDate, File Name, and a Title, then the structure may appear as follows:

þBEGDOCþ¶þENDDOCþ¶þDOCIDþ¶þDOCDATEþ¶þFILENAMEþ¶þTITLEþ

d. The extracted/OCR text for each document should be provided as a separate single text file. The file name should match the BEGDOC# or DOCID for that specific record and be accompanied by the .txt extension.

e. Directory and folder structure: The directory structure for productions should be:

*CaseName***LoadFiles**
*CaseName***Images** < For supporting images (can include subfolders as needed)
*CaseName***Natives** <Native Files location (can include subfolders as needed)
*CaseName***Text** <Extracted Text files location (can include subfolders as needed)

3. Required Metadata/Database Fields

- A " ✓ " denotes that the indicated field should be present in the load file produced.
- "Other ESI" includes data discussed in sections 5 – 20 below, but does not include email, email repositories (section 11), "stand alone" items (section 11), and imaged hard copy material (section 9). Email, email repositories, and "stand alone" materials (section 11) should comply with "Email" column below. Imaged hard copy materials should comply with the "Hard Copy" column.

ATTACHMENT
Specifications for Production of ESI and Digitized ("Scanned") Images
United States *ex rel.* Poehling v. UnitedHealth Group., Inc.

Field name	Field Description	Field Type	Field Value	Hard Copy	E-mail	Other ESI
COLLECTION SOURCE	Name of the Company/Organization data was collected from	Text	160	✓	✓	✓
SOURCE ID (BOX #)	Submission/volume/box number	Text	10	✓	✓	✓
CUSTODIAN	Custodian/Source - format: Last, First or ABC Dept.	Text	160	✓	✓	✓
ALL CUSTODIANS	All Custodians that had a version of the MD5 Hash Duplicate - format: Last, First; separated by semi colons			✓		✓
AUTHOR	Creator of the document	Text	500			✓
BEGDOC#	Start Bates (including prefix) - No spaces	Text	60	✓	✓	✓
ENDDOC#	End Bates (including prefix) - No spaces	Text	60	✓	✓	✓
DOCID	Unique document Bates # or populate with the same value as Start Bates (DOCID = BEGDOC#)	Text	60	✓	✓	✓
PGCOUNT	Page Count	Number	10	✓	✓	✓
GROUPID	Contains the Group Identifier for the family, in order to group files with their attachments	Text	60		✓	✓
PARENTID	Contains the Document Identifier of an attachment's parent	Text	60		✓	✓
ATTACHIDS	Child document list; Child DOCID or Child Start Bates	Text – semicolon delimited	Unlimited	✓	✓	✓
ATTACHLIST	List of Attachment filenames	Text – semicolon delimited	Unlimited		✓	✓
BEGATTACH	Start Bates number of first attachment	Text	60	✓	✓	✓
ENDATTACH	End Bates number of last attachment	Text	60	✓	✓	✓

ATTACHMENT
Specifications for Production of ESI and Digitized ("Scanned") Images
United States *ex rel.* Poehling v. UnitedHealth Group., Inc.

Field name	Field Description	Field Type	Field Value	Hard Copy	E-mail	Other ESI
PROPERTIES	Privilege notations, Redacted, Document Withheld Based On Privilege	Text – semicolon delimited	Unlimited	✓	✓	✓
RECORD TYPE	Use the following choices: Image, Loose E-mail, E-mail, E-Doc, Attachment, Hard Copy or Other. If using Other, please specify what type after Other	Text	60	✓	✓	✓
FROM	Author - format: Last name, First name.	Text	160		✓	✓
TO	Recipient - format: Last name, First name.	Text – semicolon delimited	Unlimited		✓	✓
CC	Carbon Copy Recipients - format: Last name, First name.	Text – semicolon delimited	Unlimited		✓	✓
BCC	Blind Carbon Copy Recipients - format: Last name, First name.	Text – semicolon delimited	Unlimited		✓	✓
SUBJECT	Subject line/Document Title	Text	Unlimited		✓	✓
CONVINDEX	E-mail system ID used to track replies, forwards, etc.	Text	Unlimited		✓	
DOCDATE	Last Modified Date for files and Sent date for e-mail, this field inherits the date for attachments from their parent.	Date	MM/DD/YYYY		✓	✓
TEXT FILEPATH	Relative file path of the text file associated with either the extracted text or the OCR	Text	Unlimited	✓	✓	✓
DATE TIME SENT	Date Sent (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	✓
DATE TIME CRTD	Date Created (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	✓

ATTACHMENT
Specifications for Production of ESI and Digitized ("Scanned") Images
United States *ex rel.* Poehling v. UnitedHealth Group., Inc.

Field name	Field Description	Field Type	Field Value	Hard Copy	E-mail	Other ESI
DATE TIME SVD	Date Saved (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	✓
DATE TIME MOD	Date Last Modified (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	✓
DATE TIME RCVD	Date Received (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	
DATE TIME ACCD	Date Accessed (USE TIME ZONE OF COLLECTION LOCALITY)	Date and Time	MM/DD/YYYY HH:MM:SS		✓	✓
FILE SIZE	Native File Size in bytes	Number	10			✓
FILE NAME	File name - name of file as it appeared in its original location	Text	Unlimited			✓
APPLICATION	Application used to create native file (e.g. Excel, Outlook, Word)	Text	160		✓	✓
FILE EXTENSION	Extension for the file (e.g. .doc, .pdf, .wpd)	Text	10		✓	✓
FILEPATH	Data's original source full folder path	Text	Unlimited		✓	✓
NATIVE LINK	Relative file path location to the native file	Text	Unlimited		✓	✓
FOLDER ID	Complete E-mail folder path (e.g. Inbox\Active) or Hard Copy container information (e.g. folder or binder name)	Text	Unlimited	✓	✓	✓
MD5 HASH	MD5 Hash value (used for deduplication or other processing) (e-mail hash values must be run with the e-mail and all of its attachments)	Text	Unlimited		✓	✓
MESSAGEHEADER	E-mail header. Can contain IP address	Text	Unlimited		✓	

ATTACHMENT
Specifications for Production of ESI and Digitized ("Scanned") Images
United States *ex rel.* Poehling v. UnitedHealth Group., Inc.

Field name	Field Description	Field Type	Field Value	Hard Copy	E-mail	Other ESI
ATTACHMCOUNT	Number of attachments (any level child document) associated with a ParentID	Text	10		✓	
FILE TYPE	Identifies the application that created the file Type of file, not to be confused with file extension	Text	160		✓	✓
COMMENTS	Identifies whether the document has comments associated with it	Text	10		✓	✓
MESSAGE TYPE	Exchange Message class or equivalent	Text	60		✓	
EXTENDED PROPERTIES	For PDFs Only	Text	600		✓	✓
CONFIDENTIAL DESIGNATION	Identifies whether the document is Confidential or Attorneys' Eyes Only	Text	60	✓	✓	✓

4. Search, De-Duplication, Near-Duplicate Identification, E-mail Conversation Threading and Other Culling Procedures

De-duplication of exact copies across all custodian data (i.e., globally) is required in accordance with the following parameters: all custodians must be provided in the load file "ALL CUSTODIANS" field for duplicate documents that are either (1) hard copy images (as detailed in Section 9) or (2) ESI documents that are not Emails or "Stand alone" documents (as detailed in Section 11). Additionally, parties will work collaboratively to address requests for file path and/or custodian metadata on other documents.

The producing party shall not use any other procedure to cull, filter, group, separate or de-duplicate, or near-deduplicate, etc. (i.e., reduce the volume of) responsive material before discussing with and obtaining the written approval of the receiving party. All objective coding (e.g., near duplicate ID or e-mail thread ID) shall be discussed and produced to the receiving party as additional metadata fields. The producing party will not employ analytic software or technology to search, identify, or review potentially responsive material, including but not limited to technology assisted review (TAR) or predictive coding, without first discussing with the receiving party.

5. Hidden Text

All hidden text (e.g., track changes, hidden columns, mark-ups, notes) shall be expanded and rendered in the image file. For files that cannot be expanded the native files shall be produced with the image file.

6. Embedded Files

All non-graphic embedded objects (Word documents, Excel spreadsheets, .wav files, etc.) that are found within a file shall be extracted and produced. For purposes of production, the embedded files shall be treated as attachments to the original file, with the parent/child relationship preserved.

7. Image-Only Files

All image-only files (non-searchable .pdfs, multi-page .tiffs, Snipping Tool and other screenshots, etc., as well as all other images that contain text) shall be produced with associated OCR text and metadata/database fields identified in section 3 for "Other ESI."

8. Encrypted Files

The producing party will use reasonable efforts to decrypt any data (whether individual files or digital containers) that is protected by a password, encryption key, digital rights management, or other encryption scheme, prior to processing for production.

a. The unencrypted text shall be extracted and provided per section 2.c. The unencrypted files shall be used to render images and provided per sections 2.a and 2.b. The unencrypted native file shall be produced pursuant to sections 10-20.
b. If such protected data is encountered but unable to be processed, each file or container shall be reported as an exception in the accompanying Exception Report (pursuant to section 26) and shall include all available metadata associated with the data, including custodian information.

9. Production of Imaged Hard Copy Records

All imaged hard copy material shall reflect accurate document unitization including all attachments and container information (to be reflected in the PARENTID, ATTACHID, BEGATTACH, ENDATTACH and FOLDERID).

a. Unitization in this context refers to identifying and marking the boundaries of documents within the collection, where a document is defined as the smallest physical fastened unit within a bundle. (e.g., staples, paperclips, rubber bands, folders, or tabs in a binder).
b. The first document in the collection represents the parent document and all other documents will represent the children.
c. All documents shall be produced in black and white TIFF format unless the image requires color. An image requires color when color in the document adds emphasis to information in the document or is itself information that would not be readily apparent on the face of a black and white image. Images identified as requiring color shall be produced as color 300 dpi single-page JPEG files.
d. All objective coding (e.g., document date or document author) should be discussed and produced to the receiving party as additional metadata/database fields.

10. Production of Spreadsheets and Presentation Files

All spreadsheet and presentation files (e.g. Excel, PowerPoint) shall be produced in the unprocessed "as kept in the ordinary course of business" state (i.e., in native format), with an associated placeholder image and endorsed with a unique Bates number. *See* section 19 below. The file produced should maintain the integrity of all source, custodian, application, embedded

and related file system metadata. No alteration shall be made to file names or extensions for responsive native electronic files in the File Name field.

11. Production of Items Originally Generated in E-mail Repositories but Found and Collected Outside of E-mail Repositories, i.e., "Stand-alone" Items

Any parent e-mail or other parent items (e.g., calendar, contacts, tasks, notes, etc.) found and collected outside of e-mail repositories (e.g., items having extensions .msg, .htm, .mht, etc.), shall be produced with the "Loose E-mail" metadata fields outlined in section 3, including but not limited to any attachments, maintaining the family (parent/child) relationship.

12. Production of Instant Messenger (IM), Voicemail Data, Audio Data, Video Data, etc.

The producing party shall identify, collect, and produce any and all data which is responsive to the requests which may be stored in audio or video recordings, cell phone/PDA/Blackberry/smart phone data, tablet data, voicemail messaging data, instant messaging, text messaging, conference call data, video/audio conferencing (e.g., GoTo Meeting, WebEx), and related/similar technologies. However, such data, logs, metadata or other files related thereto, as well as other less common but similar data types, shall be produced after consultation with and written consent of the receiving party about the format for the production of such data.

13. Production of Social Media

Prior to any production of responsive data from social media (e.g., Twitter, Facebook, Google+, LinkedIn, etc.) the producing party shall first discuss with the receiving party the potential export formats before collecting the information.

14. Production of Structured Data

If responsive data exists in a structured database (e.g., Oracle, SAP, SQL, MySQL, QuickBooks, etc.), the producing party and receiving party shall discuss what additional information, if any, need be provided with that production.

15. Production of Structured Data from Proprietary Applications

Prior to any production of structured data from proprietary applications (e.g., proprietary timekeeping, accounting, sales rep call notes, CRMs, SharePoint etc.) the producing party and receiving party discuss what additional information, if any, need be provided with that production.

16. Production of Photographs with Native File or Digitized ESI

Photographs shall be produced as single-page JPEG files with a resolution equivalent to the original image as they were captured/created. All JPEG files shall have extracted metadata/database fields provided in a Concordance® load file format as outlined in section 3 for "Other ESI."

17. Production of Images from which Text Cannot be OCR Converted

An exception report shall be provided when limitations of paper digitization software/hardware or attribute conversion do not allow for OCR text conversion of certain images. The report shall include the DOCID or Bates number(s) corresponding to each such image.

18. Production of ESI from Non-PC or Non-Windows-based Systems

If responsive ESI is in non-PC or non-Windows-based Systems (e.g., Apple, IBM mainframes, and UNIX machines, Android device, etc.), the ESI shall be produced after discussion with and written consent of the receiving party about the format for the production of such data.

19. Production of Native Files (When Applicable Pursuant to These Specifications)

Production of native files, as called for in these specifications, shall have extracted metadata/database fields provided in a Concordance® load file format as defined in the field specifications for "Other ESI" as outlined in section 3.

ESI shall be produced in a manner which is functionally usable by the receiving party. The following are examples:

a. AutoCAD data, e.g., DWG and DXF files, shall be processed/converted and produced as single-page JPG image files and accompanied by a Concordance® Image formatted load file as described above. The native files shall be placed in a separate folder on the production media and linked by a hyperlink within the text load file.
b. GIS data shall be produced in its native format and be accompanied by a viewer such that the mapping or other data can be reviewed in a manner that does not detract from its ability to be reasonably understood.
c. Audio and video recordings shall be produced in native format and be accompanied by a viewer if such recordings do not play in a generic application (e.g., Windows Media Player).

20. Bates Number Convention

All images should be assigned Bates numbers before production to the receiving party. The numbers should be endorsed on the actual images. Native files should be assigned a single Bates number for the entire file. The Bates number shall not exceed 30 characters in length and shall include leading zeros in the numeric portion. The Bates number shall be a unique number given to each page (when assigned to an image) or to each document (when assigned to a native file). The numbering convention shall remain consistent throughout the entire production. There shall be no spaces between the prefix and numeric value. If suffixes are required, please use "dot notation." Below is a sample of dot notation:

PREFIX0000001	PREFIX0000003
PREFIX0000001.001	PREFIX0000003.001
PREFIX0000001.002	PREFIX0000003.002

21. Media Formats for Storage and Delivery of Production Data

Electronic documents and data shall be delivered on any of the following media:

a. CD-ROMs and/or DVD-R (+/-) formatted to ISO/IEC 13346 and Universal Disk Format 1.02 specifications; Blu-ray.
b. External hard drives (USB 3.0 or higher, Firewire or eSATA, formatted to NTFS format specifications) or flash drives.
c. Storage media used to deliver ESI shall be appropriate to the size of the data in the production.

d. Media should be labeled with the case name, production date, Bates range, and producing party.

22. Virus Protection and Security for Delivery of Production Data

Production data shall be free of computer viruses. Any files found to include a virus shall be quarantined by the producing party and noted in a log to be provided to the receiving party. Password protected or encrypted files or media shall be provided with corresponding passwords and specific decryption instructions. No encryption software shall be used without the written consent of the receiving party.

23. Compliance and Adherence to Generally Accepted Technical Standards

Production shall be in conformance with standards and practices established by the National Institute of Standards and Technology ("NIST" at www.nist.gov), U.S. National Archives & Records Administration ("NARA" at www.archives.gov), American Records Management Association ("ARMA International" at www.arma.org), American National Standards Institute ("ANSI" at www.ansi.org), International Organization for Standardization ("ISO" at www.iso.org), and/or other U.S. Government or professional organizations.

24. Read Me Text File

All deliverables shall include a "read me" text file at the root directory containing: total number of records, total number of images/pages or files, mapping of fields to plainly identify field names, types, lengths, and formats. The file shall also indicate the field name to which images will be linked for viewing, date and time format, and confirmation that the number of files in load files matches the number of files produced.

25. Transmittal Letter to Accompany Deliverables

All deliverables should be accompanied by a transmittal letter including the production date, case name and number, producing party name, and Bates number range produced.

-XXX-

DECLARATION OF CUSTODIAN OF RECORDS

I, the undersigned, being the duly authorized Custodian of Records for

America's Health Insurance Plans

and having personal knowledge and an understanding of the record-keeping system declare under the penalty of perjury the following: (CHECK ONE)

CERTIFICATE OF RECORDS

☐ Attached are true and correct copies of the records described in the Subpoena. The records were made at or near the time of occurrence of the matters set forth therein by, or from information transmitted by, a person with knowledge of those matters, and kept and made in the course of regularly conducted activities. The produced documents or other tangible things constitute all the documents or tangible things in existence which are responsive to this Subpoena.

OR

CERTIFICATE OF NO RECORDS

☐ That a thorough search of our files reveals no documents, records or other material called for in the Subpoena and that no such records exist with the information provided. An explanation is attached to this declaration if the requested records existed at some time but have since been purged.

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

Executed at_____, on _____
(CITY/STATE) (DATE)

_____ _____
PRINT NAME SIGNATURE

America's Health Insurance Plans
ON BEHALF OF

U.S. ex rel. Poehling v. UnitedHealth Group, Inc. CV 16-08697 MWF (SSx)
CASE NAME/NUMBER

PROOF OF SERVICE BY ELECTRONIC MAIL

I am over the age of 18 and not a party to the action entitled U.S. *ex rel.* Poehling v. UnitedHealth Group, Inc., CV 16-8697 MWF (SSx). I am employed by the United States Attorney's Office for the Central District of California. My business address is 300 N. Los Angeles Street, Room 7516, Los Angeles, California 90012.

On February 1, 2019, I served the foregoing NOTICE OF SUBPOENA TO AMERICA'S HEALTH INSURANCE PLANS on each person or entity named below by electronic mail, pursuant to written consent under Federal Rule of Civil Procedure 5(b)(2)(E).

Date of e-mailing: February 1, 2019

Place of e-mailing: Los Angeles, California

Person(s) and/or Entity(s) to whom e-mailed:

See attached page

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

Executed on February 1, 2019, at Los Angeles, California.

/s/ Jack D. Ross

JACK D. ROSS

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