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

25 Plaintiffs,

26 v.

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

28 Defendants.

No. CV 16-08697 FMO (SSx)

**UNITED STATES' OPPOSITION TO
UNITED'S MOTION TO APPOINT
RETIRED MAGISTRATE JUDGE
SUZANNE H. SEGAL AS SPECIAL
MASTER**

Date: May 21, 2020

Time: 10:00 a.m.

Court: 6D. Hon. Fernando M. Olguin

I. INTRODUCTION

The fact that retired Magistrate Judge Suzanne H. Segal handled prior discovery disputes in this case does not warrant appointing her as a special master to decide all future discovery disputes over the plaintiffs' objections. If the standard for appointing a special master were prior knowledge of a case, then retired magistrate judges would simply carry their full docket of pending cases with them into private practice. But that is not the standard. Instead, in this district, active magistrate judges handle discovery disputes as they arise in pending cases, and the appointment of a special master is reserved for exceptional circumstances. When a magistrate judge retires, the court assigns a new magistrate judge to handle discovery disputes. Rule 53 of the Federal Rules of Civil Procedure authorizes the appointment of a special master to resolve discovery disputes, over a party's objection, only if no sitting magistrate judge of this district could "effectively and timely" address "pretrial and posttrial matters" in the case. Such is not the case here.

United HealthGroup, Inc. and its related entities ("United") ask this Court to dispense with this standard practice and assign all pretrial proceedings to a special master of United's own choosing: retired Magistrate Judge Segal. United argues that appointing retired Magistrate Judge Segal would promote "efficiency." However, Rule 53 does not authorize the appointment of a special master based solely on the potential for increased efficiency. Because there are no exceptional circumstances in this case warranting the appointment of a special master, or even a single discovery dispute pending in this action, the Court should deny United's unusual request.¹

¹ United misrepresents the government's position by stating that, "although the government acknowledges that allowing Magistrate Judge Segal (Ret.) to continue to preside over the case would be a more efficient use of judicial resources," it opposes the motion "because it claims it currently does not have the budget to pay any of the costs associated with a Special Master." Mot. at 2. The government opposes United's motion to appoint a special master, let alone a specific special master, because it is *both* (a) unwarranted for the reasons set forth herein and because it would (b) require the government unnecessarily to incur expenditure of unallocated funds to prosecute this case. The Relator joins this opposition and is not filing a separate brief.

II. BACKGROUND

In this False Claims Act (“FCA”) case, the United States alleges that United knowingly and improperly avoided its obligations to repay significant sums of money to the Medicare Advantage Program. Under the Medicare Advantage program, the Centers for Medicare & Medicaid Services (CMS) makes capitated payments to private health-insurance organizations to provide healthcare benefits to Medicare beneficiaries. CMS adjusts these payments for various “risk” factors that affect expected healthcare expenditures, to ensure that Medicare Advantage organizations are paid more for those enrollees expected to incur higher healthcare costs and less for healthier enrollees expected to incur lower costs. To make these adjustments, CMS collects “risk adjustment” data, including medical diagnosis codes, from Medicare Advantage organizations. This payment model creates powerful incentives for Medicare Advantage organizations to exaggerate the expected healthcare costs for their enrollees by “over-reporting” diagnosis codes.

Over the past decade, United scoured millions of medical records to identify additional diagnosis codes to increase the payments it received from CMS. Dkt. No. 171 (Am. Compl.) ¶¶ 10-13 & 164-77. Those same reviews also revealed numerous invalid diagnoses that United had submitted to CMS and resulted in substantial improper payments to United. *Id.* ¶¶ 13 & 235-38. But United ignored this negative information and improperly retained the payments it obtained based on these invalid diagnoses.

On November 17, 2017, the United States filed its Amended Complaint alleging that United’s conduct violated 31 U.S.C. § 3729(a)(1)(G), which makes it unlawful to knowingly conceal, or knowingly and improperly avoid or decrease, an obligation to pay the United States. Dkt. No. 171 ¶¶ 341-43. United filed its Answer and Counterclaim on March 23, 2018. Dkt. No. 223. On May 31, 2019, following Judge Fitzgerald’s self-recusal, this case was transferred to this Court. Dkt. No. 362.

The parties are currently pursuing fact discovery, which ends on December 4, 2020. In most instances, the parties have successfully worked cooperatively to eliminate

1 or reduce their discovery disputes in this case. For its part, the United States has
2 provided United with nearly two million documents in response to discovery requests.

3 On November 9, 2018, United filed the one and only motion to compel discovery
4 that has been filed by any party to this action. Dkt. No. 310. United challenged the
5 government's assertion of the deliberative process privilege as to various categories of
6 documents. On December 14, 2018, Magistrate Judge Segal granted United's motion,
7 Dkt. No. 324, and this Court affirmed, Dkt. No. 366. There have been no other
8 discovery motions that have required the Court's ruling.

9 United never sought the appointment of a special master prior to the retirement of
10 Magistrate Judge Segal in January 2020. Instead, this motion comes only upon her
11 retirement, and during a period when the Court has not yet assigned a magistrate judge to
12 take her place in this case. Nor has there been any pressing need to assign a magistrate
13 judge, because the parties have not concluded that they need to resort to motion practice
14 regarding any discovery disputes.

15 **III. ARGUMENT**

16 **A. Rule 53 Does Not Warrant Appointment of a Special Master in This** 17 **Case**

18 Rule 53(a) authorizes district courts to appoint special masters "only" for three
19 specific reasons: (1) to perform duties consented to by the parties; (2) to hold trial
20 proceedings or make or recommend findings of fact when warranted by "some
21 exceptional condition;" or (3) to "address pretrial and posttrial matters that *cannot be*
22 *effectively and timely addressed by an available district judge or magistrate judge of the*
23 *district.*" Fed. R. Civ. P. 53(a)(1)(A)-(C) (emphasis added).

24 Here, the parties have not consented to the appointment of a special master, and
25 United is not seeking a special master to hold trial-related proceedings. Accordingly,
26 United's only available argument is that a special master is warranted because pretrial
27 matters "cannot be effectively and timely addressed by an available district judge or
28 magistrate judge of the district." Mot. at 9. However, United has no basis to contend

1 that a magistrate judge in this district could not effectively and timely address the
 2 parties' pretrial matters, because no magistrate judge has yet been assigned to this case
 3 following Magistrate Judge Segal's retirement and no discovery motions are pending and
 4 awaiting immediate adjudication.

5 Courts have recognized that Rule 53 applies only in exceptional circumstances.
 6 *See Burlington N. R. Co. v. Wash. Dep't of Revenue*, 934 F.2d 1064, 1071 (9th
 7 Cir. 1991) (interpreting a prior version of Rule 53); Advisory Committee Notes to 2003
 8 Amendment to Fed. R. Civ. P. 53 ("[A]ppointment of a master must be the exception
 9 and not the rule."); Fed. Jud. Ctr., *Manual for Complex Litigation* § 11.52 (4th ed. 2004)
 10 ("Reference to a special master must be the exception and not the rule."). Contrary to
 11 United's contention, congestion itself is not a reason to appoint a special master. *La Buy*
 12 *v. Howes Leather Co.*, 352 U.S. 249, 259 (1957) ("[C]ongestion in itself is not such an
 13 exceptional circumstance as to warrant a reference to a master. If such were the test,
 14 present congestion would make references the rule rather than the exception."); *Hartford*
 15 *Fire Ins. Co. v. Progressive Corp.*, 2013 WL 12137765, at *3 (N.D. Ohio Oct. 9, 2013)
 16 (explaining that "calendar congestion, complexity of the issues, and the possibility of a
 17 lengthy trial" are not "exceptional circumstances"). Were congestion alone a sufficient
 18 basis to appoint a special master, districts with heavy dockets, such as this one, would
 19 appoint special masters in most cases, making the use of special masters routine rather
 20 than the exception.

21 Nor does United's contention that this is an FCA case raising complex issues of
 22 fact and law provide a sufficient basis. District courts deal with such complex issues
 23 every day. *See La Buy*, 352 U.S. at 259 ("But most litigation in the antitrust field is
 24 complex. It does not follow that antitrust litigants are not entitled to a trial before a
 25 court.").² Just as with antitrust cases, the district and magistrate judges in this district

26
 27 ² Although Rule 53 has been amended since *La Buy*, this view continues to control
 28 the analysis of whether an appointment of a special master is needed. *See, e.g., Hartford*
Fire Ins. Co., 2013 WL 12137765, at *3; *O'Connor v. Wells Fargo Bank*,

1 have frequently dealt with complex FCA cases. The fact that discovery disputes were
 2 addressed timely and effectively by Magistrate Judge Segal before her retirement
 3 demonstrates that this Court's normal practice of assigning magistrate judges to handle
 4 discovery disputes is more than adequate, even in this FCA case with complex issues.
 5 The magistrate judges in this district are capable of handling complex discovery
 6 disputes. There was no need for a special master before Magistrate Judge Segal's
 7 retirement, and there is none now.

8 The standard under Rule 53(a)(1)(C) requires the Court to assess the volume and
 9 complexity of the pending discovery motions and their timing relative to the pretrial
 10 schedule. *Compare FTC v. Qualcomm Inc.*, 2018 WL 3868976, at *2 (N.D. Cal. Feb.
 11 24, 2018) (denying motion to appoint special master and concluding that the Court could
 12 "effectively address the parties' discovery disputes directly"), *with City of Almaty v.*
 13 *Khrapunov*, 2018 WL 9920031, at *1 (C.D. Cal. June 11, 2018) (concluding, "given the
 14 number of discovery motions and the voluminous briefing and exhibits such motions
 15 entail," that "no district or magistrate judge is available to resolve the pending and any
 16 forthcoming discovery matters in a timely and effective manner").³

17 In this case, however, such an assessment is not possible because not even a single
 18 motion to compel is currently pending before the Court. *See Valley Forge Ins. Co. v.*
 19 *Hartford Iron & Metal, Inc.*, 2017 WL 365630, at *3 (N.D. Ind. Jan. 25, 2017) ("[O]n
 20 the basis of nothing more than the threat of future disputes, no special master is required
 21 in this matter.") (quoting *Borom v. Town of Merrillville*, 2008 WL 155018, at *4 (N.D.
 22 Ind. Jan. 15, 2008)); *In re Wyoming Tight Sands Antitrust*, 715 F. Supp. 307, 308 (D.
 23 Kan. 1989) (declining to appoint special master where "plaintiffs have not availed

24
 25 2012 WL 7808867, at *3 (N.D. Ga. Oct. 29, 2012), *report and recommendation adopted*,
 26 2013 WL 1281925 (N.D. Ga. Mar. 27, 2013); *Agostino v. Quest Diagnostics, Inc.*,
 2012 WL 2344865, at *1 (D.N.J. June 20, 2012).

27 ³ In *City of Almaty*, this Court tallied the page count for the pending discovery
 28 motions as follows: for defendants, a 151-page motion accompanied by a 381-page joint
 stipulation and a 191-page joint stipulation; and for plaintiff, a 624-page joint stipulation
 accompanied by declarations and exhibits totaling an additional 835 pages. May 24,
 2018 Order, Case No. 2:14-cv-03650-FMO-FFM, Dkt. No. 253.

1 themselves to other, more conventional remedies,” such as a motion to compel or
 2 informal conference).

3 United instead references only two discovery issues that are not yet ripe for
 4 adjudication, one relating to United’s efforts to obtain the investigative materials of the
 5 U.S. Department of Health and Human Services’ Office of the Inspector General and
 6 another relating to a single interrogatory. *See* Mot. at 8. But the parties are still
 7 continuing to discuss and attempting to resolve their discovery disputes informally, as
 8 they have throughout this case. *See Ribadab Properties Corp. v. Eaton*, 2006 WL
 9 1734368, at *2 (D. Ariz. June 16, 2006) (denying request to appoint special master
 10 “[g]iven the prospect of an achievable out-of-court resolution” of the parties’ disputes).
 11 More significantly, to the extent the parties are unwilling or unable to reach an
 12 agreement, these discovery disputes could be resolved by any available magistrate.⁴

13 United’s purported justification for appointing retired Magistrate Judge Segal as a
 14 special master in this case is that “it would be far more efficient for all parties to
 15 continue to allow Magistrate Judge Segal (Ret.) to preside over discovery disputes”
 16 because she was the assigned magistrate judge before retiring. Mot. at 1. Such a
 17 purported “efficiency,” however, is not one of the permissible justifications under Rule
 18 53 for appointing a special master. *See Broadcom Corp. v. Qualcomm Inc.*, 2008 WL
 19 11338539, at *2 (C.D. Cal. May 13, 2008) (stating, “the fact that a concept makes
 20 common sense and may produce efficiencies for the Court and the parties does not
 21 substitute for a sound legal basis to proceed in such fashion,” denying motion to appoint
 22

23
 24 ⁴ Although United’s motion mentions a dispute with A. Reddix & Associates, Inc.
 25 (“ARDX”) that is the subject of a related action, *United States ex rel. Poehling v.*
 26 *UnitedHealth Group, Inc.*, No. CV 20-3184-FMO-RAO (C.D. Cal. Feb. 17, 2020),
 27 United represents that it “does not anticipate the need for any further court intervention”
 28 in that matter. Mot. at 1 n.1. The parties in that case have “reached a resolution” of their
 dispute and that case has now been dismissed. Dkt. Nos. 42, 43. And while United also
 hints at the possibility of additional discovery disputes arising in this case, the parties
 can continue to discuss these issues as needed. Should additional discovery disputes
 arise in this case that overwhelm the ability of an available district judge or magistrate
 judge of this district to sufficiently handle, the Court may at that time entertain the
 possible assignment of a special master under more normal procedures,

1 special master). Moreover, the customary practice of this Court is for active magistrate
 2 judges to handle discovery disputes, not to appoint retired magistrate judges to act as
 3 special masters merely because of their prior knowledge of the case.

4 Thus, United fails to show that discovery disputes in this case cannot effectively
 5 and timely be addressed by an available district or magistrate judge of this district.

6 **B. The Court Should Follow its Normal Practice of Having All Discovery**
 7 **Matters Decided by an Assigned Magistrate Judge**

8 The normal practice of federal courts, including this district, is to assign
 9 magistrate judges to handle all discovery matters. Under 28 U.S.C. § 636(b)(1)(A), a
 10 district judge “may designate a magistrate judge to hear and determine any pretrial
 11 matter pending before the court,” except certain matters not pertinent here. Likewise, in
 12 this district, General Order 05-07 provides that magistrate judges may be assigned
 13 “[d]iscovery-related matters upon referral by the District Judge to whom the case is
 14 assigned.” *Id.* at 2. Indeed, this Court’s Initial Standing Order, applicable to this case,
 15 expressly states that all discovery matters are referred to the assigned magistrate judge.
 16 Initial Standing Order at 2, Dkt. No. 363. And the Court assigned Magistrate Judge
 17 Rozella Oliver to handle United’s discovery dispute with ARDX in the related action
 18 that United insisted should be transferred from the Eastern District of Virginia based on
 19 its relationship to this litigation, *United States ex rel. Poehling v. UnitedHealth Group,*
 20 *Inc.*, No. CV 20-03184-FMO-RAO. United has not demonstrated that Magistrate Judge
 21 Oliver, or any other magistrate in this district, is unable to timely and effectively address
 22 discovery disputes in this case.

23 Moreover, it is axiomatic that “parties are not permitted to select their own judges
 24 in cases in federal court.” *Hatcher v. Consolidated City of Indianapolis*, 323 F.3d 513,
 25 517 (7th Cir. 2003). The “random-assignment process” helps “ensure the integrity of the
 26 judicial system.” *UCP Int’l Co. Ltd. v. Balsam Brands, Inc.*, 261 F. Supp. 3d 1056, 1060
 27 (N.D. Cal. 2017).
 28

1 Accordingly, given the retirement of Judge Segal as the assigned magistrate judge
2 in this case, the Court should follow its normal practice of requesting that another
3 magistrate judge be randomly assigned to handle all discovery matters in this case.

4 **C. Appointment of a Special Master Will Cause the United States to Incur**
5 **Unnecessary Expenditures in this Case**

6 The costs of a special master may not be insignificant. Such expenses are not a
7 normal part of the government’s litigation costs, which routinely depend on the work of
8 the magistrate judges in resolving discovery disputes in cases litigated in federal courts.
9 *See* Advisory Committee Note to 1983 Amendment to Fed. R. Civ. P. 53 (“The creation
10 of full-time magistrates, who serve at government expense and have no nonjudicial
11 duties competing for their time, eliminates the need to appoint standing masters.”).
12 United proposes that the parties “split evenly” the costs of a special master. Should the
13 Court accept United’s proposal, appointment of a special master would cause the United
14 States to incur unnecessary expenditures in this case.

15 **IV. CONCLUSION**

16 For the foregoing reasons, United’s motion to appoint a special master in this case
17 should be denied.

Dated: April 30, 2020

Respectfully submitted,

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