

FILED

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MAY 28 2021

CENTRAL DISTRICT OF CALIFORNIA

BY: vdr DEPUTY

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 United States Magistrate Judge
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WESTERN DIVISION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel.
 BENJAMIN POEHLING,

Plaintiffs,

vs.

UNITED HEALTH GROUP, INC., et. al.,

Defendants.

Case No. CV 16-8697 FMO (SSx)

ORDER DENYING WITHOUT PREJUDICE
 PLAINTIFF'S MOTION TO COMPEL RE
 INTERROGATORY NO. 14 AND REQUEST
 FOR PRODUCTION NO. 147

On April 16, 2021, Plaintiff United States (the "government") filed a motion to compel (the "Motion" or "MTC") seeking an order regarding Defendant United Health Group, Inc. and related entities ("UnitedHealth" or "UHG") to provide a supplemental response to Interrogatory No. 14 ("Interrogatory 14") and Request for Production No. 147 ("RFP 147" or "Request 147"). The parties submitted a Joint Stipulation in connection with the Motion. Each party also filed a Supplemental Memorandum. On May 20, 2021, the Special Master held a Zoom hearing on the

1 Motion. For the reasons discussed below, the Motion is DENIED without prejudice
2 to renewing the motion at a later stage in the litigation.
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5 I. FACTUAL AND PROCEDURAL BACKGROUND 6 7

8 The government contends that UnitedHealth has refused to reasonably
9 respond to two discovery requests that address whether UnitedHealth improperly
10 failed to delete diagnosis codes from its Medicare Part C risk adjustment submission.
11 According to the government, UnitedHealth systematically ignored medical record
12 reviews when it indicated that diagnosis codes UnitedHealth previously submitted
13 to CMS were not supported by beneficiaries' medical records.
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16 The government contends that it has identified every diagnosis code that
17 UnitedHealth submitted to CMS to increase its risk adjustment payments and then
18 improperly failed to delete when UnitedHealth's own review found no support for
19 the diagnosis code in the medical records. The government asserts that Interrogatory
20 14 and Request 147 are intended to discover UnitedHealth's contentions about the
21 very same diagnosis codes. The government seeks to discover whether
22 UnitedHealth contends that any of the diagnosis codes on the government's list were
23 supported by medical records, despite not being found during any of UnitedHealth's
24 reviews of the associated medical records.
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1 Interrogatory 14 asked UnitedHealth to, with respect to every diagnosis code
2 on the government's list, (a) identify which code is supported by a medical record
3 and (b) identify every medical record review that UnitedHealth conducted. (MTC
4 at 5-7). Request 147 requests all medical records associated with the diagnosis codes
5 on the government's list. (Id. at 7).

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8 In response to Interrogatory 14, UnitedHealth objected on the grounds that
9 "this Interrogatory is an improper contention interrogatory that impermissibly seeks
10 to shift the burden of proving an essential element of the government's False Claims
11 Act case on to UnitedHealth and seeks expert opinion." (Id. at 8). In response to
12 Request 147, UnitedHealth stated: "Based upon its General and Specific Objections,
13 UnitedHealth does not intend to produce documents responsive to this Request."
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16 At the meet and confer on this issue, UnitedHealth indicated that it would
17 produce the responsive medical records in its possession. This production, however,
18 would require a production of approximately 21 million charts and take 8 months to
19 produce. This proposal did not resolve the discovery dispute.
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22 The government asserts that, as it was required to provide a list of 28 million
23 diagnosis codes to comply with its obligation to identify the diagnosis codes it
24 contends UnitedHealth knew were invalid, UnitedHealth should now explain
25 whether medical records do or do not support these codes. (Id. at 9).
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1 According to UnitedHealth, Interrogatory 14A requires it to identify the over
2 20 million medical records corresponding to each of the 28 million codes on the
3 government's list and then to hire experts to review those charts to determine
4 whether each code on the government's list is or is not supported by the medical
5 chart. Subpart 14B requests that UnitedHealth "[i]dentify each Medical record
6 Review(s) of the chart(s) corresponding to that Diagnosis, etc." According to UHG,
7 this request would also require it to engage in a massive and complex matching
8 analysis. RFP 147 seeks the documents that relate to the answer required in
9 Interrogatory 14.
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15 II. INTERROGATORY 14 REQUIRES EXPERT ANALYSIS TO
16 RESPOND
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19 Although the government argues that Interrogatory 14 is "only seeking facts,"
20 it would be impossible for anyone other than an expert to provide a reliable answer.
21 Only an expert -- or someone with specialized knowledge -- could do a fair
22 comparison of the medical records and the diagnosis codes to determine if the
23 medical record supported the code. It is also undeniable that the interrogatory would
24 impose a tremendous burden on the responding party to prepare an answer that does
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1 not currently exist. For these reasons, Interrogatory 14 is an improper interrogatory
2 at this stage of the proceedings.

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4 Contention interrogatories may be improper “[when] they ask the respondent
5 to provide an expert opinion.” Amgen Inc. v. Sandoz Inc., 2017 WL 1352052, at *2
6 (C.D. Cal. April 13, 2017); Montgomery v. Wal-Mart Stores, Inc., 2015 WL
7 11233384, at *6 (S.D. Cal. July 17, 2015). In addition, a court has discretion to
8 delay an answer to a contention interrogatory until designated discovery is complete
9 or at some other time. See Capacchione v. Charlotte-Mecklenburg Sch., 182 F.R.D.
10 486, 489 (W.D.N.C.1998) (stating that “[d]ue to the nature of contention
11 interrogatories, they are more appropriately used after a substantial amount of
12 discovery has been conducted - typically, at the end of the discovery period”). In
13 general, courts prefer to defer answers to contention interrogatories that are
14 propounded prematurely. See e.g., Everett v. USAir Group, Inc., 165 F.R.D. 1, 3
15 (D.D.C. 1995) (denying without prejudice motion to compel response to contention
16 interrogatory on grounds that interrogatory served too early in discovery process);
17 B. Braun Medical, Inc. v Abbott Lab., 155 F.R.D. 525, 527 (E.D. Pa. 1994) (“[T]here
18 is considerable support to defer answering contention interrogatories until the end of
19 the discovery period.”).

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21 In the present action, the request seeks the application of expert knowledge to
22 facts, i.e., the medical records. This interrogatory cannot be answered until after
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1 expert discovery is completed and only if UnitedHealth intends to assert a defense
2 based upon this information. Indeed, parties generally provide this type of
3 information through expert testimony. See United States ex rel. Desrosiers v. Thaller,
4 2016 WL 6441548, at *4-6 (S.D. Fla. Nov. 1, 2016) (whether medical codes
5 submitted for reimbursement were proper was subject of expert testimony); Counts
6 v. Pollock, 2020 WL 5534444, at *2 (M.D. Fla. August 21, 2020) (providing expert
7 testimony on whether plaintiff's medical bills were properly coded); United States
8 ex rel Armfield v. Gills, 2012 WL 12918274, at * 2 (M.D. Fla. 2012) (qualifying
9 expert for testimony regarding improperly coded claims). Accordingly, this
10 interrogatory is improper at this stage of the proceedings because it would require
11 expert analysis to respond.

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16 It is also undeniable that preparation of the response to the request would be
17 extremely burdensome and costly. It would require UnitedHealth to pay for and
18 create an analysis for 20 million documents. Ordinarily, a respondent is not required
19 to undertake investigation and analysis to prepare a response to an interrogatory.
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21 See Behrazfar v. Unisys Corp., 2009 WL 10673197, at *4 (C.D. Cal. June 3, 2009)
22 (party need not respond to an interrogatory that would require extensive analysis and
23 cost). While this analysis and cost may be necessary at some point in the litigation,
24 the Special Master concludes that it is premature to order UHG to undertake this
25 analysis now.
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1 UnitedHealth has stated that if it discloses during the expert discovery phase
2 that it has retained an expert to testify at trial that the 28 million codes on the
3 government's list are supported by medical records, that information will be
4 produced in a manner that provides the government sufficient time to prepare a
5 rebuttal. (MTC at 42). Nothing more is required during this phase of the litigation.
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7 Because Request 14 is a contention interrogatory and requires expert analysis,
8 UnitedHealth is not required to prepare a response at this time.
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12 III. REQUEST 147 IS DEPENDENT UPON A RESPONSE TO
13 INTERROGATORY 14 AND THEREFORE IS
14 DENIED WITHOUT PREJUDICE
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18 Request 147 seeks: "All Chart(s) corresponding to, associated with, or related
19 to each Beneficiary, from each DOS Year(s) in which that Beneficiary is listed in
20 the United States Response to Defendants' Interrogatory No. 1 (Including the United
21 States' First Supplemental Response served on August 17, 2020, the United States
22 Amended First Supplemental Response served on October 13, 2020, the United
23 States' Second Supplemental Response served on October 30, 2020, and any other
24 subsequent responses)." (Mason Decl., Ex. B). The government agreed to limit this
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1 request to production of only those medical records UHG contends supports a
2 diagnosis code on the government's list. (MTC at 7-8).

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4 During the meet and confer process, UnitedHealth offered to produce the
5 responsive medical records in its possession which would amount to an estimated
6 21 million charts and take 8 months to collect and produce. This would allow the
7 government to review the medical records that UnitedHealth reviewed as part of its
8 chart review program and the government could then determine which of the codes
9 on its list are or are not supported. (MTC at 17). At the hearing on the MTC,
10 counsel for the government argued that at a minimum the medical records should be
11 produced to allow the government to review the medical evidence underlying
12 UnitedHealth's codes. Production of these records would allow the government to
13 determine for itself which of the codes on its list are supported or are not supported.
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18 However, in the Motion itself, the government asserted the following: "After
19 the United States identified its list of all diagnosis codes it contends are at issue, it
20 served Interrogatory 14 and Request 147 to discover UnitedHealth's contentions
21 about the very same diagnosis codes. In particular, the United States seeks to
22 discovery whether UnitedHealth contends that any of the diagnosis codes on the
23 United States' list were supported by medical records, despite not being found
24 during any of UnitedHealth's reviews of the associated medical records. The United
25 States further seeks to discover factual information related to UnitedHealth's
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1 medical record reviews.” (MTC at 2, ll. 18-24). The United States also noted:
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3 “Request 147, as written, relatedly requests all medical records associated with the
4 diagnosis codes on the United States’ list. (citation omitted). Importantly, as a result
5 of the meet and confer process . . . the United States agreed to limit its request for
6 medical records to only those records associated with the diagnosis codes that
7 UnitedHealth contends were supported (i.e., the medical records UnitedHealth
8 identifies in response to Part A of Interrogatory 14).” (MTC at 3, ll. 5-11) . . .
9
10 “Subsequently, UnitedHealth agreed to produce some (but not all) of the underlying
11 medical records, but that offer is hollow without identifying which codes
12 UnitedHealth contends are supported by medical records (i.e., responding to
13 Interrogatory 14). Simply producing millions of medical records alone does nothing
14 to illuminate UnitedHealth’s contentions.” (MTC at 3, ll. 17-21).

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18 As UHG observed, “RFP 147 is . . . dependent entirely on whether United is
19 required to Interrogatory 14A; if the Court agrees that United is not required to hire
20 experts to engage in the coding reviews that responding to Interrogatory 14A would
21 require, then there would be no medical records responsive to RFP 147 as now
22 recrafted by the government.” (MTC at 16, ll. 2-6). UHG, as part of the meet and
23 confer efforts, offered to produce to the government every medical record in
24 United’s possession that United reviewed as part of its chart review program, to
25 allow the government to determine for itself which of the codes on its list are or are
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1 not supported. (MTC at 16, ll. 25-28; 17, ll. 1-2). The government rejected this
2 offer. UHG contends that the government's position regarding Request 147 has
3 "vacillated dramatically over time." (MTC at 17, ll. 12-13). At the hearing on the
4 MTC, the government did take a position that contradicted the government's prior
5 arguments in the MTC, i.e., the government argued that a response to Request 147
6 would be meaningful even without a response to Interrogatory 14.

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9 The Special Master finds that the inconsistency in the government's
10 arguments undermines their persuasiveness. The Special Master concludes that if
11 the two discovery requests are related and linked as the government originally
12 argued, then the Order should be consistent regarding both requests. Accordingly,
13 the MTC is DENIED without prejudice as it pertains to Request 147. The
14 government may renew Request 147 if the requested documents are relevant to
15 UHG's defenses asserted at a later phase of the action.
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21 IT IS SO ORDERED.

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24 **DATE: May 28, 2021**

DocuSigned by:

Hon. Suzanne Segal (Ret.)

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Hon. Suzanne H. Segal (Ret.)

PROOF OF SERVICE

RE: United States ex rel. Poehling v. United Health Group, Inc., et al.
Case ID: KEERX

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action. My business address is 633 West 5th Street, Suite 1000 Los Angeles, CA 90071

On June 1 2021 I served the **ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION TO COMPEL RE INTERROGATORY NO. 14 AND REQUEST FOR PRODUCTION NO. 147** on the following parties. Placing a true copy to all parties as follows:

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Executed on June 1, 2021 at Los Angeles, California.

Alisa Martinez
Alisa Martinez
Signature Resolution