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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-FMO-PVCx

**NOTICE OF LODGING OF SPECIAL MASTER'S ORDER DENYING UNITED STATES' MOTION TO COMPEL PRODUCTION OF MEDICAL RECORDS**

**TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD**:

PLEASE TAKE NOTICE that on May 3, 2024, the Honorable Suzanne Segal (Ret.), Special Master in this Action, issued the attached Order Regarding the Motion to Compel Discovery requesting the Court compel Defendant UnitedHealth Group, Inc. ("United") to produce certain medical records, filed by the United States on March 22, 2024.

A true and correct copy of the May 3, 2024 Order is attached hereto and filed under seal pursuant to the parties' Joint Application for a Sealing Order. A redacted copy will be filed publicly.

Dated: May 10, 2024

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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**WESTERN DIVISION**

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|---|---|
| UNITED STATES OF AMERICA *ex rel.* BENJAMIN POEHLING,<br><br>Plaintiffs,<br><br>vs.<br><br>UNITEDHEALTH GROUP, INC., *et al.*,<br><br>Defendants. | Case No. CV 16-08697-FMO-PVCx<br><br>SPECIAL MASTER'S ORDER DENYING UNITED STATES' MOTION TO COMPEL PRODUCTION OF MEDICAL RECORDS<br><br>(Submitted to Special Master as of 4/19/24) |

On March 22, 2024, Plaintiff United States of America ("the United States") filed a Motion to Compel Discovery requesting the Court compel Defendant UnitedHealth Group, Inc. ("United") to produce certain medical records, filed on March 22, 2024. United filed an Opposition on April 12, 2024, and the United States filed a Reply on April 19, 2024.

The Special Master previously held an informal discovery conference on this dispute. The Special Master has considered the Motion, the Opposition, the Reply, and all related filings. For the reasons discussed below, the Motion is DENIED.

## A. THE UNITED STATES' CONTENTIONS

Through its recently disclosed expert, M. Timothy Renjilian, UnitedHealth Group ("United") seeks to present evidence to suggest to the jury that [redacted] that overlap with codes the United States contends were not found supported in United's Chart Reviews and should have been deleted. It further seeks to argue to the jury, again through Mr. Renjilian, that the [redacted]

[redacted] (Mot. at p. 1.)

At the same time, United refuses to produce the medical records related to [redacted] reviewed by its own Chart Review coders and refuses to answer an interrogatory asking United to identify any medical records it contends support [redacted] the United States contends should have been deleted. In so doing, United is withholding evidence relevant to its new defenses and necessary for a fair evaluation of those defenses. Without United's responses to these requests, the United States lacks key information necessary to respond to United's new defenses, particularly information about whether United can show that [redacted] were supported by medical records reviewed in United's Chart Review program. Consequently, the United States requests the Court to compel United to produce the medical records in its possession that its Chart Review coders reviewed for [redacted], and to identify any medical records it contends support [redacted] (Mot. at p. 1.)

## B. UNITED'S CONTENTIONS

The government claims in this litigation that 28 million diagnosis codes submitted by United for payment in Medicare Advantage were unsupported by medical records, resulting in over 2 billion dollars in overpayments that United knowingly retained. During expert discovery, one of United's experts observed that—contrary to the government's assertions in this case—[redacted] The government now seeks on the basis of this opinion, to reopen fact discovery, seek reconsideration of this Court's discovery order, and require United to perform new expert work. The motion is meritless. (Opp. at p. 1.)

The instant motion is a misguided attempt to revisit the Special Master's May 28, 2021 order ("Order") denying certain discovery requests that the Special Master correctly concluded would have required United to perform expert analysis it had no interest in performing as part of its defense of the case and which is not required

by the Federal Rules. The government obfuscates the facts that have unfolded since 2021 and advances a tortured reading of the Order to suggest there is now a basis to revisit it solely because a United expert, Timothy Renjilian, noted that [redacted]. Mr. Renjilian identified those findings based upon his review of information provided by CMS auditors to United, which is already in the possession of the government. Mr. Renjilian did not review or rely on any of the information the government now seeks. (Opp. at p. 1.)

The government seeks to leverage United's expert's observation to suggest circumstances have somehow changed and United should now be required to undertake the same expert analysis the Special Master previously concluded United is under no obligation to perform. Nothing United's expert did warrants revisiting the Order. (Opp. at pp. 1-2.)

The Special Master previously concluded that United would only be required to respond to Interrogatory 14 and Request 147 if

United retained an expert to testify at trial that certain of 28 million codes on the government's list are supported by specific medical records that the expert reviewed, which would effectively place those records squarely within the requirements of Rule 26 or the Expert Stipulation. Nothing has changed since 2021: United still has not retained any expert who has considered, much less relied on, any specific medical records. (Opp. at p. 2.)

The government does not argue it is entitled to these materials because Mr. Renjilian relied on them, only that the data Mr. Renjilian reviewed "simply do not provide enough detail to determine whether the same medical charts (reviewed by CMS auditors) were actually reviewed by United's coders in Chart Review." *See* Mot. at 1, 9. As the government concedes, Mr. Renjilian did not possess or review—let alone rely on—any medical records as part of his reports, nor did he conduct the kind of expert matching exercise or analysis required to identify the specific medical records the government now seeks. His analysis did not relate, in any way, to any medical records reviewed by United's coders in Chart Review, and his opinions were not predicated, in any way, on the review of any medical records. His

opinions were based solely on materials prepared by CMS auditors, which remain in the government's possession. (Opp. at pp. 2-3.)

Those facts, which the government does not dispute, foreclose the government's attempt to revisit the Order because the necessary condition precedent for reconsideration (United reviewing medical records and identifying those that support the relevant conditions) has not, and will not, occur. Instead, Mr. Renjilian simply observed that [redacted]. His reports merely reveals these "admissions against interest" by CMS's auditors—they do not provide any factual or legal basis to warrant revisiting the Order. (Opp. at p. 3.)

Separate and apart from Mr. Renjilian's reports not providing any basis to warrant revisiting the Order, the discovery the government now seeks has little, if any, probative value, and whatever value the belated discovery might provide to the government is easily outweighed by the untimeliness of the request and the substantial burden producing it would impose on United. Contrary to the government's assertions, the requested discovery does not serve to buttress the government's contention (*i.e.*, that United improperly retained an overpayment) or to refute United's fundamental denial that it was overpaid or knowingly retained any overpayment. The requested discovery will not mitigate, let alone address, the fact that [redacted] associated with the diagnosis codes the government has alleged in this litigation were unsupported and therefore formed the basis of an overpayment. [redacted]

[redacted] the government (and its expert in this litigation) relied upon when alleging United was overpaid. (Opp. at pp. 3-4.)

Furthermore, the discovery the government seeks still will require United to engage in a complicated expert review and analysis of no value to United and which does not form the basis of any of United's defenses. United should not be required to perform burdensome expert analysis for the government's use—particularly when that analysis does nothing to affect [redacted] (Opp. at p. 4.)

## C. THE UNITED STATES' CONTENTIONS ON REPLY

Plaintiffs' expert Dr. Garthwaite has opined that United submitted 1.9 million diagnosis codes to CMS for increased risk adjustment payments that United's own Chart Review coders later found to be unsupported by the beneficiaries' medical records. United now intends to offer expert testimony that [redacted]

[redacted] United's expert Mr. Renjilian expressly opines that "[t]he government's assertion that the diagnosis codes in the First Interrogatory Response are not supported is contradicted by CMS's own RADV auditors." United Memorandum in Opposition ("United Opp.") at 12. He further opines that [redacted]." Glover Decl., Ex. I at 33 [¶ 63]. But even if a diagnosis code on Dr. Garthwaite's list maps to an HCC1 that was [redacted] it is impossible to know – without reviewing the medical records that were reviewed by United's Chart Review coders – if the medical records reviewed by the RADV auditors were the same medical records reviewed by United's coders. (Reply. at p. 1.)

It would be fundamentally unfair to allow United to offer expert testimony that some of the diagnosis codes on Garthwaite's Deletes [redacted] while at the same time precluding the United States from discovering the medical records in United's possession, which are necessary for

the jury to assess the validity of Mr. Renjilian's opinion. The medical records for [redacted] identified by Mr. Renjilian are highly relevant to United's defense, they are already in United's possession, and they should be produced as contemplated by the Special Master's Order. Glover Decl., Ex. F; Dkt. 419 ("government may renew Request 147 if the requested documents are relevant to UHG's defenses asserted at a later phase of the action"). The motion should therefore be granted. (Reply. at p. 1.)

**D. DISCUSSION**

The United States seeks to compel United to respond to Interrogatory 14 and Request 147, which request discovery regarding medical records that the United States contends are relevant to the diagnostic codes that the government has identified as unsupported by medical records.

Interrogatory 14 asks United to, with respect to every diagnosis code on the United States' list of allegedly unsupported diagnosis codes: (A) identify which of those diagnosis codes, if any, United contends were supported by a medical record, as well as the specific medical record United contends provides

such support, and (B) identify every medical record review that United conducted (and the results of that review) for every code that United contends it was not obligated to delete or otherwise return payment for, regardless of whether the basis for United's contention is claimed support in an underlying medical record or some other defense. Request 147, as written, relatedly requests all medical records associated with the diagnosis codes on the United States' list. As a result of the meet and confer process, the United States previously agreed to limit its request for medical records to only those records associated with the diagnosis codes that United contends were supported (*i.e.*, the medical records United identifies in response to Part A of Interrogatory 14). (Joint Stipulation at 3.)

The Special Master's May 28, 2021 order (the "Order") denied without prejudice the United States' previous motion to compel regarding Interrogatory 14 and Request 147. (Dkt. 419.) The Special Master concluded Interrogatory 14 was "an improper interrogatory at this stage of the proceedings" because "[o]nly an expert—or someone with specialized knowledge—could do a fair comparison of the medical records and the diagnosis codes to determine if the medical record supported the code." (*Id.* at 4-5.) The Special Master also found the interrogatory "would impose a tremendous burden on the responding party to prepare an answer

that does not currently exist." (*Id.* at 4.) Accordingly, the Special Master held Interrogatory 14 "cannot be answered until after expert discovery is completed and *only if UnitedHealth intends to assert a defense based upon this information*." (*Id.* at 5-6 (emphasis added).)[1] The Special Master held the same with respect to Request 147, denying the motion to compel production of specific medical records and stating that "[t]he government may renew Request 147 if the requested documents are relevant to UHG's defenses asserted at a later phase of the action." (*Id.* at 10.).

The United States now argues that the opinions of United's expert, Timothy Renjilian, have placed at issue whether specific medical records support diagnosis codes identified by the United States as unsupported. On this basis, the

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[1] The parties provide differing interpretations of the phrase "*if UnitedHealth intends to assert a defense based upon this information.*" To clarify, the Special Master intended to incorporate the rule regarding expert discovery, i.e., that the medical records could be discoverable if a defense (through the expert) was asserted based upon the expert's reliance on particular data, i.e., the medical records. However, United's expert has not based any of his findings on the requested medical records and therefore they do not fall within this rule.

government argues United should be compelled to respond to Interrogatory 14 and Request 147.

Discovery is permitted into underlying data an expert relied upon in reaching his or her opinions. *See* Fed. R. Civ. P. 26(a)(2) (testifying experts must include in their report "the facts or data considered by the witness in forming" the expert's opinions). In denying the United States' previous motion to compel, the Special Master's Order acknowledged that following expert discovery, the United States might be entitled to discovery from United regarding medical records that United contends disprove the United States' allegations that certain diagnosis codes were unsupported "*if UnitedHealth intends to assert a defense based upon this information*." (*Id*. at 5-6 (emphasis added).) However, United, through Mr. Renjilian, has not asserted that specific medical records (other than records already considered by the CMS reviewers) prove any diagnosis codes identified by the government as unsupported were actually supported.

Mr. Renjilian did not review nor rely on any medical records in reaching his opinions. (*See* Renjilian Initial Report; Renjilian Rebuttal Report; Renjilian Depo. at 156:7-19, 195:8-196:5, 225:25-226:6, 236:22-237:1.) Instead, Mr. Renjilian compared the government's list of allegedly unsupported diagnosis codes with data

from CMS's RADV audits and other documents produced in this litigation – all of which is data already in the government's possession – to conclude that "[t]he government's assertion that the diagnosis codes in the First Interrogatory Response are not supported is contradicted by CMS's own RADV auditors." (Renjilian Initial Report at 76 (Opinion 4).)

Mr. Renjilian's Rebuttal Report similarly relied upon CMS audit data compared against the subset of allegedly unsupported codes identified by the government's expert, Dr. Garthwaite, as having a financial impact. (*See* Renjilian Rebuttal Report at ¶ 62 (opining that [redacted] and, thus, the diagnosis codes could not have led to any overpayment.") Mr. Renjilian used CMS's own RADV data to "rebut[…] the presumption that diagnosis codes not independently identified by a chart reviewer were necessarily unsupported." (Renjilian Depo. at 130:25-131:4.) To the extent any medical records were considered by the RADV auditors, those medical records are already in the possession of the government. (Opposition, p. 17, ll. 8-11).

The medical records the United States seeks via Interrogatory 14 and Request 147 are not discoverable as expert reliance materials because Mr. Renjilian did not rely on them. Nor has the United States shown other justification for requiring United to comply with these requests. The Special Master also finds that United's assertions of burdensomeness are well taken and the United States has oversimplified the burden required to collect and analyze these medical records.

It is the United States' burden to prove its allegations that United "knowingly submitted false claims to the United States" and that the diagnosis codes identified by the government as unsupported were, in fact, unsupported by medical records. Presumably, based on the extensive five-year pre-filing investigation conducted by government investigators (see Opposition at 20, ll. 5-6), the government believed it had the necessary factual evidence to support its claims before it proceeded with the action. United cannot be compelled to respond to discovery requiring it to undertake a costly and burdensome expert analysis of medical records to identify evidence to support contentions it has never made regarding whether specific medical records *disprove* the United States' claims. *Cf. In re Facebook, Inc.*, 2016 WL 5080152, at *4 (S.D.N.Y. July 7, 2016) (denying motion to compel plaintiffs to respond to contention interrogatory regarding

defendants' affirmative defense, explaining "[i]t would be inappropriate to require Plaintiffs to devise a theory for an element which is not required for their prima facie case."); *see also Melder v. Allstate Corp.*, 2007 WL 9777975, at *4 (E.D. La. Nov. 5, 2007).

As noted in the *Melder* decision:

> A party cannot be forced to prepare its opponent's case. Consequently [discovery] that require[s] a party to make extensive investigations, research or compilation or evaluation of data for the opposing party are in many circumstances improper.

*Melder* at *4 (citing 8A C.A. Wright, A.R. Miller, & A.L. Marcus, *Federal Practice and Procedure,* Section 2174, at 302-303 (2d ed. 1994) (additional citations omitted). The Special Master agrees that ordering United to undertake the requested retrieval of records and matching would improperly shift the government's burden of proof to United. The motion is therefore DENIED.

DATED: 5/3/2024

DocuSigned by:
Hon. Suzanne Segal (Ret.)
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Honorable Suzanne H. Segal (Ret.)
Special Master