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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 FMO-PVCx

**SUPPLEMENTAL BRIEF OF THE  
UNITED STATES OF AMERICA**

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1       **I. INTRODUCTION**

2       The central issue in this case is this: When an MAO like United reviews its  
3 beneficiaries' medical records, can the MAO turn a blind eye to information from those  
4 reviews showing that diagnosis codes it submitted to CMS for payment were unsupported  
5 and retain overpayments it received for those unsupported codes? United contends it is  
6 allowed to do both. But it is allowed to do neither. By burying its head in the sand and  
7 ignoring information about the unsupported codes it had submitted for payment, United  
8 knowingly and improperly retained over \$2 billion of Medicare payments to which it is  
9 not entitled. This is an unacceptable depletion of the Medicare trust funds that provide  
10 healthcare to millions of elderly and disabled individuals, leaving a gaping hole in those  
11 funds. United here argues that it should be granted summary judgment – and *never* have  
12 to repay those billions of dollars – because its refusal to return funds intended to provide  
13 healthcare to our nation's most vulnerable citizens was somehow immaterial to CMS, or,  
14 even more bold of a claim, that CMS somehow sanctioned its retention of funds rightfully  
15 belonging to the Medicare trust. While United claims to be CMS's partner in providing  
16 healthcare to the country's elderly, instead it has sought to unlawfully maximize its profits  
17 at the expense of the taxpayer funded Medicare program.

18       In moving for summary judgment, United makes the surprising argument that no  
19 rule prohibits it from deliberately ignoring the negative results of its Chart Reviews or  
20 from retaining these overpayments. Joint Brief, 48-53. But since the inception of the MA  
21 program, MAOs have had clear contractual and regulatory requirements to conduct their  
22 chart reviews in good faith and to exercise due diligence in taking steps to correct the  
23 submission of unsupported codes. Joint Brief, 54-58. As the Ninth Circuit held, turning a  
24 blind eye to over-reporting errors shows a lack of diligence and absence of good faith.  
25 *United States ex rel. Swoben v. UnitedHealthcare Ins. Co.*, 848 F.3d 1161, 1175-76 (9th  
26 Cir. 2016). And MAOs have a duty to refund to CMS, rather than retain, overpayments  
27 from unsupported codes. Joint Brief, 54-62. The FCA imposes liability on a person who  
28 deliberately ignores or recklessly disregards information showing it was a recipient of

1 overpayments. Joint Brief, 58-62.

2 Because the evidence clearly shows that United deliberately ignored or recklessly  
3 disregarded the results of its own Chart Reviews, showing it submitted unsupported codes  
4 for payment and failed to return money owed to CMS, United attempts to contort the False  
5 Claims Act and impose elements of proof beyond those required by the statutory language.  
6 In particular, United claims that materiality is an additional statutory element of the second  
7 prong of the reverse false claims provision, 31 U.S.C. § 3729(a)(1)(G), and that CMS  
8 would not have sought to recover the payments it made to United for unsupported codes  
9 it had submitted. United relies primarily on a single 45-minute videoconference in April  
10 2014 during which United contends CMS gave it a green light to ignore over-reporting  
11 errors found in its Chart Reviews. Joint Brief, 67-68. But the United States will present  
12 evidence at trial that CMS did no such thing, and conversely informed United that  
13 “[r]egardless of the effective date of the proposed requirement related to medical record  
14 reviews, there are other laws that do impose standards, requirements and responsibilities  
15 on MA plans in connection with the federal payments they receive from CMS. We cannot  
16 provide advice to United about the scope of those other laws. Nor can we provide advice  
17 on whether United’s plan [sic] course of action and/or purported limits on the scope of its  
18 attestation are compliant with such other laws.” Joint Brief, 30, 71-72. Even the notes of  
19 United’s own CFO who attended the meeting demonstrate that CMS informed United at  
20 the meeting that CMS, “Haven’t known enough process to give feedback on our [United’s]  
21 judgments.” Joint Brief, 30, 71. Confronted with a red light at the 2014 meeting, United  
22 purports to have seen a green light. At minimum, facts are in dispute regarding that  
23 meeting, and summary judgment should be denied.

24 In short, United asks this Court to be the very first court ever to hold that an MAO  
25 is allowed to turn a blind eye to over-reporting errors and retain overpayments. Its  
26 argument is based on a mistaken view that liability under the second prong of the reverse  
27 false claims provision implicitly requires additional proof of materiality beyond that  
28 established by showing that the MAO knowingly and improperly avoided an obligation to

1 pay CMS. Rejecting United’s argument, the Court should grant the United States’ Motion  
2 for Partial Summary Judgment, and hold that under the second prong of 31 U.S.C. §  
3 3729(a)(1)(G), proof that a defendant concealed, avoided or decreased an obligation to  
4 pay establishes any applicable materiality requirement, and that there is no extra proof of  
5 materiality required by this provision. For the reasons stated in its Opposition to United’s  
6 Motion for Summary Judgment, *see* Joint Brief generally, and in this Supplemental Brief,  
7 the Court should also deny United’s Motion for Summary Judgment.

## 8 II. ARGUMENT

9 The second prong of 31 U.S.C. § 3729(a)(1)(G) requires the government to prove  
10 that a defendant “knowingly conceal[ed] or knowingly and improperly avoid[ed] or  
11 decreas[ed] an obligation to pay or transmit money or property to the Government.” The  
12 FCA defines “obligation” to mean “an established duty, whether or not fixed, arising from  
13 an express or implied contractual . . . relationship, . . . , from statute or regulation, or from  
14 the retention of any overpayment.” 31 U.S.C. § 3729(b)(3) (emphasis added). United’s  
15 obligation to pay the government arises from two requirements: (1) contract and  
16 regulation; and (2) retention of an overpayment. First, the government will prove that  
17 United was required by regulation and contract not to turn a blind eye to unsupported  
18 codes it submitted for payment, and to correct those unsupported codes by deleting them  
19 (as such, automatically repaying CMS for the associated overpayments). Joint Brief, 54-  
20 58. Second, the government will also prove that United was required to repay  
21 overpayments within sixty days of being put on notice of potential overpayments. Joint  
22 Brief, 58-62. Violations of these requirements are inherently material because they, by  
23 definition, influence the agency’s payment or receipt of money.

24 Nevertheless, United contends that the second prong of 31 U.S.C. § 3729(a)(1)(G)  
25 contains some sort of additional materiality requirement. At bottom, United argues that,  
26 even though it was overpaid and obligated to repay the overpayment, the government must  
27 make some further showing that its failure to repay was material to CMS. Not only is such  
28 a bizarre requirement lacking in the text of the statute, but it is also totally devoid of

1 common sense. Consequently, the court should grant the government summary judgment  
2 and reject United's attempt to insert an additional materiality requirement under this prong  
3 beyond showing that the defendant unlawfully failed to return an overpayment owed to  
4 the United States.

5 **A. The Second Prong of the Reverse FCA Provision Does Not Require**  
6 **any Additional Proof of Materiality Beyond the Failure to Return an**  
7 **Overpayment**

8 The second prong of 31 U.S.C. § 3729(a)(1)(G) does not require some additional  
9 showing of materiality beyond United's improper retention of an overpayment. The  
10 receipt and failure to return an overpayment is, by definition, material to the government's  
11 payment or receipt of money. United has failed to identify any support in the statute or  
12 caselaw for its position that the United States must offer additional proof of materiality  
13 beyond demonstrating that the government was deprived of funds legally owed to it. While  
14 feigning credulity at the United States' argument, it is United that is asking this Court to  
15 take a precedential step and become the first to hold that the second prong of §  
16 3729(a)(1)(G) in essence requires the United States to prove materiality twice – first to  
17 establish that United knowingly and improperly avoided an obligation to pay the  
18 government, and then to make some type of second and additional showing of materiality  
19 beyond the obligation to pay.

20 The FCA defines “material” as “having a natural tendency to influence, or be  
21 capable of influencing, the payment or receipt of money or property.” 31 U.S.C.  
22 § 3729(b)(4). Proving liability under the second prong of the reverse false claims provision  
23 necessitates showing that the person (1) had an “obligation to pay” and (2) knowingly and  
24 improperly avoided the obligation. An “obligation” is defined as an “established duty,  
25 whether or not fixed, arising from” among other sources, a contractual relationship,  
26 regulation or the “retention of any overpayment.” 31 U.S.C § 3729(b)(3). To prove an  
27 obligation to pay, the government must show that the requirements of the relevant sources  
28 of the obligation – United's contracts with CMS, regulation, or retention of an

1 overpayment – give rise to an established duty to pay. By proving an established duty to  
2 pay and that the person avoided that duty to pay, the government has shown that the  
3 person’s violation of the requirements influenced the agency’s payment or receipt of  
4 money and thus was material. Contrary to what United contends, the second prong of §  
5 3729(a)(1)(G) does not have an extra or double materiality requirement. Such a  
6 requirement does not exist in the statute and, in practical terms, makes no sense. The  
7 refusal to refund money owed to the government is not only capable of influencing the  
8 agency’s payment decision, but necessarily does so since it deprives the agency of funds  
9 to which it is legally entitled.

10 United argues that Congress *must have meant* to include a double materiality  
11 requirement in the second prong of the reverse false claims provision because the  
12 legislative history of the 2009 amendments to the FCA does not evidence any debate about  
13 whether to add the word “material” to the clause. Joint Brief, 89-91. But that reasoning is  
14 circular and faulty. As explained above, this is because the concept of materiality is  
15 inherently present in establishing that a person, in fact, had an obligation to pay. As a  
16 result, there is no need to impose a second materiality step that requires the government to  
17 make some additional materiality showing of some sort. Moreover, it is well established  
18 that nothing can be inferred from silence in the legislative history, as United suggests. *See*  
19 *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 90 (2018) (“If the text is clear, it needs  
20 no repetition in the legislative history; and if the text is ambiguous, silence in the  
21 legislative history cannot lend any clarity.”). United cannot read meaning into the lack of  
22 discussion in the legislative history just like it cannot read a new element into the statute  
23 where Congress chose not to include it.

24 United, however, argues that a double materiality requirement is necessary to avoid  
25 the second prong of the reverse FCA provision being used to punish “minor infractions.”  
26 Joint Brief, 93. But the reverse false claims provision does no such thing. As courts have  
27 recognized, the obligation element itself prevents “a damages award to every person who  
28 reports a violation of the law.” *United States ex rel. Miller v. Citigroup, Inc.*, No.

1 19cv10970 (DLC), 2022 WL 2237619, at \*3, 4 (S.D.N.Y. June 22, 2022). The provision  
2 requires proof that there is an “established duty” to pay money to the government. In this  
3 case, the materiality inherent in proof that United had an obligation to pay CMS – i.e., that  
4 it had a duty to correct the unsupported diagnoses codes it learned about through its Chart  
5 Reviews, and not retain the overpayments it received in connection therewith – protects  
6 against the FCA being used to penalize “every minor regulatory misstep.” In other words,  
7 United’s interpretation of the reverse false claims provision is not needed to ensure that it  
8 only reaches those regulatory missteps where the violation results in the unlawful retention  
9 of federal funds. Where that occurs, however, the defendants conduct is material by  
10 definition, and no further showing of materiality is required.

11 United contends that *Escobar’s* holding requires reading a double materiality  
12 requirement into the second prong of § 3729(a)(1)(G). Not so. The central materiality  
13 concern in *Escobar* is whether a person’s violation of a requirement was capable of  
14 influencing an agency’s payment or receipt of money. *Universal Health Servs., Inc. v.*  
15 *United States ex rel. Escobar*, 579 U.S. 176, 192-196 (2016). Here, United violated the  
16 requirement not to turn a blind eye to unsupported codes and to delete them and the  
17 requirement to repay an overpayment. Proving that United avoided its obligation to pay  
18 satisfies the *Escobar* Court’s materiality concerns because United’s violation of the  
19 requirements to delete unsupported codes and to repay an overpayment necessarily  
20 influenced CMS’s payment or receipt of money.

21 Though United attacks the cases cited by the United States in its opening brief,  
22 United cannot point to even one case holding that the second prong of the reverse FCA  
23 requires proof of materiality in addition to a showing that the defendant unlawfully  
24 retained an overpayment. Each of the cases cited by the United States in its opening brief  
25 stand for the proposition that once the United States has established that the person  
26 knowingly and improperly avoided an obligation to pay, there is no separate requirement  
27 to make some sort of additional materiality showing.

28 United’s attempts to distort this caselaw are unpersuasive. In *United States ex rel.*

1 *Ormsby v. Sutter Health*, 444 F. Supp. 3d 1010 (N.D. Cal. 2020), the court explicitly held  
2 that there are **two** elements of a reverse false claim under the second prong of §  
3 3729(a)(1)(G): (1) concealing or improperly avoiding or decreasing an obligation to pay  
4 the government; and (2) doing so knowingly. 444 F. Supp. 3d at 1056. The court in *Sutter*  
5 fully analyzed the government’s allegations and concluded that a violation of the second  
6 prong of § 3729(a)(1)(G) was sufficiently pled without requiring the government to make  
7 any extra showing of materiality. *Id.* at 1077-82 (examining only whether those two  
8 elements were sufficiently pled). Likewise, in *United States ex rel. Jacobs v. Pacific*  
9 *Dermatology Institute, Inc.*, the court is clear that there are only two elements of a  
10 successful claim under the second prong, with no mention of materiality as an independent  
11 element to be proved. No. EDCV 20-1906 JGB (SHKx), 2022 WL 17401522, at \*13 (C.D.  
12 Cal. Aug. 16, 2022). Similarly, in *United States ex rel. Little v. Shell Exploration &*  
13 *Production Co.*, while acknowledging that the pre-FERA FCA applied to the case, the  
14 court examined the FERA amendment to the reverse FCA provision and noted that it  
15 articulated a distinct materiality requirement only in the first prong of the provision. No.  
16 CV H-07-871, 2017 WL 4742917, at \*29 n.260 (S.D. Tex. Aug. 18, 2017).

17 The court in *United States ex rel. Frey v. Health Management Systems, Inc.*, a case  
18 that United wholly misrepresents, is even more explicit. No. 3:19-CV-0920-B, 2021 WL  
19 4502275, at \*7 (N.D. Tex. Oct. 1, 2021). United claims *Frey* did not address whether an  
20 independent showing of materiality was a required element under the second prong of §  
21 3729(a)(1)(G), but that is simply untrue. The court expressly states that “[u]nder 31 U.S.C.  
22 § 3729(a)(1)(G), the [plaintiff] must prove either five or three elements.... Both methods  
23 requires [*sic*] [plaintiff] to establish the ‘obligation’ and ‘knowledge’ elements.... But only  
24 the first method requires proving the materiality element.” *Id.* In examining whether the  
25 elements of an FCA claim had been adequately pled, the court reiterated this point stating  
26 that it would “then address the required element of materiality *for the first method* of  
27 establishing an indirect reverse false claim.” *Id.* (emphasis added).

28 Additional caselaw further demonstrates that materiality is not a separate element

1 of claims under the second prong of the reverse FCA. A number of courts have discussed  
2 the elements necessary to state a claim under this provision when evaluating motions to  
3 dismiss and have not required any additional showing of materiality beyond the receipt of  
4 an overpayment. *See, e.g., United States v. Cockerell Dermatopathology, P.A.*, No. 3:21-  
5 CV-0672-B, 2021 WL 4894173, at \*5-8 (N.D. Tex. Oct. 20, 2021) (discussing the  
6 elements of an § 3729(a)(1)(G) second prong claim and not including materiality); *United*  
7 *States v. Univ. of Miami*, No. 12-24513-CIV-LENARD/LOUIS, 2018 WL 8581772, at \*6  
8 (S.D. Fla. Mar. 29, 2018) (holding that relator adequately stated a claim for a reverse false  
9 claim when alleging that Defendants owed a duty to Medicare to investigate and repay  
10 overpayments within sixty days under ACA, were on notice of the overpayments, and  
11 failed to conduct an investigation and return overpayments); *United States ex rel. Kane v.*  
12 *Healthfirst, Inc.*, 120 F. Supp. 3d 370, 393-394 (S.D.N.Y. 2015) (finding the United States  
13 had properly alleged a claim under the second prong of § 3729(a)(1)(G) and not including  
14 materiality as an independent element to do so).

15 In fact, it is United that seeks a first of its kind ruling that, in addition to showing  
16 that United knowingly and improperly avoided an obligation to pay, which necessarily  
17 influenced CMS's payment or receipt of money, the government must also make some  
18 additional separate showing of materiality. United offers no caselaw directly on point, and  
19 instead bases its argument solely on the proposition that certain courts have applied  
20 *Escobar* to all FCA claims. Joint Brief, 91. However, none of the cases United relies on  
21 apply *Escobar* to insert an additional materiality requirement into the second prong of the  
22 reverse false claims provision beyond that established by showing the unlawful retention  
23 of an overpayment. Indeed, many of the cases do not specifically address the reverse false  
24 claims provision at all. For example, in *United States ex rel. Foreman v. AECOM*, 19 F.4th  
25 85, 105 (2d Cir. 2021), the Second Circuit held only that *Escobar's* materiality  
26 requirement applies to all types of claims brought under § 3279(a)(1)(A). Similarly, in  
27 *United States ex rel. Doe v. Heart Solution, PC*, 923 F.3d 308, 314 (3d Cir. 2019), the  
28 court only examined affirmative claims under § 3279(a)(1)(A) and (a)(1)(B) and did not

1 address the reverse FCA provision. Finally, as discussed in the United States’ Opposition,  
2 *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325 (9th Cir. 2017), likewise does not  
3 address materiality in the context of the second prong of the reverse FCA. Rather, *Kelly*’s  
4 brief discussion of the reverse false claims provision cites a pre-FERA case and clearly  
5 relates to the first prong’s false statement requirement. *Id.* at 335-36.

6 In sum, the requirements that give rise to United’s obligation to pay were material  
7 because, by definition, they affected the agency’s payment or receipt of money. United  
8 violated those material requirements by failing to repay overpayments. *Escobar*’s central  
9 concern regarding materiality – that a person violated a requirement that is material to  
10 payment – is satisfied. No additional showing of materiality is required.

11 **B. Even if a Showing of Materiality Beyond the Unlawful Retention of**  
12 **an Overpayment was Required, there is Evidence that United’s**  
13 **Failure to Pay Money Owed was Material and thus Granting**  
14 **Summary Judgment on Materiality is Unwarranted**

15 Even if the type of additional materiality showing proposed by United were  
16 required, to succeed on summary judgment United must establish that facts showing its  
17 failure to repay money owed to CMS for unsupported diagnosis codes was immaterial are  
18 undisputed and it is entitled to summary judgment as a matter of law. Evidence supports  
19 that United’s failure to pay money owed was material because a supported diagnosis code  
20 is a prerequisite for payment, accurate payment is the essence of the bargain between  
21 MAOs and CMS, failing to return billions of dollars in overpayments is neither minor nor  
22 insubstantial, United knew that CMS recovers overpayments for unsupported codes when  
23 MAOs delete them, and the government took action to recover overpayments from a  
24 different MAO that failed to return overpayments for known unsupported codes (and  
25 United knew that the government took this action).

26 **i. Materiality is a Multi-Factor Inquiry and No One Factor is**  
27 **Dispositive**

28 As noted above, the FCA defines “material” as “having a natural tendency to

1 influence, or be capable of influencing, the payment or receipt of money or property.” 31  
2 U.S.C. § 3729(b)(4). The Supreme Court clarified that a variety of factors are relevant to  
3 the materiality inquiry and stressed that no one factor is automatically dispositive.  
4 *Escobar*, 579 U.S. at 191 (citing *Matrixx Initiatives, Inc., v. Siracusano*, 563 U.S. 27, 39  
5 (2011)). In the wake of *Escobar*, courts have recognized that the holistic nature of the  
6 materiality inquiry often renders it inappropriate for resolution as a matter of law,  
7 particularly when the factors point in different directions. *See, e.g., United States ex rel.*  
8 *Rose v. Stephens Inst.*, 909 F.3d 1012, 1022 (9th Cir. 2018) (“The Department can  
9 demonstrate that requirements, such as the incentive compensation ban, are material  
10 without directly limiting, suspending, or terminating schools’ access to federal student  
11 aid.”); *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 906 (9th Cir. 2017)  
12 (warning “that to read too much into the FDA’s continued approval – and its effect on the  
13 government’s payment decision – would be a mistake” because it would “allow [the  
14 defendant] to use the allegedly fraudulently-obtained FDA approval as a shield against  
15 liability for fraud”); *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842  
16 F.3d 103, 109 (1st Cir. 2016) (*Escobar II*) (finding on remand from the Supreme Court  
17 that materiality was sufficiently alleged despite continued payment by the Government).

18 a. The Evidence Supports Many Escobar Factors from Which the Jury  
19 can Find Materiality

20 The Supreme Court identified at least four factors relevant to the materiality inquiry:  
21 (1) whether the applicable requirement is a condition of payment; (2) whether the alleged  
22 violations go to the “essence of the bargain;” (3) whether the alleged violations are  
23 significant or trivial; and (4) what actions the government has taken when it has actual  
24 knowledge of the same or similar violations. *Escobar*, 579 U.S. at 193-195. Application  
25 of these factors demonstrates that, at a minimum, a jury could reasonably conclude that  
26 United’s deliberate ignorance or reckless disregard of unsupported codes it learned of  
27 through its Chart Review program and failure to refund CMS for the overpayments from  
28 those codes had a natural tendency to influence CMS’s payment to or receipt of money

1 from United.

2 First, the government’s decision to identify a requirement as a condition of payment,  
3 while not dispositive, is evidence of materiality. *Escobar*, 579 U.S. at 194. It is a condition  
4 of payment that a diagnosis code be supported by the medical record. MAOs are not  
5 entitled to payments for unsupported codes and must refund CMS for the overpayments.  
6 From the start of the MA program, CMS has always been clear that because diagnostic  
7 data is “used as a factor in calculating payments” and the data submissions “represents a  
8 ‘claim’ for payment,” accurate and complete data submissions are essential to ensure  
9 accurate risk adjustment payments. D-66 at 2039, Medicare+Choice Program, 65 Fed.  
10 Reg. 40,170, 40,268 (June 29, 2000); *United States ex rel. Silingo v. WellPoint, Inc.*, 904  
11 F.3d 667, 673 (9th Cir. 2018). “Each diagnosis code submitted must be supported by a  
12 properly documented medical record.” *Swoben*, 848 F.3d at 1168; *see also Silingo*, 904  
13 F.3d at 673. A risk adjustment payment for an unsupported code is an overpayment which  
14 MAOs must refund to CMS. Joint Brief, 58-62.

15 Second, a violation that goes “to the very essence of the bargain” shows materiality.  
16 *Escobar*, 579 U.S. at 193 n.5. Submitting supported codes and correcting unsupported  
17 codes and returning associated overpayments go to the very essence of the bargain  
18 between CMS and MAOs like United because accurate data submissions are essential to  
19 ensure accurate payment, D-66 at 2039, 65 Fed. Reg. at 40,268; *Silingo*, 904 F.3d at 673,  
20 and accurate payment is the very essence of the bargain.

21 Third, a violation that is neither minor nor insubstantial shows materiality. *Escobar*,  
22 579 U.S. at 194. Turning a blind eye to millions of unsupported codes and failing to return  
23 billions of dollars in overpayments is neither minor nor trivial, but rather is substantial.

24 Fourth, regarding what actions the government has taken when it has actual  
25 knowledge of the same or similar violations, a defendant who “knows that the Government  
26 consistently refuses to pay claims in the mine run of cases based on noncompliance with  
27 the particular . . . requirement” shows materiality. *Escobar*, 579 U.S. at 194-195. United  
28 knew that CMS adjusted payment and recovered overpayments when MAOs, including

1 United, deleted unsupported codes and that CMS does not wittingly pay for an  
2 unsupported code. P-5, United 30(b)(6) (Sedor) Tr. 4067:16-4069:23; 4072:4-22.

3 As United knew, when the United States became aware of an MAO failing to delete  
4 unsupported codes identified through chart review and return overpayments, similar to  
5 United's conduct here, it took action to recover the overpayments. United was aware no  
6 later than March 2013 that the United States entered into an FCA settlement with another  
7 MA plan, P-18 at 4297, which United internally described as "Recently, CMS announced  
8 a settlement with SCAN health plan which outlined the expectation that when plans  
9 conduct chart review, they should be correcting/removing codes that were submitted on  
10 claims and not supported in the corresponding charts, which is the sole purpose of our  
11 Claims Verification offering." P-17 at 4293. Similarly, CMS is seeking to recover the  
12 overpayments to United through this case, showing that United's failure to return  
13 overpayments matter to CMS and were material. Indeed, "Congress intended to allow the  
14 government to choose among a variety of remedies, both statutory and administrative, to  
15 combat fraud." *United States ex rel. Onnen v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 688  
16 F.3d 410, 414-15 (8th Cir. 2012).

17 United attempts to rest its argument that its failure to return money owed was  
18 immaterial entirely on a single factor of the *Escobar* materiality inquiry: that CMS was  
19 aware of United's "chart review practices" but continued to pay United and contract with  
20 it.<sup>1</sup> Joint Brief 49, 94-95. Even if United's argument was compelling (which it is not, see  
21 section II.B.i.a.2 below), United has still not established that its failure to return money  
22 owed was immaterial because no one factor is dispositive and the many factors that can  
23

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24 <sup>1</sup> United also argues that CMS could have taken some intermediate form of  
25 sanction against United pursuant to 42 C.F.R. § 422.752, but it fails to establish that this  
26 provision could be applicable to the facts here. Joint Brief, 95. Rather, the regulation  
27 provides a number of violations which could trigger sanction, but the conduct alleged in  
28 this case does not appear to be one of them. Moreover, the United States does not need to  
exhaust administrative remedies before bringing an FCA case. *United States v. Lahey  
Clinic Hosp., Inc.*, 399 F.3d 1, 17 (1st Cir. 2005), *United States v. Tenet Healthcare  
Corp.*, 343 F. Supp. 2d 922, 934-35 (C.D. Cal. 2004). Consequently, even if CMS had an  
administrative sanction available (which it did not), the fact that CMS did not pursue that  
action does not disprove materiality.

1 establish materiality should be considered by the jury. *See e.g., Stephens Inst.*, 909 F.3d at  
2 1022; *Campie*, 862 F.3d at 906; *Escobar II*, 842 F.3d at 109.

3 Moreover, because of the basic rule that in determining whether a triable issue of  
4 material fact exists, “[t]he evidence of the non-movant is to be believed, and all justifiable  
5 inferences are to be drawn in his favor,” *see Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
6 242, 255 (1986), it would inappropriate to weigh the evidence of the multiple factors and  
7 conclude as a matter of law that United’s failure to return money owed was immaterial.

8 1. *CMS had no Actual Knowledge of the Specific Unsupported*  
9 *Diagnosis Codes United Failed to Delete*

10 The government’s actions are relevant to materiality only when it has “actual  
11 knowledge” of the violation. *Escobar*, 579 U.S. at 195. Actual knowledge of a violation  
12 is different than general knowledge of a practice. *See, e.g., Escobar II*, 842 F.3d at 112  
13 (“mere awareness of allegations concerning noncompliance with regulations is different  
14 from knowledge of actual noncompliance”). Even if CMS had general knowledge of  
15 United’s “chart review practices” (which it did not), such knowledge is not the proper  
16 focus of the materiality inquiry. When an MAO deletes a diagnosis code, CMS recoups  
17 overpayments by calculating the amount of the overpayment resulting from that  
18 unsupported code and reducing future payments to recover the overpayment. Joint Brief,  
19 21. Thus, CMS must know which specific diagnosis codes were unsupported. If CMS does  
20 not know which specific diagnosis codes were unsupported, CMS has no way to calculate  
21 and recoup overpayments for the unsupported codes.

22 Moreover, the Ninth Circuit, since *Escobar*, has recognized that it would be a  
23 mistake to read too much into a government agency’s continued payment. *See Campie*,  
24 862 F.3d at 906 (warning “that to read too much into the FDA’s continued approval – and  
25 its effect on the government’s payment decision – would be a mistake” because it would  
26 “allow [the defendant] to use the allegedly fraudulent-obtained FCA approval as a shield  
27 against liability for fraud”). Here, because United failed to delete the unsupported codes  
28 despite its Chart Review coders’ findings, United deprived CMS of the ability to recover

1 the overpayments to United for those unsupported codes. Reading too much into the fact  
2 that CMS did not stop paying United for future claims would allow United to use the fact  
3 that it did not delete the unsupported codes as a shield against liability for avoiding its  
4 obligation to pay.

5 United's argument that CMS "knew that United was submitting substantial volumes  
6 of such codes for reimbursement," even if CMS did not know which specific codes were  
7 invalid, does not advance its argument. Joint Brief, 95. CMS cannot adjust payment and  
8 recover overpayments when it only has generalized information about large volumes of  
9 codes. Even United does not claim that CMS understood the intricacies of United's own  
10 processes or had actual knowledge of the specific unsupported diagnosis codes at issue.  
11 Rather, United seeks to rely on some purported general knowledge CMS had regarding  
12 United's "chart review practices." But it is highly disputed that CMS had knowledge about  
13 United's chart review practices and undisputed that CMS *did not* know the specific  
14 unsupported codes that United had submitted for reimbursement yet chose to ignore and  
15 not return the overpayments.

16 In sum, for this factor – government action when it has actual knowledge of a  
17 violation – to support a finding of immateriality, United would need to establish that when  
18 unsupported codes were deleted, CMS did not recover the resulting overpayment. There  
19 is no evidence at all on that score. The inquiry is what does the agency do when an  
20 unsupported code is actually deleted, not what the agency does when it finds out an MAO  
21 did a chart review. The government cannot possibly discern from such information that an  
22 overpayment is due or its amount.

23 *2. The Facts Related to a 45-Minute Videoconference between*  
24 *United and CMS on April 29, 2014 are Hotly Contested, Do Not*  
25 *Establish that CMS had Actual Knowledge that United Failed to*  
26 *Pay Money Owed for Unsupported Diagnosis Codes, and Do*  
27 *Not Support Summary Judgment on Materiality*

28 In addition to the fact that United's "chart review practices" generally should not be

1 the focus of any materiality inquiry, the facts surrounding a 45-minute video conference  
2 between CMS and United on April 29, 2014, and subsequent email communication  
3 between the parties, are highly disputed. The evidentiary record is clear and undisputed  
4 that the April 29, 2014 videoconference focused on United's *Claims Verification process*  
5 and not its Chart Review processes. Joint Brief, 29-31, 69-71; P-34, Erickson Tr. 4425:17-  
6 4426:8; P-25, Nelson Tr. 4352:24-4353:5; 4354:10-17. The record is also clear that CMS  
7 did not take away from the meeting, or any subsequent correspondence, an understanding  
8 of United's Chart Review processes. Joint Brief, 71-72; P-26, CMS 30(b)(6) (Hornsby)  
9 Tr. 4363:1-24; P-10, Rice Tr. 4236:20-4237:7; 4238:12-4239:2, 4234:13-4235:1; P-24 at  
10 4347-48; P-1D at 4008-09; P-1E at 4011-12; P-1F at 4015-16. Thus, even if knowledge of  
11 United's Chart Review practices generally was the proper focus of a materiality inquiry  
12 (which it is not) and even if a single factor – government action when it has actual  
13 knowledge of the violation – alone could be dispositive of materiality (which it cannot),  
14 United would still not be entitled to summary judgment on materiality. *See, e.g., Escobar*,  
15 579 U.S. at 195 (discussing actual knowledge of Government); *Campie*, 862 F.3d at 906-  
16 7 (“[T]he parties dispute exactly what the government knew and when, calling into  
17 question its ‘actual knowledge.’”).

18 b. There is Evidence for the Jury to Find that the Diagnosis Codes at  
19 Issue were Unsupported

20 United incorrectly claims that “the summary judgment record contains no evidence  
21 establishing that these diagnosis codes were in fact unsupported and thus material to  
22 CMS's payment decision.” Joint Brief, 96. As discussed in greater detail in the Joint Brief,  
23 however, ample evidence exists for a jury to find that the diagnosis codes at issue were  
24 unsupported. *See* Joint Brief, 42-48, 73. United operated a highly sophisticated (and  
25 lucrative) Chart Review program. Joint Brief, 22-25. United collected medical charts from  
26 providers and instructed its trained, certified coders to review those charts to identify *all*  
27 risk-adjusting diagnosis codes supported by the charts for each date of service reviewed.  
28 P-14 at 4264, Coding Policy; P-15, United 30(b)(6) (Baker) Tr. 4267:12-22. United

1 compared the diagnosis codes identified by its coders during Chart Review against the  
2 diagnosis codes it previously submitted to CMS to identify new, or additional, diagnosis  
3 codes. P-76, Martin Tr. 4949:13-24. United submitted those additional codes to CMS  
4 resulting in an additional **\$7.2 billion** from CMS for 2009-2016. P-11 at 4245-47,  
5 Response to Interrogatory 18.

6 While United was happy to use the results of its Chart Review to submit additional  
7 codes to CMS for payment, it deliberately chose not to inquire further into the other side  
8 of its Chart Review results – namely, information that some codes that it had previously  
9 submitted for payment had **not** been identified by its coders as supported.

10 The following illustration shows how United's Chart Review program operated,  
11 using a hypothetical beneficiary named Mary Smith. On May 1, 2012, Dr. Jones had a  
12 medical encounter (visit) with Ms. Smith and reported diagnoses to United mapping to  
13 HCC 19 (diabetes) and HCC 108 (COPD). United submitted those diagnosis codes to CMS  
14 and consequently received increased monthly risk adjustment payments for Ms. Smith.  
15 Several months later, as part of its Chart Review program, United instructed its coders to  
16 review the medical record for the May 1, 2012 visit and identify all risk-adjusting  
17 diagnosis codes supported by that record. The coders found support for a diagnosis code  
18 mapping to HCC 19 and for an additional diagnosis that Dr. Jones had not reported to  
19 United, which mapped to HCC 80 (congestive heart failure). However, the coders did not  
20 find support for any diagnosis code mapping to HCC 108. United compared its Chart  
21 Review results to its claims data (i.e, what had already been submitted to CMS) and  
22 identified the diagnosis code mapping to HCC 80 as a new and unique diagnosis code. It  
23 then submitted that new code to CMS for additional payment. However, United turned a  
24 blind eye to the fact that its coders did **not** identify any diagnosis code mapping to HCC  
25 108 when reviewing the underlying medical record. Instead of deleting the code or  
26 investigating the discrepancy, United simply kept the payments associated with HCC 108.

27 United's position in this case is that it has no obligation to delete the diagnosis code  
28 mapping to HCC 108 or conduct *any* further inquiry, even though its coders reviewed the

1 beneficiary's medical record and did not find support for any diagnosis mapping to that  
2 HCC. United offers a litany of excuses as to why a coder in its Chart Review program  
3 might not identify a code previously submitted by a provider, Joint Brief, 36-37, which it  
4 tries to characterize as merely "unresolved discrep[anc]ies between United's coders and a  
5 doctor (or doctor's coder)." Joint Brief, 35.

6 As thoroughly explained in the Joint Brief, neither caselaw nor logic supports  
7 United's extreme position. First, "[n]o court . . . has held that an MA Participant can keep  
8 and not report or return payments based on unsupported codes." *Sutter Health*, 444 F.  
9 Supp. 3d at 1072. Here, given the evidence showing how thoroughly United mined the  
10 charts that went through Chart Review for diagnosis codes, a jury could certainly find that  
11 United deliberately ignored or recklessly disregarded the risk that codes *not* identified  
12 during Chart Review were unsupported. *See Swoben*, 848 F.3d at 1175–76.

13 United's argument that some other medical records not collected as part of its Chart  
14 Review program might support the diagnosis codes not identified by its coders is even  
15 more illogical. Joint Brief, 41, 96. Under United's theory, no MAO would ever be  
16 obligated to delete a provider-submitted code, because it could always speculate that  
17 perhaps there was a medical chart buried in a provider's filing cabinet that would support  
18 the diagnosis code. The Ninth Circuit has already squarely rejected this argument, stating  
19 that a "[MAO] cannot simply ignore the reporting error because it speculates that some  
20 other medical record might support the same diagnosis code." *Swoben*, 848 F.3d at 1177  
21 n.8.

22 Similarly, United's argument that RADV audits somehow provide evidence that the  
23 specific codes at issue in this case were supported is equally unpersuasive. Joint Brief, 52,  
24 96. RADV audits are simply not designed with the same objective and parameters as the  
25 MA payment process, and these important distinctions make any findings from a RADV  
26 audit meaningless in this case. Joint Brief, 44-46.

27 United's argument also ignores an important step in the analysis that the United  
28 States' expert, Dr. Garthwaite, performed in order to generate the list of approximately 2

1 million diagnosis codes United submitted for payment, but were not found to be supported  
2 by the medical chart *linked to the submission associated with the chart reviewed*.  
3 Returning to the hypothetical beneficiary discussed above, if United’s claims data showed  
4 that Dr. Jones submitted a diagnosis code mapping to HCC 108 for Mary Smith in  
5 connection with a claim for an encounter on May 1, 2012, but United’s Chart Review  
6 coders did *not* identify that diagnosis code in reviewing Mary Smith’s medical chart *from*  
7 *her May 1, 2012 visit with Dr. Jones*, then the diagnosis code was reported in error. *See*  
8 *Swoben*, 848 F.3d at 1176-77. But Dr. Garthwaite’s analysis went further than simply  
9 identifying the codes that were reported in error based on a comparison between United’s  
10 Chart Review data and its claims data. He also searched United’s risk adjustment data for  
11 *any* other diagnosis code that mapped to the same HCC as the unsupported code,  
12 regardless of whether the diagnosis code was ever submitted to CMS, thereby giving  
13 United “credit” for these diagnosis codes from other charts. Thus, contrary to United’s  
14 assertion, this case only concerns diagnosis codes that United submitted to CMS when all  
15 of the following were true: (a) United’s coders found no support for any diagnosis code  
16 mapping to the same HCC in the medical record for the relevant visit; (b) United’s coders  
17 found no support for any diagnosis code mapping to the same HCC in any other medical  
18 record reviewed in United’s Chart Review Program; and (c) no healthcare provider  
19 reported any diagnosis code to United mapping to the same HCC for a visit where the  
20 associated medical record was not reviewed in United’s Chart Review Program.

21 **ii. United’s Argument Regarding Duplication of Claims is**  
22 **Unavailing**

23 Finally, United constructs and takes aim at strawmen by arguing that (1) viewing  
24 the fact that CMS automatically would have reduced United’s payments had it submitted  
25 ‘deletes’ for the diagnosis codes at issue as “rendering all of United’s actions ‘material’ to  
26 payment” would gut the materiality requirement and leave *Escobar* an empty shell”  
27 because “[i]t is always true that CMS (or any other party) would accept a purported  
28 repayment of an overpayment;” and (2) “If that were all that was required, DOJ could

1 duplicate any affirmative FCA claim with a reverse FCA claim, alleging that the  
2 government would have accepted repayment of the funds obtained as a result of the false  
3 claims or statements if offered. It is well established that the government cannot generate  
4 ‘redundant’ reverse FCA claims this way.” Joint Brief, 95-96.

5 United grievously misstates the government’s claims in multiple respects. First, and  
6 most obviously, the government is not pursuing a direct false claim in this case, and thus  
7 the reverse FCA claim is not “redundant” of any other claim. Second, the United States’  
8 theory is based on more than just CMS “being willing to accept” a repayment for a  
9 hypothetical presentation of a direct false claim (the cases United cites stand for nothing  
10 more than this proposition), but rather United knowingly avoided repaying CMS. Finally,  
11 while this “duplication argument” (and the cases United cites) has no connection to  
12 materiality, the fact that CMS automatically recovers overpayments when an MAO deletes  
13 an unsupported code proves two *Escobar* factors: (1) that returning overpayments from  
14 unsupported codes goes to the very essence of the bargain between CMS and an MAO;  
15 and (2) that in the “mine run of cases” CMS recovers overpayments when MAOs report  
16 and delete unsupported codes. Glaringly, United offers no evidence whatsoever that when  
17 an MAO deletes an unsupported code for which it has received payment, CMS does not  
18 recover the overpayment. Therefore, even if there were a double materiality requirement  
19 in the second prong of the reverse false claims provision, these (and other) facts are  
20 evidence of materiality for the jury to consider.

### 21 **III. CONCLUSION**

22 For the foregoing reasons, the Court should grant the United States’ Motion for  
23 Partial Summary Judgment, and deny United’s Motion for Summary Judgment.  
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