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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.

CASE NO. 2:16-cv-08697-FMO-PVCx

**NOTICE OF LODGING OF
TRANSCRIPT OF PROCEEDINGS
BEFORE SPECIAL MASTER
SEGAL REGARDING
GOVERNMENT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AND UNITED'S MOTION FOR
SUMMARY JUDGMENT**

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

PLEASE TAKE NOTICE that on January 15, 2025, the Honorable Suzanne Segal (Ret.), Special Master in this Action, heard oral argument on the Government's Motion for Partial Summary Judgment and United's Motion for Summary Judgment. Special Master Segal instructed the parties to file the Transcript of Proceedings with the Court.

A true and correct copy of the January 15, 2025 Transcript of Proceedings is attached hereto as **EXHIBIT A**.

Dated: March 19, 2025

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
ex rel., BENJAMIN POEHLING,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.
	)	16-08697 FMO
UNITEDHEALTH GROUP, INC.,	)	
et al.,	)	
	)	
Defendants.	)	
-----	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE HON. SUZANNE SEGAL (RET.)
JANUARY 15, 2025

Reported by:
Brooke Silvas, CSR 10988
Job No. 1261925

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1 WEDNESDAY, JANUARY 15, 2025
2 12:00 P.M.
3

4 THE COURT: Good afternoon. This is
5 the hearing on the Government's motion for
6 partial summary judgment and also on United --
7 United's motion for summary judgment. And I had
8 provided the parties with the tentative decision
9 or a tentative recommendation, I should say,
10 earlier today. And also let the parties know
11 that I wanted to hear argument today.

12 I am unfortunately not in my usual
13 location for conducting any kind of Zoom
14 proceeding. And so if you have any trouble
15 hearing me during the hearing or can't see for
16 any reason, just make sure that you let me know.

17 I would like to have counsel make their
18 appearances and let the court reporter create
19 the record of who is going to appear today. And
20 please say your name and which party you're
21 representing.

22 ATTORNEY McMAHON: Good afternoon, Your
23 Honor. This is Linda McMahon with the
24 Department of Justice on behalf of the United
25 States.

1 THE COURT: Good afternoon.

2 ATTORNEY HAVIAN: Good afternoon, Your
3 Honor. This is Eric Havian on behalf of the
4 Relater, Benjamin Poehling.

5 THE COURT: Good afternoon.

6 ATTORNEY KRIEG: Good afternoon. This
7 is Jessica Krieg on behalf of the United States
8 from the Department of Justice.

9 THE COURT: Good afternoon.
10 For United.

11 ATTORNEY MERON: Yes. Good morning.
12 Daniel Meron from Latham & Watkins on behalf of
13 United. With me here is Michael Clemente, also
14 of Latham & Watkins for United. And from
15 Bartlit Beck, Andrew Baak and Jameson Jones.

16 THE COURT: Good afternoon.

17 ATTORNEY BECK: This is Phil Beck on
18 behalf of United as well.

19 THE COURT: Good afternoon.

20 So I thought what might be best, from
21 an organization perspective, is that we take the
22 two motions separately. And I wanted to start
23 with United's motion for summary judgment, and
24 then hear argument on the motion for partial
25 summary judgment.

1 So I would like to invite the
2 representatives of the United States to speak
3 first. And I hope you will both address any
4 concerns that you have as a result of the
5 tentative. But also, I often see argument as a
6 good opportunity for a response to the opposing
7 parties' supplement memorandum or reply brief.

8 With that, I will turn it over to
9 Ms. McMahon.

10 ATTORNEY McMAHON: Good afternoon, Your
11 Honor.

12 THE COURT: Good afternoon.

13 ATTORNEY McMAHON: This afternoon, I
14 will be addressing the bulk of the issues raised
15 by United in their motion for summary judgment.
16 And I will be focusing primarily, of course, on
17 the tentative recommendation that you issued
18 this morning.

19 Ms. Krieg will address the issues
20 related to the -- both the Government's motion
21 for partial summary judgment, as well as the
22 specific issues related to materiality and the
23 common law claims that United raised in their
24 motion for summary judgment.

25 And also, Mr. Havian, who represents

1 Relaters, would likewise like to be heard on
2 behalf of Relater with respect to United's
3 motion for summary judgment as well.

4 THE COURT: Yes. I think that is good.
5 Sorry to interrupt you. But I recognize most of
6 the names that are in the waiting room, but I
7 just have a phone number now in the waiting room
8 that I don't recognize. So I wanted to ask if
9 you know who that is. It's 1-202-598-7414.

10 ATTORNEY McMAHON: Well, I will say
11 that I believe that's Department of Justice
12 phone number.

13 THE COURT: Okay.

14 ATTORNEY McMAHON: I'm not sure --
15 202-598 is the Department of Justice extension.

16 THE COURT: I will admit the person.
17 This is technically a public proceeding anyway.
18 All right. Go ahead.

19 ATTORNEY McMAHON: All right. First,
20 and most importantly, I want to address what
21 appears to be the main conclusion that Your
22 Honor has drawn as stated in your tentative
23 recommendation. And if I understand it -- you
24 correctly, it seems as if you have concluded
25 that the Government has pointed you to

1 absolutely no evidence from which a jury could
2 reasonably conclude that the diagnosis codes at
3 issue in this case are unsupported. And we
4 strongly disagree with that conclusion. The
5 evidence -- and there may be more. But the
6 evidence certainly includes that United's chart
7 review coders reviewed the very medical records
8 that United's providers' offices based the
9 diagnosis codes on and that they submitted to
10 United, and United, in turn, submitted to CMS.

11 And it does seem that you have credited
12 that submission as evidence that the code is, in
13 fact, supported. But our evidence is that
14 United's chart review coders were highly
15 qualified, highly trained, certified coders.
16 And that is evidence from which the jury can
17 conclude that the chart review coder was
18 accurate in determining which codes were
19 supported by the medical record that they were
20 reviewing. In fact, they were held to a
21 95 percent accuracy standard as the evidence
22 shows, as well as a completeness standard, which
23 means that they were expected to find all of the
24 codes that are supported by the medical records
25 that were reviewed. They were not even

1 permitted to review charts in chart review until
2 they proved that they could meet these
3 standards.

4 And in their process of reviewing in
5 the chart review, the chart review coders would
6 literally make a list of all the codes that are
7 supported by the records that they were
8 reviewing. And evidence further shows -- our
9 evidence that we have put forth further shows
10 that when a comparison is done between the list
11 of codes that the chart review coders found as
12 supported to the list of the codes that United
13 submitted for payment, based on what its
14 providers' offices had given it, that there
15 were -- that -- that there were 28 million codes
16 that the chart review coders did not find as
17 supported by the very record that the provider's
18 office had based its submission of the code to
19 United on.

20 And in many instances, more than one
21 chart review coder reviewed the same medical
22 record that supposedly supported the very codes
23 that we're talking about, and also did not find
24 support for those -- for those codes.

25 We suggest that this is all very real

1 evidence -- in our view, highly probative
2 evidence, but evidence nonetheless that the jury
3 could determine that United's chart review
4 coders got it right. That they actually were
5 correct. That there was no support in those
6 records for the diagnosis codes that are --
7 that -- at issue in this case.

8 THE COURT: Let me make sure that I
9 understand correctly your argument. Your
10 argument is your evidence shows conclusively
11 that the 28 million that you identified were
12 incorrect?

13 ATTORNEY McMAHON: Our evidence is that
14 the chart review coder did not find support in
15 the record for the diagnosis code. And
16 therefore, that is evidence that there was no
17 support in the record for that diagnosis code.
18 Yes, that that -- that the chart review coder is
19 good evidence. And I would suggest --

20 THE COURT: So let me make sure that I
21 understand. All 28 million are incorrect or
22 just a percentage?

23 ATTORNEY McMAHON: No. We are not
24 alleging any type of percentage. We are -- our
25 evidence is that the chart review coders -- that

1 the chart review coders were so highly qualified
2 and reliable that they would have gotten this
3 right. Now, we -- you know, perhaps an analogy
4 can be drawn to -- for us to sort of explain how
5 this --

6 THE COURT: I'm sorry. I don't feel
7 like you've answered the question. The question
8 is, does your evidence show that all 28 million
9 codes are unsupported by the medical records?

10 ATTORNEY McMAHON: Yes.

11 THE COURT: Okay. And the evidence is
12 that the training and the background of the
13 chart reviewers -- but for that training and
14 that ability of the chart reviewers, is there
15 any other evidence that the 28 million are
16 incorrect? Or is it just 100 percent dependent
17 upon the talent, the training, the experience,
18 the expertise of the chart reviewers?

19 ATTORNEY McMAHON: Well, in the chart
20 review program itself -- I mean, you have -- it
21 is important to keep in mind that it is a blind
22 review. So what the chart reviewer is
23 instructed is to find every single code that is
24 supported by the record. So --

25 THE COURT: Yes. I understand. I want

1 to make sure that I understand your position,
2 which is the evidence that shows the 28 million
3 codes are incorrect, that are not supported by
4 the medical evidence, is the training and the
5 education and the expertise of the chart review
6 coders?

7 ATTORNEY McMAHON: And the way the
8 chart review program was conducted. It is
9 extremely important to -- it will be extremely
10 important for the jury to understand that the
11 chart review coders were instructed to find
12 every single code. And so it didn't leave room
13 for them to -- to not identify codes on their
14 list that were otherwise supported by the
15 record. Or that were supported by the record.
16 Excuse me.

17 THE COURT: Understood.

18 ATTORNEY McMAHON: So -- and -- the
19 further evidence shows that they indeed were not
20 found by the chart review coder. So we're not
21 making any guesses or assumptions about that.
22 There's -- you know, the records were compared
23 directly to be able to identify. And this was
24 done by Dr. Garthwaite. Records were compared
25 directly to confirm that indeed the chart review

1 coders did not find support for these particular
2 records.

3 THE COURT: Did Dr. Garthwaite look at
4 medical records?

5 ATTORNEY McMAHON: No. No.
6 Dr. Garthwaite did not look at medical records.
7 But Dr. Garthwaite was able to do that analysis
8 by looking at United's data and comparing
9 information both United's data with information
10 in CMS's data.

11 THE COURT: So if Dr. Garthwaite did
12 not review an individual medical record, how
13 could he determine that a particular code was
14 not supported by the medical record? Is it
15 entirely based on the expertise of the chart
16 reviewers and the integrity of that program?

17 ATTORNEY McMAHON: Yes. We -- we are
18 not -- we didn't ask Dr. Garthwaite to, nor
19 really would he -- well, we didn't ask him to
20 and he did not look at any medical records and
21 determine whether chart review -- whether the
22 codes at issue were unsupported. We asked him
23 to identify for us at a -- one of the first
24 steps of his, to tell us which codes the United
25 chart review coders did not find support for.

1 So that was --

2 THE COURT: How did he do that?

3 ATTORNEY McMAHON: He compared the
4 information, the results of what the United
5 chart review coders found as supported.
6 Those -- that information was kept -- was
7 clearly kept in United's data. And there were
8 lists of diagnosis codes that United had --
9 there were lists of diagnosis codes that the
10 chart review coders had found were all of the
11 codes that were supported by the medical record.
12 He was able to then go back and -- because
13 when -- when the codes are initially submitted
14 to United, and United submits them to CMS, the
15 codes are -- they are identified in a way that
16 you can tell which medical record the code
17 supposedly was supported by.

18 And so by comparing which codes had
19 been submitted and which medical records
20 supposedly supported those codes with the
21 medical records that were reviewed in chart
22 review -- the list of medical records; this is
23 all in data -- with the information about the
24 medical records that were reviewed in chart
25 review and which codes that the chart review

1 coder deemed supported, you can compare and see
2 what codes, on the one hand, right -- this was
3 the whole purpose of chart review. You can
4 compare which codes the chart review coder found
5 support for but had not previously been
6 submitted by United. And those codes were
7 then -- they went ahead and submitted them. But
8 you could also tell -- from doing a similar type
9 comparison, you could tell which codes had
10 previously been submitted by United and had been
11 given to them by their providers' offices, but
12 which the chart review coder did not find
13 support for in that same record.

14 THE COURT: Okay.

15 ATTORNEY McMAHON: And -- okay. And
16 that data analysis, which I'm sure explaining it
17 it sounds very simple and this is all very
18 complicated data, but not -- it wasn't very
19 complicated for Dr. Garthwaite because he's a
20 data analyst.

21 So -- so they -- you know, the evidence
22 that we urge you to reconsider your thinking
23 that there was no evidence by which a jury could
24 conclude that the codes at issue -- and this is
25 the larger amount of codes, the 28 million --

1 were unsupported. I mean, it -- and the analogy
2 I was hoping to -- to bring to your attention,
3 to sort of make that point, is the -- and United
4 had indicated in their briefing -- and I think
5 you in your tentative recommendation gave some
6 credence to the notion -- that the Government
7 could have gone out and reviewed these same
8 records that were reviewed in chart review, and
9 the Government could have hired an expert to
10 determine what codes were and what codes were
11 not supported by the record that they were
12 reviewing. Well, our -- I mean, I can explain,
13 if you would like, the -- I don't think we
14 actually could have done that with the records
15 that we have. But putting that aside for one
16 moment, that evidence would be our expert doing
17 exactly the same thing that United's coder did
18 in chart review. And if that is evidence --

19 THE COURT: But you're saying that the
20 coders came to different conclusions than the
21 doctors; right?

22 ATTORNEY McMAHON: Well, I think
23 that -- I mean, that is certainly the way that
24 United -- that is certainly the way that United
25 presents it. We're not necessarily disagreeing.

1 I mean, it is not -- I will point out that it is
2 not necessarily doctors. It gets sort of
3 condensed very quickly to say that this is what
4 the doctors decided. And oftentimes it is not
5 actually the doctor; it is a coder who is in the
6 doctor's office or maybe a nurse practitioner.
7 And there's a lot of evidence about that in the
8 record, which, you know, if we presented it to a
9 jury, I'm guessing here, that United would be
10 trying to build up for the jury the -- the
11 information about what came out of the
12 provider's offices and what was submitted to
13 you -- and what was submitted to the Government
14 for payment. But it's -- my only point is that
15 it is not necessarily a treating physician who
16 is sitting there deciding that this is the code.
17 It could be and, in some instances, I believe
18 was, but it is not necessarily.

19 But our point is almost -- I mean, it
20 is not truly independent of what the doctors
21 submit -- the doctors' offices submitted to
22 United. But the -- our point is that because
23 this was a blind review, it -- it can be looked
24 at as evidence in and of itself. It isn't
25 necessarily -- it doesn't necessarily have to be

1 considered coder versus doctor. Although, I
2 think you could look at it that way. Because
3 the -- the coder is simply asked to find every
4 single diagnosis code that is supported by the
5 record.

6 THE COURT: Right. So if I
7 understand --

8 ATTORNEY McMAHON: -- regardless of
9 what any physician's office put down.

10 THE COURT: So if I understand your
11 position, it is that whether it is doctor or
12 nurse practitioner, professional coder, submits
13 the code to the Government on behalf of United
14 and then the chart review conducts a more
15 fulsome, maybe, review of the records and comes
16 to a different result. And your position is
17 that happened 28 million times in which the
18 doctor, nurse practitioner, professional coder
19 was incorrect and the chart reviewer was
20 correct. Is that a fair summary?

21 ATTORNEY McMAHON: I think that summary
22 is -- I think that summary is the same, right,
23 as United saying that 28 million times, the
24 doctor's office or provider was correct and the
25 chart review coder was incorrect. But -- but

1 yes, our evidence -- and I think -- but it -- it
2 seems --

3 THE COURT: You told me before -- you
4 told me before earlier that the chart reviewer's
5 expertise and training and -- and background
6 makes them exceptional in this work. That they
7 are highly regarded and that you find a great
8 deal of reliability in their work. And that
9 there's a great deal of integrity in the chart
10 review program. So I guess I gleaned from that
11 that the Government's position is that the coder
12 and the chart review program are predominantly
13 correct. And the initial code is predominantly
14 incorrect, not based on correct review of the
15 medical records. And that -- and that that is
16 the basis for 28 million incorrect submissions.

17 ATTORNEY McMAHON: Well, I think --

18 THE COURT: It could be the other way
19 is what you're saying. The doctor could have
20 been correct. The coder could have been wrong.

21 ATTORNEY McMAHON: And I guess -- I
22 guess my -- my main concern at this point is by
23 us discussing who is correct, the doctor or the
24 coder, that -- that, the government urges, is a
25 quintessential jury question. That is exactly

1 what juries are supposed to do. Juries are
2 supposed to hear the evidence about -- they
3 could hear the evidence about chart review. And
4 they will be able to decide do -- do we believe
5 that the Government proved -- not that the
6 Government -- remember, our standard at -- at
7 trial is to prove by preponderance of the
8 evidence. So did the Government prove that it
9 is more likely than not that the code -- that
10 the chart review program coders got it right and
11 did not find support for these codes? That's --
12 that is our position here, is that it's -- that
13 this is ultimately finding facts. This is --
14 this is taking two separate factual positions,
15 pit it against each other. That certainly is
16 the way that United framed their summary
17 judgment motion. Right? They -- well, we
18 disagreed about the definition of an obligation
19 under the reverse false claims provision. They
20 described it there as an obligation of -- to
21 basically pit the chart review coder, to -- for
22 them to assess whether the chart review coder in
23 every instance was right and the doctor was
24 wrong. And that is not -- we're not asking you
25 to make that finding here in any way, shape, or

1 form. That is what we fully expect to convince
2 a jury of.

3 But our point is that these are factual
4 inferences that have been drawn that are being
5 drawn against the United States and in favor of
6 United's factual position, when the standard on
7 summary judgment is to draw all factual
8 inferences in the favor of the non-moving party,
9 which is the Government here.

10 THE COURT: All right. I'll hear now
11 from United in response.

12 ATTORNEY HAVIAN: Your Honor, may I be
13 heard?

14 THE COURT: Yes. I'm sorry.

15 ATTORNEY HAVIAN: I assume United will
16 want to respond to whatever I say as well.

17 THE COURT: Yes. Mr. Havian, go ahead.

18 ATTORNEY HAVIAN: Thank you, Your
19 Honor.

20 So let me make a few points here. The
21 first is United itself concedes that this case
22 presents what it refers to as an unresolved
23 discrepancy between the doctors and the coders
24 at United. I don't think our evidence needs to
25 prove anything conclusively. The Court --

1 THE COURT: Let me ask you a -- let me
2 ask you a question about that. Did they concede
3 that or did they just note that that was the
4 argument on the other side?

5 ATTORNEY HAVIAN: They said what -- I
6 can read the Court their language. They say,
7 "At most" -- and I think on summary judgment,
8 we're entitled to at most. But they say, "At
9 most, the program revealed an unresolved
10 discrepancy between United's coders and a doctor
11 or doctor's coder." That is at page 35 of the
12 joint brief.

13 THE COURT: Got it.

14 ATTORNEY HAVIAN: As I was saying, I --
15 the Court asked whether the evidence was
16 conclusive as to who was correct in this
17 situation. I don't think our evidence needs to
18 be anything like conclusive. And I'm not going
19 to say the evidence is conclusive, if by that
20 the Court means to a certainty. But what the
21 evidence is clearly is conflicting.

22 Now, let me suggest, what if the coders
23 testified. So Your Honor is presiding over the
24 trial. We call the coders. And each one of
25 them stands up, and they're asked a question.

1 You looked at this chart? Yes, I looked at that
2 chart. Tell us all the diagnoses you found.
3 And then the coder would testify under oath, I
4 found these diagnoses. And then I would ask the
5 follow-up question, did you find diabetes? And
6 the coder would testify, I did not.

7 Now, Your Honor's point seems to be,
8 well, that's not as good of evidence -- that's
9 not as good evidentiary submission as if you
10 showed the coder diabetes and had him look at
11 the chart. But that doesn't mean that it's not
12 evidence. And that it doesn't mean it is
13 speculative. I mean, an example would be if the
14 Court asked your clerk to write down the names
15 of everybody on this call, and the question that
16 was on the table was, was Judge Olguin on this
17 call? And the clerk gave you a list of
18 everybody who was on the call. And Judge
19 Olguin's name was not on that list. Well, the
20 Court could not conclude that that is not
21 evidence of Judge Olguin's absence. It would be
22 very good evidence and admissible and certainly
23 probative evidence. So the fact that, well, the
24 coders could have been given the diagnosis and
25 asked to see if they could find it, that's a

1 possibility. United chose not to do their chart
2 review program that way.

3 Instead, the coder was told, I think
4 that you need to go find every single code in
5 here. And the Court asked, well, what are the
6 things that are on the coder's side of the scale
7 here? What are you relying on for the coder's
8 credibility? And one of the things is certainly
9 the training. They are held to 95-percent-plus
10 success rate in finding accurate and un- -- and
11 codes that are, in fact, supported by the chart.
12 But there are other factors as well.

13 The Court has been focusing on the
14 28 million. The 28 million is an interrogatory
15 answer. It is not our case. Our case is the
16 approximately two million codes that
17 Dr. Garthwaite found to be unsupported and
18 caused damage. And for those codes, those
19 two million, there's another fact that lends
20 credibility to the coders.

21 THE COURT: And remind me again what it
22 was that Dr. Garthwaite relied on to come to
23 that two million conclusion.

24 ATTORNEY HAVIAN: What he -- what
25 Dr. Garthwaite did was he looked at all of the

1 chart review chart -- or all of the chart review
2 results that came out of chart review. And for
3 each one, he compared what the chart reviewers
4 found with the codes United submitted to CMS.
5 And if he found -- this was the first cut. The
6 first cut was to do that comparison. So he came
7 up with a list. Here are all of the codes that
8 were submitted to CMS that were not supported by
9 the chart that was identified in connection with
10 that submission. He was --

11 THE COURT: I have to take issue with
12 that. I think that was persistent throughout
13 the briefing on -- on the Government's side,
14 that it consistently said whatever it was that
15 the coders found was, quote, unsupported by the
16 checks. But we don't know that.

17 ATTORNEY HAVIAN: No, we don't.

18 THE COURT: We don't know that because
19 it is the medical records that are the basis for
20 the coding. And without --

21 ATTORNEY HAVIAN: Your Honor --

22 THE COURT: -- those, you can't know if
23 it is unsupported or not.

24 ATTORNEY HAVIAN: You can't know to a
25 certainty, Your Honor. But that doesn't mean

1 that there's no evidence that would lead a jury
2 to reasonably conclude that, in fact, that code
3 was not in the chart. Just like it doesn't need
4 to be conclusive. What you have is people
5 who -- like I said, if we had them testify, if
6 we had the coders testify in court, they would
7 say, I did not find these codes. In that
8 situation, I don't think the Court could exclude
9 that evidence as not probative. I mean, our
10 only task here, according to the Court's
11 tentative, is to come up with significant or
12 probative evidence. It certainly is probative.
13 If you tell somebody, go find every code you can
14 here, and they come back with a list and it
15 doesn't have the code that you're looking for.
16 It doesn't have to be conclusive. No. I agree
17 it is not conclusive. A jury --

18 I was going to get to the second point
19 of why the coders should be credited here.
20 Because in Dr. Garthwaite's list, he did another
21 step. A second factor that would cause some --
22 at least a reasonable juror to rule that the
23 coder's conclusion was correct, was that
24 Dr. Garthwaite not only looked for that
25 particular provider, Dr. Garthwaite looked at

1 any other provider that saw that patient during
2 the same calendar year. And if Dr. Garthwaite
3 found that another provider had, in fact, also
4 recorded that -- that unsupported diagnosis --
5 I'll just use the phrase -- then Garthwaite took
6 that code out of his damages model. So what
7 that means is if when you look at his
8 two million codes, you now have two factors that
9 support the credibility of those -- of what the
10 chart reviewer found. First, the training and
11 experience and expertise of the chart reviewer.
12 Second, that if that patient saw other providers
13 in that same calendar year, those providers also
14 did not record the diagnosis that that single
15 doctor did record.

16 So that's another factor. These are
17 just factors.

18 A third factor that the Court
19 identified in its tentative was for several of
20 the years, there was not one coder that looked
21 at these charts, but two expert, 95-percent-plus
22 percent credibility coders.

23 So now you have all three of those
24 factors. A jury looking at all of the -- of the
25 two million codes, they could reach many

1 different conclusions based on what inferences
2 they draw. For example --

3 THE COURT: Well, we try not to put
4 jurors in the position of drawing inferences
5 from evidence that is not the kind of evidence
6 that the Court believes should be presented to
7 the jury. I mean, you could say all kinds of
8 things to a jury, and they could come to all
9 kinds of conclusions. And that's not what the
10 Court is trying to do. The Court is trying to
11 present evidence to a jury that is admissible,
12 probative evidence supported by the -- the laws,
13 the kind of evidence that we can put before a
14 jury. So yes, you can have an expert stand up
15 and say almost anything in front of a jury, and
16 the Court is there to make sure that that
17 doesn't happen. And so -- and that's not really
18 what we're talking about. I mean, we're talking
19 about whether or not United is entitled to a
20 judgment as a matter of law. Are they entitled
21 to judgment as a matter of law? That's the
22 question that we're addressing today.

23 ATTORNEY HAVIAN: Yes, Your Honor. I
24 understand. I don't think that I'm saying that
25 the expert is the one who is the primary witness

1 here. As I said, I go back to the coder is
2 sitting in front of you with their right hand
3 raised and saying, I did not find this code when
4 I looked at this chart.

5 THE COURT: And the next question --
6 the next question would be, from the other side,
7 and was the doctor, nurse practitioner, office
8 who submitted the code, were they incorrect?

9 ATTORNEY HAVIAN: And the answer would
10 be --

11 THE COURT: Do you have any knowledge
12 as to whether it was correct? I mean, no, he
13 doesn't know.

14 ATTORNEY HAVIAN: But it is not a
15 question of who is correct. It's a question of
16 what's in -- it's a question of is there
17 conflicting evidence? Because the Court --
18 unless the Court is saying, I would exclude that
19 testimony from the coder because it is not
20 probative, which I don't think the Court is
21 saying and I don't think the Court could say,
22 unless you're saying that, what you're really
23 saying is, there are two sources of evidence
24 here. The doctor wrote something on the chart,
25 and the coder didn't find that when the coder

1 looked at it. And the coder is in front of you
2 testifying, I did not find it. And then if he
3 is asked, well, are you saying that the doctor
4 is wrong? And the coder is saying, no, I'm not
5 saying anything. I'm saying, I did not find --
6 I saw it. I saw the chart with my own eyes.
7 I've been trained how to look at these charts.
8 And I'm telling you that I did not find this
9 code in there. Now, a jury could say, well,
10 boy, they were pretty credible. I'm going to
11 believe that coder. And I don't know, the
12 doctors, they're busy, they're distracted.
13 Jurors could reach lots of conclusions. They
14 could -- a jury could say, look, this chart was
15 reviewed by two United coders, not just one. So
16 for those --

17 THE COURT: That's not the question,
18 whether a jury could consider it or whether a
19 jury could reach some conclusion based on it.
20 The question is whether or not the Government is
21 missing an essential element of its case, an
22 essential element of its case on its burden of
23 proof. It is seeking, under the False Claims
24 Act, payment from United based on an alleged
25 overpayment; some amount of money that United

1 got that it should not have received. That's
2 what it is seeking. It has the burden to prove
3 the elements to support that. You're going into
4 tangents that are really not relevant to what's
5 before us today. Is -- is -- I understand what
6 your argument is, but it's not addressing, what
7 is the essential element here of their claim?
8 Their claim is because United submitted --
9 because United submitted a claim for payment
10 that was unsupported by the medical records, we
11 overpaid them, and they owe us money. And that
12 first piece is missing.

13 ATTORNEY HAVIAN: Your Honor, I -- I
14 respectfully disagree with the Court very
15 strongly. I do think that the issue is not have
16 we established conclusively that the chart was
17 unsupported. The issue is, is there conflicting
18 evidence on that point?

19 THE COURT: And I think that you could
20 have raised a triable issue of fact if you had
21 put into evidence before the Court. If there
22 was evidence of a conflict between even a
23 sampling of medical records and codes, that
24 would have raised a triable issue of fact. But
25 that is not in the record.

1 ATTORNEY HAVIAN: Why --

2 THE COURT: Because you would have
3 shown that you had the ability to meet your
4 burden.

5 ATTORNEY HAVIAN: Your Honor, I don't
6 understand -- there are two ways that I could --
7 that I think we can show what the Court just
8 suggested we ought to be able to show. One
9 would be to put the chart in front of the jury
10 and have somebody review the chart sitting there
11 in front of the jury. But it's not -- the
12 Court, I don't believe, can properly dismiss the
13 fact that we have that person. That person is
14 United's coder. They're a witness. They have
15 recorded their statement. It is admissible. It
16 is no different than if somebody came into the
17 Court with the chart in their hands and said,
18 I'm looking at this chart. I do not see that
19 this code is supported here.

20 How is it different what we have done?
21 We have shown you evidence that the coders are
22 sitting in front of you in court -- the same
23 evidence. The coders are sitting in front of
24 you in court, and the coders are telling the
25 jury, I don't -- I didn't see that code in here.

1 I did not see that code in there. And I think
2 that evidence is evidence that cannot properly
3 be disregarded as no evidence. I think it is
4 evidence. And the fact that you could have --
5 theoretically have other evidence that the Court
6 might consider stronger and some juries might
7 consider stronger is really not the point on
8 summary judgment. That is impermissible.

9 So I think what the Court has to
10 envision here, as a thought exercise, is if you
11 had that coder sitting in front of you with a
12 jury, and the coder was looking at the chart and
13 testified before the jury, I do not see this
14 code in this chart, would that be evidence that
15 the jury could properly consider? I think so.
16 And I don't think Your Honor sitting in trial
17 would exclude that witness. Because that is a
18 competent witness. They are testifying about
19 something that they saw with their own eyes.
20 And I do not believe that the Court, without
21 disregarding that evidence -- if the Court is --
22 if the Court disregards that evidence, there's
23 got to be some basis upon which the Court could
24 conclude that that evidence is simply irrelevant
25 or incompetent. And I don't believe the Court

1 views it that way.

2 So really what it comes down to now is
3 the Court is putting things on different sides
4 of the scale. This includes the RADV audits
5 too. The providers -- well, they have the
6 support of the RADV auditors, the code -- the
7 RADV audits. This is not a motion for partial
8 summary judgment.

9 And that is the other point that I
10 wanted to make. The Court does not need to
11 conclude that all 28 million codes are
12 unsupported. The 28 million is a red herring
13 anyway. We don't rely on that for our case.
14 The Court doesn't need to conclude that
15 two million codes are unsupported. United has
16 gone for the moon here. They're seeking summary
17 judgment, not summary adjudication. They could
18 have sought summary adjudication and said, some
19 portion of these codes are, in fact, supported.
20 They could have done that. They chose not to.

21 So here, it is all or nothing for them.
22 They have to demonstrate -- and it is their
23 burden -- persuasion and also producing
24 evidence, their burden to convince the Court
25 that all of these codes, that the Government

1 can't prove that any of these codes are
2 unsupported. Because if some of them are
3 unsupported, then summary judgment on the entire
4 case cannot be granted.

5 So that's the procedural point that I
6 wanted to make, in addition to the substantive
7 one.

8 But the key is really what I said
9 earlier. I think the Court is required to treat
10 this circumstance as if you had a coder sitting
11 in court and testifying, I did not find this
12 code in this chart. And then could a jury
13 credit that coder? Yes, for all of the reasons
14 that I have described. That the coders are
15 incredibly well trained. That no other provider
16 found that code either during that same calendar
17 year. And that in many instances, two coders
18 failed to find that code. Not just one. All of
19 whom are very well trained.

20 So for all of those reasons, a jury --
21 I can give the Court the mix of outcomes here.
22 Some jurors might conclude, well, I'm going to
23 find preponderance of the evidence where there
24 was only one coder and not two coders. I'm
25 going to find the preponderance of the evidence

1 where there was only one provider. So there
2 wasn't two providers that didn't put that down.
3 There was only one. I think jurors could come
4 up with a whole range of things depending on the
5 inferences that the jury would draw from this
6 very admissible and competent evidence that we
7 have presented to the Court in this opposition
8 to the motion. And so in that situation where
9 there is evidence on both sides of the ledger --
10 and I don't deny that United has some evidence
11 on its side of the ledger as well. But it is
12 conflicted. And in United's own words, it is an
13 unresolved discrepancy. And the one thing that
14 we all know is discrep -- factual discrepancies,
15 and that's what this is, cannot be resolved on
16 summary judgment.

17 Thank you, Your Honor.

18 THE COURT: Thank you. All right.

19 So now United's counsel?

20 ATTORNEY MERON: Yes. Thank you, Your
21 Honor. Can you hear me?

22 THE COURT: Yes.

23 ATTORNEY MERON: Perfect. May it
24 please the Court, Daniel Meron of Latham &
25 Watkins, on behalf of UnitedHealthcare.

1 In order for there to have been
2 overpayment here, which is an essential element
3 of their reverse False Claims Act count here, as
4 well as the common law counts, the codes at
5 issue have to, in fact, be unsupported. And to
6 survive summary judgment, the Government has to
7 point to evidence that would allow a jury to
8 conclude that the codes here at issue are in
9 fact unsupported.

10 Now, Ms. McMahon, not DOJ -- I'm sorry,
11 not United, but it is the Government here, as
12 McMahon acknowledged, that has gone in. All or
13 nothing. They said to you earlier that they
14 don't take a position as to some percentage less
15 than a hundred percent being unsupported. Their
16 position is that every single time a United
17 coder did not observe the code, it means that
18 the code was in fact unsupported. No reasonable
19 juror could possibly conclude that. There are
20 millions of codes at issue. Coders make
21 mistakes. Even expert coders. And in support
22 of that position, the Government and Mr. Havian
23 are relying on Dr. Garthwaite, who is the only
24 expert that the Government has who has attempted
25 to set forth the list of the overpayments here.

1 And I think it is important to -- to
2 show you the exchange that we had with
3 Dr. Garthwaite in his deposition because he
4 actually disclaimed that he has an opinion on
5 issue that we're now discussing whether these
6 codes are, in fact, unsupported.

7 If I could put that up. And sorry.
8 There might be a slight delay here technically
9 as this comes up.

10 So Dr. Garthwaite at his deposition --
11 I hope, Judge Segal, you can see this.

12 THE COURT: Give me one moment. Let me
13 just -- I'm trying to make it bigger on my
14 screen here.

15 And what page is this from the
16 deposition?

17 ATTORNEY MERON: It is page 165 of his
18 deposition. It is cited on page 17 of the joint
19 brief.

20 THE COURT: Got it.

21 ATTORNEY MERON: D-167 to 168. And we
22 include there the complete cites, including to
23 the evidentiary appendix.

24 THE COURT: Okay.

25 ATTORNEY MERON: So we asked

1 Dr. Garthwaite:

2 "Q What percentage of the codes on your
3 potential deletes list will be found supported
4 in the relevant medical record, as you defined
5 it, if you were to go and look at that record?

6 "A I don't have an opinion on that."

7 Your Honor, if the Government's expert
8 has no opinion on what percent of the codes at
9 issue here are, in fact, supported by the
10 underlying medical record, if you were to go and
11 look, the jury can't have an opinion on that.
12 It can't just make it up. It can't just pick a
13 number from one to two million or one to
14 28 million. It has to have an evidentiary
15 basis.

16 THE COURT: Can I ask a question, a
17 follow-up to this?

18 ATTORNEY MERON: Yes.

19 THE COURT: So the Government's counsel
20 noted that even though their interrogatory
21 identified 28 million in an interrogatory
22 response, their expert chiseled it down to about
23 two million. And I'm trying to reconcile that
24 testimony. The two million that he found that
25 should be considered overpayments to the -- what

1 percentage of the codes on your potential
2 deletes list will be found supported? What --
3 what were the two findings? How could he make
4 those two findings?

5 ATTORNEY MERON: Okay. I'll be glad to
6 clarify. So the set of codes that the
7 Government to this day alleges are unsupported
8 is 28 million. And that's --

9 THE COURT: That's their interrogatory
10 response, yeah.

11 ATTORNEY MERON: It is their
12 interrogatory response. And it is conceptually
13 the same set of codes that Garthwaite called as
14 potential deletes. And those are all of the
15 codes that were submitted by provider, certified
16 to be true by the provider, but not found on
17 chart review.

18 And Dr. Garthwaite's analysis was a
19 data analysis, as Ms. McMahon said. He compared
20 those two sets. And he assumes that every code
21 not found by a chart reviewer is unsupported.
22 So that's the universe of the unsupported codes.
23 And that's 28 million.

24 The second step that Dr. Garthwaite
25 did, which really isn't, I think, relevant to

1 our discussion today particularly, is he then
2 calculated which of that set of codes had a
3 financial impact on a payment. And that reduced
4 it from 28 million to 1.97 million. So
5 essentially he was admitting 93 percent had --
6 were not overpayments.

7 But with respect to this question of
8 whether these codes are supported, that was
9 really the first step in his analysis. But
10 whether it is one million or -- sorry. Whether
11 it is two million or 28 million, the
12 Government's own expert has no opinion on what
13 percentage of those codes are, in fact,
14 supporting. And he explains later in this
15 answer, at line 21, sort of how he got here.
16 And he says, "So my opinion is limited to what
17 United knew at the time in their risk adjustment
18 and chart review data."

19 And this is -- Your Honor, your
20 opinion, you already know this. This was his
21 whole task. He basically is saying, I am
22 telling you as a data matter which codes United
23 did not find. But he has no opinion as to
24 whether they're, in fact, supported. And that's
25 the problem here. At this stage, there's a

1 number of elements to the False Claims Act. One
2 is recklessness. But separately, overpayment.
3 They have to show that these codes are, in fact,
4 unsupported. And if -- sorry. Go ahead, Your
5 Honor.

6 THE COURT: I just want to ask you this
7 question. So I think Mr. Havian's position on
8 that is, well, Garthwaite can testify about, you
9 know, sort of the data analysis that he did and
10 how he whittled it down to the 1.9 million,
11 et cetera, et cetera. But then we can put on
12 the stand a coder from United who will testify
13 about the coder's training and expertise and the
14 methods that they used and how they looked very
15 carefully to ensure that they got every code
16 correctly that they could based on the medical
17 records. Why is that evidence -- why shouldn't
18 the Court let that go to the jury or have that
19 presented? Why is there still a problem with
20 that?

21 ATTORNEY MERON: Because what that
22 would show is that -- as you said, there are two
23 sets of coders here. There was the coding in
24 the doctor's office which said that the code was
25 there. There would be testimony from this one

1 coder saying, in this instance, I didn't see it.
2 And the question would be, not only number one
3 who is correct on that. And that is an --
4 something that I believe you would need an
5 expert to look at a medical chart and tell you
6 who is correct about that determination. But
7 certainly then to make a leap from one coder to
8 all 28 million, which is where the Government
9 is, every single code here. And there is no
10 evidence to support that. They didn't look at a
11 single chart. They didn't try to do a sampling.
12 And no jury could leap from this one person they
13 put on or even eight to say 28 million.

14 Because, you know, all they would -- all they
15 would know without any kind of expert sampling
16 is that there's been some cherry-picking, and
17 you picked eight people -- eight codes. That's
18 not enough for a jury to make an evidence-based
19 decision as to the percent of the codes that are
20 unsupported, especially when the Government's
21 expert says, I don't have an opinion on that.

22 THE COURT: So would it be -- would it
23 be something that the jury -- in your opinion,
24 would it be something that the jury would be
25 speculating about? That is, if --

1 ATTORNEY MERON: Correct.

2 THE COURT: -- the coder from chart
3 review says, I'm very careful. I look at every
4 medical record. My job is to report every code
5 that the medical record asks me to find. And
6 I'm very thorough. And therefore there was, you
7 know, the jury needs to assume that every time
8 the coder did his job or her job and it was in
9 conflict with the doctor's office coding, that
10 the coder was correct and that something the
11 doctor did was unsupported by the medical
12 record. The jury would have to assume that
13 based on that testimony.

14 ATTORNEY MERON: It would have to
15 assume that. And it would also have to assume,
16 without the benefit of any expert testimony,
17 that the one, two, eight, or ten coding examples
18 that were presented were representative of the
19 whole universe here. And that's the type of
20 things that you need an expert to do. To say,
21 here is statistically valid sample. Here is why
22 these are representative. And you can't do that
23 in a case like this, billions of dollars and
24 just put one or two people. Again, their own
25 expert had the opportunity to do it and

1 understood his mission to be something about
2 what United knew as opposed to what was, in
3 fact, the case. And what, in fact, is the
4 question are these, in fact, supported? And
5 their own expert has no opinion on that.

6 And if I may also, Your Honor -- and I
7 don't want to -- but you -- at the beginning,
8 you suggested that we could also respond to --
9 to the supplemental brief. And there's a
10 portion of the Government's supplemental brief
11 that I think is also very telling here.

12 So at page 15 of the supplemental
13 brief, the Government has a heading. There's
14 evidence for the jury to find that the diagnosis
15 codes at issue were unsupported. So you think
16 you're going to see here evidence that goes to
17 whether these codes are, in fact, supported or
18 not. And what instead you get is -- is it
19 builds to a conclusion that says a jury could
20 certainly find that United deliberately ignored
21 or recklessly disregarded the risk the codes not
22 identified were unsupported. And earlier, they
23 say on the prior page that United either should
24 have deleted the codes or investigated the
25 discrepancy or conducted a further inquiry. The

1 language about a risk in investigating a
2 discrepancy is an acknowledgment that the fact
3 it wasn't seen by the coder doesn't necessarily
4 mean, in fact, that it is not supported.
5 They're saying it is a risk that we disregarded
6 that we should have investigated.

7 But even if that were true and they
8 showed that there was a disregard of a risk,
9 that would go to recklessness. It would not
10 show what that investigation would actually have
11 determined or allow a jury to have a reasonable
12 basis to estimate what percentage of these codes
13 are, in fact, unsupported. And that's the
14 critical hole in the Government's case. It just
15 has no such evidence. And that's why it has
16 gone all in on every one of these codes must be
17 unsupported because a coder didn't code it. And
18 no reasonable jury could make that finding.

19 THE COURT: Thank you.

20 ATTORNEY MERON: Your Honor, if you
21 have no questions, that concludes our argument
22 about the overpayment issue.

23 My co-counsel Andrew Baak wanted to
24 briefly address other aspects of our -- of
25 United's motion as the Government proceeds to

1 its motion.

2 THE COURT: I have one other question
3 for you. So one of the things that I found
4 challenging also is how does the Gov- -- how
5 does the Government ultimately prove what it is
6 entitled to in this case from a damages
7 perspective? I know we're far away from that.
8 But that was the other thing that I was, you
9 know, trying to conceptualize, which is, you
10 know, if the Government is not putting on any
11 evidence of the underlying medical records at
12 all and only says 100 percent of the time, you
13 know, when the coder found these codes and the
14 doctor found different codes, there's an
15 overpayment. How -- how is that determined what
16 the overpayment is? Because you're not looking
17 back to see what the medical record was. You're
18 not doing any kind of individualized analysis.
19 It just doesn't seem that there's a way to go
20 forward on that -- that evidence. I'm just --
21 I'm just wondering what your thoughts are.

22 I'll get to the Government in just one
23 second on it. Let me finish with Mr. Meron, and
24 then I'll come back to you.

25 ATTORNEY McMAHON: Okay. Thank you.

1 ATTORNEY MERON: So, Your Honor, I
2 agree. Now, in a case where you're in the
3 reverse False Claims Act and it is about
4 overpayments -- and especially in the Medicare
5 Advantage context here, I think the question of
6 proving the overpayment and proving the damages
7 is basically the same -- the same thing. Here
8 one critical additional flaw for the
9 Government -- and this is the statement of
10 undisputed fact D-247. It is undisputed that
11 the way the Medicare Advantage payment system
12 works is that when you calculate the risk score,
13 essentially how sick or healthy a patient is,
14 for one person and -- and you make a change, it
15 doesn't impact at all the risk for other people.
16 So each of -- each one is a separate payment.
17 So if you are to try to -- you know, even if you
18 somehow showed that eight individuals -- there
19 was an overpayment as to eight individuals, you
20 couldn't use that -- the jury couldn't use that
21 as a basis to assess damages as to the other
22 people because it wouldn't have impacted them.
23 So in order to prove damages in any reliable
24 way, as you said, we're way away from this. We
25 are obviously on liability here. But it is

1 essentially the same problem. The jury is going
2 to have a reasonable basis what it could
3 estimate what percentage of these codes are
4 unsupported, and therefore what percent of these
5 beneficiaries had overpayments. And it has no
6 basis like that. It has done any medical record
7 review and its expert didn't attempt to make
8 that determination.

9 THE COURT: Understood. Thank you.

10 I'll come back to Mr. Baak in a moment.
11 I wanted to give Ms. McMahon a chance to comment
12 or respond.

13 ATTORNEY McMAHON: Yes. Specifically
14 with respect to that question about how to
15 determine damages. One thing I think I don't
16 necessarily disagree with Mr. Meron on is that
17 in this case, determining what the damages are
18 is determining what the overpayments were. And
19 that's exactly what -- the evidence is exactly
20 what Dr. Garthwaite was engaged to do and what
21 he did do. His estimation is he determined what
22 the overpayments in this case are. And the
23 overpayments are -- are his final deletes list.
24 And it comes out to \$2.1 billion. And the way
25 he did that --

1 THE COURT: Let me ask you a question,
2 though. Can I ask you a question?

3 ATTORNEY McMAHON: Certainly.

4 THE COURT: If Dr. Garthwaite
5 acknowledged that he didn't look at any medical
6 records and he is basing this entirely on a
7 comparison of the codes from the coders and the
8 codes that were submitted to United, and if they
9 came back and they said, okay, Garth- --
10 Garthwaite, we understand your analysis, but
11 we're going to show you in at least 25 percent
12 of the 1.9 million that you think you're -- that
13 the Government is entitled to we're going to
14 show you 25 percent of those. We're going to
15 show you the medical records. Not Garthwaite,
16 but somebody else. And we're going to show you
17 that the medical records supported both the
18 doctor's code and the coder's findings. The
19 coder missed the fact that the person had
20 diabetes. But, in fact, the doctor was treating
21 the person for diabetes. And the coder didn't
22 look -- missed it somehow. And it is
23 legitimate. So maybe you have to reduce
24 Dr. Garthwaite, right, by the number of times
25 that the defense could actually show that the

1 medical records supported the finding. Right?
2 Because the Government couldn't get -- couldn't
3 get a finding on an overpayment if, in fact, the
4 medical records did support it.

5 ATTORNEY McMAHON: Well, I think we --
6 the -- we're mixing apples and oranges a little
7 bit here. And I think that's one of the
8 problems with Mr. Meron's constant refrain that
9 it is somehow terribly detrimental to us that
10 Dr. Garthwaite did not even look at a medical
11 record or had no opinion on whether the codes
12 were unsupported. We are not -- we have not
13 advanced any -- any thought that Dr. Garthwaite
14 was there to determine which codes were
15 unsupported. What we asked Dr. Garthwaite to do
16 is to accept our evidence that the chart review
17 coder determined which codes were unsupported.
18 United themselves determined which codes were
19 unsupported. And then we said, assume -- assume
20 that that list, that he was able to figure out
21 what that list was based on the data, assume
22 that those are unsupported. Now tell us which
23 of those unsupported codes actually led to an
24 overpayment. And that is the analysis that
25 Dr. Garthwaite engaged in. So he did -- I think

1 maybe -- perhaps for different reasons than you
2 suggested, Your Honor. But his process,
3 which -- and I agree with Mr. Havian. The
4 28 million is sort of a proxy that we're talking
5 about. Because it's -- it wasn't
6 Dr. Garthwaite's set. But we can assume for
7 purposes of this discussion, I think, that
8 Dr. Garthwaite's sent -- set of potential
9 deletes is conceptually similar to the
10 28 million, which is codes that were
11 supported -- submitted to United, and United
12 submitted to CMS as having been supported by a
13 medical record. And then upon review of that
14 very medical record by the chart review coder,
15 no code was found. The -- the -- or these
16 particular codes were not found. So in that
17 instance, it is approximately 28 million codes
18 that were not found supported by the chart
19 review coder, by United themselves.

20 That is -- then we said to
21 Dr. Garthwaite, but that's not always going to
22 lead to an overpayment. Because as we all know,
23 the -- it is not the individual code that
24 determines the payment to the MAO. It is the
25 code that -- it is the code whether it maps to

1 an HCC. And if the HCC has support for it in
2 any way, whether the code that we said is
3 unsupported or some other code that mapped to
4 it, as United has recognized many times in its
5 briefing, then that HCC is -- United still gets
6 to get paid for it. That's fine. And we won't
7 consider that diagnosis code as leading to an
8 overpayment because, again, the -- United was
9 properly paid based on a different code.

10 And so that's -- and so Dr. Garthwaite
11 sifted out, he went through, that's how he
12 sifted from 28 million to 2 -- to 1.97 million
13 codes was by searching all of United's data to
14 figure out are there any other codes, any other
15 codes based on the same or different medical
16 records that support the HCC in question? And
17 if so, then let's knock that out. We will never
18 talk about those again. Which is why they are
19 not the subject of the lawsuit in the sense that
20 they do not lead to overpayments. We are not
21 asking United to do anything.

22 Now, the important thing to keep in
23 mind though and how you figure out damages in
24 reverse False Claims Act case is that what
25 United should have done is deleted all

1 28 million of those codes. And they -- had they
2 done that, then in the ordinary process, that
3 CMS would have reconciled what had already been
4 submitted, and CMS is able to figure out, based
5 on all of the codes that are in its system,
6 whether there are any other codes that will
7 support the HCC that they paid for. If there
8 is, that's fine. United would never -- no money
9 would ever be taken back from United as a result
10 of being paid for that HCC. The deletions would
11 still be in there. They -- they -- United would
12 not be getting credit, so to speak, for the code
13 that was deleted because they can't. Under the
14 rules, it is unsupported.

15 But if something else saves the HCC,
16 that unsupported code had mapped up to, that's
17 all well and good. And that's the process that
18 Dr. Garthwaite engaged in. And that is exactly
19 how the -- how the False Claims Act mandates you
20 figure out what the damages are. Right? You
21 figure out what CMS would have paid if the
22 unsupported code had been deleted, if United had
23 met its duties and deleted the code that it had
24 information about that was unsupported. And --
25 and -- but because they didn't do that, that's

1 what Dr. Garthwaite simulated with the data
2 analysis.

3 And I don't know if you're interested
4 necessarily at this point. I think we did
5 mention in our brief, we were particularly
6 conservative. And we asked Dr. Garthwaite to go
7 even further than the CMS system would have.
8 And we said, look, even if -- because of course
9 all CMS can do in the normal payment process is
10 run the computer program to analyze the other
11 diagnosis codes that are in their system. And
12 so -- but we said to Dr. Garthwaite, okay, you
13 will catch all of those by analyzing CMS's data.
14 And you can make sure that United -- we don't
15 call that an overpayment. But also, in a
16 particularly conservative approach, we asked
17 Dr. Garthwaite, also, search all of United's
18 data that they have given us. And if there's
19 any codes that they have, meaning any provider
20 has given them a diagnosis code that maps up to
21 one of the HCCs that are sort of the overpayment
22 HCCs that we're talking about, even in the CMS
23 system, CMS could have never given them credit
24 for that. We will give them credit. So go and
25 knock those out too. So we took all of those

1 unsupported diagnosis codes off our list, saying
2 that also wouldn't necessarily lead to an
3 overpayment. At least we're not claiming
4 damages for it. It would have actually led to
5 an overpayment because United hadn't actually
6 submitted it. And it has to submit it in order
7 to get paid for it. But -- so that's how we
8 figured out the damages in this case.

9 And it's -- so it really is not -- it
10 doesn't speak to the evidence of whether the
11 codes are unsupported to say that Dr. Garthwaite
12 never decided or had an opinion on whether
13 they're actually unsupported or not. Because
14 that wasn't what we asked him to do. And it
15 does seem to me, just to -- I have two quick
16 final points for you.

17 One, it does seem to me that you --
18 that there's this notion that because the coding
19 that the chart review coder was blind, that they
20 didn't have information of what the physician's
21 office had originally submitted to United, that
22 that somehow is -- is lesser evidence or no
23 evidence that what they found is correct. That
24 there actually is no support in the record. But
25 if we had -- if we had hired an expert to review

1 the medical records, we could have asked an
2 expert to do exactly the same thing. Right? If
3 we hired a medical record -- if we had access to
4 all of the records that went through chart
5 review, which, again, we didn't because most of
6 them, according to United's papers, were done by
7 vendors -- overseas vendor. And they never
8 offered us, we never had access, they refused
9 always to give us access to those records
10 because they said they were not in their
11 possession, even though it was their vendors
12 doing chart reviews.

13 THE COURT: I have a different memory
14 of the history of the discovery regarding
15 medical records. But that's -- that's fine.

16 ATTORNEY McMAHON: Oh, well, I -- I
17 will say I did check this pretty carefully over
18 the last couple of days because I thought it
19 would come up. So we can -- you know, if you
20 want information from us, we would happy - we
21 would be happy to provide it to you. So --

22 THE COURT: I just find it hard to
23 believe with 28 million records, that the
24 Government couldn't obtain from United a
25 sampling of medical records of some of those

1 cases to -- to make the analysis that they
2 needed to make, which was to show that the codes
3 were unsupported. I mean, that seems so simple.
4 I just -- I can never understand why the United
5 States decided not to do that.

6 ATTORNEY McMAHON: Well -- well, okay.
7 Then let me address that specifically. One, we
8 were never offered 28 million records.

9 THE COURT: No. That's right. You
10 weren't. But you could be offered a portion of
11 them. And you were.

12 ATTORNEY McMAHON: Okay.

13 THE COURT: So -- and that was never a
14 discovery request. And I know because I
15 supervised the discovery in the case.

16 ATTORNEY McMAHON: We did request all
17 of the records. We requested --

18 THE COURT: 28 million. And you asked
19 them to do the comparison for you, which I said
20 was not their burden. But you could easily have
21 asked for 10 medical records. Ten. You could
22 have asked for 20. You could have asked for 25.
23 You could have asked for 50. 28 million is
24 different. And as United pointed out, it is not
25 uncommon in these types of cases that a party in

1 your position does a sampling and extrapolates
2 from the sampling. That is some evidence that
3 unsupported codes went forward. Right? I've
4 got Dr. X saying diabetes. And I've looked at
5 the medical records. There's not a shred of
6 evidence to support diabetes here. That's
7 proof. That would raise a triable issue of
8 fact. But I don't understand why the United
9 States never wanted to go down that path.

10 ATTORNEY McMAHON: Well, I -- I will --
11 I mean, if I can address just a couple of
12 points. One, I do believe normally, at least
13 when I have worked with experts that did
14 samplings in the past, the expert needs the
15 entire universe to be able to sample from in
16 order to get a sample that is not immediately
17 rejected by the other side as being
18 unrepresentative. And, I mean, it sounds to me
19 from United's -- from United's summary judgment
20 papers that what they are talking about is the
21 vast majority of these records were conducted by
22 a vendor, that were reviewed by a vendor
23 overseas. They continually reference the
24 offshore nature of them. And those are records
25 that they said they absolutely would not give to

1 us, the records of their vendors who conducted
2 the chart review. Only records that they
3 personally had in their possession. But -- but,
4 again, the point of a -- an outside review, I
5 mean, at that point it seems that is just an
6 outside reviewer that we hired versus United's
7 chart review coder. The outside reviewer would
8 have reviewed the same records that the chart
9 review coder reviewed. They would have, you
10 know -- potentially came to the exact same
11 conclusion. We think -- we would like to
12 believe that every coder we hired would get it
13 right. And we believe there's evidence that the
14 chart review coders were getting it right. And
15 that United would, again, say if we didn't
16 review every single record, that that -- that
17 our coder who looked at 15 records is no -- is
18 not evidence of the 28 million records -- codes
19 being unsupported.

20 And I do want to clarify a little bit.
21 My point about a hundred percent -- and I think
22 Mr. Meron sort of twisted it a little bit. What
23 our point is is that the chart review evidence,
24 the evidence that they did not find support, is
25 evidence that can go to all 28 million codes.

1 Right. There is -- we do have -- there is most
2 certainly support that it is 28 million codes
3 that the code -- chart review coders did not
4 find support for. They did -- they did not find
5 support for 28 million codes. And so the fact
6 of -- the evidence surrounding the chart review
7 coders, what their process was, how trained they
8 were, how good they were, all the evidence that
9 I keep repeating, that's all evidence that goes
10 towards all 28 million codes. It applies
11 equally across the board because it was those
12 coders that did not find support. And I believe
13 it is those -- that is the evidence that a jury
14 could find, yeah, we agree. We don't think that
15 the chart review coders found support for those
16 28 million codes. And we conclude that that
17 means that they were unsupported. And United
18 was put on notice of that fact when their chart
19 review coder did not find it.

20 One -- one very quick point. And this
21 is with respect to a smaller subset of evidence.
22 But given the fact that we -- that we -- that we
23 are dealing with this notion that there is
24 absolutely no evidence in the record that anyone
25 ever looked at any of these codes that the chart

1 review coders considered and did not find
2 support for, well, there actually is evidence in
3 the record that United itself at -- at a certain
4 point, they engaged in their claims verification
5 process. And their claims verification program
6 was a program that basically took this list of
7 codes -- I mean, I'm simplifying dramatically
8 here. But at a high level, it took these --
9 this list of codes and said, okay, chart review
10 coders didn't find support for these, although
11 they have already been submitted for payment.
12 Let's get to the bottom of this. And they
13 reviewed an entire set of codes. Not only did
14 they -- did they agree in many instances that
15 the codes were unsupported and submitted those
16 and deleted them, and they paid CMS back
17 \$200 million for that. So those codes are
18 obviously not on our list because they've
19 already paid them back for it.

20 But there's this subset of codes that
21 has taken on the name of either midstream
22 canceled deletes or CV pipeline deletes, where
23 United coders -- United's claims verification
24 coders looked at the codes. They had all of the
25 records that -- they were able to look at all of

1 the records and determine, was the chart review
2 coder correct or not? And these CV pipeline
3 deletes, there's approximately 190 million -- I
4 think it is \$188.7 million worth of diagnosis
5 codes that a CV reviewer found, in essence, the
6 chart review coder was correct. There was no
7 support.

8 And that's -- now, I assume if United
9 would say what they have said previously is,
10 well, still -- we wanted to look some more. We
11 wanted to review those more. We wanted to
12 subject them to yet another higher level of
13 review. And then they decided not to when they
14 decided to cancel their CV program. But that --
15 it seems to me that those \$190 million worth of
16 codes is sort of -- is a proxy for exactly what
17 Your Honor is suggesting we could have done.
18 You suggested that we could have looked at 15
19 codes -- records. This was far more than 15
20 records.

21 THE COURT: All right. Thank you.

22 ATTORNEY HAVIAN: Your Honor, could
23 I --

24 THE COURT: Sure.

25 ATTORNEY HAVIAN: Could I be heard on

1 Mr. Meron's comment?

2 THE COURT: Of course.

3 ATTORNEY HAVIAN: I just want to make
4 one point. Mr. Meron and the Court has actually
5 also alluded to this, has indicated that, well,
6 you know, you could have hired an expert to come
7 in and look at some sample. And first thing I
8 want to say is this is like 1.97 million
9 separate false claims. That's what this is. Or
10 I'll just use two million as a rounding number.
11 There are two million separate false claims
12 here. And for each of those, we have the same
13 evidence, which is that United's coders did not
14 find -- they looked at the charts. They didn't
15 find it.

16 We do have experts. To answer the
17 Court's question and Mr. Meron's point, we do
18 have experts, very highly trained experts who
19 have done exactly what the Court has suggested
20 the Government should do. Those experts
21 looked at a particular chart. Pick one of the
22 two million. They looked -- that expert looked
23 at that chart and said, I don't see the code.

24 Now, Your Honor indicated that would
25 create a triable issue. And I agree. It does

1 create a triable issue. So why is it different?
2 Why does the Government have to go out and pay
3 somebody -- I mean, we all know jurors tend to
4 disregard paid experts. We have experts who are
5 paid by United, not by the Government. They are
6 experts. They are trained to do one thing, to
7 look at these charts. They have as much
8 expertise as anybody. And certainly the Court
9 could say, well, you could have bolstered their
10 credibility if you had hired an independent
11 expert. But, I mean, relying on your opponent's
12 expert is going to have a much bigger impact on
13 a jury than hiring somebody, however sterling
14 their credentials are.

15 So when Mr. Meron says well, they could
16 have gone out and hired an expert. And the
17 expert would have done what? It would have done
18 exactly what United's own experts did. They
19 would look at the chart. They would say, I see
20 this code or I don't see these codes.

21 And so the question is, how can the
22 Court say, I'm going to grant summary judgment
23 because you did not do what United's coders
24 already did, which is have an expert look at the
25 chart and opine on what codes that chart

1 represents?

2 So I think that -- like I said, we have
3 two million false claims here. That's the
4 universe. And on each one, we have that
5 evidence. Now, United is free to pick any one
6 or all of those two million codes and say, well,
7 maybe our expert says that this is not in there,
8 but we have another expert who is going to
9 disagree with our expert. Just more factual
10 grist for the jury's mill.

11 But the jury could certainly look at
12 those and say, no, you know, we're going to give
13 more credibility to the expert that you hired,
14 that you trained, that you certified, and that
15 you used throughout. Not only for your own
16 business, but who you sold as an expert to third
17 parties and charged them to having these same
18 people go out and do this service for you.

19 So I think we do have an expert, Your
20 Honor. We have dozens of experts. And, you
21 know, Mr. Meron's point, well, you can call 10
22 or 15. We could call every one of them. That
23 is trial logistics. That's not a summary
24 judgment question. If necessary, we could call
25 every single coder to the stand, establish their

1 credentials, and have them do exactly what the
2 Court postulated. But they have already done
3 that. They don't need to do that. If we had to
4 do it, we could and we would.

5 THE COURT: Wouldn't you also have to
6 call the doctor? So let's use the diabetes
7 hypothetical. You got the coder. He's looked
8 at all of the charts. He says, heart disease
9 and cancer and something else, but no diabetes.
10 You call the doctor, and he says, well, yeah, I
11 checked diabetes because my patient is
12 exhibiting the following symptoms that I saw in
13 the office. And therefore, based on what I
14 observed in the office, I think he is actually
15 suffering from or maybe he is prediabetes,
16 something like that. So you really have to have
17 the doctor testify too. Because in order to
18 decide that United submitted a false claim or
19 was overpaid for something that was not
20 supported, you would have to know why the doctor
21 offered the code that he offered or she offered
22 instead of what it was that the coders found. I
23 mean, it's not that straightforward.

24 ATTORNEY HAVIAN: Your Honor, I
25 respectfully disagree. And I actually think

1 Mr. Meron will probably agree with me on this
2 point. The question on the table for purposes
3 of the rules of the program, of the Medicare
4 Advantage program, is not does the patient
5 actually have diabetes? That is not the
6 question. And that is very clear and undisputed
7 between the parties.

8 The only question on the table when it
9 comes to Medicare Advantage is, does the chart
10 show support for diabetes? That is the only
11 question. So no, the doctor's testimony would
12 not be part of this.

13 THE COURT: All right. Fair enough.
14 Fair enough. What he observed in the office is
15 irrelevant. Couldn't -- irrespective of that,
16 couldn't the doctor have a different view of the
17 chart than the coder? I know the coders are
18 perfect. But couldn't the doctor have a
19 legitimate different view --

20 ATTORNEY HAVIAN: Yes.

21 THE COURT: -- based on the chart?

22 ATTORNEY HAVIAN: Yes, Your Honor. And
23 that is exactly what juries do every day. You
24 have one witness who looks at a chart and says,
25 I think the chart shows diabetes. Here are my

1 reasons. Here are my credentials. Here are the
2 reasons that you should believe me. The other
3 witness --

4 THE COURT: There are no -- there are
5 no medical charts in the records currently.

6 ATTORNEY HAVIAN: Your Honor, United is
7 free to put them in. We are happy with the
8 record as it stands now, which we have an expert
9 who has reviewed those medical records.

10 THE COURT: That's -- that's the whole
11 point. That's the whole point. And I know you
12 have argued that, you know, you don't have to
13 put that forward. But the law also provides
14 that it -- that a party moving for summary
15 judgment can point to the absence of evidence on
16 an essential element of the party's burden. And
17 that's what they have done here. They have said
18 it is your burden, Government. It is your
19 burden to show that the medical charts did not
20 support the diagnosis. It is your burden. And
21 without those charts, you can't meet your
22 burden. That's -- it is a relatively simple and
23 straightforward motion.

24 ATTORNEY HAVIAN: Your Honor, I think
25 what our evidence is is we don't have the chart

1 in court. And we don't have to have the chart
2 in court. We have a witness who has seen the
3 chart.

4 THE COURT: That's the legal
5 disagreement. That's the legal disagreement
6 that we have.

7 ATTORNEY HAVIAN: I -- perhaps, Your
8 Honor. But I would like to --

9 THE COURT: I think that's what it is.

10 ATTORNEY HAVIAN: I would like to make
11 the case, if I can --

12 THE COURT: Yes.

13 ATTORNEY HAVIAN: -- that if we have a
14 witness who has seen the chart, that is enough
15 to get us past summary judgment. Just like if
16 there was a deed that was in question and we had
17 a witness on summary judgment who had seen the
18 deed and testified, this is what the deed said,
19 that would have to be accepted absent
20 countervailing evidence that the deed didn't say
21 that. Whether the deed was presented in court
22 or not. Now, maybe at trial, maybe that would
23 be required. I don't know. It would be up to
24 the District Court. However, at summary
25 judgment, the Court is required to accept the

1 fact that an expert reviewed the chart and the
2 expert concluded there was no support. And so
3 you have a conflict essentially, again,
4 unresolved discrepancy, to use United's term,
5 between the coder and what the doctor wrote on
6 the chart. And you cannot resolve that on
7 summary judgment, even if at trial if you were
8 sitting as the trial judge, maybe you would say,
9 well, I really think you need to have the chart
10 in here.

11 But in -- like I said, I think we have
12 done what the Court postulated had to be done,
13 which is we have an expert in each of these
14 two million claims. We have an expert who has
15 recorded what would be testimony if we called
16 them as a witness. And you have to assume that
17 they will testify consistently with what the
18 documents say. Again, that inference in our
19 favor. And I -- I don't see why we have to do
20 more than what the Court postulated we should
21 do, which is present an expert who has looked at
22 this chart, who says this is my view of what the
23 chart supports and what it does not support.
24 And Mr. Meron may be able to get up and say,
25 well, you know, how is he going to pick -- how

1 did the jury -- he did say, how is the jury
2 going to pick between the doctor -- what the
3 doctor wrote and the -- and the -- what our own
4 expert wrote? And I think the answer is, that's
5 what juries do. When they have -- if you have a
6 traffic accident, one witness says the light was
7 red and the other witness says the light was
8 green. You have two completely diametrically
9 opposed witnesses to the same traffic accident
10 who say opposite things. The defendant doesn't
11 get summary judgment in that kind of a case.
12 One side says, well, my witness was closer and
13 he was wearing glasses that are prescription.
14 And your witness is supposed to be wearing
15 glasses and didn't wear the glasses. And that's
16 what you do. You each pile up the evidence that
17 tends to circumstantially support the witness.
18 So they are going to present evidence why the
19 jury should credit the doctors and we're going
20 to show evidence that shows why they should
21 credit the coders. And they are free to bring
22 in charts if they want to put on their side of
23 the scale. And we will bring in evidence on our
24 side of the scale. But that's exactly what
25 juries do every day, where you have two

1 witnesses who give opposite accounts of a single
2 event.

3 And in that situation, where there are
4 circumstances that would bear on the
5 persuasiveness of each of those witnesses, a
6 court cannot pick one and say, well, I think you
7 could have presented another witness. I think
8 you could have presented another witness to this
9 accident. Or I think you could have presented
10 an expert traffic expert on this, so I'm going
11 to grant summary judgment to the defendant. If
12 you had a witness who said, I saw the light and
13 it was red, the Court cannot say, you should
14 have brought in another witness. And that's
15 what United wants you to do. They say, well,
16 the Government has to hire its own expert. No,
17 it does not.

18 ATTORNEY McMAHON: And if I could just
19 add one tiny remark in Mr. Havian's analogy.
20 You also don't have to bring the traffic light
21 into court, which is the same as the medical
22 record, in order for the jury to find that one
23 of the -- one of the witnesses was correct and
24 the other was not.

25 THE COURT: All right. Thank you,

1 Mr. Meron.

2 ATTORNEY MERON: Very quickly. Just
3 have a last word on our motion. Very quickly, I
4 would like to correct a couple of things.

5 With respect to the medical records,
6 Your Honor's recollection is correct, United
7 offered to produce all of the medical records in
8 its possession that went through chart review.
9 I don't know if we're -- if the dispute here is
10 about the number. There are 28 million codes.
11 United estimated that the corresponding charts
12 in its possession were 21 million. And it
13 offered to produce those. That is documented,
14 memorialized in one of your opinions. And I
15 think we estimated it would take eight or ten
16 months or something. But we absolutely offered
17 to do. And I just want to correct --

18 THE COURT: I want to make this very
19 clear because I remember this very distinctly.

20 ATTORNEY MERON: Correct.

21 THE COURT: I believe that I -- we had
22 a hearing on this and we talked about it, and I
23 believe that United did agree to produce the
24 medical records.

25 ATTORNEY MERON: Right. And the

1 Government's position -- and the Government's
2 position was that was too many records. That it
3 didn't want to be swamped with 21 million. It
4 wanted us to go through, code the charts, tell
5 them which ones support the codes, and only give
6 them that subset. And that's what they moved to
7 compel on. But even after that, we reiterated
8 to them that our offer of the 21 million
9 remained open.

10 And just to correct an incorrect
11 inference that Ms. McMahon drew. Yes, a vast
12 majority, a substantial majority of United's
13 coders are offshore, but they're United Optum
14 assets, they're not vendors. And we offered
15 21 million charts, which would have been the
16 vast lion's share of the charts here at issue.
17 And the Government turned that down.

18 Secondly, Your Honor, Ms. McMahon's
19 reference to the in-process codes reviewed in CV
20 as evidence to avoid summary judgment has been
21 waived. The Government -- there's a process
22 here. The Government had a brief. And it set
23 forth in that brief, here is our evidence. And
24 they said, there is abundant, lots of evidence.
25 And Your Honor quoted it in full in her opinion.

1 And not once did they say, and part of our
2 evidence is CV. So we didn't even have an
3 opportunity to rebut that and explain. It is
4 waived. I mean, Judge Olguin's process is very
5 clear. They have to put that in their brief.
6 They have to put a column in the statement of
7 undisputed facts, citing their contrary
8 evidence. They didn't do any of that. It was
9 too late. And the truth is, it is a red
10 herring. Because those codes are just a subset
11 of what we're talking about. There is an
12 admission here that all of the codes on the
13 Garthwaite deletes list that they're seeking
14 damages on were all coded in a blinded review
15 and not found. That is D-172 to 173. And it is
16 also undisputed that in RADV -- this is a small
17 set of overlap here. Now, you're talking about
18 the CV, the claims verification codes, the ones
19 that went through claims verification. It turns
20 out in RADV, two-thirds of the time, they were
21 validated.

22 And so it gets you the same problem,
23 which is, are these codes actually unsupported
24 or not? And you cannot ask a jury to say --
25 there is simply no basis to say that all of

1 these 28 million codes are unsupported.

2 And then finally to this point that
3 there's no difference between the analysis
4 Dr. Garthwaite did, which is a pure data
5 analysis, and bringing an actual expert to
6 court. There's a thousand differences between
7 them. But it goes also to this fundamental
8 point: The United coders were coding blindly.
9 That is undisputed. So they weren't making an
10 affirmative determination that a particular code
11 was unsupported. There's -- they didn't
12 identify the code. And then the question is,
13 did they miss it? Because it is undisputed that
14 when you do blind coding, some percentage of
15 codes that are supported are missed. The
16 difference is when you put an expert on, they
17 actually go and review the chart to make that
18 determination. And they didn't do that.

19 So there's an absence of evidence that
20 would allow a jury here to conclude that all
21 28 million codes are unsupported. And that's
22 all that has been presented to you. They have
23 disclaimed in this case any sub-percentage. And
24 if they had, we would still be in the same
25 position because Dr. Garthwaite and Dr. Stark

1 admitted there is no reliable basis in the
2 evidence to make an estimate as to what
3 percentage are supported.

4 THE COURT: So let me ask you a
5 question. In your -- in your opinion, in
6 United's opinion, what's the flaw in
7 Mr. Havian's argument that we should just let
8 this all go to a jury? That the coders are
9 themselves experts. They can testify before a
10 jury and say, I am extremely competent. I
11 always find every code. Therefore, the original
12 code submitted by the doctor was unsupported.
13 What's the flaw in that position?

14 ATTORNEY MERON: The flaw is you need
15 to have a few things. First of all, you would
16 have to have an expert who has done some kind of
17 sampling that could say these codes are
18 representative of the universe. If you were
19 going to go in, as they have, and say, this is
20 going to be evidence, that all 28 million or
21 two million are unsupported, which is what
22 they're doing here.

23 So number one, there is no such expert
24 who has done that exercise.

25 And -- and secondly, what -- the flaw

1 in it is, again, just because that coder did not
2 find it in the blind review doesn't mean that
3 the code is not there. Because like you said,
4 likely the doctor's office took a contrary view
5 on that. And you need an expert that is going
6 to go look at the coding and say, yep, the code
7 is there or is not there. And here there is
8 none of that. The Government didn't develop any
9 of that evidence. They didn't depose any of
10 these coders. They didn't develop any of this
11 evidence. And they didn't do any expert --
12 produce any expert to create any kind of sample
13 that would allow you to go from eight to ten
14 people and then say, Jury, based on this, I have
15 shown eight to ten overpayments. I want you to
16 conclude that all \$2 billion here are
17 overpayments. You can't do that.

18 THE COURT: So did the Government put
19 coders on its witness list? Have they talked
20 that coders are going to be -- I mean, has
21 anybody deposed the coders?

22 ATTORNEY MERON: We have not deposed
23 them. They are not on the disclosure list, to
24 my knowledge.

25 ATTORNEY McMAHON: I actually believe

1 there are. Certainly all of the coders in
2 United's chart review program are not on the
3 initial disclosures. But I believe that that is
4 not exclusive. I believe there are some.

5 THE COURT: Which ones -- which ones
6 are on there?

7 ATTORNEY McMAHON: I believe there is a
8 woman named Natasha Walker who was a coder.
9 Tracey Bradberry was a coder. And Tracey
10 Bradberry was deposed in this case. Actually, I
11 deposed her. It was the very first deposition
12 in this case, other than United's very early
13 ones. There's a woman named Tammy Decker --
14 Tammy Dickey. She was a coder. So there are
15 some coders who were -- who were put on the list
16 and -- and were deposed.

17 But I think our main point obviously is
18 that we did develop a very large set of evidence
19 and put together evidence about the chart review
20 program and the chart -- and the processes that
21 each of the experts -- expert coders would have
22 been held to and would have engaged in
23 regardless of whether they individually were
24 testifying or not.

25 ATTORNEY HAVIAN: Your Honor, I would

1 add the point that we have the evidence of what
2 the coders are saying already in the record.
3 And the Court has to assume, for purposes of
4 summary judgment, that that evidence is truthful
5 and accurate. It certainly is competent. They
6 wrote down what their testimony would be if
7 called. Whether we call them or not is not the
8 issue on summary judgment. The Court must
9 accept as true that if called, they would say
10 what they said. Because United has not
11 presented any evidence that they would not.

12 THE COURT: You don't know what they
13 said.

14 ATTORNEY HAVIAN: Well, they said --
15 what they said is reflected in their chart
16 review, Your Honor.

17 THE COURT: I get it, but I don't think
18 that's the end of the story. And you said they
19 would be the experts on your behalf. So I'm
20 curious to know, as experts on your behalf, what
21 they would testify to. But I think we went a
22 little far afield here.

23 ATTORNEY HAVIAN: I think --

24 THE COURT: My question to Mr. Meron --
25 my question to Mr. Meron was, what was wrong

1 with your position? And --

2 ATTORNEY HAVIAN: I like your question,
3 Your Honor.

4 ATTORNEY MERON: Just very quickly,
5 Your Honor. And there's also the other set of
6 coders. And we know how they -- we have their
7 testimony if you will, if that counts as
8 testimony. Every one of these codes was
9 submitted by a doctor's office that certified
10 that the codes were accurate. And that's the
11 problem. You have two different coding results.
12 And there has to be evidence as to which one was
13 right. And you can't just assume that they --
14 that one person was always right and one was
15 always wrong, which is what the Government's
16 case is here.

17 With respect to the coders that
18 Ms. McMahon mentioned, I believe those people
19 are trained coders. I don't believe any of
20 those are actually the coders who coded these
21 particular charts blind. They just happened --
22 they're trained coders who work for United that
23 have a role in overseeing the program. But
24 they're not the coders who reviewed these
25 charts, which is I think what Your Honor was

1 asking.

2 THE COURT: Right. Well, I think
3 that's what Mr. Havian was saying, is that their
4 evidence would be the coders who did the charts.

5 ATTORNEY HAVIAN: Yes, Your Honor.
6 That's exactly it. And, you know, Mr. Meron
7 says, well, if you only got an expert, then it
8 would be different. Why is it different? In
9 other words, I guarantee -- I guarantee that if
10 we had an expert who came in and said, oh, no,
11 the coder was right on this particular claim,
12 Mr. Meron would say, well, you're mistaken too.
13 They're always going to say the coder who is
14 taking that position is mistaken. Why is it
15 different if the Government is paying the
16 expert?

17 THE COURT: I don't think --

18 ATTORNEY HAVIAN: It is not different.

19 THE COURT: I don't think it is
20 different. You could have an expert. I also
21 think you could bring in the underlying doctor,
22 nurse practitioner, the person, whoever did the
23 contrary finding could testify. But the problem
24 is I don't think that you can prove up -- I
25 don't think you can prove up that there was an

1 overpayment without a comparison between the
2 charts and the codes. Like, I don't think the
3 Government -- I don't think the Government has
4 that evidence. I don't think they have that
5 evidence.

6 But we're going a little bit round in
7 circles. And I'm worried that we're going to
8 run out of time. So I would like to move on, if
9 we can and move on to the Government's motion
10 for partial summary judgment.

11 And -- and, Ms. McMahon, did Ms. Krieg
12 say she was going to respond on that?

13 ATTORNEY KRIEG: Yes.

14 THE COURT: Ms. Krieg.

15 ATTORNEY KRIEG: Thank you, Your Honor.

16 Our position is that materiality is
17 proved through proving the elements of the
18 reverse False Claims Act second provision. And
19 that's because materiality is inherent once the
20 Government proves a knowing and improper
21 avoidance to pay, but that there's not a second
22 or additional showing of materiality required.

23 And as we discussed in our briefing, we
24 believe our position is in keeping with the
25 central concerns of the Court in Escobar, which

1 focused on whether a person's violation of a
2 requirement was capable of influencing an
3 agency's payment or receipt of money.

4 THE COURT: Ms. Krieg --

5 ATTORNEY KRIEG: Yes.

6 THE COURT: Can I just -- can you speak
7 just a little more slowly.

8 ATTORNEY KRIEG: Oh, of course. I'm
9 sorry.

10 THE COURT: I'm sorry. I'm trying
11 to take notes.

12 ATTORNEY KRIEG: We were running out of
13 time, so I was trying to --

14 THE COURT: I appreciate it.

15 ATTORNEY KRIEG: -- speak fast.

16 THE COURT: Thank you.

17 ATTORNEY KRIEG: And as we know, the
18 FCA defines materiality as having a natural
19 tendency to influence or be capable of
20 influencing the payment or receipt of money or
21 property.

22 So the U.S. -- the United States'
23 position is that if it can prove a knowing
24 avoidance of an obligation to pay money to the
25 Government, then that satisfies Escobar's

1 materiality concerns because that naturally
2 influences an agency's payment or receipt of
3 money.

4 To address the Serco case, our reading
5 of that case and its cite to the Cafasso case.
6 The Cafasso case addresses the reverse False
7 Claims provision pre-FERA amendments. And our
8 position is that its analysis then doesn't
9 reflect on whether there is a second materiality
10 showing required because the pre-FERA amendments
11 did not include the False Claims Act that we're
12 discussing here today.

13 We cited case law, including from the
14 Ninth Circuit in our papers, that support that
15 there is no double materiality requirement. It
16 is our position that these cases, Sutter and
17 Frye, for example, did more than just a routine
18 recitation of the elements. We think the courts
19 were thoughtful there. And they were thoughtful
20 about whether there is a second materiality
21 requirement or double materiality requirement
22 beyond the Government just proving -- beginning
23 to prove a knowing and improper avoidance.

24 THE COURT: Can you point me to
25 language that is --

1 ATTORNEY KRIEG: Sure.

2 THE COURT: -- that is clear on that?
3 Because I found that it was hard to find that in
4 the --

5 ATTORNEY KRIEG: I'm sorry.

6 THE COURT: It's okay.

7 ATTORNEY KRIEG: Sutter, for example,
8 at 1056 said -- the Court said, "Regarding the
9 scienter element and with respect to the first
10 prong only, the false statement immateriality
11 element, the standards for these elements are
12 the same for the reverse FCA provision and the
13 direct FCA provision."

14 So our reading of that is the Court
15 really looked at the elements and was thoughtful
16 about what does the first prong require for
17 proof and what does the second prong require?
18 And the Court laid it out. And notably, the
19 Court didn't say that the Government needed to
20 have a second materiality standard to prove its
21 case. The Court was thoughtful. And the Court
22 was clear which prong required materiality
23 element proof and which prong didn't. And it
24 laid it out. So that -- that is our reading of
25 the Court in Sutter, as well as -- as well as

1 Frye.

2 Just quickly on the redundancy issue.
3 The Jacobs court commented that courts recognize
4 that a person commits two wrongful acts when he
5 or she submits a false claim, then receives
6 money for the claim and does not return it.
7 One, submitting the false claim or making the
8 false statement. And two, later avoiding an
9 obligation to return money.

10 I want to just briefly move on and
11 address the tentative at page 33.

12 THE COURT: Okay. Can you give me one
13 second?

14 ATTORNEY KRIEG: Yes.

15 THE COURT: Go ahead, please.

16 ATTORNEY KRIEG: Okay. So there's just
17 one sentence in there. It says, "As previously
18 noted, CMS undeniably knew for years about
19 United's practice of blind coding reviews and
20 was well aware when it made the challenge
21 payments that United's coders never looked at,
22 let alone sought to independently confirm the
23 validity of the diagnosis codes identified by
24 the doctors in their claims submissions."

25 So very respectfully, United States

1 just vehemently disputes this. Your Honor cites
2 D-21 in support of this, which is an email that
3 Steve Nelson sent to Cheri Rice in 2015 about
4 its claims verification program. And Your Honor
5 refers to an April 2014 meeting between the
6 parties. Both of these are disputed between the
7 Government. And it is certainly disputed that
8 either of these would give CMS the knowledge
9 attributed to it in your tentative statement.

10 THE COURT: So tell me what happened at
11 that meeting.

12 ATTORNEY KRIEG: Yes. Absolutely. The
13 main thing I can tell you is that what happened
14 in that meeting in April 2014 is disputed
15 between the parties. And certainly not the
16 basis for any summary judgment.

17 THE COURT: Who was at the meeting?

18 ATTORNEY KRIEG: Okay. Well, it was a
19 meeting between CMS and United representatives.
20 The main takeaway.

21 THE COURT: And who was there for CMS?

22 ATTORNEY KRIEG: For -- Cheri Rice and
23 Sean Cavanaugh, Cynthia Tudor, and two sort of
24 administrative assistants.

25 THE COURT: And who are those people

1 and what are their titles?

2 ATTORNEY KRIEG: Cheri Rice at the time
3 was -- and the administrative folks are named
4 Dan Farmer and Julie Uebersax.

5 THE COURT: Okay. And what are their
6 titles?

7 ATTORNEY KRIEG: Dan Farmer was the --
8 and I might not get his title perfectly correct.
9 He was the chief of staff for Sean Cavanaugh.
10 And I believe Julie Uebersax was the assistant
11 to Cheri Rice.

12 THE COURT: And who was Mr. Cavanaugh?

13 ATTORNEY KRIEG: Mr. Cavanaugh was the
14 director of the Center for Medicare. And Cheri
15 Rice was the deputy director for Center for
16 Medicare.

17 THE COURT: All right. So if I
18 understand correctly, you have Mr. Cavanaugh,
19 who is the director of the Center for Medicare;
20 is that right?

21 ATTORNEY KRIEG: Yes.

22 THE COURT: And Ms. Rice, who is the
23 deputy director for the Center for Medicare?

24 ATTORNEY KRIEG: Yes.

25 THE COURT: And then you have

1 Mr. Farmer, who is the chief of staff?

2 ATTORNEY KRIEG: I believe he
3 was assistant or chief of staff type role.

4 THE COURT: And then you have Julie
5 Uebersax, who is she?

6 ATTORNEY KRIEG: She was the assistant
7 to -- or chief of staff, that type of role --

8 THE COURT: Uh-huh.

9 ATTORNEY KRIEG: -- to Cheri Rice. And
10 it is U-e-b-e-r-s-a-x.

11 THE COURT: Okay. And then who was
12 there for United?

13 ATTORNEY KRIEG: For United, it was --
14 and Cynthia Tudor also was there for CMS. And I
15 believe her title is deputy director for the
16 Center for Medicare as well.

17 THE COURT: Great.

18 ATTORNEY KRIEG: Okay. For United --
19 and I apologize. I don't have all of the titles
20 for the United folks. But Karen Erickson, Steve
21 Nelson, Dan Schumacher, and Thad Johnson, who
22 was their attorney.

23 THE COURT: And do you know their roles
24 at United?

25 ATTORNEY KRIEG: I apologize. I don't

1 have the United roles in front of me.

2 THE COURT: Okay. All right. Well, we
3 can ask them when it is their turn.

4 ATTORNEY KRIEG: Yes.

5 THE COURT: All right. So you have
6 this meeting between the chief of staff, the
7 director, the deputy director, and the deputy
8 director for CMS.

9 ATTORNEY KRIEG: Yes.

10 THE COURT: And you have the United
11 representatives.

12 ATTORNEY KRIEG: Yes.

13 THE COURT: And who called the meeting?

14 ATTORNEY KRIEG: United requested the
15 meeting from CMS.

16 THE COURT: And was that in an email or
17 phone call? How do we know that took place?

18 ATTORNEY KRIEG: United requested the
19 meeting via phone call.

20 THE COURT: Okay. And what was the
21 topic for the meeting?

22 ATTORNEY KRIEG: The Medical Record
23 Review Rule.

24 THE COURT: Medical -- is that like in
25 an email or is that your summary or is that like

1 a title?

2 ATTORNEY KRIEG: The Medical Record
3 Review Rule was a proposed rule.

4 THE COURT: Oh, rule. I couldn't hear
5 you.

6 ATTORNEY KRIEG: Oh, I'm sorry.

7 THE COURT: So MRRR.

8 ATTORNEY KRIEG: You got it.

9 THE COURT: I've seen that in my order.
10 So MRRR. So that was the topic of the meeting?

11 ATTORNEY KRIEG: Yes.

12 THE COURT: So tell me about that
13 proposed rule.

14 ATTORNEY KRIEG: The Medical Record
15 Review Rule was a proposed rule in 2014.

16 THE COURT: Uh-huh. What did the --
17 oh, go ahead.

18 ATTORNEY KRIEG: The rule had to do
19 with the design of chart reviews. It was a
20 proposed rule.

21 THE COURT: The design of chart
22 reviews? What do you mean by that?

23 ATTORNEY KRIEG: So I want -- so the
24 Medical Record Review Rule was a proposed rule
25 by CMS that had to do with whether and if MAOs

1 were going to look at charts. Whether they had
2 to specifically design the review of the charts
3 to look at both supported and unsupported codes.

4 THE COURT: And had that been sort of
5 issued in sort of a preliminary administrative,
6 you know, fashion? Had it been sent out for
7 notice and comment?

8 ATTORNEY KRIEG: Yes. Yes.

9 THE COURT: So CMS had sent out the
10 MRRR for notice and comment in a public document
11 somewhere?

12 ATTORNEY KRIEG: Yes, in the Federal
13 Register.

14 THE COURT: Okay. And had that
15 happened before this meeting took place?

16 THE WITNESS: Yes.

17 THE COURT: All right. So they sent it
18 out for notice and comment.

19 ATTORNEY KRIEG: They sent --

20 THE COURT: And had the notice and
21 comment period gone on for a while? Had they
22 received comments?

23 ATTORNEY KRIEG: They sent the Medical
24 Record Review Rule for notice and comment in
25 January of 2014.

1 THE COURT: Yes.

2 ATTORNEY KRIEG: Now, this meeting
3 occurred in April of 2014.

4 THE COURT: So a few months after it
5 was sent out for comment.

6 ATTORNEY KRIEG: Yes.

7 THE COURT: All right. And then United
8 asked for a meeting to talk about the rule?

9 ATTORNEY KRIEG: Yes.

10 THE COURT: Okay. And let's -- just
11 for my sake. I appreciate I've got a roomful of
12 experts here, but I'm not as expert in this
13 area. And when you say the MRRR had to do with
14 the design of chart reviews, what exactly was
15 the rule suggesting or proposing?

16 ATTORNEY KRIEG: The rule was focused
17 actually on the design of the Medical Record
18 Review Rule. So I want to be clear because it
19 didn't change any long-standing obligation under
20 the program, under the -- under the risk
21 adjustment program. It really was focused on
22 the design of the program. So -- on the design
23 of chart review. So if you were going to
24 undertake to design a new program, the rule
25 talked about how an MAO should, if the rule was

1 implemented, design that program. And so that's
2 what the rule covered. And so when this rule --

3 THE COURT: And why -- why was this
4 rule sent out? Why was the agency asking for
5 notice and comment on this rule? How was it --
6 how was it going to change whatever existed?

7 ATTORNEY KRIEG: And that's what I
8 wanted to be clear about. The evidence in the
9 record is that the rule wasn't going to change
10 any long-standing obligation that existed in the
11 risk adjustment program. In terms of why the
12 rule was passed and implemented, our -- our
13 evidentiary record doesn't -- doesn't really go
14 into that. So what we have in the record is
15 simply that this rule was proposed.

16 THE COURT: Is there any language in
17 the -- in the proposed rule about why the agency
18 was proposing it at that time?

19 ATTORNEY KRIEG: I think it
20 strengthened -- it was meant to strengthen the
21 risk adjustment program. But it was part of a
22 larger piece of legislation. It was proposed as
23 part of a larger piece of legislation.

24 THE COURT: Okay. All right. So -- so
25 the rule is out for notice and comment. And

1 United asks for a meeting.

2 ATTORNEY KRIEG: Yes.

3 THE COURT: And they have this meeting
4 with the deputy director and the deputy director
5 of CMS.

6 ATTORNEY KRIEG: Yes.

7 THE COURT: And what happened at the
8 meeting?

9 ATTORNEY KRIEG: Well, so if I could
10 turn back to the focus of the meeting.
11 United -- and I think Mr. Meron alluded to
12 this -- had a program called claims
13 verification. This program was not part of this
14 larger chart review program that we're talking
15 about and that our litigation has been the
16 subject of -- or has been the subject of our
17 litigation. Excuse me.

18 So United has a chart review program.
19 This program is mis- --

20 THE COURT: You mean Claims
21 Verification.

22 ATTORNEY KRIEG: Thank you.

23 THE COURT: Sorry. Just to be clear.

24 ATTORNEY KRIEG: Yes. So this claims
25 verification program, it was a limited program.

1 And it did compare some doctor-submitted codes
2 with some charts. And so United asked to come
3 in and talk about this claims verification
4 program. And there's evidence in our record,
5 deposition testimony from Karen Erickson, who I
6 mentioned, and Steve Nelson, who I mentioned,
7 that the focus of this meeting was claims
8 verification. And there's deposition testimony
9 from Dan Schumacher, who also was at the
10 meeting. I hope I mentioned him. And he said,
11 about the meeting, "We were clear to say that,
12 you know, the chart program is one thing. It
13 has its own QA process. We're not asking about
14 that right now. We're asking you about our
15 claims verification process."

16 So the meeting, this April 2014
17 meeting -- and this is just what I wanted to
18 emphasize with regards to that comment in the
19 tentative. The April 2014 meeting was not about
20 the broader chart review program, the blind
21 chart review program that we're talking about
22 today and that is the subject of our litigation.
23 The meeting was just a limited -- it was a
24 45-minute video conference. And it was about
25 the claims verification process. And there is

1 no evidence at all in the record that this
2 45-minute video conference that they had gave
3 CMS any information about the broader chart
4 review program. For example, its size or its
5 scope or that it was blind, that the coding was
6 blind, or the instructions that United gave to
7 the coders -- like, for example, that the coders
8 were told -- told code every supported diagnosis
9 code. That information was not conveyed to CMS
10 at this April 2014 meeting.

11 THE COURT: What did the MRRR propose?
12 What was it going to do?

13 ATTORNEY KRIEG: I have it in front of
14 me. And I can read it to you. So here -- here
15 is what it said. And if you just indulge me
16 because it is long.

17 THE COURT: Sure.

18 ATTORNEY KRIEG: Okay.

19 "We propose to strengthen existing
20 regulations related to the accuracy of risk
21 adjustment data by amending 422.310 on risk
22 adjustment data validations. First, we propose
23 to renumber existing paragraph 422.310E as
24 paragraph E2 and add a new paragraph EL, which
25 would require that any medical record reviews

1 conducted by an MA organization must be designed
2 to determine the accuracy of diagnoses submitted
3 under 422.308C1 and 422.310G2. Paragraph
4 422.308C1 addresses adjustments to payments for
5 health status. And paragraph 422.310G2
6 addresses deadlines for risk adjustment data
7 submission, including the final risk adjustment
8 data submission deadline prior to" --

9 THE COURT: Can I stop you for a
10 second?

11 ATTORNEY KRIEG: Yes.

12 THE COURT: So it is renumbering the
13 rule and asking for medical reviews to be
14 directed towards accuracy. Is that what it
15 says?

16 ATTORNEY KRIEG: So it's -- yes. More
17 or less, yes.

18 THE COURT: Okay. And was that topic
19 discussed during the 45 minutes?

20 ATTORNEY KRIEG: So exactly what was
21 discussed during the 45 minutes, there's
22 competing recollections between the parties. I
23 think it would be fair to say that that topic
24 was discussed during the meeting.

25 THE COURT: Accuracy of medical

1 reviews.

2 ATTORNEY KRIEG: So I would be
3 uncomfortable saying exactly what was discussed
4 during the meeting. Because, again, deposition
5 testimony -- there's competing evidence. So
6 their witnesses have given their views of what
7 was discussed during the meeting and what was
8 said. And our witnesses -- for example, Sean
9 Cavanaugh, he was deposed. And he denied what
10 their witnesses say was said during the meeting.
11 I think the best thing that we can say about
12 this meeting is that what exactly was said at
13 the meeting is -- is disputed between the
14 parties. So actually what was said during the
15 meeting, it is not a basis for summary judgment
16 at this stage. I think that's the best way to
17 answer your question.

18 THE COURT: Okay. All right.

19 ATTORNEY KRIEG: I'm --

20 THE COURT: Yeah. Go ahead.

21 ATTORNEY KRIEG: No. I mean, I'm happy
22 to read you various pieces of evidence about
23 what has come in about what was said at the
24 meeting. But the takeaway is that their -- Thad
25 Johnson has offered pieces of his

1 recollection -- of what he says was said at the
2 meeting. And our witness, Sean Cavanaugh, has
3 disputed it. So what happened at the meeting is
4 simply disputed.

5 THE COURT: All right. That's fine.

6 ATTORNEY KRIEG: Okay.

7 THE COURT: Go ahead.

8 ATTORNEY KRIEG: And then just moving
9 on to -- following the meeting, Steve Nelson
10 sent an email.

11 THE COURT: Remind me who he is again.

12 ATTORNEY KRIEG: He is a United
13 employee.

14 THE COURT: Got it.

15 ATTORNEY KRIEG: So he sent Cheri
16 Rice -- again, the deputy director of CMS -- an
17 email following this meeting. And he sent
18 another email with basically the same language.
19 And that is what is cited in your tentative.
20 So, again, that email just told Cheri Rice that
21 they were ending this claims verification
22 program. It didn't tell CMS anything about this
23 broader chart review program that we're talking
24 about. And that is the subject of the
25 litigation. And there is no evidence in the

1 record that CMS had actual knowledge about the
2 blind chart review program that's the subject of
3 the litigation. And all of the pieces of it
4 that I have walked through, that's just not in
5 the evidentiary record.

6 And I also wanted to touch upon, even
7 if CMS -- even if United was correct, that CMS
8 had actual knowledge and CMS continued paying
9 with actual knowledge, that's not -- as Your
10 Honor recognized, that's not dispositive. And
11 the materiality analysis under Escobar, courts
12 in the Ninth Circuit have found continued
13 payment not dispositive, in particular where
14 withholding money would have a deleterious and
15 counterproductive effect. That can be found in
16 the needling case in CD Cal. And here, our
17 30(b)(6) witness gave testimony that beneficiary
18 harm is the overarching reason for termination
19 of contracts.

20 And CMS's main concern is ensuring the
21 continuity of coverage and care for the Medicare
22 population. CMS wants beneficiaries to have a
23 continuity of coverage and to be protected. And
24 United is the largest MA plan in the program.

25 And United -- United asserts it is

1 entitled to summary judgment on materiality
2 based on the single factor -- the single factor
3 face that CMS continued paying after United's
4 alleged actual knowledge. But even if we gave
5 United the benefit of the doubt on that one
6 single Escobar factor, summary judgment on
7 United's motion -- United's motion for summary
8 judgment on materiality still wouldn't be
9 appropriate because all of the other Escobar
10 factors were in favor of materiality.

11 And I'll just very quickly run through
12 those. Accurate data is a condition of payment.
13 Submitting supported codes and correcting
14 unsupported codes and returning overpayments,
15 that goes to the essence of the bargain between
16 CMS and United. And turning a blind eye to
17 millions of unsupported codes. Failing to repay
18 money is significant. And the Government took
19 action when it did have knowledge of similar
20 violations. And United knew this. And I'm
21 referring to a 2013 settlement which United was
22 aware of between the United States and another
23 MAO. It is called --

24 THE COURT: How much money should --
25 should United have paid?

1 ATTORNEY KRIEG: Well, in our position,
2 United should have paid the \$2 billion, the
3 overpayment. Should have made the deletes.

4 THE COURT: All 2 billion are proved
5 up, and you should get \$2 billion based upon the
6 overpayments?

7 ATTORNEY KRIEG: Yes.

8 THE COURT: Got it.

9 ATTORNEY KRIEG: And just turning back
10 to the SCAN settlement. The Government took
11 action when it had knowledge of similar
12 violations in 2013. And that was a similar
13 case, the SCAN settlement, where the United
14 States recovered money when SCAN failed to
15 delete unsupported codes.

16 And very quickly, we addressed this in
17 our brief. But the United States -- it is
18 United States' position that general knowledge
19 of United's chart review practices are not the
20 proper focus of a materiality inquiry. The
21 proper focus of a materiality inquiry is the
22 specific unsupported diagnosis code. And that's
23 because when an MAO deletes a diagnosis code,
24 CMS recoups overpayments by calculating the
25 amount of the overpayment resulting from the

1 unsupported code and reducing future payments to
2 recover that overpayment. So CMS needs to know
3 a specific diagnosis code that was unsupported
4 in order to recover the overpayment.

5 So for those reasons, we respectfully
6 request that you grant our partial motion for
7 summary judgment and deny theirs on the grounds
8 of materiality.

9 THE COURT: Thank you so much.

10 ATTORNEY KRIEG: Thank you.

11 THE COURT: All right. Now on behalf
12 of United.

13 ATTORNEY BAAK: Let me just get my
14 ducks in a row here.

15 Good afternoon, Judge Segal. Andy Baak
16 from Bartlit Beck on behalf of the Defendant
17 UnitedHealthcare.

18 THE COURT: Good afternoon.

19 ATTORNEY BAAK: I'm happy to answer any
20 questions that were addressed to the Government
21 about attendees and the like. But let me just
22 start with a brief response to the Government's
23 motion -- affirmative motion suggesting and
24 asking this Court to be the first in the country
25 candidly to rule that materiality is not a

1 requirement under the second requirement under
2 the False Claims Act.

3 As the tentative sets forth I think at
4 length and is plainly correct, at the most
5 fundamental level, the Government's position
6 cannot be squared with the Supreme Court's
7 opinion in Escobar. And a position that it
8 reiterated last term in SuperValu. And that's
9 absent a directive from the contrary -- to the
10 contrary by Congress in the statutory text, that
11 we have to presume that the False Claims Act
12 retains the elements and limitations of common
13 law fraud. And the Government points to no such
14 evidence in the text here. And indeed, it would
15 be remarkable if Congress, in passing FERA for
16 the first time ever extended the punitive
17 remedies of the False Claims Act to nonmaterial
18 conduct.

19 The four cases that are discussed in
20 the tentative that are relied upon by the
21 Government simply do not, in fact, reach this
22 issue. The Department of Justice just invoked
23 the Sutter Health case. And I believe pointed
24 to 1056 of that opinion. If you go to 1056 of
25 the opinion, you will see that that is in the

1 background section of the case merely discussing
2 the fact that the reverse False Claims Act does
3 not require an affirmative misstatement. The
4 Court in Ormsby did not reach the question,
5 certainly it was not litigated at any point
6 whether or not materiality is required under the
7 reverse False Claims Act. And that is true of
8 all of the cases that the Government relies on.
9 And notably, in all four cases the Government
10 places central reliance on -- and I'm talking
11 about the Sutter Health case, Jacobs, Frye, and
12 Little. In each of those cases, the Government
13 was either a party to the case as a litigant or
14 filed a statement of interest at the key
15 decision point. And not one of those cases did
16 the Government advance the position that it is
17 advancing here today -- frankly, a remarkable
18 position in terms of the scope, I would
19 suggest -- and argue that materiality was not
20 required.

21 So for the reasons set forth in our
22 briefs, we believe that it is plain that the
23 reverse False Claims Act requires materiality.

24 Turning to our motion and the Court's
25 discussion of the evidence on page 33, United

1 would submit that it is plainly correct that we
2 disclose to CMS year in and year out what we
3 were doing. And I don't think the evidence --

4 THE COURT: Can I stop you, Mr. Baak?

5 ATTORNEY BAAK: Sure.

6 THE COURT: You said we disclosed to
7 CMS what we were doing. Can you be a little
8 more specific both about when and where the
9 disclosure was made and what was disclosed?

10 ATTORNEY BAAK: Sure. Absolutely. So
11 first, I want to set the meeting aside. Because
12 I don't think the Government is fairly
13 characterizing. I think they're overstating the
14 sense of any sort of dispute. But I don't think
15 you need to rely upon that at all.

16 We, after the meeting -- and I'm happy
17 to share it if I can do so.

18 Great. I'm going to zoom in so you
19 don't have to squint yet.

20 I have put on the screen here what is
21 Exhibit P-1D. This is the 2015 version. You
22 will find a similar email at P-24. And indeed a
23 similar email every year during the period
24 relevant. But after the meeting, it is
25 undisputed that we sent an email to CMS

1 explaining the changes in our procedures.

2 And I'll zoom in on the relevant
3 portion.

4 So this is an email from Steve Nelson,
5 one of the United attendees, to Cheri Rice.

6 And hopefully -- hopefully that is big
7 enough.

8 But as relevant here, we are plainly
9 conveying that in light of the withdrawal of the
10 Medical Record Review Rule, which we confirmed
11 did not then -- in light of that required --
12 that withdrawal, we no longer had to design our
13 chart reviews or our processes to determine the
14 accuracy -- the accuracy of risk adjustment
15 diagnosis.

16 We also say --

17 THE COURT: I'm just reading it. I'm
18 sorry. It just takes me a second.

19 ATTORNEY BAAK: Sure. Why don't I just
20 leave it up on the screen.

21 THE COURT: Okay. All right. Thank
22 you.

23 ATTORNEY BAAK: Again, this is P-1D.

24 THE COURT: Okay. Thank you.

25 ATTORNEY BAAK: Similar disclosures

1 were made every year. And you will see that
2 this email itself shows that it is, in fact, not
3 true that chart review was never addressed in
4 these communications. The very last sentence
5 touches on chart review.

6 THE COURT: We do have a quality
7 assurance process? That one?

8 ATTORNEY BAAK: Yes.

9 THE COURT: So when you say, "We do
10 have a quality assurance process that deletes
11 codes initially identified during chart review
12 and later determined to be unsupported," is
13 that -- that is something different than what I
14 thought we were talking about in this dispute.

15 ATTORNEY BAAK: Well, I think the whole
16 context of this email, Your Honor, is, first,
17 after the rule was proposed, we approached you
18 and we confirmed that we no longer have to
19 validate code -- no longer have to have a
20 validation process related to risk adjustment
21 data for chart review.

22 THE COURT: And I think what your
23 opponent is arguing is that there was zero
24 discussion about -- her contention is -- the
25 fact that your chart review coders were doing

1 blind reviews and not verifying the accuracy of
2 the doctors' codes. I think that's what -- I'll
3 -- we can ask her. But I think what she was
4 saying is there is no evidence in the record
5 that -- that the United States was aware that
6 United had this blind chart review system. And
7 that's what I find hard to believe because it
8 was going on for a while.

9 ATTORNEY BAAK: I think the distinction
10 the Government is drawing -- although, candidly,
11 I'm not sure that I understand it -- is the idea
12 that we told them about claims verification but
13 not chart review. But I don't think that can be
14 squared with the unsupported evidence. This
15 email itself -- again, similar communications
16 every year -- says nothing about claims
17 verification. And, in fact, it says that CMS
18 confirmed that the requirements wouldn't apply
19 after the fact, and thus we were not required to
20 design our medical record reviews to determine
21 the accuracy of risk adjustment diagnosis.

22 So I don't -- I think the hair they're
23 trying to split is chart review versus claims
24 verification. But there is no such discussion
25 in these communications. And I think the key

1 facts on materiality are year after year
2 disclosure, also in the bid documents. Again,
3 the bid documents don't say anything about
4 claims verification. Instead -- and there is an
5 example at -- at D-25. We say, "The Health Plan
6 has decided to cease one of its prior processes
7 that identified and deleted certain diagnosis
8 codes through the medical record review
9 process," which everybody understands is chart
10 review.

11 So you have unbroken disclosure every
12 year at the attestation stage, at the bid stage.
13 And you never have any remedial action taken by
14 CMS against us. And I would submit not only
15 would that show -- I think your opinion is a
16 correct description of the evidence. But I
17 actually think the evidence would support going
18 further and granting summary judgment to United
19 on materiality based on these undisputed facts.
20 If the Government can defeat a finding of
21 materiality year after year after year by a
22 party going to the regulator and saying, here is
23 what we're doing, and you get no follow-up
24 questions, you get no remedial action, I would
25 submit that no defendant will ever prevail on

1 summary judgment on materiality. And that is
2 directly contrary to footnote 6 of Escobar that
3 says this is a meaningful standard and cases can
4 and should be disposed of at summary judgment
5 based on materiality.

6 Your Honor, I know we have indulged a
7 lot of time today. I would like to find a few
8 moments to discuss another aspect of our
9 affirmative motion. It is actually related to
10 materiality -- to your discussion of
11 materiality, if I may.

12 THE COURT: Yes.

13 ATTORNEY BAAK: I will be brief and
14 mindful of time.

15 So I would like to discuss our motion
16 for summary judgment as an alternative basis on
17 the False Claims Act count which is the
18 Government's failure to show that United engaged
19 in any conduct that was concealment or to
20 improperly avoid -- improperly being read in
21 tandem with concealment.

22 And I think this is timely,
23 particularly in light of the discussion on page
24 33, about what the -- about the lack of such
25 evidence here after 13 years of litigation,

1 which I would suggest is remarkable. That after
2 13 years of litigation, we have actually no
3 evidence of fraud.

4 And I also think -- I would encourage
5 the Court to think about including this as an
6 alternative issue to reach because I think,
7 particularly given the arguments that the
8 Government has advanced here, there is -- and if
9 this is the reach, I think there is a lot of
10 uncertainty created by it. And I think this
11 case is a very good vehicle to clarify that the
12 Government's position on the reach of the False
13 Claims Act is not correct.

14 So the important thing about this
15 issue -- and the reason I'm willing to bring it
16 up this late in the day and indulge you -- is,
17 Your Honor, what is left in front of you, the
18 Court, on this issue is incredibly narrow. So
19 recall we move for summary judgment. We made
20 two arguments. First, that the plain text of
21 the False Claims Act requires concealment or
22 improper avoidance. Improper implying some kind
23 of deceitful conduct. And second, on the record
24 here, there is no such evidence. And
25 critically, the Government only responded to the

1 first portion of our argument.

2 So what does that mean? It means that
3 if you agree that we have read the False Claims
4 Act correctly as applying to fraudulent conduct
5 adjacent to fraud, then we are entitled to
6 summary judgment on this ground.

7 Now, turning to the merits, the
8 Government advances the position -- and this is
9 page 86 of -- 78, rather, of the joint brief.
10 The Government advances the position that mere
11 avoidance of an obligation is enough to create
12 False Claims Act liability.

13 First and foremost, that position --
14 let me take this down. That position cannot be
15 squared with the text of the statute itself
16 because it effectively reads the word conceals
17 and improperly right out of the statute. So it
18 violates one of the most basic canons of
19 statutory interpretation, by failing to make
20 sense of all of the statutory language.

21 The second problem with the
22 Government's reading is it fails to read
23 improperly as informed by conceals. And this is
24 a well-known canon of construction, that you
25 read the words and the company they keep.

1 Noscitur a sociis. And the Supreme Court
2 reminded us of the importance of the canon last
3 term in the United -- in Fisher versus the
4 United States. What does this mean? It means
5 that improper has to imply something similar to
6 conceal. Some sort of deceit. Which is also
7 supported by Escobar, the notion that we assume
8 the False Claims Act absent congressional
9 directed to the contrary incorporates common law
10 limitations and elements of fraud.

11 The last problem with the Government's
12 position on the statute -- on the statute is it
13 is directly contrary to Escobar itself. Escobar
14 said that the False Claims Act is not a vehicle
15 for imposing treble damages and other penalties
16 for insignificant regulatory or contractual
17 violations. But that is precisely what the
18 Government position would capture here.

19 Now, the Government suggests that other
20 courts have endorsed their reading. But the
21 only case they cite that even gets close to
22 reaching the argument that we advance is Kane.
23 And I would suggest Kane should be rejected for
24 two very simple reasons. First and foremost,
25 Kane, the Southern District of New York opinion,

1 that is, it focused only on the word avoid and
2 never addressed the word conceal or improper.
3 So it never addressed the statutory text on
4 which our argument rests.

5 And second, Kane is pre-Escobar, which,
6 as I just explained, Kane would have swept in
7 just the kind of insignificant contractual
8 regulatory violations that Escobar says that the
9 False Claims Act does not reach.

10 And I would just close by saying
11 there's a very instructive opinion on joint
12 brief 75 from the Eighth Circuit, Olson versus
13 Fairview, which I think points the way to how to
14 read the statute. Now, the question in Olson
15 was, does Rule 9's heightened pleading standards
16 apply to the second prong of the reverse False
17 Claims Act? And the Court concluded yes. The
18 Government's only response to this case is in
19 footnote 25. And it says all it addressed was
20 pleading. Well, if the question is does Rule 9
21 apply, the thing that the Eighth Circuit had to
22 decide was, does the second prong of the reverse
23 False Claims Act, the one at issue, does that
24 encompass fraudulent activity? And what did the
25 Court conclude? It concluded that Rule 9

1 applied because improper avoidance or
2 concealment is a species of fraudulent conduct.
3 That that phrase, that that provision of the
4 reverse False Claims Act, was a required proof
5 of fraud, and thus applied the pleading
6 standard.

7 And the other thing that the Court goes
8 on to do is expressly reject the argument that
9 the Government has advanced today. The Court
10 said that punitive liability does not make sense
11 merely based on knowingly receiving an
12 overpayment.

13 And finally, this wasn't dicta. The
14 Court applied its holding and actually affirmed
15 the dismissal of the reverse False Claims Act in
16 that case because there was no evidence --
17 allegation of fraudulent conduct.

18 So respectfully, even if we didn't -- I
19 think Olson is very instructive on how to think
20 about the statute. I think -- even though I
21 recognize it is an alternative ground, given the
22 arguments that the Government is advancing, I
23 think the parties would benefit from clarity
24 from the Court that, in fact, just as the Court
25 has said in Escobar and other cases, that the

1 domain of the FCA is a subset of fraud and it
2 cannot be swept in by reading the words
3 concealment and improper out of a statute.
4 Given that the Government has no fallback
5 argument, has made no argument in this case that
6 we have, in fact, engaged in such conduct, we
7 believe we're entitled to summary judgment.

8 THE COURT: So let me just stop you for
9 a second. On the issue of the disclosures made
10 by United to CMS, you said -- you showed me one
11 letter. And you have referenced another
12 exhibit. I just want to understand what's in
13 the record. Like, are those disclosures in the
14 record? Or is that -- is that something you're
15 just telling me? Or can I find that somewhere?

16 ATTORNEY BAAK: No. Those disclosures
17 are in the record. They're exhibits to the
18 statements of facts. P-24, P-1D. The bids are
19 at D-25. Those are exhibit numbers, not record
20 cites. I'm looking at the statement of facts to
21 see if I have that handy. I don't know if we
22 put in the record, Your Honor, the email that we
23 sent every year. But it is materially identical
24 to the 2015 email, which I did show you and
25 which is in the record at Exhibit P-1D.

1 THE COURT: Got it.

2 ATTORNEY BAAK: And same for the bids.

3 So the language that you see at Exhibit D-25

4 would be included in all of the bids.

5 THE COURT: Okay. And I guess I just
6 want to make sure that I understand procedurally
7 what you're suggesting. You're saying that I
8 could sua sponte recommend granting summary
9 judgment to United on the materiality issue?

10 ATTORNEY BAAK: Well, I don't think it
11 would sua sponte because we did move on this
12 basis. And I think the record supports finding
13 of no materiality. But honestly, my focus
14 today, Your Honor, because I think it is much
15 cleaner for your purposes is the concealment and
16 deceit, which is the argument that we make in
17 our brief right before the common law claims.
18 And the reason I say it is more straightforward
19 is there you don't even have an argument from
20 the Government that there is a factual dispute.
21 So what you have is a disagreement about the
22 reading of the statute, that if we're right on
23 and they're wrong on is an alternative basis to
24 dismiss the False -- the False Claims Act count.

25 THE COURT: Thank you. I understand

1 that better. Thank you.

2 All right. All right. Okay. Anything
3 further from United?

4 No. Okay.

5 The United States -- oh, Mr. Havian,
6 did you wish to be heard?

7 ATTORNEY HAVIAN: Just on the last
8 point that Mr. Baak made, Your Honor, if I
9 might.

10 United's argument is that deception and
11 concealment is required for all false claims
12 cases because it is a fraud statute. As I
13 understand it, that's their argument. The
14 trouble is Congress went out of its way to say
15 specifically -- intent of fraud is not required
16 as one of the elements of knowledge. It is in
17 the -- it is in the -- it is in the definition
18 of knowingly that applies to the statute
19 throughout. And they say knowingly is
20 recklessness, put your head in the sand,
21 et cetera. But then Congress went out of its
22 way to say you don't have to prove intent to
23 defraud right there in the statute. And so the
24 trouble is if you require concealment or acts of
25 deception in every case, you have now completely

1 undercut Congress' very clearly expressed
2 intention not to require that kind of deception.
3 And, in fact, just the opposite. Congress said,
4 we think that people should be liable if they
5 just stick their head in the sand, and -- and
6 are deliberately not paying attention.

7 THE COURT: Are you saying that there
8 is no element of fraud to that second prong? Or
9 are you just saying you don't have to -- the
10 Government doesn't have to show that United
11 intended to commit a fraud? I mean, I guess you
12 could recklessly commit a fraud. And that's
13 what you're saying. I'm not quite following it.

14 ATTORNEY HAVIAN: So the argument that
15 United is making is every false claims case has
16 to show -- involve some sort of affirmative acts
17 of deceit. That's the phrase they used.

18 THE COURT: Yes.

19 ATTORNEY HAVIAN: Affirmative acts of
20 deceit. And yet, Congress said specific intent
21 to defraud is not required.

22 THE COURT: Those are two different
23 things, though; right?

24 ATTORNEY HAVIAN: They are. But when
25 would you have an affirmative act of concealment

1 that would not also reflect intent to defraud?
2 In every case that you have an affirmative act
3 of concealment, you can't even really even
4 postulate how that could happen unless --

5 THE COURT: I can't think of it right
6 now, but I think it is possible. They're not
7 identical conduct. Intent to defraud versus an
8 affirmative act of concealment could be
9 different things.

10 ATTORNEY HAVIAN: I agree they're
11 different, Your Honor. I actually think intent
12 to defraud is a subset. I think it is
13 broader -- I think that if you commit
14 affirmative acts -- if you commit affirmative
15 acts to conceal what you're doing, then that is
16 actually even -- that's going to sweep in or
17 rather keep out more cases than intent to
18 defraud will. So they're not identical. I
19 think that actually intent to defraud is an even
20 lower standard than affirmative acts of
21 deception. And that's what United is claiming
22 is required. And I'm just saying, that would be
23 very hard to square with Congress specifically
24 saying, you don't have to show intent to
25 defraud. And also, by the way, undercuts the

1 argument that the False Claims Act is a fraud
2 statute. All purpose fraud statute. Escobar
3 said it is a fraud statute except to the extent
4 that the statutory language is not consistent
5 with fraud, with common law fraud. And so I
6 don't see how -- I mean, what they postulate as
7 affirmative acts of deception, the mildest form
8 is destroying evidence. If you're destroying
9 evidence, that pretty clearly reflects an intent
10 to defraud.

11 THE COURT: Okay. Thank you.

12 ATTORNEY HAVIAN: So I just think it is
13 wildly intentioned with the statutory text and
14 Congress' intent in enacting that text.

15 Thank you, your Honor.

16 THE COURT: Thank you.

17 And, Ms. McMahon or Ms. Krieg, did you
18 want to comment?

19 ATTORNEY KRIEG: Could I say a couple
20 things, Your Honor, if you don't mind?

21 THE COURT: Sure.

22 ATTORNEY KRIEG: One is I just wanted
23 to address that when CMS did not finalize that
24 Medical Record Review Rule, they did put
25 something in the Federal Register that I just

1 wanted to point out. They noted that, "We
2 emphasize that our decision not to finalize this
3 regulatory proposal does not change CMS's
4 existing contractual requirement that MA
5 organizations must certify based on best
6 knowledge, information, or belief the accuracy,
7 completeness, and truthfulness of the risk
8 adjustment data that they submit to CMS.
9 Further, this decision does not change the
10 long-standing risk adjustment data requirement
11 that a diagnosis submitted to CMS by an MA
12 organization for payment purposes must be
13 supported by medical record documentation."

14 And, of course, that is exactly what
15 we're here today talking about. So I just
16 thought it would be important to point out that
17 CMS emphasized this in the Federal Register.

18 And I just also wanted to address that
19 2015 Steve Nelson email, which is part of the
20 statement of undisputed facts, as Mr. Baak
21 pointed out. In United's statement of
22 undisputed facts, which is D-51, they actually
23 wrote, "The cited portion of the email is
24 referring to United's decision to terminate its
25 claims verification program."

1 So they agreed that that is talking
2 about the claims verification program. So
3 that's agreed between the parties. And also
4 they talked about the bid language. And he read
5 it. And it does say that United decided to
6 cease one of its prior processes that identified
7 and deleted certain diagnosis codes through the
8 medical record review process. So on its face,
9 that language implies that there could be other
10 prior processes.

11 So United is asking us to infer
12 knowledge to CMS that is just not in the record.
13 And sitting here today, yes, we all know that
14 there is a blind chart review program that had
15 processes and procedures and instructed the
16 coders to find all of the supported codes. But
17 we have to look at what is in the record. And
18 what's in the record during the time period is
19 disputed. And there is just not evidence or at
20 least the evidence is disputed what CMS actually
21 knew about the blind chart review program.

22 And, again, for Escobar purposes, the
23 other factors win in favor of materiality. So
24 it is at least disputed whether materiality
25 weighs in favor -- or whether the factors weigh

1 in favor or against materiality. So summary
2 judgment is not appropriate, at least on
3 materiality basis.

4 Thank you.

5 ATTORNEY BAAK: Your Honor --

6 THE COURT: Yes.

7 ATTORNEY BAAK: -- if I may respond.

8 THE COURT: Well, I think I had offered
9 an opportunity for Ms. McMahon to comment.

10 ATTORNEY BAAK: Oh, sorry.

11 THE COURT: After that, I will hear
12 from you.

13 You're on mute. I'm sorry,
14 Ms. McMahon.

15 ATTORNEY McMAHON: I apologize. Sorry
16 about that.

17 Yes, I wanted to address Mr. Baak's
18 argument regarding the -- what he continued to
19 refer to as concealment and deceit. And I think
20 that's the -- their argument that there has to
21 be an affirmative act of deception. But for one
22 thing, Mr. Baak has urged you not to look at
23 the -- at the opinion in Kane in part because it
24 discusses improperly avoided as opposed to
25 concealing. But the prong the False Claims Act

1 that we are bringing this under clearly states
2 that a defendant is liable if they knowingly
3 conceal or knowingly and improperly avoid or
4 decrease an obligation. We are arguing that
5 United knowingly and improperly avoided an
6 obligation. And if we can prove that United
7 knowingly and improperly avoided an obligation
8 to pay CMS, then that is how we satisfy the
9 element -- the elements of this case. Those are
10 literally the only elements of the case. And --
11 and Kane -- so Kane -- and Kane was interpreting
12 exactly that language. Kane -- Kane was
13 interpreting a case that was brought under the
14 second prong of the reverse False Claims Act.
15 And so I would suggest, albeit it a Southern
16 District of New York case, it is highly relevant
17 to the decision that you would have to make
18 today if you are to engage in the argument that
19 Mr. Baak has asked you to. Because there are
20 not other courts who have interpreted it.
21 Mr. Baak has turned to courts interpreting other
22 languages and other provisions. But not this --
23 not the False Claims Act, and specifically the
24 second prong of the reverse False Claims Act.
25 And what Kane -- and it does not --

1 also Mr. Baak suggested that rights would --
2 rights out any -- any suggestion of wrongdoing.
3 But what Kane decided that knowingly and
4 improperly avoiding means is when an individual
5 is put on notice of a potential issue, they're
6 legally obligated to address it, and they do
7 nothing. Now, that is what we suggest is the
8 proper interpretation.

9 And besides the Kane court -- I think
10 he said nobody else has ever discussed it. But
11 the Sutter court also adopted that. The Sutter
12 court relied on Kane in concluding that there
13 was a sufficiently pled complaint if -- if there
14 are allegations that a defendant was put on
15 notice, was legally obligated to address it, and
16 did nothing.

17 And that is exactly what our evidence
18 shows. We -- we put forth evidence and we --
19 the case that we intend to prove is that United
20 was put on notice of the unsupported codes when
21 its chart review coders did not find support for
22 them. That was putting them on notice. That
23 they were legally obligated to address that
24 because of the obligations set forth in their
25 contractual -- in their contracts, in their

1 regulatory obligations that we talked about a
2 lot in our brief, as well as the retaining of an
3 overpayment under the Affordable Care Act.

4 And so we also think that reading the
5 statute the way that United has suggested you
6 read it as the Kane court -- as the Kane court
7 suggested it would, it leads to observed
8 results. And I think Mr. Havian was -- was
9 recognizing this as well. It would allow
10 Defendants to never address what they -- what
11 they choose not to and never figure out whether
12 there is indeed an overpayment or whether the --
13 whether the codes are unsupported, and move on
14 and never address their -- their -- the results
15 of their actions. And so we would suggest that
16 that is an improper reading that would indeed
17 lead to an observed result.

18 We urge the Court to -- rather than
19 disregard, but to pay heed to the Kane opinion
20 because it goes through -- it's a -- it's a
21 fairly lengthy analysis of what these words mean
22 and how they should be interpreted in the very
23 context that we are talking about today.

24 And the last thing that I would like to
25 bring to your attention -- I know I'm now sort

1 of getting back to something that happened
2 really earlier. It's -- it's just a bit of
3 housekeeping. But I think when Mr. Meron first
4 addressed what I had said about the CV pipeline
5 deletes, I believe he indicated that the
6 Government did not mention those in opposing the
7 statement of facts. And that is actually
8 something that they -- those CV pipeline deletes
9 are addressed in the statement of facts that
10 support the -- this briefing today. And I think
11 you can look at D-237, where we -- where we did
12 include an excerpt of those -- of those deletes;
13 and P-87, which is an excerpt of the codes; and
14 P-89, which is a letter which describes the
15 pipeline deletes. Also, the overlap between the
16 CV pipeline deletes is raised by United in
17 D-241. And there is, as far as evidence goes,
18 the Bates numbers for all of the CV pipeline
19 deletes are referenced in the United States
20 first interrogatory response, which is D-11A.
21 And that's where Dr. Garthwaite quantifies them
22 in his report, which is D-59.

23 THE COURT: Thank you.

24 All right. Mr. Baak?

25 ATTORNEY BAAK: Your Honor, I'm going

1 to have my colleague Mr. Meron address the CV
2 pipeline deletes and I think explain why the
3 argument is plainly waived in the briefs
4 themselves.

5 I just want to make sure that we're not
6 conflating things because there seems to be
7 confusion. I'm focused narrowly on the argument
8 that we are entitled to summary judgment because
9 they have failed to offer or prove that we
10 either concealed or improperly avoided our
11 obligation. Right?

12 So first, to be clear, I heard no
13 disagreement with my framing of the issue from
14 the other side because there cannot be because I
15 described it correctly. There is no argument in
16 any brief at any point that we actually engaged
17 in such concealment or improper avoidance. So
18 we made, remember, two arguments. One on the
19 facts, one on the law. So all we're left with
20 is, are we reading the statute correctly?

21 And to Mr. Havian's point, we are not
22 asking you to contradict other portions of the
23 False Claims Act that says specific intent to
24 defraud is not required. But they have to
25 offer, the Government and the Relaters, have to

1 offer a reading of the second prong that makes
2 all of the words make sense. And they don't
3 have one. Instead, they have suggested -- and
4 they say it in their brief -- that mere
5 avoidance is enough. And contrary to
6 Ms. McMahon, I'm not suggesting concealment is
7 required. Concealment or improper avoidance are
8 basic canons of statutory interpretation.
9 Improper is read in light of concealment. Some
10 concept of deceitful conduct consistent with the
11 very purpose of codifying common law fraud,
12 which the FCA does.

13 Just briefly on the cases. I wouldn't
14 say that we're asking you to ignore Kane, Your
15 Honor. I think if you read it, you will see
16 that it does not actually address the statutory
17 text that we are advancing. And so any opinion
18 that does not try to make sense of the plain
19 language of the text cannot be right. It fails
20 at stop one. The Supreme Court has said over
21 and over again that is the starting point for
22 statutory interpretation.

23 In terms of the provision that
24 Ms. McMahon just relied on, that had nothing to
25 do with the argument that we're advancing. It

1 was in a different section of the opinion
2 discussing the meaning of the word identified
3 under the overpayment statute. The Court's
4 discussion of this argument, concealment or
5 improper avoidance, never explained what the
6 word conceal means. It never explained what the
7 word improper means. So I would suggest if you
8 focus on the portion of the opinion that we are
9 discussing as relevant here, the Court's opinion
10 simply did not meet the test of doing sense of
11 the statutory text.

12 The Sutter case, which I also heard
13 reliance on, never reaches this issue. It --
14 the entire citation of Sutter is a citation back
15 to Kane. The discussion of the completely
16 distinct issue, about what the word identified
17 means under the overpayment statute. Again,
18 this is not a great leap of faith.

19 And contrary to the Government's
20 position, we do have a reverse False Claims Act
21 case that supports us. It is the Eighth Circuit
22 case. That involved the very prong of the
23 reverse False Claims Act that we're proceeding
24 under. And it expressly rejects the notion that
25 mere avoidance is enough.

1 We would ask that you re- -- that you
2 adopt the similar reasoning given that there's a
3 factual concession by the Government that there
4 is no evidence of concealment or to say that
5 they have not argued otherwise. If you agree
6 with us -- and I would respectfully submit, we
7 are the only party who has tried to give life to
8 all the terms in the text. Conceal and
9 improperly avoids. If you agree with us on the
10 text, we are entitled to summary judgment.

11 I would like to hand it over to
12 Mr. Meron if there are no further questions.

13 THE COURT: Thank you.

14 ATTORNEY MERON: Very quickly, Judge.
15 You've been very indulgent. I appreciate that.

16 On the question of the housekeeping
17 matter that Ms. McMahon mentioned, CV in-process
18 deletes are never mentioned in the Government's
19 brief as an evidence suggest proving that the
20 codes are unsupported. That's not an argument
21 that was ever made in the briefs. And the
22 scattershot references to the CV in-process
23 deletes in the statement of undisputed facts
24 that were mentioned, none of those are about
25 that issue. It is in the context of materiality

1 or the discussion with CMS. For example, which
2 is what D-237 is about. So this argument has
3 been waived.

4 Secondly, Your Honor asked whether the
5 line coders who coded the charts blind were
6 listed in the Government's disclosures. And the
7 answer is no. In the second amended disclosure,
8 the latest one, January 7th, 2022, there is no
9 disclosure of any of the line attorneys -- line
10 coders who coded any of these charts. And none
11 of them were deposed.

12 So that's it, Your Honor. I do want
13 to -- I feel I would be remiss if I didn't
14 acknowledge -- obviously there are difficult
15 circumstances in Los Angeles now. And we really
16 appreciate Your Honor proceeding with the
17 argument in the face of everything that is going
18 on in Los Angeles. So thank you for that.

19 THE COURT: Thank you very much.

20 All right. Anything else from anyone
21 on the -- on the Zoom? Any other comments?

22 All right. Well, I just want to take
23 an opportunity to express my gratitude to the
24 lawyers for the United States and Mr. Havian,
25 the lawyers on behalf of United. It's really an

1 honor and a treat to work with such talented
2 people. And thank you for doing such a great
3 job today of educating me. And I have a lot to
4 think about. So I'm going to take everything
5 that the parties have brought to my attention
6 and do some -- some deep thinking about it.

7 I wanted to ask our court reporter,
8 what kind of timeline do you think for turning
9 something around?

10 THE REPORTER: Eight business days is
11 normal turnaround. But it can be sooner if you
12 need it sooner.

13 THE COURT: Well, what are the parties'
14 views on that?

15 ATTORNEY McMAHON: We -- I think we
16 would defer to Your Honor. If you would like it
17 quicker.

18 THE COURT: I would like it as soon as
19 possible. I really would.

20 ATTORNEY BAAK: We're happy to pay for
21 it to be expedited, Your Honor.

22 THE COURT: Thank you.

23 I would like it to be expedited then.
24 And the parties are covering the costs of this
25 matter. And if I could get an expedited copy, I

1 would really be grateful.

2 THE REPORTER: Is tomorrow afternoon
3 okay?

4 THE COURT: That would be great. Thank
5 you.

6 ATTORNEY McMAHON: And we would simply
7 ask that the parties be given copies at the same
8 time as the Special Master.

9 THE REPORTER: Okay.

10 ATTORNEY McMAHON: And, of course,
11 we -- you can just charge us for it. That's how
12 it works.

13 THE COURT: All right. With that, I
14 think we are done. Again, many thanks to all of
15 you.

16 (Proceedings concluded at 2:47 p.m.)

17 -oOo-

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1 CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

2

3 State of California)
) ss.

4 County of Riverside)

5

6 I, Brooke Silvas, hereby certify that I
7 am a Certified Shorthand Reporter and that I
8 recorded verbatim in stenographic writing the
9 proceedings held on January 15, 2025, in the
10 matter of UNITED STATES OF AMERICA, EX REL.,
11 BENJAMIN POEHLING v. UNITEDHEALTH GROUP, INC.,
12 ET AL., and that the foregoing is a true and
13 accurate transcript of the proceedings as
14 reported by me stenographically, to the best of
15 my ability;

16 I further certify that I am neither
17 counsel for nor related to nor employed by any
18 of the parties to this case and have no
19 interest, financial or otherwise, in its
20 outcome.

21

22 Dated: January 16, 2025

23

24



Brooke Silvas, CSR

25

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