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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

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

Plaintiff,

v.

UNITEDHEALTH GROUP, INC. *et al.*,

Defendants.

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

**UNITED'S REPLY IN SUPPORT OF
MOTION TO STRIKE PORTIONS OF
PLAINTIFF'S REPLY IN SUPPORT
OF MOTION FOR REVIEW OF
SPECIAL MASTER'S REPORT AND
RECOMMENDATION**

Hon. Fernando M. Olguin

Hearing Date: July 3, 2025

Hearing Time: 10:00 a.m.

Courtroom: 350 W. First Street

Courtroom 6D, Los Angeles,
CA 90012

INTRODUCTION

DOJ's opposition offers no defense of its failure to comply with this Court's rules. *See* Dkt. 654. It fails to identify any place in its summary judgment briefing where it argued that, even if its theory that all 28 million diagnosis codes are unsupported could not survive summary judgment, its case should still proceed to trial on three discrete subsets of codes. It does not dispute—or even address—that it expressly disavowed any such fallback theory at the hearing before the Special Master. Nor does it dispute—or even address—whether its new argument violates this Court's standing order on summary judgment briefs and its order on motions for review. At bottom, DOJ offers no justification whatsoever for why it should be able to proceed with a new argument that indisputably violates this Court's rules and basic principles of procedural fairness.

DOJ's attempt to recast its new argument as something other than a “fallback” position is incoherent and unpersuasive. DOJ offers no explanation for why it highlighted these subsets of diagnosis codes if they were not to serve as a fallback position on which summary judgment could be avoided. There are two possibilities. DOJ's reply either asks the Court to allow these subsets to survive summary judgment even if its categorical theory fails, or it does not. If it does, then DOJ is asserting a new argument in the alternative—a fallback position—that was never properly raised, was expressly disavowed, and violates this Court's rules. If DOJ is not asking the Court to deny summary judgment as to these discrete sets of codes, then the discussion is *irrelevant* to DOJ's motion for review. If DOJ is not advancing a fallback argument, then its case can survive summary judgment only if a reasonable jury could find in its favor that *all* of the *millions* of codes at issue are unsupported, and these subsets by definition cannot make any difference. Either way, the argument should be stricken.

DOJ's various other efforts to muddy the water all fail. The issue presented by United's motion to strike is straightforward: The fallback theory in DOJ's reply violates this Court's rules and is waived. The Court should strike the new argument and the portions of DOJ's reply brief that rely on it.

ARGUMENT

I. DOJ Has No Defense for Its Violation of This Court’s Rules and Basic Principles of Procedural Fairness

DOJ’s opposition never grapples with the core problem: its reply brief blatantly violates this Court’s rules. United’s motion was grounded in this Court’s procedural orders governing summary judgment and motions for review—yet DOJ’s opposition does not even mention them. It ignores the Court’s standing order requiring parties to present their summary judgment arguments—with issue-by-issue responses—in a single, coordinated joint brief. *See* Dkt. 365. And it disregards the Court’s directive that “[t]he parties shall not include—and the court will not consider—any evidence, argument, or authority that was not presented to the Special Master.” Dkt. 633 at 1 (emphasis in original); *see* Dkt. 395 at 8 (similar). DOJ never even attempts to argue that it complied with these rules. That alone is dispositive and requires striking the offending portions of DOJ’s reply brief.¹

DOJ cannot identify any portion of the summary judgment briefing where it argued that these three subsets of diagnosis codes could survive summary judgment even if its categorical theory fails. It cites no page where it argued for a fallback argument based on second-level review, claims verification deletes, or codes not reported by other providers. DOJ instead provides only scattered references to evidence it cited in the background section of its brief or in support of its theory that *all* of the 28 million codes were

¹ DOJ suggests that United’s motion is procedurally improper because a motion to strike under Rule 12(f) applies only to pleadings. Dkt. 654 at 2 & n.1. But United’s motion is not based on Rule 12(f). It is based on this Court’s inherent authority to enforce its own procedural orders. *Ready Transp. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) (district court may grant a “motion to strike pursuant to its inherent powers”). Courts routinely strike or disregard improperly filed documents on this basis. *See, e.g., Bolooki v. Honda Motor Co. (In re Honda Idle Stop Litig.)*, No. 2:22-cv-04252, 2024 WL 4404067, at *2 (C.D. Cal. July 30, 2024); *Gomez v. Am. Med. Sys. Inc.*, No. 20-cv-00393, 2020 WL 7310586, at *4 (D. Ariz. Dec. 11, 2020). DOJ’s footnote does not address that body of authority or engage with the actual grounds of United’s motion—failing to cite even once this Court’s rules.

1 unsupported. None of this evidence was used to support an alternative fallback theory.²

2 Nor did DOJ ever explain in its summary judgment briefs how these categories
3 could survive summary judgment on their own, in the absence of DOJ's categorical theory.
4 It has never articulated a viable method for how a jury could assess which diagnosis codes
5 in its subsets were unsupported and which led to overpayments. DOJ expressly concedes
6 that at least one of the subsets has never been quantified, which means DOJ has no record
7 evidence that would allow a jury to impose liability based on this subset that would not be
8 simply a wholly speculative guess. Dkt. 654 at 9 & n.2 ("United is correct that no expert
9 has calculated the number of codes that would fall in this category."). Any theory of
10 liability based on any of these subsets would thus suffer from the same fatal flaw as DOJ's
11 wholly speculative theory that all 28 million codes are unsupported, which is presumably
12 why DOJ deliberately chose not to argue for an alternative fallback theory based on these
13 subsets in its summary judgment briefing.

14 DOJ repeats throughout its opposition that it "is not raising 'new evidence.'" Dkt.
15 654 at 3; *id.* at 10 ("not 'new' evidence"); *id.* at 10 & n.3 ("United States has not offered
16 new evidence in its reply brief"). But United's motion to strike identified multiple *specific*
17 *citations* from DOJ's reply brief that appear nowhere in DOJ's prior briefing. *See* Dkt.
18 650-1 at 6 & n.1 (identifying citation from DOJ reply brief that was "entirely new and was
19 never presented to the Special Master: D-57, Garthwaite (US Expert) Rep. (Sept. 29, 2023)
20 at 1481"); *id.* at 8 & n.2 ("DOJ never cited in its summary judgment briefing the
21 spreadsheet on which it now relies: P-87 at 5017-18 (excerpt of a spreadsheet of DOS
22 2012 cancelled deletes)."). DOJ's opposition ignores all of these instances.

23 Even more fundamentally, DOJ never made the new fallback *argument* it now
24

25 ² DOJ does not dispute that it never mentioned two of these subsets—codes from claims
26 verification and codes involving another provider the same year—in its summary
27 judgment briefing as part of any argument that the codes were unsupported and resulted
28 in overpayments. Dkt. 650-1 at 7-8. As to the third subset—review by two United coders—
DOJ does not dispute that the only place it referenced this subset in its summary judgment
brief was in support of its categorical argument that all 28 million codes were unsupported.
Id. at 6.

1 advances in its reply brief. To obscure its failure, DOJ repeatedly asserts the evidence
2 *exists* somewhere in the “record.” Dkt. 654 at 2 (“pointing out this record evidence”); *id.*
3 (“This contention is belied by the record in this case.”); *id.* at 3 (“there is ample and
4 powerful evidence in the record”); *id.* (“All of this evidence . . . was *in the record*
5 presented to the Special Master.”) (emphasis added); *id.* at 7 (“[I]f the jury is inclined to
6 find for the government for some but not all of the 1.97 million codes the government
7 contends were unsupported, *there is evidence in the record* that would allow them to do
8 so.”) (emphasis added). Of course, the presence or absence of record evidence says nothing
9 about whether DOJ presented the fallback argument it now advances in its reply (it never
10 did). Nor is it sufficient for DOJ to retrospectively identify various citations in this
11 enormous evidentiary record. “Judges are not like pigs, hunting for truffles buried in [the
12 record].” *Brown v. Dash*, No. 20-cv-10676, 2021 WL 4899021, at *1 & n.2 (C.D. Cal.
13 Sept. 29, 2021) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per
14 curiam)). DOJ made a deliberate decision not to advance any alternative argument about
15 specific subsets of diagnosis codes in its summary judgment opposition, even after United
16 argued in its motion that DOJ had presented no reliable way for a jury to find that at least
17 a portion of the diagnoses (less than 100%) was unsupported. That theory is therefore not
18 only barred by this Court’s rules but clearly waived. *See Move, Inc. v. Real Estate Alliance*
19 *Ltd.*, No. 07-cv-2185, 2016 WL 9080238, at *2 (C.D. Cal. Apr. 25, 2016) (counterclaim-
20 plaintiff waived argument when it “chose not to address this issue in its [summary
21 judgment] opposition, even as an alternative theory”); *id.* at *5 (“[counterclaim-plaintiff]
22 cites no authority, and we have found none, that permits a party to ignore a challenge
23 presented on a summary judgment motion just because it chose to keep it as a backup
24 argument”).

25 DOJ also relies on a handful of transcript excerpts from the hearing before the
26 Special Master, but it does not address the basic legal problem that raising an argument
27 for the first time at a hearing is too late. *See, e.g., Rice Corp. v. Grain Bd. of Iraq*, 582 F.
28 Supp. 2d 1309, 1313 (E.D. Cal. 2008) (declining to consider an argument because it was

1 “raised for the first time at oral argument” (citation omitted)); *Ramirez v. Salvation Army*,
2 No. C06-0631, 2006 WL 1867722, at *9 (N.D. Cal. July 6, 2006) (similar); *see also* Dkt.
3 631 at 23 (collecting cases). Further, arguments raised for the first time at the hearing
4 violate this Court’s summary judgment rules, which required DOJ to present all arguments
5 in the joint brief. Dkt. 365. Following those rules would have allowed United to address
6 DOJ’s theory and evidence in its supplemental brief and the Special Master to consider
7 the argument in the R&R. DOJ does not even attempt to defend its failure to comply with
8 those rules.

9 Even with respect to the hearing, DOJ ignores the central point United made in its
10 motion to strike. *See* Dkt. 650-1 at 4-5, 8, 10. The Special Master directly asked DOJ
11 whether it was advancing a categorical theory that all 28 million codes were unsupported
12 or also an alternative theory that some smaller percentage of codes were unsupported: “So
13 let me make sure that I understand. All 28 million are incorrect or just a percentage?” Hr’g
14 Tr. 10:20-22. DOJ responded by expressly *disavowing* a smaller subset alternative theory:
15 “No. We are not alleging any type of percentage.” *Id.* at 10:23-24. It made that position
16 clear throughout the hearing. *See* Dkt. 650-1 at 4-5, 8 (collecting citations). United
17 emphasized this disavowal in its motion to strike, and DOJ has not responded at all. DOJ
18 does not deny the statement, does not explain it away, and does not address the transcript
19 passages United cited—each of which reflects DOJ’s consistent insistence that its theory
20 applied equally across all 28 million codes. DOJ thus concedes its disavowal and should
21 be held to that concession.

22 DOJ’s reliance on a statement by *relator* at the hearing is an ultimate Hail Mary act
23 of desperation. *See* Dkt. 654 at 8. First, even if relator advanced the fallback theory at the
24 hearing, that argument still would have come too late under basic waiver principles and in
25 direct violation of this Court’s rules because it was not raised in the briefs. *See supra* at 4-
26 5. Second, DOJ—not the relator—is responsible for “conduct[ing]” the action and
27 defining its litigation position after intervention. 31 U.S.C. § 3730(b)(4)(A) (upon
28 intervention “the action shall be conducted by the Government”); *United States ex rel.*

1 *Eisenstein v. City of New York*, 556 U.S. 928, 932 (2009) (“If the United States intervenes
2 . . . the United States acquires the ‘primary responsibility for prosecuting the action.’”). In
3 a case in which DOJ has intervened, a relator—who is not even a signatory on the summary
4 judgment briefs—cannot resurrect an argument that DOJ expressly disavowed.

5 DOJ argues that it was not required to “slice and dice” its claims and advance
6 arguments for why “only certain subsets of claims should survive summary judgment.”
7 Dkt. 654 at 6. DOJ did not have to argue that *only* certain subsets of claims survived
8 summary judgment. It was, of course, free to argue that there was sufficient evidence for
9 a reasonable jury to find that all the codes were unsupported. But *if* it wanted to preserve
10 an alternative argument that *at least* these subsets of codes could survive summary
11 judgment even if the broader set did not, it was required to expressly make that argument
12 and point to evidence in the record showing why those particular codes were allegedly
13 unsupported. The Court’s procedural orders required DOJ to present its legal theories in
14 the joint summary judgment brief, supported by specific evidence. *See* Dkt. 365. That
15 obligation exists for good reason: it ensures the parties have a full and fair opportunity to
16 test each other’s arguments and point to relevant evidence, during the summary judgment
17 briefing, and it thus allows the Special Master to evaluate the evidence in a structured,
18 adversarial posture. Had DOJ advanced its fallback arguments before the Special Master,
19 United would have had the opportunity to respond on the merits in its supplemental brief
20 in support of summary judgment (and its reply to DOJ’s statement of facts in dispute),
21 testing DOJ’s evidence and its framing of each subset. And the Special Master could then
22 have considered that record and addressed it. None of that happened, and it is far too late
23 to undo that now. That breakdown in process is exactly why this Court’s rules on issue-
24 presentation matter.

25 **II. DOJ’s Refusal to Label Its New Theory a “Fallback” Cannot Save It**

26 DOJ’s opposition insists that its reply brief did not raise a “fallback” theory. Dkt.
27 654 at 2 (“The United States is not . . . relying on new theories of liability as some sort of
28 ‘fallback.’”); *id.* at 7 (“This is not a ‘fallback’ position....”); *see also id.* at 9 & n.2. But of

1 course it did. As explained, DOJ's sole theory throughout this litigation was that every
2 single one of the millions of doctor-submitted codes not identified by a blinded United
3 chart reviewer are unsupported. Dkt. 650-1 at 3-5. Any argument that DOJ could survive
4 summary judgment on at least a subset of these codes, even if DOJ lacked sufficient
5 evidence to support its categorical theory, is a fallback argument in substance—whatever
6 label DOJ prefers. In any event, the distinction makes no difference. Either way, the
7 relevant portions should be stricken.

8 If DOJ is pressing a fallback theory—arguing that some smaller category of codes
9 could support liability even if the broader theory fails—then that argument is new,
10 violating this Court's rules and basic principles of fairness, for the reasons set forth above.

11 If DOJ is not pressing such a theory, then the reply's discussion of these subsets is
12 irrelevant. It cannot affect the outcome of the motion for review. If DOJ is not advancing
13 a fallback argument but only speculating about what a jury might do at trial, then DOJ's
14 case rises or falls on its categorical theory: that all 28 million codes were unsupported.
15 That is the theory it presented in its summary judgment briefing, and the one the Special
16 Master evaluated. *See* R&R 21, 24. Because DOJ's discussion of the smaller categories of
17 codes cannot buttress its claim that *all* 28 million codes are unsupported, it does not bear
18 on the sole theory of liability that is properly before the Court. In other words, if DOJ is
19 not offering the subset discussion as an alternative basis to survive summary judgment in
20 part, then it has no legal significance and should be stricken on that basis.

21 Either way, the Court should grant United's motion to strike this portion of DOJ's
22 reply brief. It is either an improper new theory or a legally meaningless diversion meant
23 to confuse the record on appeal that has no bearing on the issues the Special Master
24 addressed or the Court must now resolve.

25 **III. DOJ's Reframing Attempts Cannot Salvage Its Reply**

26 Implicitly acknowledging that it never presented this argument in its summary
27 judgment briefing, DOJ desperately claims that its reply brief was merely a response to
28 United's "all-or-nothing" framing in United's opposition to DOJ's motion for review. Dkt.

654 at 10. That is baseless. United’s opening summary judgment brief recounted DOJ’s categorical theory the same way. *See* Dkt. 650-1 at 3-5 (detailing DOJ’s longstanding categorical position). DOJ itself acknowledges that United characterized its position that way in United’s supplemental summary judgment brief. Dkt. 654 at 8, 10. If DOJ disagreed with United’s characterization of DOJ’s position, it should have raised that in its summary judgment opposition or, at the very least, in its opening motion for review. It did neither. United’s opposition to the motion for review merely pointed out the indisputable fact that DOJ had expressly disavowed any fallback theory. Identifying DOJ’s disavowal and waiver does not open the door for DOJ to somehow undo that disavowal in its reply brief.³

DOJ tries to frame its reply as invoking a basic jury function—suggesting that it is merely asking the Court to allow a jury to weigh the full evidence in the record and decide which codes were unsupported. *See* Dkt. 654 at 7. But the case is not before a jury, it is before the court at summary judgment. The question is whether DOJ has presented sufficient evidence from which a reasonable jury could conclude that all the codes were unsupported—which is the only theory of liability that DOJ pursued throughout this case and briefed on summary judgment—to permit the case to proceed to a jury trial in the first place. *See* Dkt. 631 at 12-13. And as the Special Master explained, it has not.

DOJ also attempts to run from the 28 million codes it claims are unsupported,

³ DOJ is plainly wrong in claiming that the Special Master “did not adopt” this framing of the case. Dkt. 654 at 8. The R&R expressly concluded that “a jury could not reasonably conclude that any, *much less every*, diagnosis code certified by a medical provider and submitted by United to CMS but not identified by United’s coders in chart review is *necessarily invalid*.” R&R at 24 (emphasis added); *see also id.* at 21 (“The government has not, however, presented evidence from which a jury could reasonably conclude that in any particular instance of a discrepancy, much less in every instance, the code United *initially* submitted was invalid. The government’s theory assumes that United’s coders were always perfect in their coding and did not miss any codes supported by a beneficiary’s medical records.” (emphasis in original)). Each of these instances addressed and explained why no reasonable jury could find that all of the codes were unsupported, which the Special Master correctly understood to be the only theory of liability presented. DOJ thus has no excuse for not raising its fallback argument in its opening brief in support of its motion for review, even if were not otherwise too late since it was not included in its summary judgment briefing.

1 asserting that 1.97 million is really the number of codes at issue, because that is the number
2 of codes it alleges resulted in overpayments. *See* Dkt. 654 at 1, 3-4. That argument holds
3 no water. DOJ's theory of the case has always been that *all 28 million codes* that doctors
4 submitted but that United's coders conducting blind review did not independently identify
5 are unsupported. Dkt. 623 at 7-8. In arriving at the 1.97 million figure, Dr. Garthwaite
6 simply narrowed down the set of allegedly unsupported codes to those he claimed
7 impacted United's payment. *See* Dkt. 631 at 22 (Special Master noting that "Dr.
8 Garthwaite . . . disclaimed that he had, or would express at trial, any opinion as to the rate
9 at which the doctors' diagnosis codes were unsupported by patient medical records, but
10 merely assumed that every diagnosis previously certified by a doctor but not separately
11 identified by a United coder was invalid."). DOJ has no separate basis for arguing that all
12 1.97 million codes are unsupported if its foundational claim that the 28 million codes are
13 unsupported lacks a sufficient evidentiary basis. Since DOJ's foundational theory fails—
14 because no reasonable jury could find that all 28 million codes (or anything close to that
15 number) were unsupported—the 1.97 million figure collapses along with it.

16 CONCLUSION

17 For the foregoing reasons, as well as those set forth in United's brief in support of
18 its motion to strike, the Court should strike page 4:20 through page 6:9 of DOJ's reply
19 brief in support of its motion for review of the Special Master's R&R.

20
21 Dated: June 18, 2025

Respectfully submitted,

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19 **CERTIFICATE OF COMPLIANCE**

20 The undersigned, counsel of record for Defendants, hereby certifies that this Reply
21 in support of Motion to Strike Portions of Plaintiff's Reply in Support of Motion for
22 Review of Special Master's Report and Recommendation contains 3,519 words, which
23 complies with the word limit of L.R. 11-6.1.

24 Dated: June 18, 2025

25 /s/ David J. Schindler

26 David J. Schindler