

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
3 WESTERN DIVISION

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5 HONORABLE FERNANDO M. OLGUIN, DISTRICT JUDGE PRESIDING

6
7 UNITED STATES OF AMERICA,)
8 Plaintiffs,)
9)
10 vs.) No. CV 16-8697-FMO
11)
12 UNITED HEALTH GROUP, INC, et)
13 al.,)
14 Defendants.)
15

16 REPORTER'S TRANSCRIPT OF PROCEEDINGS

17 *PLAINTIFF'S MOTION FOR REVIEW OF SPECIAL MASTER'S REPORT*
18 *and RECOMMENDATION [636]*

19 LOS ANGELES, CALIFORNIA

20 WEDNESDAY, NOVEMBER 19, 2025

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I N D E X

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<i>PLAINTIFF'S MOTION FOR REVIEW OF SPECIAL MASTER'S REPORT and</i> <i>RECOMMENDATION [636]:</i>	5

1 LOS ANGELES, CALIFORNIA; WEDNESDAY, NOVEMBER 19, 2025

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3 (COURT IN SESSION AT 2:07 P.M.)

4 THE COURTROOM DEPUTY: Calling item number one,
5 CV 16-8697-FMO: United States of America, et al. v.
6 United Health Group, Inc.

7 Will counsel, please make their appearances.

8 THE COURT: You can stand where you're at, but
9 if all of you get up and walk up there, we'll be here
10 all day.

11 Go ahead.

12 MR. LaSCALA: Good afternoon, Your Honor.
13 Assistant United States Paul LaScala on behalf of the
14 United States of America.

15 THE COURT: Okay.

16 MS. ZUPAC: Good afternoon, Your Honor.
17 Wendy Zupac on behalf of the Department of Justice.

18 THE COURT: Okay.

19 MS. McMAHON: Good afternoon, Your Honor.
20 Linda McMahon on behalf of the Department of Justice, as
21 well.

22 MR. HASEGAWA: Good afternoon, Your Honor.
23 Steve Hasegawa of Phillips and Cohen on behalf of the
24 relator.

25 THE COURT: Okay.

1 MR. HAVIAN: Good afternoon, Your Honor.
2 Eric Havian on behalf of Whistleblower Partners on
3 behalf of the relator, Benjamin Poehling.

4 MR. MERON: Good morning, Your Honor.
5 Daniel Meron from Latham and Watkins on behalf of
6 defendants United Healthcare.

7 THE COURT: Okay.

8 MR. SCHINDLER: Good afternoon, Your Honor.
9 David Schindler, Latham and Watkins on behalf of
10 defendants, as well.

11 THE COURT: Okay.

12 MR BAAK: Good afternoon. Andy Baak from
13 Bartlit Beck, also on behalf of the defendants.

14 MR. JONES: Good afternoon, Your Honor.
15 Jameson Jones from Bartlit Beck, also on behalf of the
16 defendants.

17 THE COURT: Okay. I think I'd like to start by
18 just hearing -- let's start with the motion to strike.
19 And so why don't I have defendants get started since
20 it's your motion.

21 And just for purposes of today, there is no
22 need to really repeat too much what's in your briefs.
23 Just elaborate and make your major points, and then
24 we'll go from there.

25 Go ahead. Yes?

1 MR. MERON: Thank you, Your Honor.

2 The -- in terms of the motion to strike, the
3 Government throughout this case -- and literally from
4 the first interrogatory response through discovery
5 through the summary judgment briefing has advanced one
6 theory of liability here. And that is that every single
7 time a United coder did not identify a diagnosis code,
8 while coding blindly that a doctor had previously
9 submitted. That meant that the code was unsupported and
10 United had an obligation to delete it. And it
11 identified roughly 28,000,000 such instances in response
12 to its first interrogatory response. And that is the
13 argument in advance throughout this case, including at
14 the hearing before Judge Segal when she specifically
15 asked them, "I want to make sure I understand your
16 position. Are you saying all 28,000,000 are
17 unsupported? Are you saying some percentage? Some
18 subset? And they said "No, we're not arguing for a
19 subset. We're arguing for all \$28,000,000." And that's
20 how the parties briefed the summary judgment briefing.
21 And that's the only arguments that were made in the
22 summary judgment briefs. And for the first time in
23 reply in support of the motion for review -- on the
24 reply brief, for the first time they suggested as we
25 read it -- although, they appear somewhat to disavow it,

1 but they were potentially advancing a fallback argument,
2 under which if Your Honor agreed with Judge Segal that
3 there was insufficient evidence on which a rational jury
4 could conclude that all 28,000,000 codes are
5 unsupported; nevertheless, there were three subsets of
6 codes that -- that they should survive summary judgment
7 and go -- and be able to go to the jury on. We move to
8 strike, because those three, there was -- those -- there
9 was never an argument in the summary judgment brief with
10 respect to those three. With respect to one of the
11 sets, there wasn't even evidence, which is a set of
12 codes that they're identifying which they were
13 describing, I should say, in which a -- in addition to
14 the United coder not identifying the code, the patient
15 had seen another doctor, other than the one whose chart
16 was reviewed, and that doctor had also not submitted the
17 code. The Government admits in a footnote in its
18 opposition to our motion to strike that one has ever
19 even quantified that -- that set. The jury would have
20 no idea what universe you're talking about there. That
21 one is very easy.

22 The second set of codes that they pointed to
23 are a set of codes relating to a process United had for
24 a period of time called "claims verification." The word
25 "claim verification" or "CV," either one, does not

1 appear a single time in the argument section of the
2 Government's brief relating to overpayment. Not one
3 time. It's -- the only time it's addressed in the
4 summary judgment briefing is in support of different
5 arguments: obligation and materiality.

6 There was one reference at the hearing to
7 claims verification by the Department of Justice.
8 Arguments cannot be made for the first time at a hearing
9 that weren't made in the briefs. So we don't think
10 that's relevant. But in any event, the reference made
11 in support -- the reference to CV that was made -- the
12 claims verification that was made, the hearing was
13 simply -- it was argument as to -- additional argument
14 as as to why it believed there was sufficient evidence
15 that all 28,000,000 codes were supported -- or
16 unsupported that basically said that the claims
17 verification process that United had served as a proxy
18 for their failure to review medical charts in this case
19 or to have an expert review.

20 And the third category that they point to in
21 the -- and that we move to strike is a set of codes that
22 went through what's known as second-level review, which
23 means a second United coder also blind, not knowing what
24 either the doctor had submitted or the first United
25 coder had done also reviewed the -- the -- the charts in

1 question. And, again, there was no argument made in
2 their briefs at any point with respect to any of these
3 three categories that even if they -- there's not enough
4 evidence for a jury to -- to go to the jury on all
5 28,000,000 are unsupported, that these subsets should
6 nevertheless go -- go to trial. That was never made as
7 any kind of argument. And, in fact, in their
8 opposition, they actually disclaimed that they're making
9 a fallback argument, which we think if that's so, then
10 these arguments are irrelevant. Either way, they should
11 be stricken; but with respect to the second-level
12 review, again, there was one -- literally, one mention
13 of it in the argument section. It was in support,
14 again, of the argument that all 28,000,000 are
15 unsupported. And this is very clear, if you look,
16 Your Honor, at the hearing transcript before
17 Judge Segal, pages 10 and 11, when Ms. McMahon on behalf
18 of the Department of Justice discussed second -- what
19 we're calling second-level review. What she said about
20 it was that it was additional evidence that the fact
21 that a second coder had not seen -- identified the code
22 independently was allegedly some corroboration of the
23 fact the first coder got it right. And, again, it was
24 very expressly in support of the 28,000,000 -- the
25 argument that all 28,000,000 are unsupported and that

1 they had enough evidence on all 28,000,000, because just
2 a few lines later is when Judge Segal interjects and
3 said, "Look, I want to make clear that I understand your
4 argument. Are you saying all 28,000,000 are
5 unsupported?" And she said, "Yes, we're not arguing for
6 any percentage." And repeatedly throughout the hearing,
7 the Government said a number of times that its evidence
8 went equally to all 28,000,000.

9 And I know you just want to hear about the
10 motion to strike; but, obviously, our position is -- and
11 I think Judge Segal, her report and recommendation is
12 very thorough -- thoroughly reasoned and persuasive: No
13 rational jury could possibly find that every single one
14 of these millions of instances, whether it's 28,000,000
15 or the Government wants to say, really, no, no, it's
16 just 2,000,000. Either way, you're talking about
17 millions of instances of -- of codes that they claim a
18 United coder didn't identify; but in each case, the
19 doctor said the diagnosis was there, and they certified
20 it was accurate. And they want a jury to say that every
21 single one of those millions of times the diagnosis was
22 unsupported. And that's -- we can address the merits.
23 I don't know if you want to hear just a motion to
24 strike, but we don't think there's -- a rational jury
25 who could do that, but certainly, they didn't preserve

1 any of those events -- any of those three fallback
2 arguments on the motion, in opposition to summary
3 judgment. So they should be stricken. They violate the
4 rules. Judge Segal had no opportunity to evaluate those
5 arguments. And Your Honor was, therefore, deprived of
6 the whole benefit of having a special master. So we
7 believe that motion should be stricken -- that motion
8 should be granted. And we think it's important for
9 Your Honor to reach that, because I think it's -- I
10 suspect whoever loses here will appeal, and I think it
11 will be very important for the Ninth Circuit to know
12 what was in the record and what was not.

13 Thank you, Your Honor.

14 THE COURT: Okay. Can I hear from the other
15 side.

16 MS. ZUPAC: Good afternoon, Your Honor.
17 I'm Ms. Zupac on behalf of the Department of Justice.
18 So I'll just start addressing the motion to strike.
19 Mr. Meron is right that in our opposition we did state
20 very clearly we are not making a fallback argument. Our
21 position has -- is, has always been there's powerful
22 evidence that a jury could rely on to find that all of
23 the codes on our experts' list are unsupported. And
24 just because this is a good opportunity to do so, I do
25 want to talk a little bit about which codes are at issue

1 here because Mr. Meron referenced a universe of
2 28,000,000 codes. Those were codes that were identified
3 in an interrogatory response earlier in the case which
4 was many years ago.

5 THE COURT: And let me ask you then --

6 MS. ZUPAC: Sure. .

7 THE COURT: -- did you ever supplement that
8 interrogatory response under -- you would have -- you
9 had an obligation to supplement and under 26(e)(1) --
10 and, of course, under 26(g)(1) you have to make sure
11 that your discovery responses are accurate and correct,
12 and you had an obligation to update it.

13 Did you ever update it?

14 MS. ZUPAC: No, Your Honor. And I'll explain
15 why. The --

16 THE COURT: There is -- there is no why. It
17 doesn't matter. You had an obligation to update it once
18 you came up with a different number; right?

19 MS. ZUPAC: So the interrogatory and the expert
20 report that has the different universe of codes are
21 addressing different types of codes. So that -- so I
22 think there is an explanation for why the
23 interrogatory --

24 THE COURT: So then we can talk about the
25 28,000,000 code -- the 28,000,000; right? If they're

1 different, why can't -- why do I have to -- because you
2 want me to go to the 1.97.

3 MS. ZUPAC: That's right.

4 THE COURT: But you put in 28,000,000 in your
5 response to the interrogatory. And you never amended
6 your interrogatory, which, of course, you're obligated
7 to do. And you also signed the interrogatory response
8 in accordance with 26(g)(1). So you -- so what am I
9 supposed to do with that? Because, you know, it's --
10 it's either one or the other; right?

11 MS. ZUPAC: I agree, Your Honor.

12 THE COURT: Okay.

13 MS. ZUPAC: And right now the codes at issue in
14 our case are the 1.97 million and the experts' reports
15 which are the codes -- they're the subset of codes that
16 have a --

17 THE COURT: Okay. And you got those from the
18 experts' reports; right?

19 MS. ZUPAC: Yes.

20 THE COURT: And -- and -- and so once you got
21 it from the experts, why didn't you amend your
22 interrogatory at that time?

23 MS. ZUPAC: So the reason, Your Honor, is that
24 the interrogatory asked the Government to identify the
25 codes that we contend should have been deleted by United

1 because they were not identified by United's trained
2 expert coders when they're reviewing underlying medical
3 records -- there is, however, a distinction --

4 THE COURT: Okay. So then you've just made the
5 case I should consider all \$28 million -- all 28,000,000
6 codes; right? Because you're saying that they shouldn't
7 have been deleted; right? So -- so it's one or the
8 other.

9 MS. ZUPAC: Well, respectfully, Your Honor, the
10 distinction that we're making is the 28,000,000 are the
11 codes that should have been deleted. Not every code
12 that should have been deleted has a payment impact and,
13 therefore, represents an overpayment. And that's an
14 important distinction in our case because, obviously, a
15 lot of the obligations that we talk about throughout our
16 briefing throughout our case are tied to retentions of
17 overpayments. And so the expert took United's own data,
18 used it to identify not just the codes that should have
19 have been deleted but the codes that had a payment
20 impact, because there were no other codes submitted for
21 that beneficiary in the relevant payment year that
22 mapped the same hierarchal condition category. And I'm
23 happy to get into the distinction between diagnosis
24 codes and hierarchal condition categories, because I
25 think that's an important one if Your Honor is

1 interested.

2 THE COURT: It's all in the paperwork.

3 MS. ZUPAC: Okay. Great.

4 THE COURT: Go ahead.

5 MS. ZUPAC: Okay. So -- but I did just want to
6 clarify that the reason that we talk about the
7 1.97 million codes is because those are the ones that we
8 contend had a payment impact. Those are codes for which
9 United received payment, was overpaid, and should have
10 returned the overpayment to the Government. And it
11 remains our position that all 1.97 million codes
12 should -- should have been deleted and represent damages
13 to the Government and to the tune of \$2.1 billion.

14 The portion of the reply brief that United is
15 challenging responds to --

16 THE COURT: So let me ask you this: So -- I'm
17 just curious. When your expert came up with the
18 1.97 million; right --

19 MS. ZUPAC: Uh-huh.

20 THE COURT: -- this is sort of like what they
21 talk about in class actions like the fail safe type of
22 class; right? Because you said -- started at
23 \$28,000,000. Now you've gone down to 1.97 million. So
24 by definition, the expert has made a liability
25 determination; right? Because this is what the damages

1 are. This is the liability. But it's a damages expert,
2 not a liability expert. So is -- wasn't this a
3 liability determination that your expert was making?

4 MS. ZUPAC: So we --

5 THE COURT: He's a damages expert; right?

6 MS. ZUPAC: He is a damages expert, Your Honor.

7 THE COURT: Okay.

8 MS. ZUPAC: He analyzed United's own data. In
9 doing so, our damages expert, Dr. Craig Garthwaite, is
10 not himself a medical record coder. He's not an expert
11 coder. He's not a physician of any kind. So he was not
12 going in and making his own determination as to whether
13 or not the underlying codes were unsupported. For that,
14 he relied on United's own work and United's own data.
15 And from there, analyzed the data to identify the codes
16 that had the payment impact and calculate damages based
17 on that. So it's -- it is our position, I think I've
18 said this multiple times that all 1.97 million codes
19 should go to a jury; however, the challenged portion of
20 the reply brief, responds to United's argument in its
21 opposition brief that there was no evidence that would
22 allow the jury to do anything but guess that any
23 percentage of codes less than 100 percent was supported.
24 The point that we were trying to make in our reply brief
25 is that, well, actually although, we maintain the

1 position that the jurors should find in our favor on the
2 entire universe of 1.97 million codes, there are certain
3 subsets of codes to which there are different -- you can
4 say they fall in different buckets. There's just
5 different evidence that goes to certain buckets of
6 codes. Mr. Meron discussed some of them. One is this
7 set of -- valued at approximately \$800 million of codes
8 that went through second-level review, meaning they were
9 reviewed not just by one expert coder at United but two
10 expert coders at United.

11 There's also this subset of codes called the --
12 we've called them in the case, the claims verification
13 or CV pipeline deletes, which are codes that went part
14 of the way through United's short-lived limited program
15 to look at some of its negative chart review results,
16 and they didn't find support for those codes either, but
17 still failed to delete them. So those were just
18 illustrative of certain buckets of codes. And as
19 Mr. Meron noted, there was another hypothetical that we
20 threw out there that has never been valued. So it
21 clearly is not a subset that we're trying to argue
22 should survive summary judgment; but, again, the main
23 point that I want Your Honor to take away is that we are
24 not trying to argue that certain subsets of codes and
25 only those subsets should survive summary judgment. We

1 believe all of the 1.97 million codes should be
2 presented to the jury.

3 THE COURT: Okay.

4 MS. ZUPAC: All right.

5 THE COURT: Let me hear from Mr. Meron.

6 MR. HAVIAN: Your Honor, may I respond to

7 Ms. --

8 THE COURT: No. You didn't sign the briefs.

9 MR. HAVIAN: I --

10 THE COURT: You didn't sign the briefs --

11 MR. HAVIAN: Your Honor, we're parties to --

12 THE COURT: Your relaters counsel, but you -- I
13 only want to hear from the lawyers who wrote the briefs.
14 Sit down, Counsel.

15 MR. HAVIAN: Yes, Your Honor.

16 MR. MERON: Judge Olguin --

17 THE COURT: Yeah?

18 MR. MERON: -- just two very quick points:
19 First I want to respond, Your Honor is exactly correct
20 about the first interrogatory response. And with
21 respect to my -- my colleague, this is what we asked for
22 in the interrogatory: We asked the Government to
23 identify, quote -- and this appears in Judge Segal's
24 report and recommendation on page 17. She quotes it.
25 "Every diagnosis code you allege, United knowingly and

1 improperly failed to delete or otherwise return to the
2 Medicare program as an overpayment." We -- they're
3 suing on an overpayment. We wanted to know what are the
4 overpayments. How do we defend this case without
5 knowing that? And we fought that before Judge Segal,
6 and Judge Segal said, "You're right. You're entitled to
7 to know." At no point, did they amend that
8 interrogatory. So throughout the case, they were taking
9 the position until the expert report that all
10 \$28,000,000 were overpayments.

11 Secondly, in some respects, Your Honor, I think
12 the motion to strike has been simplified for you,
13 because Ms. Zupac did confirm that the Government is not
14 making a fallback argument. It is not arguing that any
15 of these three subsets would survive summary judgment,
16 even if they lose summary judgment as to the entire
17 universe. So at this point, I think it's very clear it
18 should just be stricken as irrelevant. The only way
19 this case -- this case rises or falls on whether a
20 reasonable jury can conclude that the entire universe of
21 these codes, whether it's 28 or frankly even just the
22 2,000,000, are all unsupported. And if -- and if you
23 agree with Judge Segal that a rational jury could not
24 conclude that, we're done and these three sets don't
25 change anything. So I think they're either an improper

1 fallback argument or irrelevant. Either way, they
2 should be stricken.

3 Thank you.

4 THE COURT: Okay. Anything else from this
5 side?

6 MR. HAVIAN: Yes, Your Honor.

7 THE COURT: Go ahead.

8 MR. HAVIAN: Thank you, Your Honor.

9 THE COURT: Now, I want to -- did you join the
10 brief? Are you on the brief?

11 MR. HAVIAN: Yes, we're on the brief,
12 Your Honor.

13 THE COURT: You're on on the brief.

14 I don't want you to repeat -- well, actually,
15 you know, the way we're going to do this is, just don't
16 repeat anything that your co-counsel said.

17 MR. HAVIAN: I promise.

18 The court: Okay.

19 MR. HAVIAN: And Your Honor can cut me off.

20 THE COURT: Oh, believe me, I will.

21 Mr. HAVIAN: May I hand something up to
22 Your Honor?

23 THE COURT: No, no.

24 Is that -- isn't that part of the issue here
25 that you're -- anyway, go ahead. Go.

1 MR. HAVIAN: Yes, Your Honor.

2 MR. MERON: Your Honor, I just want to correct
3 that they're not on the briefs. They're not on the
4 brief of the motion --

5 THE COURT: If you're not on the brief as one
6 of the attorneys, then I'm not going to let you argue.
7 That is -- that's really -- look, it's the Government's
8 obligation to conduct the case and prosecute the case.

9 Let me ask lead Government counsel: Who's lead
10 Government counsel here today?

11 MS. McMAHON: The -- I am, Your Honor --

12 THE COURT: Is the relator counsel on your
13 brief?

14 MS. McMAHON: I actually had thought they were
15 on the motion to strike as opposed to the motion for
16 summary judgment but...

17 THE COURT: Are they on this motion -- any of
18 the two motions?

19 MS. McMAHON: Dan, do you have the brief handy?

20 MR. MERON: I do. It has a lot of my work
21 product on it.

22 MS. McMAHON: I apologize, Your Honor.

23 No, Your Honor relater's counsel is not --

24 MR. HAVIAN: Your Honor, I did argue in front
25 of Judge Segal. And we are a full party to the case,

1 and we've worked with the Government very closely in
2 writing the briefs and submitting the briefs. And I
3 would like to be -- I'm not going to be --

4 THE COURT: I'll give you a few minutes but...

5 MR. HAVIAN: That's all I need, Your Honor.

6 THE COURT: Yeah, but that's -- but that's it.
7 I -- I -- and, you know, any attorney that's on the
8 brief is welcome to argue. It's the way I've always
9 done it. But in these cases, they're a little unique
10 because the Government is the lead counsel by
11 definition. Once they intervene, they're the lead
12 counsel. But Go ahead, Counsel.

13 MR. HAVIAN: Thank you, Your Honor. I'd
14 appreciate that.

15 Your Honor, the point I want to make is a
16 slightly different point.

17 THE COURT: Okay.

18 MR. HAVIAN: The argument that Mr. Meron made
19 here, that the Government's position is all the
20 claims -- all of the codes are unsupported. His
21 unremarkable -- you ask any plaintiff in your courtroom,
22 are you alleging that all of the claims you filed are
23 valid? And every plaintiff's lawyer will say -- give
24 you the same answer; yes, our position is, every single
25 one of our claims are valid, and we win on every single

1 one, because otherwise, I violated Rule 11. I can't
2 bring a claim if I'm not going to get up in front of a
3 judge, who asks me, are you saying all 28,000,000 are
4 unsupported? If I say, "no, that's not our position,"
5 I've just violated Rule 11 by alleging the opposite. So
6 that's not the Government's theory. No rational
7 plaintiff -- now, but United's argument morphed in their
8 to the motion here. It changed from what I -- what
9 Mr. Meron just said to this. And Ms. Zupac read it:
10 DOJ "developed no evidence whatsoever" -- "they
11 developed no evidence whatsoever from which a reasonable
12 jury to reliably estimate what percentage of the
13 diagnosis codes at issue were unsupported." That's what
14 their argument turned into in front of this Court for
15 the very first -- I -- I defy United to point to that
16 argument in any brief, other than a supplemental brief
17 they filed in front of Judge Segal, which was a
18 supplement reply brief that they raise it for the first
19 time. And now it's become their whole case. And you
20 know what? That's why in the reply for the first time,
21 in the response to the specific allegation never made
22 before the hearing in front Of Judge Segal we said, "No,
23 it's not true. We developed no evidence" -- I'm reading
24 from their argument at page 2 of their opposition brief
25 to review of Judge Segal's RNR. Page 2, that's exactly

1 what they articulated, and that's the only theory that
2 even makes any sense. And that's why -- that's why for
3 the first time in a reply brief, we put in evidence of
4 "You're wrong. There is evidence from which a jury
5 could parse these claims."

6 Before that point, all they said ever was what
7 Mr. Meron just said now, which was a very different
8 argument which was an argument that, hey, the
9 Government's position is they have to run the table or
10 they lose everything. What plaintiff's lawyer in
11 history has ever made that argument as a plaintiff's
12 argument? You don't go in there and say to the Court,
13 "Well, Your Honor, some of these claims are kind of
14 weak, and so, yeah, our fallback is we went on the weak
15 claims." No. If a judge asks me which of any claims am
16 I standing on, the answer is always the same, everything
17 in there.

18 THE COURT: Wait a minute. Are you talking
19 about claims that you put in a complaint, or are you
20 talking about diagnosis codes?

21 MR. HAVIAN: Well, Your Honor, in this case --

22 THE COURT: It is different. You have Rule 11
23 obligations with respect to your actual causes of
24 action. But, you know, damages are often -- that is
25 what experts get brought in here all the time to

1 establish what percentage of blah, blah, blah is this.
2 You know, they -- and this is the percentage of damages
3 that we suffered based on this. But there wasn't a
4 single coder that was deposed in this case, and -- and I
5 just -- you know, I don't know.

6 But anyway, finish up because you're not even
7 on the briefs. But I'll let you -- give you a couple
8 more minutes, and then we'll go -- go ahead.

9 MR. HAVIAN: And Your Honor, I can't tell how
10 much I appreciate you giving me a couple of minutes. I
11 appreciate that.

12 THE COURT: Okay. Go ahead.

13 MR. HAVIAN: So the point I'm trying to make
14 here is you will see throughout their briefs the
15 argument that Mr. Meron stood up and made, which no
16 plaintiff in the world would ever make, which is a judge
17 says are you standing on the position that all of your
18 claims alleged in this case are in fact unsupported? No
19 lawyer would -- and the Government never, by the way,
20 said, "Yeah, we're taking the position that unless we
21 win on everything, we win on zero." The their position
22 is if you lose one claim, you're out of the court on all
23 of your claims.

24 And by the way, that is your theory. Well, let
25 him point to where the Government said that. They

1 can't. And in fact, that is the only argument until the
2 hearing in front of Judge Segal when they brought up
3 this new argument. They kind of mentioned it briefly in
4 their supplement, meaning their reply brief, in front of
5 Judge Segal. And I immediately responded to it at the
6 hearing with Judge Segal.

7 If you look at pages 34 to 36 of the hearing
8 transcript in front of Judge Segal, I said, "No, that is
9 crazy. We are not saying that." I now understand what
10 you're saying which is you're saying we have no way for
11 a jury to reach a compromise and I laid out these things
12 we're talking about. I said, "No, there are these other
13 buckets of evidence." And a jury could compromise by
14 saying, okay, if there is one United coder and there is
15 one doctor's office and they disagree, there is an
16 unresolved discrepancy. I pointed out, well, there is
17 some instances we have \$800 million worth that we have
18 where you have two United coders who both say that code
19 is not in there. And you have a doctor's office who
20 says it is --

21 THE COURT: Okay. I get your point now. That
22 is all I will give you.

23 MR. HAVIAN: Thank you, Your Honor. I
24 appreciate the indulgence of the Court. Thank you.

25 THE COURT: Go ahead, Mr. Meron.

1 MR. MERON: Sorry, Your Honor. Just very
2 quickly, this notion that it was sort of a last minute
3 switcheroo by United to make the argument that the
4 Government has gone all or nothing on 28 million is just
5 not --

6 THE COURT: Well, I just heard the Government
7 lawyer saying it is all 1.97 million. You guys may
8 agree on which of there 1.97 or 28 million. Yeah, but
9 it's different; right? Because he keeps saying claims,
10 which I say -- I think of as causes of action. We're
11 talking about diagnosis codes. This is the damage.
12 This is the liability. That is not -- you know,
13 that's -- that is what you use what you use to support
14 your claim. That is not the actual claim. And no
15 plaintiff's counsel would go in there and argue that all
16 of the claims -- you know, that you win on all the
17 claims. It is not what this is about.

18 But anyway, go ahead.

19 MR. MERON: I fully agree. Just very quickly
20 on pages 17 and 38 to 39 among others of the joint
21 brief, this was our opening summary judgment brief. We
22 said, "The Government has brought a categorical theory
23 that all 28 million." And it never sampled any medical
24 charts and didn't have a way for a jury to figure what
25 portion of those are unsupported. So we made that

1 argument from day one.

2 THE COURT: Okay.

3 MR. MERON: Thank you, Your Honor.

4 THE COURT: Anything else on the motion to
5 strike?

6 MS. McMAHON: No, Your Honor.

7 THE COURT: No? And with respect to the motion
8 for review, does anything -- anyone have anything they
9 want to add as far as this at this point? I looked at
10 all the briefing. I don't really particularly have any
11 questions. But, you know, I am a little bit -- you
12 know, I'm still not sure that -- I don't see any
13 evidence of -- of intent here at all. And -- and you
14 know, even if -- I mean, there's no evidence from the
15 coders here. Nobody was deposed. And I don't -- I
16 just -- I'm just not sure where -- you know, where we're
17 going to go from here. But I'll just look at all the
18 paperwork and -- and go through it very carefully.

19 Does anyone though have anything though they
20 want to add to their paperwork?

21 MS. McMAHON: Your Honor, if I may address the
22 Court briefly?

23 THE COURT: Yes, go ahead.

24 MS. McMAHON: Thank --

25 THE COURT: State your name for the record.

1 MS. McMAHON: Yes. Linda McMahon on behalf of
2 the United States.

3 THE COURT: Okay.

4 MS. McMAHON: Thank you, Your Honor. I
5 would -- I could talk about the motion for review in
6 more depth. It sounds like you don't necessarily need
7 me to do that, which is fine.

8 I would like to address the point you just made
9 about the actual evidence. The United States -- the
10 United States believes that there is indeed evidence
11 that the diagnosis codes that are at issue in this case
12 are unsupported. And that is the issue that -- that is
13 the main issue that we take -- that we take issue with
14 the report and recommendation in granting summary
15 judgment.

16 The -- the evidence itself that the codes are
17 unsupported is based on the very sophisticated medical
18 record review that United engaged in. United collected
19 millions of records, all with respect to its chart
20 review program. Those -- and the 28 million diagnosis
21 codes that the United coders did not find supported, had
22 all already been submitted to CMS and for payment.

23 Now, as Ms. Zupac explained, they wouldn't
24 necessarily have been paid for all of them because there
25 are other reasons why -- why a code might not

1 necessarily have a payment impact. And that is what we
2 engaged Dr. Garthwaite to figure out which ones of those
3 28 million. But all 28 million, they did not -- there
4 was no finding that those were supported with medical
5 record reviews that were done by certified coders who
6 were held to extremely high standards for accuracy --

7 THE COURT: So let me ask you this: So you're
8 assuming that the coders -- were all the coders doctors?

9 MS. McMAHON: No, Your Honor, the coders were
10 not doctors.

11 THE COURT: So you're taking -- you want me to
12 assume that the coders -- again, there is no evidence
13 from any coders except maybe a supervisor or something
14 like that, but that the coders determination was more
15 accurate than the doctor's determination. And so -- but
16 even with your theory, first of all, you don't have an
17 affirmative False Claims Act. And my experience in
18 doing these cases, there is always both. And the
19 conduct is always -- you know, it is usually the same
20 scheme applies to both, the direct false claims and the
21 reverse false claims.

22 But you don't have a direct False Claims Act
23 here because the implication of what you're saying is
24 that all these doctors, you know, somehow -- I mean, you
25 would be going after the doctors because they're the

1 ones that put in the wrong codes; right? You're
2 assuming that they're -- that there is a violation here
3 because United's coders disagrees with the doctor's
4 coders. Because by definition, it is wrong. So why
5 aren't you naming any doctors in this action?

6 MS. McMAHON: Well, if I can take both of those
7 both of those points directly and...

8 With respect to the coders, the doctor's coders
9 versus United's coder, one thing that is important to
10 understand, I think, is factually and this is part of
11 the facts -- United doesn't dispute this -- that -- that
12 codes that are submitted initially from a provider's
13 office to United who then submits it to CMS, those are
14 not always done by doctors either. In fact, they often
15 doctor's offices may have coders or there's coders that
16 are involved in that process. It very well -- it -- it
17 could be a nurse practitioner or it could be a coder.
18 There is all sorts of people within the provider's
19 office that could be doing the same thing.

20 And the important part about this -- this
21 practice is that the -- the coding itself, there --
22 there certainly is an argument to be made. And if we
23 were before a jury, we might be making this argument
24 that the coding itself, the review of the medical record
25 in deciding what code should be pointed and is justified

1 by that record could -- could very well be better done
2 by a coder than a physician because it's a technical
3 process. And the coding itself -- and that is the basis
4 for a for CMS's payment.

5 THE COURT: But how does it get you to intent
6 here? You don't have any evidence from any of the
7 coders. How does that get you -- do you have any
8 evidence that the coders were, you know, directed or
9 manipulated or, you know, something? Everything that
10 you've said that I saw was very positive about the
11 coders. You think they were exceptionally well trained
12 and everything. But, you know, to get to the level of
13 intent -- it is a False Claims Act case after all --
14 you're going to -- you would have to show that somehow
15 the coders and United through the coders were somehow
16 had this intent to -- to, you know, keep the bunny and
17 do the overpayment.

18 But then -- and then you have to do deal
19 with -- you know, the evidence that I found somewhat
20 persuasive, is that for -- or very persuasive, I guess I
21 should say, is that the Government audited United during
22 all this process. And, you know, they audited and the
23 results came out pretty good for United as far as -- I
24 think it was 89 percent. It was that -- it was -- so I
25 don't -- it was the Government's own auditors who

1 arguably know Medicare even better than United's coders.
2 And they came out with this.

3 So I guess it is very, very tough for me to
4 kind of get a handle on this because you know, there
5 is -- there's no evidence of even one false overpayment
6 here or false claim, whatever you want to call it. You
7 need at least one false claim. And there is nothing
8 here. There is no false claim. There is just a theory
9 that -- that, you know, is just -- it's just hard for me
10 to get my arm -- my -- everything to understand. Go
11 ahead. Yeah.

12 MS. McMAHON: I understand, Your Honor. With
13 respect to your first point and the intent.

14 THE COURT: Yeah.

15 MS. McMAHON: No showing of intent,
16 respectfully, there -- there is no element of intent in
17 the fall -- in any aspect of the False Claims Act.

18 THE COURT: It is a False Claims Act. You have
19 to --

20 MS. McMAHON: Yeah, it is a False Claims Act,
21 and the scienter that's required is knowledge, not
22 intent. And --

23 THE COURT: Yeah.

24 MS. McMAHON: -- it is clearly distinct.

25 THE COURT: That they knew. Okay. Go ahead.

1 MS. McMAHON: And so the point is whether there
2 is knowledge or not. And knowledge of course, as
3 defined under the False Claims Act, is actual knowledge
4 or reckless disregard or deliberate ignorance. And
5 reckless disregard and deliberate ignorance are often
6 described as sort of the quintessential putting your
7 hands over your ears or sticking your head in the sand,
8 choosing not to pursue the information, to know it
9 definitely or affirmatively.

10 THE COURT: Okay.

11 MS. McMAHON: And that is the scienter
12 requirement. And the actual -- as you pointed out, this
13 is a reverse false claim so as opposed to the normal
14 (a)(1)(A) or (a)(1)(B) claim that are false claims that
15 are submitted or false statements that are made. And in
16 the reverse false claim theory that we are bringing,
17 what we have to show is that United had an obligation,
18 and it avoided that obligation.

19 And the obligation that we are relying on is
20 the obligation that it had -- that when it received
21 information and the information that it received was
22 from its chart review coders, that it's chart review
23 coders who were told to find every single solitary code
24 that is supported by the record they were reviewing did
25 not find support for that code.

1 And -- and therefore, United had information,
2 certainly reckless disregard or deliberate ignorance,
3 that that code was not supported by that record. So
4 United had that -- had the -- had that information that
5 it perhaps -- that it was on notice --

6 THE COURT: That the doctor's code was
7 unsupported?

8 MS. McMAHON: That it was a claim that was
9 unsupported.

10 THE COURT: The doctor's code was unsupported?

11 MS. McMAHON: Yes, from the provider's office,
12 from the doctor's office. Exactly.

13 THE COURT: Okay.

14 MS. McMAHON: That that had already been
15 submitted and they have a obligation -- a regulatory
16 obligation to undertake due diligence and make good
17 faith efforts to make sure -- to ensure that they're
18 codes that they have submitted are accurate.

19 And so our position is -- our legal position is
20 that right there at that point, once their chart review
21 coders had not found support for these codes, they had
22 an obligation to ensure the accuracy of that code. But
23 United didn't do anything with that information. What
24 United did was nothing; right? It kept the money for
25 those codes.

1 THE COURT: But CMS knew what they were doing
2 for years. They had the meetings with them. There were
3 the e-mails that went back and forth, and they kept
4 paying them. I mean, let's assume that what United was
5 doing that there was something fishy about it, and the
6 Government did its audits. And after the audits were
7 done, the Government continued to pay United.

8 Under those circumstances, how can you say that
9 what they did was -- you know, was fishy or that they
10 intended to deceive the Government? If CMS is
11 continuing to pay them year after year for the -- and --
12 and they told CMS this is the process that we use,
13 and -- and there is e-mails to back this up. It just --
14 I -- you know, I mean, we're probably getting into the
15 weeds more than I expected to today. But, you know, I
16 was -- I've just been reading the papers, and I don't
17 normally get into the weeds like this on these kinds of
18 things. But, you know, it's -- but I do see your point.
19 I do see your point as far as that goes. So...

20 MS. McMAHON: Okay. And --

21 THE COURT: Go ahead. No, you go ahead.

22 MS. McMAHON: I would just say as far as the
23 weeds, I agree. We are in the weeds a little bit.

24 THE COURT: Yeah.

25 MS. McMAHON: But, I mean, we certainly believe

1 that we have evidence that we could present to a jury
2 that CMS did not understand this information. That the
3 information that United gave to -- to CMS in that
4 145-minute conference or video call that they had and
5 the follow-up e-mails and e-mails that they have
6 followed up there after, there was evidence that the CMS
7 attendees who were at that meeting have testified in
8 deposition that they did not understand that United was
9 keeping -- was keeping money for codes that it -- that
10 it knew were unsupported.

11 And there -- and -- and we -- there is also
12 information in United's own notes that they took that
13 there is evidence in this case. But I think all of that
14 goes to our point here today, is that that is all
15 evidence that should be able to go to a jury to decide.
16 Did CMS know? What information did they give CMS? What
17 information -- you know, was it material to CMS?

18 Obviously, those are determinations that we
19 suggest that are better suited for a jury. And I'm sure
20 that the United lawyers will argue the opposite of what
21 we're saying. But then --

22 THE COURT: Well, you had your chance, right,
23 as far as that goes. But the one thing that -- that we
24 don't have evidence about and which you're hinging your
25 whole case about is the coders. And -- and there is not

1 a single deposition of any coder that you have here, and
2 there is no evidence of a single overpayment that you
3 did. And so I -- you know, I -- you have a scheme. You
4 have a theory or, you know, a -- some sort of scheme
5 that you think that -- that you believe violates a False
6 Claims Act.

7 But without any sort of evidence, I mean, you
8 could -- I know the -- that the special master pointed
9 out to you guys you could have done sampling. It's done
10 in cases all the time, sampling. And -- and -- but
11 anyway, it is what it is. So let me let the other
12 side -- give the other side a chance.

13 Do you want to finish with you point? Go
14 ahead.

15 MS. McMAHON: If I can just address it very
16 quickly?

17 THE COURT: Yeah, yeah, go ahead.

18 MS. McMAHON: It is our contention that, yes,
19 there are other ways we could have developed evidence.
20 And we could have done sampling, and we could have hired
21 an expert. In our estimation, those experts would have
22 done the same thing that United coders had already done.
23 And frankly -- and respectfully, in -- in bringing these
24 False Claims Acts cases --

25 THE COURT: See, that I have to stop you right

1 there. We're talking about medical records. And we all
2 know it is true with even lawyers. Why do people go get
3 second opinions? People can go look at the same medical
4 records and come up with different conclusions. All the
5 time it happens. So what a coder sees in looking at a
6 medical record can be very different from what the
7 doctor sees. And there may be an obvious basis for
8 disagreement.

9 So anyway, I just had to stop you there because
10 you're making this assumption that what the coder says
11 is 100 percent correct. And that is just not the case,
12 and that is not the case in so many things in life. You
13 can always look at a lot of things and, you know, two or
14 three different people will look at something. I mean,
15 I -- judges, we disagree with each other all the time on
16 based the set same set of facts. And I'm sure -- so I
17 don't know what to tell you there. But go ahead.

18 MS. McMAHON: Well, I mean, my response to that
19 is that we believe that the -- that the United coders,
20 having looked at every one of these records -- and we
21 know it is undisputed -- they did not find support for
22 any of the codes we were complaining about. That that
23 is evidence that a jury should be able to evaluate.
24 United will be able to put in different evidence that it
25 could -- I mean, United also didn't do any sort of

1 sampling, so that's not -- there would be no sampling or
2 review that would be part -- that would be presented to
3 the jury. But presumably, they would have other
4 evidence that they could present.

5 But -- but knowing the qualifications of the
6 chart review coders and the standards they were held to
7 and the fact that they were instructed to find every
8 single code, and successfully did so in many -- I mean,
9 the United submitted \$7.2 billion worth of additional
10 codes at this very chart review. And they relied on
11 them -- happily relied on them for the extra
12 7.2 billion. It is just the ones that they didn't find
13 that United claims is no evidence at all that the coder
14 could have been right.

15 And so our main point here today is that that
16 is indeed evidence that a jury could consider. And
17 reasonably conclude -- be -- reasonably conclude that,
18 yes, it is more likely than not that those codes were
19 unsupported.

20 THE COURT: Okay. Thank you.

21 MS. McMAHON: Thank you.

22 THE COURT: Let me hear from the other side.

23 MR. MERON: Thank you, Your Honor, just a
24 number of quick points. Your Honor asked a series of
25 questions about intent, and the Government spent a fair

1 amount of time on questions of materiality and
2 obligation and intent. Judge Segal, as you know,
3 recommended summary judgment on two grounds. One is
4 lack of evidence of an overpayment, and the other is
5 something that is very close to this intent question,
6 which was there evidence of concealment or improper
7 avoidance. And if you wish, my colleague, Andrew Baak,
8 is happy to address the second part of that.

9 The one thing that I'd like to clarify for the
10 court as it considers various potential issues to
11 address in its opinion is Judge Segal's recommendation
12 with respect to lack of evidence of an overpayment, lack
13 of evidence that these codes were unsupported. That --
14 if Your Honor agrees with that, that disposes of the
15 entire case.

16 Your Honor's questions with respect to other
17 elements of the False Claims Act, such as intent,
18 materiality, or her recommendation with respect to
19 concealment, would dispose of the False Claims Act count
20 but not the two common-law counts. So that is why we're
21 so focused frankly on her first recommendation, which is
22 a lack of evidence of overpayment. And as to that, the
23 Government today recounted the same evidence that
24 Judge Segal carefully considered and the problem is
25 it -- it can't get a jury to where the Government needs

1 to be, which is to say the United coder was always
2 perfect, never missed anything. The doctor was always
3 wrong in every one of these instances, a disagreement
4 between the two.

5 And in reaching that conclusion, Judge Segal
6 wasn't weighing evidence or making factual findings.
7 She is an experienced jurist. She is very familiar with
8 the summary judgment standard which she relied on as a
9 series of undisputed facts that even expert coders will
10 miss codes supported in the record, that even when CMS
11 reviews charts blind, it will -- its coders will miss
12 codes. The two coders looking at the same chart will
13 miss codes.

14 And the set of admissions there are -- and I'll
15 say this hopefully slowly enough -- D2253 to 62 to
16 98161172 to 173 and 182. And those are undisputed
17 facts, which to our mind preclude any reasonable jury
18 from finding in the Government's favor.

19 And with respect to the summary judgment
20 standard, the Government is latched on to this language
21 about no evidence in its argument, but it is some
22 evidence. Judge Segal correctly pointed to the *Anderson*
23 *versus Liberty Lobby* supreme court case which sets
24 forth -- it is the seminal case.

25 It sets forth the standard and what it says

1 very clearly and expressly there that "The old days," it
2 says, "where some evidence was enough, isn't the correct
3 standard for summary judgment. At summary judgment, the
4 burden on the nonmoving party who will ultimately have
5 the burden of proof at trial is not to show that there
6 is some evidence. They have to show enough evidence for
7 which a rational jury could find that it carried its
8 burden of proof." And we submit that Judge Segal was
9 completely correct here that they didn't.

10 And as Your Honor touched upon, the Government
11 had ample opportunity to develop this case. We offered
12 to produce to them in 2021 all the medical records in
13 our possession, 21 million records. They could have
14 sampled. They could have reviewed them all. They could
15 have sampled some of them, and then, you know, we would
16 be in a different situation. But they didn't do that
17 for strategic reasons. And now I think it is not unfair
18 to hold them to the consequences of that strategic
19 choice.

20 Your Honor, if my colleague could just briefly
21 address the concealment issue? Thank you.

22 THE COURT: That's fine.

23 MR BAAK: Thank you, Your Honor. Andy Baak
24 from Bartlit Beck. I appreciate you're indulgence.

25 THE COURT: Hold on one second. Never mind.

1 Go ahead.

2 MR. BAAK: So since Ms. McMahon touched on the
3 special master's second basis for making summary
4 judgment for United on the False Claims Act claim, I
5 just wanted to briefly respond. So, Judge, as you
6 explained, Judge Segal explained at length why the
7 Government did not have any evidence that, in fact,
8 United engaged in deceitful conduct or similar
9 fraudulent conduct. And I heard from Ms. McMahon today
10 the suggestion that if given the chance, they could
11 adduce such evidence for the jury.

12 And I think Judge Segal's opinion explains why
13 that is probably not true -- certainly not true. And
14 more fundamentally -- and I think this is important for
15 the record -- the Government has waived coming and going
16 on the second basis for Judge Segal's ruling that they
17 actually have any facts that would allow them to show
18 concealment or improper avoidance. That is what we call
19 deceitful conduct if that is, in fact, the standard you
20 adopt, which you should based on Judge Segal's careful
21 analysis of the statutory text.

22 And I don't want to belabor this, but this is
23 waived coming and going. In our opening brief, we made
24 two points. One, the False Claims Act is a fraud
25 statute. It requires fraudulent conduct or its akin,

1 right, so concealment or improper avoidance. And our
2 second argument -- and this is on page 77 of the joint
3 brief -- we said and there is no such evidence here.
4 They don't have the goods.

5 And what did the Government do in response?
6 Pages 78 to 80 of the joint brief, they only responded
7 to the first argument. So they decided to sink or swim
8 on their view that the False Claims Act reaches
9 non-fraud, and for the reasons Judge Segal explained,
10 that cannot be the cases. This is waived under standard
11 litigation procedures, but it is also waived under this
12 Court's own orders. When you appointed the special
13 master in May of 2020 -- and this is docket entry 395,
14 paragraph five -- you said that this Court would not
15 consider any evidence or argument not presented to the
16 special master.

17 And you repeated this admonition to the parties
18 earlier this year, and this is docket entry 633
19 paragraph three. And the language is in bold.

20 [As read]: "The parties shall not include and the Court
21 will not consider any evidence, argument, authority that
22 was not presented to the special master." That is
23 exactly what the Government's asking you to do here
24 which they present for the first time in the very last
25 footnote of their opening brief.

1 And their reply brief, they claim they didn't
2 waive this, but all they cite back to is their opening
3 brief. They don't point to anything that was presented
4 to special master Segal and that is because they can't.
5 There is nothing where they made this argument.

6 And if that's not enough, and I would submit it
7 is, at oral argument in front of Judge Segal, I said no
8 fewer than five times -- and I regret being
9 repetitive -- that they had waived this argument. And
10 no one from the other side stood up and disputed it
11 because it was true.

12 Now, so any factual argument on the special
13 master's second basis is waived, and we think for the
14 purposes of appellate review that should be made clear.

15 And then Judge Segal, of course, she recognized
16 the waiver herself -- pages 38 and 39 of her report and
17 recommendation -- she said the Government has failed to
18 allege any sort of deception on the part of United and
19 then went on to explain why they didn't make that
20 argument because there was no such evidence. So that's
21 on the facts.

22 Just briefly on the law because I heard -- and
23 the important thing to understand too is this was all
24 presented and carefully considered by Judge Segal. On
25 the law, I heard Ms. McMahon suggest that the mere --

1 that the barrier they had to cross on this issue was
2 merely showing that we had an obligation and we avoided
3 it. Judge Segal saw that that cannot be the law because
4 it reads words out of the statute. And I took that down
5 carefully because there is no concealment and there is
6 no improper avoidance. And for the reasons Judge Segal
7 recognized, the False Claims Act covers fraud. There is
8 none here. Thank you.

9 THE COURT: Go ahead, Counsel.

10 MS. McMAHON: Good afternoon again, Your Honor.
11 I'm going to start with the legal -- of course. I'm so
12 sorry. Wendy Zupac on behalf of the Department
13 of Justice.

14 MS. ZUPAC: I'm -- I'm going to start with the
15 legal question because I actually think that this is a
16 critical question. United is asking Your Honor to be
17 the first court in the country to hold that the improper
18 avoidance prong reverse False Claims Act requires some
19 sort of deceitful or evasive conduct. As we've
20 explained in our papers -- and I won't belabor the
21 cases -- every court to address this question from Kane,
22 Sutter, and then the Walgreens case has rejected that
23 kind of reading. And they've held that a defendant
24 knowingly and improperly avoids an obligation when
25 they're on notice of a potential issue, have on

1 obligation to address it, but do nothing.

2 Here, United was on notice that millions of the
3 diagnosis codes it had submitted for payment were
4 unsupported. It knew it had an obligation to do
5 something about the codes, but instead it chose to do
6 nothing. Instead it buried its head in the sand and
7 kept billions of dollars that it should have returned to
8 the Government.

9 This conduct falls squarely within the bounds
10 of the improper avoidance prong of the reverses False
11 Claims Act provision. And I heard Mr. Baak say a few
12 times that the Government is trying to argue that the
13 False Claims Act covers non-fraud and non-fraudulent
14 conduct. That is not at all what we're arguing here.
15 But I think that United is making a mistake when they
16 are equating affirmatively deceptive conduct with fraud.

17 There are species of common-law fraud that are
18 non-affirmative or that -- I don't know if passive is
19 the right word -- but that don't require speaking. One
20 common-law species of fraud is just -- it is a failure
21 to disclose material facts when you have an obligation
22 to do so. That is very similar to what we allege United
23 is doing here.

24 In addition, while United quotes heavily from
25 in its brief from the Escobar and SuperValu decisions,

1 to the extent that the False Claims Act is a fraud
2 statute, we want to note that the False Claims Act is at
3 bottom a statute. You have to start with the statutory
4 text. Escobar is very clear about this. And I should
5 also mention neither Escobar nor SuperValu actually
6 interpreted the meaning of the improper avoidance prong
7 of the reverse False Claims Act. But what they both did
8 emphasize, we start with the text of the statute.

9 In this case, the statutes sometimes abrogates
10 common-law fraud. One of the important ways it
11 abrogates common-law fraud is an issue that has come up
12 already. The statute specifically states in
13 31 U.S.C. 3729 (b) (1) (B), "The False Claims Act does not
14 require proof of specific intent to defraud." And that
15 is, of course, a difference from the False Claims Act
16 that Justice Thomas recognized in footnote two of
17 Escobar.

18 So I'm happy to address any specific questions
19 Your Honor has about our legal argument with respect to
20 our reading of the improper avoidance prong. I do want
21 to note -- and I don't mean to correct my colleague here
22 because I do believe she did say "avoidance of an
23 obligation." And we do think that the word "improper"
24 is important. It does a lot of work in the statute, and
25 we are alleging improper avoidance on the part of

1 United.

2 It's fairly clear that improper avoidance
3 refers to avoidance that is good -- that goes beyond an
4 allowed reconciliation period and a statute or
5 regulation governing a particular Government program.
6 So for example, and I think everyone in this room can
7 agree on this, the Medical Advantage program is
8 extraordinarily complicated. The joint brief goes in
9 some detail about the interim payments, the
10 reconciliation deadlines, the fact that CMS will do
11 reruns later.

12 There are going to be circumstances where a
13 Medicare advantage organization, if they're acting in
14 good faith and properly and in accordance with their
15 obligations, will learn about unsupported codes well
16 after their final reconciliation deadline. And they
17 have an obligation to submit those as deletes to CMS.
18 CMS might hold onto those for a while before they do
19 what is called a "rerun" and calculate how the payments
20 shake out.

21 The Government is not going to argue that this
22 is improper avoidance of an obligation to pay, even
23 though the company is holding onto the money while this
24 process is running its course, but even though it might
25 be technically avoidance. So we do believe that the

1 word "improper" is important and does a lot of work in
2 the statute. But it doesn't mean affirmatively
3 deceitful or evasive conduct. No court has ever held
4 that. I'm happy to go through the statutory
5 interpretation argument if Your Honor is --

6 THE COURT: That's okay.

7 MS. ZUPAC: I was going to say it is in the
8 papers.

9 THE COURT: Yeah, it's in the papers. Go
10 ahead.

11 MS. ZUPAC: The only other thing I will address
12 is Mr. Baak's waiver point. And I just want to
13 address -- I mean, first of all, this would be an
14 entirely new requirement for reverse false claims
15 liability. That has never been imposed on the
16 Government before. But the conduct and the evidence
17 that the special master looked at and that United put
18 forth to argue that it wasn't deceitful, that it was
19 transparent with the Government, is essentially the same
20 evidence that they put forth to argue that the
21 materiality of their -- that there was no materiality
22 for their conduct because CMS knew all about it and
23 continued to choose to pay them.

24 So in our -- in our briefing we certainly went
25 into a great detail about the evidence of the April 2014

1 meeting. The evidence that we believe shows that they
2 came in and weren't transparent when the Government,
3 gave half truths at best, and tried to get self-serving
4 vindication from the Government as to their decision to
5 stop their claims verification program but didn't
6 actually disclose the details of their chart view
7 program, and certainly never disclosed to the Government
8 the underlying codes that its coders had failed to find
9 during chart review, which did prevent the Government
10 from adjusting payment to United and recouping those
11 overpayments from United.

12 So that is discussed in the joint brief in the
13 context of responding to their materiality discussion.
14 Judge Segal did go through and we believe weighed the
15 evidence that at -- if Your Honor were to find that this
16 requirement exists, should be properly weighed and
17 evaluated by a jury. Thank you, Your Honor.

18 THE COURT: Okay.

19 MR BAAK: This is Mr. Baak. Briefly,
20 Your Honor, let me start with the waiver point.
21 Judge Segal understood the arguments that were actually
22 presented in the briefs below and concluded clearly that
23 they had not made any such factual argument as I
24 represented to this Court, which is exactly what you'll
25 find when you go look at your pages 78 to 80 of their

1 joint brief.

2 Merely having some sections otherwise in the
3 brief is not how advocacy or how this Court's orders
4 work. The Court plainly warned the parties if you don't
5 make the argument to Judge Segal, it won't be considered
6 now. And I don't think you heard any disagreement from
7 the Government that I correctly described that they did
8 not make this argument, which was what Judge Segal
9 recognized.

10 On the law we set forth at length and
11 Judge Segal plainly understood why the cases that the
12 Government relies on including Kane don't get them where
13 they need to go. And we set forth at length in our
14 briefs why they're overstating the authority. But I
15 will just briefly respond and say it is not true that no
16 court has recognized that the reverse False Claims Act
17 reaches fraudulent conduct or other deceitful conduct.

18 We discuss the Eighth Circuit's opinion in
19 *Olsen* at length. And critically, the Government says
20 that is a pleading case. But this issue, the one that
21 we're litigating now which is can you have liability
22 under the reverse False Claims Act with mere avoidance?
23 Can you do that? Or do you need something more was the
24 very question the Court had to decide to determine
25 whether Rule 9 applied. And the punch line is page 1074

1 of the Eighth Circuit's opinion, "If there is no
2 allegation of fraudulent conduct under the False Claims
3 Act, there can be no reverse liability."

4 So it is not the case that you're out on an
5 island, which is what the Government will have you
6 believe. And we would have you say that Judge Segal
7 heard all of these very same arguments carefully parsed
8 the statutory text, took into account what the Supreme
9 Court has said in Escobar, which is the False Claims Act
10 is not a vehicle for punishing with punitive sanctions,
11 garden variety contractual and regulatory disputes,
12 which is precisely what the Government invites you to
13 find here.

14 We ask that you adopt the second basis for the
15 special master's recommendation, as well.

16 THE COURT: If I just go with the first basis
17 is what your co-counsel was saying, that takes care of
18 the entire case. Is that what you're saying?

19 MR BAAK: That's correct, yes. And the second
20 basis, the one I've just presented to you --

21 THE COURT: Yeah.

22 MR BAAK: -- covers only the False Claims Act.
23 We had alternative grounds for the common-law counts
24 that we presented to special master Segal, but obviously
25 she did the not reach those.

1 THE COURT: Let me ask the Government: What is
2 your take on the *Olsen* case? It is a Circuit case,
3 which you know the -- the Ninth Circuit's going to care
4 a lot more what other Circuits say than anyone like me
5 and anyone in my position. And so -- so what's your
6 take on the *Olsen* case? Because it is a Circuit case
7 and when you're in my position if there is no -- if your
8 Circuit hasn't dealt with it, you look to see if other
9 Circuit courts have.

10 MS. McMAHON: Of course, Your Honor. I'm happy
11 to address the *Olsen* case. The question that the *Olsen*
12 case addressed was whether or not pleading -- claims
13 under the reverse False Claims Act provision and that
14 particular case the knowingly concealing prong, were
15 subject to Rule 9(b), the height and pleading standard
16 of Rule 9(b). And it explained why it thought it did
17 because concealment was a species of fraudulent conduct.
18 We have no problem with that actually.

19 What -- what we don't think the *Olsen* case
20 stands for is the idea that fraudulent conduct or the
21 specific language of improper avoidance requires
22 affirmatively deceitful or invasive conduct. We think
23 that requiring the Government to prove affirmatively
24 deceitful or evasive conduct for the improper avoidance
25 prong would essentially render it superfluous because

1 that conduct is already covered by two other grounds in
2 the reverse False Claims Act, the false statement ground
3 and the knowingly concealing ground.

4 With respect to *Olsen*, I think that there is in
5 a lot of respects *Olsen* supports what we've tried to
6 argue, which is that non-affirmative conduct can still
7 be fraudulent. For example, the *Olsen* case notes that
8 "To conceal is to fail to disclose." That pin cite of
9 that is 1074. It goes onto note in that same pin cite,
10 "Likewise, at common-law fraud encompassed material
11 non-disclosures by those with a duty to disclose." And
12 we think that this is just very similar to what we're
13 talking about here.

14 United had an obligation to do something about
15 the codes that it knew or should you have known were
16 unsupported. It didn't do so, and it pocketed the
17 money. We think that this is particularly -- that the
18 reading is particularly surprising because as -- as
19 we've pointed out in going through the statutory
20 history, every single time Congress has weighed in on
21 the False Claims Act, it is endorsed a broad reading of
22 it as a statute that can address all kinds of fraud
23 against the Government. And it has been very careful to
24 expand the scope of liability.

25 It -- initially, it added the reverse False

1 Claims Act in 1986 when it did require at that time a
2 false statement. In 2009, however, with the FERA
3 amendments, the Fraud Enforcement and Recovery Act of
4 2009, it added additional bases for liability, the
5 knowing concealment prongs and the knowing and improper
6 avoidance prongs.

7 And since Your Honor is interested in Circuit
8 court cases, I would point Your Honor to the *Victaulic*
9 case from the Third Circuit. That is the *United States*
10 *ex rel. Customs Fraud Investigations, LLC versus*
11 *Victaulic Company*. The *Victaulic* court in 2016, so this
12 is -- their opinion came out a few months after the
13 Escobar case was issued by the Supreme Court held that
14 "A false statement is no longer a required element since
15 the post-FERA FCA specifies that mere knowledge and
16 avoidance of an obligation is sufficient without the
17 submission of a false record to give rise to liability."

18 The Third Circuit recognized in that case that
19 the -- that Congress had explicitly expanded the scope
20 of conduct in the FERA amendments. But in addition to
21 FERA, I think it is very important to note that in the
22 following year in 2010, the -- that Congress in the
23 Affordable Care Act expressly provided that Medicare
24 advantage organizations like United had an obligation to
25 return overpayments within 60 days and went further and

1 said that failing to do so could open them up to False
2 Claims Act liability.

3 So given this history, given this context we
4 think that United's reading is completely contrary to
5 the plain language, the structure, and the purpose of
6 the False Claims Act. Thank you, Your Honor.

7 THE COURT: Let me here from United on that.

8 MR BAAK: Briefly on the statutory text: We
9 heard the formulation repeated again that we heard in
10 the Government's brief, which is in their view all that
11 is needed for liability is for the defendant to be put
12 on notice, be legally obligated to do something and do
13 nothing. I heard that multiple times. It is in their
14 brief. What we never heard today nor did we hear in
15 their brief is an explanation for how that actually
16 matches the statutory text, which is why Segal said it
17 was completely incompatible.

18 And I'll just explain why briefly: Put on
19 notice, that's the knowing requirement. Legally
20 obligated, that's the obligation requirement. Do
21 nothing, that's avoidance. What we never heard today
22 and we didn't see in the briefs is an explanation for
23 what the words "concealment" or "improper avoidance."
24 So the Government's -- the position they urge violates
25 one of the most basic principles of statutory

1 interpretation because it seeks to read the word
2 "improper" out. Avoidance is enough.

3 Now, briefly, on the Third Circuit opinion that
4 was mentioned, *Victaulic*. *Victaulic* only observed that
5 FERA eliminated the false record requirement. It didn't
6 touch this issue at all; right? And again, coming back
7 to *Olsen*, pleading standard or not, there is no way the
8 Court could have concluded that as it did, that reverse
9 FCI liability requires fraudulent conduct without
10 contemplating the very position the Government presents
11 here and rejecting it.

12 And then finally, I think there was an attempt
13 to pivot today, to say that the position is actually not
14 mere avoidance, but it is avoidance with an obligation
15 to disclose. That argument is waived. It has never
16 been presented in their briefs. But beyond that, that
17 the Fourth Circuit opinion we cite *United States versus*
18 *Colton* says that "The common-law draws a sharp
19 distinction between mere non- -- between concealment and
20 mere nondisclosure," right, "and nondisclosure alone is
21 not" -- it is a background principle -- we assume is
22 embedded in the false claim, "is not fraud." Right?

23 And that is exactly what the -- what Escobar
24 teaches. The Supreme Court has said when we read the
25 False Claims Act statute, we should presume that

1 Congress intended to incorporate principles such as
2 that. And if -- if that is what Congress did, then we
3 should be entitled to summary judgment on the second
4 issue, Your Honor.

5 THE COURT: Okay. Okay.

6 MR. HAVIAN: Your Honor?

7 THE COURT: Yes.

8 MR. HAVIAN: At the risk of my bar license,
9 could I make less than 2-minute comment on something the
10 Court raised during the first issue, and I didn't get a
11 chance to respond. But I think I have a response for
12 the Court on something, and I won't take more than two
13 minutes.

14 THE COURT: Okay.

15 MR. HAVIAN: I want to address the Court as to
16 some questions about people disagree all the time and
17 you have the coders on one side and the -- the doctor's
18 offices on the other side, and I appreciate that. But I
19 want the Court to be mindful that there is a United mood
20 for summary judgment, the whole case. She said you
21 cannot prove even one of your claims. So I want to
22 point the Court to there was a bucket of claims, which
23 we refer to as the claims verification program, where
24 United actually did do what they said they should do.

25 They actually went out and they found cases

1 where the coder said I don't see that code. And the
2 provider's office said that code is in there. And they
3 had their own people comb all of United's records to try
4 to find some support for the doctor's code. There is
5 \$188 million worth of claims where they -- despite
6 United looking far and wide, they did not find any
7 support for \$188 million worth of codes that they kept.

8 Now, they're going to say we waived that
9 argument. If you look at transcript in front of
10 Judge Segal -- first of all, it was in the briefs. But
11 second of all, this issue was thoroughly argued --

12 THE COURT: What page? What page? What page
13 of the brief that you never participated in was it on?

14 MR. HAVIAN: Your Honor, I will --

15 THE COURT: And this counts as part of your two
16 minutes.

17 MR. HAVIAN: Well, Your Honor, is going to
18 challenge me here.

19 No, Your Honor. I'm sorry. You've stumped me
20 on this one, but I'm happy to provide a letter to the
21 Court afterward.

22 THE COURT: No, this -- letters -- letters
23 aren't allowed in this district. Where are you from?
24 Letters are not allowed. And it's also surprising how
25 people just e-mail and ask for things, you know. In

1 Central District, you've got to file something. If you
2 want something from the Court, you have to file
3 something.

4 MR. HAVIAN: That is in our brief, Your Honor.
5 It is.

6 THE COURT: Okay.

7 MR. HAVIAN: The CD program is in our brief.

8 THE COURT: Okay. Your two minutes are up.

9 MR. HAVIAN: Thank you, Your Honor. I
10 appreciate it.

11 THE COURT: Okay.

12 MR. MERON: Well, Mr. Havian correctly
13 predicted that I -- that this -- we were going to say
14 that argument is waived, and it is clearly waived,
15 Your Honor. And I guess we've come full circle to the
16 discussion on the motion to strike and why it is
17 interrelated here.

18 "Claims verification," those words do not
19 appear one single time in argument one of the summary
20 judgment briefing about evidence of overpayment.
21 Mr. Havian says, well, it was discussed in the briefs.
22 It was discussed in connection with materiality and
23 obligation, which are two issues that Judge Segal did
24 not rest her opinion on and have no relevance
25 whatsoever. And they were discussed one time at the

1 hearing.

2 But again, you can't preserve an issue by
3 raising for the first time in a hearing if it is not in
4 the briefs. So it is waived, number one. And number
5 two, even if that weren't a -- a fatal impediment, it
6 was raised in connection with the argument that all the
7 codes were unsupported.

8 And when we had our discussion, which I will
9 not repeat on the motion to strike, I think we reached
10 consensus when the Government said it is not arguing for
11 a fallback. It is not arguing for the universe of codes
12 that went through claims verification that survived
13 summary judgment separately from the entire universe.
14 And since the -- there is no basis for -- to go to the
15 jury on the whole 28 million. There is no basis for the
16 Court to reach this waived argument that they can
17 survive just on the narrow substance. Thank you, Your
18 Honor.

19 MR. HAVIAN: Your Honor, I can give you those
20 pages, if you'd like.

21 THE COURT: Okay. Go ahead.

22 MR. HAVIAN: Pages -- and these are citations
23 to the joint brief on summary judgment so the initial
24 joint brief that we all filed. Pages 14 --

25 THE COURT: No, no. I want the argument

1 section.

2 MR. HAVIAN: The argument section.

3 THE COURT: Not background section because what
4 you say in background, that doesn't -- that just gives
5 context to the case. If you don't raise it in the
6 argument section, you haven't raised it.

7 MR. HAVIAN: Okay.

8 THE COURT: And you know, this is a good
9 example. I've been using joint briefs, but over the
10 years -- believe me, I've been doing this for a while --
11 lawyers complain about my joint briefs and how
12 cumbersome they are. But it makes our life in chambers
13 a little bit easier. And I've also found that lawyers
14 are more likely to address each other's argument if it
15 is right there in front of you when you're addressing
16 it.

17 When you have a -- do the traditional motion,
18 opposition, and reply, sometimes it is like ships
19 passing in the night by the time you see the opposition.
20 And it is really hard to say you didn't know or
21 something like that when you do the joint brief. But I
22 do appreciate the work that you guys did, and you guys
23 did -- you worked very hard.

24 I know you can tell, and the work was -- you
25 know, I -- you know, I'm so glad I have a special master

1 in this case, let me put it that way. It helped a lot,
2 but I know it is a de novo review. So I've been taking
3 a look at everything very carefully, and I will continue
4 to look at it very carefully. I don't think -- I think
5 I've -- I've heard everything I need to hear. I -- I
6 know I understand Judge Segal. I was reading the
7 transcript last night, and it looks like she went almost
8 three hours with you guys. You're not getting three
9 hours from me.

10 (Laughter)

11 THE COURT: Okay.

12 MR. HAVIAN: Your Honor, did do you want me to
13 answer the question about the argument section of the
14 brief?

15 THE COURT: Sure.

16 MR. HAVIAN: Pages 64, 69, 70 --

17 THE COURT: But the issue is -- you understand,
18 Counsel, the issue isn't whether or not you cited the
19 evidence in that section, it's that whether you made the
20 argument?

21 MR. HAVIAN: Well, Your Honor, this goes back
22 to what I said earlier that they did not raise this
23 argument that we didn't have sufficient evidence for a
24 jury to distinguish amongst our claims. They didn't
25 make that argument until the hearing --

1 THE COURT: Amongst your claim? There is only
2 one claim in this case.

3 MR. HAVIAN: Your Honor, I would respectfully
4 disagree.

5 THE COURT: And you have the other the common
6 clause, the state parallel claims.

7 MR. HAVIAN: No, no.

8 THE COURT: But that is all. That is one claim
9 exactly. All right. Well, the matter will be taken
10 under submission. Thank you very much.

11 (Whereupon, proceeding adjourned.)

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C E R T I F I C A T E

UNITED STATES OF AMERICA :
vs. : No. CV 16-8697-FMO
UNITED HEALTH GROUP, INC, et :
al.

I, MARIA BUSTILLOS, OFFICIAL COURT REPORTER, IN AND FOR THE
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753,
TITLE 28, UNITED STATES CODE, THE FOREGOING IS A TRUE AND
CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED
PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE
TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.
FEES CHARGED FOR THIS TRANSCRIPT, LESS ANY CIRCUIT FEE
REDUCTION AND/OR DEPOSIT, ARE IN CONFORMANCE WITH THE
REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

/s/ 11/21/2025
MARIA R. BUSTILLOS DATE
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