



O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006-4061

T: +1 202 383 5300
F: +1 202 383 5414
omm.com

File Number:

June 29, 2026

K. Lee Blalack II
D: +1 202 383 5374
lblalack@omm.com

VIA ELECTRONIC DELIVERY AND COURT FILING

The Honorable Katharine H. Parker
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 750
New York, New York 10007

Re: United States of America v. Anthem, Inc., 1:20-cv-02593-ALC-KHP

Dear Judge Parker:

We represent Defendant Anthem, Inc. (“Anthem”), and submit this reply in support of Anthem’s discovery requests regarding the Notice of Intermediate Sanctions that the Centers for Medicare & Medicaid Services (“CMS”) issued to Anthem on February 27, 2026 (“the Notice”).

I. Plaintiff Does Not Deny that this Litigation Prompted CMS to Issue the Notice.

Plaintiff’s position statement (Dkt. 529) is most notable for what it does *not* say. Plaintiff does not dispute that (i) the Notice was issued to bolster Plaintiff’s allegations in this case; (ii) the Notice was the product of an irregular administrative process; or that (iii) the process was influenced by government counsel. Despite questions about the process that produced the Notice, Plaintiff offers no agency declarant to contest Anthem’s *prima facie* showing that the Notice was manufactured to supply evidence of materiality in this False Claims Act (“FCA”) action.

Plaintiff instead insists that the Notice reflects (i) “that CMS *does* care about a Medicare Advantage Organization’s [(“MAO’s”)] failure to comply with its regulatory and contractual obligations by refusing to delete unsupported diagnosis codes” and (ii) “CMS’s reaction to an instance where CMS had actual knowledge of specific noncompliance.” (Dkt. 529 at 2) (emphasis in original). But until the Notice earlier this year, CMS had never taken such an action against an MAO, ever. It had never sanctioned any MAO for failing to submit accurate risk adjustment data, nor threatened intermediate sanctions against Anthem. *See* Pl.’s R&Os to Anthem’s RFA Nos. 121, 122, 131, 132, and 228. The fact that CMS took no adverse action for seven years, renewing Anthem’s contracts year after year and paying Anthem without disruption, only to issue the Notice at the end of discovery in this case, undermines Plaintiff’s contention that the Notice was the product of genuine regulatory concern.

II. Plaintiff Cannot Put the Notice at Issue and Simultaneously Deny Anthem Discovery That Would Impeach Plaintiff’s Arguments Under Second Circuit Precedent.

Given that the Notice concerns conduct which is not at issue in this case and which post-dates the relevant time period in this action, Anthem maintains that the Notice is irrelevant. But where Plaintiff intends to offer the Notice as affirmative evidence of materiality, Anthem is entitled to

the discovery necessary to rebut and contextualize it.¹ That is particularly the case here, where *prima facie* evidence shows the Notice was issued to advance a litigation purpose.

Contrary to Plaintiff's assertion, Anthem cannot rely on the date of the Notice alone. The materiality element necessarily puts the state of mind of CMS at issue, because materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 193 (2016). In applying the Supreme Court's seminal *Escobar* case, the Second Circuit has held that post hoc enforcement actions can be improper efforts to manufacture materiality and are thus unpersuasive evidence of materiality. *See United States v. Strock*, 982 F.3d 51, 63 (2d Cir. 2020) ("*Escobar* emphasized that 'the materiality standard is demanding,' and that the government may not manufacture materiality by alleging it had an option not to pay after the fact . . . [a]llowing the government to rely on post hoc enforcement efforts to satisfy the materiality requirement would allow the government to engage in just such materiality manufacturing . . ."). *Strock* further explained that *Escobar* "indicates that allegations of post hoc prosecutions or other enforcement actions do not carry the same probative weight as allegations of nonpayment." *Id.* And the Second Circuit has gone further, affirming that post hoc enforcement efforts initiated *after* the agency learned of the conduct at issue but where the agency continued to contract with and pay the defendant "cut[] heavily *against* a finding of materiality." *United States ex rel. Lee v. N. Metro. Found. for Healthcare, Inc.*, 2021 WL 3774185, at *11-12 (E.D.N.Y. Aug. 25, 2021) (emphasis added), *aff'd sub nom. Lee v. N. Metro. Found. for Healthcare, Inc.*, 2022 WL 17366627, at *2 (2d Cir. Dec. 2, 2022). Therefore, not only is Anthem entitled to discovery concerning the Notice because Plaintiff has included the Notice on its Rule 26 disclosures, such discovery is also highly probative because it is likely to reveal that Plaintiff seeks to manufacture evidence of materiality in a manner contrary to established Second Circuit precedent.

III. Plaintiff Has Failed to Show that Complying with this Discovery Poses an Undue Burden.

Plaintiff next argues undue burden. But Plaintiff has failed entirely to provide a basis for this objection. Plaintiff has not conducted a single document search or offered any agency declaration explaining the alleged burden. Plaintiff has even refused to identify the personnel involved in issuing the Notice—a straightforward request that would narrow the universe of relevant custodians and reduce any purported burden of production. Similarly, without conducting a search for responsive documents, Plaintiff has no basis to assert that a privilege log would be unduly burdensome to prepare. It is premature for Plaintiff to raise privilege when it cannot represent in good faith that any responsive documents satisfy the stringent requirements for asserting privilege.

Plaintiff's related argument that granting Anthem's discovery requests would somehow delay fact discovery is both meritless and shocking. It was *Plaintiff* who put the Notice at issue at this late stage of the case, not Anthem. Having chosen to inject the Notice at the eleventh hour, Plaintiff cannot now fairly complain that Anthem seeks the discovery necessary to respond. Accordingly, Anthem respectfully requests that the Court order Plaintiff to: (i) confer with Anthem on appropriate search terms and custodians, and, (ii) if it seeks to withhold any responsive documents on grounds of privilege, produce a privilege log in connection with these requests.

¹ Plaintiff argues that Anthem seeks this discovery for its administrative challenge to the Notice, despite noting that Anthem does not argue materiality there. Appropriately so; there *is no* materiality requirement in the CMS administrative challenge. Thus, Anthem seeks this discovery only because *Plaintiff* has put the Notice at issue *in this FCA case*.

Dated: June 29, 2026

Respectfully submitted,

By: /s/ K. Lee Blalack, II

K. LEE BLALACK, II, *Pro Hac Vice*
ANWAR GRAVES, *Pro Hac Vice*
WILLIAM BUFFALOE, *Pro Hac Vice*
BRIAN D. BOYLE
BENJAMIN D. SINGER
RAHUL KOHLI, *Pro Hac Vice*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
lblalack@omm.com
agraves@omm.com
wbuffaloe@omm.com
bboyle@omm.com
bsinger@omm.com
rkohli@omm.com

JAMES A. BOWMAN, *Pro Hac Vice*
ADAM LEVINE, *Pro Hac Vice*
HANNAH E. DUNHAM, *Pro Hac Vice*
SHELBY A. CUMMINGS, *Pro Hac Vice*
ELIZABETH ARIAS GRAY, *Pro Hac Vice*
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, California 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407
jbowman@omm.com
alevine@omm.com
hdunham@omm.com
scummings@omm.com
earias@omm.com

DAVID DEATON, *Pro Hac Vice*
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, California 94111
Telephone: (949) 823-6900
Facsimile: (949) 823-6994
ddeaton@omm.com



CHRISTOPHER P. BURKE, *Pro Hac Vice*

O'MELVENY & MYERS LLP

1301 Avenue of the Americas, Suite 1700

New York, New York 10019

Telephone: (212) 326-2000

Facsimile: (212) 326-2061

cburke@omm.com

JOHN MARTIN, *Pro Hac Vice*

HEYWARD BONYATA, *Pro Hac Vice*

NELSON MULLINS RILEY & SCARBOROUGH LLP

1320 Main Street, 17th Floor

Columbia, South Carolina 29201

Telephone: (803) 255-9655

john.martin@nelsonmullins.com

heyward.bonyata@nelsonmullins.com

Attorneys for Defendant Anthem, Inc.

cc: Assistant United States Attorney Peter Max Aronoff, Esq.
Assistant United States Attorney Charles Salim Jacob, Esq.
Assistant United States Attorney Adam M. Gitlin, Esq.
Assistant United States Attorney Dana Walsh Kumar, Esq.
Assistant United States Attorney Rachael Doud, Esq.
Assistant United States Attorney Pierre Armand, Esq.
Assistant United States Attorney Harry Fidler, Esq.
Trial Attorney Martha Glover, Esq.