

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO.

24-0762

COMMONWEALTH OF MASSACHUSETTS, Petitioner,
v.
UNITEDHEALTHCARE INSURANCE COMPANY, Respondent.

JON E. POWERS III
 ACTING CLERK MAGISTRATE
 2024 MAR 20 P 12:29
 SUFFOLK SUPERIOR COURT
 CIVIL CLERK'S OFFICE

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR ENFORCEMENT OF CIVIL INVESTIGATIVE DEMAND

Pursuant to the Massachusetts False Claims Act, G.L. c. 12, § 5N(10), Petitioner Commonwealth of Massachusetts (“Commonwealth”), acting through Andrea Joy Campbell, Attorney General for the Commonwealth of Massachusetts (the “Attorney General”), hereby submits this Memorandum of Law in Support of her Petition for Enforcement of Civil Investigative Demand (the “Petition”). Because the Attorney General has broad authority to investigate potential violations of the Massachusetts False Claims Act (“MFCA”), because Respondent UnitedHealthcare Insurance Company (“United”) has waived its right to challenge the Civil Investigative Demand, and because United has engaged in a pattern of conduct that reflects a desire to delay the Attorney General’s investigation rather than comply with the Attorney General’s requests for information, this Court should compel United to fully comply.

¹ The defined term of “Attorney General” as used in this Memorandum includes both the Attorney General and those Assistant Attorneys General in the Medicaid Fraud Division working on this Massachusetts False Claims Act investigation.

United is a large and monetarily successful company. According to *Forbes* Advisor, as of February 26, 2024, UnitedHealth Group, Inc, United's ultimate parent company, was the overall fourth largest health insurance provider in the United States. Affidavit of Kevin O'Keefe, Assistant Attorney General, in Support of Petition for Enforcement of Civil Investigative Demand and in Compliance with Superior Court Rule 9C ("O'Keefe Affidavit") ¶ 5. Other sources report that UnitedHealth Group, Inc. had net revenues of \$324.2 billion in year 2022. *Id.*

In the Commonwealth, United is a Senior Care Options program ("SCO") provider to the MassHealth program. SCO programs are comprehensive health plans administered by private entities that cover all services normally paid for by Medicare and MassHealth.² Persons eligible for Medicare and MassHealth can choose to enroll in an SCO program to receive health services through a network of private providers. The members may also receive social support services and coordinated care plans. Members are not responsible for co-pays or other fees; MassHealth pays for the services provided to MassHealth members enrolled in the SCO on a capitated basis from Medicaid funds MassHealth receives from the United States and the Commonwealth.

The SCO program categorizes plan members into different "rate cells" based on the geographic region and likelihood and extent of care required for the members, and MassHealth pays the SCO program administrator monthly fees based on the number of members in each rate cell. The Attorney General is investigating whether United improperly inflated rate cell classifications, also known as rating categories, for MassHealth members participating in United's SCO, so that United would be paid higher monthly amounts per member.

² MassHealth, Senior Care Options (SCO) Overview, <https://www.mass.gov/info-details/senior-care-options-sco-overview>, last visited Mar. 19, 2024.

The Petition concerns the enforcement of a Civil Investigative Demand issued on July 25, 2023 and delivered to United via certified mail on July 31, 2023 (the “CID”).³ The CID is a key element of the Attorney General’s investigation into whether the MFCA has been violated (the “MFCA Investigation”) as it seeks to determine, *inter alia*, the basis and rationale for United’s rate cell classifications; whether United knowingly presented, or caused to be presented, false or fraudulent claims for payment or approval to MassHealth, including the dollar amount of all such claims for payment or approval; and to determine whether United knowingly made, used or caused to be made or used, a false record or statement material to a false or fraudulent claim which was submitted to MassHealth.

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background of this matter is set forth in the Petition and the O’Keefe Affidavit. For purposes of economy, that background is not repeated here.

ARGUMENT

United’s response to the CID is now overdue by months. United, a national health insurer operating private and public health plans across the country, has not advanced any practical or legal reason for its delay, such that the only plausible reason remaining for its refusal to provide responsive records is strategic delay. As discussed below, the Commonwealth has offered United every opportunity to comply and has allowed more than reasonable time for United to review and produce the documents requested. Notwithstanding those entreaties, United has not committed to, or even tentatively offered, a date by which it would agree to produce responsive information and has even refused to confirm in writing that certain responsive records do not

³ The CID is attached as Exhibit A to the Petition.

exist. United has had every opportunity to produce records and, absent a court order, there is no reason to believe that it will ever respond to the Commonwealth's CID.

I. United Has Waived Any Objection to the Civil Investigative Demand and Should Be Compelled to Comply.

In accordance with G.L. c. 12, § 5N(9), the CID set forth the time by which United had to file a motion to modify or set aside the CID and/or seek a protective order. That time was any time prior to the date specified for compliance, which was August 8, 2023, or within 21 days after the CID had been served, whichever period was shorter. Thus, United had to file any motion to set aside or modify the CID, and/or seek a protective order, by August 8, 2023. *See* Exhibit A to the Petition at 1.

United did not avail itself of the mechanisms available to it pursuant G.L. c. 12, § 5N(9). United failed to file a motion to modify or set aside the CID and/or seek a protective order by August 8, 2023 and, to date, has not done so. This failure by United constitutes a waiver of all objections it may have had to the CID. *See Attorney General v. Bodimetric Profiles*, 404 Mass. 152, 154 (1989) (holding under an analogous section of G.L. c. 93A that a “failure to bring [a motion to modify or set aside a Civil Investigative Demand] constitutes a waiver by the person to whom the [Civil Investigative Demand] is served”).

II. United Has Not Meaningfully Engaged with the Attorney General Concerning the Civil Investigative Demand.

To date, while United and the Attorney General have had many communications about this CID, United's pattern of conduct reflects a desire to prevent the Attorney General from conducting her investigation, not to comply with or even raise objections to the CID. Since May 5, 2023, United has refused to agree to toll the statute of limitations in this matter. O'Keefe Aff. ¶ 14. And since the Attorney General served the CID in July 2023, United has produced only a small fraction of the documents requested by the Attorney General. *Id.* at ¶¶ 12-13.

Indeed, almost all of the conversations between United and the Attorney General have resulted in promises of updates that United did not deliver, assurances that United was working on a production that never materialized, and follow-up after follow-up that went unreturned. *Id.* at ¶ 12.

United's informal communications with the Attorney General, including, for example, verbal assertions that Document Request No. 1 is overbroad (*see id.* at ¶¶ 9-10), and that United is still reviewing documents after being served the CID over six months ago (*see id.* at ¶ 12) without any claims of privilege, are not sufficient under Massachusetts law to exempt it from its failure to object to the CID. "Merely informing the Attorney General of its refusal to comply [with a Civil Investigative Demand] does not suffice to shift the burden to the Attorney General to take the next legal step." *Bodimetric Profiles*, 404 Mass. at 155. Thus, this Court should not read United's limited engagement with the Attorney General of the sort sufficient to maintain its right to object to the CID where United has fully refused to timely comply with the CID.⁴ Indeed, United's engagement with the Attorney General is analogous to that detailed in *Bodimetric Profiles*, except only that United has produced a small quantity of documents to the Attorney General. *See O'Keefe Aff.* ¶ 12.

⁴ In contrast, the Supreme Judicial Court in *Attorney Gen. v. Facebook, Inc.*, concluded that the respondent had not waived its objections to a civil investigative demand issued by the Attorney General where, although the respondent had not preserved its objection by moving to modify or set aside the demand, the corporation's engagement with the Attorney General was "far from passive," in that the respondent worked with the Attorney General and communicated its objections to the civil investigative demand, including making assertions of privilege, and complied with the requests in the demand that the respondent believed called for information that was not privileged. The Supreme Judicial Court emphasized and explained that a civil investigative demand recipient must meet a threshold of active engagement with the Attorney General to preserve their right to object. *See* 487 Mass. 109, 121 (2021).

Here, United cannot be said to have met this threshold or otherwise compare itself favorably to the respondent in *Facebook, Inc.* United has not asserted the existence of a privilege or other legal bar to producing the requested records. United has produced some records in response to the CID, though this has amounted to only 781 documents comprised of a small subset of chat messages and the contents of a shared network folder, *i.e.*, fewer than 4 documents per day since issuance of the CID on July 25, 2023.

Indeed, this rationale has already been endorsed by Judge Krupp sitting in the Business Litigation Session of the Superior Court who found:

Here, the case is far closer to *Bodimetric* than it is to Facebook. [The Respondent] declined to comply with the CID . . . and only agreed to produce documents that it had already produced in two other law enforcement investigations. [The Respondent] was passive; it sat back and waited to see if the [Attorney General] would seek to enforce the [Civil Investigative Demand]. This is precisely what *Bodimetric* instructs a [Civil Investigative Demand] recipient cannot do without waiving its objections.

Memorandum and Order on Motion to Dismiss at 4-7, *Attorney General v. USiDG LLC*, Civil Action No. 22-2370-BLS1 (Suffolk Super. Ct. Apr. 20, 2023).⁵

United cannot have it both ways. It cannot refuse to enter into further tolling agreements and also try to claim that it has meaningfully engaged with the Attorney General over the scope of the CID while repeatedly failing to respond to the Attorney General's inquiries. This position would enable United, and all other similarly situated respondents, to freely engage in these same types of delaying maneuvers, all to the detriment of the Commonwealth. United should not be permitted to obstruct the Attorney General's proper MFCA investigation with baseless and informal objections and abuse the MFCA process to impede or delay the progress of the MFCA investigation.

III. Even if It Has Not Waived its Right to Object, United Should Be Compelled to Comply with the Civil Investigative Demand as It Falls Squarely Within the Attorney General's Authority to Investigate Potential Violations of the MFCA.

Even assuming that United could object to the scope or substance of the CID after foregoing that opportunity for eight months, there would be no basis to modify or set aside the requests at issue here. The Attorney General has clear and broad authority to investigate potential violations of the MFCA, including authority to issue civil investigative demands. United should

⁵ A full copy of the Memorandum and Order is attached hereto as Exhibit 1.

therefore be compelled to comply. The records sought by the CID need only be **relevant** to the MFCA investigation, G.L. c. 12 § 5N(1), and targets cannot overlay additional “good cause” or “primary and substantial” requirements on top of the Attorney General’s statutory authority, *In the Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. 353, 357-58 (1977) (construing analogous authority for G.L. c. 93A investigations).

“The Attorney General is the ‘chief law officer’ of the Commonwealth, empowered by the Legislature to ‘set a unified and consistent legal policy for the Commonwealth.’” *Com. v Exxon Mobil Corp.*, 489 Mass. 724, 730 (2022) (quoting *Sec’y of Admin. & Fin. v. Attorney Gen.*, 367 Mass. 154, 159 (1975)). The Attorney General has general and specific statutory mandates to protect the public interest and “a common law duty to represent the public interest and enforce public rights.” *Com. v. Mass. CRINC*, 392 Mass. 79, 88 (1984). One of the Attorney General’s specific statutory mandates is to investigate potential MFCA violations “involving state funds or funds from any political subdivision.” G.L. c. 12, § 5C(1).

The MFCA grants the Attorney General the power to issue Civil Investigative Demands as part of any MFCA investigation whenever she “has reason to believe that a person may be in possession, custody or control of documentary material or information relevant to a false claims law investigation.” MFCA, G.L. c. 12, § 5N(1); *see also Yankee Milk*, 372 Mass. at 358, 364 (explaining that the Attorney General has broad investigatory power and the statute granting this power must be liberally construed in favor of the government).

The materials sought here are indisputably relevant to the Attorney General’s authority to investigate United as a recipient of tens of millions of dollars per month from MassHealth for the administration of its SCO program. As discussed *infra*, the particular documents and responses

sought in the CID are relevant, and there is no basis for United to assert that its response would require undue burden.

Request 3 of the CID seeks internal, non-privileged communications between and among the nursing staff responsible for categorizing SCO program members into rate cells and staff responsible for reviewing and confirming those classifications:

Any and all communications concerning Rating Categories, Rate Cells, Assessments and corresponding diagnoses and services (as well as policies, practices, procedures, directives, instructions, guidance, and training, whether formal or informal, pertaining to such Rating Categories, Rate Cells, Assessments, diagnoses, and services) located in Microsoft Teams Chats, Cisco Webex Messages, or Yammer, including but not limited to group communications between and among any MDS nurses or RN Case Managers performing or reviewing Assessments of Members in the Senior Care Options Program.

Petition Ex. A at 5. Insofar as members were improperly categorized into higher rate cells than justified by their actual diagnoses and physical impairments, that improper categorization translates directly to overpayment by MassHealth to United and would give rise to a claim under the MFCA. Internal communications relating to those rating decisions are indisputably relevant to the Attorney General's investigation of United.

The documents requested in CID Request 3 are limited in scope and time period and would shed light on whether and how United engaged in this conduct. United has represented that the only potentially responsive documents available date back to 2020, and there is a defined scope of document custodians and search terms targeted towards communications that are likely to be relevant to alleged misclassifications, namely communications between and among the staff performing and verifying the categorizations at issue.

The Attorney General is seeking to review the contemporaneous, candid communications of the staff whose conduct is at the center of the investigation. United has already produced a

small subset of these records, covering two months out of an approximately five-year period, such that it is clear that United has the capability to review and produce these records but has not come close to fully complying with CID Request 3.

There is even less justification for United to refuse to respond to CID Request 4 which seeks:

Any and all documents and communications concerning audits or reviews of Fieldglass, Resource Partners, CareBridge, and any other contractors that performed Assessments of Members in the Senior Care Options Program.

Petition Ex. A at 5. The Attorney General is seeking documents related to internal audits or reviews of third parties believe to have conducted assessments and rating categorizations of the members at issue. These documents would reflect candid commentaries regarding the accuracy of these assessments and the extent to which United corrected or did not correct assessments identified as unsupported or false.

United has already provided an ostensible response, namely its oral representation that there are no such responsive documents. O’Keefe Aff. ¶ 12 (at October 3, 2023). However, to date, United has refused to reduce that representation to writing, notwithstanding the Attorney General’s request to do so over five months ago. *Id.* If, as United has represented, there are no documents responsive to CID Request 4, then there is no burden for them to confirm as such.

United’s refusal to timely comply with the CID has deprived the Attorney General of the ability to determine whether United improperly inflated care levels for MassHealth members participating in United’s SCO, such that United would be paid improperly high capitation rates by MassHealth. United’s conduct has frustrated a properly predicated investigation of fraud against the Commonwealth, and it should not be permitted to thumb its nose at legally sound—and eminently reasonable—investigative requests issued by the Attorney General.

CONCLUSION

Because United failed to timely object to the CID, because United has engaged in a clear pattern of delay tactics, and because the Attorney General's CID is reasonable in scope and issued under her clear authority, this Court should allow the Commonwealth's Petition for Enforcement of the CID.

Commonwealth of Massachusetts,

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