UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES of AMERICA and *ex rel.* TRACY CONROY, PAMELA SCHENK and LISA WILSON,	)	
Plaintiffs/Relators,	)	
v.	)	CASE NO. 3:12-CV-00051-RLY- DML
SELECT MEDICAL CORPORATION, SELECT SPECIALTY HOSPITAL - EVANSVILLE, and DR. RICHARD SLOAN,	)	
Defendants.	)	

THE UNITED STATES' STATEMENT OF INTEREST IN SUPPORT OF RELATORS' OBJECTION TO MAGISTRATE JUDGE'S APRIL 2, 2018 ORDER CONCERNING THE USE OF STATISTICAL SAMPLING

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this Statement of Interest under the False Claims Act ("FCA" or "Act"), 31 U.S.C. §§ 3729-3733, in support of Relators' objection to the Magistrate Judge's April 2, 2018 Order precluding the use of statistical sampling as a means of proving liability in this case. The United States remains the real party in interest[1] in this *qui tam* suit, and, as the FCA is the Government's primary tool for recovering damages for fraud, the Government has a significant interest and distinct perspective in the correct application of the FCA.

As discussed further below, the Magistrate Judge's Order should be set aside as clearly erroneous because it is contrary to long-established precedent recognizing statistical sampling as an admissible and valid method of proof in complex cases involving large numbers of claims,

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[1] *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 852 (7th Cir. 2009)(holding the United States remains the real party in interest in *qui tam* cases where it declines to intervene).

including cases brought under the FCA. To the extent that the Magistrate Judge had concerns about the particular statistical methodology to be employed by Relators in this case, it was premature to reject Relators' Discovery Plan without a proper evidentiary record or a specific proposed methodology.

The United States takes no position on the remaining objections advanced by Relators to the Magistrate Judge's Order.

I. PROCEDURAL HISTORY

Relators Tracy Conroy, Pamela Schenk, and Lisa Wilson ("Relators") filed this *qui tam* case in September 2012, alleging that Defendants Select Medical Corporation, Select Specialty Hospital – Evansville, Inc., Select Employment Services, Inc. ("Select"), and Dr. Richard Sloan ("Dr. Sloan") (collectively, "Defendants") violated the FCA through its medically unnecessary admissions of patients to its Long Term Acute Care facilities, and through fraudulent attempts to maximize reimbursements through manipulation of patients' lengths of stay and falsification of diagnoses. (Dkt. No. 128). The United States filed a notice of declination to intervene on June 19, 2015. (Dkt. No. 115).

On March 13, 2017, the parties submitted a joint Case Management Plan and advised the Court that they had not reached an agreement regarding the appropriate geographic[2] and temporal scope of discovery. (Dkt. No. 189). The Court held a status conference on April 4, 2017 and requested the parties submit briefs outlining their discovery plans and positions regarding the appropriate scope and framework for discovery and other case management tasks. (Dkt. No. 198).

[2] Whether the case involves false claims that were submitted by Select nationwide or at one facility located in Evansville, Indiana.

Relators' Discovery Brief proposed a two phased discovery plan; the initial phase involved fact discovery of Defendants' corporate policies and procedures as well as patient data in order to generate the record upon which its expert statisticians could devise a statistical sampling plan. (Dkt. No. 201). Defendants' Discovery Brief[3] claimed that statistical sampling may not be necessary if the Court limits the geographic scope of discovery to a single facility. Both parties requested the Court defer briefing regarding the use of statistical sampling. Defendants' brief stated "[W]e do not seek a determination at this early stage that statistical sampling cannot be used at any point in this litigation." Defendants further suggested that the close of discovery would be an appropriate time to brief the use of statistical sampling if the Court ruled that discovery will be nationwide. (Dkt. Nos. 199, 203). Relators proposed that briefing on statistical sampling could occur after the initial phase of discovery. (Dkt. No. 201).

On April 2, 2018, the Magistrate Judge issued an Order limiting the temporal and geographic scope of discovery. Further, the Order held that statistical sampling was not appropriate because it "ignores what the plaintiffs would have to prove to prevail in this case". The Magistrate ruled that "fraud will have to be proved on a claim-by-claim basis based on the patient's actual medical condition and actual medical care. Conducting discovery in a manner that is not focused on the ultimate burdens of proof is not appropriate." *Id.* Relators filed a timely objection to the Magistrate's Order pursuant to Federal Rule of Civil Procedure 72 requesting that the Court set aside the Order on several grounds related to the temporal and geographic scope. (Dkt. No. 219). The United States submits this Statement of Interest in support of Relators' objection to the ruling excluding the use of statistical sampling to prove

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[3] Dr. Sloan submitted his own brief adopting Select Medical's positions (Dkt. No. 202).

liability in this case. The United States' position is not affected by the Court's ultimate ruling on the appropriate geographic scope of discovery – whether the scope of discovery is nationwide encompassing multiple facilities or narrower in scope but still involving numerous claims – since the use of statistical sampling is appropriate to establish liability and damages in an FCA case where it would not be feasible to present and prove each false claim to the jury individually.

III. STANDARD OF REVIEW

The district court's review of a magistrate's judge's order is governed by Federal Rule of Civil Procedure 72(a) which states that "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); *see* 28 U.S.C. §636(b)(1). *See also Bowman v. Int' Bus. Mach. Corp.*, No. 1:11-CV-0593-RLY-TAB, 2013 WL 1857192, at *2 (S.D. Ind. May 2, 2013) (*citing Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 926 (7th Cir. 1997)); *Heartland Recreational Vehicles, LLC v. Forest Rive*r, Inc., No. 308–CV-00490, 2010 WL 3119487, at *2 (N.D. Ind. Aug. 5, 2010)([t]the district court "reviews the magistrate's factual determinations under the 'clear error' standard, and the legal determinations under the 'contrary to law' standard.) (*quoting Lafayette Life Ins. Co. v. City of Menasha*, No. 409-CV-64-TLS, 2010 WL 1138973, at *1 (N.D. Ind. Mar. 17, 2010)), *rev'd on other grounds sub nom. Am. Bank v. City of Menasha*, 627 F.3d 261 (7th Cir. 2010) *as amended* Dec. 8, 2010). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Herz v. Diocese of Fort Wayne--S. Bend, Inc.*, No. 1:12-CV-122 RM, 2012 WL 3870528, at *2 (N.D. Ind. Sept. 5, 2012) (*quoting Mart v. Berkshire Hathaway, Inc.*, No. 3:10–CV–118, 201 WL 924281, at *4 (N.D. Ind. Mar. 14, 2011)).

IV. LEGAL ARGUMENT

To the extent that the Magistrate Judge's Order was intended as an exercise of the Court's rightful function to serve as a gatekeeper and to ensure that only reliable expert testimony is admitted and used in this case, it was premature for the Magistrate Judge to rule on this issue before any specific methodology was even offered by Relators. Instead, to the extent that the Magistrate Judge's Order reflects a determination that sampling is never appropriate in False Claims Act cases regardless of its reliability, such a ruling is contrary to the language, history, and broad remedial purposes of the FCA; numerous cases upholding sampling under the FCA; and other pertinent Supreme Court and Seventh Circuit decisions recognizing the validity of sampling where it would be impractical to present the plaintiff's case to the jury without the use of technique. In either case, the Magistrate Judge's ruling was clearly erroneous and should be overturned.

1. The Magistrate's Ruling Was, At a Minimum, Premature Given the Absence of a Proper Evidentiary Record

As the Magistrate Judge's Order correctly recognizes, the Court plays an important role in serving as a gatekeeper to ensure that only appropriate and reliable expert testimony is presented to the jury. To properly exercise that role, however, the Court requires an appropriate evidentiary record upon which to evaluate any proffered expert testimony. Here, because Relators have not yet proposed any particular sampling methodology, it was at a minimum, premature for the Magistrate Judge to evaluate whether Relators proposed use of sampling was appropriate in this case.

Notably, even the Defendants recognized[4] that it was premature at this stage for the Court to make any ruling on the admissibility of sampling in this case. Rather, the Defendants asked the Court to defer any ruling because of the fact dependent nature of such an inquiry and the absence of a fully developed record and any proposed methodology:

> [A]ny determination at this early stage as to the appropriateness and legality of any proposed statistical sampling methodology would be premature for two reasons: First, as the Fourth Circuit observed in refusing to review the propriety of sampling in FCA cases, the determination of whether statistical sampling should be used, and how, is a fact dependent issue that should – if at all – be resolved at the conclusion of discovery based on a fully developed record.[5]

Consistent with the Defendants' (and Relators') position in this case, courts have declined to prematurely adjudicate the admissibility of expert testimony on sampling. In *United States ex rel. Berntsen v. Prime Healthcare Services, Inc.,* the Defendants filed a pre-discovery motion to exclude statistical sampling claiming that, as a matter of law, the United States is precluded from using statistical sampling and extrapolation to support the falsity of certain claims under the False Claims Act. The Court denied Defendants' motion because the evidentiary record was incomplete. The Court reasoned that it was inappropriate to address the propriety of statistical sampling when "it was not clear to the Court if, when, and/or how the government will use statistical sampling," and that "if the government attempts to introduce sampling evidence, Defendants can review their motion and the Court will reconsider the issue in the context of the motion." 2:11-CV-08214 (C.D. Cal. Jan. 13, 2017). (Attached as Ex. 1).

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[4] The United States acknowledges that Defendants position applies in the event nationwide discovery is ordered.

[5] Dkt. No. 199, pg. 18 c*iting United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 341 (4th Cir. 2017)(dismissing an interlocutory appeal as to statistical sampling in FCA case because it did not present a pure question of law); *see also United States v. Vista Hospice Care, Inc.*, No. 3:07-CV-00604-M, 2016 WL 3449833, at *13 (N.D. Tex. June 20, 2016)(to determine if sampling is appropriate, courts are "required to engage in a particularized analysis of whether extrapolation from a particular data set can reliably prove the elements of the specific claim").

Similarly, *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig*., 984 F. Supp. 2d 1021, 1037 (C.D. Cal. 2013), the court held that "the proper time to decide on the admissibility of the extrapolation methodology will be *when the expert testimony including the extrapolation of the data has been submitted*." (emphasis added).

Courts have avoided prejudging the admissibility of other types of expert testimony until the evidentiary record was appropriately developed, thus permitting the reliability of the proffered testimony to be fairly evaluated. *See Jahn v. Equine Servs., PSC*, 233 F.3d 382, 393 (6th Cir. 2000) ("A district court should not make a Daubert ruling prematurely, but should only do so when the record is complete enough to measure the proffered testimony against the proper standards of reliability and relevance."); *KCG Americas LLC v. Brazilmed, LLC*, No. 15 Civ. 4600 (AT), 2016 WL 900396, at *4 (S.D.N.Y. Feb. 26, 2016) ("fact laden inquiry" is "unsuited" for "pre-answer, pre-discovery" resolution) (*quoting Tommy Lee Handbags Mfg. Ltd. v. 1948 Corp.,* 971 F. Supp. 2d 368, 376 (S.D.N.Y. 2013)).

Here, Relators have not yet introduced any particular sampling methodology. Without a record of how the sample would be derived or used, or what other types of evidence would be introduced, it was premature, at a minimum, for the Magistrate Judge to preclude the use of statistical evidence to establish the Defendants' liability.

2. The Language, History, and Purpose of the FCA Support the Use of Sampling and Extrapolation.

If the Magistrate Judge's Order was not intended as a ruling on the reliability of Relators' specific anticipated statistical sampling methodology, but instead was a determination that sampling is never appropriate in FCA cases, then the Order was equally flawed. Sampling is a well-recognized form of evidence that is widely used in cases where the scope of the issues or

claims would make it impractical to present the case to the jury absent the use of sampling. Indeed, courts have recognized that if the government were not permitted to use sampling in a False Claims Act case, then defendants would be incentivized to commit fraud on a large scale, knowing that the government could not present all of the defendant's false claims individually to the jury. *United States v. Life Care Centers of Am., Inc.*, 114 F. Supp. 3d 549 (E.D. Tenn. 2014). For this reason, the overwhelming majority of courts have rejected claims by defendants that sampling is categorically prohibited in False Claims Act cases.

These decisions are consistent with the False Claims Act's language and purpose. The FCA contains no express limitation on the use of statistical evidence. That omission is significant as Congress has amended the Act multiple times since sampling was first raised in a FCA case. *See United States ex rel. v. Life Care Centers of Am., Inc.*, 114 F. Supp. 3d 549, 571 (E.D. Tenn. 2014). In fact, in amending the FCA, Congress recently emphasized the importance of "mak[ing] the statute a more useful tool against fraud in modern times." *id.,* noting that the FCA has "evolved with the ever-changing landscape of technology and new methods and mechanisms for committing fraud." *Id.* at 558. That broad remedial purpose requires an interpretation of the FCA that authorizes the use of statistical evidence in cases large-scale fraud cases, to ensure that defendants do not profit from their wrongdoing. *Cf. United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (stating the Act is "broadly phrased to reach any person who makes or causes to be made "any claim upon or against' the United States"). As discussed below, the Magistrate Judge's Order is contrary to these principles, and rests on a flawed assumption as to the requirements and limitations of the False Claims Act.

a. The Magistrate Judge Erred In Holding That Fraud *Must Be Proved* On A Claim-By-Claim Basis to Establish Liability under the FCA

The Magistrate's Order overlooks the rulings of numerous courts that have permitted sampling as evidence of liability and damages[6] in FCA cases and analogous cases. Specifically, the Order fails to consider that the majority of FCA decisions that have addressed sampling in medical necessity cases —like this case --- have approved its use. *See United States v. Americus Mortg. Corp.*, No. 4:12-CV-2676, 2017 WL 4083589 (S.D. Tex. Sept. 14, 2017)(statistical sampling was properly used to extrapolate a total damages figure); *Cretney-Tsosie v. Creekside Hospice II, LLC*, No. 213CV00167APGPAL, 2016 WL 1257867, at *6 (D. Nev. Mar. 30, 2016); *U.S. ex rel. Guardiola v. Renown Health*, No. 3:12-CV-00295-LRH, 2015 WL 5123375 (D. Nev. Sept. 1, 2015), at *1; *United States v. Robinson*, No. 13-CV-27-GFVT, 2015 WL 1479396, at *11 (E.D. Ky. Mar. 31, 2015); *Life Care Centers of America, Inc.*, 114 F. Supp. 3d at 567.

Relators seek phased discovery, with the first phase focusing on corporate policies and procedures and a database of patient information, and the second to include sampling. The Order claims that the Relators cite no authority "for the proposition that proving that a particular Medicare reimbursement claim was fraudulent based on a theory of lack of medical necessity can be done by a random-sampling method that does not evaluate whether each particular claim for which the plaintiffs seek relief was actually knowingly false within the meaning of the FCA". (Dkt. No. 218, pg. 7). However, Relators did provide relevant authority supporting the position that statistical sampling is permitted in FCA cases, by citing the *Life Care* case.

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[6] The Magistrate Judge's Order acknowledged that "statistical evidence based on sampling could be appropriate for calculating damages, but that is not a matter that needs to be determined now." (Dkt. No. 218, pg. 8 n.6.)

Further, the Seventh Circuit upheld the use of sampling in *United States v. Rogan*, where the manager of a healthcare company was engaged in a kickback scheme. 517 F.3d 449, 453 (7th Cir. 2008). In *Rogan*, there were 1,812 claims in question; the defendant argued that "the district judge had to address each of the 1,812 claim forms," to prove that there were patients who did indeed receive treatment at the medical center that qualified for reimbursement. *Id.* This argument was rejected as "a formula for paralysis," by the Seventh Circuit, which held instead that "[s]tatistical analysis should suffice." *Id.*

Similarly the Sixth Circuit recently rejected similar arguments in a medical necessity case involving optometry services provided to Medicare beneficiaries, including that "the necessity of each claim at issue is a subjective determination made by the medical professional on a patient-by-patient basis," and the "use of samples in order to extrapolate liability" is "improper as a matter of law" because "individualized proof" is required. *Robinson*, 2015 WL 1479396, at *1.

In *United States ex rel. Martin v. Life Care Ctrs.*, the court also allowed the use of statistical sampling and adopted an approach to discovery similar to that which Relators have proposed in this case. *Id* at 567. (Dkt. 201, pg. 16). In *Life Care,* the court considered allegations that a chain of skilled nursing facilities submitted and caused the submission of tens of thousands of false claims to Medicare for unreasonable and unnecessary rehabilitation therapy services. *Life Care Centers of America, Inc.*, 114 F. Supp. 3d at 554. The Government sought to use statistical sampling to prove both liability and damages. *Id.* at 553-55. In a comprehensive opinion, the district court carefully examined the basic principles of statistical sampling, *id.* at 559–60, and the many cases permitting the use of sampling in a variety of

contexts, *id.* at 562–65, and concluded that sampling could properly be used to prove FCA claims in that case, *id.* at 565–70.

The *Life Care* court observed that "the purpose of statistical sampling is precisely for these types of instances in which the number of claims makes it impracticable to identify and review each claim and statement," *id.* at 565, and stressed that requiring "claim-by-claim review" in all FCA cases would have the pernicious effect of immunizing the largest perpetrators of fraud, *id*. at 571. "Armed with the knowledge that the government could not possibly pursue each individual false claim," the court summarized, "large-scale perpetrators of fraud would reap the benefits of such a system." *Id.* Because the court concluded that such a result would not be "consistent with the purpose and history of the FCA," the court held that statistical sampling could be used to prove both liability and damages under the FCA. *Id.* at 571-72; *see*, *United States ex rel. Loughren v. UnumProvident Corp*., 604 F. Supp. 2d 259, 261 (D. Mass. 2009) (holding that "extrapolation is a reasonable method for determining the number of false claims so long as the statistical methodology is appropriate"); *United States v. Cabrera-Diaz*, 106 F. Supp. 2d 234, 240–41 (D.P.R. 2000) (holding that extrapolation from sampled claims could be used to prove elements of FCA liability in case involving fraudulent Medicare claims); *see also United States v. Fadul*, No. CIV.A. DKC 11-0385, 2013 WL 781614, at *14 (D. Md. Feb. 28, 2013) (granting government motion for summary judgment as to damages in FCA case based upon statistical sampling and extrapolation).

Yet another example of an FCA case where statistical sampling was held to be permissible form of proof of liability is *Cretney-Tsosie v. Creekside Hospice II, LLC,* which involved allegedly unnecessary hospice services. 2016 WL 1257867, at *2. Medicare covers such services only if a physician certifies that the beneficiary is terminally ill, meaning "the

individual has a medical prognosis that his or her life expectancy is 6 months or less." 42 U.S.C. § 1395x(dd)(3)(A); 42 C.F.R. § 418.3. The district court in *Creekside Hospice* allowed the United States to rely "upon the extrapolation made by its experts" from "a statistically valid random sample to prove its claims." *Cretney-Tsosie*, 2016 WL 1257867, at *6.

In an attempt to provide legal authority to support the Magistrate's creation of an individualized proof requirement under the FCA, Defendants rely on *United States ex rel. Crews v. NCS Healthcare of Illinois., Inc.*, 460 F.3d 853, 856 (7th Cir. 2006), for the proposition that "each of these elements (and others) must be met for each false claim at an individual transaction level is out of context and inapposite to the facts in this case". (Dkt. No. 221, pg. 28). This contention is incorrect for several reasons. First, in *Crews* and the related cases cited by Defendants,[7] the relators' claims failed because the relator did not provide evidence of a single false claim that was actually submitted. Because the relators in those cases were unable to demonstrate that the defendant's general, suspicious conduct was linked to the submission of even *one*, specific false claim to the government, their complaints were properly dismissed. By contrast, this case has been narrowed by the Court's September 30, 2016 ruling on Defendants' motion to dismiss, which held that two of the four schemes to defraud Medicare were pled with sufficient particularity: the short-stay outlier scheme and the upcoding scheme. (Dkt. No. 163 at pgs. 36-40). Moreover, by definition, Relators will have nothing to extrapolate unless they first prove that some claims in their sample were in fact false. Second, implicit in Defendants argument is the notion that statistically valid inferences based on the results of sampling are not

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[7] *United States ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730 (7th Cir. 2007) (holding plaintiff had insufficient evidence to survive Fed. R. Civ. P. 9(b)), *overruled on other grounds*, *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009).

evidence of liability on any claims beyond those actually reviewed in the sample. That fundamentally misunderstands the nature and import of statistical sampling. As the court held in *Michigan Department of Education v. United States Department of Education*, sampling is a common, mathematically-proven technique by which estimates of a characteristic of a population can be made based on a sample of that population. 875 F.2d 1196, 1205 (6th Cir. 1989). As numerous courts have recognized, "the purpose of using a sample is to extrapolate results from a small sample to a large population." *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 984 F. Supp. 2d 1021, 1038 (C.D. Cal. 2013). So long as scientifically-accepted methods are used to design and execute a sampling plan, statistical sampling provides a reliable mechanism to "confidently draw inferences about the whole from a representative sample of the whole." *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019-20 (5th Cir. 1997); *accord United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 18 n. 19 (1st Cir. 2005) (noting that "sampling of similar claims and extrapolation from the sample is a recognized method of proof"). In short, statistically valid extrapolation *is* probative evidence of liability.

b. The Supreme Court, Seventh Circuit and Other Courts in Analogous Contexts Supports the Use of Sampling and Extrapolation

Notably, outside the False Claims Act, the Supreme Court, the Seventh Circuit and other courts have routinely relied upon statistical sampling to prove liability and damages in a wide variety of cases. The Supreme Court held that a "representative or statistical sample, like all evidence, is a means to establish or defend against liability," and "categorical exclusion" of such evidence is improper. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046, 194 L. Ed. 2d

124 (2016)[8]. The Magistrate's ruling interprets *Tyson Foods* to support that statistical sampling is not necessary in this case because Relators have made no showing of a potential evidentiary gap that is the fault of the Defendants for which representative evidence would be appropriate. The Magistrate's narrow interpretation of "evidentiary gap" overlooks the key import of the Supreme Court's ruling in Tysons that sampling and extrapolation are "means to establish or defend against liability," and their "categorical exclusion" is improper. Rather, the permissibility of such evidence depends on whether it is "reliable in proving or disproving the elements of the relevant cause of action." *Id.* That question, in turn, depends on "facts and circumstances" particular to each case, such as whether the data to be sampled is related by a "common policy." *Id.* at 1048–49. *Tyson Foods* involved a class of employees seeking overtime pay. *Id.* at 1041. Because the employees "did similar work" and were "paid under the same policy," the Supreme Court held that "the experiences of a subset of employees can be probative as to the experiences of all of them." *Id.* In so holding, the Supreme Court rejected the employer's argument, reminiscent of the Magistrate's position here, that the "person-specific inquiries into individual work time" necessary to determine liability rendered sampling and extrapolation unreliable. *Id.* at 1046.

Notably, there is substantial agreement in the courts of appeals that sampling methodologies are particularly appropriate means of establishing whether claims for payments from federal programs, including the Medicare and Medicaid programs, comply with statutory limitations on reimbursement. For example, in particular, the Seventh Circuit leading case of *Illinois Physicians Union v. Miller*, approved the use of sampling and extrapolation to determine

[8] The Magistrate's ruling distinguishes *Tyson Foods* from this case, because there has been no showing of a potential evidentiary gap that is the fault of the Defendants for which representative evidence would be appropriate.

physician's liability for billing for Medicaid services that were not actually rendered. 675 F.2d 151, 155-56 (7th Cir. 1982). Also, in *Ratanasen v. State of Cal., Dep't of Health Servs.*, 11 F.3d 1467, 1471 (9th Cir. 1993), the Ninth Circuit held that the use of sampling and extrapolation to determine overpayments in Medicare and similar programs is permissible, provided that the opposing party has an opportunity to rebut such evidence. The Court explained:

> [T]o deny public agencies the use of statistical and mathematical audit methods would be to deny them an effective means of detecting abuses in the use of public funds. Public officials are responsible for overseeing the expenditure of our increasingly scarce public resources and we must give them appropriate tools to carry out that charge.

See Lahey Clinic Hospital, Inc., 399 F.3d at 18 n. 19 (statistical sampling may be used to establish amount of Medicare overpayments); *Yorktown Med. Lab., Inc.* v. *Perales*, 948 F.2d 84, 90 (2d Cir. 1991) (use of statistical sampling and extrapolation to establish a laboratory's liability for overcharging Medicaid program is consistent with due process in light of the low risk of error, the government's interest in minimizing administrative burdens, and the government's interest in eliminating fraud); *Chaves Cty. Home Health Serv., Inc. v. Sullivan*, 931 F.2d 914 (D.C. Cir. 1991)(statistical sampling procedures may be used to determine health care provider's liability for claiming Medicare reimbursement with respect to services not covered by the Medicare statute); *Michigan Dept. of Educ.*, 875 F.2d 1196 (random sampling and statistical methods of extrapolating the sample results to a large universe of claims may serve as substantial evidence of whether the claims complied with statutory limitations on federal payments); *see also United States v. Jones*, 641 F.3d 706, 712 (6th Cir. 2011) (statistical sampling and extrapolation may be used to establish government's loss from submission of fraudulent Medicare and Medicaid claims for purposes of sentencing guidelines).

The Seventh Circuit and sister courts have even accepted the use of statistical sampling as methods of proof in criminal trials and sentencing proceedings to calculate the amount of loss under the Sentencing Guidelines, both for purposes of length of incarceration and amount of restitution. *See, e.g., Jones*, 641 F.3d 706 (statistical estimate may provide a sufficient basis for calculating the amount of loss); *United States v. Conner*, 262 F. App'x 515 (4th Cir. 2008) (on appeal of health care fraud sentence, holding that extrapolation was "an acceptable method to use in making a reasonable estimate of the amount of loss under the sentencing guidelines."); *United States v. Freitag*, 230 F.3d 1019, 1025 (7th Cir. 2000) (in reviewing criminal health care fraud sentence, use of sampling to determine loss amount appropriate).

The Magistrate's ruling fails to cite *any* legal authority that warrants a departure from well-established precedent within this Circuit and nationwide that statistical sampling is an appropriate method to establish FCA liability and damages. And while Relators have the burden of proving that any proposed methodology in this case would provide reliable proof of these issues, it was premature for the Court to conclude that Relators would be unable to do so.

V. CONCLUSION

For the reasons discussed herein, the United States respectfully requests that the Court overturn the Magistrate's ruling and allow the Relators to use statistical sampling in this case.

Dated: May 11, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing upon the Parties herein, by filing a copy through the Court's CM/ECF system, which will deliver a copy to the following counsel of record on this 11th day of May, 2018.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

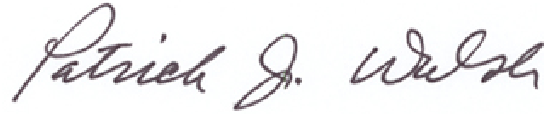
UNITED STATES OF AMERICA, ex rel. KARIN BERNTSEN, Plaintiff, v. PRIME HEALTHCARE SERVICES, INC., et al., Defendants.	CASE NO. CV-11-8214 PJW ORDER DENYING DEFENDANTS' MOTION TO EXCLUDE STATISTICAL SAMPLING EVIDENCE TO PROVE FALSITY OF CLAIMS

The government brings this False Claims Act case against Defendant Prime Healthcare Services, Inc. and others, alleging that they improperly admitted thousands of patients to the hospital who should not have been admitted and should, instead, have simply been observed by hospital staff and later released. According to the government, there are more than 35,000 potential admissions at issue in this case.

Defendants move to exclude the government's use of statistical sampling evidence to prove its case. That motion is denied without prejudice. It is not clear to the Court if, when, and/or how the government will use statistical sampling. If the government attempts

to introduce sampling evidence, Defendants can renew their motion and the Court will reconsider the issue in the context of the motion.

DATED: January 13, 2017



PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

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