

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

UNITED STATES OF AMERICA,)
)
)
 Petitioner,)
)
 v.)
) Misc. Action No. 3:23-MC-00007
)
 SENTARA HEALTHCARE,)
 HOWARD KERN,)
 MICHAEL DUDLEY, and)
 JAMES JUILLERAT,)
)
)
 Respondents.)
 _____)

**UNITED STATES' PETITION FOR ORDER TO SHOW CAUSE
AND FOR SUMMARY ENFORCEMENT OF
CIVIL INVESTIGATIVE DEMAND NOS. 21-337, 22-1024, 22-1026, 23-1221**

The United States is conducting an investigation pursuant to the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, regarding whether Sentara Healthcare (Sentara) or any of its subsidiaries or affiliates, including Optima Health Plan (Optima), made material false statements in health insurance rate filings for the 2018 and 2019 plan years for the Patient Protection and Affordable Care Act (ACA) individual health insurance marketplace in Virginia, thereby causing the submission of false claims for payments by the federal government to Optima in the form of Advanced Premium Tax Credits (APTCs). The United States submits this petition to enforce due to Respondents' failure to comply with lawfully issued Civil Investigative Demands (CIDs) for relevant information in the course of this ongoing FCA investigation.

In 2018, Optima's insurance premiums for individual plans in the state of Virginia increased *on average* by 81.8% compared to 2017. Although the average increase was 81.8%, Optima's premiums actually increased as high as 265.5% depending, among other things, on where the insured lived. For example, Optima's Charlottesville customers saw premium increases at the top of the range. For those Virginians, Optima's rates were the highest in the country, with the least expensive insurance option costing more than twice the national average.

As discussed below, under the ACA, the higher Optima's premiums were, the more money the government paid to Optima in the form of subsidies. As relevant here, the federal government paid Optima over \$535 million in 2018 and nearly \$132 million in 2019 in subsidies, large sums of money which are implicated by the allegations being investigated by the United States.

The United States comes to the Court seeking an order enforcing the lawful demands it made pursuant to its FCA investigative power to issue CIDs under 31 U.S.C. § 3733. Specifically, the government requests the Court enter an order or orders to show cause and for enforcement for Sentara, Howard Kern, James Juillerat, and Michael Dudley, compelling: 1) Sentara to comply with the United States' narrow records requests under CID No. 21-337 for the documents of custodian and former Sentara CEO Howard Kern, 2) Howard Kern to comply with CID No. 23-1221, seeking his sworn testimony, and 3) former Optima CEO Michael Dudley and Optima Chief Actuary James Juillerat to provide sworn testimony under CID Nos. 22-1026 and 22-1024, necessitated by Sentara's belated production of nearly 7,000 pages of new responsive documents *after* the government took the sworn testimony of these key witnesses.

Importantly, a CID is summarily enforceable if it is within the government's statutory authority, follows statutory requirements, seeks information reasonably relevant to the agency's

inquiry, and is not unduly burdensome. The CIDs served on Sentara, Michael Dudley, James Juillerat, and Howard Kern satisfy each of these requirements and should be enforced.

I. JURISDICTION AND VENUE

This Court has jurisdiction over this proceeding under 31 U.S.C. § 3733(j) and 28 U.S.C. § 1331. Venue is proper under 31 U.S.C. § 3733(j).

II. PARTIES

Petitioner is the United States of America.

Respondent Sentara Healthcare is a Virginia corporation with its principal place of business at 6015 Poplar Hall Drive, Norfolk, VA 23502. Sentara is the parent corporation of a large conglomerate of health care providers, including hospitals, medical groups, behavioral centers, insurers (including HMOs and insurance companies), and other health care entities. Sentara conducts business throughout the Commonwealth of Virginia, including in the Western District of Virginia.

Respondent Howard Kern is a resident of Virginia Beach, Virginia and is the former CEO of Sentara Healthcare. Mr. Kern worked for Sentara Healthcare for at least 42 years and retired as CEO of Sentara Healthcare in 2022.

Respondent Michael Dudley is a resident of Virginia Beach, Virginia and is the former CEO of Sentara Healthcare's subsidiary health plan known as Optima Health Plan. Mr. Dudley retired as Optima Health Plan's CEO on December 31, 2017.

Respondent James Juillerat is a resident of Virginia Beach, Virginia and is the Chief Actuary of Optima Health Plan.

III. STATUTORY BACKGROUND

The FCA is the “government’s primary litigative tool for the recovery of losses sustained as the result of fraud against the government.” *Avco Corp. v. U.S. Dep’t of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989). The FCA prohibits any person from “knowingly” presenting “a false or fraudulent claim for payment or approval” to the federal government. 31 U.S.C. § 3729(a)(1). It provides that the Attorney General “diligently shall investigate a violation” of the FCA and may bring a civil action if s/he finds that “a person” has committed a violation. 31 U.S.C. § 3730(a).

One of the government’s principal tools for investigating potential FCA violations is the CID. The rules governing CIDs are set forth in 31 U.S.C. § 3733, which authorizes the Attorney General or designee to issue a CID before commencing a civil proceeding or deciding whether to intervene in a relator’s *qui tam* action. 31 U.S.C. § 3733(a)(1). Specifically, the FCA empowers the Attorney General, or designee, to issue a CID to “any person¹ [which] may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation.” 31 U.S.C. § 3733(a)(1). CIDs may require such persons to produce documentary material, to answer in writing written interrogatories, “to give oral testimony concerning such documentary material or information,” or “any combination of such material, answers, or testimony.” 31 U.S.C. § 3733(a)(1)(A)-(D).

Where a CID recipient “fails to comply with any civil investigative demand issued under subsection (a) ... the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order or such court for the enforcement of the civil investigative demand.” 31 U.S.C. § 3733(j)(1). In any dispute regarding enforcement of a CID, courts treat the CID as if

¹ The FCA defines the term “person” as “any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State.” 31 U.S.C. § 3733(l)(4).

it were an administrative subpoena. *United States v. Markwood*, 48 F.3d 969, 975-76 (6th Cir. 1995); *see also In re Civil Investigative Demand 15-439*, No. 5:16-MC-3, 2016 WL 4275853 (W.D. Va. Aug. 12, 2016) (Urbanski, C.J.). As with an administrative subpoena, “a district court’s role in the enforcement” of the CID “is a limited one.” *Id.* at 976. So long as the government can show the investigation “had a legitimate purpose” and the inquiry “may be relevant to that purpose,” the CID will be enforceable, assuming the government followed all statutory requirements. *Id.* at 978.

Specifically, courts must enforce an administrative subpoena where: (1) the issuing agency has authority to engage in the investigation; (2) the issuing agency has complied with the statutory requirements of due process; (3) the information sought is reasonably relevant to the investigation and (4) where the information sought is not unduly burdensome. *In re Civ. Investigative Demand 15-439*, 2016 WL 4275853, at * 3 (citing *E.E.O.C. v. Ranstad*, 685 F.3d 433, 442 (4th Cir. 2012); *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 476 (4th Cir. 1986); *see also United States v. Powell*, 379 U.S.48, 57-58 (1964); *EEOC v. Ocean City Police Dept.*, 787 F.2d 955, 957 (4th Cir. 1986); *Marshall v. Stevens People & Friends for Freedom*, 669 F.2d 171, 176 (4th Cir. 1981) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

IV. FACTUAL BACKGROUND

a. The FCA Investigation

i. The United States Is Investigating Whether Sentara, Optima, and Others Filed False ACA Individual Market Rate Filings

The FCA provides civil remedies to the government against “all fraudulent attempts to cause the Government to pay out sums of money.” *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968). Here, among other things, the United States seeks to ascertain whether Sentara and its subsidiary Optima (or others) knowingly made material false statements in health insurance

rate filings for plan years 2018 and 2019 for the ACA individual health insurance marketplace in Virginia, thereby causing the submission of false claims for payment to the United States.

Put another way, the government is investigating whether Optima, Sentara, or others defrauded regulators to obtain approval for premium rates that Optima, Sentara, or others knew to be excessive and unjustified in violation of the ACA, among other laws. If Optima charged inflated rates, Optima increased the total amount of premiums it collected, which would have at least two major impacts on the federal fisc. First, by increasing the total amount of premiums charged, Optima would increase the total amount of subsidies the government would pay directly to Optima. Second, if Optima artificially increased premium rates, that may have materially altered the subsidies qualification calculation, meaning that more people may have qualified for subsidies than would have if Optima charged a reasonable/non-excessive rate, which in turn could mean the government paid out more money.

In 2018, Optima collected nearly \$640 million in health insurance premiums in Virginia from individual ACA plans. Of that \$640 million, the federal government directly paid Optima over \$534 million in APTC payments, representing 83% of all premiums collected by Optima that year in the individual ACA market. In 2019, Optima collected \$172 million in premiums in the ACA individual market, of which the federal government paid over \$131 million, or 76% of all premiums, in APTC payments. The government's investigation seeks to determine whether any or all of these funds were obtained in violation of the FCA.

The government's investigation is ongoing and the United States has neither commenced an FCA lawsuit against Sentara, Optima, or any other potential defendant, nor made an election under the FCA in any *qui tam* action in which Sentara, Optima or any related party may be a defendant related to this investigation.

ii. CID No. 21-337 Requires Sentara to Provide Records Related to Optima's 2018 and 2019 ACA Individual Market Rate Filings

The government issued CID No. 21-337 to Sentara Healthcare (Sentara) on May 20, 2021. The United States personally served Sentara on May 28, 2021 via certified mail at its headquarters in Norfolk, Virginia, as confirmed by Sentara's signed return receipt dated June 1, 2021.² Exhibit A, CID No. 21-337; Exhibit B, CID No. 21-337 Return Service. CID No. 21-337 notified Sentara that the "False Claims Act investigation concerns allegations that Sentara Healthcare and/or its subsidiaries knowingly filed false health insurance rate filings in 2018 and 2019 for the Affordable Care Act individual health insurance marketplace in Virginia, thereby causing the submission of false claims for premium tax credits to the United States, in violation of the False Claims Act." Exhibit A, CID No. 21-337, p. 1. Specifically, CID No. 21-337 requested four targeted categories of documents from January 1, 2017 forward: (1) records related to Sentara's/Optima's communications with its actuarial firm, Milliman, Inc, the Virginia Bureau of Insurance (BOI), or any other entity Sentara/Optima consulted or communicated with regarding Optima's 2018 or 2019 individual ACA market rate filings; (2) all records relating to Optima's 2018 or 2019 individual ACA market rate filings, including underlying data, analyses, work papers, drafts, etc.; (3) all records that reflect concerns or complaints regarding the 2018 or 2019 Optima individual ACA market rate filings; and (4) records regarding Sentara's/Optima's corporate and organizational structure.

During initial discussions with Sentara's/Optima's counsel about producing documents responsive to the CID, Sentara's counsel identified 19 custodians, which did not include Sentara's then-CEO, Howard Kern. In an effort to streamline its investigation and limit productions to

² 31 U.S.C. § 3733(d)(1)(C) provides that service may be made in several ways, including by "depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, address to such partnership, corporation, association, or entity at its principal office or place of business."

custodians which the government believed would have the most relevant information, the government offered to prioritize six custodians, including former Optima CEO Michael Dudley, former Optima CEO (and current Sentara CEO) Dennis Matheis, former Optima CFO Andy Hilbert, Optima Chief Actuary James Juillerat, Optima Managing Actuary Dean Ratzlaff, and Optima Chief Compliance Officer Noel Wharton, for the initial production of responsive records. The government and Sentara also agreed upon initial targeted search terms as reflected in a November 19, 2021 email from Sentara and a defined date range of January 1, 2017 through December 31, 2019. Via letters dated March 22, 2022, and April 4, 2022, respectively, Sentara's counsel represented that production of those six priority custodians was complete. Exhibit C, March 22, 2022 letter; Exhibit D, April 4, 2022 letter.

It should be noted the government agreed to this limited number of initial custodians in an effort to streamline its investigation, and to limit the burden upon Sentara during the investigative process. At no time, however, did the government agree not to seek additional responsive documents as the investigation progressed.

By email dated July 18, 2022, Sentara agreed to produce the remaining responsive records for Optima Chief Actuary James Juillerat for the targeted time period of August 11, 2017 through September 5, 2017, regardless of search terms. On August 3, 2022, Sentara produced 217 documents and confirmed that all of Mr. Juillerat's records for this time period without search term restrictions had been produced.

iii. Following "Completion" of Productions under CID No. 21-377, the Government Issued CID Nos. 22-1024, 22-1026 for Sworn Testimony

After having received the productions of the priority custodians that Sentara represented were complete, the United States issued CIDs on September 30, 2022, for the sworn testimony of

Dean Ratzlaff, James Juillerat, Andy Hilbert, Michael Dudley, and Dennis Matheis.³ Exhibit E, CID No. 22-1024 (Juillerat Sworn Testimony); Exhibit F, CID No. 22-1026 (Dudley Sworn Testimony). The government conducted sworn testimony of Optima Managing Actuary Dean Ratzlaff on November 1, 2022, and of former Optima CFO Andy Hilbert on December 5, 2022. On December 8, 2022, the United States conducted the sworn testimony of Optima Chief Actuary James Juillerat pursuant to CID No. 22-1024. Based on information learned through the testimony of Messrs. Ratzlaff and Hilbert, on November 14, 2022, the government requested that Sentara produce all non-duplicative records for a seventh custodian, Optima Controller Jeff Snyder, for which Sentara completed production for certain limited time periods on January 6, 2023.

Thereafter, on February 21, 2023, the United States made a presentation to Sentara's counsel, regarding the investigation to date and possible next steps and welcomed Sentara's viewpoint on the facts, the law, and/or a potential resolution, and otherwise planned to work to complete its investigation. On March 30, 2023, the government notified Sentara's counsel that it was proceeding with taking the sworn testimony of Controller Jeff Snyder, former Optima CEO Michael Dudley, and current Sentara CEO/former Optima CEO Dennis Matheis. The United States offered dates in late April 2023 and early May 2023. On April 12, 2023, Sentara's counsel informed the government that Sentara had hired a second law firm and wished to present its views to the United States, while recognizing the government planned to continue its investigation in parallel.

The United States continued its investigation and took the sworn testimony of Jeff Snyder on May 2, 2023. On June 12, 2023, the government took the sworn testimony of Michael Dudley.

³ Sentara's counsel accepted service of these five CIDs on Monday, October, 3, 2022 by email.

iv. Sentara Relies on Responsive Documents It Failed to Produce to the United States

On June 28, 2023, Sentara's counsel presented its views on the government's investigation at an in-person presentation. During that presentation, government counsel noticed documents that were unfamiliar and lacked any Bates stamp or other production identifier. Government counsel alerted Sentara's counsel to these new documents and inquired as to whether they had been previously produced as they were responsive to CID No. 21-337 and the United States was unable to find these documents in Sentara's productions.

v. Sentara Commences a Re-Review, Produces Thousands of Pages of Previously Withheld Responsive Documents, and Refuses to Comply with the Government's Requests under CID Nos. 21-337, 22-1024 and 22-1026

Two days later, on June 30, 2023, Sentara produced 102 new responsive documents consisting of 367 pages of materials from former Optima CEO Michael Dudley's email (.pst) file. These new documents were custodial records of Michael Dudley but were not produced until 18 days *after* Mr. Dudley testified, some 15 months after Sentara stated production for Mr. Dudley's custodial records was complete, and only after the government noticed documents included in Sentara's counsel's presentation that had not been produced but were clearly responsive to CID No. 21-337.

These newly produced records include important details requiring further investigation. For example, during his sworn testimony Mr. Dudley testified about a meeting invite on his calendar with then Sentara CEO Howard Kern on the first business day after Anthem announced it was exiting the ACA individual market in Virginia. Mr. Dudley testified that he did not specifically remember the meeting or any scenarios that Optima was exploring at that time, yet the newly produced records include Mr. Dudley's detailed notes of the call; exploring these notes,

among other things, will aid the United States in its investigation. Other documents in this belated production include records indicating that Mr. Dudley engaged with Sentara executives (including Sentara's CEO Howard Kern) on substantive decisions regarding Optima's position in the ACA individual market following Anthem's exit in August 2017. This information is important to investigate as Mr. Dudley testified that Sentara CEO Howard Kern (who was also Chairman of the Optima Board) was actively involved in making the decision to stay in the Virginia ACA market and to increase rates to such a large degree:

22 And then the situation that unraveled
23 in 2017, in preparation for the 2018 benefit year,
24 was a very significant decision. And so the CEO
25 of Sentara felt it important to ensure that the

Page 41

1 Board of Sentara was also involved in that.

Exhibit O, Transcript of Sworn Testimony of Michael Dudley, at pp. 40-41. Stated more directly,

10 And on major, major decisions, the CEO
11 of Sentara would seek approval from the Board of
12 Sentara for Optima to execute.

Id. at p. 28. Moreover, in its June 28, 2023 presentation, Sentara represented to government

counsel that Kern was involved in discussions with senior Virginia state officials about whether Optima would remain in the ACA market for the 2018 plan year. To what extent Sentara or its CEO Kern dictated Optima's decision-making regarding Optima's 2018 or 2019 rate filings is yet to be determined but merits further investigation.

Following Sentara's June 30, 2023 production, the government reached out to Sentara's counsel to express its concerns about the fact that these responsive and highly relevant records had not been produced. The government's letter stated:

“We note that we took CID testimony of several witnesses on the basis that responsive documents had already been produced, and have Mr. Matheis's testimony upcoming on July 19. We hope it will not be necessary to take additional testimony of any of these witnesses, but reserve all rights.”

Exhibit G, Email Chain, July 6, 2023.

Sentara's counsel responded via email, stating “We would note that many of the documents recently produced are not directly responsive to the CID, but are relevant to Sentara's defenses and are being produced voluntarily to assist the Department with its investigation.” *Id.* The United States challenged this characterization during a July 17, 2023 telephone conference and in a July 20, 2023 letter stating, “the government strongly disagrees with that assertion, as the documents are responsive to CID Requests 2 and/or 3.” Exhibit H, DOJ Letter to Sentara, July 20, 2023.

Meanwhile, on July 7, 2023, Sentara produced a second batch of new documents consisting of 269 records containing 824 pages of responsive material for custodian Dennis Matheis, Sentara's CEO. The United States took Mr. Matheis' sworn testimony on July 19, 2023.

On July 20, 2023, the United States sent a letter to Sentara that noted Sentara's July 7, 2023 production included nearly 100 records involving or referencing former Sentara CEO Howard Kern. Specifically, the government noted “Mr. Kern needs to be added as a custodian for production purposes. Please produce all responsive documents from custodian Howard Kern

pursuant to the previously-agreed search terms for the full time period specified in the CID.” Exhibit H, DOJ Letter to Sentara, July 20, 2023.

On July 25, 2023, Sentara’s counsel responded and refused the government’s lawful request to comply with CID No. 21-337 by producing Mr. Kern’s custodial records. Sentara based its refusal on its conclusion that “the Government has sufficient information from which it can determine as to how it wants to proceed.” Exhibit I, Sentara Response to DOJ, July 25, 2023. Sentara’s counsel further stated, “we will decline to undertake an additional and very expensive review so that you can simply gather more evidence rather than serve your legitimate goal of making a decision about [your investigation].” *Id.* Sentara also noted that if the government requested to continue the examination of any witnesses, it would oppose all such efforts. *Id.* The government responded on August 1, 2023. *See* Exhibit P, DOJ Letter to Sentara, August 1, 2023.

Nearly a month later on August 11, 2023, Sentara made a third production of 608 records amounting to 1,814 additional pages. In its production letter dated August 14, 2023, Sentara’s counsel confirmed the records were responsive to CID No. 21-337 but had not been previously produced. Exhibit J, August 14, 2023 letter.

On September 8, 2023, Sentara produced an additional 920 responsive documents totaling 3,741 pages. In its September 11, 2023 production letter, Sentara indicated that it did not expect any further productions, but that it would provide an updated privilege log. To date, Sentara has made no further productions and has yet to produce an updated privilege log. Exhibit K, September 11, 2023 letter.

In summary, some 17 months after Sentara first asserted that its production of the responsive materials for Messrs. Ratzlaff, Juillerat, Snyder, Hilbert, Dudley, Matheis, and Ms. Wharton was complete, Sentara now seems to have actually completed its production of relevant

documents for these custodians under CID No. 21-337. *See* Exhibit D, April 4, 2022 letter; Exhibit C, March 22, 2022 letter. That production has been completed, however, only *after* sworn testimony had been taken from several of the Sentara custodians, including Messrs. Dudley and Juillerat, and only *after* the government questioned documents in Sentara's presentation that were patently responsive and had not been produced.

vi. The Government Issued CID No. 23-1221 for Testimony of Howard Kern and CID No. 23-1222 Posing Interrogatories

After reviewing these newly produced responsive documents, the government issued two CIDs in this investigation on September 25, 2023. CID No. 23-1221 seeks the testimony of Howard Kern. CID No. 23-1222 poses 19 interrogatories to Sentara and one document request seeking production of any records identified or relied upon in answering the interrogatories to the extent such documents have not already been produced. Sentara's counsel accepted service of these two CIDs via email on September 26, 2023. Exhibit L, CID No. 23-1221 (Kern Sworn Testimony).

On October 2, 2023, the parties met and conferred regarding compliance with the new CIDs as well as Sentara's refusal to comply with the government's requests regarding CID Nos. 21-337, 22-1024, and 22-1026. During the meet and confer, the United States renewed its request for Sentara to comply with CID No. 21-337 by producing the responsive records for Howard Kern prior to the government taking Mr. Kern's sworn testimony on December 6, 2023. The government also explained that, after having reviewed Sentara's belated productions of 6,700 pages of responsive material, it had determined that it needed to continue the sworn testimony of former Optima CEO Michael Dudley for two additional hours and the sworn testimony of Chief Actuary James Juillerat for four additional hours. The government explained to Sentara that over 150 of the documents Sentara produced after Mr. Dudley's sworn testimony on June 12 relate to

Mr. Dudley. Similarly, the government explained that over 1,200 of these newly produced responsive documents involve Mr. Juillerat; accordingly, the government sought four hours of on-the-record time with Mr. Juillerat and offered to take that testimony in Charlottesville, Virginia, rather than in Roanoke, Virginia. Sentara did not take a position on these requests and indicated it would respond in writing.

Roughly two weeks later, Sentara's counsel responded to the government's request by letter dated October 13, 2023. Exhibit M, October 13, 2023 letter. Sentara again largely refused to comply. According to Sentara, its refusal to comply with the CIDs at issue is justified because "we believe that any further investigation in this matter is unnecessary, unduly burdensome and will cause Sentara and the Department to expend significant additional resources." *Id.* Similarly, Sentara's counsel, on behalf of James Juillerat and Michael Dudley, refused the government's request for those witnesses to provide testimony related to the late-produced documents. *Id.* According to Sentara, "[t]he Department has more than sufficient information in its possession to make [a] decision . . . , and it should do so without any more delay or expense to the subjects of this investigation." *Id.* at p.3. While Sentara nominally offered to make Howard Kern available in response to the government's lawful CID for his testimony, this "offer" was conditioned on Mr. Kern appearing without Sentara producing his custodial records, for a time period limited to seven hours,⁴ and at an unspecified time and place of Mr. Kern's choosing. *Id.* Despite its claims that

⁴ While the government does not expect it would require more than seven hours of on-the-record time to question Mr. Kern, counsel have not had an opportunity to review Mr. Kern's responsive custodial documents since Sentara has refused to produce them and therefore cannot commit to any such limitation. *See infra* at n. 8 (CID testimony is not limited by the Federal Rules of Civil Procedure). On November 9, 2023, counsel for Mr. Kern advised that Mr. Kern would be available for testimony on December 8, 2023 or December 4, 2023, "under the conditions stated in our October 13th letter." These "conditions," however, are unacceptable to the government for numerous reasons, including that the government needs to review Mr. Kern's responsive custodial documents before taking any testimony.

the recent CIDs are improper, Sentara produced written interrogatory answers and objections on October 27, 2023. *Id.*

V. ARGUMENT

The government's request to enforce CID Nos. 21-337, 22-1024, 22-1026, and 23-1221 is proper because (1) the government, through the Department of Justice, has authority to engage in the investigation under the FCA; (2) the government has complied with the statutory requirements of due process; (3) the information sought is reasonably relevant to the government's investigation and (4) the information sought is not unduly burdensome. *In re Civ. Investigative Demand 15-439*, 2016 WL 4275853, at * 3; *Ranstad*, 685 F.3d at 442. The Fourth Circuit has also explained that “[t]he burden of proving that an administrative subpoena is unduly burdensome is not easily met. The party subject to the subpoena must show that producing the documents would seriously disrupt its normal business operations.” *N.L.R.B. v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513 (4th Cir. 1996) (quoting *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986)). Thus, “[a] subpoena is not unduly burdensome merely because it requires the production of a large number of documents.” *Id.*

a. CID No. 21-337 For Howard Kern's Documents Must Be Enforced

First, the law is clear that the government has the authority to investigate and prosecute violations of the FCA: “The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.” 31 U.S.C. § 3730(a). The FCA also empowers the Attorney General or designee to issue CIDs to aid

investigation of potential FCA violations where there is any reason to believe a person has information relevant to a false claims law investigation.⁵

Second, the government complied with its statutory obligations by issuing CID No. 21-337 in strict accordance with 31 U.S.C. § 3733. CID No. 21-337 was properly issued by Jamie Yavelberg, Director of the Fraud Section of the Commercial Litigation Branch at DOJ, pursuant to delegated authority.⁶ CID No. 21-337 plainly states the “nature of the conduct constituting the alleged violation of a false claims law which is under investigation and the applicable provision of law alleged to be violated,” describes the records to be produced with “such definiteness and certainty as to permit such material to be fairly identified,” provides a return date, and identifies the false claims law investigator to whom the records should be produced. 31 U.S.C. § 3733(a)(2). CID No. 21-337 was also served pursuant to the requirements of the FCA. *See* Exhibit B, CID No. 21-337 Return Service; *see also* 31 U.S.C. § 3733(d)-(e). Accordingly, there can be no question that the government issued CID No. 21-337 within its authority under the FCA and in compliance with the statutory requirements of due process. *See In re Civ. Investigative Demand 15-439*, 2016 WL 4275853, at * 7 (“DOJ-Civil, acting on behalf of the Attorney General, plainly possesses authority to investigate potential FCA violations. As noted above, 31 U.S.C. § 3733 does not preclude the filing of a CID in the present case. Therefore the first and second prongs are met.”).

⁵ “False claims law investigation” means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law. 31 U.S.C. § 3733(l)(2). Similarly, “the term ‘false claims law investigator’ means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation.” 31 U.S.C. § 3733(l)(3).

⁶ “Authority relating to Civil Investigative Demands issued under the False Claims Act in cases that are jointly or personally handled by the Civil Division is hereby delegated to the Director of the Fraud Section of the Commercial Litigation Branch.” 28 C.F.R. § Pt. 0, Subpt. Y, App.

Third, the information sought from Sentara in CID No. 21-337 is reasonably relevant to the government's investigation. "For purposes of an administrative subpoena, the notion of relevancy is a broad one." *Sandsend Financial Consultants Ltd. v. Federal Home Bank Bd.*, 878 F.2d 875, 882 (5th Cir. 1989). An agency "can investigate merely on the suspicion that the law is being violated, or even just because it wants assurance that it is not." *Morton Salt*, 338 U.S. at 642. "So long as the material requested 'touches a matter under investigation,' an administrative subpoena will survive a challenge that the material is not relevant." *Sandsend*, 878 F.2d at 882 (quoting *EEOC v. Elrod*, 674 F.2d 601, 613 (7th Cir. 1982)). "Relevancy is determined in terms of the investigation rather than in terms of evidentiary relevance," and "[t]he relevance requirement is 'not especially constraining.'" *United States v. Golden Valley*, 689 F.3d 1108, 1113 (9th Cir. 2012) (quoting *EEOC v. Fed. Exp. Corp.*, 558 F.3d 842, 854 (9th Cir. 2009)). Importantly, "DOJ's determination is accepted so long as it is not obviously wrong." *In re Civ. Investigative Demand 15-439*, 2016 WL 4275853, at *7 (citing *NLRB v. American Medical Response, Inc.*, 438 F.3d 188, 193 (2d Cir. 2006)).

Here, CID No. 21-337 seeks records directly relevant to the United States' FCA investigation: records related to Sentara's/Optima's 2018 and 2019 ACA individual market rate filings. The requested documents and information more than "touch[] a matter under investigation"; rather, they go to the heart of the government's investigation into whether Sentara, Optima, or others submitted or caused to be submitted false claims to the United States resulting in payment of hundreds of millions of dollars in APTCs for ACA individual market plan years 2018 and 2019. As discussed above, the custodial records and testimony of then-Sentara CEO Howard Kern are important to assess the role of

Sentara leadership in rate-filing decisions and to gain a better understanding of the basis for those decisions.

Finally, neither Sentara nor Optima have claimed that the government seeks information that is irrelevant or does not touch upon its investigation, is unduly burdensome to produce, or is somehow outside the scope of CID No. 21-337. Neither entity claims that Howard Kern had nothing to do with the events in question or is not likely to be in possession, custody, or control of any material relevant to the United States' investigation. Sentara takes issue with the timing of the government's request but does not seriously dispute the relevance or scope of the request for Mr. Kern's custodial documents.

Sentara's stated basis for refusing to produce Mr. Kern's records is Sentara's belief that the government should close its investigation. Exhibit I, Sentara Response to DOJ, July 25, 2023. But that is not a valid basis to refuse to comply with a lawful CID. The United States, not Sentara, has the authority to determine the scope and course of its investigation pursuant to the FCA. Moreover, when it received the CID, Sentara was in the best position to identify custodians who would have responsive documents; it was Sentara that bore the burden of identifying *all* such custodians; and it was Sentara that failed to identify Mr. Kern as having responsive documents. *See generally Braswell v. United States*, 487 U.S. 99, 110 (1988) (recognizing a corporate entity possesses certain obligations, "including the duty to produce corporate records on proper demand by the Government.").

Sentara has now produced records indicating Mr. Kern played a role in the issues under investigation. Mr. Kern's involvement became more apparent after Michael Dudley, the current Sentara CEO and formerly Optima CEO when Mr. Kern was CEO of Sentara,

testified that Mr. Kern was directly involved in discussions regarding the rate filings in 2018 and 2019.

Moreover, Sentara presumably has had access to its current and former employees, including Messrs. Dudley, Matheis, and Kern, since it received CID No. 21-337 and should have conducted custodian interviews to determine each individuals' role and possible records. Sentara identified 19 custodians in November 2021, suggested search terms based on a dialogue with the government about the nature and scope of the investigation, and produced documents for only a subset of those custodians. Indeed, the government, in an effort to minimize costs and streamline the investigation, initially chose three priority custodians, which ultimately expanded to seven custodians. The government never requested Sentara produce records for all 19 custodians that Sentara identified, despite the fact that it would be fully entitled to do so. As noted above, the government never agreed that the custodians identified by Sentara represented the totality of possible relevant custodians. Yet, Sentara now refuses to preserve, search, and produce the responsive documents of one additional custodian, its former CEO, in an investigation involving over half a billion dollars in government funds. Any assertion that requesting Mr. Kern's documents is unduly burdensome or constitutes an overreach is without merit because Sentara cannot establish that producing Mr. Kern's emails would "seriously disrupt its normal business operations."

b. CID Nos. 22-1024, 22-1026 For Sworn Testimony of James Juillerat and Michael Dudley Must Be Enforced

For the same reasons articulated regarding CID No. 21-337, the government possesses authority to compel sworn testimony from James Juillerat and Michael Dudley. The government also complied with all statutory requirements of due process, including the requirements that the

CID be issued by the Director of Civil Frauds and be served upon Sentara's counsel, who also represent Messrs. Juillerat and Dudley. Accordingly, the first two prongs of the Court's inquiry are satisfied.

The continuation of sworn testimony for Messrs. Juillerat and Dudley is also reasonably relevant to the United States' investigation and is necessary because Sentara failed to produce all responsive records for each witness prior to the government taking their sworn testimony. To put this another way, the government scheduled and took the testimony of these witnesses in reliance on Sentara's representation that the production of their responsive documents was complete. Whether intentionally, or just mistakenly, this representation was incorrect. It is a matter of basic fairness that the government should be permitted to reopen the testimony of these individuals in light of Sentara's production of responsive, relevant information after these examinations were completed.

Sentara maintains in its correspondence that it need not make Messrs. Dudley or Juillerat available for continued examination because "31 U.S.C. § 3773 significantly circumscribes the Department's authority to re-examine witnesses." Exhibit M, October 13, 2023 letter, at 3. Sentara's argument is a red herring.⁷ Here, the government seeks to enforce the original CIDs for testimony of Dudley and Juillerat because it is fundamental that a party may not withhold material responsive documents until after sworn testimony and then deny the opposing party the right to examine the witness regarding those late-produced documents. *See, e.g., Eshelman v. Puma*

⁷ Sentara also is wrong as a matter of law regarding the government's authority under the FCA to require witnesses to appear for additional CID testimony. In *In re Civ. Investigative Demand No. DNM 23-02*, No. 1:23-MC-0023 MIS/DLM, 2023 WL 6458489, at *7 (D.N.M. Oct. 4, 2023), an individual who had submitted to sworn testimony pursuant to a properly issued CID under the FCA argued only the Attorney General could issue a second CID for sworn testimony. The District Court rightly rejected the argument and held that the Attorney General's designees may issue subsequent CIDs for additional testimony by the same witness. *Id.* ("Accordingly, the Attorney General's ability to delegate authority to issue CID[s] 'under this subsection' includes the issuance of all CIDs issued under § 3733(a), including those issued under § 3733(a)(2)(G).").

Biotechnology, Inc., No. 7:16-CV-18-D, 2018 WL 327559, at *2 (E.D.N.C. Jan. 8, 2018) (permitting Plaintiff to reopen the depositions of two witnesses because Defendant withheld responsive materials until after the close of discovery); *Keck v. Union Bank of Switzerland*, No. 94CIV.4912(AGS)(JCF), 1997 WL 411931, at *1 (S.D.N.Y. July 22, 1997) (noting “[C]ourts frequently permit a deposition to be reopened where the witness was inhibited from providing full information at the first deposition [or] where new information comes to light triggering questions that the discovering party would not have thought to ask at the first deposition.”); *Le v. Diligence, Inc.*, 312 F.R.D. 245, 246 (D. Mass. Dec. 9, 2015) (“[C]ourts have generally allowed re-opening a deposition where, as here, new information is unearthed only after the initial deposition.”); *In re EpiPen Antitrust Litigation*, No. 17-md-2785-DDC-TJJ, 2019 WL 3532062 (D. Kan, Aug. 2, 2019); *Spring Comm. Co., L.P. v. Comcast Cable Comm., LLC*, No. 11-2684-JWL, 2015 WL 11121851, *1 (D. Kan. Aug. 4, 2015) (finding that Sprint “should not be precluded from the ability to ask such questions by Comcast’s delayed production and that Comcast “must now face the consequences of its improper withholding”); *DeWitt v. Sw. Bell Tel. Co.*, No. 12-2606, 2014 WL 695744, at * 3–4 (D. Kan. Feb. 24, 2014) (ordering the reopening of depositions after “belated” document production); *Epling v. UCB Films, Inc.*, Nos. 98-4226, 98-4227, 2000 WL 1466216, at *8 (D. Kan. Aug. 7, 2000) (granting motion to reopen depositions after previously withheld documents are produced).⁸

Sentara has deprived the government of a full opportunity to conduct its investigation by failing to produce responsive records until Messrs. Dudley and Juillerat had already appeared for

⁸ The United States recognizes this line of cases arises in the context of a dispute once litigation has ensued and during the process of taking depositions as part of ordinary discovery under the Federal Rules of Civil Procedure. To be clear, CIDs are not depositions and the Federal Rules of Civil Procedure do not apply to oral examinations/sworn testimony pursuant to the FCA. *See* 31 U.S.C. § 3733(h). Nevertheless, the rationale in these cases is applicable to the instant matter because withholding relevant documents until after testimony under oath (whether in the form of a deposition or under a CID) creates the same problem: the withholding party gains an unfair advantage, while the party seeking to elicit relevant testimony is potentially disadvantaged.

sworn testimony. Sentara represented to the United States on April 4, 2022, that “all responsive documents” had been produced for the priority custodians. The government relied on Sentara’s representations and issued CIDs No. 22-1024 and 22-1026, among others, to take sworn testimony of those custodians regarding their records. The government took that sworn testimony between November 2022 and July 2023. As outlined above, it became apparent after these examinations that Sentara had failed to actually produce all responsive documents and Sentara commenced a re-review after the government highlighted unproduced yet responsive documents appearing in a presentation given by Sentara on June 28, 2023. The government’s concerns were heightened based on Sentara’s initial, inaccurate claim that the documents in its presentation were not responsive to CID No. 21-337 and were instead “relevant to Sentara’s defenses.” Exhibit G, Email Chain, July 6, 2023. Over the next few months, Sentara produced 1,899 responsive records consisting of 6,746 pages that had previously been wrongly withheld.

In sum, Sentara should not be permitted to thwart the government’s investigation by withholding responsive documents until after sworn testimony of witnesses is taken. Therefore, the United States submits the Court should permit it to continue the CID examinations of Messrs. Juillerat and Dudley to address the issues and content impacted by Sentara’s belated production of nearly 2,000 responsive documents, including prior testimony that may need to be clarified. *See D.M. v. Cnty. of Merced*, No. 120CV00409JLTSAB, 2022 WL 2292048, at *5 (E.D. Cal. June 24, 2022) (“While the purpose of re-opening these depositions is to permit questioning on newly-produced documents, Plaintiffs may include a reasonable amount of questioning to reset the stage and/or refresh the witness on prior deposition testimony, and Plaintiffs may seek to clarify answers from the prior deposition testimony to the extent they conflict with answers to questions about the newly-produced documents.”).

c. CID No. 23-1221 for Sworn Testimony of Howard Kern Must Be Enforced

Finally, the government issued a lawful CID for the sworn testimony of Howard Kern, former CEO of Sentara. In addition to refusing to produce Mr. Kern's responsive records under CID No. 21-337 as a precondition to his testimony, Sentara seeks to artificially limit Mr. Kern's testimony to seven hours and only "at time and location of his convenience." Exhibit M, October 13, 2023 letter, at 4. For the same reasons articulated regarding CID No. 21-337, the United States possesses authority to compel sworn testimony from Howard Kern based on the CID as issued. The government also complied with the statutory requirements of due process as the CID was issued by the Director of Civil Frauds and was served upon Sentara's counsel, who also represent Mr. Kern. Exhibit L, CID No. 23-1221 (Kern Sworn Testimony); Exhibit N, Emails re: Service, September 25, 2023. Accordingly, the first two prongs of the Court's inquiry are satisfied.

Sentara does not meaningfully contend that Mr. Kern's testimony is irrelevant or does not "touch upon" the government's investigation, but instead seeks to constrain his testimony by first preventing the government from obtaining his custodial documents and then placing unspecified temporal and location limits on his testimony. Oral testimony pursuant to a lawful CID "shall be taken in the judicial district of the United States within which such person resides, is found, or *transacts business*, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person." 31 U.S.C. § 3733(h)(3) (emphasis added). Mr. Kern was CEO of Sentara during the years at the center of this investigation. Sentara conducted business in the Western District of Virginia (and still does) and the government possesses the authority, as provided for by Congress in the FCA, to require a witness to appear in any of the places identified in subsection (h)(3). Neither Mr. Kern, nor Sentara, possesses the authority to set limits on the time, place, or duration of an investigative CID properly issued and

served under the FCA.⁹ Accordingly, the United States requests that the Court order Mr. Kern to appear in person for sworn testimony at the U.S. Attorney's Office in Charlottesville or Roanoke, Virginia within 30 days, or at a time set by the government, after the government's receipt of Sentara's production of Howard Kern's responsive documents in accordance with CID No. 21-337.¹⁰

VI. CONCLUSION

Given the complexity of the investigation to date, the government has investigated with celerity and limited scope. When seeking documents from Sentara, the government focused on a small number of priority custodians and agreed to narrow, focused search terms. The government has expeditiously reviewed documents produced by Sentara and its investigation has followed the evidence, wherever it might lead.

Here, Sentara has unilaterally decided that the United States has enough information and should close its investigation. That position is unsupported in the law and ignores the broad powers Congress conferred to false claims law investigators under the FCA. Sentara, as well as Messrs. Juillerat, Dudley, and Kern, cannot be permitted to ignore their legal obligations to comply with the CIDs issued in this case.

⁹ Sentara has repeatedly argued, both in letters and during sworn testimony, that sworn testimony is limited temporally by the Federal Rules of Civil Procedure (FRCP), specifically Rule 35(d)(1), to one day of seven hours. Sentara cites to 31 U.S.C. § 3733(j)(6), which provides "The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section." Sentara's reading of (j)(6) is wrong. Similar to the analysis discussed above regarding 31 U.S.C. § 3733(a)(2)(G), subparagraph (j)(6) is limited to subsection (j), which governs "Judicial Proceedings" to enforce or set aside a CID. Moreover, subparagraph (j)(6) limits the applicability of the FRCP to (1) judicial proceedings when the government or CID recipient seeks the aid of the Court to enforce or quash a CID, and (2) only when the FRCP "are not inconsistent with the provisions of this section." 31 U.S.C. § 3733(j)(6). The FCA does not provide any fixed temporal limits on oral testimony and to apply the FRCP under subsection (j)(6) would erroneously apply a limited subparagraph of subsection (j) to the unrelated subsection (h) governing the conduct of the examination. 31 U.S.C. § 3733(h).

¹⁰ As the government offered during its meet and confer with counsel, the government is willing to work with Mr. Kern and his counsel to try to find a mutually agreeable date for his testimony, but cannot agree to Sentara's proposed unlimited right of Mr. Kern to choose the time and place of the testimony given the burdens such an arrangement may pose on the government and the government's need to expeditiously complete these investigative steps.

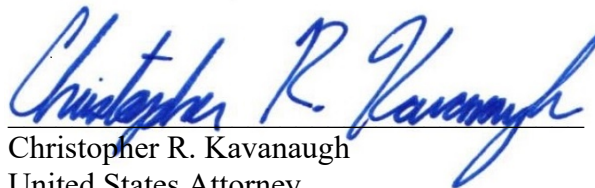
Accordingly, the United States respectfully requests an order or orders compelling the following:

1. That this Court enter an Order to Show Cause directing Sentara, Howard Kern, Michael Dudley, and James Juillerat to show cause as to why they should not be compelled to comply with CIDs 21-337, 23-1221, 22-1026, and 22-1024;
2. Sentara (and its subsidiaries and affiliates as defined in CID No. 21-337) to produce the custodial records for former Sentara CEO Howard Kern pursuant to CID No. 21-337 in accordance with the search terms previously agreed between the government and Sentara within 30 days of this Order or at a time set by the government;
3. Howard Kern to appear in person for sworn testimony at the U.S. Attorney's Office in Charlottesville or Roanoke, Virginia within 30 days of the government's receipt of Sentara's production of Howard Kern's records in accordance with CID No. 21-337 and CID No. 23-1221, or at a time set by the government, limited only by the substantive topics listed in CID No. 23-1221;
4. Michael Dudley to appear in person or remotely for supplemental sworn testimony pursuant to CID No. 22-1026 for a period not to exceed 2 hours of on-the-record testimonial time within 60 days of this Order or at a time set by the government;
5. James Juillerat to appear in person at the U.S. Attorney's Office in Charlottesville or Roanoke, Virginia for supplemental sworn testimony pursuant to CID No. 22-1024 for

a period not to exceed 4 hours of on-the-record testimonial time within 60 days of this Order or at a time set by the government.

Date: November 13, 2023

Respectfully submitted,



Christopher R. Kavanaugh
United States Attorney

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
U.S. Department of Justice - Civil Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

/s Justin Lugar
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CERTIFICATE OF SERVICE

We certify that upon filing of the *United States' Petition for Order to Show Cause and Summary Enforcement of Civil Investigative Demand Nos. 21-337, 22-1024, 22-1026, 23-1221*, the United States will serve by email the same upon counsel for Respondents as follows:

Robert J. Higdon, Jr., K&L Gates LLP (Bobby.Higdon@klgates.com)
G. Norman Acker, III, K&L Gates LLP (Norman.Acker@klgates.com)
J.D. Koesters, K&L Gates LLP (J.D.Koesters@klgates.com)

Preston L. Pugh, Crowell & Moring LLP (ppugh@crowell.com)
Troy Barsky, Crowell & Moring LLP (tbarsky@crowell.com)
Barbara Ryland, Crowell & Moring LLP (bryland@crowell.com)

/s Justin Lugar
Justin Lugar
Assistant United States Attorney

/s Laura Day Taylor
Laura Day Taylor
Assistant United States Attorney

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

UNITED STATES OF AMERICA,)	
)	
)	
Petitioner,)	
)	
v.)	
)	Misc. Action No. <u>3:23-mc-00007</u>
)	
SENTARA HEALTHCARE,)	
HOWARD KERN,)	
MICHAEL DUDLEY, and)	
JAMES JUILLERAT,)	
)	
)	
Respondents.)	
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**[PROPOSED] ORDER TO SHOW CAUSE PURSUANT TO CIVIL INVESTIGATIVE
DEMAND NOS. 21-337, 22-1024, 22-1026, 23-1221**

Upon consideration of the United States’ Petition for an Order to Show Cause and for Summary Enforcement of Civil Investigative Demand (CID) Nos. 21-337, 22-1024, 22-1026, and 23-1221, issued under 31 U.S.C. § 3733(j) to Sentara Healthcare (Sentara), James Juillerat, Michael Dudley, and Howard Kern (collectively Respondents), and the papers submitted in connection with that petition;

IT IS ORDERED, that Respondents show cause before this Court on November _____, 2023, or as soon thereafter as counsel may be heard, why an order should not be issued pursuant to 31 U.S.C. § 3733(j) directing Respondents to comply with CID Nos. 21-337, 22-104, 22-1026, 23-1221 within thirty days of the issuance of such Order.

IT IS FUTHER ORDERED that on or before the close of business on November ____, 2023, the United States shall serve a copy of this Order, along with the Petition submitted by the United States, on Sentara Healthcare, Howard Kern, Michael Dudley, and James Juillerat by sending those papers by email to the following counsel:

Robert J. Higdon, Jr., K&L Gates (Bobby.Higdon@klgates.com)
G. Norman Acker, III K&L Gates (Norman.Acker@klgates.com)
J.D. Koesters, K&L Gates (J.D.Koesters@klgates.com)

Preston L. Pugh, Crowell & Moring LLP (ppugh@crowell.com)
Troy Barsky, Crowell & Moring LLP (tbarsky@crowell.com)
Barbara Ryland, Crowell & Moring LLP (bryland@crowell.com)

IT IS FURTHER OTHERED that Sentara Healthcare, Howard Kern, Michael Dudley, and James Juillerat may file a response within 14 days of service upon counsel.

IT IS FURTHER OTHERED that the United States shall have 7 days thereafter to file a reply.

IT IS SO ORDERED.

ENTERED this ____ day of November, 2023.

UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

UNITED STATES OF AMERICA,)	
)	
)	
Petitioner,)	
)	
v.)	
)	Misc. Action No. <u>3:23-mc-00007</u>
)	
SENTARA HEALTHCARE,)	
HOWARD KERN,)	
MICHAEL DUDLEY, and)	
JAMES JUILLERAT,)	
)	
)	
Respondents.)	
)	

**[PROPOSED] ORDER ENFORCING COMPLIANCE WITH
CIVIL INVESTIGATIVE DEMAND NOS. 21-337, 22-1024, 22-1026, 23-1221**

Upon consideration of the United States’ Petition for an Order to Show Cause and for Summary Enforcement of Civil Investigative Demand (CID) Nos. 21-337, 22-1024, 22-1026, 23-1221, issued under 31 U.S.C. § 3733(j) to Respondents Sentara Healthcare (Sentara), James Juillerat, Michael Dudley, and Howard Kern, and the arguments set forth in support of that petition, the Court finds that good cause exists for such pursuant to 31 U.S.C. § 3733(j), and it is hereby

ORDERED that, Sentara, Howard Kern, James Juillerat, and Michael Dudley shall comply with Nos. 21-337, 22-1024, 22-1026, and 23-1221 as follows:

1. Sentara (and its subsidiaries and affiliates as defined in CID No. 21-337) shall produce the custodial records for former Sentara CEO Howard Kern pursuant to CID No. 21-

337 in accordance with the search terms previously agreed between the government and Sentara within 30 days of this Order or at a time set by the government;

2. Howard Kern shall appear in person for sworn testimony at the U.S. Attorney's Office in Charlottesville or Roanoke, Virginia within 30 days of the government's receipt of Sentara's production of Howard Kern's records in accordance with CID No. 21-337 and CID No. 23-1221, or at a time set by the government, limited only by the substantive topics listed in CID No. 23-1221;
3. Michael Dudley shall appear in person or remotely for sworn testimony pursuant to CID No. 22-1026 for a period not to exceed 2 hours of on-the-record testimonial time within 60 days of this Order or at a time set by the government; and
4. James Juillerat shall appear in person at the U.S. Attorney's Office in Charlottesville or Roanoke, Virginia for supplemental sworn testimony pursuant to CID No. 22-1024 for a period not to exceed 4 hours of on-the-record testimonial time within 60 days of this Order or at a time set by the government.

IT IS FURTHER ORDERED that, if Sentara, Howard Kern, James Juillerat, or Michael Dudley fails to comply with this Order, the United States may seek sanctions and/or a finding of civil contempt.

IT IS SO ORDERED.

ENTERED this ____ day of _____, 2023.

UNITED STATES DISTRICT JUDGE

JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

United States of America

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
United States Attorneys Office, Western District of Virginia

DEFENDANTS

Sentara Healthcare, Howard Kern, Michael Dudley, James Juillerat

County of Residence of First Listed Defendant Norfolk, VA
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)
Bobby Higdon, Norman Acker, JD Koesters, of K&L Gates, Preston Pugh, Troy Barsky, Barbara Ryland, of Crowell & Moring

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 422 Appeal 28 USC 158	<input checked="" type="checkbox"/> 375 False Claims Act
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 690 Other	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 320 Assault, Libel & Slander		INTELLECTUAL PROPERTY RIGHTS	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 330 Federal Employers' Liability		<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine		<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability		<input type="checkbox"/> 835 Patent - Abbreviated New Drug Application	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)	<input type="checkbox"/> 350 Motor Vehicle	LABOR	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 880 Defend Trade Secrets Act of 2016	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 720 Labor/Management Relations	SOCIAL SECURITY	<input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692)
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 485 Telephone Consumer Protection Act
<input type="checkbox"/> 195 Contract Product Liability		<input type="checkbox"/> 751 Family and Medical Leave Act	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 196 Franchise		<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 850 Securities/Commodities/Exchange
		<input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS		<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS	FEDERAL TAX SUITS	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 441 Voting	Habeas Corpus:	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 463 Alien Detainee	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 896 Arbitration
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 510 Motions to Vacate Sentence		<input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 530 General	IMMIGRATION	<input type="checkbox"/> 950 Constitutionality of State Statutes
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 462 Naturalization Application	
	<input type="checkbox"/> 448 Education	Other:	<input type="checkbox"/> 465 Other Immigration Actions	
		<input type="checkbox"/> 540 Mandamus & Other		
		<input type="checkbox"/> 550 Civil Rights		
		<input type="checkbox"/> 555 Prison Condition		
		<input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement		

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
31 U.S.C. § 3729 et seq

Brief description of cause:
Motion to enforce Civil Investigative Demands

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____
CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Dillon DOCKET NUMBER SEALED

DATE: Nov 13, 2023 SIGNATURE OF ATTORNEY OF RECORD:

Jama Day Taylor

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____