

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ET AL,	)	CASE NO: 2:16-CV-08697-MWF-SSx
	)	
	)	CIVIL
Plaintiffs,	)	
	)	Los Angeles, California
vs.	)	
	)	Monday, November 20, 2017
UNITED HEALTH GROUP, INC, ET AL,	)	(11:08 a.m. to 11:55 a.m.)
	)	
Defendants.	)	

TELEPHONIC CONFERENCE
RE UNITED'S MOTION FOR EARLY DEPOSITION DISCOVERY [DE 167]

BEFORE THE HONORABLE SUZANNE H. SEGAL,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES: SEE PAGE 2

Court Reporter: Recorded; XTR

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1 Los Angeles, California; Monday, November 20, 2017; 11:08 a.m.

2 (Call to order)

3 THE CLERK: Okay, could I have counsel state their
4 appearance for the record?

5 MR. SCHINDLER: Carol, you want to go first on behalf
6 of the Government?

7 MS. WALLACK: Sure. Hi, this is Carol Wallack. I
8 work in the fraud section of the department in Washington, D.C.

9 THE COURT: Good morning.

10 MR. PERKINS: This is Paul Perkins from the
11 Department of Justice.

12 THE COURT: Good morning.

13 MS. SPEAKER: (Indisc.)

14 THE COURT: Good morning.

15 MR. DRAYCOTT: Justin Draycott, Civil Division, DOJ.

16 THE COURT: Morning.

17 MR. LEE: Good morning, your Honor, this is John Lee
18 with the U. S. Attorney's Office.

19 THE COURT: Morning.

20 MR. HASEGAWA: Hi, this is Steve Hasegawa from
21 Phillips and Cohen for the Relator.

22 THE COURT: Good morning.

23 MR. BERRY: Good morning, it's Matt Berry from
24 Sussman Godfrey for the Relator.

25 THE COURT: Morning.

1 **MS. HARTMAN:** And this is Anne Hartman from
2 Constantine Cannon for the Relator.

3 **THE COURT:** Morning.

4 **MR. SCHINDLER:** I think that's all of the folks from
5 the Government and the Relator. This is David Schindler from
6 Latham and Watkins on behalf of Defendant United, and my
7 colleagues Dan Meron and Kirstin Do are on the line as well.

8 **THE COURT:** Good morning.

9 **MR. MERON:** Good morning.

10 **THE COURT:** All right, is that everyone?

11 (No audible response)

12 Okay, so thank you so much for agreeing to be on this
13 call on such short notice. I greatly appreciate it. And you
14 probably saw a flurry of emails from my courtroom deputy this
15 morning. Believe it or not, I was called for jury service.
16 And I had called in over the weekend and thinking I wouldn't
17 have to go in, and sure enough I did have to go in. So -- but
18 they released me and I'm here. So appreciate your flexibility
19 on that.

20 And as you all probably saw, Judge Fitzgerald
21 referred the motion to me last week, the pending motion, so
22 before too much time passed I wanted to have an opportunity to
23 talk with everyone. I did issue a notice of disclosure and I'd
24 like to take this opportunity to ask if anyone is at this time
25 contemplating the filing of a motion to disqualify, anyone?

1 **MS. SPEAKER:** No, your Honor.

2 **MR. SCHINDLER:** (Indisc.)

3 **MS. SPEAKER:** (Indisc.)

4 **MR. SCHINDLER:** Yeah, not from United, your Honor.

5 **THE COURT:** All right.

6 **MS. WALLACK:** And not from the Government, thank you.

7 **THE COURT:** Okay, great. So I -- typically I often
8 when parties file a discovery motion, as Judge Fitzgerald has
9 characterized the motion now, I hold what I call an informal
10 discovery conference. And many of my colleagues are doing this
11 both in the Central District and around the country. You
12 probably know that Rule 16 was amended to recognize this
13 practice. And we've all embraced it I think because we see
14 that it can be, not always, but it can be an effective way of
15 moving the case forward expeditiously and perhaps helping the
16 parties work through some discovery issues without a motion.
17 So my -- and everybody's procedures are a little bit different
18 on this so I'll just share you -- with you what mine are, and
19 they are on the web page of the Court. So generally I invite
20 the parties to give me a little bit of information about
21 whatever the dispute is. In this case, we do have a motion
22 pending. Normally we do this even before a motion is filed,
23 and just a verbal, you know, describe the issues to me and I
24 hear from both sides or all sides, and we talk about the issue
25 a bit, and I share with the parties how I might approach it if

1 it came to me on a motion, what my thoughts are. But the
2 difference between my practice maybe and some other judges is
3 that I don't issue a ruling from this procedure because I don't
4 think it's fair to the parties to do so without briefing. So
5 if we can't resolve it through this practice, of course, you
6 know, we can go forward in the briefing process. But I wanted
7 to see if I could talk to the parties and see if there's some
8 way we could work this out without needing the formal motion.
9 So first I'll hear from Mr. Schindler, and then I'll give an
10 opportunity for anyone on the other side to speak who would
11 like to speak.

12 **MR. SCHINDLER:** Thanks, your Honor. First of all,
13 good morning. And your practice makes good sense. And I will
14 say that the parties in this case have tried to and succeeded
15 in a number of instances to work through discovery disputes,
16 and I suspect there will be more in the future and we'll
17 certainly try and work them out amongst ourselves if we can.

18 I think here unfortunately because of somewhat binary
19 issue, the likelihood of our doing that probably is a little
20 bit more challenged. The issue really is that this is a matter
21 that's been going on for more than five years. And we have
22 tried, we've asked the Government to agree to allow us to
23 proceed with depositions. The parties had agreed to proceed
24 with written discovery, production of documents, and that's
25 been production of records in particular. And what we suspect,

1 there may be some challenges on that front going forward.
2 That's not for today. The issue purely is one of our desire to
3 proceed with depositions consistent with Judge Fitzgerald's
4 call it a request. In his standing order, he encourages the
5 parties to proceed with discovery even in advance of the Rule
6 26 conference. We had a meet and confer, we had been talking
7 about this issue with the Government. They indicated they
8 would not proceed with the depositions until the Rule 26
9 conference. We offered to hold the conference. We had a date
10 -- indeed, it was to be today -- to proceed with the Rule 26(f)
11 conference, and then the Government indicated that it was
12 withdrawing its agreement to proceed with the Rule 26(f)
13 conference and that precipitated our motion. So fundamentally,
14 you know, the issue in front of you is our request to be
15 permitted to proceed with depositions in this case. The
16 Government's been able to take 20 different depositions during
17 the course of the investigation, and really it's a matter of
18 our desire to be able to proceed consistent with the Court's
19 admonition that the parties proceed even in advance of the Rule
20 26(f) conference. So that's the short version.

21 **THE COURT:** All right, so who would like to respond
22 on behalf of the United States or the Relator?

23 **MR. PERKINS:** Sure, your Honor, this is Paul Perkins
24 from the Department of Justice. I think it's important first
25 off to dispel the notion that there's been five years of a one-

1 sided discovery and that we've taken 20 depositions. Those
2 statements really evidence a fundamental misunderstanding of
3 the False Claims Act. Until six years -- six months ago rather
4 when we filed our complaint in intervention, we were not
5 plaintiff in this case. The government was investigating the
6 allegations in the Relators' sealed qui tam complaint. That's
7 a very different role than when we were litigating against a
8 company that we've sued for fraud. It's similar to any
9 antitrust, SEC, or civil rights case investigated by the
10 government prior to bringing a lawsuit. And there was one
11 important example here to note. As I'm sure you know, the
12 False Claims Act gives the government the authority to take CID
13 testimony during its investigation. CIDs are very different
14 than depositions. They're an investigative tool for law
15 enforcement purposes that may only be taken prior to the
16 Government's intervention in an FCA case. In litigation, the
17 use of CIDs is governed by the Federal Rules of Evidence as any
18 out-of-court statement made by a declarant. But CID testimony
19 is not a substitute for depositions. And the United States
20 will be taking depositions in this matter as in any typical
21 action in this Court. So despite what United says, this is not
22 a typical case when it comes to discovery.

23 Now, in terms of whether depositions now, you know,
24 are premature or, you know, our position is that really before
25 depositions begin, we need to resolve several outstanding

1 issues. And the first is, the pleadings need to settle first.
2 The second is that there are initial motions, or there will be
3 initial motions practiced that we believe will resolve legal
4 issues that will impact the scope of discovery. And, lastly,
5 it's our position that document production by the parties
6 should be completed before depositions occur. And one
7 important reason why is because there are significant privilege
8 issues in this case, including use of deliberative process
9 privilege that would be better resolved in the context of
10 document productions rather than in depositions. You know,
11 we're trying to avoid the deposition -- multiple depositions of
12 government witnesses who are involved. There are two
13 government officials and they're involved as you know in a very
14 important and very costly healthcare program, one of the most
15 important and one of the largest healthcare programs in the
16 United States.

17 You know, it's also important to mention that the
18 parties are involved -- that they're involved in extensive
19 written discovery right now. Both parties have served RFPs and
20 RNOs (ph.s.). We're exchanging correspondence about our RNOs.
21 We're negotiating different protocols and protective orders.
22 We've actually collected and we're reviewing over 2.6 terabytes
23 of data. And, you know, tomorrow actually we're having a meet
24 and confer on United's forthcoming motion to dismiss. And then
25 as I'm sure you also know, just three days ago we filed an

1 amended complaint. So it's our position that right now, taking
2 early depositions is entirely premature. You know, prior to
3 resolution of these issues and before we produce any documents
4 in this case -- including United, they've not produced any
5 documents in this case to date -- you know, it's really
6 premature right now for depositions.

7 One last thing I want to say is, you know, we can get
8 into whether, you know, into the merits of the Defendants'
9 motion for early depositions. But we believe very strongly
10 that there is not good cause for early deposition. And we're
11 happy to go through all the five factors if you would like, and
12 we're certainly prepared to brief that issue.

13 **THE COURT:** All right. So let me go back to
14 Mr. Schindler, and maybe you can tell me with more specificity
15 who you wish to depose and on what topics and why you need it
16 now.

17 **MR. SCHINDLER:** Sure. And I think what Mr. Perkins
18 said is probably illustrative of the problem because he did, he
19 highlighted the very issue, and that is that there are a number
20 of current and former government witnesses who we do seek to
21 depose who are key to the issues that are framed by the
22 complaint. It's a little bit disingenuous to say that United's
23 produced nothing. We've produced more than 600,000 documents I
24 believe in the course of the investigation. So the distinction
25 between the intervention and the investigation, let's be clear,

1 the government has subpoenaed some CIDs and others and has
2 received literally hundreds of thousands of pages and hundreds
3 of thousands of documents from United. So the suggestion that
4 we haven't produced anything is just not true. The state of
5 play is that there's been one-sided discovery, albeit it
6 through the CID process, there's been one-sided testimony
7 taken, yes, through the CID process. There's been essentially
8 no ability for United to commence the defense of this action.
9 And while it is true that document productions are ongoing,
10 what we seek, which is key to the issues here, are -- is the
11 ability to take testimony of a number of current and former
12 government executives, officials as Mr. Perkins has described
13 them, who were part of the meetings with United that go
14 straight to the heart of the issues here, and who more
15 importantly speak to a number of the claims that the government
16 has in terms of -- and it gets more complicated and probably
17 not usually discussed in the context of this discovery motion
18 but -- and I'm sure the Court hasn't really had a chance to get
19 its arms around exactly what this case is about, other than
20 it's a False Claims Act case involving a government program.
21 But suffice it to say that we agree with Mr. Perkins, and he's
22 right, we seek to depose a number of current and former
23 government officials who administered the program, who had
24 meetings with United, who made the decision to continue
25 payments to United, who understood exactly what this program

1 was and what it isn't, and who we believe will testify to facts
2 that are inconsistent with the theory of the government's case.

3 **THE COURT:** All right. And can you be more specific,
4 can you identify them by name?

5 **MR. SCHINDLER:** I mean, I probably could. I mean, I
6 don't have a list in front of me right now. And I think we'd
7 probably want the ability -- and if it's important, we can come
8 back and give you specific names. I think the issue for us is
9 even just fundamentally the government's resistance to allow us
10 to have even a single deposition. And -- but there are a
11 number of people and some of whom are current government
12 employees and others who are former.

13 **THE COURT:** And will they play any role, their
14 statements -- I mean, a motion to dismiss is on the pleadings
15 so I'm not quite sure why these depositions would play a role
16 in your motion to dismiss.

17 **MR. SCHINDLER:** Yeah, I don't -- I think it's a fair
18 question, and I don't think that they will per se. I don't
19 think this is an instance where the testimony is going to be
20 material to our motion to dismiss, the Court's correct, where
21 our motion to dismiss is going to be predicated upon what we
22 believe are some inadequacies on the face of the pleadings.

23 **THE COURT:** All right. And when do you expect to
24 file that?

25 **MR. SCHINDLER:** Well, we have our meet and confer

1 with the government tomorrow on that, and we'll be filing our
2 motion to dismiss immediately thereafter.

3 **THE COURT:** So it'll be heard maybe January some
4 time.

5 **MR. SCHINDLER:** Yeah, I think the first available
6 date on Judge Fitzgerald's calendar is January the 8th.

7 **THE COURT:** All right, so --

8 **MR. SCHINDLER:** It may be January 15th. We'll be
9 talking about that with the government tomorrow.

10 **THE COURT:** Understood. All right, so let me ask the
11 question a little bit differently. You don't have an exact
12 list, but do you have a number, like how many depositions you
13 seek to take?

14 **MR. SCHINDLER:** You know, I think at this point no
15 more than probably five. But, I mean, it's certainly something
16 we're willing to negotiate and arrive at. I mean, our
17 fundamental notion is to be able to have the ability to start
18 to catch up. And really, the essence of our motion is there's
19 no prejudice to the government at this point in allowing us to
20 proceed.

21 **THE COURT:** And let me ask you this, you don't have
22 to tell me who it is or anything like that, but in your mind
23 are there witnesses who you would characterize as the most
24 important people for you to take? Like do you -- could you
25 rank them?

1 **MR. SCHINDLER:** I think there's probably -- and I'd
2 want the chance to visit with my colleagues but, yeah, I think
3 we could certainly come up with a list of ranked one to five of
4 people whose testimony we would like to take to be sure.

5 **THE COURT:** And were you thinking this would be the
6 sole opportunity for the Defendants to depose these individuals
7 in the case, that is this would be your -- I mean, it sounds
8 like a case where the parties might stipulate to more than ten
9 per side but generally we try to avoid a second deposition of
10 anyone so --

11 **MR. SCHINDLER:** I think -- yeah, I agree, your Honor.
12 I think that, you know, we're certainly mindful of that issue
13 and don't seek to have multiple depositions of parties. There
14 are instances of course where something surfaces down the road
15 and parties come back to the Court and say, look, we need to
16 take further testimony from experts as a result of some
17 development. But to be sure, we're mindful of the rules. And
18 while I agree, I think the parties will agree to stipulate to
19 more than ten depositions, we're not trying to have a scenario
20 where we're taking multiple depositions of multiple people
21 because we agree that wouldn't be efficient.

22 **THE COURT:** All right, and so if I understand what
23 you're saying, your primary purpose in trying to take
24 depositions in December or January is to catch up with the
25 United States and the Relator. I mean, I'm not -- I read your

1 motion and I sense from your motion that it was Defendants'
2 feeling of an imbalance in the information that both sides
3 possess and that --

4 **MR. SCHINDLER:** Correct.

5 **THE COURT:** -- you want to depose certain individuals
6 to have a better understanding of what the government's
7 position is as to those individuals who they've had an
8 opportunity perhaps to speak directly to or interview. So --
9 but I'm trying to understand, is there anything beyond that
10 that is sort of your basis for needing these depositions in
11 December and January?

12 **MR. SCHINDLER:** No, I think that's a fair
13 characterization, your Honor. I think it is that this case and
14 the investigation, as Mr. Perkins has said, is ongoing for more
15 than five years and all of the discovery has been one way. And
16 of course there have been public filings at this point by the
17 government and others essentially suggesting facts that are we
18 believe likely not borne out by some key witnesses. And we
19 think the Court's characterization is accurate, that at this
20 point we want the opportunity to start leveling the playing
21 field.

22 **THE COURT:** And, I'm sorry, I missed this on the
23 docket. Did Judge Fitzgerald hold a scheduling conference yet
24 or has that not yet happened? I guess it's not yet happened,
25 right, no 26(f) report.

1 **MR. SCHINDLER:** (Indisc.)

2 **THE COURT:** Okay, so there's no discovery cutoff and
3 no other dates set.

4 **MR. SCHINDLER:** Correct.

5 **THE COURT:** Okay, all right. So now I guess
6 Mr. Perkins, you know, if you want to respond to anything
7 Mr. Schindler said or address any of the points, if you want
8 to, it's totally optional for you, whatever you prefer.

9 **MR. PERKINS:** Well, your Honor, thank you for that
10 opportunity, I appreciate it. Yeah, just the -- maybe the one
11 point I want to come back to, you know, is just the fact that
12 there hasn't been a Rule 26(f) conference; and, you know, case
13 law provides very clearly that early depositions before the
14 Rule 26(f) conference cannot go to the merits of the
15 plaintiff's claims. And that's exactly what United is trying
16 to do here. There's really no need to proceed with early
17 depositions before a Rule 26(f) conference. And there really
18 is an enormous concern on the government's end that there will
19 be duplicate depositions of, you know, very, you know, busy and
20 important government officials who are involved in the Medicare
21 Advantage program. And, you know, the fact is, you know, the
22 government hasn't produced like I said any documents in this
23 case to date; and if depositions were to occur next month and
24 in January, we're very concerned that, you know, somewhere down
25 the road, once we begin rolling productions, that United will

1 try to re-depose these witnesses.

2 **THE COURT:** Okay.

3 **MR. PERKINS:** So the last -- I'm sorry.

4 **THE COURT:** No, go ahead.

5 **MR. PERKINS:** Well, just the last point I want to
6 return to. You know, I might have mentioned this before but I
7 just want to make sure I do say it, which is that, you know,
8 there are, you know, very significant privilege issues, you
9 know, that United has actually raised to us regarding
10 deliberative process privilege. And, again, that's another
11 instance where, you know, United begins deposing these two
12 witnesses and we claim privilege, you know, it's very likely
13 that they would come back and try to re-depose these same
14 witnesses. We believe that it's best for the Court to resolve
15 these privilege issues through the course of document
16 production.

17 **THE COURT:** All right.

18 **MR. SCHINDLER:** So --

19 **THE COURT:** Yes, go ahead.

20 **MR. SCHINDLER:** Yeah, just two things, your Honor.
21 First, I mean, we're happy at least at this point to proceed
22 with former government employees if that's going to solve the
23 impasse. But the other thing is I think Mr. Perkins, it is
24 true that there's not been a Rule 26 conference. And we have
25 offered to hold it, and what's essentially happened is the

1 government is holding hostage the proposition of allowing us to
2 proceed by being unwilling at this point to agree to a Rule 26
3 conference when they had previously agreed to do so. So we're
4 in that odd scenario where in essence the government is holding
5 hostage the process by being unwilling to proceed with a Rule
6 26 conference. And we've offered to do it -- we offered to do
7 it the end of October. They said the first point they'd be
8 willing to do it was November 20th. We said fine, we agreed,
9 we had multiple exchanges between the parties where we were
10 going to proceed to confirm that date of today. And then
11 essentially the government, using its unilateral ability to
12 withdraw from holding that Rule 26(f) conference, is
13 essentially holding discovery hostage. And that's the problem
14 that we have. And so, I mean, it is true at the end of the day
15 that there has not been a Rule 26(f) conference, and here you
16 have one party -- it's somewhat anomalous that the roles are
17 somewhat reversed, you have the Defendants pushing to proceed
18 and the Plaintiffs in this case essentially looking to prevent
19 things from moving forward, which just is what it is. But I
20 think at a minimum, even if it would solve the problem by
21 agreeing at this juncture, that we would take the depositions
22 of only former government officials, you know, we're happy to
23 do that as well. We're not looking to hold all of the
24 discovery and have every deposition that the parties would
25 likely take over the course of the matter in December or

1 January; rather, we're looking for a limited universe that we
2 believe go to some material issues in the case.

3 **THE COURT:** All right.

4 **MR. SCHINDLER:** And failing all of that, all we'd ask
5 then is that the Court order the government to appear and
6 conduct a Rule 26(f) conference with us.

7 **THE COURT:** So let's talk about that for a minute.
8 Let me ask Mr. Perkins. It is a little concerning that the
9 government has resisted that 26(f). You know, the Court likes
10 to see people engage in that as soon as is practicable. And I
11 don't think that turns on the production of documents because
12 normally we haven't really had written discovery then. So when
13 do you think that the government in this case is going to be
14 ready to hold that 26(f) conference?

15 **MR. PERKINS:** Your Honor you know, in terms of when
16 we'll be ready for the Rule 26(f) conference, you know, we
17 told, you know, Defendants that we believe it's most
18 practicable 20 days after resolution of the motion to dismiss.
19 And let me explain why we have that position. You know,
20 Defendants, when we were, you know, discussing the possibility
21 of a Rule 26(f) conference, Defendants mentioned that the Rule
22 26(f) conference would only be partial because of their
23 forthcoming motion to dismiss. Well, that led us to believe
24 that then there would be a second Rule 26(f) conference after
25 resolution of the motion to dismiss. Well, that doesn't seem

1 like that would be very practicable if that's true. And then
2 also it's important to note the Defendants told us that we had
3 to bring our calendars to the Rule 26(f) conference so that
4 they could schedule depositions in December and January. And
5 that led us to believe that Defendants are really interested in
6 the Rule 26(f) conference to jumpstart that position, not to
7 engage in a meaningful, two-way dialogue about a comprehensive
8 and efficient discovery plan.

9 **THE COURT:** So I appreciate that. I guess I -- you
10 know, I'm not sure how some of the districts that you might
11 have practiced in approach the setting of the Rule 26(f). In
12 the Central District -- I can only speak to our district --
13 it's a very busy district. And our district judges, you know,
14 we're down six judges at this time. There -- the case loads
15 are extremely high. And they tend to put quite a bit of
16 pressure on the parties to hold a 26(f) earlier rather than
17 later in the case. I don't think the fact that there's a
18 pending motion to dismiss is good cause not to hold a 26(f)
19 conference. So because -- and particularly in this case, and I
20 could be wrong, I don't know enough about the case at all to
21 comment on it, but it doesn't strike me as the kind of case --
22 False Claims Act cases are not the kinds of cases that go away
23 in their entirety on a motion to dismiss, that is, you know,
24 perhaps some of the pieces of the complaint will be dismissed
25 but, you know, you'll have leave to amend and there'll be an

1 amended complaint. And I realize you just filed an amended
2 complaint. So it's not going to terminate the case in its
3 entirety. And I don't think most of the district judges in our
4 district would think that the possibility of a motion to
5 dismiss is good grounds to delay a 26(f). So I guess, you
6 know, I would hope that -- and particularly not for months and
7 months. I mean, I just think that this case needs a 26(f)
8 conference sooner rather than later. And I don't think it's
9 inappropriate to bring calendars. We do see it's in the rule
10 that the 26(f) is for the purpose of working out a schedule of
11 discovery. So even in a big case, that's the point, is to get
12 everybody together and try and create a schedule that both
13 sides can live with. Often times in 26(f) reports we see the
14 parties weren't able to reach an agreement but they'll offer
15 alternative schedules to the judge, whether it's a district or
16 magistrate judge who's handling it, and that informs the judge
17 about setting the scheduling order and how much discovery time
18 to give. So I really would like to see us talk about a date
19 that the government can do the 26(f) conference. So,
20 Mr. Perkins, when do you think you could do that 26(f)
21 conference?

22 **MR. PERKINS:** You know, your Honor, I mean, that's
23 really something that I'm going to need to confer internally.
24 You know, I'm not sure I can give you any precise date right
25 now. I mean, if you're going to press me, maybe I can confer

1 with my colleagues right now and put you on mute for a minute.

2 **THE COURT:** That sounds good, why don't you do that.

3 **(Pause from 11:36 a.m. to 11:37 a.m.)**

4 **MS. WALLACK:** Hi, this is Carol Wallack, your -- I
5 think that we need to get our schedules and get with Relator's
6 counsel, but we will be -- we will try with the Thanksgiving
7 holiday to do this (indisc.) day to meet and do a Rule 26(f)
8 conference, a full and complete one, and then file a report
9 within the required time thereafter. My question is then, that
10 report will go as I understand it to Judge Fitzgerald, and then
11 he will have a scheduling conference and he will issue a
12 discovery or scheduling order, and at that point that order
13 will dictate when depositions occur; is that correct?

14 **THE COURT:** Well, it's partially correct. So let me
15 break that down a little bit. You said within 21 days you
16 could do the Rule 26(f)?

17 **MS. WALLACK:** We have to confer with the Relator's
18 counsel and with each other, but we'll do our best to do that
19 within 21 days.

20 **THE COURT:** Great, that would be terrific. So that
21 would put it at some time, you know, the last day would really
22 be about the 8th of December. So perhaps you could hold it
23 that week of December 4th. So that would be I think a
24 reasonable goal, give everybody a chance to prepare and get
25 their -- themselves ready for that. And then you're right, the

1 26(f) report from the parties would go to Judge Fitzgerald.
2 You know, what typically happens is the district judge will set
3 a scheduling order that will give a discovery cutoff, but it
4 won't actually break the case into phases for discovery. If
5 that's necessary in a case, then that issue is often referred
6 to the magistrate judge, sort of we are the managers of
7 discovery in our district. So if the parties put in their
8 order that they wanted, you know, to complete -- for example,
9 if Mr. Perkins said written discovery through, you know, "X"
10 date and then proceed with depositions, that would be the
11 Plaintiff's proposal, the Defendant would put in a
12 counterproposal of immediate depositions, and that conflict
13 would be sent to me I'm sure. So that's pretty much how it's
14 handled here.

15 **MS. WALLACK:** So this is a very, very large case with
16 very significant -- and a number of very significant legal
17 issues which we believe are legal issues, they're not factual
18 issues (indisc.) that should the judge decide before there is
19 especially deposition discovery, but any new demand of
20 discovery going forward because it will very much impact it.
21 And if we're right that a lot of these issues are legal and not
22 factual, it'll have a great difference to the amount of
23 depositions each party needs to take, what deposition with each
24 party. And also there is major on both sides privilege issues
25 with United withholding significant amount of documents based

1 on privileges that we don't think are legitimate (indisc.) have
2 to be done before we take depositions, otherwise we're going to
3 end up taking depositions twice, which we don't want to do. We
4 don't think that's proper for the witness and we certainly
5 don't want to burden anyone that way, including ourselves. And
6 as Mr. Perkins explained, there's significant privilege issues
7 on our side as well, which even with former employees, it is
8 going to likely, very likely result, if they're not decided
9 beforehand, in multiple depositions.

10 And so we -- I think that we can meet and try to get
11 a discovery plan, but it's going to have a lot of caveats and a
12 lot of contingencies on it because we don't know the legal
13 rulings. Not only are those rulings going to be (indisc.)
14 motion to dismiss, but we also plan to file partial summary
15 judgment motions with strictly legal issues, rulings on legal
16 issues that are not factually based.

17 As I said, the case is really huge. It has to do
18 with conduct that occurred over a decade, a lot of money
19 involved, there's a lot of witnesses involved, there's multiple
20 issues. So I think we can do something now. I'm not sure how
21 meaningful. I really do believe after these issues have been
22 decided, it's going to have to be redone a lot, and I guess I
23 feel like we're going to be putting either Judge Fitzgerald or
24 you between -- to go through the same exercise twice, and that
25 that won't be efficient for the Court. You just told us, which

1 we totally understand, that you're extremely overloaded. And
2 so there is going to be great efficiency in waiting for these
3 legal rulings and waiting for the rulings on the privilege
4 issues.

5 So we're happy to try to work out a comprehensive
6 Rule 26(f) report, submit it to the Court, then have a
7 scheduling conference, and then get a scheduling order. But
8 before that, we are going to focus all our effort on still
9 collecting more than the two million documents we have,
10 reviewing them, going through them for privilege, which is --
11 we're doing it. It's taking not only our time but more
12 importantly time of people who run the Medicare program. And
13 it's burdensome. So there's -- we understand we're going to be
14 doing a lot of work. We just want to do it in the most
15 efficient and orderly fashion for the Court's sake, for our
16 client, CMS's (ph.s.) sake, and for all the parties' sake. So
17 I guess if we could have -- you know, we're going to run into
18 Christmas, but if we could have two or three weeks after we
19 meet with the Defendants to file a Rule 26(f) report, and then
20 if we can have a conference on it sometime in January when it's
21 -- when you or -- have the time, and then get some kind of
22 order, I think that would be the best thing. I do think still
23 that we're going to end up redoing a lot of this.

24 **THE COURT:** So I appreciate everything you said. And
25 you're right, we would like to do it as efficiently as possible

1 with as little conflict as possible. But, you know, I just --
2 I know that Judge Fitzgerald will also want to see the case
3 moved along. So I think that's a reasonable plan to hold your
4 26(f) during the week of December 4th. The rule requires that
5 you submit the report I believe within 14 days so you have to
6 get that in -- looking at 26(f) here. Anyway, that report is
7 due shortly after your meet and confer, unless Judge Fitzgerald
8 changes that date. So -- and that -- once he gets the 26(f)
9 report, he will then go ahead and set the scheduling conference
10 on his schedule for some time probably within the next couple
11 of months. So I think that's a good plan.

12 In terms of, you know, what I would do with this
13 motion now that's pending, I'll just share with you that just
14 based on what you've shared with me, I would probably hold
15 another hearing on this and get -- try and get a little bit
16 more specific information. I'd like to know who it is that the
17 Defendants really need to depose and why they would be, you
18 know, harmed in some way if they can't conduct expedited
19 discovery. I haven't really heard that other than the fact
20 that the balance has been unfair in the Defendants' view
21 because of the government's position as the investigator in the
22 case. But, you know, that is true in every false act -- False
23 Claims Act case. And we don't allow expedited discovery in
24 every False Claims Act case. So, you know, I need to hear a
25 little bit more detail from the Defendants on why it's

1 necessary here and who they want to depose.

2 And then on the Plaintiff and Relator's side, the
3 government and Relator's side, I understand what you're saying
4 about the production of documents, and it is a significant
5 production, and I'm sure there are privilege issues. That's
6 also true in many, many cases brought in this district. So,
7 you know, I generally try to work with parties on that, on the
8 issue of can we have our written discovery done first before we
9 do depositions. But there is no such rule in the Federal Rules that
10 say a party has an entitlement to complete written discovery or
11 an entitlement to resolve written discovery prior to the
12 beginning of depositions. So I apply a standard of reasonable
13 to that. And I'll look to see, you know, what the government
14 has produced, how diligent they've been, and whether or not,
15 you know, the production of documents is prejudice -- is
16 causing prejudice to the Defendant in pursuing the case. So,
17 you know, I can't tell you based on what everyone shared with
18 me what I would do on the pending motion, but I guess what I
19 would say is I'd probably try to resolve the written discovery
20 by setting deadlines for people on that and then start setting
21 a schedule for depositions to take place.

22 **MR. SCHINDLER:** Your Honor, if I might, I think at
23 some level it's -- this is David Schindler. I think (indisc.)
24 if I'm hearing -- I mean, the government is agreeing to proceed
25 during that week of December 4th, and at that point we'll have

1 the Rule 26(f) conference. And if the Court's right, the rules
2 say what they say about our ability to commence depositions at
3 the end. And maybe what will end up happening, if the
4 government at that juncture seeks to move to quash or seeks to
5 have a protective order barring our ability to take any
6 particular deposition, that's probably the way in which this is
7 going to be brought before the Court. And I think the Court's
8 right, that at that juncture, that you'll be in a position to
9 decide whether there's a basis to issue a protective order
10 barring the taking of that deposition. But I think at some
11 level the most efficient resolution of where we are right now,
12 because I agree with you, holding a hearing in December to have
13 the parties fully brief this motion where we're going to have
14 the Rule 26(f) conference now because the government's agreed
15 to do it during the week of the 4th, seems to make more sense
16 just to let us proceed with our Rule 26(f) conference as you
17 suggested. At that point, we will -- you know, we will work
18 diligently with the government to come up with a workable order
19 that we'll submit to the Court. We have our section of the
20 order essentially completed, ready to go. But I think that the
21 next point at that juncture, rather than seeking a ruling from
22 the Court today as the government's doing, is if for some
23 reason they believe that any one of the depositions that we may
24 notice following the Rule 26(f) conference should not go
25 forward, then the right remedy is to then -- to come before you

1 and seek a protective order.

2 **MS. WALLACK:** Well, your Honor, that's why I was
3 asking what your intent was, because this is not going to be
4 more efficient for the Court or for the parties; because the
5 second we meet, I'm sure walking out the door, they're going to
6 give us deposition subpoenas. And, yes, we will be asking for
7 a protective order at that point. During the Rule 26, this is
8 why we wanted to postpone it until after the motion to dismiss,
9 is being done here really just to issue the subpoenas and then
10 to flip the burden here from a having to have good cause under
11 Rule 26(b) to take depositions early to putting then the burden
12 on us to move for a protective order. And we don't think
13 that's right. It's very much of a gamesmanship, it's not going
14 to be -- we'll be back on the phone with you or in person with
15 you in mid-December. So that's why I was asking if we do the
16 26(f) and then we file the report, and then Judge Fitzgerald
17 schedules a scheduling conference to do a scheduling order, or
18 it's in front of you, that the agreement could be on the
19 defense side, the Defendants now, that they would not issue
20 those subpoenas; otherwise, this is not efficient and doing a
21 26(f) now is very premature because, as I said, it's going to
22 be -- have to be redone because the legal issues are going to
23 so impact it and the privilege issues are going to so impact
24 the multiplicity of the depositions of the same witnesses.

25 **THE COURT:** I guess I just -- I'll just have to --

1 you know, I don't see it that way. I guess it's just not how
2 we handle these cases in our district. And I think Judge
3 Fitzgerald would expect you to hold that Rule 26(f) despite the
4 fact that legal issues may be altered, because that's true in
5 many, many cases. I realize this is a big case. But it is not
6 the first big case handled by Judge Fitzgerald. And so, you
7 know, if that was true, then we would be holding our 26(f)
8 conferences, you know, six months into the case. And that is -
9 - you know, that is not what the practice is. So I understand
10 you don't want to be handed subpoenas after the 26(f)
11 conference, but it's -- you know, to some degree, the
12 Plaintiffs triggered all of these things by the date that they
13 filed the complaint, and then everything else flows from that.
14 So, you know, I just -- you can't postpone indefinitely the
15 26(f) conference until the legal issues are resolved because
16 that could be months and months and months. So the parties
17 have to proceed with discovery as efficiently and quickly as
18 they can under the circumstances. So -- and if Mr. Schindler
19 provides you with subpoenas, you do have an obligation to meet
20 and confer. And as I said, I invite you to request an informal
21 discovery conference like this so we can talk about it, if you
22 get those subpoenas. But if necessary, you'll have to do a
23 joint stipulation with Mr. Schindler about your good cause for
24 protective order, which is an extremely high standard. And,
25 you know, we've had many, many cases with the United States

1 obviously, and the fact that somebody is a busy government
2 official doesn't necessarily dispose of the issue. So I
3 appreciate your frustration. I wish there was an easier answer
4 for you, but I don't think delay of the 26(f) is the answer.

5 So my plan for now on this pending motion is to
6 continue it to a later date in January because it seems to me
7 the parties will have an opportunity at the 26(f) to at least
8 revisit the issue. And, Mr. Schindler, what I would really
9 want you to do is to provide the government with a list of the
10 people you seek to depose. And I realize that's showing your
11 hand a little bit, but you're going to have to do it anyway
12 when you hand them the subpoenas. And perhaps at the 26(f),
13 talk to them about, you know, who would be your priorities of
14 those depositions and use that meeting as an opportunity to
15 talk about a schedule that works for both sides.

16 **MR. SCHINDLER:** Sure, happy to do so, your Honor.

17 **THE COURT:** All right, is there -- I wanted to
18 mention a couple other things. In terms of protective orders,
19 there is a sample protective order on my schedules and
20 procedures page. It's in Word. You can alter it as you need
21 to but it does have many of the references to the local rules
22 in there so that might be helpful to you. All right, is there
23 anything further at this time that either side would like to
24 discuss?

25 **MR. SCHINDLER:** Not from United, thank you, your

1 Honor.

2 **MS. WALLACK:** Not from the government, thank you.

3 **THE COURT:** All right, so thank you very much for
4 your participation in the call. I look forward to working with
5 everyone on the case.

6 **MR. SCHINDLER:** Likewise, your Honor, thanks very
7 much. Have a good day.

8 **MS. SPEAKER:** Thank you, your Honor.

9 **MR. SCHINDLER:** (Indisc.)

10 **(This proceeding was adjourned at 11:55 a.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is written over a horizontal line.

Signed

November 21, 2017

Dated

TONI HUDSON, TRANSCRIBER