

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION - LOS ANGELES

UNITED STATES OF AMERICA,	)	CASE NO: 2:16-CV-08697-MWF-SS
	)	
Plaintiff,	)	CIVIL
	)	
vs.	)	Los Angeles, California
	)	
UNITED HEALTH GROUP, INC,	)	Monday, December 18, 2017
ET AL,	)	
	)	
Defendants.	)	

TELEPHONIC CONFERENCE RE DISCOVERY

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

<u>APPEARANCES:</u>	SEE PAGE 2
Court Reporter:	Recorded; XTR 12/18/17
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Los Angeles, California; Monday, December 18, 2017

(Call to Order)

THE CLERK: Hi. This is Clerk to Judge Segal, Marlene Ramirez. We're here today on the record on Case CV-16-8697, United States of America, et al. versus United Health Group, Inc., et al. Counsel, please state your appearance.

MR. FREEBORNE: This is Paul Freeborne. I'm joined on the call today by John Lee from the U.S. Attorney's Office.

THE COURT: Good afternoon.

MR. SU: And this is -- and this is Henry Su from Constantine Cannon appearing on behalf of Relator. I'm also joined by John Lahad from Susman Godfrey also for Relator.

THE COURT: Good afternoon.

MR. SCHINDLER: And this is David Schindler from Latham and Watkins and I'm joined by Dan Meron and Abid Qureshi on behalf of United.

THE COURT: Good afternoon.

All right. So Mr. Schindler, maybe you could share with us what this is about and then -- and then I'll hear from counsel for the United States and the Relator.

MR. SCHINDLER: Absolutely. Good afternoon, your Honor.

We're here on really the government's request as part of an anticipated motion that the government intends to bring

1 seeking a protective order to preclude United from proceeding
2 with a deposition that has been noticed for mid-February. You
3 may recall from our last informal conference at that point in
4 time the question of the -- of United's right to proceed with
5 depositions came up. We discussed it with you. There was a
6 question about holding a Rule 26 conference which in fact
7 proceeded in conjunction with the schedule that we discussed
8 with you back in November.

9 And at this point the government has indicated to us
10 that they intend to seek a protective order from the Court,
11 from you, barring us from proceeding with the deposition and
12 particularly have been in two depositions that have been
13 noticed. One is of a former government employee named Marilyn
14 Tavner (phonetic), the other is of an individual named Jeffrey
15 Grant who is still employed by the government. And so this
16 informal conference was called by the government and is the
17 first step in conjunction with their anticipated motion for a
18 protective order.

19 **THE COURT:** All right. Thank you.

20 So for the United States?

21 **MR. FREEBORNE:** Your Honor, this is Paul Freeborne.

22 So first to be clear, we seek to defer the
23 depositions until the Court, Judge Fitzgerald, rules on
24 dispositive motions. The defendants have filed a motion to
25 dismiss. We're likely to join on the same issues in a motion

1 for partial summary judgment. We believe that a ruling on
2 those issues will define the scope of discovery under 26(d) and
3 therefore it's appropriate to defer any depositions until the
4 Court rules on the parties' dispositive motions. And that's
5 really our essential argument, your Honor, in terms of just
6 efficiency, also to alleviate any undue burden on the
7 witnesses, one of whom is, like we said, a former government
8 official. She is the former administrator of CMS. And so
9 again, while it's a good-cause standard, we also need to be
10 cognizant, in our view, of the undue burden that we're placing
11 on third parties.

12 **THE COURT:** And what is that burden? I'm not
13 following.

14 **MR. FREEBORNE:** Well, just first and foremost that
15 the case would be aided by ruling on the dispositive motions
16 because the legal issues that will be joined by the parties in
17 their respective motions are likely to be at least instructive
18 if not dispositive of the depositions in that they -- we could
19 potentially narrow the scope of depositions, if not negate them
20 all together, depending on the Court's legal rulings.

21 The parties will be filing motions on materiality
22 which relates to the government's payment process. Depending
23 on the Court's legal rulings there, neither deposition may be
24 necessary.

25 **THE COURT:** All right. So let me ask what the nature

1 of the motion to dismiss is.

2 **MR. SCHINDLER:** Your Honor, it's David Schindler.

3 To be clear, there is already a motion to dismiss
4 that has been filed. And Mr. Freeborne's correct in that
5 United has indicated that the case should be dismissed based on
6 the government's failure to plead materiality.

7 It's important to note that the depositions have been
8 noticed for a date that is after the hearings that are set
9 before Judge Fitzgerald on our motion to dismiss. So to the
10 extent the judge indeed grants our motion to dismiss and the
11 case goes away, then of course the depositions would be taken
12 off calendar, they'd be moot. If the judge denies our motion
13 to dismiss then at that point we would proceed to take the
14 depositions which (indisc.) takes place (indisc.) hearing that
15 is currently set before Judge Fitzgerald.

16 I should note that Mr. Freeborne in reference to the
17 fact that the government has indicated to us that it intends to
18 file, we already have our motion to dismiss on file and it's
19 calendared for hearing on January 29th. The government's
20 indicated to us they intend to file a motion for partial
21 summary judgment. We have any number of issues with that,
22 including most notably the fact that there are going to be
23 material issues of fact that would preclude grant of any motion
24 for partial summary judgment. But I don't think anything --
25 any of that really informs the fundamental question that is

1 before you today and that really was before you in our prior
2 informal conference and that is the government's desire to
3 preclude us from proceeding to take any depositions until such
4 time as all document discovery is complete. And as you'll
5 recall, they indicated to you then and have reference in their
6 email to you today that they intend to seek an order or ask you
7 (glitch in audio) as the individual charged with managing
8 discovery to preclude us from taking any depositions until such
9 time as all documents have been produced. You may recall our
10 view is that we're entitled to take depositions under the
11 rules. And in fact, there is good reason for us to take
12 depositions, specifically in advance of when all documents have
13 been complete because one of the things that depositions allow
14 us to do, and it's particularly relevant here, is determine
15 whether there are additional sources of documents to be found
16 and that's something that is particularly (indisc.) with
17 Ms. Tavner who is the first deposition that we've noticed to
18 occur in February.

19 **THE COURT:** And has Judge Fitzgerald set a Rule 16
20 conference?

21 **MR. SCHINDLER:** He has not.

22 **MR. FREEBORNE:** And your Honor, and we have requested
23 of the other side if they'd consent to have the oral argument
24 and the Rule 16(b) conference occur on the same day because
25 again, rulings on the dispositive motions (indisc.) or

1 otherwise will inform discovery and it's appropriate that they
2 be heard together and the other side has refused to stipulate
3 to that.

4 **THE COURT:** All right. Mr. Schindler, why is that?

5 **MR. SCHINDLER:** Sure. I mean, I think, your Honor,
6 the issue for us, of course, is if our motion to dismiss is
7 granted, then the case goes away and all of the additional
8 issues become moot. The request specifically was for us to
9 join their motion for partial summary judgment at the same time
10 with our motion to dismiss. We view those as fundamentally
11 different.

12 And with respect to the Rule 16 conference, again, if
13 the motion to dismiss for which briefing will be complete is
14 done, is granted, then of course all of this becomes moot. If
15 not, at that juncture in terms of setting a Rule 16 conference,
16 that's the time typically when you look at Judge Fitzgerald's
17 orders, he typically sets his Rule 16 conference at a point in
18 time after the motions to dismiss are ruled upon; and in
19 particular, he orders and in fact the defendant answers. So
20 his normal practice is to set that Rule 16 conference at a
21 point in time essentially after motions to dismiss are denied
22 and he's received an answer from the defendant.

23 **THE COURT:** Okay.

24 **MR. SCHINDLER:** So all we've said is, look, our
25 motion to dismiss should come first. It's the natural sequence

1 makes the most sense. If it's denied, then the normal course
2 is what we should follow here which is what Judge Fitzgerald
3 typically employs and that is that he -- at the conclusion of a
4 motion to dismiss, he orders the defendant to answer.
5 Presumably he looks at the defendant's answer and at that
6 juncture sets his Rule 16 conference because he knows what he
7 has in front of him.

8 **THE COURT:** Uh-huh (affirmative). Okay. And what is
9 the purpose of deposing these two witnesses again?

10 **MR. SCHINDLER:** Well, starting well, with Ms. Tavner,
11 you may recall when we had our last conference, she was the
12 former head of CMS. There are some pretty significant issues
13 which go, as I noted a moment ago, to the notion of determining
14 other sources of discovery that will be highly and relevant to
15 the issues given our position. She also goes directly to some
16 of the seminal issues that are alleged in the complaint,
17 including materiality, including essentially the proverbial of
18 what happened here as alleged in the complaint. So she was in
19 the midst of all of these issues and is in a primary position
20 to be able to testify to some of the allegations the government
21 has made. But in terms of timing right now, one of the most
22 important aspects is to be able to talk to her about the
23 existence and the whereabouts of additional documents that will
24 be relevant. Again, she's no longer with the government and
25 there's some indication that there may be some documents that

1 she has outside of -- that the government may not have.

2 **THE COURT:** All right. And then as to the other
3 witness?

4 **MR. SCHINDLER:** Mr. Grant is currently there. He was
5 also part of -- his role -- and again, a little hard to
6 articulate in the context of our informal conference but he
7 played a seminal role in some of the actuarial issues that are
8 at issue here and (indisc.) are more complicated but again, he
9 was somebody who we believe can disprove fundamentally or at
10 least allow us to test some of the validity of the allegations
11 that are contained in the government's complaint.

12 **THE COURT:** All right. So yeah, this all sounds
13 familiar to me from our last discussion. Well, not all the
14 various details but they're kind of coming back to me. And I
15 don't have a different feeling than I had when we talked about
16 it before. And it may be that the United States and their
17 counsel have different experiences in other parts of the
18 country but it's our practice here that as soon as the parties
19 hold their Rule 26 meet -- meeting, that a discovery plan is
20 created and the parties can proceed with discovery. And
21 particularly in a case like this of what appears to be some
22 degree of complexity, I would suspect that Judge Fitzgerald --
23 I don't know that -- but I would suspect that he would prefer
24 that people immediately begin discovery and not delay it for
25 any purpose.

1 And in terms of the burden on the two witnesses,
2 because the deposition date is set after the date of the motion
3 to dismiss hearing, I don't see exactly how they're presented
4 with an undue burden because you'll know very quickly, I think,
5 whether or not the motion to dismiss is going to be granted
6 without leave to amend or denied and what the status of the
7 case is. But if it is either granted with leave to amend or
8 it's denied and the defendant is ordered to answer, I would
9 suspect that it would be the court's preference that discovery
10 proceed as quickly as possible. So if it's (indisc.) on a
11 motion for protective order, I wouldn't find that the
12 articulated burden satisfies the good-cause standard here,
13 based on what's been provided to me, so I would probably deny
14 that motion if it came to me under the circumstances that the
15 parties have described.

16 Does that at all give you some guidance on how to
17 proceed?

18 **MR. FREEBORNE:** Your Honor, just one further point.
19 Again, the government, just to be clear, we are anticipating
20 filing a motion for partial summary judgment so I don't want
21 the Court left with the impression that it's just a motion to
22 dismiss. And again, we're going to join on the legal issues of
23 materiality that Counsel has represented that Ms. Tavner will
24 be deposed on. And so again, sort of (indisc.) -- and that may
25 -- if the ruling is favorable to the government -- limit

1 discovery. Just from an administrative standpoint, you know,
2 noticing a deposi -- or noticing a motion in the district,
3 incorporating the Court's findings, we would ask for some
4 latitude there. The February 13th and 20th just doesn't give
5 us enough time to move for a protective order incorporating the
6 Court's rulings. So we would ask at a minimum for that, just
7 enough time to incorporate the Court's rulings.

8 **THE COURT:** And Judge --

9 **(Voices overlapping)**

10 **MR. FREEBORNE:** (indisc.)

11 **THE COURT:** -- ruling on the motion to dismiss?

12 **MR. FREEBORNE:** On either the motion for partial
13 summary judgment or on the motion to dismiss.

14 **THE COURT:** When are you planning to set the motion
15 for partial summary judgment for hearing?

16 **MR. FREEBORNE:** Well we'll exchange schedules
17 tomorrow with Opposing Counsel but I can generally I think
18 early February.

19 **THE COURT:** All right. I mean, one thing that I have
20 seen -- there may be exceptions to this -- but generally with
21 Judge Fitzgerald, he's got a ruling on a pending motion very
22 quickly in conjunction with the hearing. So -- and not all of
23 our judges operate on that same or follow that same practice so
24 -- and there could be exceptions to it in various cases. But I
25 think I could comfortably say that I would predict that you'll

1 have an order in early February on the motion for summary
2 judgment.

3 So you're saying that a February 13th and 20th date
4 doesn't give you enough time to incorporate the findings on
5 that and you think the scope of discovery will be too broad?

6 **MR. FREEBORNE:** Well, it just wouldn't allow us
7 enough time to file a properly noticed motion incorporating the
8 Court's findings. And that's why we suggested having the Rule
9 16(b) at the same time oral argument is heard with the mind
10 that if we have a tentative ruling then the Court -- we could
11 gear the parties out as to the appropriate scope of discovery
12 moving forward. Absent that, again, we wouldn't have enough
13 time to file a properly noticed motion under the Local Rules.

14 **THE COURT:** I mean, you know, parties bring motions
15 for partial summary judgment all the time here. Sometimes they
16 win, sometimes they lose. But we tend not to halt discovery in
17 the anticipation that they may win their motion for partial
18 summary judgment. It's just -- I recognize that that's not
19 exactly how every party would like us to handle discovery. It
20 would be perhaps cleaner and neater if we could just conduct
21 discovery on only those issues that will survive a motion for
22 partial summary judgment but that's not the practice here. The
23 practice is that the claims and defenses are framed by the
24 complaint and by the answer. But even if there's no answer on
25 file, we generally let the defendant proceed to address the

1 allegations in the complaint through discovery and we don't --
2 we don't wait. We've had too many cases --

3 **MR. FREEBORNE:** Your Honor, I'm sorry. I'm having a
4 hard time hearing. Somebody is breathing really into the phone
5 so whoever it is, can you just take a step back from there but
6 not the judge.

7 **THE COURT:** Anyway, I was just saying that I
8 understand why the government would prefer the kind of
9 structured process that they are suggesting but that isn't --
10 that isn't my understanding of how we handle discovery here.
11 That we just -- we do not tend to stay discovery or block
12 discovery under the possibility that a party may prevail in a
13 motion for partial summary judgment. There may be exceptions
14 to that and times in which, you know, discovery is stayed for
15 various reasons but it's really the exception and not the
16 common practice here. So -- and I guess the taking of two
17 depositions doesn't, for me, generally rise to the level of
18 undue burden for a party. So I just haven't heard a reason
19 from the United States that, in my mind, would satisfy the
20 good-cause standard.

21 **MR. SCHINDLER:** Well, your Honor, we thank you for
22 your time.

23 **THE COURT:** All right. I wish I could be of more
24 assistance to you. I guess what I would hope that the parties
25 would do, if you're going to schedule that motion for partial

1 summary judgment at the beginning of February, is maybe you can
2 come to some compromise agreement with Defense Counsel and push
3 back on those depositions. If not the 13th and the 20th, you
4 know, to the end of February, beginning of March, and give a
5 little bit more time to incorporate in a findings made by Judge
6 Fitzgerald into whatever discovery motion you want to file.

7 **MR. FREEBORNE:** We'll approach Mr. Schindler about
8 that.

9 **THE COURT:** All right. Thank you. I -- let me know
10 if I can be of further assistance to the parties.

11 Thank you.

12 **MR. SCHINDLER:** Thank you.

13 **(Proceeding adjourned)**

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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

December 21, 2017

Dated

TONI HUDSON, TRANSCRIBER