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3
4 UNITED STATES DISTRICT COURT
5 CENTRAL DISTRICT OF CALIFORNIA
6 WESTERN DIVISION

7 UNITED STATES OF AMERICA,)
8)
9)
10 PLAINTIFF,)
11)
12 V.)
13)
14 UNITEDHEALTH GROUP, INC.,)
15 ET AL.,)
16) 16-CV-08697-MWF (SSX)
17 DEFENDANTS.) FEBRUARY 8, 2018
18 _____)

19
20 TELEPHONIC CONFERENCE

21
22 BEFORE THE HONORABLE SUZANNE H. SEGAL
23 UNITED STATES MAGISTRATE JUDGE

24
25 APPEARANCES: SEE NEXT PAGE
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PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING;
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

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I N D E X
16-CV-08697-MWF (SSX) FEBRUARY 8, 2018
PROCEEDINGS: TELEPHONIC CONFERENCE RE DISCOVERY

1 LOS ANGELES, CALIFORNIA, FEBRUARY 8, 2018

2 THE CLERK: GOOD MORNING, COUNSEL.

3 THIS IS YVETTE, RELIEF COURTROOM DEPUTY FOR THE
4 HONORABLE JUDGE SEGAL.

5 I'M GOING TO RUN DOWN OUR LIST. IF YOU COULD, JUST
6 CONFIRM IF YOU'RE ON THE CALL, PLEASE.

7 MR. PERKINS?

8 MR. PERKINS: I'M HERE.

9 THE CLERK: JUSTIN DRAYCOTT.

10 MR. DRAYCOTT: I'M HERE.

11 THE CLERK: JOHN LEE.

12 MR. LEE: I'M HERE.

13 THE CLERK: PAUL FREEBORNE.

14 MR. FREEBORNE: I'M HERE.

15 THE CLERK: JOHN LAHAD.

16 MR. LAHAD: PRESENT. THANK YOU.

17 THE CLERK: MAX VOLDMAN.

18 MR. VOLDMAN: YES.

19 THE CLERK: DAVID SCHINDLER.

20 MR. SCHINDLER: YES, I'M HERE. GOOD MORNING.

21 THE CLERK: GOOD MORNING.

22 DAN MERON -- OR MERON. I'M SORRY IF I MISPRONOUNCED.

23 DAN MERON.

24 MR. SCHINDLER: WE CAN PROCEED. HE SHOULD BE
25 JOINING.

1 DAN, IS THAT YOU?

2 MR. MERON: IT IS.

3 MR. SCHINDLER: OKAY. THERE HE IS.

4 THE CLERK: OKAY.

5 DAN -- I'M NOT SURE IF IT'S MERON OR MARON?

6 MR. MERON: MERON.

7 THE CLERK: MERON. OKAY.

8 KIRSTIN DO.

9 MS. DO: HI. YES, I'M HERE. THANKS.

10 THE CLERK: AND ANNE ROBINSON.

11 MS. ROBINSON: I'M HERE, TOO.

12 THE CLERK: GREAT.

13 THANK YOU.

14 I'M GOING TO CALL THE CASE.

15 CALLING CV 16-08697-MWF(SSX), UNITED STATES OF
16 AMERICA, ET AL. VERSUS UNITEDHEALTH GROUP INC., ET AL.

17 COUNSEL, IF YOU COULD PLEASE STATE YOUR APPEARANCES
18 FOR THE RECORD.

19 MR. PERKINS: THIS IS PAUL PERKINS FROM THE
20 DEPARTMENT OF JUSTICE.

21 THE COURT: GOOD MORNING.

22 MR. FREEBORNE: PAUL FREEBORNE --

23 THE COURT: GOOD MORNING.

24 MR. DRAYCOTT: JUSTIN DRAYCOTT, DEPARTMENT OF
25 JUSTICE.

1 THE COURT: GOOD MORNING.

2 MR. LEE: JOHN LEE WITH THE U.S. ATTORNEY'S OFFICE.

3 GOOD MORNING, YOUR HONOR.

4 THE COURT: GOOD MORNING.

5 MR. LAHAD: GOOD MORNING, YOUR HONOR.

6 THIS IS JOHN LAHAD -- COUNSEL FOR THE RELATOR.

7 THE COURT: GOOD MORNING.

8 MR. VOLDMAN: HELLO. MAX VOLDMAN, CONSTANTINE

9 CANNON, COUNSEL FOR THE RELATOR.

10 THE COURT: GOOD MORNING.

11 MR. SCHINDLER: GOOD MORNING, YOUR HONOR.

12 THIS IS DAVID SCHINDLER FROM LATHAM & WATKINS ON
13 BEHALF OF UNITED.

14 THE COURT: GOOD MORNING.

15 MR. MERON: AND GOOD MORNING. IT'S DAN MERON FROM
16 LATHAM & WATKINS, ALSO ON BEHALF OF UNITED.

17 THE COURT: GOOD MORNING.

18 MR. ROBINSON: AND ANNE ROBINSON FROM LATHAM &
19 WATKINS ON BEHALF OF UNITED.

20 THE COURT: GOOD MORNING.

21 MS. DO: AND KIRSTIN DO FROM LATHAM & WATKINS ON
22 BEHALF OF UNITED. GOOD MORNING.

23 THE COURT: GOOD MORNING.

24 SO, WE'RE HERE THIS MORNING FOR AN INFORMAL DISCOVERY
25 CONFERENCE. AND I UNDERSTAND THIS DISPUTE INVOLVES AN ALLEGED

1 FAILURE TO PRODUCE DOCUMENTS BEFORE A DEPOSITION THAT'S
2 SCHEDULED FOR FEBRUARY 13TH.

3 WHY DON'T WE START WITH UNITED'S COUNSEL, AND YOU CAN
4 SHARE WITH ME WHAT YOUR CONCERNS ARE. AND, THEN, I'LL HEAR
5 FROM COUNSEL FOR THE UNITED STATES AND FOR RELATOR IF THEY WANT
6 TO BE HEARD.

7 MR. SCHINDLER: THANK YOU, YOUR HONOR.

8 GOOD MORNING. THIS IS DAVID SCHINDLER.

9 THE COURT: GOOD MORNING.

10 MR. SCHINDLER: WE'RE HERE -- WE ATTEMPTED TO RESOLVE
11 THIS WITH THE GOVERNMENT AT A MEET AND CONFER EARLIER THIS WEEK
12 AND, UNFORTUNATELY, WERE UNABLE TO DO SO.

13 THERE'S TWO ISSUES. ONE RELATES TO THE FAILURE TO
14 PRODUCE DOCUMENTS SPECIFICALLY WITH RESPECT TO TWO DEONENTS
15 THAT ARE UPCOMING, MS. TAVENNER AND MR. GRANT.

16 BUT WE'RE HERE REALLY ON AN OVERARCHING PROBLEM THAT
17 WE'RE RUNNING INTO. THIS LITIGATION IS NOW ALMOST NINE MONTHS
18 OLD. WE SERVED REQUESTS FOR PRODUCTION FIVE MONTHS AGO, AND
19 MANY OF THOSE WERE LARGELY DUPLICATIVE OF THE REQUESTS FOR
20 PRODUCTION THAT HAD BEEN SERVED IN CONJUNCTION WITH THE OTHER
21 LAWSUIT THAT HAS NOW BEEN DISMISSED, THE SWOBEN CASE.

22 AND UNFORTUNATELY HERE WE ARE ALMOST NINE MONTHS INTO
23 THIS PROCESS, AND WE HAVE NOT RECEIVED A SINGLE PIECE OF PAPER
24 IN THE CURRENT LITIGATION FROM THE GOVERNMENT.

25 WE'VE PRODUCED OVER 36,000 DOCUMENTS IN THIS

1 LITIGATION ALONE IN ADDITION TO THE 600,000 DOCUMENTS WE
2 PRODUCED IN THE INVESTIGATION AND THE 34,000 DOCUMENTS THAT WE
3 PRODUCED IN THE SWOBEN CASE. AND WE'VE NOT RECEIVED ANYTHING
4 FROM THE GOVERNMENT.

5 AND THE PROBLEM WE'RE HAVING BECOMES PARTICULARLY
6 ACUTE WITH RESPECT TO THE DEPOSITIONS THAT ARE UPCOMING. AS
7 YOUR HONOR WILL RECALL, BACK IN DECEMBER WE WERE ALL IN FRONT
8 OF YOU IN CONJUNCTION WITH AN INFORMAL CONFERENCE LIKE THIS ONE
9 AS A RESULT OF THE GOVERNMENT'S INTENDED MOTION FOR A
10 PROTECTIVE ORDER TO PRECLUDE US FROM PROCEEDING WITH THE
11 DEPOSITIONS. AND YOU'LL RECALL WE HAD SOME DISCUSSIONS AT THAT
12 TIME. AND YOU INDICATED YOUR TENTATIVE INCLINATIONS WITH
13 RESPECT TO THAT -- AND LET THEM -- LET THE GOVERNMENT KNOW THAT
14 WE WERE ENTITLED TO PROCEED.

15 THE GOVERNMENT INDICATED AT THAT POINT THAT THEY WERE
16 GOING TO STILL PROCEED EITHER WITH A PROTECTIVE ORDER OR WITH A
17 MOTION FOR SUMMARY JUDGMENT, WHICH -- NEITHER OF WHICH
18 UNFOLDED.

19 AND IN THE MEANTIME WE HAD NOTICED UP THESE
20 DEPOSITIONS, MORE THAN, I THINK, APPROXIMATELY 55 DAYS AGO. WE
21 ASKED SPECIFICALLY IN EARLY JANUARY THAT THE GOVERNMENT
22 PRIORITIZE THE PRODUCTION OF RECORDS WITH RESPECT TO THESE
23 DEPONENTS.

24 AND REALLY WHAT WE DID MIRRORED EXACTLY WHAT THE
25 GOVERNMENT HAS DONE WITH US FOR NOW MORE THAN FIVE YEARS WHEN

1 THEY'VE ASKED US ON MULTIPLE OCCASIONS TO PRODUCE DOCUMENTS
2 RESPONSIVE OR RELATED TO A PARTICULAR WITNESS THAT THEY SOUGHT
3 TO DEPOSE OR INTERVIEW. AND, OF COURSE, WE DID SO. AND IT WAS
4 KIND OF THE NORMAL PROCESS OF PROFESSIONAL COURTESY.

5 WHAT'S HAPPENED HERE IS THAT THE GOVERNMENT HAS SAID
6 TO US THAT THEY CANNOT PRODUCE A SINGLE PIECE OF PAPER AS A
7 RESULT OF THEIR TECHNOLOGY ASSISTED REVIEW PROCESS, THEIR TAR
8 PROCESS.

9 AND WE ARE CONCERNED ON TWO FRONTS.

10 ONE, THERE'S A UNIVERSE OF DOCUMENTS THAT THEY HAVE
11 COLLECTED THAT ARE NOT DEPENDENT UPON ANY KIND OF TECHNOLOGY
12 ASSISTED REVIEW. THEY'VE ACKNOWLEDGED AS MUCH TO US GOING BACK
13 A MONTH, AND WE STILL SEE NOT A SINGLE PIECE OF PAPER FROM THEM
14 THAT ARE THOSE DOCUMENTS THAT ARE NON- -- THAT ARE NOT RELATED
15 TO THE TAR.

16 THE BROADER PROBLEM WE'RE HAVING IS THAT IN ESSENCE
17 THE GOVERNMENT HAS ENGINEERED A STAGED PROCESS IN AND OF ITSELF
18 VIA EFFECTIVELY A POCKET VETO. BECAUSE THEY'VE SAID TO US THAT
19 THEY WILL NOT PRODUCE -- OR CANNOT PRODUCE I SHOULD SAY -- THE
20 DOCUMENTS ASSOCIATED WITH MS. TAVENNER OR MR. GRANT BECAUSE OF
21 THIS TECHNOLOGY ASSISTED REVIEW.

22 AND EVEN MORE TROUBLING IS THAT IN OUR MEET AND
23 CONFER THEY ACKNOWLEDGED TO US THAT DESPITE OUR REQUESTS TO
24 THEM GOING BACK MORE THAN A MONTH NOW, THAT THEY PRIORITIZE THE
25 PRODUCTION OF MATERIALS FOR THESE DEPOSITIONS, THAT THEY

1 HAVEN'T EVEN PUT THOSE DOCUMENTS IN THE FIRST TRANCHE OF
2 DOCUMENTS TO BE REVIEWED OR PROCESSED VIA THEIR TAR REVIEW.

3 AND, SO, ESSENTIALLY WHAT THEY HAVE DONE IS SAY TO
4 US, LOOK, IT'S TAKEN A LONG TIME. WE'RE SORRY IT'S TAKEN A
5 LONG TIME, BUT, YOU, UNITED, HAVE TO BEAR THE BURDEN OF THE
6 FACT THAT WE HAVE DECIDED NOT TO LOAD MS. -- THE DOCUMENTS THAT
7 WOULD OTHERWISE ALLOW US THE OPPORTUNITY TO PRIORITIZE MS.
8 TAVENNER'S OR MR. GRANT'S DOCUMENTS.

9 AND, IN FACT, WHEN WE ASKED IF THEY COULD PRODUCE
10 MORE QUICKLY, THE SOONEST THEY SAID THEY WOULD BE ABLE TO
11 PRODUCE RECORDS TO US PERTAINING TO THESE DEONENTS IS THE END
12 OF MARCH.

13 AND THE CONCERN WE HAVE HERE IS THIS IS NOW BECOMING
14 ENTIRELY A ONE-WAY PIECE OF LITIGATION. THEY CHOSE THE TIMING
15 ON WHEN TO PROCEED. WE HAVE -- AS NOTED AT THE OUTSET PRODUCED
16 HUNDREDS OF THOUSANDS OF DOCUMENTS. AND WE'VE RECEIVED NOTHING
17 FROM THE GOVERNMENT.

18 AND, INSTEAD, WHAT WE'VE RECEIVED IS A PROMISE TO
19 PRODUCE SOME DOCUMENTS IN TWO WEEKS WITH AN EXPLICIT INDICATION
20 THAT THEY WOULD NOT AND COULD NOT PRODUCE THE TAVENNER AND
21 GRANT DOCUMENTS. JUST LIKE THE FACT THAT WE'VE TOLD THEM ABOUT
22 THESE DEPOSITIONS GOING BACK MORE THAN A MONTH, ALMOST TWO
23 MONTHS AT THIS POINT.

24 AND THAT'S NOT CONSISTENT WITH THE RULES IN THIS
25 DISTRICT. IT'S NOT CONSISTENT WITH CASE LAW HERE IN THE

1 DISTRICT.

2 AND WHAT WE'RE ASKING ULTIMATELY, YOUR HONOR, IS
3 PRETTY STRAIGHTFORWARD. WE WANT -- WE'RE ASKING YOUR HONOR TO
4 DIRECT THE GOVERNMENT TO PRIORITIZE AND PRODUCE WITH RESPECT TO
5 THESE WITNESSES IMMEDIATELY. I RECOGNIZE THAT IMMEDIATELY IS A
6 -- IT'S GOING TO TAKE A LITTLE BIT OF TIME. BUT THE FACT THAT
7 THEY HAVEN'T LOADED THESE DOCUMENTS AND DELIBERATELY PUT THEM
8 IN THE SECOND STAGE OF THEIR PROCESS IS TROUBLING TO US.

9 AND ONE OF THE THINGS THAT THEY'VE SAID TO US IS THAT
10 IF THEY WERE TO TRY AND PRIORITIZE RECORDS FOR THESE DEPONENTS,
11 IT WOULD SOMEHOW DIVERT RESOURCES FROM THEIR ONGOING TAR
12 PROCESS. AND, YET, BY TELLING US THAT THEY HAVEN'T EVEN LOADED
13 THOSE DOCUMENTS OR STARTED THE PROCESS WITH RESPECT TO MS.
14 TAVENNER OR MR. GRANT, IT DOESN'T MAKE ANY SENSE TO US.

15 AND CANDIDLY AS WE'VE DISCUSSED WITH THE GOVERNMENT,
16 WE CAN'T UNDERSTAND FOR THE LIFE OF US WHY THIS EXERCISE HAS
17 TAKEN PUSHING NINE MONTHS NOW, THAT THERE IS NO CONCEIVABLE
18 EXPLANATION FOR WHY THEY'VE NOT BEEN ABLE TO GENERATE ANYTHING
19 THROUGH THEIR TAR PROCESS IN ALMOST NINE MONTHS, ESPECIALLY
20 WHEN YOU CONSIDER THAT THERE WERE SUPPOSED TO BE DOCUMENTS
21 READY TO BE PRODUCED IN CONJUNCTION WITH THE SWOBEN CASE.

22 AND, MORE IMPORTANTLY, THAT THERE ARE DOCUMENTS THAT
23 THEY'VE COLLECTED OUTSIDE OF THE TECHNOLOGY ASSISTED REVIEW
24 THAT THEY SAY THEY HAVE, AND YET WE HAVEN'T SEEN A SINGLE PAGE.

25 SO, ESSENTIALLY WHAT WE'RE ASKING HERE IS TWOFOLD.

1 WE'RE ASKING FOR AN ORDER FROM THE COURT THAT THE
2 GOVERNMENT WOULD BE ORDERED TO PRIORITIZE AND PRODUCE ASAP THE
3 RECORDS PERTAINING TO MS. TAVENNER AND MR. GRANT.

4 WE'RE ASKING THAT THE GOVERNMENT PRODUCE IMMEDIATELY
5 THE RECORDS THAT THEY HAVE COLLECTED THAT DON'T REQUIRE
6 TECHNOLOGY ASSISTED REVIEW.

7 AND, ESSENTIALLY, WE'RE ASKING THAT -- AS ANOTHER
8 EXAMPLE, EVEN THINGS LIKE LITIGATION HOLDS AND DOCUMENT
9 RETENTION POLICIES, THEY'VE SAID TO US THEY CAN'T EVEN PRODUCE
10 THOSE THINGS.

11 AND, SO, HERE WE ARE, AS I SAID, NINE MONTHS INTO
12 THIS ONGOING COLLECTIVE LITIGATION, AND WE NEED SOME
13 INTERVENTION FROM THE COURT TO START BALANCING THE --

14 THE COURT: OKAY.

15 MR. SCHINDLER: -- HERE.

16 THE COURT: ALL RIGHT. SO, I WILL ASSURE YOU -- AND
17 I APPRECIATE VERY MUCH THAT COUNSEL FOR THE UNITED STATES AND
18 FOR THE RELATOR LET MR. SCHINDLER SPEAK. AND I KNOW SOMETIMES
19 IT CAN BE FRUSTRATING ON A TELEPHONE CALL YOU WANT TO JUMP
20 RIGHT IN. BUT I'LL GIVE YOU A FULL AND COMPLETE OPPORTUNITY TO
21 ADDRESS ALL THE POINTS THAT HE'S MADE. I PROMISE YOU THAT.

22 BUT I WANTED TO ASK MR. SCHINDLER JUST A QUICK
23 QUESTION.

24 COULD YOU TELL ME EXACTLY WHO THESE WITNESSES ARE,
25 WHAT IS THEIR ROLE IN THIS CASE, AND WHAT TYPE OF DOCUMENTS DO

1 YOU THINK WOULD BE THE KINDS OF DOCUMENTS YOU WOULD ANTICIPATE
2 SEEING BEFORE THEIR DEPOSITION. WHAT WOULD YOU -- WHAT WOULD
3 YOU -- WHAT WOULD YOU THINK THAT THE GOVERNMENT WOULD BE
4 PRODUCING?

5 MR. SCHINDLER: SURE.

6 I THINK IT'S PROBABLY EASIEST TO START WITH RESPECT
7 TO OUR UPCOMING WITNESS MS. TAVENNER. SO, MS. TAVENNER WAS THE
8 FORMER HEAD OF CMS DURING THE RELEVANT TIMEFRAME OR DURING MUCH
9 OF THE RELEVANT TIMEFRAME AT ISSUE HERE.

10 AND, MOST IMPORTANTLY, SHE WAS THE PERSON AT THE HELM
11 OF CMS DURING THE TIME IN WHICH THE ALLEGED FALSE CLAIMS WERE
12 BEING MADE. BUT, MOST IMPORTANTLY, THERE WERE MEETINGS WITH
13 MS. TAVENNER WITH REPRESENTATIVES OF UNITED IN WHICH THERE WERE
14 DISCUSSIONS AND, IN PARTICULAR, DISCUSSIONS WHERE UNITED
15 EXPLAINED TO MS. TAVENNER WHAT UNITED WAS DOING OR NOT DOING.

16 WE INDICATED TO THE GOVERNMENT THAT WE BELIEVE MS.
17 TAVENNER NOT ONLY KNEW WHAT UNITED WAS DOING, BUT TOLD UNITED
18 THAT IT NEED NOT DO WHAT THE GOVERNMENT WAS ALLEGING UNITED WAS
19 REQUIRED TO DO HERE. AND I'M SPEAKING COLLOQUIALLY HERE.

20 SO, SHE IS RIGHT SMACK IN THE MIDDLE OF THE HEART OF
21 THIS CASE IN SO MANY RESPECTS. AND WHAT SHE WILL BE TESTIFYING
22 TO IN MANY RESPECTS SPEAKS TO BOTH THE MATERIALITY ISSUE THAT
23 WE'VE TEED UP IN A MOTION TO DISMISS.

24 AND WE'D EXPECT THERE TO BE NUMEROUS DOCUMENTS TO AND
25 FROM MS. TAVENNER THAT SPEAK TO THE VERY HEART OF THIS CASE.

1 THE QUESTIONS ABOUT WHAT CMS REQUIRES OR DOESN'T REQUIRE, THE
2 REGULATIONS THAT ARE THERE THAT EXIST AND DON'T EXIST. WE
3 IMAGINE THERE ARE EMAIL COMMUNICATIONS THROUGHOUT CMS OF
4 SPEAKING TO MEETINGS THAT WE REFERENCED A MOMENT AGO. AND ALL
5 OF WHICH I SUSPECT AS WELL EMAILS WITHIN CMS OR OTHER DOCUMENTS
6 THAT DOCUMENT THE FACT THAT CMS KNOWING WHAT IT KNEW ABOUT ALL
7 THESE FACTS AND CIRCUMSTANCES, AFFIRMATIVELY CHOSE TO CONTINUE
8 MAKING PAYMENT TO ALL OF THE MEDICARE ADVANTAGE PLANS NOT JUST
9 UNITED -- ALL OF WHICH GOES DIRECTLY TO THE MATERIALITY ELEMENT
10 OF THE FALSE CLAIMS ACT IN -- IN THE -- OUR RULES.

11 SO, SHE IS PROBABLY THE MOST IMPORTANT WITNESS THAT
12 WE CAN IMAGINE. AND I HAVE TO BELIEVE THERE'S ANY NUMBER OF
13 DOCUMENTS WITHIN THE DEPARTMENT THAT IS KEY. AND AS THE AGENCY
14 HEAD, SHE WOULD HAVE HAD TO PERSONALLY APPROVE ANY OF THE
15 REGULATORY PROVISIONS THAT WE'RE DEBATING IN THIS CASE. AND
16 THERE SHOULD BE ANY NUMBER OF EMAILS BACK AND FORTH ABOUT THOSE
17 REGULATORY PROVISIONS. SHE REALLY SITS THERE AT THE HEART OF
18 WHAT WE BELIEVE IS THE GOVERNMENT'S CASE OR LACK THEREOF.

19 THE COURT: ALL RIGHT.

20 AND THE SECOND WITNESS?

21 MR. SCHINDLER: MR. GRANT. YOU KNOW, MR. GRANT WAS
22 -- OR HIS CURRENT POSITION --

23 AND KIRSTIN, CORRECT ME --

24 -- I THINK HE'S THE ACTING DEPUTY DIRECTOR FOR
25 OPERATIONS.

1 IS THAT HIS CURRENT TITLE?

2 MS. DO: RIGHT.

3 MR. SCHINDLER: AND, SO, HE WAS PREVIOUSLY THE
4 DIRECTOR OF PAYMENT POLICY AND FINANCIAL MANAGEMENT AT CMS FROM
5 DECEMBER 20-- DECEMBER 2015 TO THE PRESENT. AND BEFORE THAT
6 WAS THE DEPUTY IN 2015.

7 AND, AGAIN, HE WOULD HAVE BEEN RIGHT SMACK IN THE
8 MIDDLE OF MANY OF THE POLICIES AND REGULATIONS AT ISSUE HERE,
9 INCLUDING THOSE THAT ARE -- FORM THE HEARTLAND OF THE DEBATES
10 BETWEEN UNITED AND THE GOVERNMENT IN CONJUNCTION WITH THIS
11 CASE.

12 AND, IN PARTICULAR, HE CAN SPEAK TO HOW PAYMENTS ARE
13 CALCULATED AND REALLY HOW THE MODEL WORKS AND, FROM OUR
14 PERSPECTIVE, WHY UNITED WAS NOT OVERPAID.

15 SO, AGAIN, THESE ARE THE TWO WITNESSES OR TWO OF
16 SEVERAL WITNESSES AT CMS THAT GO RIGHT TO THE HEART OF THE
17 GOVERNMENT'S CASE FROM OUR PERSPECTIVE AND WE BELIEVE HAVE
18 EXTREMELY EXCULPATORY EVIDENCE WHICH IS KEY AND VITAL TO
19 UNITED'S DEFENSE.

20 THE COURT: AND THE SAME TYPES OF DOCUMENTS THAT YOU
21 WOULD EXPECT TO SEE EMAILS BACK AND FORTH FROM THIS WITNESS TO
22 OTHERS DESCRIBING THE PROGRAM AND THE PAYMENTS.

23 AND WAS HE -- WAS HE AT THE MEETINGS WITH UNITED?

24 MR. SCHINDLER: I DON'T THINK MR. GRANT WAS AT THE
25 MEETINGS.

1 I'M GOING TO SEE IF MR. -- ANYBODY DISAGREES WITH ME,
2 BUT I DON'T BELIEVE HE WAS AT THE MEETINGS AT ISSUE HERE, THE
3 MEETINGS --

4 THE COURT: OKAY.

5 MR. SCHINDLER: -- THAT INVOLVE MS. TAVENNER
6 PRINCIPALLY.

7 THE COURT: BUT THE SAME TYPE OF DOCUMENTS?

8 MR. SCHINDLER: ABSOLUTELY.

9 THE COURT: ALL RIGHT.

10 MR. SCHINDLER: AND DOCUMENTS THAT GO RIGHT TO THE
11 POLICES, TO THE PAYMENT MODELS, TO LITERALLY THE HEART OF THIS
12 FALSE CLAIMS ACT CASE.

13 THE COURT: ALL RIGHT.

14 SO, WHO WOULD LIKE TO SPEAK ON BEHALF OF THE UNITED
15 STATES?

16 MR. PERKINS: HI, YOUR HONOR. THIS IS PAUL PERKINS.

17 THE COURT: OKAY. GREAT.

18 DO YOU WANT TO RESPOND TO MR. SCHINDLER'S COMMENTS?

19 MR. PERKINS: I DO. I APPRECIATE IT. THANK YOU,
20 YOUR HONOR.

21 SO -- SO, LESS THAN TWO MONTHS AGO DEFENDANTS NOTICED
22 DEPOSITIONS FOR THIS NEXT TUESDAY AND THE FOLLOWING WEEK AS MR.
23 SCHINDLER WAS JUST DESCRIBING. BUT THEY DID SO KNOWING FULL
24 WELL THAT THEY WOULD NOT HAVE DOCUMENTS FROM THE GOVERNMENT FOR
25 THOSE TWO WITNESSES. IN FACT, YOUR HONOR, THAT'S -- THAT'S ONE

1 OF THE REASONS WE INITIALLY OPPOSED THESE DEPOSITIONS. WE
2 DIDN'T WANT TO GET IN A SITUATION WHERE DEFENDANTS TRIED TO
3 REOPEN DEPOSITIONS AFTER RECEIVING OUR DOCUMENTS.

4 IN FACT, IN TWO OF THE EARLIER CONFERENCES THAT WE'VE
5 HAD, YOU MAY RECALL THAT THIS ISSUE WAS DISCUSSED. IT APPEARS
6 THAT DEFENDANTS WERE WILLING TO ACCEPT THE RISK, THAT BY
7 DEPOSING THESE WITNESSES SO EARLY IN THE LITIGATION THEIR ONLY
8 CHANCE TO DEPOSE THOSE WITNESSES MAY BE WITHOUT DOCUMENTS.

9 AND, SO, NOW WE ARE PREPARED TO GO FORWARD WITH THESE
10 TWO DEPOSITIONS. ONLY NOW, AS YOU KNOW, DEFENDANTS ARE NOW
11 TAKING A DIFFERENT POSITION, WHICH IS THAT THEY'RE INSISTING WE
12 PRODUCE DOCUMENTS FOR BOTH MS. TAVENNER AND MR. GRANT. AND IN
13 ADDITION TO THAT, THEY'RE NOW ASKING THAT WE PRIORITIZE THE
14 REVIEW AND PRODUCTION OF INDIVIDUAL CUSTODIANS.

15 BUT, YOUR HONOR, IT'S NOT A SURPRISE TO ANYBODY THAT
16 WE CAN'T PRODUCE THESE DOCUMENTS BY THESE DEPOSITION DAYS.
17 DEFENDANTS HAVE KNOWN FOR MONTHS NOW THAT WE WOULDN'T BE ABLE
18 TO DO THAT.

19 AND LET ME EXPLAIN A LITTLE BIT ABOUT WHY WE CAN'T DO
20 THAT. AND THE REASON, YOUR HONOR, IS BECAUSE WE'RE NOT
21 PERFORMING AN EYES-ON, MANUAL REVIEW OF EVERY DOCUMENT THAT
22 WE'VE COLLECTED. I KNOW IN SOME CASES THAT MAKES SENSE. BUT
23 IN OTHER CASES, AS I'M SURE YOU KNOW, WHERE YOU'RE COLLECTING
24 MILLIONS OF POTENTIALLY RESPONSIVE DOCUMENTS, YOU JUST CAN'T DO
25 THAT. SO, WE'RE USING WHAT'S CALLED "TECHNOLOGY ASSISTED

1 REVIEW." DEFENDANTS KNOW THIS. WE HAVE SENT THEM THE
2 PROTOCOL. WE'VE ACTUALLY WORKED COLLABORATIVELY WITH
3 DEFENDANTS TO ARRIVE AT THE PROTOCOL. AND WE'RE HAPPY TO TALK
4 MORE ABOUT WHAT'S ENTAILED IN TECHNOLOGY ASSISTED REVIEW AND
5 WHAT OUR PROTOCOL LOOKS LIKE.

6 BUT THE PRIMARY POINT WE WANT TO MAKE HERE IS THAT
7 DUE TO EFFICIENCY AND WORK SLOW CONCERNS WE'RE REALLY
8 EFFECTIVELY FORECLOSED FROM DOING AN EYES-ON, MANUAL REVIEW OF
9 ALL OF THESE DOCUMENTS AND, AT THE SAME TIME, PERFORMING TAR.
10 IT'S ESSENTIALLY LIKE ASKING US TO DO -- REVIEW EACH OF THESE
11 DOCUMENTS TWICE.

12 AND, SO, YOU KNOW, DEFENDANTS KNOW THIS. BUT
13 DEFENDANTS ALSO KNOW THAT WE WOULDN'T BE IN A POSITION TO
14 PRODUCE DOCUMENTS UNTIL THE FIRST QUARTER OF 2018. WE TOLD
15 THEM THIS BACK IN NOVEMBER. IT'S IN OUR RULE 26 APP -- JOINT
16 REPORT. WE TOLD THEM THIS AGAIN IN JANUARY.

17 AND JUST TO PUT THAT IN A LITTLE BIT OF PERSPECTIVE.
18 YOU KNOW, MR. SCHINDLER MENTIONED SEVERAL TIMES THAT THEY HAD
19 BEEN WAITING NINE MONTHS FOR DOCUMENTS. YOU KNOW, I THINK
20 THAT'S NOT QUITE RIGHT. I MEAN, OBVIOUSLY, YOU KNOW, WE
21 RECEIVED RFPS IN THE SWOBEN CASE EIGHT MONTHS AGO. AND, IN
22 FACT, WE IN THE SWOBEN CASE PRODUCED ALMOST 20,000 PAGES OF
23 DOCUMENTS. BUT IN THIS CASE WE RECEIVED THE RFPS JUST OVER
24 FIVE MONTHS AGO.

25 AND ANOTHER BIT OF PERSPECTIVE THAT'S KIND OF HELPFUL

1 HERE IS DEFENDANTS' FIRST PRODUCTION IN THIS CASE WE DIDN'T
2 RECEIVE THAT UNTIL TWO MONTHS AGO TO THE DAY. THEIR SECOND
3 PRODUCTION, LAST WEEK.

4 AND, SO, THIS ISN'T A SITUATION WHERE WE'RE EVEN THAT
5 FAR BEHIND DEFENDANTS' OWN PRODUCTION TIMELINE HERE. IT'S NOT
6 -- IT'S ALSO NOT A SITUATION WHERE WE'RE HOLDING BACK
7 DOCUMENTS OR SITTING ON OUR HANDS OR SLOW WALKING THINGS. THE
8 REALITY IS WE REALLY ARE WORKING HARD TO TRY TO MOVE THIS CASE
9 FORWARD AND TO TRY TO PRODUCE DOCUMENTS.

10 BUT AS I'M SURE YOU CAN RECOGNIZE WE'RE HAVING TO
11 COLLECT DOCUMENTS FROM OVER A HUNDRED CUSTODIANS AT BOTH CMS
12 AND WITHIN DIFFERENT COMPONENTS OF THE DEPARTMENT OF HEALTH AND
13 HUMAN SERVICES. WE'VE ALREADY COLLECTED ALMOST 4 TERABYTES OF
14 DATA. WE HAVE MILLIONS OF DOCUMENTS.

15 AND, SO, WE ARE -- WE ARE MOVING FORWARD AS QUICKLY
16 AS WE CAN. AND TO THAT END -- AND DEFENDANTS KNOW THIS -- WE
17 -- WE ARE CLAIMING TO MAKE OUR FIRST PRODUCTION OF DOCUMENTS,
18 WHICH IS GOING TO INCLUDE TENS OF THOUSANDS OF DOCUMENTS,
19 WITHIN THE NEXT COUPLE OF WEEKS. AND WE HAVE TOLD DEFENDANTS
20 THAT WE'LL BE IN A POSITION TO PRODUCE MANY OF MS. TAVENNER'S
21 DOCUMENTS IN MARCH.

22 SO, YOU KNOW, ALL THESE THINGS DEFENDANTS KNOW. YOU
23 KNOW, WE ARE A BIT SURPRISED THAT THEY'RE NOW CONTEMPLATING A
24 MOTION TO COMPEL, PARTICULARLY BECAUSE DEFENDANTS, THEY REALLY
25 HAVEN'T EXPLAINED WHY THESE DEPOSITIONS NEED TO GO FORWARD NEXT

1 WEEK AND THE WEEK AFTER AND WHY THEY CAN'T JUST PUT OFF THOSE
2 DEPOSITIONS FOR A COUPLE MORE MONTHS.

3 THE COURT: ALL RIGHT.

4 SO, LET ME ASK YOU THIS -- AND MAYBE, MR. SCHINDLER,
5 YOU CAN TELL ME MORE ABOUT THIS.

6 WHAT ARE THE DATES -- HAS THE COURT SET ANY DATES FOR
7 THE PARTIES AT THIS TIME -- CUT-OFF DATES?

8 MR. PERKINS: YOUR HONOR, NO. WE HAVEN'T EVEN HAD
9 THE SCHEDULING CONFERENCE.

10 I'M SORRY. THAT QUESTION WAS DIRECTED TO MS.
11 SCHINDLER -- MR. SCHINDLER.

12 THE COURT: IT DOESN'T MATTER. EITHER SIDE CAN TELL
13 ME THAT.

14 MR. PERKINS: OKAY. SO --

15 THE COURT: SO, THERE'S BEEN -- IS THERE A SCHEDULING
16 CONFERENCE SET?

17 MR. PERKINS: NO, THERE'S NOT.

18 YOUR HONOR, WE DO HAVE A 26(F) JOINT REPORT THAT'S
19 BEEN FILED. JUDGE FITZGERALD HAS NOT SET A SCHEDULING
20 CONFERENCE YET.

21 BUT IN AN EFFORT TO TRY TO MOVE THE CASE FORWARD, WE
22 ACTUALLY -- AND WE DISCUSSED THIS AT THE -- I BELIEVE AT ONE OF
23 THE INFORMAL CONFERENCES. WE'VE ACTUALLY TRIED TO, YOU KNOW,
24 WORK WITH DEFENDANTS TO SCHEDULE THE SCHEDULING CONFERENCE.
25 AND THEY'VE ACTUALLY BEEN OPPOSED TO DOING THAT.

1 THE COURT: ALL RIGHT.

2 SO, MAYBE, MR. SCHINDLER, YOU CAN EXPLAIN THAT TO ME.

3 AND, ALSO, WHAT IS THE URGENCY OF TAKING THE DEPOS?

4 MR. SCHINDLER: SURE.

5 SO, WITH RESPECT TO THE SCHEDULING CONFERENCE, THE
6 OTHER DATA POINT IS -- AND IT'S IMPORTANT FOR THE COURT TO KNOW
7 IS THAT WE FILED A MOTION TO DISMISS. WE HAD THE HEARING. WE
8 FILED THE MOTION TO DISMISS ABOUT A WEEK AND A HALF AGO.

9 AND OUR POINT ABOUT THE 26(F) CONFERENCE WAS IT
10 DIDN'T MAKE ANY SENSE TO SCHEDULE IT UNTIL WE KNEW WHAT THE
11 COURT WAS GOING TO DO IN CONJUNCTION WITH THE MOTION TO
12 DISMISS. AND, INDEED, AT LEAST AT THIS POINT THE TENTATIVE --
13 THE TENTATIVE ON THAT MOTION WAS TO GRANT IT, AT LEAST IN PART.

14 SO, WE'RE ALL WAITING -- ALL OF US ON THIS CALL ARE
15 WAITING FOR A FINAL ORDER OUT OF JUDGE FITZGERALD. BUT OUR
16 POINT WAS SIMPLY WE NEEDED TO FIGURE OUT IF THE CASE WAS EVEN
17 GOING TO BE HERE AT THAT POINT IN ORDER TO SCHEDULE THE RULE
18 26(F) CONFERENCE.

19 AND, SO, WE'RE NOT OPPOSED TO DOING IT. WE SIMPLY
20 SAID LET'S LET THE COURT DO IT IN DUE COURSE IN THE PROPER
21 SEQUENCE. AND THAT'S SORT OF WHERE WE ARE.

22 WITH RESPECT TO THE QUESTION OF, YOU KNOW, WHAT IS
23 THE URGENCY, RIGHT. THAT'S A POINT THAT THE GOVERNMENT HAS
24 MADE DURING OUR LAST INFORMAL CONFERENCE WITH YOU BACK IN
25 DECEMBER.

1 AND WITH ALL DUE RESPECT, I THINK YOU NOTED IN OUR
2 LAST CONFERENCE WE HAVE A CLIENT THAT HAS BEEN UNDER SIEGE --
3 THE GOVERNMENT HAS BEEN WAGING WAR FOR FIVE YEARS ON THE
4 CLIENT. AND THEY ARE UNDERSTANDABLY EAGER TO GET MOVING. AND
5 THEY'RE UNDERSTANDABLY EAGER TO HAVE THE TESTIMONY THAT THEY
6 BELIEVE WILL EXONERATE THEM BE PUT ON THE RECORD SOONER RATHER
7 THAN LATER.

8 AND I DO WANT TO RESPOND TO ONE OF THE THINGS THAT
9 MR. PERKINS JUST SAID TO YOU WITH RESPECT TO THE GOVERNMENT NOT
10 SLOW WALKING.

11 I RESPECTFULLY SUBMIT THAT THAT'S NOT AN ENTIRELY
12 ACCURATE STATEMENT BECAUSE WHAT MR. PERKINS DID NOT TELL YOU IS
13 THAT THEY HAVE MADE A DECISION NOT TO PRIORITIZE EITHER
14 MS. TAVENNER OR MR. GRANT, THE EXERCISE OF LOADING THE RECORDS
15 INTO THE DATABASE. PUT ASIDE THE FACT THAT THERE REALLY IS NO
16 EXPLANATION FOR THE FIVE-MONTH DELAY, BUT HE GLOSSED OVER --
17 THE REALITY IS THEY'VE MADE AN AFFIRMATIVE DECISION NOT TO
18 PRIORITIZE MS. TAVENNER'S AND MR. GRANT IN THE FACE OF THE
19 EXPLICIT REQUEST THAT THEY RECEIVED FROM US.

20 AND THAT'S WHY WHAT YOU HEARD FROM HIM WAS, WELL,
21 THEY'RE MAKING AN INITIAL PRODUCTION -- OR THEY TOLD US THEY'RE
22 MAKING AN INITIAL PRODUCTION IN THE NEXT WEEKS. BUT WE'RE NOT
23 GOING TO SEE ANYTHING PERTAINING TO MS. TAVENNER OR MR. GRANT
24 APPARENTLY UNTIL THE END OF MARCH. THAT WAS THE -- WHAT WE
25 WERE TOLD IN OUR MEET AND CONFER.

1 AND RESPECTFULLY IT SHOULD NOT BE THE CASE THAT THEY
2 GET TO CHOOSE THE SEQUENCE HERE, WHERE -- WHERE AND WHEN WE
3 DISCOVER INFORMATION THAT WE BELIEVE IS MATERIAL TO OUR
4 DEFENSE.

5 AND THAT'S ULTIMATELY WHAT THIS COMES DOWN TO. IT'S
6 -- AS MR. PERKINS SAYS, YOU KNOW, THEY'VE TOLD US THAT THEY
7 INTEND TO DO THIS. AND, OF COURSE, WE PUSHED BACK FROM DAY ONE
8 ON THIS NOTION THAT -- WHERE THEY TELL US, LOOK, THEY'RE NOT
9 GOING TO MAKE THEIR PRODUCTIONS TILL THE FIRST QUARTER OF 2018.
10 AND WE'VE SAID ALL ALONG THAT'S UNACCEPTABLE, ESPECIALLY IN THE
11 CASE THAT YOU BROUGHT -- THAT THE GOVERNMENT BROUGHT ON THE
12 TIMELINE THAT THEY CHOSE.

13 SO, IN SOME SENSE WHAT WE'RE DEALING WITH HERE IS
14 THEIR EFFORT TO CONTROL THE TIMING BY SIMPLY SAYING, LOOK, WE
15 CAN'T DO IT.

16 WELL, WE HAVEN'T HEARD FROM THEIR CONSULTANTS ON THE
17 TECHNOLOGY SIDE TO EXPLAIN THIS DELAY. I WILL TELL YOU WE'VE
18 ALL DONE THIS NOW FOR 30 YEARS. WE'VE DEALT WITH TAR. NONE OF
19 US UNDERSTAND THE GOVERNMENT'S DELAY. AND WE ALSO DON'T
20 UNDERSTAND IT ESPECIALLY IN LIGHT OF THE FACT THAT THEY
21 APPARENTLY HAVE NOT LOADED ALL OF THE DATA THAT PERTAINS TO MS.
22 TAVENNER AND MR. GRANT. AND I SHOULD BE CAREFUL IN MY
23 NOMENCLATURE BECAUSE I DON'T REALLY KNOW WHAT THEY'VE DONE OR
24 HAVEN'T DONE. ALL I KNOW IS WHAT MR. PERKINS TOLD US IN OUR
25 MEET AND CONFER WHEN WE SAID THEY AFFIRMATIVELY CHOSE NOT TO

1 PRIORITIZE THEM WHICH IS WHY WE'RE NOT GOING TO SEE DATA OR
2 DOCUMENTS PERTAINING TO THOSE WITNESSES UNTIL THE END OF MARCH.
3 AND THAT'S WHAT'S CAUSED THE CONSTERNATION YOU'RE HEARING FROM
4 US.

5 THE COURT: ALL RIGHT.

6 SO, YOU KNOW, AS I THINK I'VE SHARED WITH THE PARTIES
7 WHEN WE HAD ONE OF THESE CONFERENCES PREVIOUSLY, I GENERALLY --
8 YOU KNOW, WITH SOME EXCEPTIONS, BUT I GENERALLY DON'T ISSUE
9 ORDERS FROM THESE INFORMAL CONFERENCES BECAUSE IT HASN'T BEEN
10 FULLY BRIEFED. AND OFTENTIMES PARTIES FEEL THAT IT'S UNFAIR
11 FOR THE COURT TO ISSUE AN ORDER WITHOUT BRIEFING.

12 BUT I TRY TO GIVE YOU AN UNDERSTANDING OF HOW I WOULD
13 APPROACH THIS PROBLEM IF IT CAME TO ME ON A MOTION. AND I DO
14 THINK THAT THE DEFENDANT HAS A RIGHT TO, YOU KNOW, VIGOROUSLY
15 AND QUICKLY DEFEND ITSELF.

16 AND SO -- AND WE DON'T-- YOU KNOW, WE DON'T HAVE
17 BUILT-IN DELAYS OR BUILT-IN PHASING NECESSARILY IN FEDERAL
18 COURT. WE SOMETIMES PHASE DISCOVERY, BUT USUALLY WHEN WE DO
19 THAT IT'S WITH BOTH PARTIES' AGREEMENT ABOUT THE USEFULNESS OF
20 PHASING.

21 IF ONE SIDE GETS TO DICTATE SORT OF THE PHASING OF
22 DISCOVERY, SOMETIMES THAT CAN BE USED AS A STRATEGY POINT IN A
23 CASE. AND THAT'S WHAT WE TRY TO AVOID.

24 SO, I WOULD -- I WOULD LOOK TO SEE IN THE
25 DECLARATIONS THAT I WOULD ANTICIPATE BEING FILED BY THE UNITED

1 STATES THE INDIVIDUALS WHO ARE INVOLVED IN THE DISCOVERY
2 PROCESS AND FOR A MORE DETAILED EXPLANATION AS TO WHY THE
3 DELAY.

4 AND I AM TROUBLED THAT THEY'RE NOT WILLING TO
5 PRIORITIZE. IF A NOTICE OF DEPOSITION WAS TIMELY SERVED, AND
6 THERE WAS A REQUEST FOR PRODUCTION OF DOCUMENTS WITH THAT
7 NOTICE OF DEPOSITION, I WOULD EXPECT THE GOVERNMENT TO
8 PRIORITIZE THEIR REVIEW OF THOSE DOCUMENTS AND PRODUCE THEM IN
9 A TIMELY WAY.

10 AND IF MR. SCHINDLER NOTICED THESE DEPOSITIONS AND,
11 YOU KNOW, REALLY THE RULE IS REASONABLE NOTICE. TWO MONTHS IS
12 -- YOU KNOW, THAT'S OFTEN INTERPRETED AS 10 DAYS.

13 SO -- AND I UNDERSTAND THIS IS A MUCH BIGGER CASE
14 THAN MAYBE THE AVERAGE CASE. BUT STILL 60 DAYS WOULD COMMONLY
15 BE SEEN AS QUITE REASONABLE NOTICE.

16 AND, SO, I WOULD EXPECT THE UNITED STATES TO PRODUCE
17 DOCUMENTS UNLESS THEY COULD SHOW GOOD CAUSE WHY THEY COULD NOT.
18 AND THE MERE FACT THAT A CASE HAS VOLUMINOUS RECORDS IS NOT
19 GOOD CAUSE.

20 AND, SO, YOU KNOW, I WOULD PROBABLY, AGAIN, IF THIS
21 CAME TO ME ON A MOTION, I WOULD HAVE TO SEE, YOU KNOW, WHAT
22 EFFORTS HAD BEEN MADE TO PRODUCE DOCUMENTS FOR THOSE PARTICULAR
23 WITNESSES. THEY HAVE A RIGHT TO NOTICE DEPOSITIONS. WE
24 HAVEN'T ENTERED A PROTECTIVE ORDER. AND I TOLD YOU THAT I
25 WOULDN'T LIKELY ENTER A PROTECTIVE ORDER BECAUSE THERE'S

1 NOTHING IN THE RULES THAT WOULD JUSTIFY IT HERE.

2 SO, YOU KNOW, I THINK WHAT WILL BE THE BETTER
3 APPROACH HERE -- AND IT'S GOOD FOR THE PARTIES IN A SENSE THAT
4 THERE'S NO CUT-OFF DATES YET SET, BUT I'M SURE ONCE YOU HAVE
5 YOUR SCHEDULING CONFERENCE, THEY WILL BE SET. AND I'M SURE
6 JUDGE -- JUDGE FITZGERALD WILL SET THAT SHORTLY AFTER HE ISSUES
7 A FINAL ORDER ON THE MOTION TO DISMISS.

8 AND GIVEN THE COMPLEXITY OF THIS CASE, AGAIN, I DON'T
9 THINK IT'S INAPPROPRIATE FOR A DEFENDANT TO BE MOVING QUICKLY
10 TO TRY AND GATHER INFORMATION AND PREPARE ITS DEFENSES.

11 SO, YOU KNOW, I WOULD -- I WOULD PROBABLY SET A FIRM
12 DEADLINE FOR THE PRODUCTION AS TO THESE TWO WITNESSES AND A
13 FIRM DATE FOR THEIR DEPOSITIONS TO BE TAKEN. AND, THEN, IF
14 THEY -- IF THOSE DEADLINES WERE MISSED, THERE WOULD HAVE TO BE,
15 YOU KNOW, SOME KIND OF CONSEQUENCE AS A RESULT OF MISSING IT
16 UNLESS THERE WAS GOOD CAUSE.

17 SO, I GUESS WHAT I'D LIKE TO KNOW FROM THE UNITED
18 STATES YOU KEEP SAYING THE END OF MARCH. AND I'M JUST TRYING
19 TO UNDERSTAND WHY IT IS YOU NEED ANOTHER ESSENTIALLY 45 DAYS
20 FOR TWO WITNESSES TO -- TO CULL OUT RECORDS AS TO TWO
21 WITNESSES.

22 MR. PERKINS: SURE, YOUR HONOR. I APPRECIATE THE
23 OPPORTUNITY TO RESPOND TO THAT QUESTION.

24 SO -- AND EXCUSE ME IF THIS BECOMES A LITTLE TOO
25 TECHNICAL, BUT -- SO, WITH THE TECHNOLOGY SYSTEM REVIEW

1 PROCESS, BEFORE YOU CAN BEGIN, YOU HAVE TO HAVE A CRITICAL MASS
2 OF DOCUMENTS.

3 AND, SO, WE BEGAN OUR FIRST TAR PROJECT WHEN WE HAD
4 COLLECTED THAT CRITICAL MASS. THAT CRITICAL MASS DID NOT
5 INCLUDE -- AND BY THE WAY, THIS WASN'T INTENTIONAL ON OUR PART
6 IN ANY WAY. BUT OUR CRITICAL MASS DID NOT INCLUDE THE MAJORITY
7 OF MS. TAVENNER'S DOCUMENTS. SO, WE BEGAN OUR FIRST TAR
8 PROJECT BEFORE THE END OF THE YEAR, AND THOSE ARE THE DOCUMENTS
9 THAT WE'RE PLANNING TO PRODUCE IN A COUPLE OF WEEKS.

10 OUR SECOND TAR PROJECT WILL INCLUDE ALMOST 55,000 OF
11 MS. TAVENNER'S CUSTODIAL DOCUMENTS. AND SO -- SO THE QUESTION,
12 WHY IS IT GOING TO TAKE UNTIL THE END OF MARCH. THE TAR
13 PROCESS ITSELF, IT TAKES QUITE A BIT OF TIME TO ACTUALLY TRAIN
14 THE SYSTEM IN DETERMINING WHICH DOCUMENTS ARE RESPONSIVE.

15 AND, SO, JUST SO YOU KNOW, THAT SECOND TAR PROJECT IS
16 GOING TO INCLUDE OVER 2 MILLION DOCUMENTS, 2 MILLION
17 POTENTIALLY RESPONSIVE DOCUMENTS, NOT JUST THE 55,000 DOCUMENTS
18 FROM MS. TAVENNER.

19 AND, SO, I THINK IN THAT CONTEXT MAYBE IT'S HELPFUL
20 FOR YOU IN MAYBE UNDERSTANDING WHY THERE IS A BIT OF TIME, YOU
21 KNOW, BETWEEN NOW AND WHEN WE COULD PRODUCE THOSE DOCUMENTS.

22 THE COURT: SURE.

23 NO, I UNDERSTAND THAT. AND I APPRECIATE YOUR
24 EXPLAINING TO ME. I AM FAMILIAR WITH TECHNOLOGY ASSISTED
25 REVIEW AND THE PROTOCOL AND HOW IT'S OPERATED AND THAT IT CAN

1 BE TIME-CONSUMING.

2 I ALSO HAVE SEEN SITUATIONS, THOUGH, WHERE PARTIES
3 HAVE SEGREGATED OUT DOCUMENTS THAT ARE MANUALLY ACCEPTABLE TO
4 THEM, THAT ARE RESPONSIVE TO THE DOCUMENT REQUEST, AND
5 SUBJECTED OTHER CATEGORIES OF DOCUMENTS TO TECHNOLOGY ASSISTED
6 REVIEW.

7 SO, YOU KNOW, IT WOULD SEEM TO ME -- AND I'M NOT
8 SAYING I'M MAKING A RULING ON THIS. I'M NOT SAYING I'M MAKING
9 MY MIND UP ON IT, BUT GIVEN THE RESPONSES THAT YOU'VE PROVIDED
10 TO ME NOW BASED ON WHAT YOU'VE TOLD ME, I WOULD PROBABLY ORDER
11 THAT YOU SEGREGATE OUT. YOU SIT DOWN WITH YOUR WITNESS AND
12 SEGREGATE OUT CATEGORIES OF DOCUMENTS THAT CAN BE READILY
13 PRODUCED TO THE DEFENDANTS FOR PURPOSES OF HER DEPOSITION AND
14 THE ISSUES THAT THE DEFENDANT WISHES TO DEPOSE HER ON. AND I
15 WOULD PROBABLY ALLOW THEM A LIMITED SECOND DEPOSITION AFTER THE
16 TECHNOLOGY ASSISTED REVIEW DOCUMENTS WERE PRODUCED.

17 AND, YOU KNOW, I CAN -- I CAN -- I CAN ANTICIPATE
18 THAT YOU ARE TROUBLED BY THAT BECAUSE TYPICALLY WE SAY ONE
19 DEPOSITION PER WITNESS OF SEVEN HOURS. BUT GIVEN YOUR RESPONSE
20 TO THE DISCOVERY REQUEST AND YOUR APPROACH TO DISCOVERY, I
21 CAN'T PREJUDICE THE DEFENDANTS IN THEIR ABILITY TO DEFEND
22 THEMSELVES.

23 SO, YOU KNOW, THAT WOULD PROBABLY BE THE APPROACH
24 THAT I WOULD TAKE. IF YOU'RE RESPONSIBLE FOR, YOU KNOW,
25 CAUSING A DELAY IN THE PRODUCTION OF DOCUMENTS WHERE IT SEEMS

1 REASONABLE BASED ON THE TYPE OF ISSUES THEY'RE GOING TO BE
2 DEPOSING THIS WITNESS ABOUT, THAT YOU COULD CULL OUT A
3 SUBCATEGORY OF MANUALLY REVIEWABLE DOCUMENTS, PRODUCE THOSE AND
4 ENABLE THE DEFENDANTS TO UNDERSTAND THE BASIS FOR SOME OF YOUR
5 CONTENTIONS, THEN, IT SEEMS TO ME REASONABLE TO REQUIRE A PARTY
6 TO DO THAT EVEN IF IT MEANS AT A LATER DATE THE DEFENDANT MIGHT
7 HAVE AN OPPORTUNITY OR REASON TO HAVE A SECOND ALBEIT LIMITED
8 DEPOSITION OF THAT WITNESS.

9 AND, AGAIN, IT'S NOT TYPICAL THAT WE WOULD ALLOW
10 THAT, BUT IN A CASE OF THIS SIZE AND MAGNITUDE, IT MIGHT BE
11 JUSTIFIED.

12 (PAUSE IN PROCEEDINGS.)

13 THE COURT: SO, I GUESS MY QUESTION IS FOR THE
14 PLAINTIFFS.

15 HOW SOON DO YOU THINK YOU COULD CULL OUT MANUALLY A
16 RESPONSIVE SET OF DOCUMENTS THAT WOULD PERTAIN TO THE ISSUES
17 THE DEFENDANT SEEKS TO DEPOSE THESE WITNESSES ABOUT?

18 MR. PERKINS: BASED ON THE ISSUES THAT MR. SCHLINDLER
19 JUST IDENTIFIED?

20 THE COURT: YEAH.

21 MR. PERKINS: IF WE'RE JUST LOOKING AT THIS -- THE
22 MEETING THAT HE REFERENCED WITH -- WITH FOLKS FROM UNITED,
23 THAT'S OBVIOUSLY GOING TO BE QUITE A BIT EASIER THAN IF WE
24 BEGAN TO LOOK AT ANY POTENTIAL REGULATIONS OR OTHER ISSUES.
25 SO, I MEAN, HONESTLY IT MAY REQUIRE DISCUSSING WITH THE

1 DEFENDANTS ABOUT THE PARTICULAR -- MAYBE HAVE A MORE -- A
2 BETTER UNDERSTANDING OF THE ISSUES THAT THE DEFENDANTS ARE
3 GOING TO RAISE IN MS. TAVENNER'S DEPOSITION. AND THEN WE CAN
4 IDENTIFY THOSE PARTICULAR REQUESTS AND PULL OUT THOSE
5 DOCUMENTS.

6 THE COURT: SO, I DON'T THINK THIS DEPOSITION IS
7 GOING TO GO FORWARD ON THE 13TH GIVEN THE TIMEFRAME RIGHT NOW.
8 BUT I DO THINK IT COULD GO FORWARD, SAY, IN THE NEXT 15 TO 20
9 DAYS.

10 AND I THINK WHAT THE APPROACH THAT I'D LIKE TO SEE
11 THE PARTIES PURSUE IS FOR THE DEFENDANTS TO IDENTIFY A LIMITED
12 SET OF ISSUES THAT THEY WANT TO DEPOSE THESE TWO WITNESSES ON
13 FOR WHICH THEY WOULD, GIVEN THEIR UNDERSTANDING OF THE CASE,
14 REASONABLY BELIEVE THAT THERE COULD BE A SUBCATEGORY OR A
15 SUBSET OF DOCUMENTS THAT COULD BE MANUALLY REVIEWED BY
16 PLAINTIFF'S COUNSEL.

17 AND THAT THEY -- AND THAT THEY WOULD KNOW THAT IF A
18 MASS PRODUCTION HAPPENED IN TWO MONTHS FROM NOW, THAT -- AND
19 THERE WERE ISSUES THAT WERE RELEVANT TO THAT PARTICULAR
20 WITNESS, THAT I WOULD -- I WOULD PERMIT A LIMITED -- AND I
21 EMPHASIZE LIMITED -- SECOND DEPOSITION OF THAT WITNESS. AND
22 THAT WOULD BE FOR THE PURPOSE OF MOVING THE CASE FORWARD, TO
23 ALLOW THE DEFENDANT TO EXPLORE ITS DEFENSES NOW THAT IT WANTS
24 TO RAISE WITH THE COURT. IF THE MOTION TO DISMISS IS PARTIALLY
25 DENIED, I WOULD SUSPECT THERE WOULD BE A SECOND MOTION OF SOME

1 KIND BROUGHT BY THE DEFENDANTS, AND THAT THIS TESTIMONY MIGHT
2 BE IMPORTANT TO THAT MOTION.

3 SO, AGAIN, I WOULDN'T WANT TO DELAY THE CASE AND
4 DELAY THEIR ABILITY TO DEFEND THEMSELVES.

5 SO, I GUESS I'D LIKE THE PARTIES TO MEET AND CONFER
6 ABOUT THOSE TOPICS AS TO THESE TWO WITNESSES. AND FOR THE
7 GOVERNMENT TO EXPLORE WHAT THEY CAN SEGREGATE OUT THAT WOULD BE
8 RESPONSIVE TO THOSE TOPICS AND SET UP A PRODUCTION TIMETABLE
9 FOR THE DOCUMENTS AND ALSO FOR THE DEPOSITIONS.

10 SO, MR. SCHINDLER, WHAT DO YOU THINK OF THAT
11 APPROACH.

12 MR. SCHINDLER: WELL, I THINK THAT'S PERFECT, YOUR
13 HONOR. IN FACT, I APPRECIATE MR. PERKINS ACKNOWLEDGING OR
14 HELPING US HERE WITH THE 55,000 DOCUMENTS. I MEAN, I -- I
15 THINK THOSE 55,000 DOCUMENTS AS AN INITIAL SET OUGHT TO BE
16 EASIER TO REVIEW AND TO SEGREGATE OUT EXACTLY AS THE COURT HAS
17 INDICATED. SO, I APPRECIATE IT VERY MUCH.

18 WE'RE PREPARED TO MEET AND CONFER FURTHER WITH THE
19 GOVERNMENT TODAY TO TALK ABOUT THOSE 55,000 DOCUMENTS AND TO
20 PUT OURSELVES ON A SCHEDULE ALONG THE LINES THAT THE COURT HAS
21 INDICATED. SO, APPRECIATE VERY MUCH.

22 THE COURT: DO YOU HAVE ANY QUESTIONS ABOUT THAT, MR.
23 PERKINS?

24 MR. PERKINS: WELL, MAYBE JUST A CLARIFYING POINT
25 JUST BECAUSE OF SOMETHING MR. SCHINDLER SAID.

1 THE 55,000 DOCUMENTS, I HOPE THERE'S AN UNDERSTANDING
2 THAT THERE'S NOT GOING TO BE AN EXPECTATION THAT WE REVIEW ALL
3 OF THOSE 55,000 BUT CERTAIN PARTICULAR SUBSETS OF THOSE 55,000.

4 IS THAT CORRECT?

5 THE COURT: THAT'S MY UNDERSTANDING --

6 MR. SCHINDLER: YES --

7 THE COURT: YEAH.

8 MR. SCHINDLER: AND -- I'M SORRY, YOUR HONOR. GO
9 AHEAD.

10 THE COURT: I WAS JUST GOING TO SAY, MR. PERKINS, YOU
11 KNOW, GIVEN THE VOLUME OF INFORMATION IN THIS CASE, GIVEN WHAT
12 I'VE ASKED YOU TO DO, WHICH IS TO CULL OUT A SUBSET, YOU KNOW,
13 I WOULD EXPECT YOU TO CULL OUT, YOU KNOW, ALL THE DOCUMENTS
14 THAT COULD BE REASONABLY MANUALLY REVIEWED AND RESPONSIVE TO A
15 PRODUCTION REQUEST THAT WAS SERVED WITH A NOTICE OF DEPOSITIONS
16 THAT WOULD BE RELEVANT TO THE TOPICS THAT MR. SCHLINDLER WISHES
17 TO DEPOSE THESE TWO WITNESSES ON.

18 YOU KNOW, I OFTEN TELL PARTIES -- PARTIES ARE ALWAYS
19 NERVOUS IN DISCOVERY. AND THE ANXIETY GOES UP WITH THE VOLUME
20 OF INFORMATION. BUT DISCOVERY IS NOT A PERFECT PROCESS. IT IS
21 A REASONABLE PROCESS. SO, YOU KNOW, I CAN -- I CAN ANTICIPATE
22 THAT THE PLAINTIFFS WOULD BE CONCERNED THAT, YOU KNOW, LATER
23 THEY'D BE FACING ACCUSATIONS THAT THEY HAD PURPOSEFULLY, YOU
24 KNOW, WITHHELD CERTAIN DOCUMENTS SO THAT MR. SCHLINDLER
25 COULDN'T ASK HER ABOUT THAT, ET CETERA, ET CETERA.

1 AND, YOU KNOW, I DON'T ANTICIPATE THAT PROBLEM. I
2 ANTICIPATE THAT YOU WOULD IN GOOD FAITH PRODUCE WHAT YOU THINK
3 IS REASONABLY NECESSARY FOR HIM TO QUESTION THESE WITNESSES ON
4 THOSE TOPICS.

5 AND IF THAT ACCUSATION WAS LATER MADE, I'D LOOK AT IT
6 UNDER A REASONABLENESS STANDARD. PLUS, HE HAS THE INSURANCE OF
7 ME SAYING I WOULD PROBABLY GIVE A LIMITED SECOND DEPOSITION.
8 SO, YOU'RE PROTECTED BY THAT IN A SENSE.

9 MR. PERKINS: OKAY.

10 AND ONE LAST POINT THAT I JUST WANT TO MAKE. YOU
11 KNOW, GIVEN THAT IT LOOKS LIKE WE'LL BE DEDICATING IN THE NEXT
12 FEW WEEKS TO REVIEWING MS. TAVENNER'S DOCUMENTS AND PERHAPS
13 DOCUMENTS THAT RELATE TO MR. GRANT, I HOPE THERE CAN ALSO BE AN
14 UNDERSTANDING THAT OUR INITIAL HOPE TO PRODUCE THE TENS OF
15 THOUSANDS OF DOCUMENTS RELATED TO OUR FIRST TAR PROJECT AND OUR
16 HOPE TO PRODUCE THE RESULTS OF OUR SECOND TAR PROJECT AT THE
17 END OF MARCH, THAT THOSE DEADLINES ARE ALSO GOING TO HAVE TO BE
18 SHIFTED TO THE THREE WEEKS OR HOWEVER LONG IT WILL TAKE US TO
19 REVIEW THE MS. TAVENNER AND MR. GRANT DOCUMENTS. OBVIOUSLY,
20 WE'RE GOING TO HAVE TO SHIFT OUR RESOURCES.

21 SO, I HOPE THERE'S AN UNDERSTANDING FROM DEFENDANTS
22 ABOUT THAT.

23 THE COURT: MR. SCHINDLER.

24 MR. SCHINDLER: LOOK, YOUR HONOR, I AM -- WE
25 DEFINITELY WANT TO BE REASONABLE, AND WE'LL TRY TO WORK THIS

1 OUT IN A MEET AND CONFER. AND WE'LL CERTAINLY BE REASONABLE.

2 THE ONLY THING I WANT TO FLAG -- TWO THINGS, IS THAT
3 OBVIOUSLY THERE ARE ALMOST 35 TO 40 LAWYERS WORKING ON THIS
4 CASE ON BEHALF OF PLAINTIFFS BETWEEN THE RELATOR AND THE
5 GOVERNMENT. AND WE'RE CERTAINLY WILLING TO WORK WITH THE
6 GOVERNMENT. WE JUST WANT TO MAKE SURE, FOR EXAMPLE, THAT THESE
7 55,000 DOCUMENTS, WHETHER THAT'S 55,000 DOCUMENTS BEFORE SEARCH
8 TERMS OR AFTER SEARCH TERMS -- THESE ARE THINGS WE'RE HAPPY TO
9 MEET AND CONFER WITH THEM ON.

10 AND THE ONLY THING I'D ASK IS IF WE'RE UNABLE TO
11 AFTER WE MEET AND CONFER WITH THEM TODAY IF FOR SOME REASON
12 NEED TO COME BACK TO YOUR HONOR, AND MY HOPE IS WE DON'T --
13 THAT WE HAVE THE OPPORTUNITY AT LEAST TO DEAL WITH SOME FORM OF
14 EXPEDITED BRIEFING SCHEDULE JUST SO THAT WE CAN RESOLVE THIS
15 ONCE AND FOR ALL.

16 I'M HOPEFUL THAT WE'LL BE ABLE TO GET IT DONE. I
17 TRIED TO LAY OUT THE TOPICS. IT IS NOT JUST THE MEETING WITH
18 MS. TAVENNER OBVIOUSLY. BUT WE'LL WORK WITH THE GOVERNMENT.
19 AND HOPEFULLY WE CAN WORK IT OUT AMONGST THE PARTIES.

20 THE COURT: ALL RIGHT.

21 SO -- SO, YEAH, GO FORWARD WITH THAT MEET AND CONFER.
22 TRY AND COME UP WITH A STRUCTURED PLAN FOR GOING FORWARD WITH
23 THESE TWO WITNESSES, KNOWING WHAT I SAID WOULD BE MY TENTATIVE
24 DECISION TO DEAL WITH ALL OF THESE RELATED PROBLEMS.

25 AND IF YOU -- IF YOU CAN'T WORK IT OUT, YES, I WOULD

1 -- I WOULD PERMIT AN EXPEDITED BRIEFING SCHEDULE.

2 I WOULD ASK THAT YOU STILL PRESENT IT AS A JOINT
3 MOTION BUT THEN SUBMIT CONCURRENTLY AN EX PARTE APPLICATION TO
4 HAVE IT HEARD ON SHORTENED NOTICE. AND THAT WAY I WON'T BE,
5 YOU KNOW, WAITING BACK AND FORTH FOR AN OPPOSITION AND SO
6 FORTH.

7 SO, THAT WOULD BE MY PREFERENCE IF YOU WANT TO HAVE
8 IT HEARD ON SHORTENED NOTICE.

9 AND JUST IN FULL DISCLOSURE, I'M STARTING A JURY
10 TRIAL ON MONDAY THAT'S GOING TO GO FOR TWO WEEKS. SO, MY
11 AVAILABILITY IN THE NEXT TWO WEEKS IS A LITTLE BIT MORE
12 LIMITED. I CAN STILL HEAR MATTERS, BUT IT JUST IS MORE
13 DIFFICULT. SO, I'M JUST SHARING THAT WITH YOU IN THE INTEREST
14 OF MAYBE ENCOURAGING YOU TO WORK IT OUT.

15 MR. SCHINDLER: THANK YOU VERY MUCH, YOUR HONOR.

16 THE COURT: ALL RIGHT.

17 MR. SCHINDLER: I APPRECIATE YOUR TIME THIS MORNING.

18 THE COURT: THANK YOU VERY MUCH.

19 MR. PERKINS: THANK YOU, YOUR HONOR.

20 (PROCEEDINGS CONCLUDED.)
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C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.

/S/ DOROTHY BABYKIN

2/11/18

FEDERALLY CERTIFIED TRANSCRIBER

DATED

DOROTHY BABYKIN