UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE MICHAEL FITZGERALD U.S. DISTRICT JUDGE

UNITED STATES ex rel BENJAMIN POEHLING,	)	
Plaintiffs	)	CV-16-8697-MWF
VS	)	
UNITEDHEALTH GROUP, INC., et al,	)	
Defendants	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

Monday, April 9, 2018

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THE CLERK: The Court is in session on item seven, CV-16-8697-MWF, *United States of America vs. UnitedHealth, Group, et al.*

Counsel, state your appearances. The plaintiff please on the telephone state your appearances first.

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

MS. KRIEG: Jessica Krieg, Department of Justice.

MR. FREEBORNE: Paul Freeborne from the Department of Justice.

MR. DRAYCOTT: Justin Draycott, Department of Justice.

THE COURT: All right. And for the Relator?

MR. LITMAN: Harry Litman Constantine Cannon, Your Honor.

THE COURT: I'm sorry. I thought some of you were also -- are all of the four counsel here for the Relator, are all of you here or some of you on the phone, as well?

MR. LITMAN: No counsel for Relator on the phone.

THE COURT: Thank you.

MR. LITMAN: Nor are we all counsel for Relator.

THE COURT: Got it. So now -- Mr. Lee and Ms. Wallack then? Thank you. All right.

Then so Mr. Litman, if you could introduce counsel for the Relator, then.

MR. LITMAN: Sure. Harry Litman, Constantine Cannon, and Steve Hasegawa, Phillips and Cohen for the Relator.

THE COURT: All right. Anyone else representing the Government or the Relator who has not made an appearance?

MR. LAHAD: Your Honor, good afternoon. My name is John Lahad out of Houston. I'm also for the Relator.

THE COURT: All right.

MS. HARTMAN: And Ann Hartman, Constantine Cannon.

THE COURT: Thank you. Now I understand the chart that I have been given. All right. I was wondering. That is why I thought there was somebody on the phone.

Thank you. And then for the defense?

MR. SCHINDLER: Good morning, Your Honor, David Schindler and Dan Meron on behalf of Defendant UnitedHealth.

THE COURT: You know, Counsel, the scheduling conferences usually are pretty perfunctory. I assign a form of mediation as the Court's ADR program requires. In this case, obviously, it will be private mediation. I can't imagine it being anything else. And then I make sure the initial disclosures have been made, or are going to be made, discuss some specific issues that might have been raised in the report, which itself is often perfunctory, and that is not the case on this one, and then assign the dates, on which generally, about 90 percent of the time, the lawyers agree.

This obviously is not going to be that type of

scheduling conference, because first, I want to just have the chance to hear from you about why the parties are not agreeing on the same dates or why the six months matters. You know, of course I think in some ways some of the positions that you've set forth in your report, they don't necessarily translate to me as to why there is the difference of the requested trial dates, except to the extent that if discovery was phased, then maybe that would take longer and that is the reason for it. I wanted to just hear from you directly about why you are making these proposals.

The other thing, of course, is that while a lot of the discussion in your Scheduling Report is specific to certain issues which are not in front of me right now and you are just giving an overview, some of them are issues that will be handled by Judge Segal, you know, a couple of them are just things that are useful for us to talk about right now.

So in light of that, I'll get to a couple issues that I noted, but -- and then whichever ones you think you also could usefully discuss right now. Before that, I did note that the initial disclosures were made on December 22nd. I appreciate that. I would think that would have resolved some of the discovery issues, but apparently not.

I just want to remind you that the initial disclosures are important. You know, every couple of months

you should just take a breath in the midst of the litigation and ask yourselves, am I prepared to try this case on the evidence that I provided in my initial disclosures or that I have gotten from the other side thus far in discovery? And if the answer is no, then your initial disclosures are inadequate and you are going to have to very promptly bring them up to date, or maybe the two sides could agree, or the three sides, in a sense, could agree that every so often you will just formally update them to make sure that that is happening. But I just -- in the midst of all these discovery disputes, I just want to remind you that while it's great that the initial disclosures were made promptly, that you've got to make sure that they are kept up to date, because otherwise, somebody is going to have some witness or exhibit that is important for trial and is not going to be available.

You know, the first issue I wanted to discuss with you that comes from this is dealing with the counterclaims in the affirmative defenses. Of course the Government and the Relator can move to dismiss those claims. I'm somewhat less thrilled by the motion to strike the affirmative defenses. It seems the Government's thought through that. I very rarely have that happen; when I have, I've just thought it was a monumental waste of everybody's time.

You know, the fact is, whether it makes sense or not, whether it's appropriate under the Federal Rules of

Civil Procedure or not, every litigator always has a laundry list of very bare bones defenses that are put out, and just trying to strike them early on just doesn't make a lot of sense unless there is an argument that that would really streamline discovery. And at least to some of the defenses, that seems to be what the Government's contending.

So I'm not going to tell the Government or the Relator that that motion can't be made. All I'm asking is you think through why it's being made. And if it's because it's a two-sentence, you know, description of an affirmative defense, and that doesn't seem under *Twombly* and *Iqbal*, which arguably don't apply to the affirmative defenses, it's that you aren't happy with it, you know, there is so many other opportunities we are going to have in this case to decide what the affirmative defenses are, including settling jury instructions if it comes to that. So just keep that in mind when you are drafting this.

Now, has there been an agreement as to what the briefing schedule is going to be for the motion to dismiss and the motion potentially to strike affirmative defenses?

MS. WALLACK: Yes, Your Honor signed an order, I believe last Thursday or Friday. And so we are -- the United States and the Relators, filing our motions on, I believe May 22nd or 23rd, and then about a month later the defendants are filing their opposition. And we are filing a reply, I

believe it is on the 14th of July. Don't quote me exactly, it's around there. And then the hearing is scheduled, I believe for the end of July, the 30th.

THE COURT: All right. Then we'll proceed with that.

The other issue I wanted to raise with you, because this is something for me and not for Judge Segal, and that is the idea of phasing discovery. I'm generally not thrilled by that. I have to say this is one of the few times when I've seen that a plaintiff is suggesting it. It's almost always a defendant that is suggesting it. I -- there just -- it just seems to engender a lot of litigation about whether certain requested discovery then is in phase one or phase two, which is just gratuitous. And here both parties have gotten the disclosures. Both parties have a lot of documents. There is just a lot of history here. I don't really see the basis for phasing things.

And also, to the extent that this is part of that, or maybe it's just a different issue, there is this desire to get documents before there is a deposition, you know, I -- in a very high level of abstraction, I'm sympathetic to that. All white collar defense attorneys are -- he won't admit it here, but Mr. Schindler I'm sure has many times argued that he had a client that couldn't be interviewed or deposed because documents weren't available. Here, it's just not

some hard and fast rule. And moreover, both sides have a lot of documents. Certainly, the Government has a lot of documents.

So I just don't see here that it's really up -- if there is a specific case for a specific witness, then that is -- can be the subject of a protective order that can be raised with Judge Segal. But just as this ongoing issue or as a general principle, I just, if -- you know, it doesn't mean, of course, that United can take somebody's deposition a second time. They run the risk of doing it earlier than they might. But I just really just don't think that that is a basis for phasing. As for the other bases for phasing, or if there was phasing, what would be in phase one and phase two, let me hear now from the parties why that should be the case.

I'll hear from the Government, I'll hear from the Relator, and then I'll hear from the defense.

MS. WALLACK: Thank you, Your Honor. Carol Wallack for the United States.

The primary reason you hit on for wanting phase discovery is to make sure that deponents are not deposed twice. Not only do we not want government deponents deposed twice, but we don't want to be taking depositions twice. And if we have this compressed schedule to complete fact witness discovery that is being proposed by the defendants with a cutoff in January of 2019, and yet they are not producing the

documents we need for certain depositions until November or December of 2018, then we are going to be in a situation where we are waiting until the last minute to depose many people around Thanksgiving and Christmas, or the position ourselves we are going to have to take depositions and not have the documents we need to do them completely and adequately, which in my experience leads to more witnesses at trial when you can't do it in the discovery phase and understand what they are going to say and use it for summary judgment. Then you just end up with a much longer trial when you don't have the opportunity to do the discovery in an efficient way so that you have most of the documents, hopefully all of them before you depose somebody.

The other thing is that the having depositions of the Government witnesses at the same time that we are producing documents, and our collection of documents has just grown to over 11 million documents in the last week. It makes it so it's going to prolong our document production. So putting all of this together at the same time is very disruptive to document production and to getting it substantially completed in an orderly fashion.

We also believe very strongly that a lot of the issues that are going to arise with the document production on the assertion of privileges on both sides, there is privilege issues on both sides that can be appropriately

dealt with, and the parameters of the privileges set on the document production issues would go a long way to avoiding multiple depositions of the same person, because they are going to have to be started and stopped because there is going to be instructions that are going to be to not testify that is going to get before the magistrate and then the judge over and over again.

We don't only see it in the Government's best interests, we see it in the defendant's best interests, but we surely see it in the Court's best interests to do -- let's not use the word phase discovery because people don't like it, let's talk about an efficient discovery plan. And that would be one that is -- requires a focus on documents and certain other issues initially.

We also have a situation that sort of dictates this because we have an ongoing continuing violation situation that is happening now as we speak. And we are trying to have a trial where we address as much of the damages as possible. And so we have a proposal, and want to bring to the Court and to trial nine years of damages, but because we are in a continuing damage situation, the evidence on that, for the last two years at least, won't even be there in completion until the end of this year.

So the parties need to focus on getting all of that information this year. We also will have a situation where

we don't even know fully the parameters of where people should be deposed on. We think the counterclaims are going to be dismissed. We don't want a whole lot of government people unnecessarily taken away from their job in the next few months to be deposed on counterclaims that are going to be dismissed. There are affirmative defenses that should be dismissed. We are the Government, so we are different than normal cases.

There are some affirmative defenses you can't make against us. There are some affirmative defenses that just don't make sense in this case. I do understand your concern about that. We won't do anything that is even borderline on affirmative defenses, but there are some. There are some that if they are not dismissed, we are going to have to take an enormous amount of discovery on them, and they are going to even probably by two-fold increase the discovery. Just take the affirmative defense that the Government got the benefit of what it paid for. We are going to have to see what we got. And that is a whole different case with a huge amount of data and documents that is going to have to be produced.

THE COURT: Well, to what degree would most of your concerns be answered if the discovery cutoff was May 31st instead of January 28th?

MS. WALLACK: Well, because -- well, it addresses

several different moving parts here. We have the issue whether their main argument is this actuarial equivalent type of argument. And they can't tell us right now whether it's in the case or not, right? So if it's in the case, they say they want to see when the Judge is going to rule. We don't have a crystal ball and we don't know when she's going to rule or how she's going to rule, so that impacts that. It's also that enormous amount of the discovery will focus on that.

So if the Judge -- we are going to hopefully get the issue removed from the Court as a legal matter hopefully sometime soon. We were waiting until we got the answer and the counterclaims. But if the Judge does not get rid of that, then we have to go out there to May. We also need to go out to May because of not getting documents until -- substantially completed until the end of this year, to give us time to do those fact witnesses, both sides, in a way that is not going to cause multiple depositions of the same witnesses. We also need to go out to May because the damages data, they won't even have a lot of the data for the two years until October of this year. And once we get it, we know from past experience in the investigation that we have lots of questions about it. And in the investigation United was cooperative in an informal matter in helping us understand the data, and supplementing it when it was

incorrect or missing things. They are not going to -- they made it very clear they are not going to do that in this case. We are going to have this -- have all this interrogatory practice and all this deposition practice to get a lot of very detailed information about a huge quantity of data. There were millions of chart reviews and millions of beneficiaries involved.

I know that, at least in my experience, this is the most -- and I've done antitrust cases -- this is the most complex case I've ever done with the most amount of data. And to do it in an organized fashion so the Court's not unduly burdened, and so when the case finally gets to the summary judgment stage and the trial stage, it's orderly, the information that needs to be properly decided for just results is there, is going to take time, especially in this continuing violation-type of situation which we find ourselves in.

THE COURT: Well, you've raised one other point that was in the report where UnitedHealth is saying, "We really haven't gotten our initial disclosures as to the damages." Look, I understand your argument, if it is your argument, that you aren't necessarily certain on certain things or you haven't reviewed all of the documents, but still, you know, presumably if the case was going to trial in a month there would be some set of documents at least that could be

identified that would give rise to the damages.

You know, the whole point of Rule 26 is that you are able to supplement things, but certainly, you must have some sense now of what the damages are, or what documents or witnesses would support those, at least to identify them. And I take it it is your feeling that you, in fact, have done that or is --

MS. WALLACK: Yes. In our initial disclosures -- first of all, in the investigation, United gave us four years of data to assess our damages. And we did assess them. And in the Complaint and in the initial disclosures, and in the Rule 26(f) report, we explained that we assessed over a billion dollars for those four years. We also in very general terms tried to explain how we assessed those. We looked at the results of the chart reviews that they did, and then we looked at the diagnoses that were submitted for the beneficiaries and the chart reviews. We determined that the chart reviews did not support hundreds of thousands of diagnoses and they should have been deleted. We then went to our damages expert on the data. And they said if these diagnoses were not submitted for these beneficiaries, the Government wouldn't have paid X amount. And we have an estimate of 1.1 billion.

That is what we did in the investigation. We are not supposed to try a case when we investigate a case at the

Department, so we stop at some point, right? We do enough hopefully to get ourselves in a settlement posture with some information on damages. That didn't work here.

So then when we do go into litigation, we have to say, what are all our years of damages here? We have an ongoing -- we are starting with 2009. Per Your Honor's decision on the motion to dismiss, we are starting with the 2009 payment year. And we decided if there is going to be a trial at the end of 2019 or the beginning of 2020, we have to cut off, for the purposes of that trial only -- I can't waive our right to get damages in the future. We'll be back here if it continues. We'll be back and back. I can't do an injunction because I have a remedy at law, right? That is my only choice, to keep coming back.

THE COURT: I'm sure one way or the other that will not be necessary, but I understand the legal point that you are making.

Let me hear from the Relator and then I'll hear from the defense.

MR. HASEGAWA: Your Honor, we agree with the Government and have nothing to add.

THE COURT: All right. Let me hear -- because I -- the other sort of discrete question I had, which was why the difference between August 2019 and February 2020 the Government has certainly amply answered.

So let me hear from the defense.

MR. SCHINDLER: Good morning, Your Honor.

You know, I think in some senses a lot of the answers to your questions go back to the fundamental observation you made the first time we were here, and that is that the Government has chose to bring this action, and it really is not remarkable for United to want to defend itself.

And everything that you are talking about today, the phase discovery, indeed, if you read the report, it is really all focused on the Government's efforts to say, this is what the Government wants, and this is what the Government needs. And I appreciate that is their desire, but the reality is, this is a two-sided piece of litigation. We are entitled to defend ourselves. The documents we are seeking, the depositions, this is remarkable. The effort to phase it is really just a request by the Government to thwart our efforts to defend ourselves. It's not just to defend ourselves fundamentally on materiality, it goes to damages. It goes to the theory of the case, our counterclaims. There is nothing about what the Government is asking you that is not essentially designed to say to United, "You have to wait, and you have to wait until we say you get to decide. You have to wait until we, Government, decide that it's time to go." And that is just not how this process works.

They chose -- they investigated for five years. We

gave them 600,000 documents then. We've already produced seven times the documents they have produced, even as a result at the time of filing. And essentially, you know, I don't -- it's a little bit of a proverbial, the orphan kills his parents and comes in and complains. When you look at what they say, "Oh, my goodness, we filed this lawsuit and now there is tremendous burden on us, the Government, to produce the very records that the defendants are asking for." And that is just not fair. It's not how this process works, and there is no basis to phase it.

And the difference in timeframe is literally, as you observed, their desire to essentially push everything out. Even the November timeframe for discovery is really a date that the Government's asking for because they can't produce anything. They can't meet any of their own internal deadlines. They haven't been able to meet the deadlines they have shared with us. We are trying to work cooperatively, and I think we have a good working relationship in the sense of meeting and conferring, coming up with processes for exchange on protocols for TAR, Technology Assisted Review.

The parties get along fine. We have a fundamental disagreement over the proposition that the Government is advancing; namely, that this whole process is to be one-sided for their benefit and we are supposed to wait until they decide they are ready to go.

And that is what you see in terms of the differential in time, as well. Our client, as we said at the outset, wants to get moving, believes that this case is wrongfully filed, believes there is no basis for it.

And the only other thing I want to make sure I cover with you is that the suggestion from Ms. Wallack that the whole case, our case, turns on actuarial equivalence is not true. When we were here for the motions to dismiss, the question of materiality on the affirmative attestations, and you asked the question, "Am I just asking a silly question or can you say it or not say it?" And you saw them come back and say, "No, we really can't." The same thing is really true as we get into the rest of the case. And it's not just an actuarial equivalence issue. It's simple things like the fact that the Government's payment rates take into account the fact that we are doing our additional coding. It's a whole other thing called a coding intensity adjuster. And the point we are making with this is, and why discovery is important, is it's going to allow us to show, for purposes of our summary judgment, that not only do they not have a case, but even separate and apart from that there are no damages.

So we don't mean to litigate here at all. You are absolutely right, there is going to be all sorts of motion practice before you. And I think you are spot on with your observation as it relates to any particular deposition. If

they want to see Magistrate Segal, we will go. But I don't think there is any reason at all to treat this case any differently. Indeed, to the contrary, our clients have a right finally after seven years to try and clear their name.

THE COURT: There is -- there is obviously going to be multiple issues for Judge Segal here. Right now there is two issues for me: One is whether to have sort of this overall phasing or quasi-phasing as set forth in the report. And the answer to that is going to be no.

To the extent that the defense wants to depose a particular person, wants to do it a particular time, could maybe work out with the Government getting certain documents.

On the other hand, you know, the document -- the Government in the report was laying out some -- just some practical issues. You know, no matter how much UnitedHealth might want to get documents by a certain date or pound on the table, if there is a certain volume which the Government can only process at a certain speed, if that -- if the date that you are getting as to when they will be produced just seems to one side to be unreasonable, then you can go to Judge Segal, who is much more versed in these matters and the mechanics of it than I am, and I'm sure she will know, based on her extensive experience, whether the amount of time that the Government is taking is reasonable or not.

But what this comes down to is there is going to be

this phasing, to which I just said the answer is no. The other thing is how much time does there have to be. When the case is this big, I would rather pick a trial date which I am certain is realistic, which the parties are certain is realistic, which witnesses can count on, which I can plan my vacation around, if it's going to be of the length that both sides are suggesting, and that seems to me to be something which is closer to February 18th, 2020 than August 27th, 2019.

And I do think that the ability to, in a way which is cooperative, to resolve many of these specific discovery disputes, can simply get resolved if there is less of a concern. You know, I suspected that the difference, because it's often the case, was between the one -- was between of the trial dates just arose from the difference that was suggested for the discovery cutoff.

And what I'm going to do here is take the actual dates under submission. Both sides, within a week from today, if you wish to propose a different discovery date than the two dates that you proposed and the reasons for those dates, then you may do so. Like spend no more than like two pages. I don't want this to be some tome. And the issue here isn't so much a trial date, it's clearly the discovery cutoff is driving the dates both before and after. So if I can pick a fair date for that, then it shouldn't be difficult

to get a fair trial date, or you can just feel free to -- if you want to stick with the dates that you have, then just e-mail Ms. Sanchez to that effect, and then that is fine and I'll figure out some dates that will be within -- reflect what you have going on in your suggested dates.

So with that, is there anything else that the parties would like to raise in regard to the scheduling issues?

MS. WALLACK: Your Honor, do you want that to be a joint report or just individual?

THE COURT: It can be individual, but just no more than two pages. Like I said, if you are happy with May 31st, then just e-mail Ms. Sanchez and say that you are happy with May 31st.

MS. WALLACK: Thank you very much.

THE COURT: All right. Mr. Schindler, anything else?

MR. SCHINDLER: No, Your Honor. Thank you.

THE COURT: Like I said, I just -- you know, I'm not going to hold the Government in contempt for not getting the documents out quick enough. At some point if I'm being told it's going to take this amount of time, short of Judge Segal feeling that that is patently unreasonable for some reason, it's just, in a sense we all have to live with it. But what I'm not going to force UnitedHealth to do is delay the

depositions until that happens. If you want to go ahead, then go ahead. But again, absent something extraordinary, you aren't going to be able to depose the person a second time. You already know that. You already figured this out on the other depositions. So it's really you've got to decide what is in the interests of your client.

MR. SCHINDLER: The other thing I will add on that -- and I agree entirely with everything you said -- this issue will come up, and we will end up having to depose people twice in part because, as Ms. Wallack has said, they've had this expansive assertion of deliberative privilege where they are essentially instructing witnesses not to answer.

THE COURT: But that is for Judge Segal to resolve the objections. That is a garden variety thing. So we don't need to worry about that, or I don't need to worry about it, she does.

All right. Thank you, counsel.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Amy C. Diaz, RPR, CRR April 20, 2018

S/ Amy Diaz