UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	**CASE NO: 2:16-CV-08697-MWF-SS**
	)	
Plaintiff,	)	**CIVIL**
	)	
vs.	)	**Los Angeles, California**
	)	
UNITED HEALTH GROUP, INC, ET AL,	)	**Thursday, July 12, 2018**
	)	
	)	
Defendants.	)	

TELEPHONIC CONFERENCE RE DISCOVERY

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

APPEARANCES: **SEE PAGE 2**

Court Reporter: **Recorded; XTR**

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Los Angeles, California; Thursday, July 12, 2018

(Call to Order)

(Telephonic Appearances)

THE COURT: Good morning. We are here today on the record on Case CV-16-8697, *United States of America versus United Health Group, Inc. et al.*

Counsel, please state your appearance for the record.

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

THE COURT: Good morning.

MR. DRAYCOTT: Justin Draycott from the Department of Justice.

THE COURT: Good morning.

MR. VOLDMAN: Max Voldman for relator from Constantine Cannon.

THE COURT: Good morning.

MR. CROOKE: Edward Crooke for the Department of Justice.

THE COURT: Good morning.

MS. WALLACK: Carol Wallack from the Department of Justice.

THE COURT: Good morning.

MR. SU: Henry Su for the relator from Constantine Cannon.

THE COURT: (indisc.)

MS. SHEFLER: Taeva Shefler for relator from Phillips and Cohen.

THE COURT: Good morning.

MR. LAHAD: Good morning. This is --

MS. SPEAKER: (indisc.) Department of Justice.

MR. LAHAD: Good morning. This is John Lahad from Susman Godfrey (indisc.) relator. Also with me is Geng Chen for the relator, as well.

THE COURT: Good morning.

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

THE COURT: Good morning. All right. (indisc.)

MR. SCHINDLER: Is that it for all of the relators and Government counsel? (indisc.)?

MR. SPEAKER: I believe so.

MR. SCHINDLER: Okay. Good morning, your Honor. This is David Schindler on behalf of United Health.

THE COURT: Good morning.

So, we're here today for an informal discovery conference. I appreciate that the parties provided me with an agenda, a joint agenda, which was very helpful, and I -- I think at this time I'd ask who -- it would be probably helpful, since there are so many lawyers for so many different parties, is if one person speaks, generally -- I mean, obviously, if you have something important to add, feel free, but for -- for the

United States, and then one lawyer for the relator, one attorney for United Health.

So, who is going to speak on behalf of the United States?

MR. FREEBORNE: Your Honor, this is Paul Freeborne. I'll be speaking to the -- the OIG Investigative. We are on demand by United.

THE COURT: All right.

MS. WALLACK: And this is Carol Wallack, and I will be speaking on the first two issues, the production of damages data and the production of documents from the files of Mr. Hemsley and his executive assistant.

THE COURT: All right.

MR. LEE: And this is John Lee, your Honor. I'll be speaking to the third component, the documents relating to Marianne Short and Thad Johnson.

THE COURT: All right.

MR. DRAYCOTT: Your Honor, this is -- and I think I'll be the last one for the Government -- this is Justin Draycott, and I would be speaking just to the issue of whether the motions by United ought to be stayed pending the -- the issuance of a Rule 16 scheduling order by Judge Fitzgerald.

THE COURT: All right. And, then, for United Health, is that Mr. Schindler?

MR. SCHINDLER: It is, your Honor.

THE COURT: All right.

MR. SCHINDLER: I'm all by my lonesome.

THE COURT: Okay. All right.

Well, let's get started, then, on the issues from the United States' perspective. So -- and it's -- because I have this very helpful agenda in front of me, I'm just going to follow the agenda and say: What's the issue with the production of damages data for the 2016 and '17 payment years?

MS. WALLACK: Sure. This is Carol Wallack. I'm going to try to be brief because I know we have a lot of issues, but if I'm skipping over important background information that you believe you need, please just stop me and I'll address your questions.

THE COURT: Okay.

MS. WALLACK: So, this case, in large part, is about the defendant's chart review program, which is the review of their beneficiaries' medical records. These medical record reviews provided the defense with information both about what they commonly refer to as under and over reporting of diagnosis by their healthcare providers. And our False Claims Act claims are about defendant's deliberate or reckless disregard of the information from those reviews about over reporting, that is, the invalid diagnoses that were reported by physicians. And our claims are about defendant's failure to comply with their legal obligations to delete those diagnoses from their prior

submissions to Medicare for what is known as risk adjustment payments under Part C and Part D of the Medicare program. So, and as we explained in our Rule 16 conference in, I think, April to Judge Fitzgerald, the defendant's conduct in this regard is continuing and, so, as I also explained at the conference, because we're anticipating needing to complete our damage expert discovery and our damage expert reports in 2019 with the idea that this case will, hopefully, be tried sometime early in 2020 -- so, with that in mind, the Government is currently limiting its damages through to payment year 2017, of course, without waiving any rights to recover damages for subsequent years. And just so you know, this payment program pays on a payment year basis.

So, there's currently two issues in dispute concerning defendant's production of the chart review and the other data that's necessary for us to fully assess the damages to the Medicare program for two of the years, the last two years. So, they're payment years 2016 and 2017. So, defendants are objecting to producing all of the data that we need to assess all of the damages for those two years. They're only agreeing to produce the data relating to chart reviews that they completed by January 31, 2018. However, they're continuing to do chart reviews for those two payment years, and I believe will continue these chart reviews up until the fall, probably August or September of this year.

THE COURT: Can I stop you for a minute?

MS. WALLACK: So, we asked --

THE COURT: I'm sorry, Ms. Wallack --

MS. WALLACK: -- defendants to do a supplemental production of the additional data.

THE COURT: Ms. Wallack? Ms. Wallack?

MS. WALLACK: Yes.

THE COURT: I misunderstood something you just said. So, can you just go back for a moment and tell me again; what are the years that the defendant's not willing to produce?

MS. WALLACK: So -- yes. The payment years at issue are 2016 and 2017. They're producing some of the data for those years up to when they made the chart reviews up to January 31, 2018. But they're still continuing to do chart reviews for those two years, and I believe will continue to do chart reviews for those two years until August and September of this year. So, what we asked the defendants to do is, after they're done doing chart reviews for those two years, is to give us all of that, the data relating to those chart reviews, in the fall of 2018 when they're done. Defendants have not agreed to do this based on the -- their objection that we needed to impose some kind of deadline, that they can't indefinitely produce this data. But that's not what we're asking for, so there is no merit to that argument. We're only requesting that the defendants complete their production of the

data necessary for us to recover all of the Medicare damages for those two years. And they have more than sufficient time to supplement their production this fall because there's no discovery deadlines in this case. Judge Fitzgerald has not yet imposed any discovery deadlines, has not yet issued a Rule 16 order, and we don't believe he's going to do so sometime till probably sometime in the fall of this year, because he's currently -- before him are three motions, which are still being briefed. One is to dismiss the defendant's counterclaim against the United States; there's five counts to that. One is to strike certain of their affirmative defenses, and one is our motion for partial summary judgment that we filed on certain issues in the case which we believe should be decided as a matter of law if there's no disputed facts. Accordingly, it's very unlikely that there is going to be any discovery cutoff in 2018, and there is no reason why the defendants can't provide us with additional data.

Defendants also claim that the request is unduly burdensome. My response to that really is, if you are going to engage in a continuing violation of the False Claims Act, and you are going to continue to damage the Medicare program by not deleting invalid data upon which the Medicare program pays you, then you're creating your own burden by having to produce to the Government the data by which the Government can then recover its damages.

There's one additional issue about -- I'm sorry; do you have a question?

THE COURT: No, I -- I -- I was just listening to what you're saying.

MS. WALLACK: Okay. So, there is one other additional issue. It deals with defendant's compliance with the Rule 26(e) to supplement or correct information. With respect to -- and this is, again, for just 2016 and 2017 payment year. With respect to the data that they are providing, we have asked them to supplement because, based on our experience and knowledge in dealing with prior year data with defendants, they often do multiple reviews of the same medical records. And for prior years, in fact, defendants have given us all of the information about all of the multiple reviews. In this situation defendants are not agreeing to any kind of reasonable schedule to give us the supplemental information, nor are they agreeing to give it to us; they're saying that they may do so if in their subjective review it's material. But I don't think that the criteria should be a kind of subjective review -- I mean determination on their part. As I (indisc.), with prior years we've gotten all of the data about all of the chart reviews and multiple reviews of the same charts.

So, that's those two issues with respect to the damages data.

THE COURT: All right. So, perhaps you can pause, and I'll hear from Mr. Schindler in response.

MR. SCHINDLER: Thank you, your Honor. Good morning.

I think the key to this dispute lies in what Ms. Wallack said to me a few moments ago, namely, the proposition that what the Government is trying to do here is effectively collect for what is purportedly an ongoing fraud, as she describes it. And the issue here relates to the fact that, first and foremost, of course, the complaint does not allege a continuing violation of the False Claims Act; the entire complaint's written in the past tense and involves allegations regarding United's chart review program for a time period leading up to the date of the filing. And, as Ms. Wallack correctly noted, she raised this very issue in April before Judge Fitzgerald as we were discussing the question of discovery, and we made the same objection at that point; namely, that, in essence, what they're asking us to do is an ongoing, continued what I would call a prospective discovery request, because -- and it is a little complicated, as Ms. Wallack has said -- the process by which data is submitted to the Government in conjunction with these chart review programs and the actual codes that are submitted is a multi-year process. It goes on for quite some time. So, for payment year 2016 and 2017, as Ms. Wallack has indicated, we

have agreed to produce information, and all we asked and all we've proposed to the Court was that we had to have a reasonable cutoff date in which discovery was going to conclude, because the process by which we go about collecting and submitting this is incredibly burdensome.

To give you a little sense of magnitude, we have already produced four -- actually, eight terabytes of data comprising millions and millions of medical records. And what we said at the time of the hearing and what Judge Fitzgerald essentially agreed to -- although I -- I will read you what he said in the transcript to avoid any ambiguity here -- is that, look, at some point there is a fundamental question of who's right and who's wrong on the Government's claim and, namely, whether or not there has been a violation of False Claims Act. We, of course, say there hasn't; we, of course, have said and intend to prove that there was no obligation not to do one-way looks; Government has a different view, of course. But the amount of damages as she -- as Ms. Wallack says, based on a timeframe, a reasonable cutoff point -- and we extended it beyond the data filing; we agreed she can go up to January this year even though the case was filed in mid-2017. What we've said at the time was, look, if we lose this case and it turns out we were continuing to do additional chart review and, therefore, had additional damages to put it in the terms that Ms. Wallack is alleging, then we're going to solve this problem

down the road. And this came up, as I said, at the April scheduling conference, and Ms. Wallack said to Judge Fitzgerald, you know, Look, I can't waive our right to get damages in the future. We'll be back here with a continuance. 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. And she made the point to Judge Fitzgerald that the Government would have to file multiple complaints. And Judge Fitzgerald said to her, I'm sure one way or the other that will not be necessary, but I understand the legal point that you are making. And that was in direct response to a point we made , which is, "Look, there has to be a reasonable cutoff point; otherwise, we're going to continually be burdened by having to collect and process and review millions and millions. And I don't -- it's not hyperbole. It is, indeed, millions and millions and millions of these charts and -- and review processes to undertake, and we have said and represented to the Government and represented to Judge Fitzgerald that if we were not to prevail on this case such that additional conduct -- as Ms. Wallack calls it, the ongoing conduct -- became relevant, then so be it. We'll have to settle; we'll have to figure out some way to deal with that, because we will have lost the fundamental question. We, of course, believe that the ongoing chart review process and the, quote-unquote, "one-way looks" is entirely appropriate, that the Government

has known about it, has never taken action, that it is not material in any way, shape, or form to their payment decisions, but that's what we're going to be here to litigate.

And, so, fundamentally, what we're talking about here is the Government's efforts to effectively impose a future prospective discovery request for future prospective damages on a case that was filed in May of 2017 and for which we have already said we would agree to go up through January of 2018. The alternative, of course, is a never-ending process, where the Government would constantly say, if we get -- for example, the trial goes in 2019, they're going to say, "You need to update yet again into 2019." And there is ample case law out there that says that it's appropriate to set a discovery cutoff date, a point in time, so that we're not constantly under the extraordinary burden of having to continually look for additional data.

And I guess the last point I'll make relates to two things that Ms. Wallack said. First she said that Judge Fitzgerald didn't issue a Rule 16 order based on her contention that somehow he's considering the motions. I don't know where she gets that. There has been no indication to any of us that that's what's going on. If she has other information from the Court that she has received that we haven't heard, then we'd certainly love to hear it. As far as we can tell, he hasn't issued an order, and it might be anything as benign as he's

forgotten that he hasn't done it, but none of us on this call, certainly on United's side, have any basis to support Ms. Wallack's contention that somehow the lack of the issuance of a final order is somehow tethered to the Government's subsequent filing of the motions that she has related.

And, lastly, as it relates to the supplemental obligation, we have said and continue to say, and Judge Fitzgerald encourages the parties, that we are, indeed, under continuing duties to supplement discovery, and we intend to do so. But I need to be clear about that. That duty to supplement relates to the materials that we have already produced and have agreed to produce that go up through January of 2018. We have not agreed to start all over anew and start looking for things that post-date January of 2018, because, as I've said, that effectively amounts to this continuing ongoing obligation that doesn't make sense in the context of the complaint as framed and doesn't make sense in terms of the burden that it would visit upon United.

THE COURT: So, let me -- let me ask a couple questions just for Mr. Schindler, and then, Ms. Wallack, I'll let you respond. But maybe I'm misunderstanding the Government's contentions. So, Mr. Schindler, you know, you can answer this and tell me if I'm misunderstanding it. But I thought what the Government is contending is that this discovery that they're asking for right now from you is

additional chart reviews going through 2018 and possibly into 2019 that are relevant to the damages that the Medicare program incurred in 2016 and '17, which is alleged in the complaint.

MR. SCHINDLER: I don't think that's quite accurate in the following respect. To be sure, we're talking about program years 2016 and 2017, but there is no damage yet, if you will. Under the Government's theory, of course, damage doesn't occur in a reverse False Claims Act context unless and until we have engaged in some conduct that supposedly resulted in an overpayment that United has kept and failed to return. And, so, it is true they have asked for 2016 and 2017 payment years, and to the extent that there has been chart review or other analysis of those charts that has taken place, we have agreed to produce, and we have. And we've made productions and continue to make productions leading up to a defined period of time, namely, January, 2018. What the Government's asking for is essentially saying, "Well, look, if you're continuing to engage in conduct" that they believe -- that the Government believes; we don't concede for a moment that the additional, quote-unquote, "conduct," namely, chart review, because it's a benign conduct that every Medicare Advantage provider in the -- in -- well, insurer engages in, that -- "that if you continue to engage in that, you're obligated to turn back around and -- and tell us yet again what you've done postdating the filing of the complaint." And therein lies the conundrum for us that we

would be under essentially an evergreen obligation to continue to produce, and that's exactly what they pitched to Judge Fitzgerald and exactly what he declined to -- to give them relief on.

THE COURT: All right. That's -- that's one question I had. Going back to that Judge Fitzgerald has not issued a scheduling order in this case, I looked back at the minute order he issued after the parties appeared before him in April, and -- and maybe there was something that happened that isn't on the docket or that I didn't see, but it looked to me that he had asked the parties to submit reports to him as of April 16th with recommended dates for the scheduling order. Am I -- am I wrong about that?

MR. SCHINDLER: No. You are correct, and both sides did, and that's why, as I said a moment ago, I -- I don't -- it's unclear whether this is merely something that fell through the cracks or -- you know, I -- any of us would be speculating as to why the order hasn't issued yet.

THE COURT: And can you tell me where those reports are? Because I looked at the docket, and I wasn't able to see, but I'm sure I just overlooked it. Do you happen to know the docket -- document numbers for those?

MR. SCHINDLER: I think what happened is he asked us to email his clerk --

THE COURT: Ah.

MR. SCHINDLER: -- which we did. So, hence, the -- and it was really just us asking for an email.

THE COURT: Got it.

MR. SCHINDLER: (indisc.) the parties.

THE COURT: That's why it's not in the docket. Okay.

MR. SCHINDLER: Correct.

THE COURT: All right. So, they were emailed, but they just went to his clerk. Okay.

MS. WALLACK: Yeah; I don't even know if it was through an email. It could have even been a telephone call to the clerk.

THE COURT: Got it. All right.

MR. SCHINDLER: And I guess the last thing I just want to make sure was clear under, you know, what I was saying fundamentally is that there really is not an overpayment for these payment years 2016 and 2017 until the fall of this coming year. It's as Ms. Wallack has said; because essentially that process -- you know, until the whole process closes, there isn't technically an overpayment for us to return. And -- and she explained that to you, but I want to make sure, your Honor, that essentially this -- this delay, time lag, becomes important, because it's also why we have agreed to go all the way up through January of this year, but we have to have a reasonable point in time where our obligations to look for and sort through, as I've said, millions and millions of pieces

of -- millions of records ends. Even understanding that the net result of that may be, as Ms. Wallack says, that if -- if they are right on their theory, that -- for things that United did starting in January of 2018 through whenever we go to trial, that we incur additional liability, she's right about that; that -- that if they're right on the law and they're right and prevail at trial, then she is correct that we would end up having potential exposure for additional conduct. And all we're saying, and we've said it in the hearing, was -- and she noted the same thing, she'd have to file a new complaint, and we said probably won't be necessary, because if we lose we're going to have to resolve that. But just so that it's clear in terms of conceptually how this unfolds, we would have to have a point in time where we are done having the obligation to go out and hunt for new records, especially where there is not yet an overpayment because that period has not closed.

THE COURT: All right. Ms. Wallack?

MS. WALLACK: So, Mr. Schindler is not correctly representing our complaint. Our complaint does allege a continuing violation. It alleges that for a while in 2012 and '13 United was complying with its legal obligation to delete the invalid codes from the chart reviews. And then in 2014 it stopped and then started to again to continue to violate the False Claims Act. So, it does allege a continuing violation. If it's not totally clear, we would be happy to fix that.

The other thing is that Mr. Schindler told you about the fundamental question hasn't been answered yet, but that's not true. The Ninth Circuit in December, 2016, said it was a violation of the False Claims Act for Medicare Advantage organizations such as defendant's to ignore the invalidated code shown by their chart review; they're not to delete them.

As to a reasonable cutoff point, I think we're being more than reasonable. What we're saying, your Honor, is that they're only giving us part of the data to collect part of the damages for 2016 and 2017 payment year. With respect to those payment years, (indisc.) complete their chart review programs by August and September, 2018, and they have to, because they can't submit any additional adds to -- any additional diagnoses to CMS after that. So, at that point in time they will be in possession of all the additional information for the chart reviews they conducted from February to August and September, 2018, that relate to those payment years. There is no discovery deadline. There is no reasonable basis to -- putting us in a position which is very inefficient for our damages analysis to do -- just collect part of our damages for those two years. I think we're being more than reasonable in not seeking subsequent years for the purpose of getting the expert discovery done and getting this case tried. And, on that, I don't think we need to file an additional complaint, because we have a continuing violation complaint, and we will continue to

seek the damages. But right now we're being really reasonable about this, and this arbitrary January 31, 2018, date is -- they never even explained.

The defendants produced at the end of April, April 27th, 2018, the data for these two years. At that point there were several months after January 31, 2018, that they could have produced the rest of the chart reviews that they did those few months, and they didn't even do that. They just -- this January 31, 2018, is just this arbitrary sort of deadline cutting us off from getting complete damages for two years, which just doesn't make sense from anyone's perspective. And they're not going to have to go out and get millions and billions of charts to do this, because they don't give us medical records; they give us data. And the data is included in database systems. And they have given us part of the data; they know how to give us the other part data. It's simply downloading it to us and our uploading it. We're not getting medical records for these patients. And if it's a lot of data, it's because they do millions and millions of chart reviews every year. They submit only the additional codes; they get billions of dollars; they don't delete the codes that are invalid, and the Government suffers billions and billions of dollars of damages. So, this is really significant. We're dealing with a lot of data because we're dealing with a lot of damages to the Medicare program.

THE COURT: So, let's -- let's wrap this issue up so we can move on to some of the other issues. And I -- I hold these informal conferences; I don't issue orders from them because it's not fair without allowing the parties to brief it. But I try to hear the issue and talk to the parties about what I think a reasonable resolution would be. And at the moment this is kind of a tricky one, because it at least sounds to me like Ms. Wallack and Mr. Schindler really disagree about what the post-January, 2018, evidence would be relevant to. As I understand Ms. Wallack's position, it's directly relevant to the damages that the plaintiffs are contending arise from the unlawful conduct that's pled in the complaint, that is, going through the 2016-2017 time period, which is raised in the complaint. And if I understand Ms. Wallack correctly, the lag time for United to do some of the work associated with processing the information to get it back to Medicare means that damages data is still available and has not yet been produced to the plaintiff that's relevant to the years that are actually included in the complaint. And Mr. Schindler disagrees with that and contends that the plaintiffs are seeking damages information years that go beyond the complaint, 2018, 2019. I don't hear that in Ms. Wallack's argument, Mr. Schindler. I just don’t see that.

And, so, you know -- and then, you know, the second argument about the burden, usually in a case of this size and

nature a burden argument would have to be supported with very specific facts from a person with personal knowledge about what kind of burden it was, and it might difficult to show in this case because of the dollar value at stake, and because Ms. Wallack has at least contended that there really isn't a significant burden.

So, based on everything that's been put in front of me, I'm not saying that I would order endless discovery from the defendants, but additional discovery through the date that Ms. Wallack identified, at least as to this issue of the damages discovery, would probably be likely in my mind. So, just sharing that's a preliminary; I wouldn't -- it is not a ruling, and I could change my mind if I saw it all briefed, but I'm just telling you that's my initial gut reaction.

MR. SCHINDLER: Your Honor, just to -- and I do think this is one in probably several -- a couple of issues that we're going to be discussing today are ones that we probably will need to brief on both sides. But I -- I guess the one part of your tentative comments that I do want to address is this question of, quote-unquote, whether damages have already occurred. In other words -- and we need to go back just to the nuts and bolts. The Medicare Advantage program's insurers submit data for the years in question, and then they have multiple years to continue to submit data, and, in fact, CMS does not close a program year for many, many -- often many

years, and ultimately extends that -- they ultimately extend the period; they typically do extend it beyond the current date in the fall that Ms. Wallack has indicated. So, there is no damages that have occurred for those prior years today.

If we've stopped and asked yourself, quote-unquote, "As of July 12th, are there damages for program years 2016 and 2017, unless we have looked at it and under the Government's theory done a, quote-unquote, "one-way look," there is no damage associated with it, because the data that's there is there. What they're saying is we're going to commit violations in the future. That's what she's telling you, that she believes, because we engage in one-way looks, or potentially could engage in one-way looks, that we could potentially cause future damage. Not that we already have damages; rather, that we could cause it. And that's the important distinction that I'd ask you to think about that I think needs to be discussed and maybe briefed, because it's not true, as Ms. Wallack says, that they're, quote-unquote, "asking today" for us to produce data about, quote-unquote, "damages" that are already in existence. What she is telling you is, "We think they're going to create more damage later on, and we want you to order them to constantly provide to us subsequent information that," in their view, quote-unquote, "constitutes subsequent damage," recognizing, of course, that that may, if CMS extends the program year, continue into perpetuity until such time as CMS,

you know, ultimately closes the period for those years. But that's the one distinction that -- that, you know, I want to make sure is clear, because the reality is there can't be an overpayment by definition. There is no such thing until that period is closed and reconciled. There is no over --

THE COURT: Well --

MS. WALLACK: Your Honor, that's an argument. That's not a fact. That's an argument. So, just --

MR. SCHINDLER: That's the reality.

MS. WALLACK: So, (indisc.) -- no, that's not the reality. Reality is when you perform the chart review and you become in possession of data showing that those codes are invalid that you submitted, you've already gotten those payments, the 2016, 2017. You got them several years ago in 2016, 2017. And as soon as you know that that was incorrect, you should have made that delete so that the system could be processed and you could pay the money back to the Government.

But, in any event, your Honor, we do allege a continuing violation. We are not being unreasonable on cutting it off at 2017 payment year for the purposes of an expert discovery and the trial in this case, so I don't even think that the argument that Mr. Schindler is making has any relevance. Yes, they -- if you want to follow his argument, they will be in violation as of September of this year. But it relates to payments that were made for 2016-2017 that have been

sitting in the bank account of United making interest where they could have been used by the Medicare program for legitimate purposes. So --

MR. SCHINDLER: Your Honor --

MS. WALLACK: -- the-- I just want to say that we are being reasonable here in the way that we are doing this, and we really should not be in a position, which is really inefficient, to seek only part of our damages, the 2016 and 2017.

THE COURT: All right. Well --

MR. SCHINDLER: Your Honor --

MS. WALLACK: (indisc.) cutoff of January --

THE COURT: Let's move on.

MS. WALLACK: -- 31, 2018.

THE COURT: Let's move on to the next issue, because we've got a lot to cover. So, who's going to speak --

MR. SCHINDLER: Yes.

THE COURT: -- to the documents in the files of Steve Hemsley?

MS. WALLACK: Sure. So, this is my other issue. Mr. Hemsley was the chief executive officer of United Health Group, the parent company that ran all the other defendants here, from 2006 to 2017, and Janice Leesman (phonetic) was his executive assistant, and all of his emails were sent by and to her. He does not send or receive his own emails. So, her

files, as well as his files, are relevant. We made several very specific requests for documents in his files. Mr. Hemsley was significantly involved in the oversight and the management of the defendant's Medicare Advantage business, which is at issue in this case.

For example -- and I can give you many examples of his intimate involvement. But one example is on a monthly basis he met with other United executives to discuss the financial performance of this line of business and to make decisions about the revenue and target goals. He was very aware about defendant's chart review program and the importance of it to United meeting its revenue goals. Although defendants refuse to produce documents from his files and his assistant's files, we have gotten some documents from other people's files -- not much, but some -- that support this.

So, but even though he was aware of the chart review program and he was also aware of this other claims verification where for a while in 2012 and 2013 defendants were meeting their legal obligations to delete these invalid codes from the chart review program, but it appears that at some point in 2013 or 2014 he didn't want that to continue, it's having financial impact, the deletes essentially canceled out the adds so there was little return on investment when you look both ways, and at the time United wasn't meeting its revenue goals for this program. So, he was very involved, specifically, his own

conduct in initiating multiple discussions with non-attorneys for the Government. This is during our investigation. And then these -- these discussions that he helped orchestrate with the help of his legal counsel directly related to the matters being investigated, the obligation to delete these invalid codes from the chart review program; he and his attorneys directed those under them about what to say to the Government non-attorneys and what they should try -- try to get the Government non-attorneys to say back. They had these aspirational things they wanted the Government attorneys to say. He and his attorneys did this knowing that HHS and DOJ were investigating his company for violating the False Claims Act, and he and his attorneys did this without notification to HHS, Office of General Counsel, or to DOJ.

The defendants have refused to produce any documents from Mr. Hemsley's and his assistant's, Ms. Leesman's, files. They contend that -- they have, basically, two arguments, I think. They contend that the documents in those files are not likely to be unique and are likely to be produced from other custodians' files. However, your Honor, they have not demonstrated this at all. They made -- absolutely made no demonstration of this. Moreover, we, the Government, cannot guess what documents might be in Mr. Hemsley's and his assistant's files that may be being produced from other people's files, and we have a right to know what information

Mr. Hemsley directly possessed. Because of the role he played in the events resulting in this case, and particularly the role in the attempts to undermine the investigation, and because of his relevancy of his knowledge and conduct, it's really unreasonable of the defendants to -- it's not unreasonable for the defendants to have to produce documents from his files, even if some of them are duplicative of documents from other custodians' files. What he knew and what he did are very much at issue, and that is largely, as you know, dependent on what people themselves possessed in their files. And we shouldn't have to guess about that.

Also, a third point. Defendant's uniqueness test is really a double standard, which shouldn't be tolerated at all. Defendants are not (indisc.) -- are not using the same test in making their demonstration in uniqueness and demanding and obtaining documents from, I think, 140 custodian files in this case, including they've made the demand for the documents in the files of multiple custodians and the office of the secretary of HHS, including two former secretaries of HHS, and without defendants making any demonstration that the documents in those files are unique in any way, we are -- we have agreed to search those files and produce all the non-privileged responsive documents from those files.

Defendant's other argument is that we're not entitled to Mr. Hemsley's documents because he was not involved in the

daily management of the Medicare Advantage business and because he was not a key decision-maker. The key decision-maker part is really hard to believe for a CEO, but let me just address the daily operations. I don't believe there's any law that says in order for documents to be discoverable in a custodian's files that person has to be involved in day-to-day operations. If that is the test, then our number of custodians that the Government needs to search its files will be cut down drastically in this case.

Furthermore, as I said, Mr. Hemsley was involved in the key decision in this case; that was the decision to stop their program whereby they were deleting the invalid codes and to start once again not deleting it, and violating the False Claims Act.

THE COURT: All right. Mr. Schindler?

MS. WALLACK: So, your Honor, we strongly feel and need -- we need the most important things, the documents from Mr. Hemsley's and his assistant's files. This goes to about four or five requests that we're really focused on, and those requests were written specifically to get documents from his files.

THE COURT: Okay.

Mr. Schindler?

MR. SCHINDLER: Yeah, your Honor, one thing -- and I apologize, but Ms. Wallack cut me off before. I do want to

just go back on that last issue so that we can brief it, because CMS itself has said something directly opposite to what Ms. Wallack told you. CMS said itself when it extended the deadline that there are no overpayments until after the system is closed. And I can submit to you before -- if we do this writing, the CMS circular itself, the directive that has that exact language. And Ms. Wallack cut me off before, and I just want you to know that if you're considering your tentative there. And if we do brief that, you'll see exactly what CMS said that is 180 degrees from what Ms. Wallack just told you.

But I want to turn to --

THE COURT: So, Mr. Schindler, let me -- let me just stop you for a minute there and -- and I appreciate that, and it's a complicated issue, and I guess I'll have to see it when everybody briefs it. I will tell you that, I mean, you know, just for purposes of discovery and production -- and I recognize this is -- it is burdensome, but the mere fact that the actual damage, you know, doesn't occur until, you know, a certain administrative task is completed doesn't mean that evidence isn't relevant. You know, there are two really distinct rules. So, I'm just -- I'm just directing you to that, that that -- that, to me, isn't going to be the defining rule; i.e., you know, because technically the -- the overpayment doesn't occur until the period is closed doesn't mean that there isn't evidence about damages that occurs before

then. Is that -- is that understandable?

MR. SCHINDLER: Yeah, it is, and I do think as we brief this we'll either persuade you or we won't. So --

THE COURT: I understand.

MR. SCHINDLER: -- it's (indisc.).

THE COURT: I just wanted you to know that's kind of how I see that. But go ahead, please, and respond on Mr. Hemsley.

MR. SCHINDLER: Sure. I think Mr. Hemsley and his assistant are a little bit easier. At the end of the day, what Ms. Wallack has said to you is that what Mr. Hemsley knew and what he did is at issue in this case, and, in reality, it's not. It's what United did and -- that's at issue, and indeed what United did the Government already knows because, as Ms. Wallack already told you, the notion that the company stopped doing two-way looks and is engaged or engaged in one-way looks is what's at the heart of this case and whether, in fact, the company had an obligation to do it or not. And while we vehemently disagree that the Ninth Circuit has ruled the way that Ms. Wallack says, it's not relevant for purposes of whether or not getting information from Mr. Hemsley and his assistant is relevant and necessary in this case. It comes down to the following. There are 114 custodians from United Health that we are already producing information on. And, in fact, as Ms. Wallack already told you, she knows exactly what

Mr. Hemsley did or didn't do, because we've already produced documents to her that reflect all of the activities that were ongoing underneath Mr. Hemsley by those people who actually were involved in this process.

She seems to suggest some form of obstruction of justice, which is -- she suggested to you that -- an effort to undermine the investigation. There is no allegation of that or certainly nothing relevant in a False Claims Act case, and it's a rather strange basis upon which to suggest that they need these documents. From our perspective, this is an effort that's going to be wholly duplicative because there is nothing that Mr. Hemsley has that hasn't already been produced or won't be produced through all of the other discovery of all the custodians down -- downstream.

To put it differently, suppose Mr. Hemsley at one point was thinking to himself, "Gee, I'd like to violate the law," but does nothing about it. Then, at the end of the day, it doesn't really matter. But, if, in fact, it's relevant, exactly as she says, and he directs those individuals beneath him in the organization to go violate the law, we agree that the Government's entitled to that information, and that's exactly why we are producing information from those 114 custodians, who would have effectively executed on the purported scheme to defraud the Government; which, of course, we don’t concede here, but it's just for purposes of making the

point. And this essentially ends up asking us to wholesale apply a broad universe of discovery requests against a -- Mr. Hemsley, who is the CEO, a former CEO, former chairman -- current chairman -- is -- is going to add hundreds of thousands of documents to the process, and that's why we're suggesting (indisc.).

I'm mindful of your appropriate recognition that to demonstrate burden we'd have to submit a specific declaration, and we're proposed to do that. But I just wanted to let you know that, from our perspective, all of these documents are, in fact, going to be produced through all of his underlings, and this just ends up being duplicative and not going to be any other -- there's going to be no other relevant documents that won't have already been produced.

THE COURT: So, when you say, Mr. Schindler, that they'll be duplicative, are you suggesting that some of the 114 custodians are going to be producing emails that include Mr. Hemsley in the email traffic but they're -- they are not being produced from -- necessarily from him, but from a different recipient of the email? Or are you saying --

MR. SCHINDLER: Yes.

THE COURT: -- the content of what these people are producing would be similar to something he might have written about?

MR. SCHINDLER: No, it's the former; that to the

extent that -- and I appreciate the Government's contention that if Mr. Hemsley is engaged in a conversation or directs people beneath him -- and let's table the lawyer for a moment, because that's going to be our next -- next topic, but aside from privileged communications, that if Mr. Hemsley is directing non-privileged -- or having non-privileged communications with all of the people beneath him or is receiving similarly -- similar non-privileged communication, those are going to be produced. That's exactly what's part of the production of the 114 other custodians, which is exactly why Ms. Wallack was in the position to tell you her narrative that she started her presentation on, which is this idea that (quote/unquote) Mr. Hemsley directed the meeting with CMS. And not surprisingly, we don't share her nefarious characterization of it that rather, indeed, Mr. Hemsley directed his people to go and ask the very question of CMS that has given rise to the Government's inability to demonstrate materiality here. He directed his people go meet with the folks at CMS, tell them what we're doing, be transparent, find out what we're required to do or not required to do. And CMS told them, you know, you can do one way looks -- I'm sorry, you have to do two-way looks.

And that's the basis upon which CMS -- I'm sorry that United thereafter ceased performing two-way looks, an effort to obstruct the investigation, as Ms. Wallack has characterized.

But the more important point is she knows exactly what happened because that information has been produced through the files of all the other individuals.

THE COURT: Let me stop you and just say, you know, this is something that I -- you know, I would probably want to see declarations as to what has been produced from both sides and understand better the scope of the production from the Defendants in terms of these 114 custodians. And I would want to see, you know, examples of disclosures that involved Mr. Hemsley such that it would appear that it wasn't the Defendants' purpose to evade or not produce things that involved him in some way. And you'd have to show that what the Plaintiffs are actually seeking would be duplicative, in general, of what you've already produced.

And beyond that it's hard for me to see how having Mr. Hemsley produce additional e-mails if they've already been produced albeit from other, you know, addressees or people in the communication is going to be helpful to the case. I understand the Plaintiffs want to dig further and see what direction perhaps he gave to people. But you can do that through his deposition, you can do that through asking other people did you receive directions from Mr. Hemsley, you know, other types of questions.

So, you know, at the moment I mean I can't resolve this, but those are the kinds of things I'd be wondering when I

saw it on the motion and asking. And you know, if the Defendants are able to show that they've been disclosing his e-mails already through other people, then it just doesn't seem reasonable to produce a second copy at this point.

MR. SCHINDLER: Very good, your Honor.

THE COURT: All right. Production of documents in the files of Marianne Short and Thad Johnson.

MR. LEE: Thank you, your Honor. This is John Lee on behalf of the United States. I'll try to be brief here, your Honor.

THE COURT: Okay.

MR. LEE: Mr. Schindler indicated that Mr. Johnson and Ms. Short are lawyers. They happen to be lawyers but they also happen to have been involved very intimately and personally in the series of events that led up to meeting between United and CMS officials on April 29th of 2014. And there are six requests for production that relate to documents that are in the files of Thad Johnson and Marianne Short that the Government is seeking.

Let me provide a little bit of context to why the Government is asking for these documents. In Paragraph 222 to 223 of the Amended Complaint the allegations are laid out that United was facing what they recognized as a $500 million budget shortfall in March and April of 2014. And they were looking for what they described as a $250 million good guy,

meaning they were looking for a way to trim their budget shortfall in a way -- in a significant way so that the bottom line would not look so bad as they thought it might.

So about a month later what happened is that on April 29th, 2014, there's a meeting that takes place between United and CMS officials. And the events that led up to the preparation for an attendance at the meeting, the attorneys, the in-house corporate counsel, Thad Johnson and Marianne Short, were involved in providing information, giving direction, and just basically communicating and participating with the United officials in connection with that meeting.

So there are six specific requests that ask for specific things related to the participation of Thad Johnson and Marianne Short. They're very limited and circumscribed generally, for the most part, are limited to the period between January 1st of 2014 and August 1st of 2014, and they relate to the events surrounding that meeting that took place between United and CMS.

United has taken the position that because these are attorneys that they likely are privileged without really invoking that privilege. And so I'd like to emphasize here that we can't tell whether they're privileged or not because they haven't officially invoked it. They haven't even -- they haven't even undertaken to search for the documents relating to Short and Johnson with one exception. I want to be fair.

United has agreed to search for and produce documents relating to Thad Johnson, but in their words relating solely to the April 29th meeting. We're not sure exactly what they mean by relating solely to the April 29th meeting, but what we understand to be clear is that the scope of what they're offering even as to Thad Johnson is that it's not commensurate with the six specific categories of the request that the United States has made. And as to Marianne Short, they're not agreeing to search for anything, they're not agreeing to produce anything.

So at this stage what we're asking for, your Honor, is that they be ordered to produce for and -- produce if they're not privileged the documents from the files of Thad Johnson and Marianne Short. And if they feel that they are privileged, they can put them on a log, on a privilege log, and then they can be further discussed in the event it's necessary to the Court and even in camera and make a determination as to whether they're privileged, whether any privilege might have been waived or some exception might apply.

And there are several bases for the Government to believe that even if -- first of all, I think that given the nature of the communication from the context that's occurring we don't really see any legal advice being sought or given. This is a purely business decision that United made to seek out CMS officials and try to extract from them certain -- what they

believe to be missing. And lo and behold the relevance of this contact is borne out by at least four of the affirmative defenses that appear in United's pleading. I believe, if I'm correct, there are two, three, seven and fourteen as well. Three of their five counterclaims are based heavily on what they construe to be statements that CMS has made or what CMS has told United about their conduct. So this meeting, at least in United's mind, is highly relevant.

So our first argument as to these documents is that we don't think that they're in the nature of legal advice. But even if they are, we think that waiver applies because they have put in issue the conduct of the meeting that took place by virtue of the affirmative defenses and counterclaims that they raise. And so it's unfair for them to effectively use the meeting as a sword but then try to keep us from having access to the same documents relating to the very same event. So in our view it's very likely that the -- even if the privilege would otherwise apply, the conduct has waived any privilege.

And then the last point that I wanted to make is that given the nature of the meeting and by what was going on in United's board room around the time that this took place that potentially the crime-fraud exception would apply. And if these communications were in furtherance of their attempt to obtain admissions from CMS officials without really disclosing all of its facts necessary to get those statements from CMS,

that there would be some fraud scheme that these communications would be in furtherance of.

And the test that the Ninth Circuit applies comes from the Supreme Court (indisc.) necessarily. I think the courts call it a very minimal threshold standard of establishing a prima facie factual basis to believe that there's some scheme in furtherance of the fraud. And to the extent that the documents relate to that, the Court should appropriately conduct an in camera review to see if the fraud exception applies. And this in camera review process would be something that also applies to determine in the first place whether the privilege applies at all or whether it's been waived.

So I do want to emphasize that at this stage all we're doing is asking that United be ordered to search for and produce documents that are not privileged and to log on a privilege log documents that they believe could be privileged. And then the Court can make a determination as to whether or not United has properly invoked the privilege.

THE COURT: Let me just ask a quick question here sort of, you know -- I'm listening to what you're saying. I just want to make sure I understand. It's the Government's position that the communications that preceded this April meeting between Short and -- is it Mr. Johnson and various people at the Defendants' business that those communications

were (quote) involved a purely business decision and nothing -- there was no legal advice proper?

MR. LEE: Right.

MR. SPEAKER: Your Honor, I don't think we're in a position to persuade Defendant to believe the facts of the case, because we have not gotten those documents. United hasn't searched for them, United hasn't even identified any privilege that it's asserting as to the particular documents. But given what we know about that meeting and given the other evidence, this is not a fishing expedition of any kind. There's a lot of evidence that indicates that this meeting took place and a lot of discussion took place. But the overall flavor of what's going on is that it was a pure business decision to try to extract some favorable statements from CMS.

Now, is it possible that in the context of some of those discussions there might have been some legal question that was asked and some legal opinion that was provided? I think it's possible. And the facts of the case, I think that's probably the kind of document that should go on a privilege log and a determination made as to whether or not privilege has been waived or some exception applies.

But it's likely that a significant portion, if not all, of the documents would be just purely transactional or business rather than communications seeking legal advice or providing legal advice.

THE COURT: All right. Mr. Schindler?

MR. SCHINDLER: Thank you, your Honor. Let's go back to the starting point of Mr. Lee's presentation, the April 2014 meeting. We agree that that April 2014 meeting was an important meeting and we have already produced non-privileged materials, including Mr. Johnson's notes of that meeting, including e-mails where he circulated the notes to attendees at the meeting. Because that meeting, we agree, is not a privileged meeting when you're meeting with CMS.

What's at issue here is the request that we go through the exercise that really will be kind of an exercise in futility of having to produce a massive privilege log because Marianne Short was the chief legal officer, essentially general counsel, and notwithstanding Mr. Lee's speculation that those communications are privileged.

Unfortunately, I think I'd be remiss if I didn't stop and say to the Court that this kind of illusion to crime fraud or illusion to an obstruction it really has no place in this case. In *Zolan* (phonetic) and its applicability is so far afield from this case, essentially to make out a prima facie case of crime fraud we'd have to take the position that the company itself, whether through the board or otherwise, failed to disclose information to its lawyers, or more importantly, have the lawyer participating in a crime fraud in order to try and abrogate the attorney-client privilege.

And that's really -- if you stop and think about what this case is -- what the allegations are and what's being pled and what happened here, it just almost blurs on a little bit outrageous. Because at the end of the day this meeting that everybody agrees is important, the best evidence of that meeting and its significance ultimately played out in this case. Because the Government alleged affirmative false claims at counts. We made the motion on materiality, Escobar materiality, and Judge Fitzgerald asked the Government point blank, look, is this just a -- you know, a silly question or is the agency effectively prepared to say that they would have acted differently? And as you know, or hopefully you know, the Government dismissed all of its affirmative False Claims Act because they could not meet the materiality standard.

So the suggestion that this was -- this meeting was an obstruction meeting with a trick, was a crime fraud designed to deceive CMS or somehow engage in nefarious behavior it's really unfair and uncalled for. And it's just not played out or it's belied entirely by what happened in this case where CMS effectively corroborated or inclusively corroborated on what we've said all along, which is they knew what the conduct was. We told them and they themselves agreed that doing one-way looks was not a violation and did not affect their payment decision and was not material, which is why the Government could not amend and had to dismiss those other counts.

So it's easy to sort of toss out there these bombs of obstruction or fraud, but it's not what the case has revealed to this point in time. And all that we're really talking about when the day is done is should United have to produce non-privileged materials from these two attorneys. Absolutely, and we agree and we have. And that's all that's left then is this notion of forcing us to go through an exercise of logging potentially thousands of documents from lawyers for the organization, which is at some level truly burdensome and isn't going to yield any material that won't already be produced through the other 114 custodians, including the fact that we've already produced those things.

THE COURT: All right. So this is not an uncommon issue that comes up in a variety of contexts where one party wants, you know, more about in-house counsel's role in certain decisions and decisions that may be challenged for a variety of reasons.

And you know, it's a tricky one because it turns a little bit on what the in-house lawyers' role in the business itself was. That is, there's some circumstances where an in-house lawyer is really not functioning as a lawyer but is really functioning as a business decision maker. And so they don't have the value of the attorney-client privilege or the work product doctrine protecting some of the work of that in-house counsel.

And that tends to be more common, although it's not exclusive. It tends to be more common in a smaller closely held corporation or some other kind of business where the in-house counsel is also, you know, in a very significant business role.

So I guess I would need to see the declarations from Mr. Johnson and Ms. Short about what their primary purpose at United Health was, what kind of functions they served, what was their day to day work like, et cetera, et cetera; and then, in particular, what kind of work did they do in connection with this business meeting. You know, would they state under oath that their role for the company in connection with this meeting and the things that took place around this meeting, was their role predominantly the role of legal counsel or did they have some other decision-making role or influence in that meeting.

Assuming, as I have sensed a little bit from what Mr. Schindler's remarks were, that their role would be more of an attorney giving counsel to the client as opposed to -- and it doesn't really matter even if there's business decisions that are being discussed at the meeting, if the role of those two individuals is predominantly of legal counsel, that would take precedence over whatever else was, I think, discussed at the meeting.

So if their role was predominantly as a lawyer giving counsel to their client, then they would be entitled to the

attorney-client privileges to communications that were essentially legal advice to their clients on what was taking place.

So those documents would be protected. And I would look to see in the declaration what percentage of whatever they had, e-mails or other documents, they would characterize as, you know, confidential communications. And you know, the Government could come back and challenge those declarations and try to persuade me that they were false, their lawyers were deceiving the Court. That's a fairly high standard to show. So, you know, I don't necessarily see this as a productive exercise. I wouldn't require the Defendants to log all of the e-mails and other documents from the lawyers if the declarations were sufficiently detailed such that I was persuaded that their role in connection with the meeting was predominantly as legal counsel.

So that's the way I would see it. And I agree with Mr. Schindler's analysis on the crime-fraud exception. On the facts in this case it doesn't seem like that would really apply here. But again, you know, this is just my tentative view and kind of how I would approach that issue if it was presented to me in a motion.

MR. LEE: Your Honor, this is John Lee again. May I ask a procedural question?

THE COURT: Sure.

MR. LEE: The way that your Honor lays out the approach that your Honor believes that the parties should take I think the prospect of getting declarations from Mr. Johnson and Ms. Short, I think to the extent that that's going to be useful at all I think it would be potentially more useful if that was provided prior to further position by the United States as to how to respond to that. To the extent that that comes as part of a motion to compel and a joint stipulation that gets constructed with the Government's position on one side and then a week later United's position on the other side with a declaration, we would not have any kind of an opportunity to look at those declarations or respond to them. So would it be possible, would it be useful in the Court's view to ask Mr. Schindler to submit those declarations in advance before the joint stipulation gets put together?

THE COURT: So let me just comment on that. I think I understand what you're saying. I think that, you know, one possibility is he could give you, you know, a draft or some idea of what those declarations might say. That's really a good topic for a meet and confer between you and Mr. Schindler. I think he could share with you sort of, you know, the answer to my question, which is, you know, can you describe with some level of specificity the role of Ms. Short and Mr. Johnson at the company; and, in particular, in connection with that meeting. I think from just a discussion with Mr. Schindler you

could probably make an informed decision as to whether or not it made sense to go forward on a motion.

I will say, Mr. Lee, that -- and, you know, there are exceptions to this. There are definitely times when an in-house counsel's e-mails or notes are ordered produced for one reason or another: waiver or they're not functioning as a lawyer or there's some other ground. There's no question that's true. But it is the exception; it's not generally the rule. So Mr. Schindler probably has the weight of authority on his side if, in fact, Ms. Short and Mr. Johnson can swear that they were functioning as counsel.

MR. LEE: Your Honor, I appreciate the Court's comments on that. I think probably my sense is that we -- it will be in a detailed -- for the declaration that will come out and to what extent they're sufficiently credible and detailed rather than just a general statement about their role as in-house counsel.

THE COURT: All right. Well, I'll let you and Mr. Schindler work that out. You know, certainly I always think it's good in a meet and confer process if the parties can disclose as much information as possible because -- you know, spend time on the motion, you know, only to find out it wasn't really necessary. Because if you had known, you know, what was going to be in the motion at the meet and confer, you might not have brought the motion. I mean that's why we want a meet and

confer to be as detailed and thorough as possible so there's no surprises by the time you file the motion.

All right, so moving on now. This is now United HealthCare's production of documents in the files of the OIG's custodians for certain requests. Mr. Schindler?

MR. SPEAKER: There was one more Government motion, your Honor.

THE COURT: Oh, I'm sorry. I skipped right over that. I'm sorry.

MR. SPEAKER: Actually, your Honor, can I before we begin. There's been no meet and confer on this proposition that our motion should be stayed. So I object to the proposition of this being characterized as a motion for the Government to somehow stay our discovery. And I just need to be on the record with that.

THE COURT: Sure.

(Voices overlapping)

Yeah, go ahead.

MR. DRAYCOTT: It wouldn't be to stay discovery. It would be only to stay the consideration of the motion to compel, not to stay discovery.

THE COURT: And I'm sorry who --

MR. SPEAKER: There's been no meet and confer on that either.

THE COURT: Who is speaking?

MR. DRAYCOTT: I'm sorry, this is Justin Draycott for the United States.

THE COURT: Thank you. Well, Mr. Schindler, since we're all here and since I'm here, this is just a brief conversation, this is just an informal discovery conference. I'm not ruling on anything. I've given you my preliminary thoughts but none of it is binding. So, you know, I might be able to help you avoid a problem.

So, Mr. Draycott, do you want to tell me what's on your mind about that?

MR. DRAYCOTT: Thank you, your Honor. This motion certainly is going to be responsive and is bound up in the motions that are anticipated by United that I think it is a motion that pertains to an additional filing that we're going to be undertaking with the district court, which is a subject that we raised with defense counsel. We asked to meet and confer on it last week, but time didn't permit and we will be discussing the filing with Judge Fitzgerald with defense counsel upon the conclusion roughly at this call.

And the Government suggests that your Honor stay in consideration of Defendants' motion to compel the ones that are on the agenda for today until Judge Fitzgerald issues a scheduling order in this case. When the Government submitted its Rule 20 -- amended Rule 26 to Judge Fitzgerald in early April of this year the Government specifically advised that we

anticipated filing motions to resolve illegal issues in this case and that the Court's early -- Judge Fitzgerald's early resolution of those issues could be used to streamline discovery.

Since that report was filed there are now three motions pending with Judge Fitzgerald and they have -- to resolve the issues as a matter of law or confirm that they have already been resolved by the Ninth Circuit in two seminal decisions that particularly involved the accuracy of diagnostic coding and the Medicare Advantage Program and, moreover, were resolved in the context of False Claims Act cases. Those three motions are set to be heard on September 17th, and the briefing on those is ongoing with United's briefs due this month.

In very short order the Government will be filing a fourth motion with Judge Fitzgerald to set limits on discovery pursuant to Rule 16(b)(3), or in the alternative, Rule 26. Again, that is a subject that is going to be further discussed with defense counsel this afternoon. We'll particularly be seeking relief with respect to issues that resolve in this case as a matter of law. We think that we could arguably on the record -- go up and maybe we could just supplement Rule 26 that report with clarity and transparency. We're going to propose to do it by notice motion. And we will ask that the motion also be heard on September 17th, but again that's a detail that we will discuss with counsel this afternoon.

We believe that it's appropriate for Judge Fitzgerald to determine the limitations on the scope of discovery while he is considering the motions for dispositive ruling on the various issues covered by the Government's briefs.

And so consistent with our 26(f) report and taking into account the three motions that are now on file, as well as the recent July 9th decision by the Ninth Circuit in a Medicare Advantage case involving diagnostic coding, we'll ask Judge Fitzgerald to recognize the key issues have been decided or they're being decided and they can't supply a basis for discovery under Rule 26(b), specifically discovery that is both burdensome and particularly directed to privileged information.

So among the issues that have already been or are being addressed are the obligations of Medicare Advantage Plans with respect to accurate diagnostic coding, and as well as the materiality of inaccurate codes on payments by Medicare.

Now, I think we've addressed the fact that Judge Fitzgerald did not issue yet a Rule 16 scheduling order, and I can assure Mr. Schindler I don't -- can't say for certain why that is the case, but we can probably assume it's because the judge just -- you know, (indisc.) it fell behind the radiator. I think it's prudent to think that there is some relief for that. And even if statements -- with the case where the judge lost track of it, we would certainly -- the Government would certainly urge Judge Fitzgerald to wait until he has ruled on

the pending motions as well as the motion that we are now contemplating.

And our upcoming motion to the judge will demonstrate the discovery should be more focused and, therefore, more streamlined. We'll ask the Judge to specify the general scope of relevant discovery under 26(b) and impose limits on discovery that goes beyond that. And we expect limitations can then be applied to particular discovery requests and, if necessary, discovery disputes including any that would be heard by your Honor. The ultimate fact that the limitation of the Rule 16 order when it issues could be applied to the argument and contentions (indisc.) the Court the very motions that are on today's agenda.

But we believe that the stay will be abuse of the motion practice and will be limited just to the motions practice and the two -- today would be good exemplars -- would promote efficiency. Relevancy under Rule 26 will be touched on in the most fundamental issue under consideration by Judge Fitzgerald when he considers the Government's request under Rule 16 and also under Rule 26(b). It will also be a starting point for your Honor in the context of any discovery motion preceded by United.

If your Honor were to decide to hear United's motion, it will unquestionably overlap in the briefs that we filed with you which we had filed -- or will be filing with Judge

Fitzgerald. Moreover, the briefing will be virtually simultaneous. In order to demonstrate, your Honor, that United is seeking discovery to issues resolved as a matter of law or is seeking to re-litigate issues that have already been decided you would make extensive use of the points set forth in the motions now pending before Judge Fitzgerald or in the motion that we're about to file.

And that would only be a starting point for your Honor. Because while we will be asking Judge Fitzgerald to make broad ruling, there would be considerable additional arguments and considerations applied to particularly sensitive material that are sought by Defendants in the motion that they put on the agenda for today.

So in summary, your Honor, we think the most prudent and efficient way to proceed is by allowing Judge Fitzgerald to go first. The ruling before -- by Judge Fitzgerald will be over-arching substantive issues that have already been briefed and are being briefed with Judge Fitzgerald.

And finally, there's no really compelling reason for your Honor to be hearing United motions now. The briefing before Judge Fitzgerald is ongoing and is continuing in the coming weeks. The briefing schedule and the hearing date that is currently operating with Judge Fitzgerald were ones that were actually proposed by United. It allows sufficient time to prepare the briefs. United asked for 60 days to oppose the

Government's motion. They exceeded that request. United suggested the September 17th hearing date so that Judge Fitzgerald could have several weeks to consider briefs after the briefing closes.

And we see no compelling reason, no particular prejudice to United by allowing Judge Fitzgerald to issue a scheduling order that sets appropriate limits on discovery and that he's informed by the briefs by both sides on the three outstanding motions. He was informed by the recent July 9th case, which involves the accuracy of diagnostic coding in the context of the MA Program. And this would be the most efficient way for the parties to proceed with the substantial discovery disputes that are going on.

In the meantime, you will use the -- there's a preservation of resources from discovery that would be irrelevant, and we will continue with ongoing production. But we don't see any prejudice to briefing the issues of relevance, which are cross cutting across the issues that are being keyed up for your Honor. And the broader issue is going to be addressed by Judge Fitzgerald in the (indisc.) on the issued scheduling order.

THE COURT: All right. Mr. Schindler?

MR. SCHINDLER: Thank you, your Honor. You know, this is round three. This is the third time that the Government has essentially asked first your Honor and then

Judge Fitzgerald to effectively impose what they've described alternatively as staggered discovery, stayed discovery; and the third time they basically said, hey, the Defendants should not be entitled to get any documents relevant to their defense because we're going to win. And it's no different than parties -- typically the tables are turned and the Defendant comes in and says don't make us provide discovery because our motion to dismiss is going to prevail. And Judge Fitzgerald's order on his website is quite clear that discovery is to proceed and the basis of a motion to dismiss or any other motion is not a sufficient basis to preclude discovery.

And Mr. Draycott's long eloquent soliloquy, notwithstanding what's going on here, is quite clear. There are documents in the possession of the OIG that are highly relevant to our defense and go specifically to issues that are Escobar materiality at its core, namely, that the OIG was aware of the missed adjustment procedures employed by other MA plans and United and took no action, which is, in fact, the case. That goes directly to our defense in this case and it will be relevant even if Mr. Draycott, the Government, wins its motions.

We respectfully submit that even if they were to win -- and we don't think they will -- but that's not an issue to be decided here -- that that evidence in the possession of the Government in the OIG's possession is crucial. Because at

the end of the day this question of as what's left in the reverse False Claims Act counts that the Government has at issue here is this notion of overpayments, right? And the theory that the Government is proceeding on is that there was an overpayment, we knew about it and we were supposed to give it back. And we didn't give it back and that's why we have damages. That's, in 20 words, what the Government is alleging in the reverse False Claims Act.

Well, the reality is if the OIG knew exactly what we were doing and what all the other plans were doing, it would have constituted an overpayment. And the OIG has authority to proceed to recover overpayments. And if they didn't do that, we would submit as part of our defense it's because there wasn't an overpayment and they knew it. Or, as I've said before, it goes to the heart of Escobar materiality.

This is just another effort when the day is done to prevent us from defending ourselves and it -- I can't put it any more clearly. It's the same conversation we had with your Honor in our first and formal conference. It's the same conversation we had with Judge Fitzgerald at the scheduling conference when the Government made the same pitch to him: Essentially, hey, Judge, we're going to win this case. Don't give United any of the discovery they want.

And that's just not the way this works. They brought a case alleging billions of dollars of damages. We're entitled

to defend ourselves and we're entitled to discovery even if they have motions they think are winners. And if they are winners, okay, then so be it. At that point we'll end up there. That's no different than any other case and there's nothing unusual here that would in any way, shape or form support this proposition that Mr. Draycott has advanced that you should stay or effectively order us that -- prevent us from getting discovery that we're entitled to, even if they turn out and repeatedly seek hundreds of thousands, if not millions, of cases of discovery from us. So I --

THE COURT: Okay, let's move on. Because I appreciate this but I do agree that we've talked about this a little bit before in this case. And I understand the Government's position, why waste Government resources on extensive discovery if certain claims are going to go away.

MR. SPEAKER: Your Honor, I --

THE COURT: You know --

MR. SPEAKER: I have one point of clarification. I would render no assumption that Mr. Schindler would agree with what I just said. My main point is it's not just the burden that's on the parties. It's the burden on the Court. The thing I'm certain of is that there will be simultaneous briefing before your Honor and Judge Fitzgerald that these issues and everything that Mr. Fitzgerald said he will be saying in response to -- sorry, Mr. Schindler said -- he will

be saying in response to the -- in response to the motion that we're going to put before Judge Fitzgerald.

(Voices overlapping)

THE COURT: I appreciate it and I don't disagree with you that it would be more efficient to have these issues resolved before the discovery motions are filed. And you know, there's a part of me that would love to agree with you and say you're right, I'm just going to delay all the work you've put in front of me until Judge Fitzgerald decides what we're going to do here; I'm going to delay and wait until September, October, November. Trust me, there's a part of me that would really like to do that. But I honestly don't think I'm permitted to do that until the district judge who sets the schedule in this case tells me I'm permitted to do that. I can't --

MR. SPEAKER: Your Honor, if I --

(Voices overlapping)

THE COURT: -- find myself and if -- no, I really would like us to move on. Because I'm not going to resolve this now. You certainly can make the motion to stay the discovery motion, then I can consider it and Judge Fitzgerald can consider it. But I'm not going to be able to resolve this now.

What I can tell you is that typically in this district we don't save things like discovery motions until the

district judge issues a scheduling order, says okay, I'm going to do it in phases; no discovery on this issue until this date. If the trial judge, whether it's Magistrate Judge (indisc.) or the district judge, sets the schedule. And so Judge Fitzgerald will set the schedule in this case. And until he does I'm operating as I would ordinarily operate, which is you file a motion according to the local rules, you set a hearing date and I try to adjudicate it in a timely fashion. So believe me, I'd much prefer to put these motions off.

All right, so let's move on if we can to the production of documents in the files of the OIG custodian. Mr. Schindler.

MR. SCHINDLER: Well, in many respects, your Honor, these things go hand in hand, right. Because what we're really saying are tethered together. They effectively said they should not have to produce any documents that are in the files of the OIG. And those are the same kinds of documents when the day is done. They've advanced essentially a law enforcement privilege to protect the documents, but it really ignores the qualified nature of the privilege, especially in this context. You can't make a blanket assertion as privilege on the OIG even before collecting responsive documents.

But more importantly, in this case the question of the non-materiality of these records or these decisions, if you will, or the information, the notion that somehow United was

obligated to perform two-way looks, clearly outweighs any assertion of the qualified privilege that might otherwise attach to records belonging to OIG custodians.

But that issue is really subsumed in the overarching point I made earlier, which is we're entitled to documents that demonstrate that lack of materiality under *Escobar* goes to the heart of our defense and documents in the possession of the OIG are exactly that.

THE COURT: All right. And who is going to respond for the Plaintiff?

MR. FREEBORNE: Your Honor, this is Paul Freeborne. And I agree with Mr. Schindler. I think the issues are subsumed. From our perspective United has the obligation under 26(b) to show relevancy. We think materiality has been resolved as a matter of law. There is no factual issue to probe. Simply stated, Judge Fitzgerald and the Ninth Circuit have recognized that the materiality of accurate diagnosis codes. And what OIG did or did not do cannot do that. And so it's a completely irrelevant inquiry. Moreover, they're seeking privileged information, investigated information, not of United but of other third party plans. And in that rubric they have the obligation to show good cause.

And just to understand the argument we're making about the motion to stay, again, it's not a motion to stay discovery. What it is is seeking a threshold ruling on

relevancy to avoid a showdown on privilege. Mr. Schindler has stated prior to the agenda that the Court is likely to face not only motions to compel with respect to the Office of the Inspector General and its activities but they're also seeking to probe agency deliberations on the same grounds. And it behooves -- and there is case authority that's -- at least in the DC Circuit that supports the proposition that there has to be some good cause shown to go down that road. And that's all we're proposing to do. And the parties are in fundamental disagreement with respect to the relevancy and the good cause found by United. And so we think whatever motion they're going to file should be denied.

THE COURT: So let me ask you this. In getting back to the stay issue -- and I do feel it's really an issue for Judge Fitzgerald. I know you have a hearing before him on September 17th. But I do think you could, you know, do a short motion and ask for it to be heard perhaps at a certain time on the issue of, you know, a stay of discovery or a stay of the discovery motion under the theories you've put forward.

Because again, I don't think it's up for me unless Judge Fitzgerald then referred that motion to me, which he could. But until that happens, at the moment he is the decision maker about the schedule of this case. So I just don't feel like I have the freedom to say, you know, yes, I would stay discovery; or no, I wouldn't. It's just not within

my authority. So, you know, for your consideration it may be something you want to do, you know, before Judge Fitzgerald.

MR. SPEAKER: Thank you, your Honor.

THE COURT: All right. So I think on the OIG custodians and -- I'll hear Mr. Schindler in a minute on part two of that item in the agenda. But it doesn't seem like that's something that the parties could reach an agreement on. And it's a sufficiently fact driven type of analysis to apply the law enforcement privilege, you know, that I don't think I can even give you a preliminary idea of my thoughts on that because it's just going to turn a lot on the declarations and the facts you've put before the Court.

What about the production of documents concerning investigations of other MA plans?

MR. FREEBORNE: Well, that is -- this is Paul Freeborne, your Honor. That is the issue that we were just discussing.

THE COURT: Okay, all right.

MR. FREEBORNE: There were other requests that go to the specific program activities where we removed OIG as a custodian because OIG doesn't have any role in program responsibilities. But the other issues really pertain to the materiality issue that Mr. Schindler identified earlier.

THE COURT: All right. And then on the deliberative process privilege, you know, I mean it's a -- it applies to

things that are pre-decisional, it applies to things that, you know, really reflect deliberation as opposed to a factual finding. I guess that's -- I'm just sharing that with the parties that I would look to the Ninth Circuit law and other circuits' law on the application of that to decide. You know, it sometimes shields documents, it sometimes doesn't. I mean again, a very fact driven analysis. So I can't really tell you, you know, what I would do. It would depend on what was put before me.

MR. SPEAKER: And the parties have not met and conferred on the deliberative process privilege motion to compel that's contemplated by United.

THE COURT: And to some degree, you know, you can resolve it on a declaration to the Court sometimes. But often that does require in camera review that I need to look at the document and decide if it's sufficiently deliberative or if it's not deliberative and factual.

MR. SCHINDLER: Yeah. I think, your Honor, just in -- and Mr. Freeborne is right. We've not had the opportunity yet to meet and confer with them and we alert you more to the fact that it isn't just one document. What we have is a wholesale assertion by the Government to cross a broad swamp of documents. And you are right, we're going to have to present you with appropriate record to show you that this is being used inappropriately to shield relevant documents.

Moreover, the deliberative process privilege is not absolute. It can be overcome by the need -- in this case the need is demonstrable. Because these are, in fact, documents that demonstrate exactly what we've said all along as part of our defense, that CMS not only knew about what we were doing but that CMS and its internal people agree with the positions that we have taken. But we need to key that up for you in a way that will allow you to rule, so we simply wanted to flag that point.

The only other thing I would say with respect to the OIG is the information pertaining to other MA plans pertain solely to the concept of what OIG did or did not do in the face of information that demonstrates specifically that other plans were engaged in the same behavior and OIG likewise failed to take action against them, which goes directly to the defense we have raised here. And that's the issue. It isn't an effort on our part to seek information about other MA plans. Rather it's our effort to seek information about what the Government did or did not do based upon information it had that demonstrates that it, too, did not lead at the time -- that amounted to an overpayment. That's all.

THE COURT: All right. Well, thank you very much. And I just want to throw out for the parties' consideration. I recognize you're in the early stages of your case and you're vigorously litigating it and there are a lot of issues that

remain unresolved. And Judge Fitzgerald's rulings are going to be very important to the parties.

I did want to let you know that Judge Ed Infante, who sat in the Northern District for many years and also worked as a private mediator who handled billion-dollar cases with some regularity in his post-judicial life, has returned to our bench. He is sitting now as a magistrate judge in the Central District and he is available to do settlement conferences. So I just put that out there for the parties' consideration, because he would be, I think, an individual who could take on a case of this magnitude and maybe help you find a path to a resolution. So if you decide that's something you're interested in, you can let my courtroom deputy know. All right.

MR. SPEAKER: Thank you.

THE COURT: Anything further at this time?

MR. SPEAKER: No, your Honor. I suspect we are all late to our respective meetings, so thank you for your time.

THE COURT: All right, thank you.

MS. SPEAKER: We appreciate your time, your Honor.

THE COURT: Thank you.

MR. SPEAKER: Thank you, your Honor.

THE COURT: Thank you.

(This proceeding was adjourned at 4:43 p.m.)

CERTIFICATION

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

July 16, 2018

Signed **Dated**

TONI HUDSON, TRANSCRIBER