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, August 16, 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, August 16, 2018

(Telephonic Hearing)

(Call to Order)

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

Counsel, state your appearance for the record.

MR. FREEBORNE: Paul Freeborne for the Government, your Honor.

MR. TAROSKY: Adam Tarosky for the United States.

THE COURT: Good morning.

MS. KRIEG: Jessica Krieg for the Government.

THE COURT: Okay.

MS. LIKOFF: Amy Likoff for the United States.

THE COURT: Okay.

MR. DRAYCOTT: Justin Draycott for the United States.

THE COURT: Good morning.

MR. LEE: John Lee for the United States.

THE COURT: Good morning.

MR. SU: Good morning, your Honor. Henry Su for the Relator.

THE COURT: Good morning.

MR. LAHAIE: This is --

Your Honor, this is -- I'm sorry.

MS. SHEFLER: This is Taeva Shefler for the Relator.

THE COURT: Good morning.

MR. LAHAIE: Your Honor, this is John LaHaie for the Relator as well.

THE COURT: Good morning.

Anyone else?

All right, good morning. So this --

Oh, I'm sorry. Go ahead.

MR. SCHINDLER: It's me, your Honor. It's David Schindler on behalf of United. I was just waiting for the cast of Government and Relator lawyers to -- to proceed.

THE COURT: All right.

MR. SCHINDLER: There are others on behalf of United as well, but I'll be arguing this morning.

And I would ask that, since we asked for this informal conference, that we proceed with our issues first, if that's okay with the Court?

THE COURT: So any objection from the Government on that request?

MR. FREEBORNE: Well, your Honor, I think, you know, this is sort of a follow on -- to our –- the point that we made in the last conference about, you know, the overarching issues that are before Judge Fitzgerald. And it may make sense to hear the Government's prospective first because I do think that –- and it may meld together.

So if we -- if we could be afforded the opportunity

to go first, we would appreciated it.

MR. SCHINDLER: Your Honor, just so I can be clear, we asked for the informal conference. These are issues that actually arose as a result of issues we raised with the Government.

And we firmly believe that what has transpired (indisc.) is a result of our raising the issues that we were going to raise with the Court this morning, the Government has manufactured purported issues that, quote, unquote, follow on the heels of their prior motion; and they're not.

They're unrelated and there are issues that we asked to bring before you. And for the Government to suggest (indisc.) require a hearing is just not accurate.

THE COURT: So let me just say that I think, you know, now that this is -- I don't know what number this is, but now that we've held several of these informal conferences, I hope -- I hope you'll agree with me that my practice is to try and give everyone who wants to speak a full and fair opportunity to say their -- their point of view on a particular issue, with the understanding that all of us have time constraints and I have other matters that we -- we do the best we can with the time that I've allotted.

In my mind, I've allotted an hour to this hearing this morning, given the number of Counsel involved and the issues involved, and I'm hopeful that we can make progress in

that amount of time.

So simply because there are less people to speak on the side of United Health Group, I'm going to -- going to allow Mr. Schindler to go first.

That's not saying I agree with whatever arguments he just made; I'm just saying I think it seems simpler to let him go first. And then I'll hear from the Government and/or the Relators, if they have any Counsel response to what Mr. Schindler says.

So go ahead, Mr. Schindler.

MR. SCHINDLER: Thank you, your Honor. I appreciate the rule. (indisc.) be brief.

We're here especially on three issues, although two of them are principally what's driving us.

And it -- it stems from the Government's refusal to continue producing privilege logs and their failure to commit to revising privilege logs that they had produced previously in order to allow us to sufficiently evaluate the basis of the deliberative process privilege claims that they have asserted.

And as you correctly note, this is the fourth time that we're before you where, essentially, the Government is effectively unilaterally making decisions to cease participating in discovery, despite that repeated and expressed admonitions both in Judge Fitzgerald's standing order and in some of the comments you've made previously about the fact that

discovery is to produce is to proceed.

And what transpired here is that on July 27th, the Government announced to us out of the blue that it was going to cease producing privilege logs until the Rule 16 Motion that it has now filed -- or subsequently filed was resolved by Judge Fitzgerald.

And as Mr. Freeborne says, it is true that effectively what they're trying to do is ask that discovery be saved or that it be phased or that we be barred from having access to various types of information predicated on their assertion that they will prevail on their Summary Judgment Motion.

And this issue, of course, came before you before, and you've already told the parties that, look, people file Summary Judgment Motions all the time, but that doesn't allow discovery to cease. And I think you've made comments in two of the hearings to that effect.

And nevertheless, what we had here was a little bit extraordinary because the parties had agreed months before that we would reciprocally exchange privilege logs. And we agreed to that. Month by month, each side was doing that. And then, out of the blue, in June, we were told that the Government was not going to produce privilege logs anymore until Judge Fitzgerald ruled on their Rule 16 Motion, which they then filed ten days later, and essentially told us that

won’t do anything further on their existing privilege logs and effectively told us that they won't do anything further until we tell them how they're supposed to revise their privilege logs.

And the state of play is important here because there are thousands of entries on the Government's privilege logs, all of them associated with an assertion of the deliberative process privilege that effectively prevent us from challenging the particular (indisc.), making it impossible for us to provide to you an in-camera selection or designation because they are so vague that there's nothing we’ve got in it that tells us or gives us the kind of information that we would need to be able to challenge their assertion.

And I am mindful, as we discussed last time, that it's very difficult for you in a vacuum to decide that issue.

(Recording: "A participant has joined the conference.")

And then we are not asking that you decide issue today (indisc.).

The third issue for us is to discuss with you a briefing schedule for our Motion to Compel at this juncture, given the failure of the Government to continue producing privilege logs, their refusal to amend their privilege logs, and their inability at this juncture to comply with requirements of what should be in a privilege log.

In fact, round it out, we sent to them a case.

Specifically, to give them the example of the detailed privilege log that is required.

And even in the face of having provided them with an example that they asked for, has essentially said to us, we're not going to do anything further on our privilege logs until Judge Fitzgerald rules on this motion.

And what this amounts to -- again, now here we are in -- in August on a case that they filed seeking billions of dollars in damages -- is a continued unilateral effort to control the flow of discovery, to thwart our efforts to get the information that we need that is relevant to, not only the issues that are teed up in the Summary Judgment Motion, but that are teed up in the remaining counterclaims, regardless of what happens at the Summary Judgment stage.

And that's why we're before you. There is no justification for the Government to decide unilaterally to withdraw from the agreement that they entered into to produce privilege logs. There's no basis for them to refuse to amend their existing privilege logs.

Instead, what we got, after we told them that we were going to do this –- because we got a letter from them essentially saying, "Well, we want you to revise your privilege logs."

And we told them, "Okay, we are, and we're going to give all of our revised privilege logs by the end of August,"

which we committed to them in writing.

And even in face of our revising our privilege logs, which of course are not dependent upon -- are not dependent upon the deliberative process privilege claims, there –- there's more traditional attorney-client and work product.

Even in the face of our telling them we would get them revised privilege logs from this matter by the end of August, they have steadfastly refused to amend theirs, and instead manufactured what ended up being the two claims that they want to bring before you today.

And so, essential, we're asking is the Court to tell the Government "You cannot withdraw from the agreement you made and you cannot cease producing privilege logs that adequately described insufficient basis," their assertion of deliberative process privilege, so that we can proceed to bring the motion we intend to bring, and more importantly, to get the discovery we're entitled to.

THE COURT: All right. So who is going to speak on behalf of the United States?

MR. FREEBORNE: Your Honor, Paul Freeborne.

THE COURT: Okay.

MR. FREEBORNE: To bring us back to the previous cause, we -- so we alerted the Court that we have pending before the Court three motions.

And now, as Mr. Schindler has indicated, we have a

Rule 16(b) Motion that's pending before the Court. And it will be heard -- all those motions will be heard on September 17th.

What we have said to United is, efficiency dictates that the Court first rule on those motions, which include cross-cutting legal issues, so that we know -- all parties, frankly know -- what -- what information and issues are in the case and what are out.

From our prospective, it doesn't comport with the 26(b)(5) for us to be asserting privilege over information that's not otherwise discoverable. And so that's why we've held abeyance further privilege logs.

To be clear, we are continuing to produce documents and, a demonstration of good faith, that we are proceeding with discovery, to the extent possible, recognizing that some of those documents may also (indisc.) be determined to be irrelevant by the Court. So that's the privilege log issue.

With respect to our privilege assertions, we've explained that we are -- we are endeavoring with the agency to provide a greater explanation.

What I simply asked United to do is, "What, specifically, are you seeking?" so that we're (indisc.) at the end, that whatever we provide them is deemed to be insufficient.

They refused to engage on that. And then, by way of example, we said, "Look, your privilege logs are equally

deficient, and what do you intend to do to correct the deficiencies in your log?"

And -- and the universal documents includes not just the litigation documents that I believe Mr. Schindler alluded to, but it also includes litigation documents that include thousands of documents.

MR. SPEAKER: From the investigation?

MR. FREEBORNE: From the investigation, sorry. Thank you.

So the -- so we said -- we reached out to them to try to engage in a dialog as to what they believe are the parties' reciprocal obligations in terms of describing documents subject to privilege, and they refused to engage on that.

And then when I asked about timing with respect to the investigative documents, they refused to tell us a date certain for that, and yet are insisting that we provide our explanation yesterday.

It's just simply unfair. It's inequitable. So in sum, what we are seeking is an efficient cost, whereby the Court first rules (indisc.) of discoverable information is determined by the Court.

We will then provide an explanation to United that hopefully satisfies them. We continue to be open to a dialog as to the description they think is necessary.

And with respect to their logs, Mr. Tarosky can speak

to that. But they should -- if they're going to hold us to a standard, they're obligated to -- to their -- theirs should be held to that same standard.

And as you know, your Honor, that, while we have motions disputing the relevancy of certain information that they're seeking in discovery, they don't have a parallel motion, so they should have done this yesterday.

So, your Honor, we believe that we fully comported with our obligations under Rule 26(b)(5) and -- and seeking to serve privilege logs until the Court rules.

And I'll hand it over to Mr. Tarosky to speak to our issues with respect to their privilege logs.

THE COURT: All right, thank you.

MR. TAROSKY: Adam -- thank you, Judge. Adam Tarosky for the Government.

We've been in a dialog with United for some time over their log entries for their attorney-client privilege assertions, many of which we have said are grossly inadequate for many of the same reasons that they said our entries are inadequate.

And just to give the Court a few examples, in logs they have produced, they have described document as "regarding compliance with legal and/regulatory requirements," without further explanation; or "regarding internal audit," without indicating what audit or what the audit was about.

And United, we believe, has recognized the deficiency, and as Paul said, with respect to the litigation logs, have committed to revising their entries to make them more specific inadequate.

But to -- but with respect to the investigation logs, that is the over 25,000 documents that United withheld as privilege during the course of our investigation -- although they have said they will look at them and revise them and are revising their entries, they haven't given us a time by which we -- they will do so.

And they've indicated that it won't be until after -- or likely won't be until after the arguments on the Government's pending motions.

And so we feel that that issue is right now and that we need help from the Court in getting the more fulsome explanations that we need for the over 25,000 documents that United withheld during the investigation.

THE COURT: All right. Anyone else? Anyone else wish to speak at this time?

MR. SCHINDLER: Your Honor, can I -- may I respond? It's Mr. Schindler.

THE COURT: Sure.

MR. SCHINDLER: I think a number of the comments from Mr. Freeborne and Mr. Tarosky are actually informative of -- of the issues (indisc.).

Because what you heard was Mr. Tarosky say that our logs contain some of the same deficiencies that theirs contain.

The distinction is we have said to them, "We are producing revised logs by the end of August, with respect to the actual litigation, and that we are -- have already committed to the proposition of revising in the logs that were produced during the five-year-long investigation.

So the difference is, we said, "We're doing it," and what they've said is, "No. We're not going to. We're going to wait. We're not going to do this and we're going to wait under the auspices of this notion of deficiency."

Which there's the same argument they made eight months ago; same argument they made four months ago, that somehow their determination of quote, unquote, what's sufficient allows them unilaterally to -- to withdraw from their agreement and to cease providing logs or to amend their own logs.

The second thing we heard from Mr. Freeborne is that, apparently, they did not previously consult with the agency before asserting deliberative process privilege, and they are now, for the first time, doing that. And what he said is we're not willing to engage with them to tell them how their logs are deficient.

But with all due respect, it's not for us to tell them how to properly prepare a privilege log, and it's not true

that we wouldn't engage with them.

To the contrary, we told them, "Look, here's a case that tells you exactly how and what should be appropriately put into a privilege log asserting deliberative process privilege.

Because in the 7,600 doc -- entries that we have on their log are literally things like almost 2,000 documents that are withheld as privilege literally described solely as reflecting internal agency deliberations regarding the (indisc.) methodology, period. That's all we get.

So we don't have any basis -- their so vague on their face, we don't even have any basis to tell them how we would amend them because we don't have access to that information. And we just heard from Mr. Freeborne, apparently they hadn't even consulted with the agency on the front end to come up with the log entries they put.

So there is a huge disconnect between how the parties are behaving here. We agreed to amend ours. We're producing and committed to giving them the litigation-related logs by the end of August. From them, we get nothing.

We committed to (indisc.) the investigation logs that we produced over the five years of this investigation. Couldn't give them the date certain because it's going to take a while. For them, we get nothing.

And this is the kind of unilateral process that has been unfolding now since the beginning of this case, and it's

hamstringing our ability to proceed.

And I appreciate that Mr. Freeborne believes that it would be more efficient in their view to essentially proceed the way they want to proceed, but that's just not the way litigation goes. It's got to be a two-way street, and that's not what we're getting.

And if we were to take a comparison of the number of documents that we've produced, not just in the investigation, but in the litigation itself, and/or the laws that have been produced in the commitment to -- to redo them, it continues to be a fundamentally one-way street. And that's the problem for us in this case.

THE COURT: All right. So thank you very much.

MR. FREEBORNE: Your Honor?

THE COURT: Yeah, go ahead.

MR. FREEBORNE: This is Paul Freeborne. I'm sorry.

So with respect to the -- the treatment of the parties, your Honor, we, again, as I noted, we have pending motions before the Court that will fundamentally address the issues that are in the case. There are no parallel motions on United's side, so the parties are not equally situated in that regard.

And I'm -- I don't purport to be the final arbiter of efficiency, but from our prospective, it seems to be more efficient to allow the Court to rule on what is otherwise

discoverable information under 26(b)(5), and then to have the Government assert and perfect on that.

And with respect to perfecting the privilege, your Honor, or explaining the privilege, the case law that Mr. Schindler references requires references of declaration.

So that's what we've been working with the agency to see if that we can do that, so that we can provide a more fulsome explanation in the hope of obviating any privilege disputes.

So and that address -- I think that addresses both of Mr. Schindler's points.

THE COURT: All right, thank you.

So here are my thoughts on this. And, you know, I'm the last person to actually invite motion practice.

Now, this doesn't improve my workload, but, you know, I think we're getting to the point where I'm not sure how much value there is to the parties in -- in the informal process.

Because, generally, what I try to do is hear parties out on an issue and say to them, so if this came to any motion, I think this is how I would approach it so the parties can make an informed decision about whether it's worth their time and money to file a motion or whether or not, you know, given my leanings, it makes more sense to try and resolve it a different way.

So that's -- that's my general practice, would be

informal discovery conference. And -- and I will tell you that one of the toughest issues that I find to resolve on an informal discovery call is issues of privilege.

Because for discovery purposes, that usually often will raise, really, a legal issue that is -- is more difficult for -- for me to resolve without looking at the logs themselves and –- and the types of documents.

But having said that, you know, it does seem to me that we're back to a place that we were previously at with the United States. And I respect very much your desire to do this in an efficient manner and I know you're working hard and you're very busy.

But, you know, I have limits to my authority. There's limits to what I can do. And so I can't -- I can't say to parties, "Oh, you have a potential motion that someday may culminate a particular claim or defense. Sure, we'll stop discovery on that."

I mean, I understand this case may be a little more indifferent in the sense that the kinds of motions that you've brought, you feel very confident, in some fashion, are going to really narrow the case and limit the claims and defenses in the case and focus the discovery. And maybe that's true.

But -- but in general speaking, if I adopted the practice you're suggesting that I adopt, you know, parties would be here every single day, saying, "Hey, I filed a Motion

to Dismiss. I don't want to respond to their discovery."

So it's not -- that's not a general practice that we accept from Magistrate Judges who are managing discovery in a case.

We take our cues from the District Judge who sets the schedule in a case and gets to decide whether or not discovery is stayed or not stayed. And I haven't heard anything from Judge Fitzgerald.

I mean, you initiated the case; you knew the volume of the case; you knew the response that you would likely get from United; you are not new to this kind of litigation.

So it was, you know, that the -- the volume of work involved in responding to discovery requests and participating in this case was something the Government needed to kind of assess before they filed the complaint in this action.

And if it was a situation where you knew that you were going to need a stay until certain fundamental issues were resolved, that Stay Motion needed to be filed a long time ago.

And I haven't seen -- I mean, I've seen the motion that was filed before Judge Fitzgerald that's pending now, but there are ways to get emergency relief.

I'm not suggesting that you should. This is not my recommendation. I am not recommending that you file such a motion or ex-parte application, but there are procedural mechanisms available for parties who think they need immediate

relief in some fashion from the District Judge. Again, I'm not endorsing that. I'm just saying it wasn't done here.

So in the absence of an order from the District Judge staying discovery, I apply the Federal Rule. And the Federal Rules say after a certain point, you know, discovery is open and -- and going forward.

So I can apply periods of relevance and proportionality as I go forward, and that's -- those are tools for me to limit discovery. But I can't simply say no discovery goes forward because there's a procedural motion out there. That's just not a practice that we would -- that we could apply fairly to parties.

So you know -- so, again, if this came before me and the Government's argument was, you know, we really wanted to wait until Judge Fitzgerald adjudicated our relevance issues, you know, and our request for a stay in September, and this was brought before me before that, I would say I can't stop discovery on the potential that a judge may, someday, agree with you on that issue.

So -- so that -- that's how I would respond if -- if this issue of whether or not the Government has an obligation to participate right now came before me.

On the issue of the -- the privilege logs, that's a difficult issue. It comes up quite often. Because the test in Rule 26 is not entirely helpful. The test is, under Rule

26(5)(a)(ii), "Describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."

And so -- and I don't know the case that Mr. Schindler provided to the Government, but, you know, in looking at many cases on this issue, it's a very fact-intensive inquiry dependent upon the nature of the type of documents, the type of privilege being asserted, and whether or not I find that the information provided in the -- in the privilege log would allow your opponent to assess the claim; to decide whether or not it's a properly asserted claim of privilege.

And -- and so, you know, I don't -- many times in discovery, parties complain that they shouldn't be required to do something because the other side didn't do it particularly well.

It -- it’s not a -- discovery is not a tit-for-tat kind of process. It's not like I look to see what one side did in deciding whether the other side's log is adequate.

I look at them independently and ask the question, "Would their opponent have an ability to assess the claim, given the information revealed in this log?"

So I can't assess, as I sit here now, whether or not the Government's logs are adequate or United's logs are

adequate. I would only be able to make that determination if it was really placed in front of me and I looked at, specifically, what you are stating in the logs.

So I realize that's -- that's probably not the answer that either side wanted, but that's, you know -- my approach would be, I would -- I would not uphold the Government's decision not to participate at this time. I would feel obligated to tell them they have to participate until Judge Fitzgerald makes some type of a ruling.

So right up to, you know, September 17th, you have to participate. And -- and the log issue I couldn't resolve until it was put in front of me.

MR. LEE: Your Honor, this John Lee. May I ask a point of clarification?

THE COURT: Sure.

MR. LEE: We take to heart, your Honor's statements about procedural mechanisms in place and how to pursue them. We have discussed with United Counsel the possibility of seeking some sort of request for a stay.

Is it your Honor's view that such a request -- if we consider that further and decide to pursue it, that that's (indisc.) the request should be made (indisc.) Judge Fitzgerald as opposed to your Honor?

THE COURT: Yes.

MR. LEE: It seems to be -- okay.

THE COURT: I mean, I, you know -- there may be some case out there in which the District Judge has issued an order or said something in a proceeding or contacted me personally and said, "I now want you to handle the phasing of discovery. I want you to handle that."

And so if that's actually articulated in an order to me or if I can do phasing of discovery without prejudicing either side, yeah, sometimes I will handle it that way.

But to actually stop discovery to say to a party, "You are no longer obligated to respond to discovery," in my opinion, that -- that interferes with the District Judge's scheduling order.

And -- and I know you're aware of this and -- and other Counsel are too, that in a district like the Central District where we have, you know, a large number of District Judges, there's no uniform practice.

There are District Judges here who want the discovery to proceed immediately regardless of the case and to proceed until they say it's not to proceed. And there's others that are -- have a different approach.

So for me to -- to, you know, guess as to whether or not the District Judge wants me to stay discovery or not, I think would interfere with that Judge's decision making on the schedule of the case.

MR. LEE: Very well, your Honor.

MR. SCHINDLER: Your Honor, it's David Schindler. One last, just a procedural issue.

With respect to the motion that we intend to bring to compel *vis-à-vis* the deliberative process privilege issue, do you -- given the timeline here and the dragging, what we ask is the ability to perhaps do this on a little bit more expedited schedule than we would otherwise end up in.

Because we're going to end up at this point, depending on whether we schedule this for the twenty -- right now, probably, we'd have to schedule it for the 25th of September before you.

Do you have any views on a briefing schedule, a timeline, anything that you can share with us? Because otherwise, we're going to end up, again, losing another six weeks at this point.

THE COURT: Well, so it depends on, you know, the volume of the issues you're presenting to me.

I mean, I have a lot of other matters going on, and so, you know, there are times in which people think something is very urgent and they'll present to me a discovery motion with, you know, a multitude of complex issues, and then ask it to be heard, you know, the following Tuesday.

That's -- it's really pretty difficult to accomplish and do it in a -- in a careful, thoughtful way.

So, you know, the complexity of these issues and the

range of these issues makes me believe that you're going to need some time for us to consider what you've briefed.

So, you know, I mean, I'm -- I'm looking -- you can put it on any day -- any Tuesday in September. And if you need to have it heard on shortened time for some reason, you know, we generally can accommodate you.

But, you know, it's not the kind of thing where I think it would be appropriate to have it heard on tremendously shortened time.

MR. SCHINDLER: Yeah, agree. We're not -- we agree with that. We -- we'd only be bringing the one motion and one issue at this point, which is the Government's improper assertion of the deliberate process privilege. So that's the only thing we're talking about.

But we're certainly not going to bring it on emergency shortened time basis. Just wanted some feedback from you on account of your calendar and where things stand.

But we're going to schedule it for some time in September to be sure. And want to make sure you have the benefit of a briefing from both sides on not only the substance of what should be in the Government's privilege logs *vis-à-vis* the deliberative process assertion, but also our fundamental belief that the Government has abused that, and therefore, request that they compel production of materials that are being withheld.

So that's the only issue that's going to be on it from our prospective and we're not going to burden you with any other issues at this time.

THE COURT: All right. So like I said, you don't have to clear a date. Any Tuesday at 10:00 a.m. is when I hear motions. And, you know, if you need to be heard on shortened time for some reason, then you need to either get your opponent to agree to that or file an ex-parte application and a proposed order with cause for hearing in a shortened time.

MR. SCHINDLER: Thank you, your Honor.

THE COURT: All right. Is there anything further at this time?

MR. FREEBORNE: Your Honor, I would just note that each time we have to -- we're expected to perfect the privilege at this point, again, I would note my objection in terms of what I said before.

But also agency resources, I mean, we -- this is -- we're dealing with -- because of the -- from our prospective is overly broad discovery, we're -- we're asked to perfect with respect to thousands and thousands of entries that, again, are driven by United's overly broad discovery.

So we would ask for some time. But we'll first try to work that out with Mr. Schindler.

THE COURT: Is that Mr. Freeborne speaking?

MR. FREEBORNE: Yes. Sorry, your Honor, yes.

THE COURT: Oh.

MR. FREEBORNE: Paul Freeborne.

THE COURT: So what I was saying, Mr. Freeborne, I appreciate the challenge. And, you know, in this Court, we have many cases that have, you know, voluminous document productions and privilege logs in such situations are always tough.

I really would strongly recommend one of two things. You know, either you come up with categories that you and Mr. Schindler can live with, whereby the Declarant can identify the category of documents over which the Government is asserting the deliberative practice privilege and the underlying factual basis for the deliberative process privilege as to that category of documents.

So, you know, 2,000 doc -- I'm just -- hypothetical. Two thousand documents that were involved in, you know, coming to the decision that the Government would do X, you know, and a date, you know maybe restriction on those documents.

And -- and that might be a mechanism for you to simplify this process somewhat. And if that isn't successful, the other thing I'd encourage you to talk to Mr. Schindler about is -- is some random sampling.

If we're -- I don't know how many thousands of documents you're talking about, but if there was a way in which you and Mr. Schindler could come to an agreement on a fair

random sampling of the documents and the kinds of factual basis/bases that you are offering for the assertion of the privilege for those documents, that might be also an efficient way for us to -- to go forward.

So I'm just suggesting those ideas to cut down on the volume.

MR. FREEBORNE: Very well, your Honor. Thank you. This is Mr. Freeborne. Thank you. We appreciate it. We'll try to work with Mr. Schindler on that.

THE COURT: Great. Thank you both very much.

MR. SPEAKER: Thank you, Judge.

THE COURT: Thank you.

MR. SPEAKER: Thank you, your Honor.

(Proceeding adjourned)

CERTIFICATION

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

Signed

August 19, 2018

Dated

TONI HUDSON, TRANSCRIBER