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22 WESTERN DIVISION

23 UNITED STATES OF AMERICA *ex*
24 *rel.* BENJAMIN POEHLING,

25 Plaintiffs,

26 v.

27 UNITEDHEALTH GROUP, INC., *et al.*,

28 Defendants.

No. CV 16-08697 MWF (SSx)

UNITED STATES' *EX PARTE*
APPLICATION FOR A TEMPORARY
STAY OF MOTION TO COMPEL
DISCOVERY PENDING ISSUANCE OF
RULINGS

Pursuant to Local Rule 7-19, the United States of America hereby respectfully applies *ex parte* for an order temporarily staying the briefing and consideration of the United Defendants’¹ Motion to Compel the United States to Produce Documents pending this Court’s issuance of rulings on the United States’ and relator Poehling’s motions heard on September 17, 2018. (See Dkt. Nos. 234, 235, 236, and 261.)

A memorandum of points and authorities and a declaration in support of this application and a proposed order are submitted herewith.

Pursuant to Local Rule 7-19, counsel for United were advised of this application. Counsel for United stated that United opposed this application and would file an opposition. See Declaration of John E. Lee (“Lee Decl.”), ¶¶ 6-7.

Dated: October 3, 2018

Respectfully submitted,

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/S/ John E. Lee

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¹ “United” or “United Defendants” is used to refer to all defendants in this action.

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24 *rel.* BENJAMIN POEHLING,

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26 v.

27 UNITEDHEALTH GROUP, INC., *et al.*,

28 Defendants.

No. CV 16-08697 MWF (SSx)

UNITED STATES' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF *EX PARTE* APPLICATION
FOR A TEMPORARY STAY OF
MOTION TO COMPEL DISCOVERY
PENDING ISSUANCE OF RULINGS

I. INTRODUCTION

Late Friday afternoon on September 28, 2018, at 4:56 p.m. Pacific Time, 7:56 p.m. Eastern Time, counsel for the United Defendants served by electronic mail their portion of a Joint Stipulation Regarding United’s Notice of Motion and Motion to Compel the United States to Produce Documents (“Joint Stipulation”) pursuant to Local Rule 37-2.2. *See* Lee Decl. Ex. 1. In serving their Joint Stipulation, United required that the United States provide its portion of the Joint Stipulation, “along with any supporting declarations and exhibits, on or before October 12.” *Id.*, Ex. 2 (Sept. 28, 2018 E-mail from David W. Rowe). United’s e-mail service of the Joint Stipulation was made in response to the United States’ earlier request, made on September 25, 2018, that if United insisted on moving forward with their Motion to Compel the production of voluminous documents subject to the deliberative process privilege, United “allow [the United States] to bring a duly noticed motion seeking a stay before Judge Fitzgerald.” *Id.* (Sept. 25, 2018 E-mail from Paul Freeborne).

The United States’ request was eminently reasonable. Not only are United’s discovery requests implicating the deliberative process privilege extraordinarily burdensome and oppressive, they seek documents of no relevance given the nature of this False Claims Act (“FCA”) case, which focuses on United’s conduct and knowledge. Internal agency deliberations can shed no meaningful light on United’s conduct or knowledge. The United States has thus objected to requests on relevance and burden grounds, and sought threshold rulings from the Court that define the appropriate scope of Rule 26(b) discovery in this matter. Three of the motions were heard on September 17, 2018 and the Rule 16(b) motion requesting a Scheduling Order defining the limits of discovery has now been fully briefed and submitted. The United States seeks a stay of any consideration of United’s motion while the Court rules on the pending motions—or seeks further guidance from the parties regarding the scope of discovery. Doing so will conserve limited resources of the affected agency, the Centers for Medicare and Medicaid Services (“CMS”), in perfecting privilege over the thousands of documents

1 implicated by United's overly broad discovery requests for internal agency deliberations.
2 It will also undoubtedly promote judicial economy.

3 Judge Segal has recognized that a ruling by this Court on the motions heard on
4 September 17, 2018 could be helpful and stated that she believed that it was up to this
5 Court to determine the relevance of particular issues. See July 12, 2018 Hr'g. Tr., Ex. 3,
6 at 63 ("I know you have a hearing before him on September 17th. But I do think you
7 could, you know, do a short motion and ask for it to be heard perhaps at a certain time on
8 the issue of, you know, a stay of discovery or a stay of the discovery motion under the
9 theories you've put forward. Because again, I don't think it's up for me unless Judge
10 Fitzgerald then referred that motion to me"). And at the September 17th hearing,
11 this Court also recognized the importance of a relevance determination to set the proper
12 bounds of discovery in this case. Sept. 17, 2018 Hr'g Tr., Ex 4, at 55-56 ("At some
13 point Judge Segal and I are just going to have to talk among ourselves about where it
14 makes sense for us to draw the line. . . . Here I will have to talk to her and figure out
15 how are we going to resolve this where it's fair to the two of us and fair to the parties.").

16 Rather than allow this Court to issue its rulings on the pending motions, or even
17 allow the United States to bring a duly noticed motion seeking a stay pending such
18 rulings, United has chosen to serve its portion of the Joint Stipulation on September 28,
19 2018, insisting that the United States provide its portion of the Joint Stipulation,
20 declaration, and exhibits by October 12, 2018. United cites to no urgency for doing so.
21 Nor can it. This Court has not yet set any discovery cut-off or other dates in this case.

22 By this application, the United States respectfully requests a temporary stay of the
23 briefing relating to and consideration of United's Motion to Compel pending rulings by
24 this Court on the matters raised by the government's motions. (See Dkt. Nos. 234, 235,
25 236, and 261.) Doing so will permit discovery disputes to be focused on information
26 that is properly "discoverable," as defined by Fed. R. Civ. P. 26(b)(5).¹

27
28 ¹ This application only seeks to stay United's Motion to Compel, which appears to
seek only deliberative process privileged documents. Other discovery remains ongoing.

1 Advised of this application, counsel for United stated that they opposed this
2 application and would file an opposition. See Lee Decl., ¶¶ 6-7. Counsel for United are:

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9 **II. ARGUMENT**

10 **A. Ex Parte Relief Is Warranted Because United Has Given the**
11 **United States an Arbitrary October 12, 2018 Deadline to**
12 **Complete Its Portion of a Joint Discovery Stipulation**

13 *Ex parte* applications are appropriate where “there is some genuine urgency such
14 that ‘immediate and irreparable injury, loss, or damage will result to the applicant before
15 the adverse party or his attorney can be heard in opposition.’” *In re Intermagnetics*
16 *America, Inc.*, 101 B.R. 191, 192 (C.D. Cal. 1989) (citing Fed. R. Civ. P. 65(b)); *see also*
17 *Mission Power Engineering Co. v. Continental Casualty Co.*, 883 F. Supp. 488 (C.D.
18 Cal. 1995) (*ex parte* applications are appropriate where the moving party’s cause will be
19 “irreparably prejudiced” and the moving party was not at fault).

20 Here, the United States, including CMS, will be irreparably injured if it is
21 required, as United insists, to perfect privilege over documents subject to the deliberative
22 process privilege. As described below, while the requested documents are extremely
23 burdensome to review and produce, they are of no meaningful relevance in this action.
24 Given so, the United States has brought several motions seeking rulings by this Court
25 that will necessarily have an impact on the scope of the issues properly in this action,
26 which motions were heard on September 17, 2018 and are currently awaiting rulings by
27 this Court. The United States’ has also filed a motion requesting the Court to issue a
28 Scheduling Order defining the relevant issues in this case. Under these circumstances,

1 compelling the United States, including CMS, to undertake this process at this time
2 would likely cause it irreparable injury by having to perfect privilege over documents
3 that may ultimately be determined to be irrelevant by the Court.

4 Moreover, given United's demand that the United States provide its portion of the
5 Joint Stipulation by October 12, 2018 so that United can seek a hearing before Judge
6 Segal on November 6, 2018, *see* Lee Decl., ¶ 7, the United States, including CMS,
7 would be irreparably injured absent *ex parte* proceedings. *See Scott v. City Council for*
8 *the City of Santa Monica*, 2017 WL 4675720, at *4 (C.D. Cal. 2017) (*ex parte* relief
9 granted where application "cannot be heard on regular motion because preliminary
10 injunction will be decided before any motion can be heard").

11 Further, the United States is not at fault. The United States promptly sought to
12 bring legal issues to the attention of this Court and has filed four motions, including a
13 Motion Pursuant to rule 16(b)(3) for Issuance of a Scheduling Order Modifying Extent
14 of Discovery (Dkt. No. 261). These motions have been briefed, three of them were
15 heard on September 17, 2018, and the parties are awaiting rulings by the Court.²
16 Additionally, the United States acted promptly to bring this *ex parte* application shortly
17 after being served with United's Joint Stipulation on September 28, 2018.

18 In contrast, United has chosen to press its discovery issues with a false sense of
19 urgency and without regard to the Court's ability to decide what evidence is truly
20 necessary for the parties to either prove or defend the allegations that United knowingly
21 obtained and retained Medicare funds to which it was not entitled by avoiding its
22 obligation to delete invalid diagnosis data. Even though the Court's rulings on the four
23 motions are pending, and there is currently no discovery cut-off date, United has sought
24 to upend the efficient administration of this case by prematurely forcing the Magistrate
25

26
27 ² While United began serving its discovery requests in August 2017, the
28 voluminous document search and collection process has required some time to
undertake. Moreover, the United States filed three of the four legal motions on May 22,
2018 and the September 17, 2018 hearing date was set as a result of the briefing schedule
that was agreed upon by the parties.

1 Judge to determine critical issues implicating the deliberative process privilege. It has
2 also sought to cause the United States, including CMS, to waste taxpayer resources
3 (including monies) perfecting privilege over internal agency deliberations by arbitrarily
4 fixing October 12, 2018 as the date by which the United States must provide its portion
5 of the Joint Stipulation, along with any declarations and exhibits.

6 Recently, on September 25, 2018, the United States informed United that it
7 “would prefer to avoid an *ex parte* process and would request that United consider a
8 hearing date on its discovery motion that would allow [the United States] to bring a duly
9 noticed motion seeking a stay before Judge Fitzgerald.” Lee Decl., Ex. 2 (Sept. 25, 2018
10 E-Mail from Paul Freeborne). United rejected even this request, forcing the United
11 States to file this *ex parte* application.

12 **B. The Disputed Documents Are Subject to the Deliberative Process**
13 **Privilege and Are Extremely Burdensome to Review and Process**

14 United has requested numerous documents protected by the deliberative process
15 privilege. United has requested documents relating to CMS’ and the Secretary of HHS’
16 internal deliberations about numerous agency decisions and actions, including, for
17 example: (i) HHS’ issuance of Part C and D regulations relating to risk adjustment
18 payments (that is, HHS’ rulemaking files); (ii) CMS’s calibration and recalibrations of
19 the HCC payment model and its determination of the coefficients for the HCCs; (iii)
20 CMS’ administrative audit (its Risk Adjustment Data Validation (RADV) audit)
21 extrapolation methodology, including whether its methodology should include any
22 payment error rate adjuster because the payment model (the CMS HCC model) is
23 calibrated based on unaudited diagnosis data; (iv) CMS’ analyses about whether the use
24 of unaudited diagnosis data to calibrate the CMS HCC model and determine the
25 coefficients for the HCCs results in any systemic underpayment; (v) HHS’ determination
26 of the national Medicare Part C Risk Adjustment (“RA”) error rate reported publically
27 each year; and (vi) HHS’ determination of the statutory Coding Intensity Adjustor,
28 which is published each year. Given the overbreadth of these requests, the United

1 States' privilege log now includes approximately 21,400 documents (including some
2 duplicates) protected in whole or in part by the deliberative process privilege. Absent a
3 ruling from the Court that limits scope, this number will increase as discovery proceeds.

4 United contends that, in order to satisfy its burden of perfecting deliberative
5 process privilege, the United States must meet all of the following requirements as to
6 *each* disputed document:

7 (1) a formal claim of privilege by the *head of the department* possessing
8 control over the requested information, (2) an assertion of the privilege
9 based on *actual personal consideration by that official*, and (3) a *detailed*
10 *specification* of the information for which the privilege is claimed, along
11 with an explanation of why it properly falls within the scope of the
12 privilege.

13 Ex. 1 at 15 (emphasis added) (citing *Coleman v. Schwarzenegger*, 2008 WL 2237046, at
14 *4 (E.D. Cal. & N.D. Cal. May 29, 2008)). Thus, United expects that the Administrator
15 of CMS not only formally invoke the privilege, but also do so "based on [her] actual
16 personal consideration" of many thousands of documents [so far approximately 21,400
17 documents] and provide a "detailed specification" and "explanation" regarding the
18 information for which the privilege is claimed. Even though rulings are pending that are
19 anticipated to have significant impact on the proper scope of discovery and whether
20 these documents have any relevance, United now demands that the United States and
21 CMS do all this by October 12, 2018.³

22 United's urgency is false. Given the lack of any scheduled discovery cut-off or
23 other dates in this case, there can be no real urgency here. Given further that the parties
24

25 ³ While the government initially sought to undertake to complete its review and
26 processing of the documents subject to the deliberative process privilege (most of which
27 are irrelevant), the burden of perfecting the privilege at this stage has proved
28 unworkable. To address this and to aid in the resolution of this dispute, the government
offered to provide United with a draft declaration regarding the privileged documents,
but United flatly and unequivocally rejected this proposal. See Ex. 2 at 7 (Aug. 28, 2018
E-Mail from David Schindler, stating "[u]fortunately, your proposal does not address our
concerns . . .").

1 have now briefed and argued the four motions and the Court has taken them under
2 submission after the September 17, 2018 hearing, United can provide no real
3 justification for its impatience in refusing to await rulings from this Court.

4 **C. The Disputed Documents Have No Meaningful Relevance in this**
5 **False Claims Act Case**

6 United's requests for voluminous documents implicating the deliberative process
7 privilege are even less justified given their lack of relevance to the issues that are
8 germane in this case. United has often sought to justify seeking these burdensome
9 productions of documents largely on the grounds of their purported relevance to the
10 issues of knowledge or materiality, among other arguments it has made in this case. As
11 set forth more fully in the United States' and relator's moving and reply papers
12 submitted in support of their Joint Motion Pursuant to Rule 16(b)(3) for Issuance of
13 Scheduling Order Modifying Extent of Discovery, United's relevancy arguments lack
14 merit and should not be a basis for conducting improper discovery in this case.⁴

15 This FCA action requires the government to prove United's knowledge of its
16 unlawful conduct, here, its "knowing" avoidance or decrease of an obligation to repay
17 money to the government. Such knowledge naturally focuses on *United's* (not the
18 government's) state of mind and what it knew at the time of the misconduct. *See* Pls.'
19 Mem. of P.&A. in Supp. of Joint Mot. Pursuant to Rule 16(b)(3) (Dkt. No. 261-1) at 11-
20 14; Pls.' Reply Mem. (Dkt. No. 278), at 7-14. Try as it might, United cannot justify its
21 unfettered efforts at rummaging through privileged internal deliberations of countless
22 government employees and officials it never knew, never spoke with, never met, and
23 whose documents it never saw. These internal deliberations do not evidence United's
24 knowledge. United's meritless effort to manufacture some tenuous relevance cannot
25 justify its attempt to obtain wholesale access to CMS' internal documents.

26
27
28 ⁴ *See* Pls.' Mem. of P.&A. in Supp. of Joint Mot. Pursuant to Rule 16(b)(3) (Dkt. No. 261-1), at 8-14; Pls.' Reply Mem. In Supp. of Mot. Pursuant to Rule 16(b)(3) (Dkt. No. 278), at 6-17.

1 Nor does a materiality argument afford any basis to seek privileged documents.
2 The Risk Adjustment Processing System (“RAPS”), by design, relies on diagnosis codes
3 to automatically determine payment amounts. *See* Pls.’ Mem. of P.&A. in Supp. of Joint
4 Mot. Pursuant to Rule 16(b)(3) (Dkt. No. 261-1) at 8-11. Indeed, this Court has already
5 recognized this feature of the system and stated that “generalized knowledge does not
6 amount to actual knowledge of specific invalid diagnoses.” Order re Mot. to Dismiss
7 (filed Feb. 12, 2018), (Dkt. No. 212) at 21. United cannot justify embarking on an
8 expansive fishing expedition to further push its rejected generalized knowledge
9 argument. No CMS employee or official could have had actual knowledge of specific
10 invalid diagnoses unless the Medicare Advantage organization made the required deletes
11 in RAPS or otherwise provided CMS with the necessary detailed information about the
12 specific invalid codes so that CMS could have deleted them and recovered the
13 overpayment. Such details would have included the payment year, the plan number, the
14 beneficiary’s HIC number, and the code for the specific invalid diagnosis.

15 United has successfully deleted hundreds of thousands of specific invalid
16 diagnoses over the last decade. (*See, e.g.*, First Amended Complaint, ¶ 235.) It has
17 made these deletes in RAPS. And, in the past, when United has requested some
18 guidance from CMS about successfully deleting invalid diagnoses, CMS has worked
19 with United to recover the improper payments. (*Id.*, ¶ 332.) Discovery about knowledge
20 and materiality in this case should be limited to CMS’ processing of United’s deletes and
21 its recovery of improper payments from United. There is no basis for any additional
22 discovery, particularly overbroad discovery into internal agency deliberations, based on
23 their purported relevance to materiality or knowledge.⁵

24
25 ⁵ United makes a feeble effort to argue that not all diagnosis codes are
26 automatically paid and that “certain deletes” involve affirmative decisions by CMS
27 officials to process the deletes. Joint Stipulation, Ex. 1, at 28. United’s citation of its
28 own filing (Dkt. No. 274 at 15-16) is supported only by a “*see generally*” cite to
unspecified pages in their own declarations. *See* Dkt. Nos. 274-1, 274-3. These
declarations vaguely describe what appear to be technical issues encountered by United
in submitting deletes and are insufficient to justify unfettered discovery of CMS’s
processing of deletes for all Medicare Advantage organizations over the last decade.

1 Accordingly, the burden that United seeks to impose upon the United States,
2 including CMS, far outweighs any potential benefit that could result from allowing
3 United's premature Motion to Compel to proceed. Particularly given that motions heard
4 and submitted on September 17, 2018 are still pending this Court's rulings, a stay
5 pending the Court's rulings would conserve the resources of the Court and the
6 government and would be prudent at this juncture. Thus, the United States respectfully
7 requests a stay of the briefing and consideration of the Motion to Compel pending
8 issuance of the Court's rulings on the pending motions.

9 **III. CONCLUSION**

10 For the foregoing reasons, the United States respectfully requests that the Court
11 grant this application.

12 Dated: October 3, 2018

Respectfully submitted,

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23 UNITED STATES OF AMERICA *ex*
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No. CV 16-08697 MWF (SSx)

DECLARATION OF JOHN E. LEE IN
SUPPORT OF UNITED STATES' EX
PARTE APPLICATION FOR A
TEMPORARY STAY OF MOTION TO
COMPEL DISCOVERY PENDING
ISSUANCE OF RULINGS

DECLARATION OF JOHN E. LEE

I, John E. Lee, declare:

1. I am an Assistant United States Attorney in the Office of the United States Attorney for the Central District of California. Along with Department of Justice Trial Attorneys who are assigned to this matter, I have been assigned to represent the United States in the above-captioned action. I have personal knowledge of the matters set forth herein and, if called to testify, could and would testify competently thereto.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Joint Stipulation Regarding United's Notice of Motion and Motion to Compel the United States to Produce Documents, served by electronic mail on September 28, 2018.

3. Attached hereto as Exhibit 2 is a true and correct copy of an electronic mail chain consisting of communications between counsel for the United States and counsel for the United Defendants regarding discovery issues, with dates ranging from August 21, 2018 through September 28, 2018.

4. Attached hereto as Exhibit 3 is a true and correct copy of excerpts of a transcript of Telephonic Conference re Discovery held before the Honorable Suzanne Segal, dated July 12, 2018.

5. Attached hereto as Exhibit 4 is a true and correct copy of excerpts of Reporter's Transcript of Proceedings in this action, dated September 17, 2018.

6. On September 25, 2018, Paul G. Freeborne, counsel for the United States, advised counsel for United by electronic mail of the United States' intent to file an *ex parte* application in the event that United would not afford it adequate time to file a duly noticed motion for a stay. *See* Ex. 2 at 3.

7. On October 3, 2018, counsel for the United States Justin Draycott and I spoke with United counsel David Schindler and David Rowe. Mr. Schindler stated that he would seek a November 6, 2018 hearing date on United's Motion to Compel. Mr. Schindler stated that United opposed the *ex parte* application and would file an opposition. Mr. Schindler was advised that the opposition must be filed 24 hours (or one

1 court day) following service of the application.

2 I declare under penalty of perjury that the foregoing is true and correct.

3 Executed on October 3, 2018, at Los Angeles, California.

4
5 /S/ John E. Lee

6 JOHN E. LEE
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EXHIBIT 1

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA *ex rel.*
BENJAMIN POEHLING,

Plaintiffs,

v.

UNITEDHEALTH GROUP, INC., *et al.*,

Defendants.

CASE NO. 2:16-cv-08697-MWF (SSx)

[Discovery Document: Referred to
Magistrate Judge Suzanne H. Segal]

**JOINT STIPULATION
REGARDING UNITED'S NOTICE
OF MOTION AND MOTION TO
COMPEL THE UNITED STATES
TO PRODUCE DOCUMENTS**

*[Notice of Motion, Declaration of David
J. Schindler, and [Proposed] Order
filed concurrently herewith]*

Date: November 6, 2018
Time: 10:00 a.m.
Courtroom: 590
Judge: Hon. Suzanne H. Segal

Discovery Cutoff: TBD
Pre-Trial Conference: TBD
Trial: TBD

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[United to fill in after receiving the government's portion of the joint stipulation]

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1 **I. INTRODUCTORY STATEMENTS**

2 **A. United**

3 The government is withholding vast quantities of highly relevant documents
4 based *solely* on unsupportable assertions of the deliberative process privilege. The
5 government has not remotely made the required showing that *particular*
6 documents are covered by that privilege. On the contrary, the government instead
7 has adopted boilerplate explanations for withholding literally thousands of
8 documents created over the course of more than a decade. Not only are those
9 threadbare descriptions inadequate to sustain the privilege, but many of them
10 *undermine* it, suggesting that the documents contain factual matters rather than
11 deliberations about significant agency decisions. Moreover, it is has become
12 apparent that the Department of Justice failed to consult with the relevant agency
13 before making its sweeping privilege assertions. For these reasons alone, the Court
14 should compel the production of these documents.

15 The government expressly committed to providing a declaration from the
16 Centers for Medicare and Medicaid Services (“CMS”) by the end of September—
17 more than 6 months after producing its first privilege log and more than 3.5 months
18 after United’s request for such a declaration—claiming it would remedy these
19 deficiencies. Just days before it was supposed to provide the declaration, however,
20 the government reneged on its agreement and is now refusing to provide an agency
21 declaration until Judge Fitzgerald issues rulings on all four of the government’s
22 pending motions. The government is, yet again, improperly attempting to dictate
23 the flow of discovery in direct contradiction to Judge Fitzgerald’s standing order,
24 his comments during the scheduling conference, and repeated statements from this
25 Court that the government cannot unilaterally refuse to engage in discovery.

26 Even before the government’s abrupt about-face, the government was
27 unwilling or unable for months to provide any meaningful description of what its
28 declaration would look like or even the categories of documents it would cover,

1 claiming that doing so would not be “efficient or useful” before the end of
2 September. The government provided no meaningful details or assurances that it
3 could, or adequately would, support its expansive assertions of the deliberative
4 process privilege over many thousands of highly relevant documents. The
5 government outright refused to provide any detail regarding any of the individual
6 documents withheld, instead claiming in conclusory fashion that the no-longer-
7 forthcoming declaration would explain how undisclosed categories of documents
8 are both “predecisional” and “deliberative.” The government’s described
9 declaration merely pays lip service to its privilege assertions and does not satisfy
10 its burden of demonstrating the applicability of the narrow, qualified deliberative
11 process privilege. As this Court has noted previously, the government chose to
12 bring this lawsuit, and it is improper for the government to ignore its discovery
13 obligations or hamstring United’s defense by withholding critical documents.

14 Even if the government’s assertions of privilege had merit (and they do not),
15 the privilege is a qualified one and is readily overcome here by United’s need for
16 these critical documents. As detailed below, these documents are directly relevant
17 to the government’s sole remaining False Claims Act claim (a reverse False Claims
18 Act claim), including to show that: CMS officials themselves believe that
19 conducting one-way reviews is proper; United did not receive an overpayment;
20 United did not knowingly and improperly retain an overpayment; and United’s
21 alleged failure to delete codes did not materially impact the government’s decision
22 to continue paying and contracting with United. These documents also are directly
23 relevant to the government’s two common law claims, Payment by Mistake and
24 Unjust Enrichment, to demonstrate both that (a) the government was not mistaken
25 at the time it paid these claims—rather it is DOJ that is mistaken in pursuing a
26 theory predicated on the notion that CMS somehow did not know that United was
27 performing one-way looks—and (b) United was never unjustly enriched. Finally,
28 the documents that the government is withholding are relevant to interpreting the

1 meaning of the ambiguous contractual and regulatory provisions on which the
2 government relies, as well as to damages.

3 The government is the sole custodian of this relevant discovery, so United
4 cannot obtain it from a third party. The government's motive for attempting to
5 shield these documents is transparent: the limited evidence in United's possession
6 thus far—some of which the Department of Justice attempted to assert the
7 deliberative process privilege over, despite having produced it in response to a
8 Freedom of Information Act request—directly supports United's position (among
9 others) that CMS officials shared its views that conducting one-way looks was
10 perfectly appropriate.

11 Therefore, because the government has failed to satisfy its burden of
12 substantiating its privilege claims, and because United's need for these highly
13 relevant and critical materials outweighs any interest the government has in non-
14 disclosure, the Court should grant United's motion and compel the production of
15 all documents that the government is withholding solely on the basis of the
16 deliberative process privilege.

17 **B. Government**
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II. DELIBERATIVE PROCESS PRIVILEGE ASSERTIONS

A. United

1. Procedural and Factual Background

On November 17, 2017, the government filed a 166-page, 364-paragraph Amended Complaint-In-Intervention, alleging violations of the False Claims Act and two common law claims, Payment By Mistake and Unjust Enrichment, and seeking substantial damages and other remedies. On February 12, 2018, Judge Fitzgerald dismissed the government's three affirmative False Claims Act counts, leaving only a reverse False Claims Act count and the two common law claims.

United served its first document requests on the government in August 2017. Roughly 13 months later, the government has produced only approximately 47,600 documents but has withheld as privileged over 25,200 documents. *See* Exs. 1–7, United States' Privilege Logs Nos. 1–7.¹ Of those 25,200 withheld documents, the government has asserted *solely* the deliberative process privilege over approximately 21,400 documents.² And of those 21,400 documents, the government has only produced about 1,060 documents with redactions—meaning the government is withholding *in full* over 20,300 documents (95%) based solely on the deliberative process privilege. *Id.*

Rather than provide the requisite level of detail to sustain assertions of the deliberative process privilege, the government instead grouped these documents into incredibly broad categories on its privilege logs, often using identical descriptions for thousands of documents that span over a decade. None of these descriptions identifies a discrete policy decision, let alone a significant one, about

¹ Citations to “Ex.” materials refer to exhibits to the Declaration of David J. Schindler filed herewith.

² The government has also asserted the deliberative process privilege in conjunction with other privileges over approximately 1,880 documents. Only approximately 1,980 documents out of the approximately 25,200 that the government is withholding do not involve the deliberative process privilege.

1 which any alleged deliberations took place. Nor do any of these descriptions
2 describe how the particular documents are part of the deliberative process. The
3 government has made it effectively impossible to challenge any particular
4 document because there are virtually no descriptions of how a particular document
5 was part of any predecisional or deliberative process. The below examples
6 highlight the significant flaws in these privilege logs, which are replete with
7 similarly overbroad categories. *See id.*, United States' Privilege Logs Nos. 1–7.

8 The government is withholding:

- 9 • Approximately 6,400 documents “reflecting internal agency deliberations
10 regarding RADV audit methodology.” These documents span from
11 September 2003 to July 2017.
- 12 • Approximately 3,320 documents “reflecting internal agency deliberations
13 regarding calculation of RA error rate.” These documents span from
14 September 2004 to April 2017.
- 15 • Approximately 2,330 documents “reflecting internal agency deliberations
16 regarding calculation of RA factors/model.” These documents span from
17 January 2003 to April 2017.
- 18 • Approximately 1,680 documents “reflecting internal agency deliberations
19 regarding Advance Notice and/or Announcement and Call Letter.” These
20 documents span from January 2003 to April 2017.
- 21 • Approximately 1,390 documents “reflecting internal agency deliberations
22 regarding FFS adjuster.” These documents span from January 2004 to
23 May 2017.
- 24 • Approximately 1,010 documents “reflecting internal agency deliberations
25 regarding calculation of coding intensity adjuster.” These documents
26 span from November 2004 to March 2017.
- 27 • Approximately 970 documents “reflecting internal agency deliberations
28 regarding RA supporting documentation requirements.” These
 documents span from January 2004 to May 2017.

- 1 • Approximately 660 documents “reflecting internal agency deliberations
2 regarding” either “UHG RADV audits” or “non-UHG RADV audits.”
3 These documents span from March 2004 to May 2017.
- 4 • Approximately 635 documents “reflecting internal agency deliberations
5 regarding medical coding in support of RA payments.” These documents
6 span from March 2004 to May 2017.
- 7 • Approximately 545 documents “reflecting internal agency deliberations
8 regarding” “UHG RA activities” and “non-UHG RA activities.” These
9 documents span from October 2004 to February 2017.
- 10 • Approximately 500 documents “reflecting internal agency deliberations
11 regarding RA training materials.” These documents span from April
12 2004 to March 2017.
- 13 • Approximately 470 documents “reflecting internal agency deliberations
14 regarding coding guidance.” These documents span from June 2005 to
15 April 2016.
- 16 • Approximately 215 documents “reflecting internal agency deliberations
17 regarding” “return of overpayments to CMS,” “RA overpayment
18 analysis,” “recovery of overpayments,” “RA overpayment reporting
19 requirements,” and “CMS overpayment policy.” These documents span
20 from July 2006 to November 2015.
- 21 • Approximately 215 documents “reflecting internal agency deliberations
22 regarding coding intensity in MA Program.” These documents span from
23 August 2006 to September 2015.

24 Even a cursory review of these categories demonstrates the impropriety of
25 the government’s privilege assertions. It defies credibility to suggest that
26 deliberations over what RA audit methodology to adopt spanned 14 years or that
27 discussions of RA error rates are anything other than purely “factual” discussions
28 that fall far outside the deliberative process. These same temporal defects and
attempts to shield purely factual information are readily apparent in each of the
categories above.

1 United sent a letter to the government on June 15, 2018 that, among other
2 things, detailed the numerous deficiencies in the government's privilege log
3 descriptions and expressed United's concern that the privilege assertions had been
4 made by lawyers at the Department of Justice without any input from any relevant
5 agency. Ex. 8, United's June 15, 2018 Ltr. United requested that the government
6 (1) revise its privilege logs to provide the requisite detail about the information
7 over which the government claimed the privilege applied, and (2) provide a formal
8 claim of privilege by an appropriate agency official who had personally reviewed
9 the relevant documents. *Id.* The government refused to re-evaluate or revise its
10 privilege log descriptions, instead insisting that United needed to revise its own
11 logs first—the exact type of “tit-for-tat” discovery that this Court has explained is
12 improper. *See* Ex. 9, United States' June 29, 2018 Ltr.; Ex. 10, Tr. of Aug. 16,
13 2018 Hr'g at 22:18–20.

14 Despite United's commitment during a July 30 meet and confer to revise its
15 privilege logs (as the government requested), the government still refused to
16 address its deficient privilege logs and claimed that it needed to see United's
17 revised logs before it would even consider whether and how to revise its logs. *See*
18 Ex. 11, United's Aug. 2, 2018 Ltr.; Ex. 12, United's Aug. 9, 2018 Ltr. The
19 government demanded that United explain how to revise the privilege log
20 descriptions, but United explained that it could not do so because it had no insight
21 into the substance of the underlying documents—though United did point the
22 government to case law in which government agencies provided descriptions that
23 were much more detailed than the government's descriptions here and yet were
24 still found to be insufficient by the court. *See* Ex. 11, United's Aug. 2, 2018 Ltr.;
25 Ex. 12, United's Aug. 9, 2018 Ltr. During the July 30 meet and confer, United
26 also reiterated its concern that the Department of Justice had asserted the
27 deliberative process privilege without first consulting CMS.

28

1 United sought an informal discovery conference before this Court because of
2 the government's continued refusal to take any steps to ameliorate its deficient
3 privilege descriptions or commit to providing an agency declaration, in addition to
4 the government's sudden refusal to continue producing privilege logs.³ The Court
5 recommended that the parties come up with *mutually-agreeable* categories for the
6 government's assertions of the deliberative process privilege. Ex. 10, Tr. of Aug.
7 16, 2018 Hr'g at 28:8–14.

8 Shortly after the conference, the government informed United that, at some
9 undetermined time in the future, it would provide an agency declaration that
10 purportedly would “perfect” the privilege assertions. *See* Ex. 13, United States’
11 Aug. 20, 2018 Ltr. The government provided no meaningful information about the
12 substance of the forthcoming declaration, merely stating that it would explain why
13 the documents were predecisional and deliberative. *Id.* The government did not
14 share the categories it intended to use for the agency declaration, despite this
15 Court’s recommendation that the parties develop mutually-agreeable categories.
16 Indeed, the government explicitly declined United’s request to discuss the
17 categories as the Court had directed.

18 The government originally stated that it needed until September 30 to
19 provide the agency declaration—3.5 months after United first made its request for
20 such a declaration. United also suggested that the government provide an excerpt
21 of the declaration, which would allow United to assess whether the declaration was
22 likely to cure any of the deficiencies with the government’s privilege assertions.
23 The government rejected United’s suggestion because it “[did] not believe it would
24 be efficient or useful for the parties for [the government] to provide an excerpt of
25 [its] declaration in advance of September 30.” Ex. 14, A. Likoff Aug. 27, 2018

26
27 ³ During the conference, this Court explained that the government could not simply
28 refuse to engage in discovery, and the government shortly thereafter began
producing privilege logs again—albeit with the same deficiencies as its prior
privilege logs.

1 Email. Nevertheless, it “commit[ted] to providing UnitedHealth with a declaration
2 by September 30, 2018.” *Id.*

3 On September 24, just days before it was supposed to provide the agency
4 declaration, the government told United that it was no longer honoring its
5 commitment and now intended to wait until Judge Fitzgerald ruled on all four of
6 the government’s pending motions. *See* Ex. 14, P. Freeborne Sept. 24, 2018
7 Email. The government claimed that Judge Fitzgerald stated he needed to
8 determine the scope of discovery before this Court could rule on discovery
9 motions, and the government claimed—as it has on multiple occasions—that it
10 would not engage in discovery that might be obviated by future rulings. *Id.*
11 Contrary to the government’s strained interpretation of the September 17 hearing,
12 although Judge Fitzgerald stated he would likely need to confer with this Court
13 about relevant issues, he never stated that he had to issue rulings on all pending
14 motions before this Court could proceed to hear discovery disputes. *See* Ex. 15,
15 Tr. of Sept. 17, 2018 Hr’g at 54–56. In fact, he expressly stated that, under the
16 Local Rules, “the matter’s entirely up to [Judge Segal].” *Id.* at 54:14–17.

17 Both Judge Fitzgerald and this Court have repeatedly rejected the
18 government’s attempts to skirt its discovery obligations on the grounds that future
19 rulings might alter the scope of discovery. *See, e.g.,* Ex. 16, Tr. of Dec. 18, 2017
20 Conf. at 13:16–14:2 (“[W]e tend not to halt discovery in the anticipation that [a
21 party] may win their motion for partial summary judgment. . . . [W]e generally let
22 the defendant proceed to address the allegations in the complaint through discovery
23 and we don’t [] wait.”); Ex. 17, United’s Rule 16 Opp’n at 20–21. Despite these
24 admonitions, the government has persisted with its “pocket veto” strategy. *See,*
25 *e.g.,* Ex. 17, United’s Rule 16 Opp’n at 1, 5–6, 20–21. The government’s sudden
26 refusal to provide an agency declaration flouts Judge Fitzgerald’s and this Court’s
27 instructions and is nothing more than yet another brazen attempt to prevent United
28 from obtaining highly relevant and critical documents.

1 United has attempted to work cooperatively with the government to
2 minimize the scope of the parties' dispute. But United cannot be expected to
3 simply wait around for the government to engage in discovery whenever it sees fit.
4 The government chose to continue producing privilege logs with the same
5 deficiencies that United raised in its June 15 letter—logging over 18,500
6 documents after that letter—rather than address the issue. The government refused
7 to revise its privilege logs. It initially refused to provide an agency declaration,
8 then committed to providing one at the end of September, then refused to honor
9 that commitment. It refused to provide an excerpt of the declaration. It refused to
10 share with United what categories it planned to use. The government's unjust
11 refusals to cure the severe deficiencies with its assertions of the deliberative
12 process privilege, as well as its recent refusal to provide an agency declaration,
13 warrant the production of all materials that the government is currently
14 withholding solely on that basis.

15 *a. Medicare Advantage and the Risk Adjustment Process*

16 Under the MA program, *see* 42 U.S.C § 1395w-21 et seq., private insurers
17 like United create insurance plans ("MA plans") in which Medicare-eligible
18 individuals may choose to enroll. Under traditional Medicare, CMS directly
19 reimburses health care providers using a "fee-for-service" ("FFS") payment system
20 in which providers submit claims to CMS for reimbursement for services
21 rendered. Under the MA program, CMS makes predetermined monthly payments
22 to MA plans that are based on a value attributed to each diagnosis code submitted
23 by medical providers, adjusted for demographic data. CMS is required to pay MA
24 plans in a manner that ensures "actuarial equivalence" with what Medicare pays
25 directly to care for similar patients in the Medicare program. 42 U.S.C. § 1395w-
26 23(a)(1)(C)(i).

27 The FFS system covers millions of people, so it is unsurprising that the
28 associated data contains known errors, including diagnosis codes submitted by

1 providers for patients that do not actually have the illness or condition the
2 diagnosis code indicates. *See, e.g.*, Ex. 18, APA Op. at 7 (“Humans being human,
3 diagnoses in healthcare records may be miscoded, inappropriately added, or
4 otherwise faulty by accident or mal intent.”). CMS sets the rates it pays to MA
5 plans according to what CMS itself pays under traditional Medicare to care for
6 patients with those same diagnosis codes—without attempting to correct for those
7 discrepancies by auditing the FFS claims data to confirm that the diagnosis codes
8 are properly supported by charts. *See id.* at 16–17. Thus, the existence of
9 beneficiaries whose provider assigned them a particular diagnosis code but who do
10 not actually have the associated condition is built into the payment model. *Id.* at 7
11 (“The risk adjustment model is built on unaudited [traditional Medicare] data . . .
12 which must contain errors.” (citing CMS Mot.)). Put differently, because CMS’s
13 payment model uses unaudited claims data from the traditional Medicare program
14 that contain numerous unsupported codes, the resulting payment amounts that
15 CMS sets for the MA program *already account* for the existence of unsupported
16 codes. *See id.* at 16 (“[T]he rates at which CMS pays Medicare Advantage
17 insurers are based on flawed data across the millions of people in traditional
18 Medicare.”).

19 If an MA plan were required to repay funds associated with every
20 unsupported code, without first determining whether the plan’s rate of unsupported
21 codes exceeded the rate already accounted for in the payment model, the
22 government would receive an unfair windfall: the government first would have the
23 benefit of lower payment rates that reflect the existence of its own unsupported
24 codes in the model, and then the government would lower its payments a second
25 time on the back end because of the presence of comparable numbers of
26 unsupported codes within the MA plan’s data that had already been accounted for
27 in the model. *See, e.g., id.* at 16–17 (“[W]ithout some kind of adjustment, . . .
28 Medicare Advantage insurers will be paid less to provide the same healthcare

1 coverage to their beneficiaries than CMS itself pays for comparable patients. This
2 inequity is inevitable because CMS sets Medicare Advantage rates based on costs
3 that are presumed, based on traditional Medicare diagnosis codes, to be associated
4 with particular health status information that is not verified in underlying patient
5 records.”). *Id.* at 17; *see* Ex. 19, United’s Mot. for Partial Summ. J. Opp’n at 12,
6 19, 22–26.

7 A recent decision from the U.S. District Court for the District of Columbia
8 in another lawsuit involving United and the government holds conclusively that
9 CMS must take into account the errors in its own data before it can determine if
10 errors in an MA’s data gives rise to an overpayment.⁴ *See generally* Ex. 18, APA
11 Op. Put simply, there cannot be an overpayment unless the error rate in an MA
12 plan’s data **exceeds** the error rate in CMS’s own data. And if United’s error rate is
13 less than the government’s own error rate, then United likely has been *underpaid*.
14 *See id.* at 2, 9–10, 15–22.

15 At bottom, the government alleges that United submitted diagnosis codes to
16 CMS that United knew were unsupported and failed to correct, which—the
17 government alleges—resulted in United being overpaid. United seeks discovery
18 related to what the government knew about errors in United’s data and, more
19 importantly, what the government knew about errors in its own data, because the
20 latter bears directly on whether United was overpaid. However, the government is
21 withholding documents on these very topics by making improperly expansive
22 categorical assertions of the deliberative process privilege, despite (or perhaps
23 because of) the obvious importance of such documents to the claims and defenses
24 in this case. *See supra* at 21–30.

25
26 ⁴ United intends to submit appropriate briefing in the future related to the impact of
27 the APA decision. As relevant here, however, the APA decision (1) confirms
28 United’s theory that the government must account for errors in its own data when
determining whether an overpayment exists, and (2) only bolsters United’s
arguments about the importance of the discovery it seeks, which the government is
attempting to shield.

1 2. ***Argument***

2 The government has failed to meet its burden of establishing the propriety of
3 its deliberative process privilege assertions. First, the privilege logs produced by
4 the government contain threadbare descriptions that do not establish whether any
5 document is predecisional and deliberative, and the agency declaration described in
6 broad strokes by the government—and which the government now refuses to
7 provide—will not cure these deficiencies. Second, even if the government were
8 somehow able to establish the privilege, United’s need for the information
9 outweighs any governmental interest in non-disclosure. Accordingly, this Court
10 should grant United’s Motion and order the production of all documents that the
11 government is withholding based solely on the deliberative process privilege.⁵

12 a. *The Government Fails to Assert Properly the Deliberative*
13 *Process Privilege*

14 The deliberative process privilege is a qualified privilege that applies only in
15 limited circumstances. *See FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161
16 (9th Cir. 1984). Courts construe the privilege strictly and narrowly. *See N.*
17 *Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003)
18 (“[T]he [deliberative process] privilege is strictly confined within the narrowest
19 possible limits consistent with the logic of its principles.”) (internal quotation and
20 citation omitted); *Cal. Native Plant Soc’y v. U.S. Env’tl. Prot. Agency*, 251 F.R.D.
21 408, 410 (N.D. Cal. 2008) (“[C]ourts should construe the [deliberative process]
22 privilege narrowly and strictly.”). Although the privilege is designed to protect the
23 quality of agency decisionmaking by encouraging candid discussion among
24 policymakers and preventing premature disclosure of contemplated agency policies
25 or decisions, the narrow privilege applies only to documents that are both

26 _____
27 ⁵ This Motion concerns only documents over which the government has asserted
28 *solely* the deliberative process privilege. The government, however, uses the same
deficient privilege log descriptions to support its assertions of other privilege.
United reserves its right to challenge these assertions.

1 “predecisional” and “deliberative in nature”—not to purely factual material. *See*
2 *Warner Commc’ns Inc.*, 742 F.2d at 1161; *Hongsermeier v. Comm’r of Internal*
3 *Revenue*, 621 F.3d 890, 904 (9th Cir. 2010) (quoting *N.L.R.B. v. Sears, Roebuck &*
4 *Co.*, 421 U.S. 132, 150 (1975)). The government has the burden of establishing
5 that the deliberative process privilege protects the materials at issue. *See, e.g., N.*
6 *Pacifica, LLC*, 274 F. Supp. 2d at 1121.

7 A document is considered “predecisional” if it was “prepared in order to
8 assist an agency decisionmaker in arriving at his decision.” *Carter v. U.S. Dep’t of*
9 *Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002) (holding that adjusted census data
10 held back based on accuracy concerns was not “predecisional” because it was
11 originally prepared for the purpose of dissemination to the public) (quotations and
12 citation omitted); *Assembly of State of Cal. v. U.S. Dept. of Commerce*, 968 F.2d
13 916, 920 (9th Cir. 1992) (noting that a “predecisional” document is one “prepared
14 in order to assist in an agency decisionmaker in arriving at his decision” and that
15 “documents deemed ‘postdecisional’ do not enjoy the protection of the deliberative
16 process privilege”) (quoting *Sears, Roebuck & Co.*, 421 U.S. at 153).

17 A document or statement is deemed “deliberative” only if it was a direct part
18 of the deliberative process in that it makes recommendations or expresses opinions
19 on significant legal and policy matters. *See Vaughn v. Rosen*, 523 F.2d 1136, 1144
20 (D.C. Cir. 1975) (“[P]re-decisional materials are not exempt merely because they
21 are pre-decisional; they must also be a part of the agency give-and-take of the
22 deliberative process by which the decision itself is made.”); *see also Allen v.*
23 *Woodford*, No. CV-F-05-1104, 2007 WL 309945, at *5, *9 (E.D. Cal. Jan. 30,
24 2007) (stating that the deliberative process privilege only applies to documents
25 relating to a larger policy formulation, not a single, trivial decision, such as
26 whether to fire a single employee). Indeed, “documents that merely reflect an
27 agency’s formal or informal guidelines or understanding of its own policies should
28 be produced, even if they are not final or official agency policy.” *Nat’l*

1 *Immigration Law Ctr. v. U.S. Immigration & Customs Enforcement*, No. CV 14-
2 9632 PSG (MANx), 2015 WL 12684437, at *9 (C.D. Cal. 2015); *see also Coastal*
3 *States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (finding
4 deliberative process privilege not applicable to agency's interpretations of
5 regulations applied by auditors, noting that "an agency will not be permitted to
6 develop a body of 'secret law,' used by it in the discharge of its regulatory duties
7 and in its dealings with the public, but hidden behind a veil of privilege because it
8 is not designated as 'formal,' 'binding,' or 'final'").

9 The deliberative process privilege "must satisfy specific, formal
10 requirements for proper invocation," and courts impose heightened requirements
11 for asserting government privileges because "they effectively deny an adversary
12 the opportunity to inquire into perhaps dispositive areas of fact." *Martin v. Albany*
13 *Bus. Journal*, 780 F. Supp. 927, 932–33 (N.D.N.Y. 1992); *see L.H. v.*
14 *Schwarzenegger*, No. CIV. S-06-2042 LKK/GGH, 2007 WL 2009807, at *3 (E.D.
15 Cal. July 6, 2007) (stating that the privilege "should be narrowly construed because
16 confidentiality may impede full and fair discovery of the truth.") To satisfy its
17 burden, the government must provide: "(1) a formal claim of privilege by the head
18 of the department possessing control over the requested information, (2) an
19 assertion of the privilege based on actual personal consideration by that official,
20 and (3) a detailed specification of the information for which the privilege is
21 claimed, along with an explanation of why it properly falls within the scope of the
22 privilege." *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-
23 1351TEH, 2008 WL 2237046, at *4 (E.D. Cal. & N.D. Cal. May 29, 2008)
24 (internal quotation and citation omitted). Neither the government's privilege logs
25 nor the vague description of the agency declaration—which the government is now
26 refusing to provide—satisfies this burden.

27 *First*, the privilege logs produced by the government are facially deficient.
28 They contain only "generalized allegations and self-serving, conclusory statements

1 regarding privilege” that are insufficient to sustain the deliberative process
2 privilege. *See Dominguez v. Schwarzenegger*, No. C 09-2306 CW (JL), 2010 WL
3 3341038, at *4 (N.D. Cal. Aug. 25, 2010). The basic document descriptions
4 provided by the government do not provide a “detailed specification of the
5 information for which the privilege is claimed, along with an explanation of why it
6 properly falls within the scope of the privilege.” *Id.* at *5. The government’s
7 privilege log descriptions set forth no specific policy decisions, let alone
8 significant policy decisions. *See id.* The descriptions fail to detail how any
9 document fits into the deliberative process. *See, e.g., Cal. Native Plant Soc’y*, 251
10 F.R.D. at 413 (“Conclusory statements that a document is deliberative do not
11 suffice”). Accordingly, the privilege log descriptions do not satisfy the
12 government’s burden of establishing that any documents are both predecisional
13 and deliberative. *Id.*; *Dominguez*, 2010 WL 3341038, at *5 (ordering production
14 of all documents over which the government invoked solely the deliberative
15 process privilege where government failed to identify specific policy decisions at
16 issue) (internal quotation and citation omitted)).⁶

17 These generic descriptions, which the government has applied in boilerplate
18 fashion to large swaths of documents spanning many years, do not adequately
19 describe the content of the purported deliberations and fail to provide the requisite
20 level of detail to establish that the documents properly fall within the scope of the
21 deliberative process privilege. For example, as previously set forth (*supra* at 5–6),
22 the government is using basic descriptions on its privilege logs such as: “RADV
23 audit methodology” (approximately 6,400 documents withheld); “calculation of
24 RA error rate” (approximately 3,320 documents); “Advance Notice and/or
25

26 ⁶ The government should not be withholding in full documents that contain factual
27 (or other) materials that do not qualify for this narrow privilege. This does not
28 appear to be the case, however, considering the government is withholding in full
approximately 95% of documents over which it is asserting solely the deliberative
process privilege and thus is only redacting approximately 5% of these documents.

1 Announcement and Call Letter” (approximately 1,680 documents); “FFS adjuster”
2 (approximately 1,390 documents); “UHG RADV audits” or “non-UHG RADV
3 audits” (approximately 660 documents); “UHG RA activities” and “non-UHG RA
4 activities” (approximately 545 documents); and “RA training materials”
5 (approximately 500 documents). Many of these categories, such as the calculation
6 of the error rate in the government’s own data, the calculation of the RA factors in
7 CMS’s payment model, and UHG and non-UHG RADV audits, describe “[p]urely
8 factual material that does not reflect deliberative processes” and to which the
9 deliberative process privilege does not apply—as this Court has already
10 recognized. *See Warner Commc’ns Inc.*, 742 F.2d at 1161; Ex. 20, Tr. of July 12,
11 2018 Hr’g at 64:24–65:3 (“[T]he deliberative process privilege . . . applies to
12 things that . . . really reflect deliberations as opposed to a factual finding.”). Yet
13 the government is withholding *in full* nearly 95% of the documents over which it is
14 asserting solely the deliberative process privilege.

15 Furthermore, these broad categories span extended periods of time—some as
16 many as over 14 years—that undermine any notion that all of the documents
17 grouped in the category are both predecisional and deliberative. Coupled with the
18 basic privilege descriptions, the protracted time periods do not identify a specific
19 significant policy decision or provide any insight into how the documents are
20 deliberative. For example, the government is withholding approximately 1,390
21 documents spanning from January 2004 to May 2017 “reflecting internal agency
22 deliberations regarding FFS adjuster.” This description fails to detail any specific
23 significant policy decision related to the FFS adjuster—such as the government’s
24 decision in February 2012 to adopt a FFS adjuster—and the “FFS adjuster”
25 description is so generic that it prevents United from assessing whether any
26 particular document is predecisional. Nor does this basic description provide any
27 insight into how any documents were part of the deliberative process.
28

1 As another example, the government is withholding nearly 6,400 documents
2 spanning from September 2003 to July 2017 “reflecting internal agency
3 deliberations regarding RADV audit methodology.” This description similarly
4 fails to explain what significant policy decision related to the RADV audit
5 methodology is at issue or how the documents were part of the agency decision-
6 making process. RADV audits began taking place in 2008, so using such a broad
7 description for a nearly 14-year period provides no detail about how any
8 documents are predecisional or even how the decision spanned 14 years. The
9 government’s assertion of privilege over approximately 1,680 documents
10 “reflecting internal agency deliberations regarding Advance Notice and/or
11 Announcement and Call Letter” from January 2003 to April 2017 suffers from the
12 same infirmities. The description does not even identify which Advance Notice,
13 Announcement, or Call Letter—documents CMS issues multiple times per year—
14 is at issue, let alone how any particular document fits into the deliberative process.

15 The government’s privilege log deficiencies also prevent United from
16 properly assessing whether any purported deliberations were ultimately adopted by
17 the agency. This is problematic because ultimate adoption by the agency would
18 obviate any claim of deliberative process privilege. *See Nat’l Res. Def. Council v.*
19 *U.S. Dep’t of Defense*, 388 F. Supp. 2d 1086, 1098 (C.D. Cal. 2005) (“Even if the
20 document is predecisional at the time it is prepared, it can lose that status if it is
21 adopted, formally or informally, as the agency position on an issue or is used by
22 the agency in its dealings with the public.” (quoting *United States v. Rozet*, 183
23 F.R.D. 662, 666 (N.D. Cal. 1998))).

24 The agency declaration that the government has now refused to provide—
25 after refusing for months to provide it, finally committing to provide it by the end
26 of September, and then reneging on that commitment—would not have cured the
27 flaws in the government’s privilege assertions. As an initial matter, it appears that
28 lawyers from the Department of Justice were asserting the deliberative process

1 privilege without first consulting any agency official. This is particularly troubling
2 because “a government attorney is precisely who should *not* be asserting a
3 government privilege.” *See Chao v. Westside Drywall, Inc.*, 254 F.R.D. 651, 657
4 (D. Or. 2009) (emphasis added); *Martin*, 780 F. Supp. at 933 (“Only by mandating
5 that an accountable executive official invoke a governmental privilege can the
6 courts be confident that the privilege is responsibly asserted based on agency goals
7 and policies, and is not abused for litigation purposes.”). If the Department of
8 Justice failed to consult first with the agency before asserting the deliberative
9 process privilege over nearly 20,000 documents, that alone is sufficient to order
10 production of all materials withheld as it demonstrates a complete failure to follow
11 the requirements of asserting the deliberative process privilege. *See Pac. Gas &*
12 *Elec. Co. v. United States*, 70 Fed. Cl. 128, 143–44 (2006) (finding the
13 government’s assertion of the deliberative process privilege prior to obtaining a
14 supporting affidavit from a government official “procedurally deficient”).

15 Moreover, even if the government eventually provides one, the Court should
16 be especially wary of any new agency declaration that serves more as a post-hoc
17 defense of the Department of Justice’s privilege assertions than a truly independent
18 claim of privilege by the agency. The government’s extremely broad-brushed
19 description of the agency declaration it now has refused to provide offers no
20 assurance to the Court or United that the government will give sufficient detail to
21 tie thousands of documents that span over a decade to a specific agency decision
22 and adequately detail how they were part of the deliberative process. *See Cal.*
23 *Native Plant Soc’y*, 251 F.R.D. at 413 (finding agency declarations insufficient to
24 establish deliberative process privilege where the “statements do not assert the
25 detail required to show the individual documents’ role in the decision making
26 process”). Indeed, it is difficult to imagine how an agency declaration could
27 contain sufficiently detailed information to explain how approximately 21,400
28

1 documents all meet the exacting standard required to assert the deliberative process
2 privilege.

3 Furthermore, United cannot identify particular documents to challenge or
4 submit for potential *in camera* review by this Court because of the government's
5 failure to provide adequate information in support of its privilege assertions. The
6 government has argued that it would be prohibitively burdensome to conduct a
7 document-by-document review and provide individualized descriptions. But the
8 government should have conducted such a review prior to asserting the deliberative
9 process privilege—and, if it did not, the assertions are improper. This Court
10 should not be forced to assume a burden that the very party asserting the privilege
11 is unwilling to undertake. Accordingly, because this Court “ha[s] insufficient
12 information from [the government] as to why disclosure should not be permitted,”
13 it is likewise “ill-equipped to make any intelligent decisions as to discovery during
14 an *in camera* inspection.” *See Miller v. Pancucci*, 141 F.R.D. 292, 301 (C.D. Cal.
15 1992) (“[S]hould the threshold requirements not appear in the papers, the privilege
16 assertion will be overruled in its entirety and complete disclosure will be ordered.
17 No *in camera* inspection will occur.”).

18 In sum, it has been over 13 months since the government received United's
19 first set of document requests and over 3.5 months since United first raised issues
20 related to the government's fundamentally flawed privilege logs and asked for an
21 agency declaration. Despite United's requests, and despite having a protracted
22 amount of time to cure these deficiencies and provide a sufficient agency
23 declaration, the government has failed to meet its burden of substantiating its
24 privilege claims. Consequently, the government has waived its right to assert the
25 deliberative process privilege over these materials. *See, e.g., Dominguez*, 2010
26 WL 3341038, at *6 (finding waiver in light of a party's “repeated failures to
27 substantiate their claims of privilege” and ordering production of all information
28 over which the deliberative process was the sole privilege asserted). The Court

1 should therefore order the production of all documents that the government is
2 withholding solely on the basis of the deliberative process privilege. *See, e.g.,*
3 *Coleman*, 2008 WL 2237046, at *5 (ordering production of materials withheld
4 under the deliberative process privilege where neither the government's privilege
5 logs nor the agency declaration established the privilege).

6 *b. United's Need for These Relevant Materials Outweighs Any*
7 *Government Interest in Non-Disclosure*

8 Even if the government had properly invoked the deliberative process
9 privilege—which it has not—the privilege is qualified and can be overcome by a
10 sufficient showing of need outweighing the harm that might result from disclosure.
11 *Warner Commc'ns Inc.*, 742 F. 2d at 1161. The Ninth Circuit has set forth four
12 non-exclusive factors that courts consider in balancing the competing interests:
13 “(1) the relevance of the evidence; (2) the availability of other evidence; (3) the
14 government's role in the litigation; and (4) the extent to which disclosure would
15 hinder frank and independent discussion regarding contemplated policies and
16 decisions.” *Id.* (citations omitted).⁷ These factors all weigh heavily in favor of
17 requiring disclosure.

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21 ⁷ Some district courts in Ninth Circuit have considered additional factors, such as
22 the interest of the litigants, and ultimately society in accurate judicial fact-finding,
23 and the seriousness of the issues involved. *See e.g., N. Pacifica, LLC*, 274 F. Supp.
24 2d at 1122; *United States v. Irvin*, 127 F.R.D. 169, 173 (C.D. Cal. 1989)
25 (enumerating the factors and collecting cases). The parties and society have a clear
26 interest in accurate fact finding, and the government's fraud allegations and
27 magnitude of damages sought are serious. *See, e.g., Irvin*, 127 F.R.D. at 173
28 (“The desirability of accurate fact finding argues in favor of disclosure (as it would
in every case).”); *United States v. Berkeley Heartlab, Inc.*, No. 9:14-cv-00230-
RMG, 11 (D.S.C. June 19, 2017) (concluding in an intervened case involving
alleged violations of the federal False Claims Act and federal Anti-Kickback
statute, “The Court has no trouble finding that . . . the litigation is serious.”). Other
courts also consider the public's interest in government transparency, which
weighs heavily in United's favor here. *See, e.g., Reino De Espana v. Am. Bureau*
of Shipping, No. 03CIV3573LTSRLE, 2005 WL 1813017, at *12 (S.D.N.Y, Aug.
1, 2005).

i. *The Evidence the Government Is Withholding Is Critical to the Claims and Defenses*

As an initial matter, the standard for relevance in litigation is low, and the Federal Rules of Civil Procedure afford parties broad discovery of relevant evidence. *See, e.g., In re Allergan, Inc. Sec. Litig.*, No. 14-CV-02004, 2016 WL 5929250, at *2 (C.D. Cal. Oct. 5, 2016) (“The Federal Rules of Civil Procedure provide for broad factual discovery. A party ‘may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case’” (citing Fed. R. Civ. P. 26(b)(1))). The documents United has requested are crucial for its defenses to the misconduct that the government has charged. As detailed below, they bear directly on the remaining reverse False Claims Act count, the government’s common law claims of Payment by Mistake and Unjust Enrichment, resolving the meaning of the ambiguous contractual provisions and regulatory requirements at issue, and potential damages.

False Claims Act. To prevail on its reverse False Claims Act count, the government must establish that United “knowingly conceal[ed] or knowingly and improperly avoid[ed] or decrease[d] an obligation to pay or transmit money or property to the Government.” 31 U.S.C. § 3729(a)(1)(G); *see id.* § 3729(b)(3) (an “obligation” is “an established duty, whether or not fixed, arising from . . . the retention of any overpayment”). Evidence about the presence and extent of unsupported codes in CMS’s own data speaks directly to whether United was overpaid because if CMS’s rate of unsupported codes was greater than United’s, there cannot have been any overpayment. Indeed, as Judge Collyer held, requiring United to delete unsupported codes without CMS doing the same in its data would result in a systematic *underpayment* and violate the statutory (and contractual) requirement of actuarial equivalence. *See, e.g., Ex. 18, APA Op.* at 15–21; *Ex. 19 Partial Summ. J. Opp’n* at 22–23, 44–46. United has issued document requests

1 seeking evidence on this very point. For example, United has sought the
2 production of documents related to (1) the Risk Adjustment error rate in CMS's
3 data, (2) a RADV Medicare FFS adjuster, and (3) the RADV audit methodology.
4 *E.g.*, RFPs 1, 2, 6, 7. These categories of documents are relevant to, among other
5 things, whether United was overpaid merely because it may have received
6 payments based on some unsupported codes. The government, however, is
7 asserting solely the deliberative process privilege over approximately 3,320
8 documents related to the "calculation of RA error rate," approximately 1,390
9 documents related to the "FFS adjuster," and approximately 6,400 documents
10 related to the "RADV audit methodology." *See* Exs. 1–7, United States' Privilege
11 Logs Nos. 1–7.

12 The evidence that United has been able to obtain thus far supports its
13 arguments and undermines the government's theories—and highlights not only the
14 relevance of the documents the government is shielding, but also the overbreadth
15 of the government's deliberative process privilege assertions in this case. For
16 example, the government astonishingly attempted to shield documents in this
17 litigation that it previously produced in response to a FOIA request, with
18 redactions. *See* Ex. 21, Presentation from Division of Payment Validation; Ex. 22,
19 FOIA Agenda; Ex. 23, Tavenner Dep. Tr. 83:10–84:10; Ex. 24, Grant Dep. Tr.
20 293:12–23. These documents contain notes from an internal CMS presentation
21 about the need to account for CMS's own error rate in determining overpayments
22 and state that adopting an FFS adjuster "from a technical point of view is the right
23 thing to do" and would "put[] us in the best position to withstand litigation
24 challenges." *See* Ex. 22, Agenda at CMS0006201; *see also* Ex. 21, Presentation
25 from Division of Payment Validation. Evidence like this is crucial to showing that,
26 contrary to the government's core contention, United was not overpaid merely
27 because it failed to delete and may have received payment based on unsupported
28 codes. As another example, Jeffrey Grant (a CMS official who oversaw the

1 creation of the risk adjustment program and one of only two CMS officials
2 deposed in this case to date) testified that, assuming the coding intensity
3 adjustment fully offsets any activities that an MA plan undertakes to code more
4 completely, if a plan were to audit a little as twenty-five percent (or even less) of
5 its members' charts and delete unsupported codes it found—without CMS deleting
6 such codes in the FFS data—the MA plan would be underpaid. *See* Ex. 24, Grant
7 Dep. Tr. at 274:22–277:25; Ex. 19, United's Partial Summ. J. Opp'n at 44–45.

8 Yet this is the exact type of evidence the government is seeking to prevent
9 United from obtaining through its overly expansive assertion of the deliberative
10 process privilege. In fact, Judge Collyer rejected the government's over-expansive
11 stance on the deliberative process privilege and entered these very same documents
12 into the administrative record. Ex. 25, APA Mem. Op. on Mot. to Supplement the
13 Administrative R. at 12. The government's attempt to invoke the deliberative
14 process privilege on these documents, despite having produced them in response to
15 a FOIA request, illustrates its aggressive and overly broad assertions of this limited
16 privilege over documents at the heart of this case.

17 The documents the government is withholding on the basis of the
18 deliberative process privilege also are relevant to scienter. The government's
19 interpretations of the requirements imposed on MA plans by CMS statutes, rules,
20 regulations, and guidance, as well as contracts with MA plans—requirements the
21 government now claims United violated—shed light on both the meaning of those
22 requirements and whether United knew that conducting one-way reviews violated
23 them. *See, e.g.*, Ex. 26, United's Mot. to Strike Opp'n at 17–18; Ex. 17, United's
24 Rule 16 Opp'n at 12–14. Proving that United improperly retained overpayments
25 requires the government to show that United knew about unsupported codes simply
26 by virtue of its one-way looks and that United knew that unsupported codes
27 necessarily resulted in overpayments. *See* 31 U.S.C. § 3729(a)(1)(G); *see also In*
28 *re. Pharm. Indus. Average Wholesale Price Litig.*, 254 F.R.D. 35, 42–44 (D. Mass.

1 2008) (ordering the production of several documents protected by the deliberative
2 process privilege because government knowledge could be relevant to both
3 scienter and falsity under the False Claims Act). That, in turn, requires the
4 government to prove United knew that there was something improper or fraudulent
5 in conducting one-way chart reviews and that United was objectively unreasonable
6 in its belief that there was no overpayment so long as the rate of its unsupported
7 codes did not exceed CMS's. *See, e.g.*, Ex. 26, Mot. to Strike Opp'n at 17–18;
8 Ex. 17, United's Rule 16 Opp'n at 12.

9 Documents showing the government's interpretation of MA plans'
10 obligations under applicable statutes, regulations, guidance documents, and
11 contractual requirements thus bear directly on the objective reasonableness of
12 United's interpretations. *See id.*; *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 69–71 &
13 n.20 (2007) (stating that where multiple “objectively reasonable” interpretations of
14 a provision exist, “it would defy history and current thinking to treat a defendant
15 who merely adopts one such [objectively reasonable] interpretation as a knowing
16 or reckless violator”); *United States ex rel. McGrath v. Microsemi Corp.*, 690 F.
17 App'x 551, 552 (9th Cir. 2017) (applying *Safeco* to scienter requirement of False
18 Claims Act); *see also United States v. Pac. Gas & Elec. Co.*, 178 F. Supp. 3d 927,
19 963 (N.D. Cal. 2016) (holding that evidence of government's or other regulated
20 entities' interpretation of regulations was relevant to reasonableness of defendant's
21 interpretation, regardless of whether defendant actually knew of that evidence).
22 Additionally, evidence that United's beliefs were reasonable would help a
23 factfinder assess whether United actually held its asserted beliefs: “[T]he more
24 unreasonable the asserted beliefs or misunderstandings are, the more likely the jury
25 will consider them to be nothing more than simple disagreement with known legal
26 duties,” and, conversely, the more *reasonable* the beliefs are, the more likely the
27 jury is to believe that they were genuinely held. *Cheek v. United States*, 498 U.S.

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1 192, 203–04 (1991). Evidence that government officials agreed with United’s
2 interpretations are thus relevant even to United’s subjective beliefs.

3 Many of the document requests United has issued also relate to this
4 evidence. For example, United is seeking discovery related to: regulations, rules,
5 guidance, or other pronouncements setting forth the government’s standards for
6 evaluating the accuracy of diagnosis codes reported by MA plans; coding for
7 purposes of evaluating the accuracy and adequacy of diagnoses reported by MA
8 plans; and CMS instructions and guidelines regarding coding. *See* RFPs 3, 43, 44.
9 But the government is asserting solely the deliberative process privilege over
10 nearly 2,600 documents related to the “RA supporting documentation
11 requirements,” “medical coding in support of RA payments,” “RA training
12 materials,” and “coding guidance.” These types of documents are highly relevant
13 to scienter and should be produced. *See Berkeley Heartlab, Inc.*, No. 9:14-cv-
14 00230, 2017 WL 3608241, at *2 (D.S.C. Aug. 22, 2017) (ordering production of
15 certain documents subject to the deliberative process privilege in part because of
16 their relevance to defendants’ argument that they lacked the requisite scienter
17 under the False Claims Act).

18 The limited evidence United has been able to obtain thus far supports
19 United’s argument that its interpretations were objectively reasonable. For
20 example, Jeffrey Grant testified that he believed an MA plan’s submission of an
21 unsupported code would be improper only if it was making the “very specific
22 submission of a very specific data element . . . that [it] know[s] is wrong.” Ex. 24,
23 Grant Dep. Tr. at 321:21–23. He stated that performing one-way reviews that add
24 diagnosis codes, without looking at whether previously-submitted codes lack such
25 support, would not create the requisite knowledge. *Id.* at 322:18–323:15. He
26 further testified that he did not believe it was “improper” or “fraud” for an MA
27 plan to perform such one-way reviews. *Id.* at 307:11–310:16.
28

Documents related to the government's knowledge of United's and other MA plans' coding practices are also relevant to *Escobar*'s "demanding" materiality standard, which "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *See United Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2002 (2016). The government must show that any alleged misrepresentation was material to the government's decision to continue paying and contracting with United. *See, e.g.,* Ex. 17, United's Rule 16 Opp'n at 14. Additionally, evidence of how the government responded to knowledge that other MA plans were engaging in chart reviews similar to the chart reviews at issue in this litigation goes directly to the materiality of any alleged wrongdoing by United. *See id.* at 2003; *United States ex rel. Worthy v. E. Me. Healthcare Sys.*, No. 2:14-cv-00184-JAW, 2017 WL 211609, at *24 (D. Me. Jan. 18, 2017) (evidence regarding government's prior investigations of similar allegations and prior actions to prevent the same type of conduct at issue relevant for materiality purposes); *see also United States ex rel. Scharff v. Camelot Counseling*, No. 13-cv-3791, 2016 WL 5416494, at *17 (S.D.N.Y. Sept. 28, 2016) (complaint failed to allege sufficient facts to support materiality where it did not allege whether the government refused to reimburse clinics that engaged in conduct similar to defendant's).

Many of the documents United seeks and over which the government has asserted the deliberative process privilege are related to the government's knowledge of MA plans' activities. For example, United has requested documents related to the government's knowledge as to whether MA plans were (1) validating the accuracy of diagnosis codes, (2) deleting unsupported diagnosis codes, and (3) looking both ways. *See* RFPs 17–19. The government, however, is asserting solely the deliberative process over approximately 545 documents related to "UHG RA activities" and "non-UHG RA activities." United should be entitled to these

1 documents to help demonstrate that any alleged wrongdoing by United was not
2 material.

3 The government has previously argued that the automated nature of the MA
4 payment system renders diagnostic codes *automatically* material and that United
5 thus should not be entitled to discovery related to CMS's views on and treatment
6 of the submission of unsupported codes. But United contests this assertion and has
7 demonstrated that certain deletes involve much more than merely submitting
8 "delete files" to CMS—they involve affirmative decisions by CMS officials to
9 process the deletes and adjust prior payments based on CMS's reconciliation of the
10 submitted data. *E.g.*, Ex. 17, United's Rule 16 Opp'n at 15–16. In fact, United has
11 requested documents related to the processes, policies, guidance, and procedures
12 relating to deletes and the government's refusal or failure to process deletes
13 submitted by MA plans. *See* RFP Nos. 2-2-2-4. But the government is
14 withholding approximately 190 documents related to the "return of overpayments
15 to CMS," "submission of deletes," "processing of overpayments," and "proposed
16 overpayment recovery process" (and many additional documents in similar
17 categories). The government should not be allowed to withhold documents that are
18 relevant to this issue, including CMS's internal deliberations about whether to
19 process deletes, and whether CMS viewed unsupported codes as inherently
20 improper.

21 Common Law Claims. The documents that the government is shielding also
22 are directly related to its two common claims, Payment by Mistake and Unjust
23 Enrichment. *See, e.g.*, Ex. 17, United's Rule 16 Opp'n at 8–9. Payment by
24 Mistake requires the government to prove what it knew and what it would have
25 done differently if it had the knowledge it claims it lacked. If the government was
26 aware that United conducted one-way reviews or that other MA plans did the
27 same, but continued to pay and contract with United or those other MA plans, that
28 would tend to undermine any claim by the government that it paid United under a

1 mistaken understanding of applicable circumstances. United should be permitted
2 to investigate whether the government in fact labored under a misunderstanding
3 and what actions it took, if any, as a result of that alleged misunderstanding. Thus,
4 United has issued document requests related to the government's knowledge of
5 MA plans' activities, many of which the government appears to be withholding.
6 *See, e.g., id.* at 14. These and other documents related to the government's
7 knowledge of United's and other MA plans' activities contain information at the
8 heart of the government's Payment by Mistake claim.

9 The documents that the government is withholding are also highly relevant
10 to the its Unjust Enrichment claim. For example, documents United seeks related
11 to overpayments under the False Claims Act, bear on whether United was entitled
12 to receive money from the Government and whether retention of those funds was
13 improper. *See, e.g., id.* at 10–11. As United has argued previously in this case—
14 and as Judge Collyer held in the case before her—requiring plans to repay funds
15 associated with unsupported codes, without first determining whether the plan's
16 rate of unsupported codes exceeds the rate implicit in the payment model, would
17 confer an unfair windfall on the government. *See* Ex. 18, APA Op.; Ex. 19,
18 United's Partial Summ. J. Opp'n at 26. Evidence showing that the government's
19 recovery in the instant litigation would produce that inequitable effect would
20 support United's defense that it has not been unjustly enriched. *See, e.g.,* Ex. 19,
21 United's Partial Summ. J. Opp'n at 2, 19. Therefore, the government is hampering
22 United's ability to defend against the Unjust Enrichment claim by withholding
23 documents that are directly relevant to these issues. *See supra* at 5–6.

24 Contractual and Regulatory Ambiguity. Furthermore, the documents that
25 the government is withholding are relevant to interpreting the meaning of the
26 ambiguous contractual and regulatory provisions on which the government relies.
27 The regulatory provisions invoked by the government do not state that an MA plan
28 is required to delete all codes it allegedly determines to be unsupported, regardless

1 of the rate of unsupported codes in CMS's own data on which its payments are
2 based, or that it is overpaid every time it receives a payment associated with an
3 unsupported code. *See* Ex. 19, United's Partial Summ. J. Opp'n at 26–46; Ex. 17,
4 United's Rule 16 Opp'n at 16–17. At a minimum, extrinsic evidence is necessary
5 to determine the meaning of these provisions. Additionally, extrinsic evidence is
6 necessary to resolve the meaning of the ambiguous contractual provisions at issue.
7 *See* Ex. 19, United's Partial Summ. J. Opp'n at 43–46; Ex. 17, United's Rule 16
8 Opp'n at 16–17. Even if the language of the contracts otherwise appeared to
9 support the government's position, the Court still should "consider evidence of
10 course of dealing, trade usage, or course of performance" to determine whether
11 that meaning is, in fact, ambiguous. *See Mohave Valley Irrigation & Drainage*
12 *Dist. v. Norton*, 244 F.3d 1164, 1166 (9th Cir. 2001).

13 Damages. Finally, many of the documents the government is withholding
14 are relevant to potential damages calculations. Documents related to errors in
15 CMS's data and the calculation of a FFS Adjuster, for example, bear directly on
16 the existence and extent of damages in this matter. Any calculation of damages
17 that failed to take into account the prevalence of unsupported codes in CMS's data,
18 which the FFS Adjuster attempts to approximate, would grossly overestimate any
19 actual injury suffered by the government. *See* Ex. 19, United's Partial Summ. J.
20 Opp'n at 26–27. But the government is withholding over 4,700 such documents
21 that span a 13.5-year period. *See supra* at 5.

22 In sum, the government has asserted the deliberative process privilege over
23 thousands of documents that are central to the remaining False Claims Act count,
24 both common law claims, the meaning of the contracts and regulatory provisions
25 upon which the government relies, and potential damages. These documents are
26 not simply relevant—they are critical to United's ability to defend itself in this
27 case. Thus, this factor weighs heavily in favor of disclosure.
28

1 ii. *The Government Is the Sole Custodian of This Critical*
2 *Evidence*

3 The availability of comparable evidence from sources other than the
4 government is “perhaps the most important factor in determining whether the
5 deliberative process privilege should be overcome.” *N. Pacifica, LLC*, 274 F.
6 Supp. 2d at 1124. This factor imposes a high bar for the government: even if some
7 related evidence may be available elsewhere, the availability of evidence from
8 other sources will not suffice unless the evidence is “comparable.” *See Cal. State*
9 *Foster Parent Assn. v. Wagner*, No. C 07-05086 WHA, 2008 WL 2872775, at *5
10 (N.D. Cal. 2008) (finding that this factor “weigh[ed] heavily in favor of disclosure”
11 where plaintiffs claimed the state had violated a statute and sought “detailed
12 analyses completed by . . . the agency responsible for the enforcement” of the
13 statute, even though “some of the factual information contained in the analyses”
14 might be available elsewhere).

15 United cannot obtain the crucial evidence described above from other
16 sources. The government is not only the best and most authoritative source of
17 information about its own knowledge and interpretations of MA requirements—it
18 is the *sole* custodian of that information. Even if other sources for this evidence
19 existed (and they do not) “the quality and persuasiveness of such evidence w[ould]
20 be substantially inferior to that produced by the agency charged with enforcing and
21 administering the programs at issue in this litigation.” *See id.* This factor—
22 arguably the most important—also weighs heavily in favor of disclosure.

23 iii. *The Government Plays a Significant Role in this*
24 *Litigation*

25 It is difficult to imagine how the government could play a more significant
26 role in this litigation, having affirmatively chosen to file a lawsuit of this scope and
27 magnitude after a five-year investigation. *See, e.g., Berkeley Heartlab*, No. 9:14-
28 cv-00230-RMG, 11 (D.S.C. June 19, 2017) (finding the government’s role

1 significant where it government filed a complaint-in-intervention in False Claims
2 Act matter); *cf. Wagner*, 2008 WL 2872775, at *6 (noting that, “[o]bviously, as
3 defendant, the government plays a prominent role in this litigation”). The
4 government affirmatively elected to place its internal deliberations, knowledge of
5 MA plans’ activities, and interpretations of applicable regulatory, statutory, and
6 contractual MA requirements directly at issue, and it would be unfair for the
7 government to pursue its claims while shielding relevant evidence behind the
8 deliberative process privilege. *See N. Pacifica*, 274 F. Supp. 2d at 1124 (stating
9 that the government’s decisionmaking process ‘is not swept up into the case, it is
10 the case.’”) (quoting *Irvin* 127 F.R.D. at 174); *see also Fed. Deposit Ins. Corp. v.*
11 *Giancola*, No. 13 C 3230, 2015 WL 5559599, at *6 (N.D. Ill. Sept. 18, 2015)
12 (stating that as a plaintiff, the government played a “considerable role” in the case
13 and that it would be unfair if the government could advance its claims by
14 concealing relevant evidence behind a government privilege). Accordingly, this
15 factor weighs heavily toward disclosure.

16 *iv. Any Governmental Interest in Non-Disclosure Is*
17 *Sufficiently Protected by a Protective Order*

18 The risk that disclosure of the documents would chill agency deliberations is
19 minimal because there is a protective order in place. Courts have repeatedly found
20 that protective orders adequately safeguard the government’s interest in non-
21 disclosure. *See, e.g., In re McKesson Governmental Entities Average Wholesale*
22 *Price Litig.*, 264 F.R.D. 595, 602–03 (N.D. Cal. 2009) (holding that the protective
23 order in place would sufficiently protect the government’s interest); *Noble v. City*
24 *of Fresno*, No. 1:16-cv-01690, 2018 WL 1381945, at *9 (E.D. Cal. Mar. 19, 2018)
25 (same).

26 The protective order in this case—which both parties negotiated and agreed
27 to and which this Court approved—sufficiently protects any government interest in
28 non-disclosure. The government may designate documents “Confidential” or

1 “Attorneys’ Eyes Only” if it is concerned about the documents being disclosed
2 outside of this litigation. *See* Ex. 27, Protective Order ¶¶ 6, 8–13, 21–23. In
3 addition, “[e]xtremely confidential and/or sensitive” documents that the
4 government appropriately designates “Attorneys’ Eyes Only” are not even
5 permitted to be shared with United personnel, including in-house counsel. *See id.*
6 at ¶¶ 9, 22. Thus, the protective order provides adequate protection over the
7 documents that the government is withholding, such that producing them would
8 not threaten the deliberative process. Therefore, this factor, like all the others,
9 weighs heavily in favor of disclosure.

10 In sum, all four of the factors set forth in *FTC v. Warner* weigh in favor of
11 disclosure. Thus, even if the government had properly invoked the deliberative
12 process privilege (which it has not), the privilege would be overcome in this case
13 because United’s need for the documents outweighs the government’s interest in
14 non-disclosure.

15 **B. Government**

16
17 **III. PROPOSED RESOLUTION/CONCLUSION**

18 **A. United**

19 The Court should compel the production of all approximately 21,400
20 documents that the government is withholding solely on the basis of the
21 deliberative process privilege. The government’s basic privilege log descriptions
22 are plainly deficient and fail to demonstrate how any document is both
23 predecisional and deliberative. The agency declaration described by the
24 government does not cure these deficiencies. The government has had months to
25 rectify these fundamental defects but has failed to do so. And now, the
26 government has outright refused to honor its commitment to provide an agency
27 declaration by the end of September.
28

1 Furthermore, even if the government had met its burden of establishing the
2 applicability of the deliberative process privilege, United's need for these vital
3 documents outweighs any interest the government might have in non-disclosure.
4 The government's inappropriately expansive view of the deliberative process
5 privilege stems from its desire to prevent United from obtaining discovery that is
6 critical to the claims and defenses in this case—including the government's only
7 remaining False Claims Act count, its common law claims, and potential damages.
8 The government is the sole custodian of this evidence. Having chosen to bring a
9 case of this magnitude and to place these purportedly deliberative materials
10 directly at issue, the government cannot now hide behind a narrow, qualified
11 privilege to prevent United from obtaining materials it needs to fully defend itself.

12 **B. Government**
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1 **IT IS SO STIPULATED.**

2
3 Dated: DATE

LATHAM & WATKINS LLP

4
5
6 By: _____
 David J. Schindler

7 Attorneys for Defendant
8 United Defendants
9

10
11 Dated: DATE

United States of America

12
13
14 By: _____
 John E. Lee

15
16 Assistant United States Attorney
17 Attorneys for the United States of America
18
19
20
21
22
23
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FILER'S ATTESTATION

Pursuant to Civil Local Rule 5-4.3.4(a)(2)(i), the undersigned attests that all parties have concurred in the filing of this Stipulation.

Dated: DATE

LATHAM & WATKINS LLP

By: David J. Schindler

Attorneys for Defendant
United Defendants

EXHIBIT 2

Lee, John (USACAC)

From: David.Rowe@lw.com
Sent: Friday, September 28, 2018 4:54 PM
To: David.Schindler@lw.com; Freeborne, Paul G. (CIV); Likoff, Amy L. (CIV); Glover, Martha N. (CIV); ABID.QURESHI@LW.com; Anne.Robinson@lw.com; Daniel.Meron@lw.com; David.Tolley@lw.com; Kirstin.SchefflerDo@lw.com; Morgan.Maddoux@lw.com; Wallack, Carol (CIV); Doran, Cassandra J. (CIV); Hinson, Zoila E. (CIV); Krieg, Jessica E. (CIV); Draycott, Justin (CIV); Lee, John (USACAC); Marsh, Maria (USACAC); Tarosky, Adam R. (CIV); UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV)
Subject: RE: US ex rel. Poehling v. UHG
Attachments: United's Portion of the Joint Stipulation Regarding United's Notice of Motion and Motion to Compel the United States to Produce Documents.doc

Follow Up Flag: Follow up
Flag Status: Flagged

Counsel:

Further to the below email, attached please find United's portion of the Joint Stipulation Regarding United's Notice of Motion and Motion to Compel the United States to Produce Documents. I am sending the accompanying declaration and exhibits simultaneously via Latham Secure Transfer. Please provide us with your portion of the Joint Stipulation, along with any supporting declarations and exhibits, on or before October 12.

Thank you,
David

David W. Rowe

LATHAM & WATKINS LLP
200 Clarendon Street
Boston, MA 02116
Direct Dial: +1.617.880.4519
Fax: +1.617.948.6001
Email: david.rowe@lw.com
<http://www.lw.com>

From: Schindler, David (LA)
Sent: Friday, September 28, 2018 5:40 PM
To: Freeborne, Paul G. (CIV) <Paul.G.Freeborne2@usdoj.gov>; Likoff, Amy L. (CIV) <Amy.L.Likoff@usdoj.gov>; Glover, Martha N. (CIV) <Martha.N.Glover@usdoj.gov>; Qureshi, Abid (DC) <ABID.QURESHI@LW.com>; Robinson, Anne (DC) <Anne.Robinson@lw.com>; Meron, Daniel (DC) <Daniel.Meron@lw.com>; Rowe, David W. (BN) <David.Rowe@lw.com>; Tolley, David C. (BN) <David.Tolley@lw.com>; Do, Kirstin Scheffler (CH) <Kirstin.SchefflerDo@lw.com>; Maddoux, Morgan (DC) <Morgan.Maddoux@lw.com>; Wallack, Carol <Carol.Wallack@usdoj.gov>; Doran, Cassandra J. (CIV) <Cassandra.J.Doran@usdoj.gov>; Hinson, Zoila E. (CIV) <Zoila.E.Hinson@usdoj.gov>; Krieg, Jessica E. (CIV) <Jessica.E.Krieg@usdoj.gov>; Draycott, Justin (CIV) <Justin.Draycott@usdoj.gov>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Tarosky, Adam R. (CIV) <Adam.R.Tarosky@usdoj.gov>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV) <Madhura.C.Valverde@usdoj.gov>
Subject: Re: US ex rel. Poehling v. UHG

Paul:

We disagree with your characterization of Judge Fitzgerald's comments and a review of the transcript does not support the government's unilateral attempt to control discovery. We will be sending you our portion of the joint stipulation today and, despite the government's latest about-face on providing us with the agency declaration by today, we will honor our agreement to provide you with the requested 14 days in which to provide the government's portion of the joint stipulation. We intend to schedule the hearing before Judge Segal in accordance with that schedule.

You have also grossly mischaracterized Judge Segal's comments with respect to the wisdom or timing of any motion to stay discovery by the government. Rather, she simply observed that the government has not sought any such stay and she saw no basis for one. Put simply, we see nothing in the record or in Judge Fitzgerald's standing orders that justify the government's failure to produce records, its 4 month long delay in providing an appropriate agency declaration, its latest withdrawal of its prior agreement to provide a declaration by today, or its contention that United should delay any further. If the government wishes to bring a motion to stay, we will respond accordingly. We simply request the same courtesy in scheduling we have afforded the government.

Finally, we are available on Monday from 4-5 EST or after 6 EST for your requested meet and confer. If that doesn't work, send us some available times on Tuesday.

Have a nice weekend,

David

From: Freeborne, Paul G. (CIV)

Sent: Tuesday, September 25, 2018 11:12 AM

To: Schindler, David (LA); Likoff, Amy L. (CIV); Glover, Martha N. (CIV); Qureshi, Abid (DC); Robinson, Anne (DC); Meron, Daniel (DC); Rowe, David W. (BN); Tolley, David C. (BN); Do, Kirstin Scheffler (CH); Maddoux, Morgan (DC); Wallack, Carol; Doran, Cassandra J. (CIV); Hinson, Zoila E. (CIV); Krieg, Jessica E. (CIV); Draycott, Justin (CIV); Lee, John (USACAC); Marsh, Maria (USACAC); Tarosky, Adam R. (CIV); UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV)

Subject: RE: US ex rel. Poehling v. UHG

David:

Given the Court's remarks at the end of the hearing last Monday, the agency will await rulings on the pending motions and further briefing on the scope of Rule 26(b) discovery, if any is requested by the Court, before the agency will provide a detailed agency declaration regarding the privilege. While we previously proposed to provide you with a draft declaration as a potential way of resolving or narrowing the privilege dispute, please recall that you flatly rejected this proposal on August 28. On August 29, you stated that you intended to provide us with United's portion of the joint stipulation on September 5 or 12 and asked when we could provide ours. On the assumption that we would receive your portion of the joint stipulation on September 5 or 12, we responded that we would endeavor to provide our portion of the joint stipulation by September 28. Also, these events occurred before Judge Fitzgerald's remarks last week that appear to suggest that the Court intends to make threshold relevancy rulings in an attempt to aid the parties and Judge Segal. As you are aware, the approach that Judge Fitzgerald appeared to propose is the same approach that we have long advocated in our meet and confers on the subject and before Judge Segal in the informal discovery conferences. Indeed, your email last Friday recognized the value of such threshold rulings in this matter. We are thus

puzzled as to why you intend to proceed with a motion that is contrary to the approach that you appear to recognize makes the most sense from the standpoint of judicial economy.

To the extent you nonetheless proceed to compel the production of information that may be determined to be irrelevant to the claims and defenses at issue, we request that you follow the requirements of Local Rule 37-2.2 and also afford us an adequate opportunity to provide you with our portion of the joint stipulation. We also request a discussion of the proposed hearing date on your motion.

As you know, we would prefer to avoid an *ex parte* process and would request that United consider a hearing date on its discovery motion that would allow us to bring a duly noticed motion seeking a stay before Judge Fitzgerald. If we are unable to do so, however, please be advised that, in the event that United proceeds with its discovery motion, consistent with Judge Segal's comments, we intend to file an *ex parte* application with Judge Fitzgerald to stay any such motion until Judge Fitzgerald has had an opportunity to rule on the pending motions, including our Rule 16(b) motion. Please promptly provide us with your position regarding this application.

Additionally, we intend to proceed with our motions to compel regarding issues that are not impacted by the pending motions and that we have been discussing with you for several months and previously raised with Judge Segal. Please advise as to when you are available to discuss a briefing schedule and a motion date for consideration of all issues.

Paul

From: David.Schindler@lw.com [mailto:David.Schindler@lw.com]

Sent: Tuesday, September 25, 2018 1:59 AM

To: Freeborne, Paul G. (CIV) <pfreebor@CIV.USDOJ.GOV>; Likoff, Amy L. (CIV) <alikoff@CIV.USDOJ.GOV>; Glover, Martha N. (CIV) <maglover@CIV.USDOJ.GOV>; ABID.QURESHI@LW.com; Anne.Robinson@lw.com; Daniel.Meron@lw.com; David.Rowe@lw.com; David.Tolley@lw.com; Kirstin.SchefflerDo@lw.com; Morgan.Maddoux@lw.com; Wallack, Carol <CWallack@CIV.USDOJ.GOV>; Doran, Cassandra J. (CIV) <cdoran@CIV.USDOJ.GOV>; Hinson, Zoila E. (CIV) <zhinson@CIV.USDOJ.GOV>; Krieg, Jessica E. (CIV) <jkrieg@CIV.USDOJ.GOV>; Draycott, Justin (CIV) <JDraycot@CIV.USDOJ.GOV>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Tarosky, Adam R. (CIV) <atarosky@CIV.USDOJ.GOV>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV) <mvalverd@CIV.USDOJ.GOV>

Subject: RE: US ex rel. Poehling v. UHG

Paul:

Your email below is somewhat cryptic. We think you are saying that, notwithstanding your prior commitments to provide us with an agency declaration by September 28, the government is now reversing course again. Please confirm that we are reading your email correctly and that you do not intend to provide us with the agency declaration by Friday as you had previously committed to do. If that is the case, then we intend to proceed with our motion to compel and will seek an expedited hearing from Judge Segal. Please get back to us on this issue by COB on Tuesday.

Thank you,

David

From: Freeborne, Paul G. (CIV) <Paul.G.Freeborne2@usdoj.gov>

Sent: Monday, September 24, 2018 12:01 PM

To: Schindler, David (LA) <David.Schindler@lw.com>; Likoff, Amy L. (CIV) <Amy.L.Likoff@usdoj.gov>; Glover, Martha N. (CIV) <Martha.N.Glover@usdoj.gov>; Qureshi, Abid (DC) <ABID.QURESHI@LW.com>; Robinson, Anne (DC) <Anne.Robinson@lw.com>; Meron, Daniel (DC) <Daniel.Meron@lw.com>; Rowe, David W. (BN) <David.Rowe@lw.com>; Tolley, David C. (BN) <David.Tolley@lw.com>; Do, Kirstin Scheffler (CH) <Kirstin.SchefflerDo@lw.com>; Maddoux,

Morgan (DC) <Morgan.Maddoux@lw.com>; Wallack, Carol <Carol.Wallack@usdoj.gov>; Doran, Cassandra J. (CIV) <Cassandra.J.Doran@usdoj.gov>; Hinson, Zoila E. (CIV) <Zoila.E.Hinson@usdoj.gov>; Krieg, Jessica E. (CIV) <Jessica.E.Krieg@usdoj.gov>; Draycott, Justin (CIV) <Justin.Draycott@usdoj.gov>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Tarosky, Adam R. (CIV) <Adam.R.Tarosky@usdoj.gov>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV) <Madhura.C.Valverde@usdoj.gov>

Subject: RE: US ex rel. Poehling v. UHG

David:

As you know, Judge Fitzgerald stated at the end of the hearing last Monday that it makes sense for the Court to determine the scope of Rule 26(b) discovery before Judge Segal proceeds to rule on discovery motions, recognizing that it may be appropriate to "draw the line" regarding discovery that is irrelevant to the claims and defenses at issue in the case. We have consulted with the client agency following the hearing and we agree that the "parties and Judge Segal will benefit from having rulings" on the pending motions, including the government's Rule 16(b) motion. We thus intend to await further guidance on threshold issues of relevancy from the Court. Limited judicial and agency resources should not be expended regarding privilege disputes that may be obviated by the Court's rulings.

Paul

From: David.Schindler@lw.com [<mailto:David.Schindler@lw.com>]

Sent: Friday, September 21, 2018 1:11 PM

To: Likoff, Amy L. (CIV) <alikoff@CIV.USDOJ.GOV>; Glover, Martha N. (CIV) <maglover@CIV.USDOJ.GOV>; ABID.QURESHI@LW.com; Anne.Robinson@lw.com; Daniel.Meron@lw.com; David.Rowe@lw.com; David.Tolley@lw.com; Kirstin.SchefflerDo@lw.com; Morgan.Maddoux@lw.com; Wallack, Carol <CWallack@CIV.USDOJ.GOV>; Doran, Cassandra J. (CIV) <cdoran@CIV.USDOJ.GOV>; Hinson, Zoila E. (CIV) <zhinson@CIV.USDOJ.GOV>; Krieg, Jessica E. (CIV) <jkrieg@CIV.USDOJ.GOV>; Draycott, Justin (CIV) <JDraycot@CIV.USDOJ.GOV>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Freeborne, Paul G. (CIV) <pfreebor@CIV.USDOJ.GOV>; Tarosky, Adam R. (CIV) <atarosky@CIV.USDOJ.GOV>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV) <mvalverd@CIV.USDOJ.GOV>

Subject: RE: US ex rel. Poehling v. UHG

Amy:

I wanted to get back to you on our potential motion to compel and the schedule for the joint stip. We will hold off proceeding until we have reviewed your upcoming agency declaration, which we understand will be provided to us on September 28. If the declaration fails to address our concerns, we will provide you with our portion of the joint stipulation during the early part of the week of October 1. We will honor our agreement to provide you with 14 days in which to provide us with your portion of the joint stipulation and will set a hearing date before Judge Segal that takes this schedule into account. We are also hopeful that the additional time will allow Judge Fitzgerald sufficient time to issue a final ruling on the government's Rule 16 motion and its motion for partial summary judgment, as we think all parties and Judge Segal will benefit from having final rulings on those motions.

Please confirm that you will be providing us with the agency declaration on September 28 as previously promised. If you have any other questions, please let us know.

Have a nice weekend,

David

David J. Schindler

LATHAM & WATKINS LLP

355 South Grand Avenue, Suite 100
Los Angeles, CA 90071-1560
Direct Dial: +1.213.891.8415
Fax: +1.213.891.8763
Email: david.schindler@lw.com
<http://www.lw.com>

From: Likoff, Amy L. (CIV) <Amy.L.Likoff@usdoj.gov>

Sent: Tuesday, September 04, 2018 2:55 PM

To: Schindler, David (LA) <David.Schindler@lw.com>; Glover, Martha N. (CIV) <Martha.N.Glover@usdoj.gov>; Qureshi, Abid (DC) <ABID.QURESHI@LW.com>; Robinson, Anne (DC) <Anne.Robinson@lw.com>; Meron, Daniel (DC) <Daniel.Meron@lw.com>; Rowe, David W. (BN) <David.Rowe@lw.com>; Tolley, David C. (BN) <David.Tolley@lw.com>; Do, Kirstin Scheffler (CH) <Kirstin.SchefflerDo@lw.com>; Maddoux, Morgan (DC) <Morgan.Maddoux@lw.com>; Wallack, Carol <Carol.Wallack@usdoj.gov>; Doran, Cassandra J. (CIV) <Cassandra.J.Doran@usdoj.gov>; Hinson, Zoila E. (CIV) <Zoila.E.Hinson@usdoj.gov>; Krieg, Jessica E. (CIV) <Jessica.E.Krieg@usdoj.gov>; Draycott, Justin (CIV) <Justin.Draycott@usdoj.gov>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Freeborne, Paul G. (CIV) <Paul.G.Freeborne2@usdoj.gov>; Tarosky, Adam R. (CIV) <Adam.R.Tarosky@usdoj.gov>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV) <Madhura.C.Valverde@usdoj.gov>

Subject: RE: US ex rel. Poehling v. UHG

David,

Following up on our conversation last week, and consistent with CMS's schedule and obligations, we anticipate that we will be able to provide you with our portion of a joint stipulation regarding the deliberative process privilege issue by September 28th.

Thanks,
Amy

Amy L. Likoff

Trial Attorney, U.S. Department of Justice

Civil Division, Commercial Litigation Branch, Fraud Section

Tel: (202) 305-3173 | Fax: (202) 305-7797

Amy.L.Likoff@usdoj.gov

From: Likoff, Amy L. (CIV)

Sent: Wednesday, August 29, 2018 3:50 PM

To: 'David.Schindler@lw.com' <David.Schindler@lw.com>; Glover, Martha N. (CIV) <maglover@CIV.USDOJ.GOV>; ABID.QURESHI@LW.com; Anne.Robinson@lw.com; Daniel.Meron@lw.com; David.Rowe@lw.com; David.Tolley@lw.com; Kirstin.SchefflerDo@lw.com; Morgan.Maddoux@lw.com; Wallack, Carol <CWallack@CIV.USDOJ.GOV>; Doran, Cassandra J. (CIV) <cdoran@CIV.USDOJ.GOV>; Hinson, Zoila E. (CIV) <zhinson@CIV.USDOJ.GOV>; Krieg, Jessica E. (CIV) <jkrieg@CIV.USDOJ.GOV>; Draycott, Justin (CIV) <JDraycot@CIV.USDOJ.GOV>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Freeborne, Paul G. (CIV) <pfreebor@CIV.USDOJ.GOV>; Tarosky, Adam R. (CIV) <atarosky@CIV.USDOJ.GOV>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV)

<mvalverd@CIV.USDOJ.GOV>

Subject: RE: US ex rel. Poehling v. UHG

David,

John Lee, Martha Glover and I are available to speak today at 4:30pm.

Thanks,

Amy

From: David.Schindler@lw.com [<mailto:David.Schindler@lw.com>]

Sent: Wednesday, August 29, 2018 2:45 PM

To: Likoff, Amy L. (CIV) <alikoff@CIV.USDOJ.GOV>; Glover, Martha N. (CIV) <maglover@CIV.USDOJ.GOV>; ABID.QURESHI@LW.com; Anne.Robinson@lw.com; Daniel.Meron@lw.com; David.Rowe@lw.com; David.Tolley@lw.com; Kirstin.SchefflerDo@lw.com; Morgan.Maddoux@lw.com; Wallack, Carol <CWallack@CIV.USDOJ.GOV>; Doran, Cassandra J. (CIV) <cdoran@CIV.USDOJ.GOV>; Hinson, Zoila E. (CIV) <zhinson@CIV.USDOJ.GOV>; Krieg, Jessica E. (CIV) <jkrieg@CIV.USDOJ.GOV>; Draycott, Justin (CIV) <JDraycot@CIV.USDOJ.GOV>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Freeborne, Paul G. (CIV) <pfreebor@CIV.USDOJ.GOV>; Tarosky, Adam R. (CIV) <atarosky@CIV.USDOJ.GOV>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV) <mvalverd@CIV.USDOJ.GOV>

Subject: RE: US ex rel. Poehling v. UHG

Amy:

It is unfortunate that you are at a loss to understand our position. We understand yours, but find it unreasonable under the circumstances. In the end, it will be for Magistrate Segal to decide whether the process the government has employed in terms of withholding documents and creating its privilege log, or the process you are now proposing – including taking more than 3 months to get a supporting declaration and not being willing to preview what it will say or what categories (whether old or new) the declaration or your revised log will contain, or even asking us to come up with categories for you when we can't see the documents – is reasonable. At this juncture, we are not looking to continue debating with you. Rather, we are just trying to extend some professional courtesy on things like scheduling. We are unavailable at 4 pm, but could do 4:30 pm or later. Please let us know if that works for folks on your end and let us know who will be joining a call so that we can send around an invite and a dial-in.

Thanks,

David

From: Likoff, Amy L. (CIV) <Amy.L.Likoff@usdoj.gov>

Sent: Wednesday, August 29, 2018 11:22 AM

To: Schindler, David (LA) <David.Schindler@lw.com>; Glover, Martha N. (CIV) <Martha.N.Glover@usdoj.gov>; Qureshi, Abid (DC) <ABID.QURESHI@LW.com>; Robinson, Anne (DC) <Anne.Robinson@lw.com>; Meron, Daniel (DC) <Daniel.Meron@lw.com>; Rowe, David W. (BN) <David.Rowe@lw.com>; Tolley, David C. (BN) <David.Tolley@lw.com>; Do, Kirstin Scheffler (CH) <Kirstin.SchefflerDo@lw.com>; Maddoux, Morgan (DC) <Morgan.Maddoux@lw.com>; Wallack, Carol <Carol.Wallack@usdoj.gov>; Doran, Cassandra J. (CIV) <Cassandra.J.Doran@usdoj.gov>; Hinson, Zoila E. (CIV) <Zoila.E.Hinson@usdoj.gov>; Krieg, Jessica E. (CIV) <Jessica.E.Krieg@usdoj.gov>; Draycott, Justin (CIV) <Justin.Draycott@usdoj.gov>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Freeborne, Paul G. (CIV) <Paul.G.Freeborne2@usdoj.gov>; Tarosky, Adam R. (CIV) <Adam.R.Tarosky@usdoj.gov>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV) <Madhura.C.Valverde@usdoj.gov>

Subject: RE: US ex rel. Poehling v. UHG

David,

We are at a loss to understand how you can reasonably conclude, before even seeing the categories and the declaration and despite our clear and repeated statements to the contrary, that "it appears that [we] intend to rely on the overly broad 'categories' that already exist on the current deficient privilege logs." During our last call on August 23rd, we explained that for each category of documents withheld on our privilege log under the deliberative process privilege, we intend to describe the pre-decisional and deliberative steps and how the documents in that category fit in with those steps. Further, during the call, we invited your suggestions regarding the categories we intend to use for the declaration. We again invite your input regarding potential categories for the government's declaration, as we are genuinely attempting to understand what will satisfy your concerns, short of a document-by-document declaration. As you requested, we have provided a reasonable date certain by which we intend to provide the declaration to you. Until such time as we have had the opportunity to present this information to you and you have reviewed it, the motion you contemplate is premature.

We are available to speak with you today at 4pm ET.

Thanks,
Amy

Amy L. Likoff
Trial Attorney, U.S. Department of Justice
Civil Division, Commercial Litigation Branch, Fraud Section
Tel: (202) 305-3173 | Fax: (202) 305-7797
Amy.L.Likoff@usdoj.gov

From: David.Schindler@lw.com [mailto:David.Schindler@lw.com]
Sent: Tuesday, August 28, 2018 5:00 PM
To: Likoff, Amy L. (CIV) <alikoff@CIV.USDOJ.GOV>; Glover, Martha N. (CIV) <maglover@CIV.USDOJ.GOV>;
ABID.QURESHI@LW.com; Anne.Robinson@lw.com; Daniel.Meron@lw.com; David.Rowe@lw.com;
David.Tolley@lw.com; Kirstin.SchefflerDo@lw.com; Morgan.Maddoux@lw.com; Wallack, Carol
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<zhinson@CIV.USDOJ.GOV>; Krieg, Jessica E. (CIV) <jkrieg@CIV.USDOJ.GOV>; Draycott, Justin (CIV)
<JDraycot@CIV.USDOJ.GOV>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC)
<Maria.R.Marsh@usdoj.gov>; Freeborne, Paul G. (CIV) <pfreebor@CIV.USDOJ.GOV>; Tarosky, Adam R. (CIV)
<atarosky@CIV.USDOJ.GOV>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV)
<mvalverd@CIV.USDOJ.GOV>
Subject: RE: US ex rel. Poehling v. UHG

Amy:

Thank you for the follow-up email. Unfortunately, your proposal does not address our concerns and your unwillingness to share an excerpt of the proposed declaration just heightens our concerns. As we set forth in letters and discussed during calls, we believe the government's privilege log descriptions are severely deficient and contain inadequate descriptions. Despite Judge Segal's recommendation that the government work with us to try to develop "categories" that we might find sufficient to allow us to challenge particular documents placed on the government's logs, the government has refused to do so. Instead, it appears that you intend to rely on the overly broad "categories" that already exist on the current deficient privilege logs. In our view, using the "category" of "RADV audit methodology" for nearly 5,000 documents that span a nearly 14-year period simply does not satisfy the government's obligations for a proper assertion of the deliberative process privilege.

We also are unwilling to wait until September 30 to review whatever declaration you intend to provide. As you know, United asked the government to provide an appropriate agency declaration on June 15. We do not believe the 3.5 month delay is reasonable. We also have no confidence that the proposed declaration will cure the defects in the log or provide an adequate description to allow United to challenge any particular documents included on the log.

Accordingly, we are prepared to move forward with our motion to compel. As I noted during our last call, we remain committed to working cooperatively with you whenever possible. To that end, please let us know a good time tomorrow for the parties to discuss a briefing schedule. We would prefer to extend the professional courtesy of taking your schedule into account before setting a briefing schedule for the joint stip and/or a hearing date before Judge Segal.

Thank you,

David

David J. Schindler

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From: Likoff, Amy L. (CIV) <Amy.L.Likoff@usdoj.gov>

Sent: Monday, August 27, 2018 1:57 PM

To: Schindler, David (LA) <David.Schindler@lw.com>; Glover, Martha N. (CIV) <Martha.N.Glover@usdoj.gov>; Qureshi, Abid (DC) <ABID.QURESHI@LW.com>; Robinson, Anne (DC) <Anne.Robinson@lw.com>; Meron, Daniel (DC) <Daniel.Meron@lw.com>; Rowe, David W. (BN) <David.Rowe@lw.com>; Tolley, David C. (BN) <David.Tolley@lw.com>; Do, Kirstin Scheffler (CH) <Kirstin.SchefflerDo@lw.com>; Maddoux, Morgan (DC) <Morgan.Maddoux@lw.com>; Wallack, Carol <Carol.Wallack@usdoj.gov>; Doran, Cassandra J. (CIV) <Cassandra.J.Doran@usdoj.gov>; Hinson, Zoila E. (CIV) <Zoila.E.Hinson@usdoj.gov>; Krieg, Jessica E. (CIV) <Jessica.E.Krieg@usdoj.gov>; Draycott, Justin (CIV) <Justin.Draycott@usdoj.gov>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Freeborne, Paul G. (CIV) <Paul.G.Freeborne2@usdoj.gov>; Tarosky, Adam R. (CIV) <Adam.R.Tarosky@usdoj.gov>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV) <Madhura.C.Valverde@usdoj.gov>

Subject: RE: US ex rel. Poehling v. UHG

David,

Following-up on our call last Thursday, and after discussing the issues raised during the call with our client agency, we are willing to commit to providing UnitedHealth with a declaration by September 30, 2018. As discussed during the call, the declaration will provide a description on a categorical basis of how each category of documents withheld on our privilege logs under the deliberative process privilege is both deliberative and pre-decisional. We believe that this approach is in line with the guidance that Judge Segal provided during our informal discovery conference with the court on August 16. Further, at this point, we do not believe it would be efficient or useful for the parties for us to provide an excerpt of our declaration in advance of September 30. We believe that this proposal should address the concerns you've raised.

Thanks,

Amy

Amy L. Likoff
Trial Attorney, U.S. Department of Justice
Civil Division, Commercial Litigation Branch, Fraud Section
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From: David.Schindler@lw.com [mailto:David.Schindler@lw.com]
Sent: Friday, August 24, 2018 5:38 PM
To: Likoff, Amy L. (CIV) <alikoff@CIV.USDOJ.GOV>; Glover, Martha N. (CIV) <maglover@CIV.USDOJ.GOV>; ABID.QURESHI@LW.com; Anne.Robinson@lw.com; Daniel.Meron@lw.com; David.Rowe@lw.com; David.Tolley@lw.com; Kirstin.SchefflerDo@lw.com; Morgan.Maddoux@lw.com; Wallack, Carol <CWallack@CIV.USDOJ.GOV>; Doran, Cassandra J. (CIV) <cdoran@CIV.USDOJ.GOV>; Hinson, Zoila E. (CIV) <zhinson@CIV.USDOJ.GOV>; Krieg, Jessica E. (CIV) <jkrieg@CIV.USDOJ.GOV>; Draycott, Justin (CIV) <JDraycot@CIV.USDOJ.GOV>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Freeborne, Paul G. (CIV) <pfreebor@CIV.USDOJ.GOV>; Tarosky, Adam R. (CIV) <atarosky@CIV.USDOJ.GOV>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV) <mvalverd@CIV.USDOJ.GOV>
Subject: RE: US ex rel. Poehling v. UHG

Thank you Amy. We hope to hear from you on Monday.

Have a nice weekend,

David

David J. Schindler

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From: Likoff, Amy L. (CIV) <Amy.L.Likoff@usdoj.gov>
Sent: Friday, August 24, 2018 1:58 PM
To: Schindler, David (LA) <David.Schindler@lw.com>; Glover, Martha N. (CIV) <Martha.N.Glover@usdoj.gov>; Qureshi, Abid (DC) <ABID.QURESHI@LW.com>; Robinson, Anne (DC) <Anne.Robinson@lw.com>; Meron, Daniel (DC) <Daniel.Meron@lw.com>; Rowe, David W. (BN) <David.Rowe@lw.com>; Tolley, David C. (BN) <David.Tolley@lw.com>; Do, Kirstin Scheffler (CH) <Kirstin.SchefflerDo@lw.com>; Maddoux, Morgan (DC) <Morgan.Maddoux@lw.com>; Wallack, Carol <Carol.Wallack@usdoj.gov>; Doran, Cassandra J. (CIV) <Cassandra.J.Doran@usdoj.gov>; Hinson, Zoila E. (CIV) <Zoila.E.Hinson@usdoj.gov>; Krieg, Jessica E. (CIV) <Jessica.E.Krieg@usdoj.gov>; Draycott, Justin (CIV) <Justin.Draycott@usdoj.gov>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Freeborne, Paul G. (CIV) <Paul.G.Freeborne2@usdoj.gov>; Tarosky, Adam R. (CIV) <Adam.R.Tarosky@usdoj.gov>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV)

<Madhura.C.Valverde@usdoj.gov>

Subject: RE: US ex rel. Poehling v. UHG

David,

We wanted to follow-up on our call yesterday and let you know that we are discussing the issues raised during the call with our client agency, and we intend to get back to you early next week.

Thanks,

Amy

Amy L. Likoff

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Sent: Tuesday, August 21, 2018 8:06 PM

To: Glover, Martha N. (CIV) <maglover@CIV.USDOJ.GOV>; ABID.QURESHI@LW.com; Anne.Robinson@lw.com; Daniel.Meron@lw.com; David.Rowe@lw.com; David.Tolley@lw.com; Kirstin.SchefflerDo@lw.com; Morgan.Maddoux@lw.com; Wallack, Carol <CWallack@CIV.USDOJ.GOV>; Doran, Cassandra J. (CIV) <cdoran@CIV.USDOJ.GOV>; Hinson, Zoila E. (CIV) <zhinson@CIV.USDOJ.GOV>; Krieg, Jessica E. (CIV) <jkrieg@CIV.USDOJ.GOV>; Draycott, Justin (CIV) <JDraycot@CIV.USDOJ.GOV>; Lee, John (USACAC) <John.Lee2@usdoj.gov>; Likoff, Amy L. (CIV) <alikoff@CIV.USDOJ.GOV>; Marsh, Maria (USACAC) <Maria.R.Marsh@usdoj.gov>; Freeborne, Paul G. (CIV) <pfreebor@CIV.USDOJ.GOV>; Tarosky, Adam R. (CIV) <atarosky@CIV.USDOJ.GOV>; UHG-RelatorsCounsel@Lists.SusmanGodfrey.com; Valverde, Madhura C. (CIV) <mvalverd@CIV.USDOJ.GOV>

Subject: RE: US ex rel. Poehling v. UHG

Dear Paul:

Thank you for your letter. We continue to have questions about the government's logs and would like to take you up on your offer to discuss our questions. Please let us know some times that work for you on Wednesday or Thursday.

Thanks,

David

David J. Schindler

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Sent: Monday, August 20, 2018 2:38 PM

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Subject: US ex rel. Poehling v. UHG

Counsel,

Please see attached correspondence.

Martha

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Contractor for PAE
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EXHIBIT 3

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,	)	Thursday, July 12, 2018
ET AL,	)	
	)	
<u>Defendants.</u>	)	

TELEPHONIC CONFERENCE RE DISCOVERY

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

APPEARANCES:

SEE PAGE 2

Court Reporter:

Recorded; XTR

Courtroom Deputy:

Marlene Ramirez

Transcribed by:

Exceptional Reporting Services, Inc.
P.O. Box 18668
Corpus Christi, TX 78480-8668
361 949-2988

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

EXCEPTIONAL REPORTING SERVICES, INC

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

3 (Voices overlapping)

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

16 MR. SPEAKER: Your Honor, if I --

17 (Voices overlapping)

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

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

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

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

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

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

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

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

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

11 **MR. FREEBORNE:** Your Honor, this is Paul Freeborne.
12 And I agree with Mr. Schindler. I think the issues are
13 subsumed. From our perspective United has the obligation under
14 26(b) to show relevancy. We think materiality has been
15 resolved as a matter of law. There is no factual issue to
16 probe. Simply stated, Judge Fitzgerald and the Ninth Circuit
17 have recognized that the materiality of accurate diagnosis
18 codes. And what OIG did or did not do cannot do that. And so
19 it's a completely irrelevant inquiry. Moreover, they're
20 seeking privileged information, investigated information, not
21 of United but of other third party plans. And in that rubric
22 they have the obligation to show good cause.

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

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

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

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

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

3 **MR. SPEAKER:** Thank you, your Honor.

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

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

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

18 **THE COURT:** Okay, all right.

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

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

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CERTIFICATION

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

A handwritten signature in cursive script, appearing to read "Toni Hudson", is written above a horizontal line.

Signed

July 16, 2018

Dated

TONI HUDSON, TRANSCRIBER

EXCEPTIONAL REPORTING SERVICES, INC

EXHIBIT 4

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
3 HONORABLE MICHAEL FITZGERALD U.S. DISTRICT JUDGE
4

5 UNITED STATES ex rel)
6 BENJAMIN POEHLING,)
7 Plaintiffs)
8 VS)
9 UNITEDHEALTH GROUP, INC.,)
10 et al,)
11 Defendants)

CV-16-8697-MWF

12
13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

14 LOS ANGELES, CALIFORNIA

15 Monday, September 17, 2018
16
17
18
19
20
21
22

23 Amy C. Diaz, RPR, CRR, FCRR
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AMY C. DIAZ, RPR, CRR OFFICIAL COURT REPORTER

1 to this. But the posture was such that the Government has
2 essentially been resisting our discovery before Magistrate
3 Judge Segal on the proposition that you were going to
4 essentially make it irrelevant.

5 All I'm asking is that when you go back, recognizing
6 you are not going to rule on the Rule 16 today, please look
7 at that for whenever you do rule with an understanding that
8 we need guidance in front of Magistrate Segal. We have
9 additional motions coming, because the Government has refused
10 to produce a few things. That's all I'm asking.

11 THE COURT: I understand. At some point Judge Segal
12 and I are just going to have to talk among ourselves about
13 where it makes sense for us to draw the line.

14 I mean, you know technically under the local rules
15 here, and the way that references work, the matter's entirely
16 up to her, and with her using her best guess as to what it is
17 that ultimately will happen in this Court.

18 And then on the flip side, if it's a matter -- for
19 instance, even if it would make a sensible resolution of a
20 discovery dispute to have one deposition take place hours
21 after the discovery cutoff, then she lacks the authority to
22 do that, and obviously that doesn't make a lot of sense.

23 So what the district judges and the magistrate
24 judges typically do in this district, at some point is for
25 the magistrate judge to say at some point, it would be very

1 helpful if there was guidance on such and such. I'm not
2 going to do it behind anybody's back or not give a chance for
3 people to be heard.

4 Here I will have to talk to her and figure out how
5 are we going to resolve this where it's fair to the two of us
6 and fair to the parties. And again, I'm not going to make
7 any ruling just out of the blue or something without the
8 parties having the chance to be heard on it.

9 So thank you, Counsel.

10 *****

11
12 I certify that the foregoing is a correct transcript from the
13 record of proceedings in the above-titled matter.

14
15
16
17 -----
18
19 Amy C. Diaz, RPR, CRR

September 19, 2018

20 S/ Amy Diaz
21
22
23
24
25

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19 Attorneys for the United States of America

20 UNITED STATES DISTRICT COURT
21 FOR THE CENTRAL DISTRICT OF CALIFORNIA
22 WESTERN DIVISION

23 UNITED STATES OF AMERICA *ex*
24 *rel.* BENJAMIN POEHLING,

25 Plaintiffs,

26 v.

27 UNITEDHEALTH GROUP, INC., *et al.*,

28 Defendants.

No. CV 16-08697 MWF (SSx)

[PROPOSED] ORDER GRANTING
UNITED STATES' EX PARTE
APPLICATION FOR A TEMPORARY
STAY OF MOTION TO COMPEL
DISCOVERY PENDING ISSUANCE OF
RULINGS

