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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA *ex rel*. BENJAMIN POEHLING, Plaintiffs, v. UNITEDHEALTH GROUP, INC., *et al*., Defendants.	No. CV 16-08697 MWF (SSx) UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF *EX PARTE* APPLICATION FOR A TEMPORARY STAY OF MOTION TO COMPEL DISCOVERY [DISCOVERY MATTER] DATE: October 23. 2018 TIME: 11:00 a.m. COURT: Roybal Bldg., Courtroom 590

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I. INTRODUCTION

Contrary to United's contention, Opp. at 1, the United States is not asserting the deliberative process privilege (or any other privilege) to deprive United of "crucial information" in this case. The United States is asserting privilege in accordance with the law and has explained in filings made with the Court why the disputed documents have no bearing on the claims and defenses in this case. By doing so, the United States has sought threshold rulings on relevance so that the Department of Health and Human Services ("HHS") is not put unnecessarily to the burden and expense of perfecting privilege over information that is not "otherwise discoverable" under Fed. R. Civ. P. 26(b)(5). Requiring the agency to review the large volume of documents implicated by United's overly broad discovery requests in advance of a Rule 16(b) scheduling order would cause irreparable harm to HHS' mission, which is to provide health insurance coverage to millions of health care beneficiaries.[1]

And despite United's assertions that the government is somehow to blame for the ill-timed showdown on privilege that United seeks to thrust upon the Court, the government has diligently filed four motions seeking rulings on the scope of Rule 26(b) discovery based upon Ninth Circuit precedent relevant here. It has also sought to work cooperatively with United to resolve questions of privilege once those rulings are obtained. United, by contrast, seeks to charge ahead with a discovery dispute that very may well be obviated when the Court rules on the government's pending motions.

[1] Far from being prevented from conducting discovery, United has twice jumped the gun on discovery, first obtaining permission to serve written discovery during the briefing of its unsuccessful motion to transfer venue and even before answering the United States' complaint and again by commencing "early depositions" before the time allowed by Fed. R. Civ. P. 26(d)(1). Since then, United has charged full speed on discovery by, *inter alia*, propounding exceedingly broad document requests on the government, particularly the Centers for Medicare and Medicaid Services ("CMS"). In response to United's requests, the United States collected over 6.25 terabytes of data consisting of 8,750,000 files from 160 custodians. This application concerns some 21,000 documents (including some duplicates) implicated by the deliberative process privilege. As explained below, United has improperly sought to turn the tables on the government by making the government's knowledge the focus of discovery, when its own knowledge and conduct should be the focus in this False Claims Act ("FCA") case.

United misconstrues *ex parte* requirements. It improperly dismisses the United States' prejudice out of hand as merely the task of having to complete its portion of the joint discovery stipulation, when in reality, prejudice looks to whether the United States was able to bring its motion on a regular schedule. Given the short 14-day period United gave the United States to provide its portion of a joint stipulation, declarations, and exhibits, a noticed motion was impossible and irreparable prejudice is indisputable.

United also improperly relies on a passing statement from this Court to assert that a motion to stay should have been filed a long time ago. The Court's statement suggested that, "*if it was a situation where you knew that you were going to need a stay* until certain fundamental issues were resolved, that Stay Motion needed to be filed a long time ago." Opp., Ex. C, Aug. 16, 2018 Hr'g Tr. at 20 (emphasis added). United chooses to ignore the first part of this statement and selectively quotes the second part no less than four times, Opp. at 1, 5, 8, 10, as if repetition might somehow make up for its mischaracterization. But the United States could not have *known* that a motion was necessary unless United was engaged in sham negotiations and the United States knew that to be so. United appeared to be engaged in discussions that might obviate or limit its motion and the United States assumed United was conducting them in good faith, as the Local Rules require. The United States did not know a motion to stay was necessary until United made clear its intent to pursue its motion to compel.

Moreover, as noted, the United States acted diligently to bring significant legal issues to the attention of the Court by filing four motions. These motions were designed to assist the Court in "drawing the lines" in this case and sought not only to stay but eliminate irrelevant discovery. These motions have been fully briefed, were heard on September 17, 2018, and now stand submitted, awaiting rulings.

Further, in minimizing the burden imposed by its discovery motion, United incorrectly asserts that the government has "already reviewed" the relevant documents and "is prepared to produce the documents at issue." Opp. at 13. United also speculates that government lawyers invoked the deliberative process privilege without consulting

CMS. Opp. at 11, 13. Neither assertion is correct. CMS itself has properly invoked the deliberative process privilege and has also been diligently working to perfect the privilege and provide a declaration needed to defend the motion.

Accordingly, the Court should grant the application, permit Judge Fitzgerald to rule on the four pending motions, all of which now stand submitted for decision, and allow the parties a reasonable amount of time thereafter to attempt to resolve privilege matters in good faith until it becomes necessary for the Court to intervene.

II. FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background of this case is unique and noteworthy for purposes of this application for several reasons. First, in December 2016, the Ninth Circuit decided *United States ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161 (9th Cir. 2016). *Swoben* is relevant because it addressed the very same conduct at issue here – one-way chart reviews conducted by MAOs that added diagnosis codes triggering risk adjustment payments to MAOs but without deleting invalid codes – and the very same defendants now before the Court here – the United defendants. *Swoben* held that when MAOs design retrospective reviews of their enrollees' medical records deliberately to avoid identifying erroneously submitted diagnosis codes that might otherwise have been identified with reasonable diligence, they can no longer certify that the data or codes they submit are accurate, complete, and truthful. *Id*. at 1175.

Swoben so held because CMS had long made "clear," through ample guidance, that MAOs must report codes accurately. *Id*. at 1166 ("CMS has long made clear" that MAOs have "an obligation to undertake due diligence to ensure the accuracy, completeness, and truthfulness of the risk adjustment data they submit to CMS"); *id*. at 1169 (CMS "has always required due diligence and good faith"); *id*. (CMS "has always expected that [MAOs] implement . . . appropriate payment evaluation procedures"); *id*. at 1174 ("as CMS has made clear, [MAOs] have always had an obligation to take steps to ensure the accuracy, completeness, and truthfulness of the encounter data"); *id*. at 1177 ("statements by CMS are authoritative . . . because they provide clear guidance to

[MAOs]"). Thus, in light of the clear guidance, *Swoben* held that MAOs could not in good faith attest to the accuracy of their data when they knew "their data included a significant number of erroneously reported diagnosis codes." *Id*. at 1175.

In September 2018, the Ninth Circuit followed with another published decision addressing this type of conduct by MAOs. *United States ex rel. Silingo v. Wellpoint, Inc.*, 895 F.3d 619 (9th Cir. 2018). *Silingo* reiterated that MAOs like United must submit accurate diagnosis codes to CMS. *Id*. at 624 ("Every diagnosis code submitted to CMS must be based on a 'face-to-face' visit that is documented in the medical record."); *id*. ("With data for millions of people being submitted each year, CMS is unable to confirm diagnoses before calculating capitation rates" and "accepts the diagnoses as submitted" by MAOs); *id*. at 625 ("We have explained that a certification is thus false when the [MAO] has actual knowledge of the falsity of the risk adjustment data or demonstrates either reckless disregard or deliberate ignorance of the truth or falsity of the data.") (internal quotes and cites omitted); *id*. ("The importance of accurate data certifications and effective compliance programs is obvious: if enrollee diagnoses are overstated, then the capitation payments to [MAOs] will be improperly inflated.").

Against this backdrop, the United States intervened in this FCA *qui tam* case brought by relator Benjamin Poehling to recoup substantial public funds improperly retained by United from its knowing failure to delete unsupported diagnosis codes that triggered the automatic payments it received for many years. To aid the Court in framing and addressing the legal issues as guided by Ninth Circuit precedent, in May 2018, the United States filed three motions: (1) a motion for partial summary judgment regarding United's legal obligation to delete unsupported codes, (2) a motion to strike improper affirmative defenses, and (3) a motion to dismiss its counterclaim. Dkt. Nos. 234, 235, 236. In August 2018, the United States filed a fourth motion under Rules 16(b) and 26(c), expressly seeking a scheduling order modifying the scope of relevant discovery to preclude the parties from needlessly pursuing issues decided by *Swoben* and *Silingo*. Dkt. No. 261. Even though the United States filed three of these motions in

May 2018, due to the extra time United requested to file its oppositions and other scheduling reasons, the motions were not heard until September 17, 2018. Dkt. No. 288.

In truth, the United States began alerting the Court to the existence of significant legal issues in this case much earlier, as early as December 2017, proposing that discovery in this case be conducted in "phases" and identifying legal issues and motions anticipated to be filed in this case. Dkt. No. 191 (Joint Rule 26(f) Report, filed Dec. 22, 2017) at 6-7, 20-25, 31-32. The United States did so again in an amended Joint Rule 26(f) Report filed on April 2, 2018. Dkt. No. 224 at 5-11, 25-26. Thereafter, a scheduling conference was held on April 19, 2018, Dkt. No. 227, but no scheduling order has yet been issued in this case. As a consequence, no dates have yet been set in this case for the discovery cut-off, pre-trial conference, or trial. Nor has there been any guidance from the Court regarding the scope or sequence of appropriate discovery.

Meanwhile, United has vigorously conducted unfettered discovery in this case. As early as July 2017, when the venue motion was being briefed, United sought and obtained permission for the parties to commence written discovery. Dkt. No. 133 (Order filed July 17, 2017) at 1 (second page). Later, in November 2017, United sought a special exemption from Fed. R. Civ. P. 26(d)(1) to conduct "early deposition discovery," Dkt. No. 167, pursuant to which it took these depositions.

Pertinent to this application is the fact that United has served 107 requests for production, mostly directed at CMS. These requests touch on virtually every aspect of the Medicare Advantage ("MA") program and thereby inherently implicate internal agency deliberations of CMS regarding the program. These include, but are not limited to, documents related to internal CMS decisions regarding (a) calculation of the Risk Adjustment ("RA") factors in the CMS payment model; (b) calculation of RA payment policies included in the Advance Notice and Rate Announcement issued annually; (c) calculation of the RADV methodology, including deliberations regarding the use of a Fee-For-Service ("FFS") adjuster; (d) creation of training documents and materials for MA Plans regarding the operations and policies of the MA Program; and (e) policy decisions regarding the operation of the MA Program, such as the issuance of guidance documents on the manner in which MA Plans should report and return overpayments.

Predictably, the enormous breadth of United's document requests has placed undue burdens on the government, which has devoted very considerable agency resources to the search, collection, and review of voluminous documents, including review for privilege, such as the deliberative process privilege at issue here. At the same time, CMS offices with potentially responsive documents have continued, as they must, with their full-time task of administering Parts C and D of the Medicare program.

In response to United's requests, the United States collected over 6.25 terabytes of data consisting of 8,750,000 files from 160 custodians. The United States has produced 48,170 documents, with over 605,000 documents implicating privilege issues. To date, the United States has served seven privilege logs and withheld more than 21,000 documents (including some duplicates) based on the deliberative process privilege.

Regarding the deliberative process privilege, the parties were engaged in earnest discussions to resolve their differences. On September 17, 2018, the Court heard arguments on the four motions filed by the United States to settle legal issues and modify the scope of discovery in this case. At the conclusion of the hearing, Judge Fitzgerald stated, "Judge Segal and I are just going to have to talk among ourselves about where it makes sense for us to draw the line." *Ex Parte* Appl., Ex. 4, Sept. 17, 2018 Hr'g Tr. at 55.[2] Given this comment, the United States suggested that the parties await the Court's rulings. Ex. 2 (Sept. 24, 2018 Email from Paul Freeborne) at 4. Indeed, even United agreed that "all parties and Judge Segal will benefit from having final rulings on those motions." *Id*. (Sept. 21, 2018 Email from David Schindler).

Nevertheless, on September 28, 2018, United served its portion of a joint discovery stipulation, requiring the United States to provide its portion of the joint stipulation, a declaration, and exhibits in 14 days, by October 12, 2018. Ex. 2 at 1.

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[2] Exhibits 1-4 are attached to the United States' *Ex Parte* Application. Exhibit 5 is attached hereto.

Before then, the United States did not know that a motion to stay would be necessary. Indeed, United confirmed in its opposition to this application that it was "willing to work cooperatively" with the United States and acknowledged that "it would refrain from proceeding with its motion" if CMS satisfied its requirements. Opp. at 6. While CMS was ultimately unable to satisfy United in the time allotted, the United States was entitled to credit United's professed interest in negotiating privilege issues. Nor was it required to have previously filed an unripe and overbroad motion to stay all discovery.[3]

III. ARGUMENT

A. *Ex Parte* Relief Is Appropriate

Ex parte relief requires (1) irreparable prejudice if the underlying motion is heard according to regular noticed motion procedures and (2) lack of fault in creating the crisis that requires *ex parte* relief or that the crisis occurred as a result of excusable neglect. *Mission Power Eng'g Co. v. Cont'l Gas Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995).

1. Irreparable Prejudice

Irreparable prejudice is shown by an inability to get a motion heard according to regular noticed motion procedures. *Id.; see also Scott v. City Council for the City of Santa Monica*, 2017 WL 4675720, at *4 (C.D. Cal. Oct. 16, 2017) (*ex parte* relief appropriate where application "cannot be heard on regular motion"). United wrongly asserts that there is no irreparable prejudice here. After United made it clear that it was done negotiating and would file a motion to compel, United only allowed 14 days, until October 12, 2018, for the United States to provide its "portion of the Joint Stipulation, along with any supporting declarations and exhibits . . . ." Ex. 2 at 1. United also stated that it would notice its motion for hearing on November 6, 2018. Neither the October

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[3] While United quotes extensively from this Court's generalized observations about how discovery may "typically" proceed in many cases, *see* Opp. at 7-8, United ignores that there are unique circumstances in this case that make such a course inappropriate here, including (1) the existence of the *Swoben* and *Silingo* decisions as guidance in this case, (2) the submitted status of four motions that potentially could help the Court "draw the line" regarding relevance, and (3) the absence of any discovery cut-off or other dates in this case.

12, 2018 date to complete the government's portion of the joint stipulation, declaration, and exhibits nor the November 6, 2018 hearing date provided enough time for the United States to bring a duly noticed motion to stay.

This is because, under Local Rule 7, a minimum of 28 days is required between the filing and hearing dates. In addition, this 28-day period must be preceded by a Local Rule 7-3 conference, followed by a seven-day waiting period. Given the amount of time that this procedure normally has taken in this case, a minimum of 40 or 41 days would have been needed to file and get a duly noticed motion heard.[4] Instead, as stated, United only afforded the United States 14 days, until October 12, 2018.

Even as negotiations began falling apart, the United States sought to avoid *ex parte* proceedings by requesting United to allow the United States, at a minimum, to bring a duly noticed motion. Ex. 2 at 3. United was silent for several days and, with neither an explanation nor any real urgency, forced the United States to proceed on an *ex parte* basis. *Id*. at 1. Accordingly, the United States could not have filed a duly noticed motion for a stay, giving rise to irreparable prejudice.

Moreover, this prejudice runs much deeper here. United incorrectly argues that there is no irreparable prejudice because the government merely "will have to draft its portion of the Joint Stipulation." Opp. at 11. What United ignores is the harm from having to review thousands of documents in order to perfect privilege, which review may be determined to be unnecessary if the United States' motions are granted. There is

[4] In reality, this period has taken much longer in this case. The United States' motion for partial summary judgment, motion to strike, motion to dismiss, and Rule 16 motion (Dkt. Nos. 234, 235, 236, and 261) have taken, respectively, either two or six (depending on whether the initial or renewed request date for a conference is counted), six, six, and seven days, respectively, to schedule with United, resulting in an average period of 5.25 or 6.25 days per motion. Added to the seven-day waiting period under Local Rule 7-3, the pre-filing conference has taken either 12 or 13 days to complete. Added to the 28-day period between filing and hearing dates, this results in a total period of 40 or 41 days to obtain a hearing date on a duly noticed motion. But this calculation works only if United accepts a minimum seven-day opposition filing period. Typically, however, United has not contented itself with the minimum one week to oppose a motion and has always requested and received several weeks to file its opposition. On the above four motions, United requested and received, respectively, periods of 62, 62, 62, and 21 days to file its oppositions. *See* Dkt. Nos. 241, 261, 274.

prejudice in having to hurriedly complete review and analysis of some 20,000 documents on an impracticable schedule. This burden largely falls squarely on CMS, the agency invoking the deliberative process privilege here. CMS, however, is tasked with the administration of nationwide healthcare programs, not litigation. Taking exorbitant amounts of time away from that important task disrupts CMS components' ability to effectively carry out their missions. That diversion of critical resources will have been totally or partially unnecessary if the Court draw lines that recognize the irrelevancy of many of United's document requests.

Furthermore, the prejudice to CMS from an unwarranted disclosure of sensitive privileged documents, caused by a hurried and less-than-through review, is patent. The release of deliberative process privileged documents can have a chilling effect on agency deliberations. As the contents of internal agency deliberations about policy matters become public, agency officials and employees will be less confident about engaging in robust discussions necessary to effectively carry out their duties. This purpose of the deliberative process privilege should be respected and safeguarded here. *See NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 151 (1975) (purpose of the privilege "is to prevent injury to the quality of agency decisions").

Finally, no real prejudice would result to United were the Court to enter a stay as requested by the United States. The relief sought here is narrow and covers only motions practice relating to the deliberative process privilege asserted by CMS. In the meantime, other discovery can and will continue as it has over the last year – subject, ultimately, to any limitations that the Court may impose in a Rule 16 order.

2. <u>Lack of Fault</u>

United also wrongly argues that the United States is at fault in creating a crisis. To see why, it is useful to look at the period before September 28, 2018, when United was ostensibly engaged in good faith negotiations with the United States for the purpose of avoiding the filing of a motion to compel. United presumably was negotiating with the realistic possibility that it would agree to terms obviating or at least limiting the scope of its motion. During discussions, the United States explored the ambitious possibility of providing an agency declaration by the end of September 2018, but doing so ultimately proved unduly optimistic and impossible for CMS to accomplish due to the enormous volume of documents that had been requested by United.[5] Despite this hiccup, the United States believed that the parties were continuing to resolve this dispute in good faith and a motion to compel could be obviated or at least limited. The United States therefore could not have *known* that a motion to stay was necessary *unless* United was in fact engaged in sham negotiations *and* the United States knew this to be so.

A motion to stay would have been premature while the parties were engaged in negotiations that could have obviated the motion altogether or at least narrowed its scope. That the negotiations ultimately proved unsuccessful does not *ex post facto* establish the necessity of filing a motion to stay before the negotiations had come to an end. Indeed, had the United States prematurely filed a motion to stay before the negotiations had been exhausted, United presumably could have refused to consider a negotiated resolution unless and until the United States withdrew its motion.

Moreover, a blanket motion to stay discovery at an earlier stage in this case before the parties had identified and narrowed the disputed issues would have been overbroad, as it could have impacted both proper and improper discovery. Any such stay motion would have had to be parsed by the Court to address only the improper discovery. Anticipating that the Court would appreciate some help in "drawing the lines," the United States diligently filed four motions designed to set some relevancy parameters consistent with the Ninth Circuit's rulings in *Swoben* and *Silingo* and curb discovery on certain issues irrelevant or immaterial to this case. The United States filed three of these motions on May 22, 2018 (Dkt Nos. 234, 235, 236), followed by a fourth motion on

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[5] Contrary to United's characterizations, the United States has not "reneged" on a promise to provide a declaration. Opp. at 12. Rather, the United States sought to push CMS to do so, but the schedule proved unworkable for CMS. In any event, United wholly ignores that, on August 28, 2018, it clearly rejected even this ambitious proposal made by the United States, stating unequivocally that "your proposal does not address our concerns . . . ." Ex. 2 at 7.

August 6, 2018 (Dkt. No. 261). The latter motion, while not expressly requesting a "stay" (as noted, a blanket stay would have been improper and United had not yet expressed a clear intent to proceed with a motion to compel discovery of privileged material and was ostensibly engaged in earnest discussions with the United States), expressly asked the Court essentially for the same relief, requesting it to "limit discovery on matters that have been resolved or are irrelevant to the liability issues that remain in this case." Pls.' Mem. of P.&A. in Supp. of Joint Mot. Pursuant to Rule 16(b)(3) at 2 (Dkt. No. 261-1).

Remarkably, when United terminated negotiations, it did not allow the United States to bring a duly noticed motion to stay on a regular motion calendar, as expressly requested by the United States, Ex. 2 at 3, and afforded the United States only 14 days to provide its portion of the joint discovery stipulation, declaration, and exhibits. This artificial deadline was unnecessary, as no discovery cut-off date has been set. Although the United States' application noted this fact and challenged United to explain why it was necessary to bring its motion now, given the lack of a discovery deadline, United is uncharacteristically silent on this critical point, offering merely that "United cannot be expected to sit idly by" while the government "unilaterally dictate[d] the flow and scope of discovery." Opp. at 8. But this is not what is happening here. As noted, this case is very different because, unlike most cases, the Ninth Circuit has already spoken clearly in two published decisions, *Swoben* and *Silingo*, about the *same conduc*t at issue here, and in the case of *Swoben*, even the *same defendant*. Thus, unlike the majority of cases, in this case, the Court is not considering discovery issues on a blank slate, but has directly on point guidance to follow from the Ninth Circuit. Moreover, as noted above, the stay requested here is limited in scope and will not affect the larger "flow and scope" of production of material not subject to the deliberative process privilege.

Additionally, the unique combination of circumstances in this case warrants special consideration. Here, the Ninth Circuit has issued particularly applicable guidance in *Swoben* and *Silingo.* While United may not like *Swoben* or *Silingo*, they are the law in this Circuit and should be followed in this case. Moreover, four motions are now pending before Judge Fitzgerald, who may very well place reasonable limitations on what is appropriate for discovery in this case. As Judge Fitzgerald himself stated in addressing the motion for partial summary judgment, even though discovery was at an early stage, "I do feel that [the government] is raising an issue which the plaintiff and the Relator have every right to raise and to raise it by this procedural device." Ex. 5 (Sept. 17, 2018 Hr'g Tr., attached hereto) at 5. The Court further stated: "It makes sense to bring it on what appears to be purely legal issues. It could clearly move the case along. For all I know, it might even resolve the case." *Id*. at 7. At the conclusion of the September 17 hearing, Judge Fitzgerald stated, "At some point Judge Segal and I are just going to have to talk among ourselves about where it makes sense for us to draw the line." Ex. 4, Sept. 17, 2018 Hr'g Tr. at 55. Particularly given the lack of any scheduling order establishing any discovery cut-off date in this case, at this juncture, prudence dictates that the parties await the Court's decisions on the four pending motions, which have been heard and stand submitted since September 17, 2018.

B. Undue Burden

United also misconstrues the relevant burden involved here. United has served 107 requests for production encompassing virtually every aspect of the MA Program that, naturally, implicate internal agency deliberations. These overly broad requests have, to date, required the United States to assert the deliberative process privilege over approximately 21,000 documents (including duplicates).

United misplaces the blame for the time it has taken to adequately review privileged documents on the government. In blaming the government for asserting privilege broadly, United wholly ignores that the number of documents (and agency issues) implicated by the deliberative process privilege is a function of its service of more than 100 exceedingly broad requests. United's overbroad requests made this result inevitable. While the government is willing to undertake a reasonable burden to comply with its discovery obligations, it needs to do so in a practical and careful manner, not according to a hurried and artificial deadline unilaterally imposed by United, particularly in the absence of a discovery cut-off date.

Instead of considering the obvious burden caused by its overbroad requests, United shifts focus by baselessly suspecting "that lawyers from the Department of Justice failed to consult with CMS before (improperly) asserting the privilege themselves." Opp. at 11-12; *see also* at 13-14. According to United, "either the government has improperly invoked the deliberative process privilege and now faces the (self-imposed) consequence of that decision, or it has undertaken the requisite review and is merely attempting to withhold the final declaration to shield these documents from United." *Id*. at 12. United offers no basis for its speculation and it is far from the truth. Government counsel have consulted with CMS and other HHS officials in determining the applicability of the privilege. Furthermore, reviewing thousands of documents for deliberative process privilege is not an event that occurs instantaneously, but rather a process that has been ongoing for some time. United ignores this important feature of a uniquely governmental privilege as an excuse to speculate about and ascribe improper motives where none are warranted.

Additionally, the burden of what United seeks to compel must now be measured against the prospect that four motions have now been fully briefed, been argued, and stand submitted, and that a Court ruling drawing relevancy lines may be in the offing. Given this impending ruling, the burden that United seeks to impose on the government at this time becomes even more unreasonable.

C. Irrelevance

United also grossly overstates the relevance of the documents it seeks. While the burden it imposes by virtue of its overbroad discovery is great, the documents that United seeks are largely irrelevant to the central issues in this case. It is worth bearing in mind that this case is at its core an FCA lawsuit, meaning that a central issue is United's scienter or knowledge of its improper retention of moneys owed to the government. In an attempt to turn the tables, United seeks to shift that focus away from its own culpable conduct to complaints about the government's administration of enormous public health programs. To accomplish this, United largely relies on a misguided construction of what "objective reasonableness" means. Opp. at 21. According to United, if its construction of its legal obligations was objectively reasonable, regardless of the strength of its own guilty state of mind, it cannot be liable under the FCA. Put another way, according to United, even if its executive management all said to each other, "Let's defraud Medicare out of billions and billions of dollars," such statements would be meaningless as long as United could claim that its construction of its legal obligations was arguably "objectively reasonable." United's position fails as a matter of law.

To support this implausible proposition, United relies on *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 70 n.20 (2007), a Fair Credit Reporting Act ("FCRA") case. United argues that *Safeco* establishes that "the objective reasonableness of a given legal interpretation provides an *independent defense* without any need to determine the defendant's 'state of mind.'" Opp. at 21 (emphasis added). This argument, however, was roundly rejected by the Ninth Circuit in *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457 (9th Cir. 1999). There, the district court below relied on *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996), to hold that a defendant's demonstration "that it made a reasonable interpretation of an ambiguous accounting standard" could negate falsity under the FCA. *Id*. at 462-63. The Ninth Circuit reversed, holding that:

> Unlike *Hagood*, this case involves regulations that, while unquestionably technical and complex, are not discretionary. Their meaning is ultimately the subject of judicial interpretation, and it is Parsons' compliance with these regulations, as interpreted by this court, that determines whether its accounting practices resulted in the submission of a 'false claim' under the [FCA].

Id. at 463; *see also United States v. Bourseau*, 531 F.3d 1159, 1164 (9th Cir. 2008) (stating that "courts decide whether a claim is false or fraudulent by determining whether a defendant's representations are accurate in light of applicable law") (citing *United States ex rel. Oliver v. Parsons*).

Moreover, *Safeco* itself does not support the massive weight that United seeks to place upon it. Although United quotes from a footnote, which it improperly elevates to the status of a "holding," Opp. at 21, United ignores the more important statements from the body of the opinion preceding that footnote, which state as follows:

> This is *not a case in which the business subject to the Act had the benefit of guidance* from the courts of appeals or the Federal Trade Commission (FTC) that might have *warned it away* from the view it took. . . . Given this *dearth of guidance* and the less-than-pellucid statutory text, Safeco's reading was not objectively unreasonable, and so falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability.

551 U.S. at 70 (emphasis added). The Court then observed in passing in a footnote that, in the presence of "more than one reasonable interpretation" and the absence of any court or agency guidance, "it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Id*. n.20.

In other words, *Safeco*'s footnote 20 has no application where, as here, a defendant has been "warned away" by "clear" court or agency guidance. Indeed, this is what numerous courts that have addressed *Safeco* in the context of FCA cases have recognized. *See United States ex rel. Purcell v. MWI Corp*., 807 F.3d 281, 288 (D.C. Cir. 2015) ("But this court, looking to Supreme Court guidance, has held that a jury might still find knowledge if there is interpretive guidance 'that might have warned [the defendant] away from the view it tool.'") (quoting *United States ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983 (D.C. Cir. 2008)); *United States ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp*., 276 F.3d 1032, 1053 (8th Cir. 2002) (even if regulation was ambiguous, if relators "show[ed] the defendants certified compliance with the regulations knowing that the HCFA [now

CMS] interpreted the regulations in a certain way and that their actions did not satisfy the requirements of the regulation as the HCFA interpreted it, any possible ambiguity of the regulations [would be] water under the bridge."); *United States v. Celgene Corp.*, 226 F. Supp. 3d 1032, 1051 (C.D. Cal. 2016) ("But if the defendant was 'warned . . . away from the view it took' by guidance from the courts or the agency charged with interpreting the statute, ambiguity in the underlying statute would not defeat a finding of willfulness.") (citations omitted); *United States ex rel. Armfield v. Gillis*, 2011 WL 13151974, at *16 (M.D. Fla. Mar. 31, 2011) ("Thus, regardless of any ambiguity, scienter could be established if defendants *knew* how the agency interpreted the regulation.") (emphasis original).

This FCA case is precisely like those other FCA cases and unlike *Safeco*, which dealt with a "dearth" of guidance under the FCRA. To see that this is so, one need only review *Swoben*. There, the Ninth Circuit, in looking at the precise conduct at issue here (the knowing failure to delete unsupported diagnosis data upon which risk adjustment payments are based) engaged in by the very same defendant (United), stated that United acts in bad faith when it violates "clear" guidance from CMS requiring diagnosis codes to be supported by medical records, which it found. 848 F.3d at 1166 ("CMS has long made clear" that MAOs have "an obligation to undertake due diligence to ensure the accuracy, completeness, and truthfulness of the risk adjustment data they submit to CMS"); *id*. at 1169 (CMS "has always required due diligence and good faith"); *id*. (CMS "has always expected that [MAOs] implement . . . appropriate payment evaluation procedures"); *id*. at 1174 ("as CMS has made clear, [MAOs] have always had an obligation to take steps to ensure the accuracy, completeness, and truthfulness of the encounter data"); *id*. at 1177 ("statements by CMS are authoritative . . . because they provide clear guidance to [MAOs] regarding their obligations"). Thus, in light of this "clear" guidance from CMS, the Ninth Circuit held that MAOs could not in good faith submit certifications to CMS when they knew that "their data included a significant number of erroneously reported diagnosis codes." *Id*. at 1175.

The Ninth Circuit reiterated its message in *Silingo*. *See* 895 F.3d at 624 ("Every diagnosis code submitted to CMS must be based on a 'face-to-face' visit that is documented in the medical record."); *id*. ("With data for millions of people being submitted each year, CMS is unable to confirm diagnoses before calculating capitation rates" and "accepts the diagnoses as submitted" by MAOs); *id*. at 625 ("a certification is thus false when the [MAO] has actual knowledge of the falsity of the risk adjustment data or demonstrates either reckless disregard or deliberate ignorance of the truth or falsity of the data") (internal quotes and cites omitted); *id*. ("The importance of accurate data certifications and effective compliance programs is obvious: if enrollee diagnoses are overstated, then the capitation payments to [MAOs] will be improperly inflated."). Thus, given this ample "clear" guidance "warning away" MAOs from submitting unsupported codes, United's attempt to seek documents exploring the government's knowledge is misguided and cannot be used to excuse its unfettered fishing expedition as to documents that are irrelevant to the claims and defenses at issue.

Indeed, the Court has already indicated that internal government documents would not be "germane" to either United's knowledge or any purported contract ambiguity:

> [GOVERNMENT COUNSEL]: The other element of the claim we are dealing with here, whether it was knowingly done. A knowing violation has to be based on the actual knowledge that United had when it committed the violation, whether it didn't make the deletes. All the stuff that happened internally in the agency of what anyone said, United never had privy to that. So it doesn't go to whether it acted knowingly and in good faith and it doesn't go to the legal obligation, so –
>
> THE COURT: And moreover, if it truly was internal, then it *would traditionally not be viewed as germane* in interpreting a contract, because it isn't a part of either of usage of the industry or the course of conduct of the parties.

Ex. 5 (Sept. 17, 2018 Hr'g Tr.) at 15 (emphasis added).

The same is true of materiality. The Risk Adjustment Processing System ("RAPS"), by design, relies on diagnosis codes to automatically determine payment amounts. *See* Dkt No. 261-1 (Pls.' Mem. of P.&A. in Supp. of Joint Mot. Pursuant to Rule 16(b)(3)) at 8-11. As already recognized by the Court, this is an undisputed fundamental feature of the system and, as a necessary corollary, "generalized knowledge [on the part of CMS] does not amount to actual knowledge of specific invalid diagnoses." Dkt. No. 212 (Order re Mot. to Dismiss (filed Feb. 12, 2018) at 21.[6] United cannot justify embarking on its unjustified campaign to further push its rejected generalized knowledge argument. This is particularly so given that no CMS employee or official could have had actual knowledge of specific invalid diagnoses unless United made the required deletes in RAPS or otherwise provided CMS with the necessary detailed information so that CMS itself could have deleted invalid codes, which United did not do. Thus, United's claimed basis for seeking documents relating to CMS's development and administration of its risk adjustment system lacks merit.

At most, discovery relating to knowledge and materiality that is directed to the government should be limited to CMS' processing of United's deletes and its recovery of improper payments from United. There is no basis for any additional discovery by United, particularly overbroad discovery into internal agency deliberations.

Similarly, the government's common law claims afford United no license to conduct unbounded discovery. While payment by mistake may focus to a limited extent on what the government would have done had it known the truth, there is no basis to conclude that the government knew of United's misconduct and yet paid. *See Silingo*, 895 F.3d at 624 ("With data for millions of people being submitted each year, CMS is unable to confirm diagnoses before calculating capitation rates" and "accepts the diagnoses as submitted" by MAOs). Absent some evidence to the contrary to show

[6] United seeks to dismiss this conclusion by relegating it to an inconsequential comment made at a "pleading stage." Opp. at 16 n.7. But the Court was not making an inconsequential statement and its conclusions of law are equally applicable now.

some good faith basis for pursuing such improbable discovery, which United has not shown, it ought not to be permitted to conduct a fishing expedition.

Likewise, unjust enrichment is not a basis for unlimited discovery. Although United may seek to challenge and recalculate its risk adjustment payments, this effort has no place in this FCA case. For years, United conducted countless one-way chart reviews and obtained risk adjustment payments for diagnosis codes it added, while at the same time refusing to delete codes it knew were unsupported. Having obtained and retained risk adjustment payments for its added codes, and after having been caught failing to delete invalid codes, United may not now seek to recalculate payments only as to deletes. Indeed, the Ninth Circuit has already rejected United's attempt to criticize the data and method CMS used to calculate risk adjustment payments as being merely an improper attempt to divert attention away from its failure to act in good faith:

> [T]his is not a case about whether [MAOs] have to take affirmative steps to verify risk adjustment data. The defendants indisputably took such steps by conducting retrospective reviews. This is a case about whether such organizations, having adopted affirmative verification procedures, have to conduct them in good faith.

Swoben, 848 F.3d at 1179. As *Swoben* recognized, United's attempt to challenge CMS's calculation of risk adjustment payments, particularly when it has accepted these payments for years, lacks good faith. Just as the Ninth Circuit flatly rejected United's improper effort to divert attention away from its own culpable conduct to focus on CMS's data quality, United should not be allowed to do so here. Thus, United's lacks any legitimate basis for conducting irrelevant discovery as to CMS in this case.

IV. CONCUSION

By this application, the United States seeks a temporary stay of United's motion to compel pending issuance of rulings from the Court. The United States has shown irreparable prejudice and that it was not at fault. In deciding this application, the Court should also consider the special circumstances in this case, including (1) the existence of published Ninth Circuit authorities expressly addressing the very same conduct and the very same parties here, (2) the pending status of four motions that could readily assist the Court in drawing appropriate discovery lines, and (3) the absence of any discovery cut-off date in this case. For the foregoing reasons, the United States respectfully requests that the Court grant this application.

Dated: October 17, 2018

Respectfully submitted,

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EXHIBIT 5

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

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

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

Monday, September 17, 2018

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matters. And as I indicated in the tentative, I do feel that it is raising an issue which the plaintiff and the Relator have every right to raise and to raise it by this procedural device.

The -- the real issues here -- and I'll summarize this since the tentative doesn't go on the docket -- is I note that there is two issues that are raised here. One is, just as a matter of law, is there is this obligation to delete the unsupported diagnostic codes. And the second issue is, is that how the contract should be interpreted.

And both of those are fine things to raise on summary judgment. And my very tentative tentative -- because again, just as a matter of common sense you would think that there would be such duty -- but as my very tentative tentative is to deny the motion on both grounds.

As to the contract, that is not really that surprising. There is still a lot more that can happen in this case. It's -- I'm not entirely certain what the contractual law is that governs the interpretation of the contract and what iteration of the parol evidence rule is necessarily being invoked here so I could know whether this is even the sort of contract which is potentially unambiguous.

To the extent that extrinsic evidence comes in, then clearly the defendants have the right to get more of it.

MS. WALLACK: I'm just happy to answer any -- I don't think what is happening here by not having a ruling on this legal obligation is opening us up to enormous irrelevant discovery. And that is why we came to you early, because they are asking for a huge amount of attorney -- I'm sorry -- of internal deliberation documents from CMS. Nothing that could go to any elements of the claim. It's a legal issue whether they had an obligation to delete. And that is one element of the claim we are dealing with here.

The other element of the claim we are dealing with here, whether it was knowingly done. A knowing violation has to be based on the actual knowledge that United had when it committed the violation, whether it didn't make the deletes. All the stuff that happened internally in the agency of what anyone said, United never had privy to that. So it doesn't go to whether it acted knowingly and in good faith and it doesn't go to the legal obligation, so --

THE COURT: And moreover, if it truly was internal, then it would traditionally not be viewed as germane in interpreting a contract, because it isn't a part of either of usage of the industry or the course of conduct of the parties.

MS. WALLACK: Again, I want to go back to the contract is just a restatement of the regulations, and the regulations and their interpretation is strictly a question helpful if there was guidance on such and such. I'm not going to do it behind anybody's back or not give a chance for people to be heard.

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

So thank you, Counsel.

***** ***** *****

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

Amy C. Diaz, RPR, CRR September 19, 2018

S/ Amy Diaz