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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA ex
12 rel. BENJAMIN POEHLING,

13 Plaintiffs,

14 v.

15 UNITEDHEALTH GROUP, INC., et
16 al.,

17 Defendants.
18

Case No. CV 16-8697 MWF (SSx)

19 **MEMORANDUM DECISION AND ORDER**
20 **DENYING THE UNITED STATES' EX**
21 **PARTE APPLICATION FOR A**
22 **TEMPORARY STAY OF MOTION TO**
23 **COMPEL DISCOVERY PENDING**
24 **ISSUANCE OF RULINGS**

[Dkt. No. 294]

25 **I.**

26 **INTRODUCTION**

27 On October 3, 2018, the United States (the "Government") filed
28 an Ex Parte Application for a Temporary Stay of Motion to Compel
Discovery Pending Issuance of Rulings ("Appl."), supported by the
declaration of John E. Lee ("Lee Decl."). (Dkt. No. 294).
Defendant UnitedHealth Group, Inc. ("United")¹ filed an Opposition
on October 5, 2018 ("Opp.," Dkt. No. 297), including the

¹ For ease of reference, the Court will refer to the United Defendants collectively in the singular as "United" or "Defendant."

1 declaration of Abid R. Qureshi. ("Qureshi Decl.," Dkt. No. 298).
2 The Government filed a Reply on October 17, 2018. ("Reply," Dkt.
3 No. 301). The Court held a telephonic hearing on the Application
4 on October 23, 2018. For the reasons stated below and on the
5 record at the hearing, the Government's Application for a Temporary
6 Stay is DENIED.

7 8 II.

9 BACKGROUND FACTS

10
11 The Government contends that United's Medicare Advantage
12 ("MA") plans failed to correct diagnosis codes that United
13 submitted to the Centers for Medicare and Medicaid Services
14 ("CMS"), even though United knew from its review of the underlying
15 medical records that the codes were not supported. The operative
16 Amended Complaint-in-Partial Intervention ("Am. Compl.," Dkt. No.
17 171), as modified by the District Judge's partial grant of United's
18 Motion to Dismiss, raises one claim under the False Claims Act
19 ("FCA"), 31 U.S.C. § 3729(a)(1)(G), and two common law claims, for
20 Unjust Enrichment and Payment by Mistake.² (Am. Compl. at ¶¶ 341-
21

22 ² The Amended Complaint-in-Intervention originally alleged four
23 separate FCA claims in Claims One through Four. However, on
24 February 12, 2018, the District Judge granted in part United's
25 Motion to Dismiss the Amended Complaint-in-Intervention upon
26 finding that the Government had failed to adequately plead the
27 materiality of the misrepresentations at issue in its second, third
28 and fourth FCA claims. (Dkt. No. 212 at 1). The Government elected
not to file a Second Amended Complaint. (Dkt. No. 217).
Accordingly, this action is proceeding on the three surviving
claims in the Amended Complaint, for "reverse false claims" under
the FCA, (Am. Compl. ¶¶ 341-43), Unjust Enrichment, (id. ¶¶ 356-
58), and Payment by Mistake. (Id. ¶¶ 359-61). (See Dkt. No. 218).

1 361). United's Answer to the Amended Complaint-in-Intervention
2 include five counterclaims for breach of contract, breach of the
3 covenant of good faith and fair dealing, fraudulent inducement,
4 negligent misrepresentation, and promissory estoppel.
5 ("Counterclaim," Dkt. No. 223, ¶¶ 39-71).

6
7 Under Medicare Advantage plans, private insurers create health
8 plans in which Medicare-eligible individuals may choose to enroll.
9 (Dkt. No. 250 at 5). MA plans cover at least the same benefits as
10 traditional Medicare, and pay providers for their services. (Id.
11 at 5-6). In return, CMS makes a fixed per-member, per month payment
12 to the MA plan by applying each actual plan member's "risk
13 coefficient" to the estimated cost of providing benefits to a
14 Medicare enrollee with a national average risk profile. (Id. at
15 6). The risk coefficient that applies to a particular plan member
16 is determined in part by the diagnosis codes on claims forms
17 submitted by providers for that patient in a given year. (Id. at
18 6-7). The higher the risk coefficient assigned to a particular
19 plan member, the more the plan is paid by CMS.

20
21 MA plans submit diagnosis codes to CMS through the CMS's "Risk
22 Adjustment Processing System" ("RAPS") and "Encounter Data System."
23 (Dkt. No. 234 at 7). "Each RAPS submission includes only a few
24 data fields: the beneficiary's identification number, the date of
25 the medical encounter, the type of healthcare provider, and the
26 diagnosis code(s) reported by the provider for that encounter."
27 (Id.). There is also a field called a "delete indicator" that
28 permits the MA plan to delete invalid diagnosis codes. When

1 deletions are made after a payment has been sent to the MA plan,
2 CMS reconciles its payments "as part of a routine process." (Id.).
3

4 To ensure that the correct risk coefficients are applied, CMS
5 requires MA plans to implement effective compliance programs that
6 include, in part, audits to verify that the diagnosis codes
7 submitted for its members are supported by the members' underlying
8 medical records. (Am. Compl. ¶ 96). Because MA plans have an
9 incentive to find and report as many diagnoses as can be supported
10 by the medical record, MA plans typically arrange for "chart
11 reviews" to locate "diagnoses documented in their beneficiaries'
12 charts that a provider failed to code." (Dkt. No. 250 at 9).
13

14 The Government alleges that United's MA plans engaged in so-
15 called "one-way" chart reviews. (Am. Compl. ¶ 164). According to
16 the Government, under these programs, "coders were instructed to
17 perform 'blind' reviews of the beneficiaries' medical records,"
18 without knowing which, if any, diagnoses had been reported by the
19 providers. (Id.). "[T]he coders were instructed to look for all
20 medical conditions purportedly documented in the records, record
21 all diagnosis codes identifying those conditions, and give all of
22 those codes" to United. (Id.). The Government states that United
23 then identified the diagnosis codes submitted by the "blind" coder
24 review that had not been reported by the provider and added those
25 codes to those already submitted to CMS "for additional risk
26 adjustment payments." (Id.). However, the Government maintains
27 that United did not look the "other way" and delete codes previously
28

1 reported by providers that were not identified by coders during
2 their blind review. (Id.).

3
4 On May 22, 2018, the Government filed three Motions before
5 the District Judge that it contends will possibly narrow the scope
6 of permissible discovery. First, the Government filed a Motion
7 for Partial Summary Judgment seeking a finding that, as a matter
8 of law, United was obligated to delete known coding errors through
9 RAPS once it discovered during the course of its compliance reviews
10 that previously reported diagnosis codes were unsupported by the
11 underlying medical records. ("MSJ," Dkt. No. 234 at 1) (citing
12 United States ex rel. Swoben v. United Healthcare Ins. Co., 848
13 F.3d 1161, 1176 (9th Cir. 2016)). Second, the Government filed a
14 Motion to Strike Affirmative Defenses, in which it alleged that
15 certain of United's affirmative defenses are invalid because they
16 improperly "seek to turn the focus of this case, and of discovery,
17 away from Defendants' conduct and toward the actions,
18 deliberations, and mental state of a wide range of Government
19 employees and agency officials," even though the Government's
20 scienter is not an affirmative defense to an FCA claim. ("MTS,"
21 Dkt. No. 235, at 1). Third, the Government filed a Motion to
22 Dismiss United's Counterclaims on the ground that because United
23 cannot claim that any payments were wrongly withheld, United cannot
24 prove damages. ("MTD," Dkt. No. 236 at 1).

25
26 Finally, on August 6, 2018, the Government filed a Motion
27 Pursuant to Rule 16(b)(3) for Issuance of Scheduling Order
28 Modifying Extent of Discovery. ("Motion for Scheduling Order,"

1 Dkt. No. 261). In that Motion, the Government contended, inter
2 alia, that non-public information, such as CMS's internal
3 deliberations, is not relevant to United's scienter, and that the
4 Ninth Circuit in Swoben resolved as a matter of law that MA plans
5 have an obligation to correct known coding errors. (Id. 6-13).
6 Accordingly, the Government seeks an Order relieving it from any
7 obligation to respond to discovery relating to the Government's
8 "internal deliberations, unofficial interpretations, or informal
9 understanding of the legal requirements imposed by statutes, rules,
10 regulations, and guidance materials on MAOs to delete invalid
11 diagnosis codes," or discovery "relating to investigations
12 conducted by the Department of Health and Human Service's Office
13 of Inspector General concerning whether MAOs other than United
14 complied with their obligation to delete invalid diagnosis codes."
15 (Dkt. No. 261-11 at 2). The District Judge held a hearing on the
16 motions on September 17, 2018, following which the Court took the
17 matters under submission. (Dkt. No. 284). Those four motions
18 remain pending.

19
20 Although a scheduling order has not yet issued, the Parties
21 have engaged in discovery for more than a year. United propounded
22 its first document requests in August 2017. (Opp. at 3). Since
23 that time, the Government has produced approximately 47,600
24 documents, but has withheld as privileged over 25,200, including
25 approximately 21,400 documents withheld solely on the basis of the
26 deliberative process privilege. (Id. at 3-4). United sent a
27 letter to the Government on June 15, 2018 that detailed what it
28 contended were deficiencies in the Government's privilege

1 assertions. (Id. at 4). United represents that it asked the
2 Government to revise its privilege logs to provide "the requisite
3 level of detail to assess the government's assertions, and to
4 provide a formal claim of privilege by an appropriate [CMS]
5 official who had personally reviewed the relevant documents -- as
6 required for a proper assertion of the narrow, qualified
7 deliberative process privilege." (Id.). The Parties met and
8 conferred on July 30, 2018, but were unable to resolve their
9 differences.³ (Id.). In light of the impasse, United asked that
10 the Magistrate Judge hold an informal discovery conference, which
11 took place on August 16, 2018. (Id. at 5). According to United,
12 on August 27, 2018, the Government "committed to providing an
13 agency declaration by the end of September" that it represented
14 would "'perfect' its privilege concerns." (Id.).
15

16 United told the Government that it intended to file a motion
17 to compel production of the documents withheld on deliberative
18 process privilege grounds, but that it would refrain from
19 proceeding with the motion until it received CMS's declaration on
20 September 30, 2018. (Id. at 6). United claims that on September
21 24, 2018, the Government "changed course" and told United that it
22 would not provide the CMS declaration until after the District
23 Judge had ruled on all four of the Government's pending motions.
24 (Id.; see also Lee Decl., Exh. 1 at 9). Following these events,
25

26 ³ At the hearing, the Government argued that it negotiated in good
27 faith with United about the scope of proposed revisions to the
28 privilege log. According to the Government, the negotiations
eventually broke down over the categories the Government was
proposing to use in the anticipated revised log.

1 United decided to proceed with its motion to compel. On September
2 28, 2018, United sent the Government its portion of the Joint
3 Stipulation required by Local Rule 37-2, with a demand that the
4 Government return its portion of the Stipulation to United by
5 October 12, 2018. (Id., Exh. 2 at 1). The Government's Ex Parte
6 Application seeking a temporary stay of United's motion to compel
7 production of materials protected by the deliberative process
8 privilege followed on October 3, 2018.⁴

10 III.

11 THE PARTIES' CONTENTIONS

12
13 The Government's Ex Parte Application seeks a limited stay on
14 proceedings related to United's efforts to compel production of
15 "deliberative process" documents until the District Judge has ruled
16 on the Government's four pending motions. According to the
17 Government, a finding that CMS's non-public discussions are
18 irrelevant to the claims and defenses in this action would moot
19 the discovery that United intends to seek by its motion to compel.
20 (Appl. at 4-5).

21
22 The Government further maintains that the discovery into CMS's
23 deliberative processes is burdensome and overbroad, as United seeks
24 CMS's rulemaking files and documents relating to its: various

25
26 ⁴ United sent its portion of the Joint Stipulation by email to the
27 Government at 4:54 p.m. on Friday, September 28, 2018. (Lee Decl.,
28 Exh. 2 at 1). The Government filed the instant Ex Parte Application
on Wednesday, October 3, i.e. three working days after it received
United's email.

1 calibrations of the payment models and risk coefficients; risk
2 adjustment data validation extrapolation methodology; internal
3 analyses about whether the use of unaudited diagnosis data to
4 calibrate payment models and risk coefficients results in systemic
5 underpayment; determinations of risk adjustment error rates; and
6 determinations of coding intensity adjustors. (Id. at 6). Given
7 the broad scope of these requests, the Government claims that it
8 will be required to log over 21,400 documents on a privilege log.
9 (Id. at 7). Providing a declaration by the Administrator for each
10 of these documents would be extremely burdensome, as United is
11 demanding that it include:

12
13 (1) a formal claim of privilege by the head of the
14 department possessing control over the requested
15 information; (2) an assertion of the privilege based on
16 actual personal consideration by that official; and
17 (3) a detailed specification of the information for
18 which the privilege is claimed, along with an
19 explanation of why it properly falls within the scope of
20 the privilege.

21
22 (Id.) (quoting Lee Decl., Exh. 1 at 15). The Government also
23 maintains that the materials sought are irrelevant to an FCA
24 action, which requires the Government to prove that United
25 knowingly avoided or sought to decrease its obligation to repay
26 the Government. As such, United's state of mind, not the
27 Government's, is at issue. (Id. at 8). In sum, the Government
28 argues that "[d]iscovery about knowledge and materiality in this

1 case should be limited to CMS's processing of United's deletes and
2 its recovery of improper payments from United. There is no basis
3 for any additional discovery, particularly overbroad discovery into
4 internal agency deliberations, based on their purported relevance
5 to materiality or knowledge." (Id. at 9).

6
7 The Government further contends that ex parte relief is
8 warranted because United's "arbitrary" October 12 deadline did not
9 afford the Government sufficient time to seek a stay as a regularly-
10 noticed motion. (Id. at 4; Reply at 7). The Government maintains
11 that it is not at fault for the crisis as it has repeatedly brought
12 the legal arguments for limiting the scope of discovery to the
13 Court's attention, including the motions pending before the
14 District Judge that it filed in May 2018. (Appl. at 5).
15 Additionally, the Government maintains that it negotiated with
16 United in good faith to resolve the dispute, and notes that a
17 premature blanket motion to stay discovery would have been improper
18 and futile. (Reply at 10). The Government states that it will be
19 "irreparably harmed" if it is required to devote its limited
20 resources to reviewing and producing documents that "are of no
21 meaningful relevance in this action." (Appl. at 4; see also Reply
22 at 13-19). Irreparable harm will also arise from the chilling
23 effect production would have if CMS were required to disclose its
24 internal deliberations. (Id. at 9).

25
26 United contends that the Government is misusing the ex parte
27 process. (Opp. at 8). According to United, there is no "emergency"
28 because if the Government had wanted a stay, it should have filed

1 for one "months ago." (Id.). Furthermore, any "harm" here does
2 not qualify as "irreparable" because if United is allowed to
3 proceed with its motion to compel, the only "harm" to the Government
4 would be that it will have to fill out its portion of the Joint
5 Stipulation, which is a routine part of litigation and not an undue
6 burden. (Id. at 11, 13). United further argues that the
7 Government's "unduly burdensome" claims are "belied by the fact
8 that the government, by invoking the [deliberative process]
9 privilege, has by definition already collected and reviewed the
10 documents at issue." (Id.). To the extent that the Government
11 may be required to re-review thousands of documents, United
12 maintains that the Government would have only itself to blame for
13 its overbroad and improper invocation of the deliberative process
14 privilege and its refusal to engage in good faith negotiations with
15 United when United began addressing the inadequacies of the
16 privilege log months ago. (Id. at 12). United further contends
17 that it is not a burden to produce a log in the level of detail
18 that should have been produced when the Government first reviewed
19 the documents and prepared the log. (Id.).
20

21 United also argues that CMS's "deliberative process" evidence
22 is directly relevant to its defense of the Government's FCA claim.
23 United contends that this evidence is relevant to determine whether
24 CMS officials would have concluded that "overpayments" existed at
25 all, particularly to the extent that some CMS experts contend that
26 CMS needs to pay MA plans on some unsupported codes to avoid
27 underpaying them. (Id. at 17-18). The evidence would also be
28 relevant to help United establish that "United subjectively

1 believed it was not required to delete every unsupported code,
2 without regard to the presence of such codes in CMS's own data."
3 (Id. at 19). Finally, United states that the evidence is relevant
4 to "the objective reasonableness of United's actuarial equivalence
5 position." (Id. at 20; id. at 21 (citing Safeco Ins. Co. of America
6 v. Burr, 551 U.S. 47 70 n.20 (2007))).

7
8 Although the FCA claim may be considered the "dominant" claim
9 in this action, the Government is also pursuing two common law
10 claims. United contends that the Government's Payment by Mistake
11 claim puts the Government's state of mind at issue as it requires
12 the Government to show that it made payments to United "'under an
13 erroneous belief which was material to the decision to pay.'" (Id.)
14 (quoting United States v. Mead, 426 F.2d 118, 124 (9th Cir. 1970)).
15 To defend this claim, United contends that it is entitled to
16 discovery showing that "CMS officials were aware that United was
17 not conducting so-called 'two-way look chart reviews' and that a
18 substantial portion of codes industry-wide are insufficiently
19 documented in medical charts, yet continued to accept United's bids
20 and pay United for performing its services." (Opp. at 15).
21 According to United, discovery showing that the Government paid
22 MAs even when it knew that a given beneficiary's health status was
23 different than that reflected in her diagnosis codes would also be
24 relevant to a defense of the Government's Payment by Mistake claim.
25 (Id. at 15-16). Evidence showing that some CMS experts believed
26 that the agency was required to pay MA plans on at least some of
27 their unsupported codes to avoid underpayment would also be
28 relevant to United's defense of that claim. (Id. at 16). United

1 argues that the evidence it is seeking is similarly relevant to
2 the Government's Unjust Enrichment claim, as "it is plainly
3 relevant whether the rate of unsupported codes in CMS's own data
4 is greater than, equal to, or less than the equivalent rate in
5 United's submissions." (Id. at 17). Accordingly, in light of the
6 purported centrality of the requested discovery to the defense of
7 all three surviving claims, United claims that it should be allowed
8 to pursue its motion to compel now, even as the District Judge
9 considers the Government's pending motions.

11 IV.

12 STANDARD

14 A. Ex Parte Applications

15
16 Ex parte applications are solely for extraordinary relief and
17 should be used with discretion. See Mission Power Eng'g Co. v.
18 Cont'l Cas. Co., 883 F. Supp. 488 (C.D. Cal. 1995). Evidence must
19 show that the moving party's cause "will be irreparably prejudiced
20 if the underlying motion is heard according to regular noticed
21 motion procedures." Id. at 492. Moreover, the moving party must
22 establish that it is "without fault in creating the crisis that
23 requires ex parte relief, or that the crisis occurred as a result
24 of excusable neglect." Id.

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28

1 **B. Scope Of Permissible Discovery**

2
3 Federal Rule of Civil Procedure 26(b)(1), as amended on
4 December 1, 2015, provides:

5
6 Parties may obtain discovery regarding any nonprivileged
7 matter that is relevant to any party's claim or defense
8 and proportional to the needs of the case, considering
9 the importance of the issues at stake in the action, the
10 amount in controversy, the parties' relative access to
11 relevant information, the parties' resources, the
12 importance of the discovery in resolving the issues, and
13 whether the burden or expense of the proposed discovery
14 outweighs its likely benefit. Information within this
15 scope of discovery need not be admissible in evidence to
16 be discoverable.

17
18 Fed. R. Civ. P. 26(b)(1). Evidence is relevant if "it has any
19 tendency to make a fact more or less probable than it would be
20 without the evidence, and the fact is of consequence in determining
21 the action." Fed. R. Evid. 401. "The relevance standard is
22 commonly recognized as one that is necessarily broad in scope in
23 order 'to encompass any matter that bears on, or that reasonably
24 could lead to other matter that could bear on, any issue that is
25 or may be in the case.'" Doherty v. Comenity Capital Bank &
26 Comenity Bank, 2017 WL 1885677, at *2 (S.D. Cal. May 9, 2017)
27 (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351
28 (1978)); see also Sci. Games Corp. v. AGS LLC, 2017 WL 3013251, at

1 *2 (D. Nev. July 13, 2017) (“Even after the 2015 amendments, courts
 2 continue to recognize that discovery relevance remains ‘broad’ in
 3 scope.”); Wagafe v. Trump, 2018 WL 348470, at *1 (W.D. Wash. Jan.
 4 10, 2018) (“[T]he scope of discovery is broad.”).
 5 “Proportionality focuses on the marginal utility of the discovery
 6 sought.” In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.,
 7 180 F. Supp. 3d 273, 280 n.43 (S.D. N.Y. 2016) (internal quotation
 8 marks and citation omitted).

9
 10 Because discovery must be both relevant and proportional to
 11 the needs of the case, the right to discovery, even plainly relevant
 12 discovery, is not limitless. The December 1, 2015 amendments to
 13 Rule 26 “were designed to protect against over-discovery and to
 14 emphasize judicial management of the discovery process, especially
 15 for those cases in which the parties do not themselves effectively
 16 manage discovery.” Noble Roman’s, Inc. v. Hattenhauer Distrib.
 17 Co., 314 F.R.D. 304, 308 (S.D. Ind. 2016); see also Davita
 18 HealthCare Partners, Inc. v. United States, 125 Fed. Cl. 394, 398
 19 (2016) (2015 amendments to the Federal Rules “contribute to the
 20 overall goal of regulating the time and expense of litigation”).
 21 At the same time, the larger and more complex the case, the more
 22 even relatively voluminous discovery may be considered
 23 proportionate. It has long been settled in this circuit that the
 24 party resisting discovery bears the burden of showing why discovery
 25 should not be allowed. Doutherd v. Montesdeoca, 2018 WL 3008867,
 26 at *2 (E.D. Cal. June 15, 2018) (citing Blankenship v. Hearst
 27 Corp., 519 F.2d 418, 429 (9th Cir. 1975)); see also Hall v. Mt
 28 Terrace AOA, 2017 WL 3000026, at *1 (D. Haw. Feb. 9, 2017)

1 ("Plaintiff complains about the volume of discovery requested of
2 him and the defenses that have been asserted, but he is reminded
3 that he commenced this action and it is ultimately his burden to
4 prove his claims. Defendants are entitled to obtain certain
5 discovery to defend themselves against Plaintiff's allegations.").
6 As it is the Government that is currently resisting discovery, the
7 burden of persuading the Court rests with the Government.

8
9 **V.**

10 **DISCUSSION**

11
12 As a preliminary matter, the Court emphasizes that the only
13 issue presently before it is whether United may go forward with
14 its proposed motion to compel, even as four motions are under
15 submission before the District Judge. The Court is not required
16 to decide at this time whether United's anticipated motion to
17 compel, which has not even been fully briefed yet, will succeed.
18 Nor must the Court decide whether and to what extent the Government
19 may be required to produce deliberative process documents.
20 Allowing United to proceed with its motion to compel at this time
21 is not a decision on the merits of the motion. Instead, the Court
22 would simply permit United to make its case as to why it is entitled
23 to the documents that the Government is withholding pursuant to
24 the deliberative process privilege. Allowing the motion to proceed
25 similarly would not deprive the Government of the opportunity to
26 raise in its portion of the Joint Stipulation all of its substantive
27 arguments against such discovery, including undue burden and
28 prejudice.

1 The Court concludes that the Government has failed to meet
2 the standard for ex parte relief, and therefore DENIES the
3 Application. The Government contends that it was "without fault"
4 in creating the need for ex parte relief because United's two-week
5 deadline for the completion of its portion of the Joint Stipulation
6 did not allow time to bring this matter as a noticed motion. The
7 Government further argues that it has raised the issue about the
8 purported irrelevancy of deliberative process documents for months,
9 including when it filed three of the four motions currently pending
10 before Judge Fitzgerald in late May. Even accepting the contention
11 that the Government is not "at fault" in creating the need for
12 emergency relief, however, the Government's Ex Parte Application
13 fails because it does not show that the Government will be
14 irreparably prejudiced if United is allowed to bring its motion to
15 compel at this time.

16
17 The Government maintains that it will be "irreparably
18 prejudiced" if United's motion goes forward due to the undue burden
19 of "having to review thousands of documents in order to perfect
20 privilege" and by the chilling effect disclosure would have if the
21 contents of internal agency deliberations were made public.
22 However, these arguments are unavailing. The alleged harm the
23 Government would suffer by reviewing documents and perfecting the
24 privilege, to the extent that such review is still needed in order
25 for the Government to complete its portion of the Joint
26 Stipulation, is largely self-inflicted. The Government listed over
27 21,000 documents on its privilege log, which means that the
28 Government must have already reviewed them. If the Government must

1 expend additional resources to revise its privilege log as a
2 predicate to drafting its opposition to United's motion, that
3 effort is a very ordinary aspect of this type of litigation. The
4 government should have anticipated this burden when it filed the
5 action.

6
7 Furthermore, whatever burden does exist may be eased by
8 organizing the documents into categories to streamline the log
9 revisions. Additionally, as the Court explained at the hearing,
10 the "chilling effect" the Government complains of if it required
11 to prepare an opposition to the United's motion is a risk only if
12 truly privileged documents are ordered disclosed, which has not
13 yet occurred.⁵ It is difficult to see how the mere preparation of
14 a log as a predicate to drafting an opposition would cause
15 "irreparable harm." The Government's Application is fundamentally
16 an attempt to prevent United from even arguing about United's right
17 to the withheld documents.

18
19 In their briefing on the Ex Parte Application, both Parties
20 veered into the merits of United's proposed motion more than was
21 absolutely necessary for the Court to resolve the procedural issue

22
23 ⁵ As further explained below, even documents legitimately protected
24 by the deliberative process privilege may be ordered produced upon
25 the proper showing by the requesting party. The factors a court
26 must consider in ordering production of deliberative process
27 documents specifically include the chilling effect production might
28 have on "frank and independent discussion regarding contemplated
policies and decisions," F.T.C. v. Warner Commc'ns Inc., 742 F.2d
1156, 1161 (9th Cir. 1984), but the "chilling effect" is not the
sole consideration for the Court. Accordingly, in the proper
circumstances, even a "chilling effect" may not bar disclosure of
deliberative process documents.

1 before it. It is true that if United's proposed motion were utterly
2 frivolous, the argument for a stay would be stronger as it would
3 be prejudicial to require the Government to devote its limited
4 resources to opposing a patently baseless motion. However, it is
5 plain that United's motion is not frivolous, whether or not it will
6 ultimately be successful. For example, the Parties vehemently
7 contest whether the materials requested are or will be relevant to
8 the Government's claims. Ultimately, that is a question that will
9 be resolved by United's motion to compel, as it involves not just
10 the substantive question of relevance, but also the question of
11 whether the assertion of the deliberative process privilege over
12 certain documents on the Government's log was appropriate. For
13 the present, it is enough to note that the Government will not be
14 irreparably prejudiced by having to oppose a non-frivolous motion.

15
16 Although the Court will allow United to file its motion to
17 compel after the Government completes its portion of the Joint
18 Stipulation, in the continuing interest of encouraging an informal
19 resolution of the Parties' underlying discovery dispute, the Court
20 reminds the Parties that the scope of discovery remains broad, even
21 after the 2015 amendments to Rule 26. Doherty v. Comenity Capital
22 Bank & Comenity Bank, 2017 WL 1885677, at *2; Sci. Games Corp. v.
23 AGS LLC, 2017 WL 3013251, at *2; Wagafe v. Trump, 2018 WL 348470,
24 at *1. Information may be discoverable even if it would not be
25 admissible. Fed. R. Civ. P. 26(b)(1). While relevancy must be
26 tempered with proportionality, this is a large and complex case,
27 which the Government knew when it decided to intervene. As such,
28 determinations of what is "proportional" may accommodate a broader

1 right to discovery than might be warranted in a matter where the
2 stakes were not so high.

3
4 Furthermore, the Court admonishes the parties on both sides
5 to acknowledge that determining the exact scope of a privilege is
6 not always a straightforward enterprise. In light of the volume
7 of documents over which the Government is asserting the
8 deliberative process privilege -- over 21,400 documents -- it is
9 possible, though not certain, that the Government may have cast
10 its "deliberative process" net too widely. The privilege should
11 protect only truly deliberative materials, not underlying and
12 separate factual data. Nonetheless, it is also possible that some
13 of the Government's designations are entirely appropriate and will
14 be upheld.⁶

15 ⁶ The deliberative process privilege shields from disclosure intra-
16 agency communications that are both "predecisional" and
17 "deliberative" to "allow agencies freely to explore possibilities,
18 engage in internal debates, or play devil's advocate without fear
19 of public scrutiny." Lahr v. National Transp. Safety Bd., 569 F.3d
20 964, 979 (9th Cir. 2009) (internal quotation marks omitted).
21 "Predecisional" documents include "recommendations, draft
22 documents, proposals, suggestions, and other subjective documents
23 which reflect the personal opinions of the writer rather than the
24 policy of the agency." Id. (internal quotation marks omitted). A
25 document is part of the "deliberative process" if the disclosure
26 of the materials "would expose an agency's decisionmaking process
27 in such a way as to discourage candid discussion within the agency
28 and thereby undermine the agency's ability to perform its
functions." Id. at 979-80 (internal quotation marks omitted).

23 "Facts and evidence" are generally not protected by the
24 deliberative process privilege. Warner Commc'ns Inc., 742 F.2d at
25 1161; see also Enviro Tech Int'l, Inc. v. U.S. E.P.A., 371 F.3d
26 370, 374-75 (7th Cir. 2004) ("[T]he deliberative process privilege
27 typically does not justify the withholding of purely factual
28 material, nor of documents reflecting an agency's final policy
decisions, but it does apply to predecisional policy discussions,
and to factual matters inextricably intertwined with such
discussions.") (internal citations omitted). However, factual
material that "is so interwoven with the deliberative material that
it is not severable" may be encompassed by the privilege. United

1 Finally, the Court encourages the Parties to consider whether,
 2 fairly and objectively, there is a core set of documents that the
 3 Government will have to produce, even if the Government were to
 4 dismiss its common law claims and the FCA claim were to stand
 5 alone, or even if the District Judge were to rule in the
 6 Government's favor on any of the pending motions. It is premature
 7 for the Court to rule on whether such documents exist and what they
 8 would encompass. However, to the extent they can be identified,
 9 United should not have to wait indefinitely for their production
 10 as it prepares its defenses.

11 VI.

12 CONCLUSION

13 For the reasons stated above and on the record at the hearing,
 14 the Government's Ex Parte Application for a Temporary Stay of
 15 United's Motion to Compel pending the District Judge's rulings is

16 States v. Fernandez, 231 F.3d 1240, 1247 (9th Cir. 2000).

17 "The deliberative process privilege is a qualified one. A litigant
 18 may obtain deliberative materials if his or her need for the
 19 materials and the need for accurate fact-finding override the
 20 government's interest in non-disclosure." Warner Commc'ns Inc.,
 21 742 F.2d at 1161. "Among the factors to be considered in making
 22 this determination are: 1) the relevance of the evidence; 2) the
 23 availability of other evidence; 3) the government's role in the
 24 litigation; and 4) the extent to which disclosure would hinder
 25 frank and independent discussion regarding contemplated policies
 26 and decisions." Id. "Other factors that a court may consider
 27 include: (5) the interest of the litigant, and ultimately society,
 28 in accurate judicial fact finding, (6) the seriousness of the
 litigation and the issues involved, (7) the presence of issues
 concerning alleged governmental misconduct, and (8) the federal
 interest in the enforcement of federal law.'" Desert Survivors v.
US Dep't of the Interior, 231 F. Supp. 3d 368, 380 (N.D. Cal. 2017)
 (quoting N. Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d
 1118, 1122 (N.D. Cal. 2003)).

1 DENIED. If the Government wishes to oppose United's proposed
2 motion to compel, it shall return its portion of the Joint
3 Stipulation to United within **fourteen days** of the date of this
4 Order. Nothing in this Order should be construed as a finding on
5 the merits of United's proposed motion to compel or the
6 Government's anticipated opposition to the same.

7
8 DATED: October 23, 2018

9 /s/
SUZANNE H. SEGAL
10 UNITED STATES MAGISTRATE JUDGE
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