

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION - LOS ANGELES**

UNITED STATES OF AMERICA,	)	CASE NO: 2:16-CV-08697-MWF-SS
	)	
Plaintiff,	)	CIVIL
	)	
vs.	)	Los Angeles, California
	)	
UNITED HEALTH GROUP, INC,	)	Tuesday, October 23, 2018
ET AL,	)	
	)	
Defendants.	)	

**TELEPHONIC HEARING ON THE UNITED STATES' EX PARTE APPLICATION
FOR A TEMPORARY STAY OF MOTION TO COMPEL DISCOVERY (DKT 294)**

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

Appearances:	See Next Page
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Los Angeles, California; Tuesday, October 23, 2018

(Call to order)

THE CLERK: Good morning. We're here today on the record on Case CV-16-8697, *United States of America versus United Health Group*. Counsel, state your appearance for the record.

MR. LEE: Good morning, your Honor, John Lee on behalf of the United States.

THE COURT: Good morning.

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

THE COURT: Good morning.

MS. KRIEG: Jessica Krieg on behalf of the United States. And I have here also Justin Draycott and Amy Likoff.

THE COURT: So I could not hear you that clearly. Maybe you could stand a little closer to the phone.

MS. KRIEG: Sure. Jessica Krieg on behalf of the United States. And also with me are Justin Draycott and Amy Likoff.

THE COURT: Good morning.

MR. SU: Good morning, your Honor, Henry Su on behalf of the Relator.

THE COURT: Good morning.

MR. MERRILL: Good morning, your Honor, William Merrill on behalf of the Relator.

1 **THE COURT:** Good morning.

2 **MR. SCHINDLER:** And, your Honor, it's David Schindler
3 again. Just to make it -- to round out on behalf of United as
4 well, Dan Meron, Abid Qureshi, David Rowe, and Kirstin Do are
5 also on the line. But I thought it'd make it easier for you,
6 we sent those names along to your court clerk earlier.

7 **THE COURT:** I appreciate that, thank you. So is
8 everyone who wished to make an appearance made an appearance?

9 (No audible response)

10 All right, very good. So I sent out a tentative on
11 the ex parte application for a stay. So I just want to
12 confirm, did anyone not receive the tentative decision who's on
13 the phone?

14 (No audible response)

15 All right, so since the tentative is in favor of
16 United's arguments, I'll allow the Government to respond first
17 to the tentative. So I'm not sure who of the Government
18 representatives wishes to speak, but whoever that is, you may,
19 you know, address anything you'd like to address in the
20 tentative.

21 **MR. LEE:** Yes, thank you, your Honor, this is John
22 Lee on behalf of the United States. First of all, I wanted to
23 thank the Court for the (indiscernible) that it provided us and
24 so I wanted to address a couple of points in the tentative.

25 First, this is sort of a preliminary matter, but

1 there's some discussion on page seven of the Court's tentative
2 that relates to the (indiscernible) of dealing between the
3 parties. And I just wanted to point out to the Court that
4 while United's position and its arguments are there, it's in
5 the Government's view not a complete picture of what happened
6 during the negotiations in this case. The flavor that came
7 through from the Government's -- I'm sorry, from United's
8 description is that the Government basically reneged on a
9 promise. And that's so not true. What really happened is that
10 the Government engaged in good faith negotiations and, as
11 indicated that the emails that the Government sent, we tried to
12 work with the agency to come up with (indiscernible) proposal
13 that we made first of all was rejected by United, and it turned
14 out to be overly ambitious anyway. But I just wanted to point
15 out to the Court that the Government did engage in good faith
16 negotiations, which I think is maybe not as accurately
17 portrayed at the bottom of page seven as we would like.

18 **THE COURT:** Sure (indiscernible) do you want to share
19 with me what that -- or would it be helpful to share with me
20 what that proposal was that you said was rejected by United?

21 **MR. LEE:** Well, we did make an effort to come up with
22 a declaration. And the effort would have encompassed
23 descriptions of the 21,000 or so deliberative process
24 privileged documents, but by categories. And I think where the
25 negotiations broke down was in the categories. We tried to

1 come up with categories that would be sufficiently satisfactory
2 to United. United, my understanding is that United did not
3 like the category because they thought that they
4 (indiscernible) as well. We made further efforts but we never
5 really came to agreement on the particular categories that
6 would be in the declaration. And I think it's also fair to say
7 that while this was occurring, the September 17th hearing
8 happened. And shortly after the September 17th hearing, we,
9 the Government, proposed that we wait until Judge Fitzgerald
10 had an opportunity to rule. United responded basically
11 agreeing and saying we think that all parties and the Court
12 will benefit from the Court's ruling. So it sort of led us to
13 believe that that was also the course that United wanted as
14 well. But I think it's fair to say that the negotiations did
15 not come to satisfactory conclusion.

16 **THE COURT:** Okay. Is there something else you wanted
17 to --

18 **MR. LEE:** Another -- I also wanted to address the
19 Court's discussion of irreparable prejudice on page 17. The
20 Court basically comes to the conclusion that the Government
21 failed to show irreparable prejudice. I wanted to make a
22 couple points there. The first is that the -- as I read the
23 cases, and I'm referring to -- mainly to *Mission Power* and the
24 *Scott* case that are cited in our briefs. Really, for purposes
25 of ex parte proceedings, irreparable prejudice is whether the

1 United States could have gotten the duly noticed motion filed
2 and heard. And just as a simple pure mathematics, that would
3 not have been a possibility in this case. And the 14 days that
4 United provided certainly didn't give us enough of an
5 opportunity. Even the November 6th date didn't given us enough
6 of an opportunity to bring it to a notice motion. So
7 (indiscernible)

8 **THE COURT:** Well, let me --

9 **MR. LEE:** -- extended the --

10 **THE COURT:** I apologize for interrupting you. I
11 don't usually. I try not to do that. But I'm afraid I'll --
12 you'll move on and we won't get to discuss this. And maybe you
13 can help me on this particular issue. Because -- and I haven't
14 -- I'll concede that I haven't gone back and looked at every
15 transcript of the various hearings that we've had in this case,
16 and I know we've had several informal discovery conferences.
17 And I believe that this issue has arisen in the past like a
18 number of times. So I guess what I don't understand, and it
19 wasn't a surprise to me and maybe it was to you because you're
20 in negotiations to resolve it with Mr. Schindler, but it wasn't
21 a surprise to me that the -- that United defendants were
22 beginning the process of a motion to compel because I thought
23 they referenced that in one of our earlier discussions. I
24 guess what I don't understand is, you know, long before the
25 September 17th hearing, you know, way back in July or August,

1 certainly the Government had plenty of time to move for a stay
2 at that point. And so I guess -- you know, and even if you
3 want to argue that the issues weren't ripe or we didn't really
4 know what motions were going to be filed, you know before the
5 September 17th hearing. And it's always available to the
6 parties to file a noticed motion and then ask the Court to have
7 it heard on shortened time. That still gives notice to the
8 opponent and an opportunity to oppose it. It just is not quite
9 with the length of time that the rules normally provide. So I
10 guess there is a whole bunch of ways in which I think the
11 Government could have availed itself of the relief that it's
12 seeking in the ex parte a long time since this case has been
13 pending and then didn't, but then did it by ex parte.

14 **MR. LEE:** Sure, your Honor, if I may address that?

15 **THE COURT:** Sure.

16 **MR. LEE:** I think your Honor's correct that we've
17 been -- we've certainly been before the Court a number of times
18 and your Honor has graciously entertained our disputes. But I
19 don't think it's accurate or fair to say that this particular
20 issue has been before the Court many times. I think it was
21 discussed in one -- at least one of the informal conference
22 that we had. But this issue first cropped up as United notes
23 in their papers on June 15th when I believe Mr. Rowe wrote a
24 letter basically identifying the deliberative process issue as
25 something that they objected to. And after that, there was

1 some discussions back and forth about the nature of the
2 dispute. And then parties started negotiating about how to try
3 to resolve that dispute. In the course of those discussions,
4 Mr. Schindler did contact the Court for the informal
5 conference, which we had. But I just wanted to note that this
6 -- the notion that the United States had plenty of warning I
7 think is just kind of not a complete picture in a couple of
8 senses. One is that the issue first arose June 15th, but by
9 that time, the United States had already filed the three
10 motions back on May 22nd, which were frankly kind of attempts
11 to in a kind of a surgical scalpel way identify the particular
12 issues that the United States felt were not relevant. It's not
13 a case where we could simply ask for a blanket stay because I
14 think we agree that there's a lot of proper discovery that's
15 been going on when it should go on. What the United States
16 doesn't agree, however, is that there are certain categories or
17 classifications of discovery that's wholly improper because
18 this is a unique case in which (indiscernible) spoken directly
19 on the exact conduct at issue here involving the exact same
20 defendants. So it makes sense to carve up some of that
21 discovery and be very precise about it rather than making for -
22 - rather than making a motion for blanket stay that would be
23 overly broad. We did respectively the same thing by bringing
24 four motions that were specifically designed to carve out
25 issues that were irrelevant to this case. And we started that

1 process I think (indiscernible) back in December of 2017 with
2 all of the information that we put in a joint report that
3 continued through early 2018. In May, we filed three of the
4 motions. United took two months, more than two months to file
5 their oppositions. The motions were heard on September 17th.
6 But I don't think it's fair to say that we had a bunch of
7 notice and (indiscernible) on our hands. We did a lot of work
8 to bring four specifically tailored motions to carve out the
9 relevant issues in this case. So the notion that we had a lot
10 of advanced warning and that we are at fault for creating the
11 situation I think is just simply not true.

12 The other point that I think I wanted to address that
13 is implicated by the Court's comments on page 17 is that I
14 think it's not accurately portrayed that the only prejudice
15 that the United States would suffer is from having to prepare
16 its portion of the joint stipulation. That's an unfortunate
17 statement that came out of United's papers. We tried to
18 address that in our papers, and frankly I'm kind of -- I'm a
19 little bit surprised to see that statement in the Court's
20 tentative because clearly there is prejudice to the Government,
21 especially CMS, that's not just product of having to draft its
22 portion of the joint stipulation. And it's also not true that
23 the Government is attempting to prevent United from even
24 makings its case. If that were the case, a simple solution
25 would be to have United file its motion and then give the

1 Government an opportunity to wait until the Court makes its
2 rulings on the four motions that are pending because the
3 prejudice to the United States comes from having to perfect the
4 privilege at the time it submits its joint stipulation. By
5 that time, we have to provide a declaration that sufficiently
6 invoked the privilege and have sufficiently reviewed and
7 categorized the documents that are at issue. And so what that
8 entails is prejudice in the number of hours. We're talking
9 about hundreds, thousands of hours committed by CMS to review,
10 re-review, categorize, and describe the documents at issue.
11 And also you mentioned the prejudice from the potential
12 chilling effect of being (indiscernible) that would improperly
13 disclose documents that should be protected under the privilege
14 if CMS is forced to invoke its -- and perfect its privilege in
15 a premature fashion. So there's a lot of prejudice that comes
16 from the United States having to perfect its privilege; not
17 necessarily United having to make its motion but the United
18 States having to perfect the privilege. So that I think is
19 something that should be reflected in the Court's decision as
20 well.

21 And then I did want to point out for the Court,
22 though, that it -- what's sort of in the background of all of
23 this is that we mentioned that the four motions that are
24 pending, they've been submitted for I think more than a month
25 now. So it's possible that a decision could come any day,

1 could come soon, so it seems like a -- not a high, not a tall
2 ask to ask for a stay until the Court rules. The other -- the
3 subset of that is that there's really no urgency that United's
4 been pointing to. There's no discovery cutoff in this case.
5 If we were to wait until the Court issued a scheduling order as
6 we asked for, the Court could issue a scheduling order setting
7 a discovery cutoff date that would take into account fully all
8 of United's needs. So basically we're here on borrowed time,
9 we're here on time that's not (indiscernible) ticking clock so
10 there's really no urgency for United to go ahead with a motion
11 to compel at this stage.

12 The -- one last point, your Honor, that I wanted to
13 make is that I noticed that in the tentative on page 20,
14 there's a -- and thank you also for the guidance that the Court
15 provides regarding deliberative process. What the Government
16 would propose if the Court will indulge us is that we would
17 appreciate an opportunity to take this back to the client and
18 discuss the contents of this tentative with the Court -- with
19 the client.

20 **THE COURT:** All right. Go ahead.

21 **MR. LEE:** And specifically in regards to the blank
22 for the number of days in there. I think in light of the
23 Court's guidance, it would be helpful for the Government to
24 consult again with the client and come back to the Court in
25 about a day or two with a specific timeframe for the Court if

1 the Court would permit is us to do that.

2 **THE COURT:** All right. So let me just comment on a
3 couple of points or ask follow-up questions I guess. So you
4 said, you know, the Government's -- or the Court's tentative
5 ruling to deny the stay would have a chilling effect on the
6 agency deliberations. That's only true if there's true
7 deliberative process material at stake here. I don't -- I'm
8 not suggesting that the Government's motion is not genuine but
9 it would be possible that reasonable minds could disagree as to
10 whether or not the entire volume of documents constitute
11 deliberative process. And that's something I think I raised
12 with you in our last hearing and something I tried to address
13 in the footnote, that it's my reading of the case law on
14 deliberative process privilege, and it's my experience having
15 addressed it many times now in discovery issues, that it really
16 does have to be a document that the disclosure of which, if the
17 drafters of the document knew that it was going to be disclosed
18 in litigation, they would have deliberated differently about
19 whatever policy or issue they were discussing. That's kind of
20 the test for it. And it is true, and I think I put this in the
21 footnote, there's some case law to support the suggestion that
22 actual information that is so intertwined with the
23 deliberations that its disclosure to could chill discussions
24 might be protected by the privilege. But that's the exception,
25 it's not the rule. And so one of the things I'm concerned

1 about with what I saw in the Government's papers here is that
2 it seems like at least a percentage of the withheld documents
3 really would fall into the category of much more factual
4 information and not deliberative information. And I am
5 concerned that some of that factual information may be relevant
6 to the defenses that United wants to bring in the False Claims
7 Act claim, forget about the common law claims. I mean I'm not
8 forgetting about them but I'm just saying like even if the only
9 thing that survives is the False Claims Act claim, some of that
10 underlying factual data may be relevant to the defenses that
11 United wishes to assert. So that's what I'm concerned about.
12 I'm concerned that the Government is casting its net too
13 broadly and that some of that factual information really
14 deserves to be disclosed. And I'm not concerned that the
15 disclosure of that factual information will have any form of a
16 chilling effect on Government deliberations. So that's in
17 response to that.

18 And in terms of the hours, we've talked about this a
19 great deal and I think, you know, we've put some suggestion in
20 the decision about this. I think there's 15 lawyers on the
21 phone, Mr. Lee. And I think at least ten of them are for the
22 United States, or the Plaintiff. So it's a hard sell to
23 suggest that the burden aspect of review of documents, which is
24 a fairly routine part of a case of this magnitude, is so great
25 that you can't participate in briefing. I mean, I'm not

1 unsympathetic. I know that you're busy, I know that the
2 Government is busy. I know you have other cases and that your
3 colleagues have other cases. But, you know, there's a point at
4 which I have to impose upon you and your colleagues the
5 obligation to fulfill the duties that they took on when they
6 brought this case, and that might include the, you know, review
7 of documents in preparation of a privilege log. So that's my
8 thoughts on the two points you made about the prejudice issue.

9 And then in terms of the lack of a scheduling order,
10 you know, we talked about this a little bit before, too. It is
11 true that it creates less of an urgent situation, but it's not
12 true that that eliminates United's interest in the -- in its
13 entirety in preparing its defenses in this case because there's
14 no way of knowing what kind of deadline Judge Fitzgerald's
15 going to impose. And there's nothing to prevent United from
16 engaging now at this time in its defense. And it's -- you
17 know, when a party is sued, it's entitled to pursue that. So
18 if the underlying factual data that's being withheld under this
19 asserted privilege would be relevant to United's -- or is
20 relevant to United's defenses, they're entitled to it now, even
21 without a scheduling order. So that's why I'm concerned about
22 the argument that you've raised about the lack of scheduling
23 order. It's less urgent, it gives us more flexibility, but it
24 doesn't eliminate the obligation to participate in discovery.

25 **MR. LEE:** Very well, your Honor. I did -- I think

1 just to be clear, we are not saying that all discovery should
2 be forestalled or stayed, and I think we tried to make this
3 point in our papers. There's plenty of discovery that's
4 ongoing and that should be ongoing. What this application
5 deals with is solely documents that are implicated by the
6 deliberative process privilege. And the reason that the
7 Government believes that the stay is appropriate is because the
8 special circumstances. This is not like -- I think all of the
9 statements that Court made are correct and they're accurate.
10 They're probably perfectly applicable in 90, 95 percent of the
11 cases. This is a very unique case in that there is special
12 guidance from the Ninth Circuit and we're on the cusp of a
13 ruling from the Court that could make a lot of work that's
14 being done, that has been done unnecessary, and rulings by your
15 Honor could be made unnecessary if the district judge makes
16 rulings that carve out substantial categories of records. And
17 those motions are hopefully going to be decided, they'll be
18 decided some time. Nobody knows when but it just -- they've
19 been submitted and we're just all waiting for the decisions,
20 your Honor.

21 **THE COURT:** All right, Mr. Schindler, did you want to
22 respond to anything Mr. Lee raised?

23 **MR. SCHINDLER:** Yeah, yes, I do, your Honor, thank
24 you. I -- maybe I'll start in reverse order. There's an
25 overarching theme here that we've been down many times in our

1 prior conferences, and it's a unilateral attempt on the part of
2 the Government to prevent us from getting the documents that
3 your Honor has correctly noted are directly relevant to our
4 defense, not just in the context of the common law claims but
5 in the context of the reverse False Claims Act. And what
6 Mr. Lee suggested to you unfortunately is just untrue. And the
7 course of dealings here which you correctly observed is
8 important ultimately not just to the procedural question of
9 whether ex parte relief was appropriate here, but frankly it's
10 just gives light to what's truly going on here. As you
11 correctly noted, we raised this issue with them in June, we
12 asked them to perfect the log. We had the informal conference
13 with you in August. And in that conference, you told them,
14 okay, look, why don't you try and work it out, come up with
15 categories, talk to Mr. Schindler about it, go to him, tell him
16 what you're planning to do, see if you guys can work this out.
17 What Mr. Lee omits is the fact that when we asked them, well,
18 share with us some excerpts just of what you're proposing in
19 your declaration, share with us what the categories would be,
20 give us something to work with, let us see what this
21 declaration's going to look like so at least we have some sense
22 of that. And they basically told us no, they said we're not
23 going to do that, we're not going to share it with you. And we
24 said, okay, well, then I guess we're going to have to wait to
25 see the declaration. And in that backdrop they promised us,

1 just as they promised you in August, they were going to get
2 that agency declaration to us by the end of September. Now,
3 what's really important about this, and this is the shell game
4 that is really offensive on the part of the Government and
5 speaks volumes to sort of the effort to thwart our ability to
6 get discovery, is that they told us they would have an agency
7 declaration, and you have to go back initially to the notion of
8 them putting the 22,000 documents on the log. As we've said
9 all along, when they put those on the log, they apparently
10 didn't do what they were required to do, hence the discussion
11 of the need to "perfect" the privilege. And they told us,
12 okay, we're going to do that and we're going to get an
13 appropriate agency declaration by the end of September,
14 suggesting to us that they must not have done things correctly
15 in the first instance, they must have placed them on the log
16 inappropriately without going through the exercise they were
17 required to go through. And we agreed to be patient and say,
18 fine, go about perfecting it, get your declaration from your
19 agency representative as you're required to do. And that's
20 what they said they were doing. And indeed we talked with them
21 after the hearing on the motions themselves, which
22 parenthetically continues to be a theme that the Government
23 raises here that somehow the filing of a motion obviates the
24 need for discovery, despite explicit guidance from Judge
25 Fitzgerald and from your Honor now in multiple hearings that

1 the Government does not get to unilaterally fail to produce
2 discovery just because they file a motion. And even the
3 motions they filed -- and as we all know, tentative rulings
4 can't be cited, but at least the tentative ruling went against
5 the Government, for whatever that's worth. More importantly,
6 going back to what happened here, when they told us, when we
7 had these conversations, they wouldn't tell us what the
8 categories wouldn't be, they wouldn't give us any visibility
9 into it, we said, okay, we're going to move to compel. And as
10 exactly as your Honor said, there's no mystery here, there's
11 never been a shock, and we said, hey, look, we're willing to
12 work with you on a schedule. Normally on a motion to compel,
13 you get seven days to fill in your portion of the joint stip,
14 we'll work with you cooperatively. They said, well, we need 14
15 days. We said fine. We even talked about a hearing date in
16 November. And then at the last minute, they turned around and
17 said, we're not going to give you the agency declaration. That
18 is -- speaks volumes about the lack of good faith that's going
19 on on the other side of the net because they said that was
20 underway, it was going to be to us by the end of September.
21 And now they're reporting irreparable harm because they're
22 going to have to "do the agency declaration," which tells us
23 one of two things. They either were not being truthful with us
24 when they said they were going to get it to us by the end of
25 September and/or reveal the fact that they hadn't done the work

1 in the first instance, which the Government sort of
2 (indiscernible) in their reply when they suggest, well, no,
3 United's wrong when they put out that the Government has not
4 done the work in the first instance. They can't have it both
5 ways. They either did the work in the first instance, in which
6 case there's no irreparable harm here whatsoever, it's just a
7 matter of getting us the agency declaration and letting us talk
8 about 22,000 documents that we've been talking about with your
9 Honor now for several months. But when they didn't do it, and
10 then they falsely represented to you and to us that they were
11 doing it in the span of August and September, only then to tell
12 us at the end of September that, no, we're not going to give it
13 to you. And what makes the current ex parte perhaps most
14 offensive is a point that you highlighted that Mr. Lee
15 absolutely failed to answer for you, and that is what happened
16 when we gave them our joint stip? We gave them our joint stip
17 at the end of September, we said, fine, 14 days, you guys, you
18 know, we're -- even though we're unhappy that you've reneged on
19 your agreement to give us the agency declaration by the end of
20 September as you represented, we're going to honor our agreement
21 to give you 14 days. So then what happened? They take our
22 portion of the joint stip, they sat on it for five days out of
23 the 14, three business days as you note, they call us up and
24 they say, okay, now we're going to move for a stay. And they
25 said we're going to go ex parte. And I told them exactly, your

1 Honor, what you noted here. I said, you don't have to do an ex
2 parte, this is absurd. You can file a motion on shortened
3 time, we'll agree on some amount of time. Frankly, you know,
4 give us something more than 24 hours, it's crazy, this doesn't
5 need to be an emergency. And they refused, they went in ex
6 parte. We were forced to work round the clock 24 hours, only
7 to have an order from the Court saying we didn't have to file a
8 response, only then to have another order saying it had to be
9 filed with four hours the next day. And then the Government
10 got seven or eight days to file a reply, unlike the normal
11 paradigm of an ex parte, all the while claiming irreparable
12 injury which they created. There was not irreparable injury
13 and they created this fire drill, which has only redounded to
14 our detriment, not only from having to work round the clock but
15 the net result of all of this is they continue to succeed in
16 thwarting our ability to get the documents that are entirely
17 relevant. And when Mr. Lee says, well, the irreparable injury
18 today is that they're going to have to go through the exercise
19 of perfecting it, your Honor is spot on. We're talking about
20 22,000 documents. You know, they have not ten, your Honor,
21 they have 40 lawyers, almost 40 lawyers between Relator's
22 counsel and the Government lawyers who have made an appearance
23 in this case, almost 40 lawyers. And the notion that they
24 cannot address adequately and fix the defect that has been made
25 known to them since June is frankly just not a credible

1 position to take. And as you correctly note, we're entitled to
2 make our defense, we're entitled to make our defense across all
3 of these claims.

4 And I should say one other thing about the
5 deliberative process privilege. Separate and apart from what
6 you correctly note about factual material not being subject,
7 it's a qualified privilege. And it's a qualified privilege
8 that we're entitled to demonstrate need for the documents for
9 to overcome that privilege, even as to any potential
10 (indiscernible)

11 **(Electronic operator announced participant departure from**
12 **conference)**

13 **MR. SCHINDLER:** -- even as to any of the documents of
14 the 22,000 that we're entitled to get. So all of this is a
15 longwinded way of saying that we strenuously object to
16 Mr. Lee's request to now go back and talk to the client agency
17 again. That's absurd. At this point, they've had our joint
18 stip for almost a month. They negotiated for 14 days. We gave
19 it to them. They now want to somehow turn the joint stip into
20 some other exercise. This is a normal part of litigation.
21 Parties get to make motions to compel. Filling out their
22 portion of the joint stip is not a burden. And, frankly, they
23 can make the argument they want to make about why they are
24 properly asserting the deliberative process privilege. We
25 don't think they're well-founded but that's what this process

1 is for. But our position, your Honor, with all due respect is
2 they should have to give us their portion of the joint stip
3 tomorrow. We've had to do two 24-hour fire drills. They had
4 our joint stip for a month. There's no mystery. And instead,
5 what they're suggesting to you is that by virtue of filing
6 their motions with Judge Fitzgerald, or even their motion,
7 their ex parte application here, that somehow they're entitled
8 to a stay and that they somehow should be relieved from the
9 ordinary obligations that parties have to follow in the context
10 of motions to compel. And you give them anything other than a
11 day under the circumstances under which we've been forced to
12 operate here would be inequitable. And, frankly, there's no
13 basis for it because they've had 30 days to prepare their
14 opposition to our portion of the joint stip. And I don't say
15 that lightly because I'm a big believer that the parties should
16 cooperate in these things. Indeed, we went through the
17 exercise of asking them how long do you need to do your
18 portion, right? Instead of seven days, they told us 14. We
19 said fine. It's just now it's become a shell game that having
20 had 30 days, they continue to assert that somehow or another
21 it's a burden, they shouldn't have to do it, and it's all
22 redounding to our detriment over and over again. So I don't
23 lightly ask for the fact that they should have to produce it
24 tomorrow. I want you to understand why we feel as strongly as
25 we do, because it's really gotten to the point of enough's

1 enough in terms of how they're proceeding here.

2 **THE COURT:** All right. I have a question for you,
3 Mr. Schindler.

4 **MR. SCHINDLER:** Yes, your Honor.

5 **THE COURT:** You referenced a couple of times working
6 around the clock and so forth. Do you want to be more specific
7 about that? What is your --

8 **MR. SCHINDLER:** Absolutely, yes, because when Mr. Lee
9 called me, when the Government called me on the day before the
10 ex parte and they said, okay, we've had your joint stip now for
11 five days, we're going in ex parte to seek a stay, and I said,
12 you don't have to go ex parte. At a minimum, you can do this
13 on shortened notice, just as you observed. And they said, no.
14 They filed their ex parte 4:00 o'clock in the afternoon --

15 **THE COURT:** That was Wednesday the 3rd?

16 **MR. SCHINDLER:** -- which under the rules would -- I
17 beg your pardon?

18 **THE COURT:** That was Wednesday, October 3rd?

19 **MR. SCHINDLER:** I think that's the right date, your
20 Honor. I'll tell you exactly -- yes, exactly.

21 **THE COURT:** Okay.

22 **MR. SCHINDLER:** And at that basis we were of course
23 obligated under Judge Fitzgerald's rule to compare -- to
24 prepare our portion of -- our opposition to that ex parte
25 application within 24 hours, by the next day. And we did, we

1 worked round the clock. And only then to have on the afternoon
2 of the 4th, we got an order from the Court's clerk saying, you
3 don't have to file, you don't have to file an opposition. We
4 didn't know what to make of that. All we knew -- actually, the
5 order said, you don't have to file an opposition in light of an
6 order that is coming from Magistrate Judge Segal. We didn't
7 know what to make of that. All we were told by the Court to
8 stand down. We waited a day or two and then we got another
9 order from your Honor's clerk telling us that we had to have
10 our opposition in within four hours. That was on a Friday as I
11 recall. So we did, we scrambled again to get it -- to complete
12 it and get it in to you. I think we had three hours or four
13 hours, all of this under this completely illusory emergency
14 when all the Government had to do was file a motion, ask for an
15 expedited briefing scheduling that would have given us a
16 reasonable opportunity to oppose, and they deliberately chose
17 not to do that. And for them to cry foul over the fact that
18 they have to do their portion of the joint stip in 14 days is
19 frankly hutzpah. And at this juncture, it's why you hear a
20 little bit of ire on our side of the ledger, given the way that
21 they have gamed the system here.

22 **THE COURT:** So let me --

23 **MR. LEE:** Your Honor, may I --

24 **THE COURT:** No, let me just say a couple --

25 **MR. LEE:** All right, your Honor.

1 **THE COURT:** -- of things about what Mr. Schindler
2 just said. So I was unaware that Judge Fitzgerald had an order
3 about a 24-hour turnaround time for a response to an ex parte,
4 you know, and I don't think your interpretation was
5 unreasonable at all. But generally, if it's a discovery matter
6 and it's referred to the magistrate judge, then, you know, we
7 tend to send out orders that try to control that process. And
8 so I was unaware of Judge Fitzgerald's order. Had I been aware
9 of it and so on, I would have probably said, you know, we can
10 come up with a more reasonable schedule, given the issue. And
11 then in terms of my October 5th order, you know, it tends to be
12 a standard response by me that if a party files an ex parte
13 application, sometimes I don't even need an opposition -- not
14 in this case -- but, you know, because it's obvious what needs
15 to be done from just the nature of the ex parte. But we try
16 not to have a long briefing schedule because the suggestion in
17 an ex parte is that urgent relief is necessary. So we tend to
18 try and get the briefing done very quickly because we think
19 there's an emergency going on. And I think after I took a
20 longer look at both sides, I realized more briefing would be
21 helpful to me and that's why the order on the 11th went out,
22 you know, extending the time for some briefing. But it's never
23 my intent -- I really don't think this process should be quite
24 as painful as we all make it. And so if in the future you
25 think that something needs to be, you know, is going to require

1 work around the clock that isn't really merited, there's no
2 fire, you know, you certainly can reach out to my courtroom
3 deputy and inquire about that and, you know, -- or ask for an
4 informal discovery conference and we can do a short call, which
5 is a little trickier with the number of lawyers in this case.
6 But I'm not interested in making anyone's work life more
7 difficult than it has to be. So I apologize for that. It is
8 not our intent to have your office have to work like that. So
9 just addressing (indiscernible) --

10 **MR. LEE:** Your Honor, may --

11 **THE COURT:** Go ahead, Mr. Lee.

12 **MR. LEE:** May I be heard briefly on that? I just
13 want to comment that the tenor of the October 3rd conversation
14 that Mr. Schindler described is in my view totally false. And
15 the reason that I say that is -- and the prospect that they had
16 to work round the clock to put out a fire is also false. And
17 the way you can tell that is just by looking at the course of
18 the email that occurred. That's Exhibit 2 to our declaration.
19 September 25th is a date that Mr. Schindler said, we're going
20 to seek an expedited hearing from Judge Segal. That same day,
21 September 25th, we responded back that if you do that, we're
22 going to seek an ex parte application with Judge Fitzgerald
23 because I think in the October 16th conference, your Honor
24 indicated that that stay should be made with Judge Fitzgerald,
25 not judge -- not your Honor. So our notice not only did not

1 come October 3rd, it came September 25th, and that was in
2 response to Mr. Schindler's email. Mr. Schindler didn't
3 respond to the ex parte comment. And we asked for his
4 position, he didn't give it to us. And that's why we had that
5 further conversation on October 3rd. It wasn't as if the
6 October 3rd was some sort of a surprise on Mr. Schindler, it
7 was because he never responded to our September 25th request
8 that he tell us what his position is in response to the ex
9 parte. So it's -- I think it's totally untrue and inaccurate
10 that Mr. Schindler was caught off guard and was sandbagged
11 somehow.

12 **MR. SCHINDLER:** Your Honor, let me just ask one
13 question. Did I not tell you, John, during that October 3rd
14 that you can file a motion on an expedited briefing scheduling
15 and it did not have to be a 24-hour turnaround; did I not say
16 that to you?

17 **MR. LEE:** (No audible response)

18 **MR. SCHINDLER:** Because that's the question on the
19 table. And I apologize for asking you directly but you're
20 suggesting that the tenor was somehow unfair. That's the
21 point. I said to you on October 3rd, you do not have to do
22 this on a 24-hour turnaround, we can agree to a reasonable
23 briefing schedule that doesn't require us to return a
24 proposition in 24 hours. And if you're going to deny I said
25 that to you then, yeah, we have an issue. But I don't think

1 you are.

2 **THE COURT:** So I think that's a better conversation
3 to have outside of this hearing, Mr. Schindler. I think you
4 and Mr. Lee can work that out. And I hold both sides in very,
5 very high regard in this case. I think if there was a
6 misunderstanding, the best remedy is to put it behind us and
7 try and forget about it and try to look prospectively in this
8 case. You've got excellent lawyers on both sides. You should
9 be able to handle issues pertaining to briefing schedules and
10 timing and focus our energies of disagreement on the merits of
11 the case. So I hope that's how we'll proceed going forward.
12 For now, I'm going to --

13 **MR. SPEAKER:** (Indiscernible)

14 **THE COURT:** -- take the matter under submission. And
15 I did indicate originally to the Government that I thought the
16 issue of an overall stay was really one for the district judge.
17 I still feel that way, but this ex parte was directed to me and
18 I -- you know, it had to do really with a very narrow issue,
19 which is that motion to compel the discovery. So I -- you
20 know, I consider that my issue and, you know, address the ex
21 parte application. So I think I'm going to take the matter
22 under submission.

23 And one thing I wanted to know for the United States,
24 Mr. Lee, I did leave the end of the order open in terms of the
25 briefing schedule. And so, you know, the Government has

1 contended of course as we know that this is a very burdensome
2 process for the Government. I'm struggling with that piece of
3 it a little bit because, you know, I agree with Mr. Schindler,
4 that I believe that the Government has had an opportunity to
5 review the 21,000 documents. And I'm not trying to say that's
6 not a large number of documents, but given how we can review
7 things electronically and categorize things, you know, doesn't
8 mean that each individual page has to be looked at by an
9 attorney for the Government. So, you know, it seems to me
10 reasonable at this stage that the Government should be able to,
11 in connection with working with its client, talk about the
12 nature of those documents, what's contained in them, categorize
13 them, and come up with a, you know, response to United's motion
14 to compel. Just -- I'm not trying to say it doesn't have some
15 burden, but I don't see it as quite the degree of burden that
16 the Government has argued in this case, having done those kinds
17 of reviews myself. So, you know, I'd like to hear from you
18 what you think would be a reasonable amount of time for the
19 Government to prepare its response to the joint stipulation.

20 **MR. LEE:** Your Honor, I think that's -- I tried to
21 address that by asking the Court if the Court would see its way
22 to allowing us to consult with the client with a more informed
23 date. If the Court would indulge us, I think we could get back
24 to the Court perhaps in an email to the clerk in the next 24 to
25 48 hours.

1 **THE COURT:** Well, --

2 **MR. LEE:** If the Court feels like it can't do that,
3 then I think we would -- I'd offer up a date but -- and I
4 communicate with the client afterwards.

5 **THE COURT:** I guess I prefer that we try to handle
6 this with Mr. Schindler on the phone so he can tell me his
7 thoughts, what he thinks is fair. So, you know, I understand
8 you want to talk to the client about it, but it does tend to be
9 a lawyer's task to prepare the portion of the joint
10 stipulation. I know it's the client who's going to assist with
11 the review of the documents. But I'm asking you again, can you
12 give me a ballpark, you know, estimate of the time the
13 Government requires to prepare its side of the joint
14 stipulation?

15 **MR. LEE:** Very well, your Honor. I think given all
16 the circumstances, and in light of the Court's comments, the
17 Government believes that it could do so at -- with at least a
18 minimum of 14 days.

19 **THE COURT:** All right. And, Mr. Schindler, what are
20 your thoughts on that? I know you said he should do it
21 tomorrow, but I'm not going to make them do it tomorrow. So --

22 **MR. SCHINDLER:** Your Honor, I think it's important to
23 go back to what the Government said to us throughout this
24 process. They told us that rather than have seven days, they
25 could get it done in 14. That was a negotiated discussion that

1 didn't come out of whole cloth from us. That was what they
2 asked for and that's what they told us. And so for Mr. Lee to
3 say now that they need yet another 14 days makes me wonder what
4 have they been doing for 30 days? Have they just assumed
5 they're going to win everything? That seems to be the posture
6 that they've adopted. They file a motion that therefore
7 they're going to win and they shouldn't do anything. It's
8 inconceivable to me that they don't have their portion of the
9 joint stip completed already for the very reason you noted:
10 it's a lawyer's task. They asked for 14 days, we gave it to
11 them. They've had our portion of the joint stip for 30. I
12 don't understand -- and by the way, your temporary stay was
13 issued with only one day left in the 14. So they've either
14 (indiscernible) operate under the assumption that they've been
15 doing nothing for 30 days and that they're going to win and
16 they're going to win everything and therefore they didn't have
17 to do it. So I don't understand where the 14 days comes from.
18 And I'm sensitive and appreciate your Honor's desire to be fair
19 to all sides, but I really do think in this context, having
20 asked for 14 days from us, having gotten it, and now as a
21 practical matter having received 30 days, it's just absurd for
22 Mr. Lee to say we need another 14 days. What have they been
23 doing for 30 days is really the question. And I respectfully
24 submit that there should be no reason for them to have anything
25 more than a day or two because it should have been done by now.

1 What would have happened if your Honor had denied the temporary
2 stay? They would have had to give us their portion of the
3 joint stip weeks ago.

4 **THE COURT:** All right, anything further, Mr. Lee?

5 **MR. LEE:** Real briefly, your Honor. So what we have
6 been doing is really an ongoing process. As I think the
7 Court's tentative notes, it's not an instantaneous process,
8 it's not an either/or process where one minute it's -- none of
9 it's done and then another minute, everything is done. It's a
10 painstaking process over a lot of documents that requires
11 review and lots of times re-review of the documents to see if
12 the correct call has been made. And it's not that the
13 Government is thinking that it's going to win everything; it's
14 been undertaking this process. It -- I think it was a little
15 overly optimistic in predicting that we could do it in 30 days.
16 That didn't happen. But we haven't been sitting on our hands
17 and we're not asking for 14 days after having done nothing. We
18 have been working with contract attorneys, we've been putting a
19 lot of agency resources and attorney resource into the process.
20 And we don't come lightly asking for 14 days. I think that's
21 not an unreasonable request at this time.

22 **THE COURT:** All right, anything further at this time
23 from either side?

24 (No audible response)

25 Okay, so thank you both very much, the matter is

under submission.

(This proceeding was adjourned)

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 positioned above a horizontal line.

October 26, 2018

TONI HUDSON, TRANSCRIBER