UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA, ET AL., PLAINTIFFS, V. UNITED HEALTH GROUP, INC., ET AL., DEFENDANTS.	CV 16-8697-MWF(SSX) DECEMBER 11, 2018 LOS ANGELES, CALIFORNIA (10:05 A.M. TO 10:49 A.M.)

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

APPEARANCES: SEE NEXT PAGE

COURT REPORTER: RECORDED; COURT SMART

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PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING;
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE.

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I N D E X

CV 16-8697-MWF(SSX) DECEMBER 11, 2018

PROCEEDINGS: UNITED'S MOTION TO COMPEL THE UNITED STATES TO PRODUCE DOCUMENTS

LOS ANGELES, CALIFORNIA; DECEMBER 11, 2018; 10:05 A.M.

THE CLERK: CALLING CASE CV 16-8697, UNITED STATES OF AMERICA VERSUS UNITED HEALTH GROUP INC., ET AL.

COUNSEL, STATE YOUR APPEARANCE FOR THE RECORD.

MR. DRAYCOTT: JUSTIN DRAYCOTT ON BEHALF OF THE UNITED STATES.

THE COURT: GOOD MORNING.

MS. KRIEG: JESSICA KRIEG ON BEHALF OF THE UNITED STATES.

THE COURT: GOOD MORNING.

MR. LEE: GOOD MORNING, YOUR HONOR.

JOHN LEE ON BEHALF OF THE UNITED STATES.

THE COURT: GOOD MORNING.

MR. ROSS: GOOD MORNING, YOUR HONOR.

JACK ROSS ON BEHALF OF THE UNITED STATES.

THE COURT: GOOD MORNING.

MR. CROOKE: GOOD MORNING.

EDWARD CROOKE ON BEHALF OF THE UNITED STATES.

THE COURT: GOOD MORNING.

MR. SCHINDLER: GOOD MORNING, YOUR HONOR.

DAVID SCHINDLER ON BEHALF OF DEFENDANTS UNITED HEALTH GROUP.

THE COURT: GOOD MORNING.

SO, WE'RE HERE THIS MORNING ON UNITED'S MOTION TO COMPEL AND CHALLENGING THE GOVERNMENT'S ASSERTION OF THE

DELIBERATIVE PROCESS PRIVILEGE.

AND I ISSUED A TENTATIVE DECISION THIS MORNING TO THE PARTIES. AND I JUST WANT TO MAKE SURE YOU'VE HAD AN OPPORTUNITY TO CONSIDER IT.

HAS EVERYONE HAD AN OPPORTUNITY TO REVIEW THE TENTATIVE?

MR. DRAYCOTT: WE HAVE, YOUR HONOR.

THE COURT: OKAY.

MR. SCHINDLER: YES, YOUR HONOR.

THANK YOU.

(PHONE BEEPING.)

THE COURT: IS THERE SOMEONE ON THE PHONE?

(NO AUDIBLE RESPONSE.)

THE COURT: DO YOU HEAR ANYTHING, MARLENE?

THE CLERK: NO.

(THE COURT AND CLERK CONFERRING.)

THE COURT: OKAY. DID YOU GET THEIR APPEARANCES?

(THE COURT AND CLERK CONFERRING.)

THE COURT: ALL RIGHT.

SO, LET'S --

UNIDENTIFIED SPEAKER: HELLO.

THE COURT: HELLO.

IS SOMEONE ON THE PHONE?

(NO AUDIBLE RESPONSE.)

UNIDENTIFIED SPEAKER: THERE'S A LARGE GATHERING ON

THE PHONE, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, LET'S DO THIS JUST FOR EFFICIENCY.

I'LL ASK MY COURTROOM DEPUTY TO CHECK IN WITH FOLKS AFTERWARDS AND JUST GET THEIR NAMES. OKAY.

ALL RIGHT. SO, I ASSUME THAT THE GOVERNMENT WOULD LIKE TO RESPOND TO THE COURT'S TENTATIVE.

SO, WHY DON'T YOU TELL ME YOUR THOUGHTS.

MR. DRAYCOTT: AGAIN, JUSTIN DRAYCOTT, YOUR HONOR.

THE COURT: YEAH.

MR. DRAYCOTT: IF I CAN, IF WE MAY, WE'RE GOING TO BIFURCATE OUR COMMENTS.

THE COURT: OKAY.

MR. DRAYCOTT: I'M GOING TO ADDRESS THE RELEVANCY CONSIDERATIONS --

THE COURT: OKAY.

MR. DRAYCOTT: -- THAT INFORM THE TENTATIVE. AND THEN MY COLLEAGUE MS. KRIEG WILL ADDRESS SPECIFIC ISSUES REGARDING THE DECLARATION AND THE LOGS THAT WERE SUBMITTED.

THE COURT: ALL RIGHT.

MR. DRAYCOTT: SO, MY COMMENTS WILL BE CONFINED TO JUST THE RELEVANCY AND PARTICULARLY TO THE PARTS OF THE TENTATIVE THAT MOSTLY APPEAR ON PAGES 28 AND 29.

THE COURT: ALL RIGHT.

MR. DRAYCOTT: AND SPECIFICALLY TO THE COURT'S

CONSTRUCTION OF THE SCOPE OF THIS CASE --

THE COURT: OKAY.

MR. DRAYCOTT: -- MY COMMENTS ARE PARTICULARLY PERTAINING TO UNITED'S CONTENTION THAT CMS DID NOT BELIEVE THAT CONDUCTING SO-CALLED "ONE WAY CHART REVIEWS" IS IMPROPER AND, YOU KNOW, IT WAS NOT OVERPAID. AND THAT UNITED'S FAILURE TO DELETE UNSUPPORTED CODES DOES NOT HAVE AN EFFECT ON CMS'S DECISION TO KEEP PAYING.

THESE ARE AGAIN -- I'M QUOTING FROM PAGE 29 OF THE TENTATIVE.

THE COURT: OKAY.

MR. DRAYCOTT: I THINK THE MOST DIRECT RESPONSE TO THAT IS PLAINTIFFS --

THE COURT: CAN YOU -- CAN YOU JUST LET ME KNOW WHAT LINE YOU'RE ON THERE.

ARE YOU TALKING ABOUT -- I'M LOOKING AT LINE 19?

MR. DRAYCOTT: I'M TALKING -- YEAH, BEGINNING AT PAGE 19 AND THROUGHOUT.

AND THIS I BELIEVE IS A CONCEPT -- OR THE ONE ISSUE THAT THE COURT HAD TO RESOLVE IS THE COMPETING OR, IF YOU WILL, CONFLICTING IDEAS ABOUT THE SCOPE OF THIS MATTER.

THE COURT: YEP.

MR. DRAYCOTT: THE GOVERNMENT'S CONTENTION IS THAT PLAINTIFFS BROUGHT A FRAUD CASE THAT IS NARROWLY FOCUSED ON DEFENDANT'S FAILURE TO DELETE DIAGNOSTIC CODES THAT WERE

UNSUPPORTED BY BENEFICIARY CHARTS AS REVEALED BY THEIR OWN CHART REVIEWS.

THIS VIEW OF THE CASE IS EXPRESSED IN THE COMPLAINT.

BUT I THINK THE MOST DIRECT AND COMPACT ANSWER TO THIS DESCRIPTION OF THE COMPLAINT -- OF THE CASE AND BY UNITED IS ANSWERED BY JUDGE FITZGERALD WHEN HE RULED ON THE MOTION TO DISMISS. I'M REFERRING PARTICULARLY TO HIS ORDER, A WRITTEN ORDER ON THAT MOTION. AND THIS IS DOCUMENT FOR THE RECORD 212 IN THE DOCKET IN THIS CASE.

AND WHAT THE COURT WROTE AT -- BEGINNING AT THE BOTTOM OF PAGE 21,

AS THE GOVERNMENT ARGUES THE ISSUE HERE IS NOT THE ONE-WAY CHART REVIEW GENERALLY BUT THE SPECIFIC INVALID DIAGNOSIS CODES THAT DEFENDANTS SUBMITTED AND FAILED TO DELETE DESPITE INFORMATION AVAILABLE TO THEM.

INDEED, THIS ARGUMENT SUPPORTS THE COURT'S CONCLUSION DESCRIBED ABOVE, THAT THE REAL ISSUE IS THE ACTUAL INVALID CODES THAT WERE SUBMITTED AND NOT DELETED.

WE RESPECTFULLY SUBMIT THAT JUDGE FITZGERALD GOT IT PRECISELY RIGHT -- THAT IS THE SCOPE OF THIS CASE. AND THAT UNITED IS TRYING TO EXPAND IT PAST ANY --

THE COURT: SO, LET ME JUST ASK YOU. I DON'T HAVE JUDGE FITZGERALD'S ORDER IN FRONT OF ME.

BUT HE WAS RULING ON A MOTION TO DISMISS AT THAT

TIME, CORRECT?

MR. DRAYCOTT: THAT IS CORRECT.

THE COURT: SO, IT WASN'T A SUMMARY JUDGMENT DECISION OR --

MR. DRAYCOTT: THAT IS CORRECT.

THE COURT: OKAY. ALL RIGHT. THANK YOU.

MR. DRAYCOTT: BUT THAT IS -- THAT -- I THINK THAT CONCEPTION OF THE CASE IS PRECISELY RIGHT. AND IT IS ONE WE WOULD URGE THE COURT TO FOLLOW AND ADOPT IN ANY FINAL DECISION ON THIS.

DEFENDANTS ARE ATTEMPTING TO EXPONENTIALLY EXPAND THE SCOPE OF THIS CASE BOTH IN TERMS OF VALID LIVE LIABILITY AND DAMAGE ISSUES.

DEFENDANTS -- TURNING FIRST TO THE ISSUE OF DAMAGES.

DEFENDANTS HAVE EXPRESSLY ASSERTED THAT AN ULTIMATE DAMAGE AWARD IN THIS CASE SHOULD RESOLVE THEIR CONTENTION THAT THEY HAD BEEN UNDERPAID BY VIRTUE OF A PAYMENT SYSTEM THAT HAS NOW BEEN IN PLACE FOR ROUGHLY TWO DECADES.

THEY HAVE EXPRESSLY EXPRESSED -- THEY HAVE -- THE CLEAREST ARTICULATION OF THIS IS IN THE COUNTERCLAIM THAT THEY FILED IN WHICH PARTICULARLY THE PORTION THAT WE CITED AT PAGE 10 -- THIS IS FOR THE RECORD, DOCUMENT 223 FROM THE RECORD IN THIS CASE. THAT COUNTERCLAIM IS NOW SUBJECT TO A REQUEST FOR DISMISSAL BY UNITED.

NONETHELESS, THE TENTATIVE -- AS CURRENTLY DRAFTED,

THE TENTATIVE DECISION WOULD ALLOW DISCOVERY ON CLAIMS AND CONTENTIONS FOR WHICH THERE IS NO JURISDICTION IN THIS COURT IS EXPRESSLY CONCEDED BY DEFENDANTS.

THE COURT: I THINK WE ADDRESSED THAT, BUT I UNDERSTAND IT'S YOUR POSITION.

MR. DRAYCOTT: SECOND, WITH RESPECT TO PROPORTIONALITY, AGAIN, THE DAMAGES IN THIS CASE ARE THE ONES ASSOCIATED WITH CODES KNOWN TO BE INVALID.

DEFENDANTS' CONTENTIONS EXPONENTIALLY EXPAND THIS TO THE ENTIRE CONTRACT. AND, MOREOVER, NOT JUST THE CONTRACT BY UNITED BUT ANY M.A.O. CONTRACT.

THE EXTENT THAT THERE IS A RECALCULATION OF COEFFICIENTS, IT OPERATES PROGRAM-WIDE. AND THAT'S THE CORE OF WHAT THEY'RE ASKING FOR. IT IS ENORMOUS -- IT IS OUT OF ANY PROPORTION TO THE ACTUAL CLAIMS AND THE ALLEGATIONS IN THIS CASE.

MOREOVER, DEFENDANTS APPEAR BENT ON TRIPLE-TRACKING THIS ISSUE. THEY HAVE ASKED THE COURT TO -- THEY HAVE ASKED JUDGE FITZGERALD TO TRANSFER THE COUNTERCLAIM TO THE COURT OF FEDERAL CLAIMS SO THAT IT CAN BE PURSUED THERE. AND, YET, THEY ALSO HAVE EXPRESSLY SAID THAT THEY WANT TO LITIGATE THE ISSUE OF THE AGENCY'S DECISION NOT TO RECALCULATE OR RECALIBRATE COEFFICIENTS IN AN A.P.A. ACTION OTHER THAN THE ONE THAT'S PENDING OR, PRESUMABLY, THE ONE THAT MAY BE BROUGHT WITH RESPECT TO THE OVERPAYMENT RULE IN WHICH THE AGENCY ISSUED ITS

FINDINGS REGARDING AN F.F.S. ADJUSTER.

ON THE -- ON THE LIABILITY QUESTION, THE OBLIGATION TO DELETE INACCURATE CODES HAS BEEN DECIDED BY THE NINTH CIRCUIT.

THERE WAS NO FINDING, YOU KNOW, EITHER IN SWOBEN OR SILINGO, THAT THE OBLIGATION TO DELETE IS CONDITIONED OR CONSTRAINED BY -- TO THE EXTENT THAT PAYMENTS FOR VALID CODES ARE INACCURATE OR THAT THEY SHOULD BE -- THE OBLIGATION TO DELETE IS IN ANY WAY AFFECTED BY A FEE-FOR-SERVICE ERROR RATE OR, THAT IS, THE RATE OF UNSUPPORTED CODES THAT MAY OPERATE WITHIN THE FEE-FOR-SERVICE DATA UPON WHICH THE COEFFICIENTS ARE BASED.

MOREOVER, THE NINTH CIRCUIT IN CEDARS SINAI HELD THAT ANY COMPLAINT ABOUT THE VALIDITY OR EFFECT OF A RULE OR A POSITION DOES NOT AFFECT OR EXCUSE A DEFENDANT'S OBLIGATION TO COMPLY WITH IT.

FINALLY, THE GOVERNMENT TOOK APPROPRIATE STEPS TO AIR AND SEEK RELIEF ON THESE RELEVANCY ISSUES WITH THE DISTRICT COURT. WE SPECIFICALLY BRIEFED THE ISSUE OF WHETHER OR NOT YOUR HONOR SHOULD DEFER ON THAT ISSUE PENDING A DECISION ON THE GOVERNMENT'S MOTION FOR A PROTECTIVE ORDER.

I READ THE TENTATIVE VERY QUICKLY, YOUR HONOR. BUT I DON'T RECALL YOUR HONOR HAVING ADDRESSED THAT. AND WE WOULD URGE YOUR HONOR -- THE COURT TO CONSIDER IT IN THE CONTEXT OF ANY FINAL ORDER --

THE COURT: SO, VERY SPECIFICALLY YOU -- YOU WANT THE COURT TO ADDRESS WHETHER OR NOT IT'S APPROPRIATE FOR THE MAGISTRATE JUDGE TO ORDER THE PRODUCTION OF THIS EVIDENCE WHILE -- WHILE THE MOTIONS ARE PENDING BEFORE THE DISTRICT JUDGE AND PARTICULARLY THE ONE FOR A PROTECTIVE ORDER.

MR. DRAYCOTT: PARTICULARLY THE ONE FOR A PROTECTIVE ORDER, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. DRAYCOTT: AND WITH THAT, I'LL TURN THE PODIUM OVER TO MS. KRIEG.

THE COURT: ALL RIGHT.

YOU KNOW, IT MIGHT BE MORE HELPFUL TO HAVE MR. SCHINDLER RESPOND TO EACH ONE BECAUSE IT'S -- IT'S GOOD TO HEAR EACH SIDE AND SO FORTH.

AND I ASSUME SHE'S GOING TO MOVE ON TO A DIFFERENT TOPIC.

SO, MAYBE MR. SCHINDLER COULD ADDRESS THE RELEVANCY ARGUMENTS FIRST.

MR. DRAYCOTT: THANK YOU, YOUR HONOR.

MR. SCHINDLER: THANK YOU, YOUR HONOR. AND I'LL BE BRIEF.

AND UNLESS YOU HAVE SPECIFIC QUESTIONS, I THINK THE WAY THAT THE COURT HAS UNDERSTOOD THE PROBLEM AND SET FORTH IN YOUR TENTATIVE IS EXACTLY RIGHT.

THIS IS NOT AN ATTEMPT ON THE PART OF UNITED TO

EXPAND ANYTHING. WE'RE RESPONDING TO THE COMPLAINT THAT THE GOVERNMENT FILED HERE. PLAIN AND SIMPLE.

MR. DRAKE'S ARGUMENTS DO NOT SPEAK AT ALL TO THE MATERIALITY QUESTION, DOES NOT SPEAK TO THE UNJUST ENRICHMENT QUESTION, DOES NOT FUNDAMENTALLY SPEAK TO THE QUESTION OF OVERPAYMENT.

AND PLAIN AND SIMPLE, THEY IGNORE JUDGE COLLYER'S RULING IN ITS ENTIRETY. WE'RE NOT SEEKING TO RE-LITIGATE. WE'RE NOT SEEKING TO HAVE MULTIPLE FRONTS. WE'RE SEEKING TO DEFEND OURSELVES.

AND AS THE COURT HAS CORRECTLY NOTED, THE STANDARD HERE OF RELEVANCE IN THE CONTEXT OF DISCOVERY IN THE POSTURE OF THIS CASE IS EXACTLY AS THE COURT HAS SET FORTH IN YOUR TENTATIVE MOTION.

I -- AS TO MR. DRAYCOTT'S LAST --

THE COURT: CAN I ASK YOU ONE QUESTION AS TO --

MR. SCHINDLER: SURE.

THE COURT: -- AS TO AN ARGUMENT HE MADE.

SO, EVEN IF YOUR COUNTERCLAIMS ARE TRANSFERRED TO THE COURT OF CLAIMS, THIS EVIDENCE REMAINS RELEVANT IN UNITED'S OPINION TO THE TWO OTHER CLAIMS BROUGHT BY THE UNITED STATES -- NOT JUST THE FALSE CLAIMS ACT CLAIM, CORRECT?

MR. SCHINDLER: THAT'S CORRECT. ALL THREE.

THE COURT: AND THEN IT ALSO REMAINS RELEVANT TO THE DAMAGES CALCULATION.

MR. SCHINDLER: IT DOES INDEED, YOUR HONOR.

THE COURT: BECAUSE MANY OF THESE DOCUMENTS SEEM TO ME TO GO TO THE QUESTION OF ULTIMATELY IF THE UNITED STATES IS CORRECT ON ITS THEORY IN THIS CASE, THAT EVEN IF IT'S CORRECT -- ASSUMING FOR THE SAKE OF ARGUMENT THAT CALCULATING THE TOTAL AMOUNT OF DAMAGES DUE, YOU'D HAVE AN OPPORTUNITY TO CHALLENGE THE WAY IN WHICH THEY EVALUATED WHAT WAS OWED, WHAT THEY PAID, WHAT -- YOU KNOW.

MR. SCHINDLER: THAT'S PRECISELY RIGHT.

THE COURT: SO, ALL RIGHT.

OKAY. GO AHEAD. I'M SORRY.

MR. SCHINDLER: AND THE LAST POINT THAT MR. DRAYCOTT MADE ABOUT ESSENTIALLY ASKING THE COURT TO DEFER ITS RULING PENDING RESOLUTION OF JUDGE FITZGERALD'S -- THE MOTIONS PENDING THERE, I THINK IT'S IMPORTANT TO NOTE THAT THIS MOTION -- AND, INDEED, THE GOVERNMENT'S ORIGINAL MOTIONS FOR STAY WERE ALL FILED ULTIMATELY BEFORE JUDGE FITZGERALD. AND AS THE COURT KNOWS AT THE TIME OF THE EX PARTE APPLICATION THAT THE GOVERNMENT MADE, JUDGE FITZGERALD HAS AFFIRMATIVELY SENT THIS ISSUE BACK TO YOUR HONOR.

HE IS FULLY AWARE OF WHAT'S BEFORE HIM. IF HE THOUGHT THAT HE NEEDED TO INTERVENE, IF HE THOUGHT HE NEEDED TO CONSIDER THIS MOTION INSTEAD OF SENDING IT TO YOUR HONOR, HE WOULD HAVE DONE SO. AND IF HE THOUGHT AT THE TIME OF THE INITIAL REQUEST FOR STAY THAT THE GOVERNMENT FILED THAT THAT

NEEDED TO HAPPEN, WE'D BE IN A DIFFERENT POSTURE.

THE COURT: SO, REMIND ME AGAIN EXACTLY WHEN THE MOTION FOR A PROTECTIVE ORDER WAS FILED AND WHEN THE EX PARTE WAS FILED, IF YOU REMEMBER. OR ABOUT WHAT TIME.

I MEAN, IT SEEMS LIKE THE --

MR. SCHINDLER: WELL --

THE COURT: -- THERE ARE SEVERAL MOTIONS PENDING BEFORE JUDGE FITZGERALD THAT HAVE PENDING SINCE AUGUST I THINK.

MR. SCHINDLER: THAT IS TRUE.

AND THEN AS THE COURT KNOWS, WE WENT THROUGH THE EXERCISE OF THE EX PARTE APPLICATION. AT THE SAME TIME, OF COURSE, WE HAVE BEEN ASKING YOUR HONOR FOR THE MATERIALS THAT ARE THE SUBJECT OF THIS MOTION NOW GOING ON SIX MONTHS.

SO, THIS HAS NOT BEEN A SECRET TO JUDGE FITZGERALD. HE'S AWARE OF IT. IF HE HAD INTENDED ESSENTIALLY TO OVERRIDE HIS STANDING ORDER -- WHICH EXPLICITLY SAYS DISCOVERY IS TO GO FORWARD, THEN, HE WOULD DO SO.

AND I THINK THE EFFORT ON THE PART OF THE GOVERNMENT TO ESSENTIALLY TRY AND CIRCUMVENT WHAT JUDGE FITZGERALD HAS IN HIS STANDING ORDER IS PROBLEMATIC.

AND ESSENTIALLY GOES ULTIMATELY -- AND YOUR HONOR HAS BEEN QUITE PATIENT WITH BOTH PARTIES. WE'VE BEEN BEFORE YOU NOW MULTIPLE TIMES TELEPHONICALLY AND OTHERWISE. AND I DON'T MEAN TO BE A BROKEN RECORD. BUT THE THEME HAS BEEN THE SAME.

THEY ARE EFFECTIVELY THWARTING OUR ABILITY TO DEFEND

OURSELVES NOW GOING ON A YEAR WITH THE VERY DOCUMENTS THAT GO TO THE HEART OF OUR DEFENSE.

AND IN THE OLD ADAGE "METHINKS THOU DOST PROTEST TOO MUCH," THESE DOCUMENTS, THESE 20,000 DOCUMENTS FROM CMS'S OWN RECORDS, WE BELIEVE ARE GOING TO BE DIRECTLY RELEVANT TO TESTING THE GOVERNMENT'S THEORIES AND TO DEMONSTRATING THAT WE WERE NOT OVERPAID.

THE COURT: SO, THE MOTION FOR PROTECTIVE ORDER WAS FILED I THINK BACK IN AUGUST OR SEPTEMBER.

IS THAT RIGHT? -- BEFORE JUDGE FITZGERALD.

MR. SCHINDLER: CAN I CONFER WITH THE GOVERNMENT?

THE COURT: SURE.

(COUNSEL CONFERRING.)

MR. DRAYCOTT: AUGUST 6TH.

MR. SCHINDLER: AUGUST 6TH IT WAS FILED.

THE COURT: AUGUST 6TH, THE MOTION FOR PROTECTIVE ORDER IS FILED. AND THAT IS STILL PENDING.

AND THEN THERE WAS AN EX PARTE APPLICATION BEFORE ME.

AND THEN -- DID AN EX PARTE ALSO GET FILED BEFORE JUDGE FITZGERALD?

MR. DRAYCOTT: IF YOU REMEMBER, IT INITIALLY WENT TO JUDGE FITZGERALD.

THE COURT: OH, AND THEN HE REFERRED IT BACK --

MR. DRAYCOTT: AND THEN HE REFERRED IT -- HE REFERRED IT TO YOU.

THE COURT: -- TO ME. OKAY.

MR. DRAYCOTT: SO --

THE COURT: GOT IT. UNDERSTOOD.

OKAY. THANK YOU.

MR. SCHINDLER: THANK YOU, YOUR HONOR.

MR. DRAYCOTT: JUST A COUPLE OF --

THE COURT: SURE.

MR. DRAYCOTT: -- BRIEF POINTS, YOUR HONOR.

WELL, FIRST WITH RESPECT TO THE DECISION BY JUDGE COLLYER. JUDGE COLLYER WAS VERY CAREFUL TO EXPRESS THAT ANY -- THAT SHE SAW NO OVERLAP OR SHE SAW NO IMPACT FROM HER DECISION. AND THAT -- WITH RESPECT TO THIS CASE.

AND, MOREOVER, IF THE COURT -- IF THE DECISION BY JUDGE COLLYER -- WHICH IS NOW UNDER REVIEW AND IS SUBJECT TO A NEW BRIEFING SCHEDULE IN THE DISTRICT COURT, IF IT WERE TO BE CONSTRUED AS SOMEHOW ALLOWING A MEDICARE ADVANTAGE ORGANIZATION TO REFRAIN FROM DOING THE DELETES OF INACCURATE CODING, SUCH CONSTRUCTION WOULD DIRECTLY CONFLICT WITH THE HOLDINGS OF SWOBEN AND SILINGO.

THE NINTH CIRCUIT IN SWOBEN DIDN'T CONDITION THE OBLIGATION TO CODE ACCURATELY ON ANYTHING. IT DIDN'T CODE -- IT DIDN'T CONDITION IT ON AN M.A.O.'S UNDERSTANDING OF WHAT THE ERROR RATE WAS IN SOME OTHER PART OF THE MEDICARE ADVANTAGE -- SORRY, IN ANY PART OF THE MEDICARE PROGRAM, INCLUDING PARTS A OR B.

SO, IT'S -- IT'S -- I WOULD URGE THE COURT TO FOLLOW THE LAW OF THE NINTH CIRCUIT RATHER THAN JUDGE -- THAN A CONSTRUCTION WHICH EVEN JUDGE COLLYER HAS EXPRESSLY SAID SHOULDN'T BE APPLIED IN THIS CASE.

WITH RESPECT TO THE EX PARTE, I THINK YOUR HONOR'S RULING ON THAT WAS CAREFUL JUST TO ANALYZE WHETHER OR NOT THE EX PARTE APPLICATION WAS NECESSARY AND DIDN'T GO TO THE UNDERLYING MERITS OF -- THAT THE GOVERNMENT HAD MADE AS TO WHY DEFERRAL WOULD BE APPROPRIATE.

AND MY READING OF YOUR HONOR'S ORDER ON THE EX PARTE WAS THAT YOU EXPECTED THOSE ISSUES WOULD BE BRIEFED IN THE CONTEXT OF THE MOTION TO COMPEL THAT'S NOW BEEN BROUGHT.

THE COURT: I THINK THAT'S CORRECT. YES.

MR. DRAYCOTT: AND, AGAIN, THE -- THE LAST POINT I'D MAKE IS THAT THE GOVERNMENT ISN'T ASKING AND HAS NEVER ASKED FOR A COMPLETE CESSATION OF DISCOVERY.

INITIALLY, THERE WAS A SUGGESTION OF PHASE DISCOVERY -- THAT DOCUMENT DISCOVERY WOULD, YOU KNOW, PRECEDE DEPOSITION DISCOVERY.

AND THEN AS, YOU KNOW, ISSUES DEVELOPED IN THIS CASE, IT BECAME CLEAR THAT GIVEN THE -- THE -- GIVEN THE LEVEL OF DOCUMENTS AND THE CONTENTIONS BEING PURSUED BY UNITED, THAT APPROPRIATE LIMITS SHOULD BE PLACED ON DISCOVERY.

WE FILED THE APPROPRIATE MOTION UNDER BOTH RULE 16 AND 26. IT WAS UNDER RULE 16 BECAUSE -- AS OPPOSED TO JUST 26

BECAUSE A DISCOVERY ISSUE -- ORDER HAD NOT YET BEEN ISSUED IN THE CASE.

SO, WE THINK THAT THE -- UNDER BOTH JUDGE FITZGERALD'S PROCEDURES, UNDER THE CIVIL RULES AND PURSUANT TO NINTH CIRCUIT AUTHORITY, THE PROPER SEQUENCING IS FOR THE ISSUES ADDRESSED IN THE MOTION FOR A PROTECTIVE ORDER TO BE RESOLVED FIRST.

THE COURT: ALL RIGHT. THANK YOU.

MR. SCHINDLER: JUST VERY BRIEFLY, YOUR HONOR.

JUDGE COLLYER SAID NO SUCH THING AS WHAT MR. DRAYCOTT REPRESENTED TO YOU. AND I'D ENCOURAGE YOU TO REVIEW HER OPINION. IT WAS A DIFFERENT POSTURE.

THE ISSUE, OF COURSE, GOES TO THE QUESTION OF WERE WE OVERPAID. AND JUDGE COLLYER'S OPINION GOES SPECIFICALLY TO THE NOTION OF ACTUARIAL EQUIVALENCE, WHICH THE GOVERNMENT AVOIDS LIKE THE PLAGUE.

ALL WE'RE SAYING IN THIS CONTEXT IS WE'RE ENTITLED TO DISCOVERY TO DEMONSTRATE,

A. WE WERE NOT OVERPAID.

B. WE CORRECTLY DID NOT BELIEVE WE WERE OVERPAID.

AND THE GOVERNMENT ITSELF AGREED WITH US FOR ALL THE REASONS.

AND IN TERMS OF THE SCOPE OF THIS CASE, AGAIN, THE GOVERNMENT HAS SET THE SCOPE. IT HAS ASKED FOR BILLIONS OF DOLLARS IN DAMAGES. YOU KNOW THAT.

THE COURT: ALL RIGHT.

MS. KRIEG.

MR. DRAYCOTT: THE LAST POINT I'D MAKE, YOUR HONOR, IS JUST I'VE GOT TO RESPOND TO THE IDEA THAT WE'VE AVOIDED -- THE GOVERNMENT HAS AVOIDED THE ISSUE OF ACTUARIAL EQUIVALENCE.

IT IS PRECISELY THE OBJECT OF A MOTION FOR PARTIAL SUMMARY JUDGMENT, WHICH, IN TURN, IS PART OF THE PREDICATE UPON WHICH THE MOTION FOR A PROTECTIVE ORDER IS BASED.

SO, WE'VE -- THAT -- THAT ISSUE CAN AND SHOULD BE ADDRESSED AS A LEGAL ISSUE. IT'S A STATUTORY TERM. AND IT HAS BEEN EXTENSIVELY BRIEFED BY THE PARTIES BEFORE JUDGE FITZGERALD.

AND A FULL CONSIDERATION OF THE GOVERNMENT'S POSITION AND, OF COURSE, UNITED'S POSITION WITH RESPECT TO ACTUARIAL EQUIVALENCE SHOULDN'T FORM WHAT DISCOVERY IS ALLOWED IN THIS CASE.

THE COURT: OKAY. THANK YOU.

(PAUSE IN PROCEEDINGS.)

MS. KRIEG: THANKS, YOUR HONOR. AND THANKS FOR THE TENTATIVE. I WILL ATTEMPT TO ADDRESS THE CONCERNS RAISED THERE.

THE GOVERNMENT HAS APPROPRIATELY ASSERTED PRIVILEGE IN THE MANNER ENVISIONED BY THE NINTH CIRCUIT IN THE BURLINGTON CASE.

WE'VE LOGGED THE PRIVILEGED INFORMATION.

AND AS MY COLLEAGUE ADDRESSED, GIVEN THE IRRELEVANCE AND OVERBREADTH OF THE REQUEST FOR PRODUCTION FROM UNITED, WE'VE SOUGHT APPROPRIATE THRESHOLD RULINGS WITH THE DISTRICT COURT.

AND WHEN FACED WITH A MOTION TO COMPEL, WE'VE PERFECTED THE PRIVILEGE WITH DECLARATIONS THAT DESCRIBE THE MEDICARE ADVANTAGE PAYMENT PROGRAM, OUTLINED THE DELIBERATIONS IMPLICATED BY THESE REQUESTS, AND WALKED THROUGH HOW THE DOCUMENTS AT ISSUE ARE PART OF THOSE DELIBERATIONS HIGHLIGHTED WITH EXEMPLAR DOCUMENTS.

AND THE DECLARATIONS MAKE CLEAR THE HARM THAT DISCLOSURE WOULD CAUSE.

THE COURT: CAN I ASK YOU A QUESTION.

MS. KRIEG: SURE.

THE COURT: YOU KNOW, THERE -- THERE WERE A LOT OF PROBLEMS I HAD --

MS. KRIEG: YEP.

THE COURT: -- WITH THE ASSERTION OF THE PRIVILEGE HERE, OBVIOUSLY.

AND MAYBE I JUST DIDN'T SEE IT IN THE CASES THAT YOU CITED. AND THAT'S WHY I'M ASKING YOU THIS.

BUT JUST FROM A VERY BASIC SORT OF SIMPLISTIC APPROACH TO THIS, IT DIDN'T SEEM LIKE THERE WERE ANY DECISIONS THAT UPHELD THE PRIVILEGE THAT HAD QUITE THE BREADTH AND QUANTITY OF DOCUMENTS THE GOVERNMENT IS ASSERTING THE PRIVILEGE

OVER HERE.

THERE IS SOMETHING -- AND I THINK WE TALKED ABOUT THIS IN ONE OF THE EARLIER TELEPHONE CALLS. IT'S A HARD SELL FOR THE UNITED STATES TO SAY 20,000 DOCUMENTS ARE INVOLVED IN DELIBERATIONS AND THE KIND OF DELIBERATIONS THAT I BELIEVE THE CASE LAW IS INTENDED TO PROTECT.

AND IF -- IF THAT'S TRUE, IF THE GOVERNMENT'S POSITION IS TRUE, THAT, YOU KNOW, THIS QUANTITY AND BREADTH OF FACTUAL INFORMATION BY AN AGENCY CAN BE WITHHELD UNDER THIS PRIVILEGE, THEN, IT GREATLY EXPANDS THE SCOPE OF SECRECY THAT THE UNITED STATES CAN ASSERT -- WHICH I THINK IS REALLY CONTRARY TO THE LAW. THAT'S NOT WHAT THE DELIBERATIVE PROCESS PRIVILEGE IS FOR.

AND -- AND I THINK THAT'S THE HEART OF WHAT TROUBLES ME ABOUT THIS IS THAT IT'S NOT A PRIVILEGE TO BE ASSERTED BECAUSE DISCOVERY IS BURDENSOME.

MS. KRIEG: I APPRECIATE THAT.

AND I WANT TO WALK THROUGH -- MAYBE AT A MORE -- IN A MORE FULSOME WAY THE STEPS THAT THE AGENCY TOOK.

AND IN ORDER TO PERFECT THE PRIVILEGE IN A WAY THAT I THINK COMPLIES WITH THE GUIDANCE THAT YOUR HONOR GAVE US IN THE OCTOBER 23RD CONFERENCE WHERE YOUR HONOR STATED THAT IT WAS

"REASONABLE AT THIS STAGE THAT THE GOVERNMENT SHOULD BE ABLE TO IN CONNECTION WITH WORKING WITH ITS CLIENT, TALK ABOUT THE NATURE OF THESE DOCUMENTS,

WHAT'S CONTAINED IN THEM, CATEGORIZE THEM AND COME UP WITH A RESPONSE TO UNITED'S MOTION TO COMPEL."

AND THAT GUIDANCE I THINK IS IN LINE WITH THE NINTH CIRCUIT BURLINGTON CASE, WHICH INSTRUCTS DISTRICT COURT TO USE A HOLISTIC REASONABLE ANALYSIS WHEN ASSESSING PRIVILEGE ASSERTIONS.

THE COURT: SO, I GUESS WHAT I'D SAY IS THIS.

I'M AWARE THAT I DIRECTED THAT OR SUGGESTED THAT --

MS. KRIEG: UH-HMM.

THE COURT: -- BECAUSE THAT WAS IN RESPONSE -- IF I REMEMBER CORRECTLY TO CONCERNS BY THE UNITED STATES OVER THE VOLUME OF MATERIAL, THAT IT WOULDN'T BE PRAGMATIC FOR AN AGENCY EMPLOYEE WITH PERSONAL KNOWLEDGE TO LOOK AT 20,000 DOCUMENTS AND EXPLAIN TO ME IN A DECLARATION WHY EACH ONE WAS DELIBERATIVE OR CONNECTED TO DELIBERATIONS.

AND I SUGGESTED THAT YOU -- YOU USE CATEGORIES.

THE PROBLEM WAS WHEN I SAW THAT EXECUTED IN THE AFFIDAVITS OF THE DECLARANTS, IT DIDN'T ADDRESS THE STANDARD THAT I BELIEVE THE NINTH CIRCUIT EXPECTS US TO ADDRESS FOR THE DELIBERATIVE PROCESS PRIVILEGE.

AND THEY KIND OF ADMITTED IT IN THEIR DECLARATIONS. THEY SAID WE DON'T HAVE TIME TO REVIEW 20,000 DOCUMENTS AND WE WERE NOT THE CREATORS OF THESE. BUT WE'RE GOING TO EXPLAIN TO YOU WHY WE THINK THAT THEY SATISFY THE STANDARD ANYWAY.

AND I REALIZE I GAVE YOU THE DIRECTION TO DO IT THAT WAY WITH 20,000 DOCUMENTS.

AND THAT'S WHY I SAID BEFORE I DON'T THINK THIS PRIVILEGE IS DESIGNED TO PROTECT 20,000 DOCUMENTS. LIKE, I DON'T THINK THAT'S THE PURPOSE OF THIS PRIVILEGE.

MS. KRIEG: WHAT THE DECLARANTS DID WAS WHILE THEY DID NOT DO AN EYES' ON REVIEW. AND IF THEY HAD, UNDER OUR STATISTICS IT WOULD HAVE TAKEN THEM 45 WEEKS TO DO AN EYES' ON REVIEW. SO WHAT THEY DID --

THE COURT: SO, HOW ABOUT THIS QUESTION.

NAME ME A CASE WHERE THE GOVERNMENT SUCCESSFULLY ASSERTED THE DELIBERATIVE PROCESS PRIVILEGE FOR THIS VOLUME OF DOCUMENTS.

MS. KRIEG: FOR THIS VOLUME OF DOCUMENTS, I DON'T HAVE A CASE.

FOR THIS TYPE OF CATEGORICAL REVIEW, I THINK THE BURLINGTON CASE -- WHICH SUGGESTS USING A HOLISTIC REVIEW -- AND I CAN WALK MORE THROUGH THE MATRIX BECAUSE THE AGENCY DID DO AN EYES-ON REVIEW OF 10,841 DOCUMENTS. SO, IT WAS NOT THE LIMITED REVIEW THAT I THINK THE BRIEFING BY UNITED SUGGESTS.

THEY DID -- THE AGENCY DID DO AN EYES-ON REVIEW OF 10,841 DOCUMENTS TO MEET PRIVILEGE CALLS. SO, IT WAS NOT A SMALL AMOUNT OF DOCUMENTS BY THE AGENCY. AND THEN THAT EYES-ON REVIEW WAS FED UP TO THE DECLARANTS. SO, THERE WAS A SUBSTANTIAL AMOUNT OF REVIEW DONE BY THE AGENCY ITSELF.

THERE'S ALSO THE SEC VERSUS THRASHER CASE WHICH AGREED THAT A DOCUMENT-BY-DOCUMENT LISTING WAS NOT AN APPROPRIATE OR NECESSARY TYPE OF REVIEW.

SO, THERE ARE CASES THAT AGREE THAT THERE DOES NOT HAVE TO BE A DOCUMENT-BY-DOCUMENT REVIEW.

AND I DO THINK WHAT THE AGENCY DID HERE TO PERFECT THE PRIVILEGE IS IN LINE WITH BOTH THE NINTH CIRCUIT AND YOUR GUIDANCE. AND THE DECLARATIONS WALK THROUGH THE CATEGORIES AND THE TYPES OF DELIBERATIONS AND POLICY THAT THE AGENCY DOES IN MAKING THESE RULEMAKING.

THE COURT: I'M WILLING TO SAY MY GUIDANCE MIGHT HAVE BEEN WRONG.

MS. KRIEG: OKAY.

THE COURT: I'M SORRY TO SAY THAT BECAUSE I KNOW YOU RELIED ON IT, BUT I'M NOT SURE THAT I REALLY APPRECIATED WHAT IT WOULD LOOK LIKE WHEN THE DECLARATIONS CAME IN.

WHAT I WAS THINKING OF WHEN I SAID YOUR AGENCY PERSONNEL COULD PROPOSE CATEGORIES, I WAS THINKING OF CATEGORIES THAT WERE DELIBERATIVE DOCUMENTS. I THOUGHT THAT THERE WOULD BE A HIGHER PERCENTAGE OF WHAT YOU WERE TALKING ABOUT THAT WERE TRUE WHAT I CONSIDER TO BE DELIBERATIVE DOCUMENTS -- THAT IS, POLICY MEMORANDUM THAT EXPRESSLY DISCUSSED THE BACK AND FORTH OF AGENCY DECISION-MAKING, THAT KIND OF THING. OR EVEN EMAILS, PERHAPS.

MS. KRIEG: BUT THOSE TYPE OF DOCUMENTS --

THE COURT: BUT --

MS. KRIEG: I'M SORRY. GO AHEAD.

THE COURT: I WAS JUST GOING TO SAY THAT THERE WAS A GREAT DEAL MORE THAT -- THAT THE GOVERNMENT SOUGHT TO PROTECT HERE.

MS. KRIEG: THE GOVERNMENT SOUGHT TO PROTECT DELIBERATIVE DOCUMENTS.

WE HEARD YOU WHEN YOU IN THE OCTOBER 23RD CONFERENCE GUIDED AND INSTRUCTED THE AGENCY TO RELEASE PURELY FACTUAL DOCUMENTS.

AND WE WENT BACK TO THE AGENCY. WE GAVE THEM THAT ORDER ON THE MOTION TO STAY WITH THAT IN FACT INSTRUCTION.

AND THEN AS A RESULT OF THE REVIEW, THE AGENCY RELEASED ABOUT 1300 DOCUMENTS.

SO, I THINK THE SCOPE OF WHAT YOU ARE INSTRUCTING IN -- IN YOUR TENTATIVE AND EVEN THE SPIRIT OF WHAT YOU INTENDED IN YOUR OCTOBER 23RD HEARING IS ALL ENCOMPASSED IN WHAT THE AGENCY IN FACT DID -- ALTHOUGH THERE WAS NOT AN EYES-ON REVIEW.

THE COURT: OKAY.

MS. KRIEG: OTHER -- OTHER POINTS I WANT TO MAKE IS THE REFERENCE TO CONTRACTOR REVIEW IN THE AGENCY REVIEW THAT IT WAS NOT -- THE AGENCY DIDN'T HIRE CONTRACT ATTORNEYS. THE CONTRACTORS ARE ACTUALLY OFTEN USED BY THE AGENCY. THEY'RE USED IN THE ADMINISTRATION OF THE AGENCY POLICY. SO, THEY'RE FAMILIAR WITH THE AGENCY'S WORK. AND, SO, IT WAS NOT OUT OF

LINE FOR THEM TO BE PART OF THE REVIEW.

THE USE OF DOJ IN THIS PORTION OF THE REVIEW, AGAIN, IT WAS NOT WITHOUT AGENCY GUIDANCE. ALTHOUGH, DOJ WAS PART OF THE REVIEW OF A SMALL PORTION OF THE DRAFT DOCUMENTS.

AGAIN, WITH AGENCY GUIDANCE -- AND THE AGENCY WAS FORCED AS I THINK YOU UNDERSTOOD WITH OPERATIONALIZING THIS LARGE-SCALE REVIEW AS A RESULT OF THE OVERBROAD AND IRRELEVANT DOCUMENT REQUESTS FROM UNITED. AND THE AGENCY HAD TO DO IT IN A TIMELY WAY THAT WOULD NOT CRIPPLE THE AGENCY.

SO, IT MADE DECISIONS TO USE CONTRACTOR WHO ARE PART, AGAIN, OF WHAT THE AGENCY DOES IN ITS DAY-TO-DAY WORK. AND THEN AGENCY EMPLOYEES WHO WOULD FEED UP THE INFORMATION TO THE DECLARANTS. AND THEN IT PULLED OUT THE DRAFT DOCUMENTS, WHICH DOJ REVIEWED. IT DID AN EYES-ON REVIEW WITH GUIDANCE FROM THE AGENCY.

ALL OF THAT WAS APPROPRIATE DECISIONS AND DID NOT NEGATE THE FACT THAT IT DID A DELIBERATIVE REVIEW OF THE DOCUMENTS. AND THE DECLARATIONS WALKED THROUGH THE POLICY DECISIONS, THE SCOPE OF THE DELIBERATIONS, HOW THE PARTICULAR TYPES OF CATEGORIES OF DOCUMENTS -- BE IT EMAILS, OPINION PAPERS -- FALL INTO THOSE CATEGORIES. AND THEN THE PRIVILEGE LOGS CORRELATE TO THOSE DECLARATIONS.

SO, THE AGENCY ABSOLUTELY CONVEYED ENOUGH INFORMATION FOR THE READER TO UNDERSTAND HOW THESE DELIBERATIVE DOCUMENTS WORK, IN THE UNIVERSE OF THE DELIBERATIVE DOCUMENTS, WHAT'S

CONTAINED IN THERE. THERE'S ABSOLUTELY ENOUGH INFORMATION. AND THE HARM IS VERY CLEARLY DELINEATED. IT'S ACTUALLY SPELLED OUT "HARM" AND THEN WHAT THE HARM WOULD BE WITH DISCLOSURE.

SO, WE RESPECTFULLY REQUEST THAT YOU DENY UNITED'S MOTION TO COMPEL THESE DOCUMENTS. AND WE THINK THAT THE UNITED STATES HAS ABSOLUTELY PERFECTED THE PRIVILEGE AND IDENTIFIED HARM THAT OUTWEIGHS ANY OF UNITED'S NEEDS.

THE COURT: THANK YOU.

MR. SCHINDLER.

MR. SCHINDLER: AGAIN, YOUR HONOR, VERY BRIEFLY.

FIRST, I THINK THE WAY THE COURT HAS SUMMARIZED THE ISSUE IN YOUR TENTATIVE IS EXACTLY RIGHT. AND THE LAW IS WHAT MS. KRIEG HAS SUGGESTED TO YOU HERE.

THESE DOCUMENTS WERE REQUESTED A YEAR AGO. THE PROPOSITION THAT THE AGENCY WAS SOMEHOW OVERBURDENED AND OVERTAXED AND WAS UNABLE TO EFFECTIVELY FOLLOW THE PROCESS OF THE CASE LAW MAKES CLEAR IS TO BE EMPLOYED IS BELIED BY THE ESSENTIALLY YEAR-LONG PERIOD THAT IT HAS TAKEN.

AND WHAT HAPPENED -- WE DON'T KNOW WHAT HAPPENED FOR THE FIRST SIX MONTHS. YOU'LL RECALL WE STARTED HAVING TELEPHONE CONFERENCES ON THIS ISSUE GOING BACK TO THE BEGINNING OF SUMMER. AT THAT POINT THEY SUGGESTED TO US THIS WHOLE PROCESS WAS UNDERWAY.

THE COURT: UH-HMM.

MR. SCHINDLER: IT DIDN'T HAPPEN.

WE VOLUNTEERED AT THE TIME WHEN YOU FIRST DISCUSSED THE PROPOSITION OF POTENTIALLY HAVING CATEGORIES. YOU'LL RECALL WE OFFERED TO MEET WITH THEM ON THAT. THEY SAID NO. THEY WOULDN'T SHARE WITH US THE CATEGORIES. THEY ASSURED US THESE COMPREHENSIVE AGENCY DECLARATIONS WERE COMING. AND AT THE LAST MINUTE THEY STONEWALLED AND DID A BAIT-AND-SWITCH AND ESSENTIALLY SAID, NO, WE'RE NOT GOING TO GIVE THEM TO YOU. AND THEN WE WERE LEFT WITH WHAT WE ULTIMATELY GOT HERE.

I THINK YOUR ULTIMATE ASSESSMENT THAT THE PRIVILEGE IS NOT INTENDED TO CAPTURE WHAT THE GOVERNMENT HAS DONE HERE IS SPOT ON.

AND JUST TO INDICATE HOW THIS PROBLEM IS GOING TO CONTINUE THE NEW LOGS THAT WE'RE GETTING FROM THEM CONTINUE TO LOG THOUSANDS AND THOUSANDS AND THOUSANDS OF DOCUMENTS USING THE SAME DEFECTIVE PROCESS.

AND WITH ALL DUE RESPECT TO MS. KRIEG, IT IS NOT OKAY FOR THEM TO CONTRACT OUT TO SOME CONTRACTORS THIS NOTION OF WHETHER OR NOT A DOCUMENT INDEED IS PRE-DECISIONAL. IT'S NOT JUST AS MS. KRIEG KEEPS CALLING "DELIBERATIVE." IT HAS TO BE PRE-DECISIONAL. IT CAN'T BE FACTUAL. IT'S EXACTLY AS THE COURT HAS LAID OUT HERE.

AND THIS PROPOSITION THAT EVERY SINGLE DOCUMENT THAT MIGHT TOUCH THE QUESTION OF RADV WHEN THEY JUST USE A CATEGORY "RADV."

AND ANY DOCUMENT THAT EVER HAD ANYTHING TO DO WITH

RADV SOMEHOW BECOMES PART OF THE DELIBERATIVE PROCESS PRIVILEGE IS CRAZY.

AND, MOREOVER, AT THE END OF THE DAY AS YOU'VE NOTED, IT'S A QUALIFIED PRIVILEGE. AND OUR NEED FOR THESE DOCUMENTS CLEARLY OUTWEIGHS THEM. AND FRANKLY, AS WE'VE NOTED AND THE COURT NOTED A PROTECTIVE ORDER SUFFICES TO SOLVE THE PROBLEM.

IF THERE REALLY ARE CROWN JEWELS -- AND, YOU KNOW, WE THINK THERE ARE CROWN JEWELS VIS-A-VIS OUR DEFENSE. WE DON'T THINK THERE ARE CROWN JEWELS -- AND NOTHING IN THE DECLARATIONS REMOTELY SPEAKS TO THIS NOTION OF HARM TO THE AGENCY.

BECAUSE IF YOU PLAY IT OUT, AND THEY'VE MADE NO SHOWING WHATSOEVER IN THIS REGARD, LET'S SUPPOSE THAT WE'RE RIGHT AND THESE DOCUMENTS INDEED HAVE INDICATIONS OF INTERNAL DISCUSSIONS THAT SHOW THAT UNITED WOULD NOT HAVE BEEN OVERPAID IN THIS CONTEXT BECAUSE THE ERROR RATE AT CMS -- UNLESS AND UNTIL THE ERROR RATE AT CMS -- AT -- UNLESS AND UNTIL THE UNITED'S ERROR RATE EXCEEDED THE ERROR RATE IN THE FEE-FOR-SERVICE POPULATION CMS USES. LET'S JUST HYPOTHESIZE THAT.

DISCLOSURE OF THAT FACT IS HARDLY THE KIND OF HARM -- AND THE WORLD DOES NOT COME CRASHING DOWN ON CMS OR THE ABILITY OF THE GOVERNMENT TO ENGAGE IN DELIBERATIVE PROCESS. IT CERTAINLY WILL BE HARMFUL TO THIS PARTICULAR CASE. OKAY. BUT MUCH OF THAT DISCUSSION IS GOING TO BE FACTUAL. IT'S GOING TO BE THE INTERNAL CALCULATIONS, THE INTERNAL OPINIONS OF THOSE

INDIVIDUALS NOT WHO SIT AT A DELIBERATIVE -- AT A DECISIONAL STATE. IT'S NOT GOING TO BE EXACTLY AS THIS COURT NOTED, A MEMO FROM SUBORDINATE TO SENIOR OFFICIAL, HEY, YOU'RE CONSIDERING X RULE. LET'S TALK ABOUT Y.

AND MAYBE THERE ARE TWO OR FOUR DOCUMENTS THAT LIVE OUT THERE. BUT NOW AFTER A YEAR THEY FORFEITED THEIR OPPORTUNITY TO DEMONSTRATE THAT.

WE'VE BEEN AT THIS WITH YOUR HONOR NOW MULTIPLE TIMES. AND EACH TIME THEY'VE MADE PROMISES. THEY'VE BROKEN THEM. EACH TIME THEY'VE MADE REPRESENTATIONS ABOUT WHAT THEY'D SHOW. THEY'VE IGNORED IT. AND THEY DID NOTHING THAT REMOTELY FOLLOWS THE GUIDANCE YOU GAVE THEM.

AND, SO, AT SOME LEVEL IT HAS TO BE, YOU KNOW, ENOUGH IS ENOUGH. AND I THINK THE WAY THE COURT HAS CHARACTERIZED IT, INCLUDING THE DECLARATIONS THAT HAVE BEEN PRESENTED IS SPOT ON.

THE COURT: ALL RIGHT.

MR. DRAYCOTT.

MR. DRAYCOTT: YOUR HONOR, I THINK THIS IS A -- WE REACHED AN AREA WHERE THERE'S AN OVERLAP BETWEEN THE SECTION THAT MS. KRIEG HAS COVERED AND I'VE COVERED.

THE EXTENT OF THE LOGGING IS A DIRECT CONSEQUENCE OF THE OVERBREADTH OF THE DISCOVERY THAT'S BEEN PROPOUNDED. IF THE -- AND THIS IS WHY THE SEQUENCING IS IMPORTANT. IF THE ISSUE OF RELEVANCE IN THE CONTEXT OF THE 16(B) ORDER OR THE 26(C) PROTECTIVE ORDER IS ADDRESSED, IF THE -- IF THE SCOPE OF

THE DISCOVERY IS APPROPRIATELY LIMITED, THEN, THE LOGS NECESSARILY CONTRACT.

AND THE -- AND THE -- THE REASON THE LOGS AND THE DECLARATIONS LOOK THE WAY THEY DO IS THAT IT ARISES FROM THE CONTEXT IN WHICH -- OF THE DISCOVERY THAT'S BEEN PROPOUNDED.

THERE WAS -- BECAUSE OF THE BREADTH THERE IS AN ENORMOUS AMOUNT OF POTENTIALLY RESPONSIVE MATERIAL.

THE REASON FOR THE PROTECTIVE ORDER WAS TO, ONE, HELP YOUR HONOR TO MAKE RELEVANCE DETERMINATIONS WHEN CONSTRUING THE PRIVILEGE, WHEN CONSTRUING WHETHER OR NOT THERE IS -- YOU KNOW, CAN MAKE A SHOWING OF NEED. BUT IT'S ALSO IN A RELATED WAY AN EFFORT TO REDUCE THE LOGGING BURDEN ON THE AGENCY. SO, THE TWO ARE RELATED.

THE APPROPRIATE LIMITS ON THE SCOPE OF DISCOVERY IN THE CONTEXT OF RULE 16 DISCOVERY ORDER WILL ASSIST AND STREAMLINE THE LOGGING OF MATERIAL THAT IS TRULY AT ISSUE IN THIS CASE.

THE COURT: CAN I ASK YOU A QUESTION.

SO, WHEN YOU FILED THE MOTION FOR A PROTECTIVE ORDER, WAS THAT SET FOR A HEARING THEN BEFORE JUDGE FITZGERALD?

MR. DRAYCOTT: TECHNICALLY IT WAS SET FOR A HEARING ON THE SAME DAY AS THE THREE OTHER MOTIONS THAT HAVE BEEN FILED.

ON I THINK IT WAS SEPTEMBER 17TH JUDGE FITZGERALD

TOOK ARGUMENT ON THE THREE MOTIONS -- THAT IS, THE MOTION TO STRIKE THE AFFIRMATIVE DEFENSES, THE MOTION TO DISMISS THE COUNTERCLAIM AND THE MOTION FOR PARTIAL SUMMARY JUDGMENT.

HE DID NOT TAKE ARGUMENT ON THE MOTION FOR A LIMITATION ON DISCOVERY THAT HAD ALSO BEEN FILED. SO, THAT'S JUST A FOURTH MOTION THAT IS AT THIS POINT UNRESOLVED.

THE LAST POINT I'D MAKE IS WITH RESPECT TO THE DETERMINATION OF WHETHER OR NOT THE PAYMENTS FOR VALID CODES NEED TO BE ADJUSTED OR RECONFIGURED.

THE AGENCY HAS SPOKEN ON THAT ISSUE. THEY'VE ANSWERED THE QUESTION -- PRECISELY THE QUESTION THAT MR. SCHINDLER POSED AT THE CONCLUSION. AND SO THERE'S NO -- THERE'S NO -- AND AS LAID OUT IN EXTENSIVE DETAIL -- AND THIS WOULD BE THE TECHNICAL APPENDIX.

AND THE ONE ISSUE THAT HASN'T BEEN ADDRESSED IS IN LIGHT -- THIS IS AN AGENCY THAT BOTH DEVELOPS POLICY, IMPLEMENTS POLICY, ANNOUNCES POLICY ON A PUBLIC RECORD.

THESE ARE -- THESE ARE -- AND THE CLEAREST EXAMPLE OF THAT IS WHEN THE AGENCY HAS NOW PROPOSED NOT TO USE A FEE-FOR-SERVICE ADJUSTER IN THE CONTEXT OF RADV AUDITS, IT FULLY EXPLAINED WHY IT WAS DECLINING TO DO THAT IN A TECHNICAL SUMMARY AND THEN A TECHNICAL APPENDIX WHICH WALKS THROUGH THE LEVEL OF WHAT ARE CALLED "DISCREPANCIES" IN THE FEE-FOR-SERVICE ADJUSTMENT -- WITH RESPECT TO THE FEE-FOR-SERVICE DATA LAYS OUT WHY IT'S NOT APPROPRIATE TO APPLY THAT ADJUSTMENT IN THE

CONTEXT OF THE RADV AUDITS.

AND WHY -- AND BY THE WAY, IT'S NOT ADDRESSED BY THE AGENCY. BUT IT -- THAT SAME BASIC EMPIRICAL ANALYSIS WOULD APPLY HERE. WE BELIEVE IT'S THE REQUIREMENT OF AN F.S.S. ADJUSTER IS BOTH CONCEPTUALLY INCORRECT IN THE CONTEXT OF THIS F.C.A. CASE BUT ALSO EMPIRICALLY INCORRECT.

BUT THE AGENCY IS -- THE QUESTION THAT'S NOT ANSWERED IS WHY IS NOT THAT SUFFICIENT. THE AGENCY HAS PUT OUT THERE EXACTLY HOW IT ANALYZED THIS ISSUE, WHAT IT DID TO EVALUATE THE ISSUE AND DESCRIBED IT IN EXTENSIVE DETAIL.

ONE THING THAT'S COMPLETELY MISSING FROM THE MOTION TO COMPEL IS WHY THAT'S NOT SUFFICIENT. WHY IS THAT -- WHAT IS -- WHAT IS THE QUESTION THAT'S LEFT OPEN BY THAT.

AND IN THAT RESPECT, IF YOU WILL, THE MOTION TO COMPEL HASN'T BEEN PERFECTED BECAUSE THAT -- THAT INFORMATION IS OUT THERE. AND IT'S THE TYPE OF -- AND THAT IS NOT A ONE OFF. THAT IS THE WAY THAT THE AGENCY -- THAT'S WHY THERE ARE NOTICES OF PROPOSED RULEMAKING, WHICH ARE THE -- AND, AGAIN, THOSE ARE, IN FACT, REFERENCED IN THE DECLARATION BY, FOR EXAMPLE, CHERRI RICE. AND THAT'S THE WAY THAT PAYMENT POLICY IS FORMULATED --

THE COURT: I UNDERSTAND.

MR. DRAYCOTT: -- AND ANNOUNCED.

THE COURT: I UNDERSTAND.

THANK YOU.

MR. SCHINDLER: JUST VERY BRIEFLY, YOUR HONOR.

THIS NOTION OF BURDEN -- I MEAN, WE HAVE 20,000 DOCUMENTS THAT HAVE BEEN IDENTIFIED.

SCOPE OF DISCOVERY WAS SET BY THE SCOPE OF THE CASE THE GOVERNMENT BROUGHT.

THE PROPOSITION THAT THE SCOPE OF DISCOVERY THAT WE ARE SEEKING IN RETURN IS SOMEHOW OVERBROAD AND BURDENSOME IS AT SOME LEVEL A LITTLE BIT DISINGENUOUS WHEN YOU LOOK AT THE SCOPE OF DISCOVERY THAT THE GOVERNMENT HAS TAKEN FROM UNITED OVER THE SPAN OF THIS INVESTIGATION IN THIS CASE.

THE COURT: WELL, WHAT WOULD YOU SAY IN RESPONSE TO THE GOVERNMENT'S CONTENTION THAT THEIR NOTICE OF RULE-MAKING IS SUFFICIENT FOR YOU TO UNDERSTAND THEIR METHODOLOGY HERE.

MR. SCHINDLER: YEAH. NOT EVEN CLOSE. FIRST AND FOREMOST, IT'S A PROPOSED RULE.

AND, INDEED, WE'RE ENTITLED TO DISCOVERY ON THAT BECAUSE WE STRONGLY SUSPECT WHAT'S HAPPENED IS DOJ HAS SOUGHT TO STRONG-ARM CMS TO WITHDRAW.

AND I DON'T KNOW IF I'M RIGHT OR NOT. I JUST KNOW I'M ENTITLED TO DISCOVERY TO TEST THAT THEORY. AND I'M ENTITLED TO DISCOVERY SPECIFICALLY HISTORICALLY TO CHALLENGE THE DEFINITION AND THE INTERPRETATION OF THESE AMBIGUOUS PRONOUNCEMENTS THAT THE GOVERNMENT SUGGESTS TO YOU OVER AND OVER AGAIN ARE PLAIN AS DAY. THEY'RE NOT.

WHEN YOU LOOK AT THE 2001 RULE, THE 2008 RULE, ALL

THESE RULES THAT THEY CLAIM ARE PLAIN AS DAY AND CLEAR -- THAT ONE-WAY LOOKS ARE NOT PERMITTED. YOU'VE GOT TO DO TWO-WAY LOOKS.

AND EVEN THEIR CHARACTERIZATION OF THE PROPOSITION OF, QUOTE, UNQUOTE, IF YOU KNOW A CODE IS UNSUPPORTED, YOU MUST DELETE IT. ALL OF THAT PRESUPPOSES AN INTERPRETATION THAT DOJ WANTS TO ADVANCE. AND NOWHERE DID SWOBEN OR SILINGO OR JUDGE FITZGERALD REMOTELY CONSIDER THE ISSUES THAT ARE PENDING IN THIS CASE.

A REVERSE FALSE CLAIMS ACT CASE PREDICATED ON THE PROPOSITION THAT WE WERE, QUOTE, UNQUOTE, OVERPAID, AND IF THE AGENCY INDIVIDUALS ALONG THE WAY SHARED OUR VIEW THAT WE WERE NOT OVERPAID, NOTHING ABOUT THIS NEW PROPOSED FEE-FOR-SERVICE -- RETRACTION OF THE FEE-FOR-SERVICE ADJUSTER IN A RADV AUDIT SETTING REMOTELY MAKES THE MATERIAL THAT WE'RE SEEKING NOT DISCOVERABLE.

I UNDERSTAND THE GOVERNMENT HAS TRIED 25 WAYS FROM SUNDAY TO KEEP US FROM GETTING INTO THAT. I UNDERSTAND THAT.

I EVEN UNDERSTAND THAT -- TO MR. DRAYCOTT'S LAST POINT, IT WASN'T ENTIRELY TRUE THAT THE JUDGE, HE -- AT THE VERY END OF THE SEPTEMBER 17TH HEARING ON THAT MOTION, WE NOTED FOR HIM, HEY, JUDGE, THERE'S ONE MORE MOTION.

AND HE TOOK IT UNDER SUBMISSION. HE WAS FULLY AWARE IT WAS THERE. IT'S NOT AS THOUGH IT SOMEHOW ESCAPED HIS RADAR.

IT IS TRUE HE DID NOT ASK US AT THAT POINT TO ELABORATE ON WHAT WE ALL HAD BRIEFED. BUT I'M GOING TO GO OUT ON A LIMB AND SAY JUDGE FITZGERALD IS SUFFICIENTLY AWARE AND INTELLIGENT ENOUGH THAT HE HAD -- KNOW THAT HE HAD A WRITTEN -- HE HAD BRIEFS. THEY WERE THERE. THE WRITTEN -- THE NOTION THAT WE DIDN'T HAVE ORAL ARGUMENTS SPECIFICALLY ON THAT MOTION DOES NOT CHANGE THE POSTURE HERE.

HE KNOWS WHAT THIS CASE IS ABOUT. HE HAS REFERRED THESE ISSUES TO YOUR HONOR.

AND I KEEP COMING BACK TO WHERE I STARTED A YEAR AGO.

JUDGE FITZGERALD'S ORDER TELLS EVERYBODY. AND THE NINTH CIRCUIT AND IN THIS CASE -- AND JUDGE FITZGERALD TOLD THEM ORALLY IN THE COURTROOM WHEN WE APPEARED FOR OUR INITIAL RULE 26 CONFERENCE -- MY RULE IS DISCOVERY PROCEEDS. IF HE WANTED TO PREVENT US FROM GETTING DISCOVERY, HE KNOWS HOW TO DO IT.

AND THEY'RE GOING TO -- YOU KNOW, WE'VE ALREADY BEEN TOLD THEY WANT TO HAVE ANOTHER MEET AND CONFER AFTER THIS HEARING AGAIN TO TRY ANOTHER BITE AT THE APPLE TO TRY AND PREVENT US BY GOING TO JUDGE FITZGERALLD AGAIN ON A -- SOME FORM OF NEW RULE 16 MOTION THEY'RE TALKING ABOUT.

OKAY. THEY'RE ENTITLED TO LITIGATE. I DON'T QUARREL WITH THAT. BUT WE'RE EQUALLY ENTITLED TO PROCEED TO GET THE DISCOVERY WE NEED TO DEFEND OURSELVES.

AND YOUR COURT'S -- THE COURT'S ORDER IS SPOT ON IN

HOW YOU'VE APPROACHED IT.

AND BEYOND THAT, UNLESS YOU HAVE OTHER QUESTIONS, I'LL SIT DOWN.

THE COURT: NO.

MR. SCHINDLER: THANK YOU.

THE COURT: THANK YOU.

MR. DRAYCOTT: I WILL I THINK CREDIT COUNSEL'S LAST ARGUMENT WITH -- WITH ACTUALLY CRYSTALLIZING AN ISSUE IN TERMS OF THE -- AND I THINK IT DOES GO TO THE VERY CORE OF AN ISSUE THAT'S BEFORE YOUR HONOR. AND THAT IS HE WAS EXPLICIT THAT THEY WANT INFORMATION TO CHALLENGE THE INFORMATION THAT WAS RELEASED BY THE AGENCY IN THE CONTEXT OF A NOTICE OF PROPOSED RULE-MAKING THAT -- CREDIBLE COUNSEL SAID.

AND THAT'S PART OF THE PROBLEM HERE. THAT -- IF THERE'S GOING TO BE A CHALLENGE TO THE NOTICE -- TO THE PROPOSED RULE, IT SHOULD OCCUR IN THE CONTEXT OF THAT PROPOSED RULE. AND THAT GOES TO -- PARTICULARLY TO RADV -- WHAT ARE KNOWN AS "RADV AUDITS." BUT THAT'S ONE OF THE REASONS THIS IS OUTSIDE THE SCOPE OF THE CASE.

THE ISSUE OF OVERPAYMENT IS WHETHER OR NOT THERE WAS -- THEY WERE -- THAT UNITED WAS ENTITLED TO PAYMENT FOR -- THE CLAIMS BY THE UNITED STATES ARE BENEFICIARY SPECIFIC. THEY'RE DIAGNOSIS-CODE SPECIFIC. AND THAT'S A HISTORICAL QUESTION. WHAT WAS THE RISK ADJUSTMENT COEFFICIENT THAT WAS APPLIED TO THAT DIAGNOSIS CODE THAT INCREASED THE PAYMENT FOR THE

BENEFICIARY IN THAT PAYMENT YEAR. THAT IS THE AMOUNT THAT THE GOVERNMENT IS SEEKING TO RECOVER IN THIS LAWSUIT.

THE ARGUMENT IS -- BY UNITED ISN'T THAT -- DOESN'T REALLY RELATE TO THOSE DAMAGES.

WHAT THEY'VE ESSENTIALLY ASKED FOR IS A SET-OFF WITH RESPECT TO AN ALLEGED UNDERPAYMENT WITH RESPECT TO VALID CODES.

THAT IS NOT MY CHARACTERIZATION OF IT. THAT'S THE CHARACTERIZATION THAT IS EXACTLY EXPRESSED IN THE COUNTERCLAIM.

SO, IT'S A SEPARATE CLAIM APART FROM THE DAMAGE ISSUE HERE. AND IT'S ONE IN WHICH -- AND, AGAIN, NOW I'M REPEATING MYSELF. AND I DON'T WANT TO GO OFF -- GO TOO FAR BEYOND MR. SCHINDLER'S LAST POINT -- BUT I THINK THAT IS THE KEY ISSUE HERE IS WHAT ARE THE DAMAGES PLED AND TO WHAT EXTENT IS THE PAYMENT ISSUE THAT'S BEING PURSUED BY UNITED -- NOT JUST IN THIS CASE BUT IN -- WELL, PRESUMPTIVELY THE COURT OF FEDERAL CLAIMS AND IN THE CONTEXT OF AN A.P.A. ACTION.

AND THIS IS I THINK AT THE -- AT THE CORE OF THE SCOPE ISSUE THAT'S BEFORE YOUR HONOR.

THE COURT: UNDERSTOOD.

THANK YOU.

IS THERE ANYTHING FURTHER?

MR. SCHINDLER: NO, YOUR HONOR.

THE COURT: ALL RIGHT.

THANK YOU BOTH VERY MUCH.

MR. DRAYCOTT: THANK YOU, YOUR HONOR.

THE CLERK: COURT IS ADJOURNED.

(PROCEEDINGS ADJOURNED AT 10:49 A.M.)

C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/S/ DOROTHY BABYKIN 12/12/18

_____ _____

FEDERALLY CERTIFIED TRANSCRIBER DATED

DOROTHY BABYKIN