UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel. BENJAMIN POEHLING, Plaintiffs, v. UNITEDHEALTH GROUP, INC., et al., Defendants.	Case No. CV 16-8697 MWF (SSx) **MEMORANDUM DECISION AND ORDER GRANTING UNITEDHEALTH GROUP, INC.'S MOTION TO COMPEL THE UNITED STATES TO PRODUCE DOCUMENTS** **[Dkt. No. 310]**

I.

INTRODUCTION

On November 9, 2018, Defendant UnitedHealth Group, Inc. ("United")[1] filed a Motion to Compel the United States to Produce Documents challenging the Government's assertion of the deliberative process privilege over more than 20,000 documents.

[1] For ease of reference, the Court will refer to the United Defendants collectively as "United" or "Defendant." A Notice of Errata filed by United on November 16, 2018 clarifies that this Motion is brought by the United Defendants and Defendant Pacificare of Nevada. These Defendants, including Pacficicare, shall be referred to as "United". (Dkt. No. 312).

("Motion" or "MTC," Dkt. No. 310). The Parties filed a Joint Stipulation pursuant to Local Rule 37-2, ("Jt. Stip."), including the declaration of David J. Schindler ("Schindler Decl.") in support of the Motion and, in opposition to the Motion, the declarations of John E. Lee ("Lee Decl."), Cheri Rice ("Rice Decl."), George G. Mills, Jr. ("Mills Decl."), and Patrick J. Cogley ("Cogley Decl."). (Dkt. No. 310). On November 30, 2018, each party filed a Supplemental Memorandum. ("Gov. Supp. Memo.," Dkt. No. 317; "United Supp. Memo.", Dkt. No. 318).[2] The Government's Supplemental Memorandum was supported by the declaration of John E. Lee ("Lee Supp. Decl."), which, along with the attached Exhibit E, was filed under seal. (Dkt. No. 321). United's Supplemental Memorandum was supported by the declaration of David Schindler. ("Schindler Supp. Decl.," Dkt. No. 318). The Court held a hearing on the Motion on December 11, 2018. For the reasons stated below and on the record at the hearing, United's Motion to Compel is GRANTED.

\\

\\

\\

\\

[2] Simultaneously with its Supplemental Memorandum, the Government filed a "Notice of Errata" attaching a corrected version of the revised privilege log that it had submitted as Exhibit A to the Lee Declaration with the Joint Stipulation. (Dkt. No. 315). References to the "privilege log" shall be understood to refer to the corrected revised log at Dkt. No. 315. As revised and corrected, the operative privilege log reduces the number of documents over which the Government is asserting the deliberative process privilege, in whole or in part, from approximately 21,400 to approximately 20,000.

II.

BACKGROUND FACTS

The Government contends that United's Medicare Advantage ("MA") plans failed to correct diagnosis codes that United submitted to the Centers for Medicare and Medicaid Services ("CMS"), even though United knew from its review of the underlying medical records that the codes were not supported. The operative Amended Complaint-in-Partial Intervention ("Am. Compl.," Dkt. No. 171), as modified by the District Judge's partial grant of United's Motion to Dismiss, raises one claim under the False Claims Act ("FCA"), 31 U.S.C. § 3729(a)(1)(G), and two common law claims, for Unjust Enrichment and Payment by Mistake. (Am. Compl. at ¶¶ 341-361). United's Answer to the Amended Complaint-in-Intervention includes five counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, fraudulent inducement, negligent misrepresentation, and promissory estoppel. ("Counterclaim," Dkt. No. 223, ¶¶ 39-71).[3]

[3] The District Judge has taken the Government's Motion to Dismiss United's counterclaims under submission. (See Dkt. No. 236 (MTD); Dkt. No. 284 (Order taking MTD under submission)). United asserts that it is willing to litigate its counterclaims before the Court of Federal Claims and explains that the only reason it raised them here was out of concern that if it brought the claims in a stand alone suit in the Court of Federal Claims, the Government would argue there that the claims should be dismissed because they qualified as "compulsory counterclaims" that could only be brought here. (Dkt. No. 249 at 2) (citing Fed. R. Civ. P. 13). In its Opposition to the MTD, United asks the Court to "hold that it lacks jurisdiction over the counterclaims, and then sever and transfer them" to the Court of Federal Claims. (Id.). Accordingly, for purposes of the instant discovery dispute, the Court will assume that the only claims at issue in this litigation are the

The Court incorporates by reference its summary of the facts relevant to the Parties' discovery dispute as set forth in its prior Order denying the Government's ex parte application for a temporary stay of proceedings related to United's then-anticipated motion to compel. (Dkt. No. 304 at 2-7). For purposes of this Motion, it is important to note that under Medicare Part C, CMS makes a fixed per-member, per month payment to Medicare Advantage plans (such as United) based on each plan member's "risk coefficient," which is determined in part by the diagnosis codes submitted to CMS for that member by the MA plan.[4] Because MA plans have an incentive to find and report as many diagnoses as can be supported by the record, MA plans typically arrange for chart reviews to locate diagnoses documented in their beneficiaries' charts that a provider failed to code. The Government alleges that following blind reviews of plan members' medical records, United submitted all previously unreported diagnosis codes to CMS, but did not look the "other way" and delete codes previously reported by providers that the chart reviewers did not find.

\\

\\

\\

Government's surviving "reverse" False Claims Act claim and its common law claims.

[4] "By law, CMS must pay Medicare Advantage insurers in a manner that ensures 'actuarial equivalence' between payments for healthcare under Medicare and Medicare Advantage plans[.]" See UnitedHealthcare Ins. Co. v. Azar, 330 F. Supp. 3d 173, 178 (D. D.C. 2018), appeal filed 11/14/18, U.S. Court of Appeals for the D.C. Circuit, Case No. 18-5326 (citing 42 U.S.C. § 1395w-23(a)(1)(C)(i)).

III.

THE PARTIES' CONTENTIONS

A. United's Contentions

United maintains that it is entitled to all documents that the Government has withheld solely under the Government's assertion of the deliberative process privilege. These documents broadly relate to United's contention that "because CMS's payment model [under Medicare Advantage] uses unaudited claims data from the traditional [fee for service] Medicare program that contain numerous unsupported codes, the resulting payment amounts that CMS sets for the MA program already account for the existence of unsupported codes." (Jt. Stip. at 13) (emphasis in original). Therefore, "United seeks discovery related to what the government knew about errors in United's data and, more importantly, what the government knew about errors in its own data, because the latter bears directly on whether United was overpaid." (Id. at 14).

United first argues that the Government has failed to show that the deliberative process privilege protects any of the contested documents because the Government's "threadbare" privilege log does not provide sufficient information to sustain the privilege as to any particular document. (Id. at 1). Furthermore, United complains that the log fails to identify the specific policy decision at issue, or explain why the document should be deemed both "predecisional" and "deliberative." (Jt. Stip. at 18). The log also does not state whether any of the purported deliberations were adopted by the agency, and appears to include purely factual materials, including many documents relating to the Fee for Service Adjuster. (Id. at 20; see also United Supp. Memo. at 8). United also alleges that the log is procedurally deficient because it does not appear that the Government consulted with CMS before making its privilege assertions. (Jt. Stip. at 1-2, 20-21). Because of these deficiencies, United maintains that the Government has waived its right to assert the deliberative process privilege. (Id. at 22).

Second, United contends that even if there were any merit to the Government's privilege assertions, the deliberative process privilege is a qualified one and is readily overcome by United's need for these highly relevant, "critical" documents. (Id. at 24). According to United, "[e]vidence about the presence and extent of unsupported codes in CMS's own data speaks directly to whether United was overpaid because if CMS's rate of unsupported codes was greater than United's, there cannot have been any overpayment."[5] (Id.). This evidence is relevant to the Government's False Claims Act claim because it will show that (1) CMS officials believe that conducting one-way reviews is proper, (2) United did not receive an overpayment, (3) United did not knowingly and improperly retain an overpayment, and (4) United's purported failure to delete codes

[5] In its Supplemental Memorandum, United specifically contends that the Government cannot credibly dispute the relevancy of the more than 10,000 documents that it is withholding "relating to the presence and extent of unsupported codes in FFS data" because it recently "affirmatively argued that a study about the rate and effect of unsupported codes in FFS data is relevant and important to this case." (United Supp. Memo. at 11) (citing Notice of Proposed Rulemaking, Dkt. No. 307, submitted here as Schindler Supp. Decl. Exh. 3).

did not have a material effect on CMS's decision to continue paying and contracting with United. (Id. at 2). The Government's interpretations of its own statutes, rules, regulations, and guidance are relevant to the reasonableness of United's reading of those requirements, (id. at 26-28), and the Government's responses to chart reviews similar to those at issue in this litigation go "directly to the materiality of any alleged wrongdoing by United." (Id. at 29). United also asserts that the withheld evidence is relevant to the Government's two common law claims, as it will show that (1) CMS was not mistaken when it paid the claims, and (2) United was not unjustly enriched. (Id. at 30-31). The withheld evidence also relates to damages. (Id. at 31-32).

Third, United argues that the other factors a court may consider in determining whether a requesting party's need overcomes an assertion of the deliberative process privilege, beyond the relevancy of the materials, weigh strongly in favor of disclosure. For example, United contends that CMS is the "sole custodian of this relevant discovery" and the information is not available from a third party. (Id. at 3; see also id. at 33). United also notes that the Government "makes no effort -- either in the Joint Stipulation or in any agency declaration -- to show why the protective order here would be insufficient to protect the government's interest in non-disclosure." (Id. at 15).

Finally, United contends that the Government's declarations fail to remedy the alleged deficiencies in the privilege log because they, too, do not provide the "necessary of level of detail showing that documents are both predecisional and deliberative," and actually confirm the procedural deficiencies in the preparation of the log. (United Supp. Memo. at 2). United notes that labeling a document as a "draft" is insufficient, by itself, to establish that the document is "inherently predecisional, deliberative, and reflective of the personal opinion of its author" because there are "all sorts of reasons why a draft document might fall outside the scope of the privilege," such as the timing of the draft or its failure to reflect the "give-and-take" of the deliberative process. (Id.). Furthermore, the Government's declarants reviewed "only a tiny fraction" of the documents withheld pursuant to the privilege and therefore are incompetent to testify as to the actual contents of more than 99% of the withheld materials. (Id. at 4). Indeed, the declarations give no indication that any agency officials "even weighed in ex ante on the parameters for determining what to consider deliberative and pre-decisional or supervised the reviews." (Id. at 5-6). Even more fundamentally, United argues that the Government's declarations are too broad and conclusory. Noting that "subject matter areas are not policy decisions," the declarants' conclusory document descriptions by subject matter "fail to identify specific policy decisions that were the subject of agency deliberation." (Id. at 6) (emphasis in original). As such, the declarations "fail to 'connect the dots'" between each withheld document and a specific policy or decision. (Id. at 7) (citation omitted). Additionally, the declarants' "generalized and formulaic" statements that the disclosure of the documents would hinder frank and independent discussion "are not tethered to specific documents and do not explain in sufficient detail why the claimed effect(s) would come about." (United Supp. Memo. at 9).

2. The Government's Contentions

The Government argues that United seeks discovery that is irrelevant to this lawsuit, which it claims "reduces to the question of whether United knowingly failed to comply with its legal obligation to delete unsupported diagnosis codes." (Jt. Stip. at 3). In its Supplemental Memorandum, the Government describes what it calls United's "free pass" argument as follows: "Defendants argue that they are entitled to retain payments based on some number or percentage of false claims and that this number or percentage is based on the number or percentage of invalid diagnoses in the claims data submitted by healthcare providers under two other parts of the Medicare Program, Parts A and B, which pay providers on a Fee-For-Service ("FFS") basis." (Gov. Supp. Memo. at 1). "In other words, Defendants claim that they were underpaid and should therefore get a free pass for a certain number or percentage of their false claims." (Id. at 4). However, "[a]n insurer is not entitled to any payment for an invalid diagnosis," (id. at 3), and a party "cannot knowingly commit fraud as a 'means of self-help,' even to counterbalance what it claims to believe are payments that do not satisfy a statutory requirement." (Id. at 11). Accordingly, the Government maintains that United's fee for service arguments have no bearing on whether United submitted unsupported diagnosis codes and failed to delete them. (Id. at 6)

As such, United's attempt to refocus the case by arguing that a payment disparity could exist based on the manner in which MA plans are paid in comparison to fee-for-service providers is simply a "distraction," and will not support United's requests for "far flung" discovery. (Jt. Stip. at 3). According to the Government, internal agency discussions about regulatory impact statements, medical loss ratios and draft regulations and policies simply "do not bear on the obligation to delete unsupported diagnosis codes" or have any meaningful connection to "the direct relationship between diagnosis codes and risk-adjusted payments." (Id. at 4; see generally id. at 55-60). As such, "agency documents heretofore unknown to United are not probative of what United knew at the time it was including, or refraining from deleting, unsupported codes in its Medicare claims." (Id. at 5).

Specifically, the Government argues that the documents United seeks are irrelevant because (1) even if there were any support for United's speculation that it was underpaid, the only relevance of the data sought would be to United's "free pass" theory, which this Court does not have jurisdiction to adjudicate, (Gov. Supp. Memo. at 11-12); (2) documents relating to "RADV audit sampling, extrapolation, and contract-level payment error rate methodology" are irrelevant because Plaintiffs are not seeking to recover overpayments, (id. at 12-13); and (3) documents relating to an FFS Adjuster for RADV audits are irrelevant because United does not need them to show it had a "reasonable good-faith belief" that it was entitled to a free pass. (Id. at 13). Furthermore, the Government notes that in the same recent Notice of Proposed

Rulemaking cited by United, CMS showed that the use of unaudited FFS diagnoses in calibrating the FFS Adjuster model did not result in a negative payment to MA insurers. (Id.). The Government also rejects the contention that it is withholding "purely factual" documents relating to the FFS Adjuster. (Id. at 14). Furthermore, the Government maintains that it would not be practical to litigate United's "free pass" theory in this case, as adjudication would require "recalibrating the risk adjustment model used to calculate payments to every plan participating in the Part C program," which "would be an enormously burdensome undertaking that cannot be justified in this FCA action." (Gov. Supp. Memo. at 10).

According to the Government, because the issue of relevancy underlies all of the discovery disputes, and because that issue has been squarely presented to the District Judge for adjudication, "any consideration of agency privilege assertions is premature during the pendency of the government's motion for a protective order." (Id. at 35; see also id. at 38-41). The Government emphasizes that it would be unduly burdensome for it to "perfect the privilege" over thousands of documents that the District Judge may find are not discoverable. (Id. at 4-5). The Government further argues that United's Motion is unnecessary because the primary information that United is seeking -- the rate of unsupported diagnosis codes reported by providers in claims submitted to fee-for-service Medicare programs -- either is already publicly available, or the Government has agreed to produce it. (Id. at 41-43).

Finally, the Government argues that its revised privilege log and the declarations of Rice, Mills and Cogley sufficiently support its invocation of the deliberative process privilege. (Id. at 62-65). The Government contends that to properly invoke the privilege, a party must simply "'make the claim expressly'" and "'describe the nature of the documents'" in a manner that "will enable other parties to assess the claim." (Id. at 62) (quoting Fed. R. Civ. P. 26(b)(5)(A)). According to the Government, "Rule 26 . . . does not set out an express requirement that a party invoke any privilege on a document-by-document basis," and "courts in this circuit . . . consistently take a practical approach when construing the obligations imposed on a party with respect to perfection of a privilege claim." (Jt. Stip. at 62) (citing Burlington N. & Santa Fe R.R. Co. v. U.S. Dist. Court for the Dist. of Mont., 408 F.3d 1142, 1149 (9th Cir. 2005)). The Government additionally contends that United's need for the materials does not outweigh the Government's interest in non-disclosure because "United wholly fails to demonstrate any genuine relevancy of the documents it seeks." (Id. at 66). Instead, other information already in United's possession, custody or control, such as "internal communications of [United's] management personnel regarding United's decision not to delete unsupported codes," is "much more relevant" to this action than the privileged documents that United is demanding the Government produce. (Id. at 67).

\\

\\

\\

\\

IV.

THE GOVERNMENT'S CORRECTED REVISED PRIVILEGE LOG AND DELIBERATIVE PROCESS PRIVILEGE DECLARATIONS

A. The Privilege Log

The Government's privilege log, submitted with the November 30, 2018 Notice of Errata, is 1,547 pages long, not including attachments. The log has fields for:

- "privilege id" (numerical document identifier)
- custodian
- from/author
- to
- cc
- bcc
- date
- description
- privilege
- prod_begdoc#
- prod_enddoc#

The descriptions of the documents retained pursuant to the deliberative process privilege conform to a set protocol. The document is first generically identified as a "document," "memorandum," "e-mail," "presentation," "letter" or "spreadsheet," sometimes with the qualifier "draft." That identifier is followed by the phrase "reflecting internal agency deliberations regarding" and one (or in exceptional instances, more than one) of these subject descriptions:

- "RADV audit methodology"[6];
- "calculation of RA error rate";
- "calculation of RA factors/model";
- "Advance Notice and/or Announcement and Call Letter";
- "FFS adjuster";
- "calculation of coding intensity adjuster";
- "RA supporting documentation requirements";
- "UGH RADV audits"/"non-UGH RADV audits";
- "medical coding in support of RA payments";
- "UGH RA activities"/"non-UGH RA activities";
- "RA training materials";
- "coding guidance";
- "coding intensity in MA Program"; or
- one of the following references to overpayments: "return of overpayments to CMS"/"RA overpayment analysis"/"recovery of overpayments"/"RA overpayment reporting requirements"/"CMS overpayment policy."

(Jt. Stip. at 7-8; see also, e.g., Corrected Revised Privilege Log, Dkt. No. 315 at 148, USBPPRIV00002370 ("Draft document reflecting internal agency deliberations regarding calculation of RA [Risk Adjustment] factors/model"; id. at 156, USBPPRIV00002505 ("Draft memorandum reflecting internal agency deliberations regarding RADV

---

[6] "RADV" stands for "Risk Adjustment Data Validation." (Mills Decl. ¶ 5).

[Risk Adjustment Data Validation] audit methodology"); id. at 349, USBPPRIV00005739 ("Email, with attachments, reflecting internal agency deliberations regarding the following topic(s): overpayments")).

The fields for privilege ID, custodian, date, description and privilege appear to be systematically populated for nearly all entries. However, the to/author, cc and bcc fields are frequently left blank, except when the document in question is an email. (Compare id. at 501, USBPPRIV00008217, USBPPRIV00008218, USBPPRIV00008223, USBPPRIV00008229 ("document," "draft document," "draft spreadsheet," and "memorandum" lacking author identification), with id. at 657, USBPPRIV00010761, USBPPRIV00010774, USBPPRIV00010771, USBPPRIV00010757 ("emails" identifying author and recipient; "documents," "draft document" and "draft memoranda" entries on same page lacking author identification or actual or intended recipient)).

B. Agency Declarations

The Government submits three agency declarations to support its assertions of the deliberative process privilege. The declarants are: (1) George G. Mills, Jr., currently the Deputy Center Director for CMS's Center for Program Integrity, with responsibility for Risk Adjustment Data Validation audits and the Fee for Service Adjuster; (Mills Decl. ¶¶ 2, 10); (2) Patrick J. Cogley, Regional Inspector General for the Office of Audit Services in HHS's Office of Inspector General, with responsibility for supervising audits to determine whether CMS made correct payments to MAs, and whether MAs submitted correct data for use in CMS's risk adjustment program (Cogley Decl. ¶¶ 2, 9); and (3) Cheri Rice, Deputy Director, Center for Medicare, with responsibility for managing the Part C Medicare Advantage program. (Rice Decl. ¶ 2). Each of the declarants asserts the deliberative process privilege over the categories of documents addressed in their respective declarations.

1. Mills Declaration

Mills is responsible for managing contract-level Risk Adjustment Data Validation ("RADV") audits, which are a "corrective action by HHS's [sic] to recoup improper payments under Medicare Part C," (Mills Decl. ¶ 5), and for the analysis of whether to apply a Fee for Service Adjuster ("FFSA") to extrapolated RADV audit results. (Id. ¶ 8). Mills states that he personally reviewed the eleven documents "specifically identified in this declaration," (id. ¶ 12), and "discussed the categories of issues and the types of documents . . . which fall within the subject areas for which I am responsible . . . with agency personnel who are familiar with these categories and who have reviewed certain of the documents on the privilege log and identified applicable ones that should be withheld as deliberative." (Id. ¶ 13).

Mills explains that that CMS conducted RADV audits in 2007 and 2011, and that United was among the contract plans audited. (Id. ¶ 7). Additionally, in 2012, CMS issued a Notice of Final

Payment Error Calculation Methodology for Part C Medicare Advantage RADV Contract-Level Audits, based on the FFSA analysis. (Id. ¶ 8). According to Mills, the RADV process is "large and complex." (Id. ¶ 18). "Designing the RADV methodology requires input from many . . . individual stakeholders" and operating the program involves "day-to-day back and forth" from these stakeholders. (Id.). "To conduct audits, CMS defines the eligible population, requests medical record documentation, reviews medical records, calculates a payment error for each sampled beneficiary, calculates a payment error rate for the contract's sample, extrapolates sample findings to the contract level and then determines the payment adjustment amount." (Id. ¶ 20). Mills states that the types of documents generated during this process include: emails among CMS personnel and its contractors, internal CMS presentations, RTI contractor work, spreadsheets for internal use by CMS and its contractors, talking points, options papers, issue papers, and draft sampling specifications. (Id. ¶ 23-30).

Mills asserts that disclosure of these types of documents, which he maintains are "predecisional," "would inhibit candid discussions within CMS and the fulsome discussion and assessment of different policy solutions." (Id. ¶ 33). Additionally, disclosure would "compromise policy development" by preventing CMS from fully evaluating alternatives without concern that "external stakeholders would use this information to circumvent or challenge the final decision." (Id.). Furthermore, if internal deliberations were interpreted to be representative of CMS's current position, CMS's ability to communicate effectively would be impaired, and public confusion as to CMS's official position would ensue. (Id.). Finally, disclosure would "allow [the] industry to game audits and reduce the effectiveness of the approaches." (Id. at 33).

2. Cogley Declaration

Cogley also addresses the audit process, including "analyses as to whether CMS made correct payments as well as audits designed to determine whether Medicare Advantage (MA) organizations submitted correct data for use in CMS's risk adjustment program." (Cogley Decl. ¶ 9). Although Cogley identifies forty-four documents in his declaration, he does not specifically identify which ones he personally reviewed. (Id. ¶¶ 23-26, 28-30). Instead, Cogley declares that his assertion of the deliberative process privilege is based on his "personal review of these documents or on a discussion of the contents with other agency personnel who have personally reviewed the Privileged Documents." (Id. ¶ 21) (emphasis added).

According to Cogley, HHS's Office of Audit Services begins the audit process in the planning phases, conducted by a "discrete OAS audit team" that determines the "audit objectives, scope and the methodology that will be followed to conduct the audit." (Id. ¶ 13). The team drafts, then finalizes, an "audit plan" that includes "how and from which sources data will be collected, and how the data will be analyzed." (Id. ¶ 14). The next stage of the audit process is the "survey phase," in which the audit team assesses, designs and implements internal controls and makes risk assessments, and which may involve the development of a statistical sampling or mathematical calculation plan. (Id. ¶ 15). The next two stages are the data collection/analysis phase, (id. ¶ 17), and the drafting phase, in which the team summarizes its work, conclusions and recommendations. (Id. ¶ 18).

The kinds of documents generated in the OAS audit process include audit planning documents, audit status summaries, correspondence, meeting notes, and requests for legal advice. (Id. ¶¶ 24-27). Cogley asserts that "if my staff or others within the OIG expected that their comments, criticisms, suggestions, or proposed edits made during our report process would be publicly displayed in the context of a lawsuit, this would stifle much of the very necessary candid dialogue among us." (Id. ¶ 35).

3. Rice Declaration

Rice invokes the deliberative process privilege for all of the "categories of issues and the types of documents" on the privilege log except for documents relating to RADV audits and the Fee-for-Service Adjuster, which were addressed by Mills. (Rice Decl. ¶¶ 7, 11). Rice states that she personally reviewed the sixty-seven documents identified as examples in her declaration. (Id. ¶ 9; see also id. ¶¶ 62-66, 69, 71, 72-76, 96, 98-101, 103-104, 106). According to Rice, the documents on the privilege log "relate generally to the two general policy-making processes conducted for the [Medicare Advantage] program: MA rule-making and MA subregulatory guidance production." (Id. ¶ 13).

a. Rule-Making

Rice explains that the rule-making process involves the development and publication of "Advance Notices" (proposed policies) and "Rate Announcements" (final policies). (Id. ¶ 18). According to Rice, as part of this process, "numerous drafts of the Advance Notice are exchanged across multiple levels: among [Medical Plan Payment Group ("MPPG")] personnel, between MPPG and [Center for Medicare ("CM")] managers, then CM and other [Centers for Medicare and Medicaid Services ("CMS")] components, CM and the CMS Administrator, and finally among CMS, [the Department of Health and Human Services ("HHS")] and [the Office of Management and Budget ("OMB")]. (Id. ¶ 20). The final Rate Announcement goes through "the same clearance process as the Advance Notice." (Id. ¶ 22). "Issue papers, talking points, briefing memoranda are again prepared, options are discussed, final policies are determined and the final Announcement is reviewed and approved by multiple levels of CMS management, the HHS Office of the Secretary, and the OMB." (Id.). Rice then provides several examples of policy deliberations that arise in the rule-making process, including recalibration of the diagnoses included in the CMS-Hierarchical Condition Category ("CMS-HCC") model, (id. ¶¶ 31-36); Medicare Advantage coding intensity adjustments, (id. ¶¶ 37-42); medical record review by Medicare Advantage organizations, (id. ¶¶ 43-49); overpayments, (id. ¶¶ 50-52); and the "medical loss ratio" requirement to the MA program. (Id. ¶¶ 53-59).

Rice also describes the harm that would arise from disclosure of the deliberations surrounding these policies, including the cessation of certain analyses, (id. ¶ 36); public confusion arising from the circulation of unlabeled rough drafts, (id.); impairment of the agency's ability to "consider and evaluate alternatives to identify the most accurate coding intensity adjuster methodology," (id. ¶ 42); hindrance of the agency's evaluation of "potential advantages and disadvantages of different policy outcomes," (id. ¶ 49); staff reluctance "to freely and openly engage in written policy assessments," (id. ¶ 52); and abstention from a "comprehensive policy development process." (Id. ¶ 59). According to Rice, the types of privileged documents that are created in the rule-making process include emails, issue (or "options") papers, briefing documents, talking points, drafts of rulemaking documents, reviews of comments on proposed rules and proposed responses to those comments, draft press releases, and Q&As offering internal guidance intended to assist CMS management in responding to questions about the rules from the press or Congress. (Id. ¶¶ 60-76).

b. Subregulatory Guidance

According to Rice, "subregulatory guidance" refers to "implementation guidance on a range of policies," (id. ¶ 77), commonly in the form of CMS Health Plan Management System ("HPMS") memos that are released to MA organizations. (Id. ¶ 79). HPMS memos have addressed topics such as "Requirements for Submitting Risk Adjustment Data to CMS," "Encounter Data Submission Implementation," "Medicare Advantage Risk Adjustment Data Validation (RADV) Guidance," etc. (Id.). Besides HPMS memos, other types of subregulatory guidance documents include the "Medicare Managed Care Manual" and the "Encounter Data Submission and Processing Guide," which are available on the web. (Id. ¶ 80). Rice explains that subregulatory guidance documents "typically undergo deliberation and clearance within CM, similar to the regulatory process" applying to rule-making. (Id. ¶ 82). While some regulatory guidance is produced on a quarterly basis, other guidance is updated as needed over several years. (Id. ¶ 84).

As with rule-making, Rice provides several examples of policy deliberations that arise in the subregulatory guidance process, (id. ¶¶ 85-88, 90-91), and describes the harm that would arise from disclosure of those deliberations, including confusing the public by the dissemination of drafts that could be mistaken for "actual, final, agency policy, [thereby] creating confusion among stakeholders and discouraging full agency deliberations," (id. ¶ 89), and compromising the appeals process through the revelation of internal agency discussions that would give litigants additional information about overpayments. (Id. ¶ 92). Rice states that the types of privileged documents created in the subregulatory guidance process include emails, handwritten notes of meeting minutes or telephone calls, draft scripts for the help desk, issue or "options" papers, datasets, talking points, draft guidance documents, and reviews of comments on policy white papers released on the CMS website. (Id. ¶¶ 93-107).

V.

STANDARDS

A. Scope Of Permissible Discovery

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

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

Fed. R. Civ. P. 26(b)(1). Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action." Fed. R. Evid. 401. "The relevance standard is commonly recognized as one that is necessarily broad in scope in order 'to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" Doherty v. Comenity Capital Bank & Comenity Bank, 2017 WL 1885677, at *2 (S.D. Cal. May 9, 2017) (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)); see also Sci. Games Corp. v. AGS LLC, 2017 WL 3013251, at *2 (D. Nev. July 13, 2017) ("Even after the 2015 amendments, courts continue to recognize that discovery relevance remains 'broad' in scope."); Wagafe v. Trump, 2018 WL 348470, at *1 (W.D. Wash. Jan. 10, 2018) ("[T]the scope of discovery is broad."). "Proportionality focuses on the marginal utility of the discovery sought." In re Methyl Tertiary Butyl Ether Prod. Liab. Litig., 180 F. Supp. 3d 273, 280 n.43 (S.D. N.Y. 2016) (internal quotation marks and citation omitted).

Because discovery must be both relevant and proportional to the needs of the case, the right to discovery, even plainly relevant discovery, is not limitless. The December 1, 2015 amendments to Rule 26 "were designed to protect against over-discovery and to emphasize judicial management of the discovery process, especially for those cases in which the parties do not themselves effectively manage discovery." Noble Roman's, Inc. v. Hattenhauer Distrib. Co., 314 F.R.D. 304, 308 (S.D. Ind. 2016); see also Davita HealthCare Partners, Inc. v. United States, 125 Fed. Cl. 394, 398 (2016) (2015 amendments to the Federal Rules "contribute to the overall goal of regulating the time and expense of litigation"). At the same time, the larger and more complex the case, the more even relatively voluminous discovery may be considered proportional.

It has long been settled in this circuit that the party resisting discovery bears the burden of showing why discovery should not be allowed. Doutherd v. Montesdeoca, 2018 WL 3008867, at *2 (E.D. Cal. June 15, 2018) (citing Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975)); see also Hall v. Mt Terrace AOAO, 2017 WL 3000026, at *1 (D. Haw. Feb. 9, 2017) ("Plaintiff complains about the volume of discovery requested of him and the defenses that have been asserted, but he is reminded that he commenced this action and it is ultimately his burden to prove his claims. Defendants are entitled to obtain certain discovery to defend themselves against Plaintiff's allegations."). As it is the Government that is currently resisting discovery, the burden of persuasion rests with the Government.

B. The Deliberative Process Privilege

"[T]he deliberative process privilege permits the government to withhold documents that 'reflect advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and polices are formulated,'" Hongsermeier v. Comm'r, 621 F.3d 890, 904 (9th Cir. 2010) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (brackets omitted)), so that agencies may "freely . . . explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." Lahr v. National Transp. Safety

Bd., 569 F.3d 964, 979 (9th Cir. 2009) (internal quotation marks omitted). To qualify for the privilege, the intra-agency communication must be both "predecisional" and "deliberative." Id. "Predecisional" documents include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Id. (internal quotation marks omitted). A document is part of the "deliberative process" if the disclosure of the materials "would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Id. at 979-80 (internal quotation marks omitted).

The purpose of the deliberative process privilege "is to prevent injury to the quality of agency decisions." Sears, Roebuck, 421 U.S. at 151. The privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news . . . ." Dep't of the Interior v. Klamath Water Users Protective Assoc., 532 U.S. 1, 8-9 (2001). However, "[a]s with all evidentiary privileges, the deliberative process privilege is narrowly construed . . . ." Karnoski v. Trump, 328 F. Supp. 3d 1156, 1161 (W.D. Wash. 2018) (internal quotation marks omitted); see also N. Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003) (deliberative process privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principles") (internal quotation marks omitted); Thomas v. Cate, 715 F. Supp. 2d 1012, 1044 (E.D. Cal.

2010) (deliberative process privilege "should be narrowly construed because confidentiality may impede full and fair discovery of the truth").

Accordingly, it is widely accepted that the privilege protects opinions and deliberations, but generally not "facts and evidence." F.T.C. v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (citing Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1973)). However, factual material that "is so interwoven with the deliberative material that it is not severable" may be encompassed by the privilege. United States v. Fernandez, 231 F.3d 1240, 1247 (9th Cir. 2000); see also Enviro Tech Int'l, Inc. v. U.S. E.P.A., 371 F.3d 370, 374-75 (7th Cir. 2004) ("[T]he deliberative process privilege typically does not justify the withholding of purely factual 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). "The burden of establishing application of the deliberative process privilege is on the party asserting it." Thomas, 715 F. Supp. 2d at 1019.

Nonetheless, even where the privilege otherwise applies, "[t]he deliberative process privilege is a qualified one. A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." Warner Commc'ns Inc., 742 F.2d at 1161. It is the requesting party's burden "to show that the privilege should be waived in the instant case." California Native Plant Soc. v. U.S. E.P.A., 251 F.R.D. 408, 415 (N.D. Cal. 2008) (citing Chevron U.S.A. v. United States, 80 Fed. Cl. 340, 355-57 (2008)). "Among the factors to be considered in making this determination are: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." Id. "'Other factors that a court may consider include: (5) the interest of the litigant, and ultimately society, 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, 274 F. Supp. 2d at 1122).

VI.

DISCUSSION

A. The Documents United Seeks Are Relevant To The Claims And Defenses In This Action

As a preliminary matter, the Court must address the Government's argument, raised at the hearing as well as in its Supplemental Memorandum, that the undersigned Magistrate Judge should defer ruling on United's Motion until after the District Judge has ruled on several pending motions. The Court believes that the unique circumstances of this case warrant immediate consideration of United's discovery request.

The Court notes that the Government originally brought its ex parte application for a temporary stay of United's anticipated motion to compel before the District Judge, (Dkt. No. 294), who then referred the matter to the Magistrate Judge for ruling. The Magistrate Judge ultimately denied the request for a stay, and the District Judge has not reversed that ruling. (Dkt. No. 304).

Furthermore, as United argued at the hearing, the District Judge has admonished the Parties that discovery should move forward even in the absence of a scheduling order. The Court also notes that United served its first document requests on the Government in August 2017 -- almost a year and a half ago -- and still has not obtained information it considers necessary to prepare its defense. (Jt. Stip. at 10). The Government has accused United of failing to comply with requirements of a government program, yet has withheld some of the factual data that the Government relied upon in reaching that determination. The Government apparently seeks an award that may exceed one billion dollars, but nevertheless is withholding information pertaining to its calculation of damages. The Court concludes that it is appropriate under such circumstances to address the merits of the Parties' dispute, including the relevancy of the materials requested.

The Government attempts to constrict the scope of "relevant" information in this case to its narrowest possible definition.

According to the Government, the only relevant question is whether United knowingly failed to delete certain diagnosis codes in its Medicare Advantage submissions after learning that medical records did not support the diagnoses. As such, according to the Government, only United's state of mind is at issue, and nothing pertaining to CMS's records has any meaningful bearing on the claims and defenses in this action.[7] The Court disagrees.

---

[7] To support its contention that the scope of discovery should be narrowly construed, the Government relies heavily on United States ex rel. Swoben v. United Healthcare Ins. Co. ("Swoben"), 848 F.3d 1161 (9th Cir. 2016). In that case, the Ninth Circuit concluded on a motion to dismiss that a qui tam plaintiff who alleged that United willfully withheld information about over-reporting errors from CMS stated a claim for false certification under the False Claims Act. (Id. at 1175).

In contrast, United relies heavily on a decision by District Court Judge Rosemary M. Collyer in UnitedHealthCare Ins. Co. v. Azar, 330 F. Supp. 3d 173 (D. D.C. 2018), appeal filed Nov. 14, 2018, D.C. Cir. Case No. 18-5326. In that case, the Court vacated CMS's 2014 "Overpayment Rule," pursuant to which "any diagnostic code that is inadequately documented in a patient's medical chart [is deemed to] result[] in an 'overpayment'" to a Medicare Advantage plan. Id. at 182. The court concluded that "[h]aving recognized that actuarial equivalence, mandated by statute, required an FFS Adjuster for purposes of defining overpayments because of dissimilar data for RADV audits, CMS provides no legitimate reason for abandoning that statutory mandate in the context of the 2014 Overpayment Rule. The Court finds that CMS was arbitrary and capricious in adopting the 2014 Overpayment Rule without explaining its departure from prior policy." Id. at 190.

The Government argued at the hearing that if Judge Collyer's decision, which it represented "is now under review and is subject to a new briefing schedule in the district court," were construed to somehow allow "a Medicare Advantage organization to refrain from doing the deletes of inaccurate coding, such construction would directly conflict with the holdings of Swoben and [United States ex rel. Silingo v. WellPoint, 904 F.3d 667 (9th Cir. 2018)]." If Judge Collyer's decision is affirmed on appeal, it remains to be seen whether it can be reconciled with the Ninth Circuit's decision in Swoben. However, for the reasons stated below, the Court does

Relevance for purposes of discovery is broadly construed, even after the 2015 Amendments to Rule 26. The Government is seeking an award that may exceed a billion dollars, which necessarily broadens the scope of what may be deemed "proportional" to the needs of this case, pursuant to Rule 26.

United has a right to construct its defense as it sees fit, so long as the defense arguably responds to the Government's claims. Here, the documents United seeks easily fall within the broad parameters of "relevance" for discovery purposes. In contrast to the Government's characterization of this case, United's defense challenges whether, by failing to delete known unsupported diagnosis codes, it was overpaid. To support its argument that it was not overpaid, United seeks information concerning unsupported codes in CMS's data, including documents "related to (1) the Risk Adjustment error rate in CMS's data, (2) a RADV Medicare FFS adjuster, and (3) the RADV audit methodology," which it apparently intends to use to compare to its rate of unsupported codes. (Id. at 25). According to United, this internal information is relevant to all of the Government's claims because it will show that: CMS did not believe that conducting so-called "one-way" reviews is improper; United was not overpaid and did not knowingly and improperly retain an overpayment; and United's failure to delete unsupported codes did not have an effect on CMS's decision to keep paying and contracting with United. (Id. at 2). Furthermore, United maintains that documents showing that CMS

---

not conclude that Swoben necessarily precludes discovery of CMS's records in the particular circumstances of this case.

officials not only knew that United (and other MA providers) conducted one-way reviews, but also agreed that such reviews were proper, would support the conclusion that United reasonably believed that one-way reviews were not improper and did not necessarily result in overpayments. (Id. at 26). Similarly, any documents showing that CMS's interpretations of "applicable statutes, regulations, guidance documents and contractual requirements" mirrored United's own would "bear directly on the objective reasonableness of United's interpretations." (Id. at 27). Evidence showing that CMS knew about one-way reviews but took no action would also support the argument that the failure to delete unsupported codes was not material. (Id.).

United's expectation that the Government possesses at least some information that will be favorable to its defense is not pure speculation. As the Ninth Circuit noted in Swoben, "[i]n 2014, CMS considered but ultimately decided not to finalize a proposed rule that would have altogether prohibited Medicare Advantage organizations from performing one-sided retrospective reviews." Swoben, 848 F.3d at 1169. It is not unreasonable for United to anticipate that the reasons why CMS did not finalize that proposed rule may be helpful to its defense.

At the very least, these are legitimate lines of defense that United is entitled to explore. Therefore, even if United's counterclaims, which seek damages for what United contends are CMS's systemic Medicare Advantage underpayments, are transferred to the Court of Federal Claims, the information United seeks will remain relevant to United's defenses in this action. The discovery need not support United's potential defenses for every single claim -- the question for the Court is whether the evidence appears relevant and proportional for any of the matters at issue. The uses for the discovery proposed by United in the paragraph immediately above show its relevance to the defense of the Government's reverse False Claims Act claim. However, even if the Court were to accept the Government's contention (which it does not) that such evidence has no bearing on the reverse False Claims Act claim, the Government does not explain why evidence relating to overpayment, or the lack thereof, is not relevant at a minimum to the Government's unjust enrichment claim. Additionally, while the Government contended at the hearing that the only measure of damages in this case is the amount that the Government paid as a consequence of United's failure to delete an unsupported code, United is entitled at the discovery stage of this case to information that may challenge the Government's actual loss, if any. Finally, United may be able to use the information as impeachment evidence, to challenge testimony by government witnesses.

It is unclear at this stage of the proceedings whether United's proposed defenses will actually succeed, or even if, after reviewing the Government's documents, United will ultimately pursue each of its presently planned defenses. However, ultimate success on a claim is not what is required for the information to be discoverable during the discovery phase of litigation. United is entitled to test the Government's claims, and has adequately demonstrated that the documents withheld by the Government may assist in that effort. Accordingly, the Court finds that the materials withheld by the Government pursuant to the deliberative process privilege are relevant for purposes of discovery.

B. The Government's Privilege Log And Agency Declarations Fail To Establish The Applicability Of The Deliberative Process Privilege

Having concluded that the internal CMS materials sought by United are relevant to the claims and defenses in this action, the Court also finds that the Government's corrected revised privilege log and agency declarations fail to establish that the deliberative process privilege applies to the withheld documents.

As noted above, the deliberative process privilege is narrowly construed and the party resisting production "bear[s] the burden of establishing its applicability." Karnoski, 328 F. Supp. 3d at 1162. The government must show that the communication is both predecisional and deliberative. Lahr, 569 F.3d at 979. Here, even considering the Government's privilege assertions in the log in conjunction with the agency declarations, the Government simply fails to provide sufficient information to show that the withheld documents meet the required standard. See Senate of the Com. of Puerto Rico on Behalf of Judiciary Comm. v. U.S. Dep't of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987) ("The information provided by the DOJ -- consisting almost entirely of each document's issue date, its author and intended recipient, and the briefest of references to its subject matter -- will not do [to establish the deliberative process privilege].") (footnote omitted).

As a threshold matter, the Court agrees with United's contention that the Government's assertion of the privilege is procedurally flawed. Instead of involving agency personnel in the initial assertion of the privilege, it appears that the Government used contract attorneys to review the documents and determine the applicability of the deliberative process privilege. There is no evidence before the Court even suggesting that senior agency personnel became involved in the process until after the original privilege logs were produced. However, "[t]he requirement that the privilege be asserted solely by the head of a department or agency, and even then only after personal review of the material in question, is not merely technical. Rather, it is intended to ensure that the privilege is invoked by an informed executive official of sufficient authority and responsibility to warrant the court relying on his or her judgment." Yang v. Reno, 157 F.R.D. 625, 632 (M.D. Penn. 1994); see also id. at 634 ("It is not enough to satisfy the requirements of personal consideration that the individual asserting the privilege . . . is 'familiar with the types of issues and information that could arise' . . . or that he 'understand[s] that on a number of occasions' [meetings took place to discuss policy issues].").

\\

\\

\\

\\

As one court in this Circuit has explained,

> The requirement that the [deliberative [process] privilege be invoked only by the head of the department after actual personal consideration has been promulgated to insure that the privilege remains a narrow privilege which is not indiscriminately invoked. As stated in Coastal Corp. v. Duncan, 86 F.R.D. 514 (D. Del. 1980): "Requiring the agency head to claim the privilege assures the court, which must make the ultimate decision, that executive privilege has not been lightly invoked by the agency, [U.S. v. Reynolds, 345 U.S. 1 (1953)], and that in the considered judgment of the individual with an overall responsibility for the administration of the agency, the documents withheld are indeed thought to be privileged." Id. at 518. Thus, the courts have not permitted staff attorneys, especially those who are participating in the pending litigation, to assert the privilege on behalf of the agency. Exxon Corp. v. Department of Energy, 91 F.R.D. 26, 43-44 (N.D. Tex. 1981); see also, Pierson v. U.S., 428 F. Supp. 384, 395 (D. Del. 1977).

United States v. Rozet, 183 F.R.D. 662, 665 (N.D. Cal. 1998). Furthermore, the proper time to make this showing is when the privilege is initially asserted. See Pac. Gas & Elec. Co. v. United States, 70 Fed. Cl. 128, 135, modified on reconsideration, 71 Fed. Cl. 205 (2006) ("'[T]the time to make the showing that certain information is privileged is [therefore] at the time the privilege is asserted, not months later when the matter is before the Court on a motion to compel.'") (quoting Anderson v. Marion Cnty. Sheriff's Dep't, 220 F.R.D. 555, 562 n.5 (S.D. Ind. 2004)). The process the Government appears to have followed in asserting the privilege does not give the Court confidence that the Government properly invoked the privilege.

The Court's concern in this regard is heightened because the declarants have not reviewed any more than a miniscule fraction of the documents on the log and cannot personally attest to their contents. As one court has explained, "generalized descriptions of 'categories' of withheld information do not cure the index's defects, especially where there is no indication [the agency declarant] had any personal knowledge of the withheld 1,600 documents outside of the thirty-five documents withheld from his own office." Nat'l Res. Defense Council v. U.S. Dep't of Defense, 388 F. Supp. 2d 1086, 1105 (C.D. Cal. 2005); see also King v. U.S. Dep't of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987) ("Categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate."). Instead, the agency declarant "must 'connect the dots' between each withheld document and a decision-making process or specific decision." Nat'l Res. Def. Council, 388 F. Supp. 2d at 1106 (emphasis added).

Moreover, the privilege log utterly fails to establish that the specific documents withheld were predecisional. The description field merely states that a given "document" or "spreadsheet" (for example) "reflecting internal agency deliberations regarding" any one of a number of subject areas was withheld. However, a subject area is not a policy, and the Ninth Circuit has long held that for the privilege to apply, the "agency must identify a specific decision to which the document is predecisional." Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1094 (9th Cir. 1997). This requirement is critical to ensuring that the deliberative process privilege is properly contained to its intended narrow scope. As the Ninth Circuit has explained, "the absence of an identifiable later decision [in the document description] is of considerable relevance to the deliberative process privilege[] as evidence of whether a later decision was indeed under consideration. Otherwise, the privilege would be boundless, as '[a]ny memorandum always will be 'predecisional' if referenced to a decision that possibly may be made at some undisclosed time in the future.'" Lahr, 569 F.3d at 981 (quoting Assembly of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992)); see also Nat'l Res. Defense Council, 388 F. Supp. 2d at 1103 ("'[The agency] must identify particular decisionmaking processes, or else the court cannot recognize the documents as 'predecisional.''") (quoting Judicial Watch v. United States Postal Serv., 297 F. Supp. 2d 252, 264 (D. D.C. 2004)).

Furthermore, the Ninth Circuit has "rejected the argument that 'a continuing process of agency self-examination is enough to render a document 'predecisional.'" Lahr, 569 F.3d at 981 (quoting Maricopa Audubon Soc'y, 108 F.3d at 1094). "The documents must be prepared to assist an agency decision-maker in arriving at a future particular decision, although we need not be able to identify retroactively 'the actual decision that was made' on the basis of the withheld documents." Id. Similarly, "simply designating a document as a 'draft' does not automatically make it privileged under the deliberative process privilege." Wilderness Soc'y v. U.S. Dep't of Interior, 344 F. Supp. 2d 1, 14 (D. D.C. 2004). As one court in this district has held, "to the extent Defendants are withholding 'draft' data compilations because they may have been 'subject to revision,' such withholding appears to be improper." Nat'l Res. Def. Council, 388 F. Supp. 2d at 1107.

A court may also reject a claim of deliberative process privilege where the withholding party "fails to indicate whether these documents lost their predecisional status by being adopted as final policies or by being shared with the public." Nat'l Res. Defense Council, 388 F. Supp. 2d at 1103 (citing Arthur Anderson & Co. v. I.R.S., 679 F.2d 254, 258 (D.C. Cir. 1982)). "[P]ost-decisional records fall outside the deliberative process privilege if they follow a final decision and are designed to explain a decision already made." Lahr, 569 F.3d at 981. It is unclear whether the "predecisional" nature of these documents, if it ever existed, was lost by subsequent government conduct.

The privilege log, which contains the only information the Government provides concerning over 99% of the documents currently being withheld, makes no attempt to identify a specific decision or decision-making process, or to explain whether a document concerns a particular decision that was eventually adopted. It does not provide a non-conclusory, non-boilerplate description of the predecisional nature of any of the withheld materials.

The log similarly fails to show that the documents reflect "deliberation." "In order for a document to be 'deliberative' it should disclose the personal opinions or 'mental processes of decision-makers.'" California Native Plant Soc'y, 251 F.R.D. at 413 (quoting Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1090 (9th Cir. 2002)). For example, intra-agency memoranda from "subordinate" to "superior" "are more likely to be deliberative in character than documents traveling in the opposite direction." Senate of the Com. of Puerto Rico on Behalf of Judiciary Comm. v. U.S. Dep't of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987) (citing Schlefer v. United States, 702 F.2d 233, 238 (D.C. Cir. 1983)); see also Gordon v. F.B.I., 388 F. Supp. 2d 1028, 1039 (N.D. Cal. 2005) (deliberative process privilege applied where redactions reflected "an inferior's personal opinions and reflections communicated to a superior for the purpose of the superior determining how the agency should address the issue"). The agency must explain how the communication fits within the deliberative, decisionmaking process. See Nat'l Res. Def. Council, 388 F. Supp. 2d at 1106 ("'[T]he affidavits fail to carry the Government's burden of proof here because at no place do they define, explain, or limit the 'deliberative process' which the Government seeks to protect.'") (quoting Vaughn v. Rosen, 523 F.2d 1136, 1146 (D.C. Cir. 1975)). The high-level characterization of the subject matter of a document says nothing about its deliberative nature.

Furthermore, because the log entries, apart from discussing emails, generally fail to identify either the author or recipient, it is impossible to tell whether a subordinate is forwarding informed options or concerns upward to a superior, which may be a privileged communication, or whether a superior is instructing a subordinate about a decision that was adopted, which is likely not.

Indeed, the Government has not persuaded the Court that all of the many thousands of documents on the log are even fairly characterized as opinions or materials reflecting the author's mental processes, or that any opinions or mental processes, to the extent they are reflected in the document, cannot be separated from unprotected factual information. To withhold documents containing factual information under the deliberative process privilege, the declarant must show that the factual information is intertwined with the author's opinions such that the facts and opinions cannot be practically separated. See Warner Commc'ns Inc., 742 F.2d at 1161 ("Purely factual material that does not reflect deliberative processes is not protected . . . [but] factual material . . . [that is] so interwoven with the deliberative material that [it] is not severable [may be withheld]."); Shapiro v. U.S. Dep't of Justice, 153 F. Supp. 3d 253, 293 (D. D.C. 2016) ("[A]ny attempt to claim categorical protection under the deliberative process privilege would be difficult to maintain given agencies' obligation to segregate factual material from deliberative material when asserting the deliberative process privilege."). Here, the Government's categorical assertions that it is not withholding "purely factual" documents relating to the FFS Adjuster, and that disclosure of these documents "would have a detrimental impact on HHS's ability to deliberate about agency actions," fail to show that factual information is <u>not</u> severable. The sheer volume of documents over which the Government is asserting the privilege strongly suggests that the withheld documents include a potentially significant amount of factual information. Acceptance of the Government's blanket contention that any factual information is "intertwined" with deliberative materials would seemingly open the door for agencies to withhold all factual data any time they finalize a decision. This is clearly contrary to the purpose of the deliberative process privilege, which is not intended to withhold factual information.

Courts in this Circuit have rejected assertions of the deliberative process privilege where the agency offered far more information that presented here. In <u>California Native Plant Society</u>, for example, the Court stated:

> In the present case, Agencies claim the deliberative process privilege for 80 documents. For each document, Agencies identified the date, the individuals to and from whom the document was sent, and a brief statement describing the document (<u>e.g.</u> "Email re: strategy for developing Conceptual Strategy"). Additionally, the EPA went further by identifying each employee's position within the agency, and grouping the documents into six categories, with descriptions for each category as to why the documents are pre-decisional, and why they are

> deliberative. Each agency provided a declaration from a senior agency official, generally attesting to the fact that the documents are deliberative and pre-decisional.
>
> The declarations by senior agency officials are not sufficient. These declarations merely assert conclusory statements in a boilerplate format. The statements do not assert the detail required to show the individual documents' role in the decision making process. See [Parke, Davis & Co. v. Califano], 623 F.2d 1, 6 (6th Cir. 1980); Senate of Puerto Rico, 823 F.2d at 585; Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980)]. Indeed, the declarations only pertain to a sample of the documents, and do not assert any basis for protecting the majority of the documents.

California Native Plant Soc'y, 251 F.R.D. at 413 (internal record citations and footnote omitted); see also Karnoski, 328 F. Supp. 3d at 1164 ("Privilege logs must provide sufficient information to assess the claimed privilege and to this end must "(a) identify individual author(s) and recipient(s); and (b) include specific, non-boilerplate privilege descriptions on a document-by-document basis.") (emphasis in original).

The Government's insistence, in its Opposition and at the hearing, that the Ninth Circuit's admonition in Burlington Northern that privilege assertions should be considered "in the context of a holistic reasonableness analysis" is misplaced. Burlington Northern, 408 F.3d at 1149. Burlington Northern did not address the showing necessary to establish the deliberative process privilege, which has been recognized as a narrow and qualified privilege. Furthermore, the Burlington Northern decision also noted that one of the factors a district court should consider in determining whether a privilege has been effectively asserted is "the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged (where providing particulars typically contained in a privilege log is presumptively sufficient and boilerplate objections are presumptively insufficient) . . . ." Id. Accordingly, Burlington Northern does not provide support for the Government's contention that the deliberative process privilege's particularity requirements should be excused here.

The Government has produced three versions of its privilege log and has had ample opportunity to correct these defects, which United brought to its attention early in the meet-and-confer process. The operative version of the log, even in light of the agency's declarations, fails to meet even the minimal requirements for establishing the deliberative process privilege. Accordingly, United's Motion is GRANTED.

C. Even If The Deliberative Process Privilege Applied, United's Need For The Documents Outweighs The Government's Interest In Non-Disclosure

The Court finds that even if the Government had adequately asserted the deliberative process privilege, the privilege is a qualified one, and United's need for the withheld information plainly exceeds the Government's interest in non-disclosure. The information United seeks is an essential component of its anticipated defense. Desert Survivors, 231 F. Supp. 3d at 380 (requesting party bears burden of showing relevance of the withheld evidence to warrant waiver of privilege). That information is not available from any other source, and the role of the Government in this case is obvious and undisputed. Id. While the Government's declarants summarily assert that disclosure would hinder frank and independent discussions, because the Government's log does not tie specific documents to specific policies, it is virtually impossible to assess the credibility of those blanket assertions. Id. Furthermore, the Government fails to address how the existing protective order (or any modification of that order) could not be utilized to protect against this alleged harm.

At the same time, the Parties and the public have a significant interest in ensuring that the judicial determinations in this case are based on complete and accurate information, and the seriousness of the issues raised by this litigation is manifest. Id. There is no doubt that this case raises serious concerns and high stakes for United, the Government, and the public at large. These combined interests militate strongly in favor of disclosure.

Finally, as noted above, the Government has not even attempted to explain why the existing protective order (or a modified version) would be insufficient to protect its interests. Confidential Informant 59-05071 v. United States, 108 Fed. Cl. 121, 142 (2012) ("The disclosure to plaintiff of such documents under the Protective Order in this case is unlikely to result in any public confusion or otherwise lead to challenges by taxpayers of IRS policies -- both because the documents will not be publicly disclosed and because the documents are so specific to plaintiff's case."); In re McKesson Governmental Entities Average Wholesale Price Litig., 264 F.R.D. 595, 602 (N.D. Cal. 2009) (rejecting deliberative process privilege assertion where agency declarations failed to explain "why a protective order would not reduce [the] harm" that would result from production of each document); Price v. Cnty. of San Diego, 165 F.R.D. 614, 620 (S.D. Cal. 1996) ("[T]he Court is convinced that the infringement upon the frank and independent discussions regarding contemplated policies and decisions of the County . . . caused by disclosure of these documents, can be alleviated through the use of a strict protective order against use or dissemination of the materials outside of this lawsuit."). Accordingly, even if the Government were able to establish the applicability of the deliberative process privilege, the Court would find that in the unique circumstances of this case, United's need for the materials overrides the Government's privilege concerns, and that any alleged harm may be adequately addressed through an appropriate protective order. As such, further amendment of the privilege log would be futile, as United would be entitled to the withheld information even if the logs were more detailed.

VII.

CONCLUSION

For the reasons stated above and on the record at the hearing, United's Motion to Compel the United States to Produce Documents is GRANTED. The Government shall produce the documents withheld solely on the ground of the deliberative process privilege within **twenty-one days** of the date of this Order. If additional time is necessary for the production of documents, counsel may submit a joint stipulation with a proposed order setting a schedule for production.

DATED: December 14, 2018

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE