

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
3 HONORABLE MICHAEL FITZGERALD U.S. DISTRICT JUDGE
4

5 UNITED STATES ex rel)
6 BENJAMIN POEHLING,)
7 Plaintiffs) CV-16-8697-MWF
8 VS)
9 UNITEDHEALTH GROUP, INC.,)
10 et al,)
11 Defendants)

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13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

14 LOS ANGELES, CALIFORNIA

15 Monday, April 8, 2019
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1 THE CLERK: Calling item number two, case number
2 CV-16-8697-MWF, United States of America vs. UnitedHealth
3 Group, Inc., et al.

4 Counsel, please state your appearance for the
5 record.

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

8 MR. FREEBORNE: Good morning, Your Honor. Paul
9 Freeborne on behalf of the United States.

10 MS. KRIEG: Jessica Krieg on behalf of the United
11 States.

12 MR. ROSS: Good morning, Your Honor. Jack Ross on
13 behalf of the United States.

14 MR. HASEGAWA: Your Honor, Steve Hasegawa for Ben
15 Poehling.

16 MR. SU: Good morning, Your Honor. Henry Su on
17 behalf of the Relator, Ben Poehling.

18 MR. MERRILL: William Merrill on behalf of the
19 Relator, Ben Poehling.

20 THE COURT: Good morning, counsel.

21 MR. SCHINDLER: Good morning, Your Honor. David
22 Schindler on behalf of Defendant UnitedHealth.

23 MR. MERON: Good morning, Your Honor. Daniel Meron
24 on behalf of the Defendant UnitedHealth.

25 MR. SNYDER: Ben Snyder on behalf of UnitedHealth.

1 THE COURT: Good morning, counsel.

2 We are here on the motion in regard to the
3 magistrate judge's ruling. I will hear from either the
4 government or the Relator as the moving party.

5 MR. FREEBORNE: Good morning, Your Honor. Again,
6 Paul Freeborne.

7 Your Honor, just taking the questions as presented
8 in the tentative --

9 THE COURT: You are free to argue however you like,
10 but those were things that struck me after reading the
11 magistrate judge's order and reading your briefs.

12 MR. FREEBORNE: Your Honor, with respect to the first
13 question, the standard of review is whether Judge Segal's
14 order is clearly erroneous or contrary to law. We think it
15 is because of the relevance rulings that were made in her
16 order.

17 THE COURT: Right. That is -- that is the point.
18 The Ninth Circuit could say that one of my rulings is either
19 reviewed for abuse of discretion or reviewed de novo and that
20 would be true in every single thing, but at some point
21 they've got to pick.

22 What I'm asking you to say is tell me what you
23 believe her errors are, and for each of those errors, what is
24 the standard, is it clearly erroneous or is it contrary to
25 law? Because that matters a lot. One of them I have to defer

1 to her and one of them I don't.

2 MR. FREEBORNE: Your Honor, we believe it's contrary
3 to law, because we don't believe that internal agency
4 statements or deliberations are relevant or germane to the
5 issues in the case. And taking them in sequence, as we see
6 it, you know, we understand in the Court's motion on the
7 motion for partial summary judgment, the Court has identified
8 an interpretive issue with respect to the underlying
9 obligation to delete. But we don't believe that internal
10 agency statements are in any way germane to that issue.

11 There is a two-pronged inquiry. First, whether or
12 not there is a regulatory obligation to delete. That is a
13 matter for the Court to undertake and to determine.

14 With respect to the contractual interpretation, as
15 Your Honor recognized, that is governed by *Mohave Valley*.
16 And *Mohave Valley* clearly rules and holds that internal
17 documents are not germane to trade usage, course of
18 performance or course of dealing. While admittedly that
19 issue, as framed now, is not before Judge Segal, we think
20 that that is the appropriate rule of law to apply to that
21 question.

22 We also don't think that internal agency documents
23 are relevant for two additional reasons. As you know, Your
24 Honor, you've ruled in striking a number of affirmative
25 defenses that *OPM v. Richmond* is an important background

1 principle to consider in seeking to bind the government with
2 respect to certain decisions, particularly as it relates to
3 the recovery of money. We think *OPM v. Richmond* separately
4 prevents the type of discovery that Judge Segal permitted to
5 go forward in her record. And then separately, although it's
6 not binding on this Court, the *Lachman* court, as well as
7 others, recognized that internal agency statements are not
8 germane to the interpretive issues that the Court has now
9 identified.

10 With respect to knowledge, Your Honor, the knowledge
11 inquiry here is United's knowledge, and that is not informed
12 by internal statements or deliberations within the agency.
13 While United has sought to interpose a reasonably objective
14 interpretation, that, too, is a legal test. It's an
15 objective test. And while they rely upon *Safeco*, *Safeco* only
16 applies in the circumstance where there is an absence of
17 regulatory guidance. And no argument could be made in the
18 Medicare field that there is a lack of guidance.

19 With respect to materiality, Your Honor, we, too
20 think that that could be resolved as a matter of law. There
21 could be no argument that the codes at issue determine the
22 risk adjustment payments at issue. And that the codes,
23 however you want to look at it, are central. They are the
24 essence of the bargain. But even if there were a factual
25 issue with respect to that issue, given the principles in *OPM*

1 v. *Richmond*, internal agency statements, deliberations,
2 etcetera, are not relevant to that issue, as well.

3 And then finally, they are not relevant to damages.
4 Again, we are talking about internal statements or
5 deliberations. United has made no effort to explain why
6 internal agency deliberations with respect to anything are
7 relevant to damages in this case. And so we think and we
8 would ask that the Court overturn the magistrate's order in
9 that respect for all of those reasons.

10 With respect to the other issues identified in the
11 Court's order, Your Honor, we are still digesting the motion
12 for partial summary judgment, as well as the order on the
13 affirmative defenses, as well as the counterclaim. And we
14 understand that the Court would like to have more fulsome
15 discovery on the understandings pertaining to the obligation
16 to delete, but just so you can understand perhaps where this
17 case is going, when I think the questions are posed in
18 questions 2 or 3, and they are related, we think that United
19 is seeking to interpose a payment challenge that with respect
20 to the submission of valid codes as a defense to their
21 knowing submission of invalid codes. And that raises
22 *Cedars-Sinai* issues, as well as *Bryson* and *Dennis* that we
23 outlined in our papers. But we understand the Court would
24 like a more fulsome record on that.

25 Related to that point, we also think that they are

1 attempting to pursue essentially a counterclaim for a setoff,
2 setting off monies that they claim they were underpaid in the
3 system at large against monies that they owe the government
4 because of their failure to delete.

5 THE COURT: Well, other than write a check for
6 whatever amount the government thinks it deserves, what is it
7 exactly that you think the defendants are going to do? I
8 just at some point -- look, I'm going to be very blunt with
9 you. I understand why the government feels that the argument
10 that United is putting forth is ultimately very unappealing.
11 If I discussed this case with my almost 90-year-old parents,
12 they would, I think, reach -- who are not lawyers -- they
13 would grasp why the government is upset here.

14 At the same time, and as to where the case is going,
15 I clearly have no idea as to that. I thought that when I
16 granted the first motion, that you were going to come back
17 and just put in the magic words and rewrite things, and then
18 suddenly that claim was dismissed. So I clearly am out of my
19 depth here.

20 But the point is you have to -- the defense gets to
21 do something when the government wants such a large sum of
22 money. And you are just assuming things which are going to
23 be the basis of a great deal of argument, which -- and things
24 that I encountered in my own law practice, which is what is
25 the difference between a setoff and a counterclaim? When can

1 you have an affirmative defense of a setoff, even if you
2 can't have a counterclaim, or do those rise and fall
3 together?

4 It's not that you don't have good arguments. You
5 even perhaps have a good argument on the underlying point
6 that was raised in the motion for partial summary judgment.
7 The point is, you aren't saying that there is an argument,
8 you are saying that you've already won. And what I'm saying
9 is, well, maybe you haven't already won, in which case United
10 gets to do something.

11 So I will ask you again what is the difference
12 between the argument that you made to Judge Segal, and you
13 made to me and the -- in the objections to her order, and the
14 arguments that you made in the motion for partial summary
15 judgment?

16 MR. FREEBORNE: I'm sorry, Your Honor. The
17 difference, well the commonality, obviously we argued
18 fundamentally, we don't see that internal documents go to any
19 of the issues in the case. And she found to the contrary.
20 And so we think that that is clearly erroneous for the
21 reasons that I previously outlined.

22 We also are aware that the Court has now ruled on --

23 THE COURT: Well again, clearly erroneous or
24 contrary to law? Because that is -- there is a big
25 difference between those two things. And several times in

1 your briefs you did say, as you just said here, you said
2 clearly erroneous. And there is just simply a difference
3 between clearly erroneous and contrary to law. Just as I
4 would hope when my orders are reviewed in the Ninth Circuit,
5 the Circuit is mindful of the difference between review for
6 abuse of discretion or clear error or de novo.

7 MR. FREEBORNE: Fair enough, Your Honor. Contrary to
8 law.

9 THE COURT: All right. Go ahead.

10 MR. FREEBORNE: So with respect to issues two, three
11 and four, Your Honor, if -- we believe -- we understand that
12 the Court would like a more fulsome record on the obligation
13 to delete. So we are resting on our arguments that we don't
14 believe internal agency documents relate to any of the issues
15 in the case.

16 If the Court is inclined to disagree with us, we
17 would really ask the Court for limited discovery in that
18 respect. While Your Honor has 20,000 documents before you
19 today, we don't believe any of those documents are relevant,
20 and we also believe that the volume of discovery -- United is
21 seeking discovery essentially of the whole payment side of
22 the MA program. And that is placing an undue burden upon the
23 agency.

24 And so while we obviously recognize that discovery
25 will go forward, and that United has the right to defend this

1 case, it has to be, in our view, in line with legal
2 principles, which is that these documents are relevant to
3 particular issues in the case. It can't be that they are
4 just entitled to discovery because they want it.

5 So what we would ask are limited -- are directed
6 rulings as to what internal agency statements and
7 deliberations are relevant to the issues in the case, so that
8 we can proceed in discovery in an orderly fashion.

9 THE COURT: And were those issues raised and
10 preserved before the magistrate judge, and in light of the
11 briefing, are those issues really before me now? You are
12 saying did -- should I send it back to Judge Segal to
13 determine those issues further, or do you feel that she's
14 just done, and therefore it's up to me to start managing
15 this? You know, what exactly is the state of the record in
16 regard to, let's say the ancillary issues that you just
17 raised?

18 MR. FREEBORNE: Well, Your Honor, I think we need
19 guidance as to -- with respect to today, we are here talking
20 about internal agency statements and deliberations. United
21 wants the waterfront. We obviously don't feel that any of
22 that is relevant. But we need -- the parties need direction.
23 If there is some portion of those documents that Your Honor
24 feels would aid the fact finding process, we are certainly
25 willing to cooperate with that, but we need some instruction

1 from the Court, because the parties are in loggerheads on
2 this issue.

3 And I'm not sure -- I mean, Judge Segal I think has
4 been very clear that she thinks that United is entitled to
5 whatever discovery they say they need. And --

6 THE COURT: Well, it's one thing to say that Rule
7 26, even as amended, allows something to happen. It's
8 another thing to say that in regard to a specific document or
9 a specific category of documents, that that should go
10 forward. The government can obviously seek a protective
11 order and say, Well, we should have this, or -- you know,
12 it's often a matter of negotiation; if it's not, it's
13 something the magistrate judge determines. I'm just saying
14 what is the status here in regard to that before the
15 magistrate judge? In this district those are matters
16 typically that are raised before the magistrate judge.

17 And here, you know, Judge Segal was an Assistant
18 U.S. Attorney in the civil division. She has been a judge
19 far longer than I am. When you say "guidance," you could
20 have no better person than her to sort out the practicalities
21 of how this should happen apart from the broader legal issues
22 which are being raised in your motion and objections here.

23 So that is why I'm asking, just specifically are you
24 feeling that you raised these issues below and you got an
25 answer that you don't like, or are you afraid that when you

1 do raise them below, based on what she wrote in her order,
2 you are going to get an answer you don't like? I have to say
3 I'm not entirely sure what it is that you are asking of me
4 right here.

5 MR. FREEBORNE: Your Honor, I think the case would be
6 guided if there was a particularized need that you see in the
7 record for internal agency documents, despite the arguments
8 that I made earlier, we think that that is how the case
9 should proceed. And otherwise, we will go before Judge
10 Segal, perhaps time and time again, and have to raise the
11 issues.

12 I think that is where we are in the case.

13 THE COURT: All right. Thank you.

14 And look, the district judges and magistrate judges
15 work as a team, obviously. And there are times when we'll
16 just -- we'll just talk to each other and say, Okay, what are
17 you going to do, what am I going to do? Would it be helpful
18 to you if I did X, or I'll issue an order saying there is a
19 discovery cutoff, but I give the magistrate judge discretion
20 to decide of all discovery that has previously been requested
21 to allow it to occur after that date. So it's not that we
22 don't work together. I understand, then, that you are saying
23 it would help the case if there was this broad sense, but --
24 and perhaps that will happen if Judge Segal agrees, but it's
25 not typically the way things happen in this district, which

1 is there is a dispute, the magistrate judge rules on the
2 dispute, and then the district judge gets involved if
3 necessary in the procedure that you have properly invoked
4 here.

5 MR. FREEBORNE: Your Honor, if I could be heard on --

6 THE COURT: You may.

7 MR. FREEBORNE -- specific categories of documents
8 that go outside the questions posed?

9 As Your Honor may be aware, there is a current
10 rulemaking process that pertains to the so-called RADV
11 process, and there is an accompanying study and a technical
12 appendix, etcetera. We think that producing internal agency
13 statements, deliberations pertaining to that would
14 particularly chill agency communications with respect to an
15 ongoing rulemaking. It would also provide United an unfair
16 advantage over other commenters in that process.

17 THE COURT: I understand that.

18 And again, is this -- were those specific issues --
19 see, that is why I'm asking about discovery. I understand
20 why it often makes sense, and why it might very well have
21 made sense here to deal with these disputes according to
22 broad principles, especially when you have thousands of
23 documents. Although by electronic discovery standards it's
24 not really a lot of documents.

25 Again, the arguments you are making, which

1 intuitively have a certain appeal, is there enough of a
2 record in front of me to decide those issues even if I was
3 tempted to agree with you?

4 MR. FREEBORNE: Well, Your Honor, I think the record
5 below before Judge Segal, we provided three declarations that
6 took essentially the documents and the 20,000 and broke them
7 out into categories to describe what each of the category, or
8 the types of documents pertain to.

9 And we think, again, if there are -- and I think
10 they represent a pretty good cross-section of the issues
11 implicated in United's request, although the requests are
12 ongoing.

13 And so there was a record, and either with reference
14 to that or perhaps the parties could brief particular issues,
15 it would just be helpful to have guidance from the Court as
16 to what issues pertaining to those types of documents are
17 relevant to the issues in the case. Again, emphasizing the
18 internal agency statements and deliberations.

19 THE COURT: All right. Thank you. I'll give you a
20 chance to respond.

21 But let me hear from United.

22 MR. FREEBORNE: Thank you, Your Honor.

23 MR. MERON: Good morning, Your Honor.

24 If I may, I would like to address some of these
25 legal questions that have come up, and Mr. Schindler is going

1 to address the record that was created below and some of the
2 deliberative process issues.

3 With respect to your threshold question on the
4 standard of review, I think it's fair to say the cases are
5 not entirely consistent on this question. We believe that
6 when the question's one of relevance, that the abuse of
7 discretion standard actually applies. So neither clearly
8 erroneous nor contrary to law. We think it's abuse of
9 discretion, which makes sense because the trial court would
10 be applying discretion when it makes rulings at a trial about
11 the relevance of testimony. And one case that says that is
12 *Geophysical Systems vs. Raytheon*, 117 FRD 646 at 647. So we
13 think that is the standard. But we think on any standard,
14 truthfully Judge Segal's decision was correct here.

15 There has been hardly a mention of the common law
16 claims. The evidence we are seeking clearly is relevant to
17 the common law claims. Was United unjustly enriched? What
18 did the government know? That is an element of a payment by
19 mistake claim. It's actually pled in their Complaint. Had
20 we known, we would not have paid. I don't see how their
21 internal views, what they knew, what they didn't, could
22 possibly not be relevant to payment by mistake.

23 Now, with respect to the issues Mr. Freeborne
24 addressed, there essentially -- and why the internal agency
25 discussions are so crucially relevant here, not just

1 relevant, really powerful -- there are two levels here of
2 where intent comes into play.

3 First threshold question, if you will, is what are
4 the meaning of the obligations? And specifically, what does
5 the contract mean?

6 Now, Mr. Freeborne referenced *Mohave Irrigation* and
7 your court opinion last week addressed that. I would like to
8 explain. There is two different types of situations where
9 the Court looks at extrinsic evidence. And the types of
10 extrinsic evidence that is admissible in each is very
11 different.

12 So we did cite *Mohave*, Your Honor, in our briefs on
13 summary judgment. We cited that as a fallback argument in
14 case this Court had held that the contract was unambiguous.
15 So *Mohave* involves the first situation. And there the Court
16 held at the threshold that the contract was clear and
17 unambiguous on its face. It then recognized that under the
18 UCC, there are a few limited categories of extrinsic evidence
19 that a party may use to show that a contract that is clear
20 and unambiguous on its face nevertheless contains a latent
21 ambiguity. And those are the categories that were at issue
22 in *Mohave*.

23 The rule is -- and I understand you are going to be
24 ruling on extrinsic evidence, it's not really before you
25 today, but since they are invoking that, there is an entirely

1 different rule that applies where, as we read Your Honor's
2 decision from last week, you've decided that the contract is
3 not clear and unambiguous on its face.

4 In that situation where extrinsic evidence is being
5 offered to -- not to establish whether there is an ambiguity,
6 but to resolve the ambiguity, then it's a much broader set.
7 And essentially, evidence of the party's subjective intent is
8 allowable.

9 THE COURT: Well, I would say that this is -- I
10 think you are overstating the degree to which I have the
11 desire in the ruling to kick the can down the road.

12 So I don't think I have made a -- there is a narrow
13 issue in front of me. You know, United was not the moving
14 party. So it was whether the -- you can -- here is the
15 contract, here is what it means, the end. So I don't
16 think -- I have not rejected -- I have not decided that
17 extrinsic evidence beyond the three categories should come in
18 or not. I just haven't ruled on it one way or the other,
19 okay? Which isn't to say that if it's potentially relevant,
20 you shouldn't get it now. Then it becomes -- or that you
21 shouldn't get some sample of it, or we should -- you know, it
22 just is -- it's just, I think there is limits to which either
23 side, other than the basic fact of -- to the extent that the
24 government right now is relying on a very clear, you know,
25 intuitively appealing but unfortunately perhaps not legally

1 cognizable, legally sound argument as to how the case should
2 be viewed in light of my ruling last week, then that is one
3 thing.

4 I guess here is -- I said just beyond that there is
5 just -- what I want to see is what else is there? If it's
6 the government should only do X and not Y, or it should give
7 some and not others, or there should be a sample or not this,
8 or if there is a hidden motivation on the part of United,
9 should that be frustrated? All of those are perfectly great
10 arguments for the government to make in seeking a protective
11 order from the magistrate judge. Because I just have this
12 concern that those -- that is not the way this -- the motion
13 and objections are really being presented to --

14 MR. MERON: And Your Honor, I understand your
15 question. And I certainly was not suggesting that you've
16 made at this point -- in fact, I was saying I think the
17 opposite, you haven't yet ruled what extrinsic evidence might
18 be admissible at the end? The Courts treat that really as a
19 weight issue, not as a threshold bar to discovery. Now --
20 which is all that is at issue here.

21 Now, once you get past that first question, which is
22 what the contract means, this isn't a breach of contract
23 suit, it's a False Claims Act suit. So the government has to
24 prove that United acted knowingly. That is a scienter
25 standard that changes the breach of contract into a fraud.

1 And as to that, we think that the evidence of what
2 CMS regulators thought about some of these issues is squarely
3 and powerfully relevant.

4 You can see already in the papers, Your Honor, I
5 think I counted over a dozen times where the government said
6 United's views are post hoc rationalizations, after the fact,
7 not genuinely held, feigned, absurd, tortured, etcetera.

8 If, in fact, at the same time CMS regulators
9 internally expressed the same understanding about whether a
10 plan had to delete codes beyond their errors rates and things
11 like that, that would be powerful evidence to show, both to
12 corroborate the likelihood that United also had that view,
13 and to show that those views were reasonable.

14 And in a case where intent is so central to the
15 ultimate questions, that evidence is surely very important to
16 gather.

17 THE COURT: All right, counsel, I'm going to have to
18 ask you to limit your remarks since you said Mr. Schindler
19 wishes to address other issues.

20 MR. MERON: Fair enough, Your Honor. I will cede my
21 time to Mr. Schindler.

22 MR. SCHINDLER: Your Honor, I want to go to the
23 question you raised, which is what to do now, and whether to
24 send this back to Judge Segal and/or whether the government
25 has essentially created a record before you that would allow

1 you to rule as you asked on should we get documents X or not?

2 And the history here is important. This issue has
3 been before Judge Segal for almost a year. We have been
4 dealing with this for more than a year. We've had multiple
5 discussions with the government, multiple attempts to allow
6 them to get it right, and they have declined at every turn.

7 And in terms of where we are right now?
8 Respectfully, it's too late for them to ask to go back. As
9 you correctly observed in your questions and in the briefing,
10 they have waived any suggestion that they have done this
11 correctly. They have waived any additional arguments that
12 somehow or another this privilege log was done correctly.
13 They have waived any assertion or claim that it should be
14 this document or that. Instead, where we are at this point
15 has been a full on relevance, that is it. All cards on the
16 table. Chips in the middle. They have said relevance.

17 And as Mr. Meron has said to Your Honor, we are at a
18 threshold point. And Judge Segal thought about this very
19 carefully in terms of what the claims are that remain. It's
20 a reverse False Claims Act and two common law claims. And
21 she thoughtfully went through those questions about whether
22 these are relevant. So as to the relevance question, I think
23 Your Honor understands where we are.

24 But as to the balance of that, they didn't even
25 raise the question that these are privileged documents. They

1 have essentially foregone that conclusion. They simply have
2 said to you, We are giving up on deliberative process
3 privilege. We are simply telling you we don't think they are
4 relevant. That United shouldn't get an opportunity to defend
5 itself by pointing to the internal documents that the CMS and
6 the government has created.

7 And so we respectfully suggest it's time now for
8 them to actually produce. There is no burden. The 20,000
9 documents have been segregated. They are there. They are
10 available. And as you correctly noted at the outset of your
11 comments to Mr. Freeborne, you thought way back when, hey,
12 the government's going to come back, amend, show materiality,
13 and we'll be on our way. That is exactly where we are right
14 now. It's what happened when we took depositions there. We
15 started to see exactly what we have been saying, that our
16 view is consistent with the views held by the internal
17 government actors here. And we think the same thing is going
18 to be true with respect to these 20,000 documents, and that
19 is why they are fighting tooth and nail to prevent them.

20 Suggesting now that we go back to Judge Segal, where
21 they've had three, four bites at the apple, they had three,
22 four bites at the apple with respect to creating the
23 privilege log. They had multiple bites at the apple with
24 respect to the declarations themselves which she found wholly
25 inadequate. They reviewed a sum total of 101 documents, I

1 think, of the 20,000 that were here. The declarants looked
2 at 67 plus 44, so 111. Sorry, my math was off. She
3 concluded, quite correctly, that is a woefully inadequate
4 process. And that in and of itself ends the inquiry.

5 But even if you went beyond that and looked at the
6 logs themselves, as she did, they are woefully deficient.
7 They have not demonstrated and can't demonstrate that these
8 are not factual documents. They have made no attempt to
9 suggest to you that she got it wrong with respect to any of
10 that.

11 And respectfully, now after a year and a half, and
12 indeed it's been more than a year that we were before you at
13 our initial Rule 16 conference, we are still waiting for
14 them. And what is going to happen is this case is going to
15 go on for years and years.

16 And in fact, what has happened is they continue to
17 use that as a sword and shield. Every time we ask for
18 something, they say, Judge Fitzgerald hasn't ruled it's
19 relevant yet. Got to wait until Judge Fitzgerald rules on
20 that. Got to wait until Judge Fitzgerald gives us our Rule
21 16. What is your hurry? That is what we are confronted with
22 week by week, month by month. And this case has got to
23 proceed, as you've noted, and your standing order says,
24 discovery proceeds. And yet, they have slow rolled and
25 unilaterally decided not to produce documents to us on this

1 all chips in the middle of the table relevance argument.

2 That ship has now sailed and the bar is low.

3 The cases are clear, relevance is not a basis at
4 this juncture to prevent us the opportunity to defend
5 ourselves. If we are wrong and the documents don't show
6 that, okay, then we are wrong, as you correctly noted. But
7 they don't get to continue to prevent us the opportunity to
8 defend ourselves.

9 And we would respectfully submit that the ship has
10 sailed. Judge Segal has issued a 47-page order, mind you,
11 the second order, because the first one came in the ex parte,
12 and it's well-reasoned, it's thoughtful, there is no basis
13 not to affirm it, and it's time for us to get those
14 documents.

15 THE COURT: Thank you.

16 Counsel?

17 MR. FREEBORNE: Your Honor, with respect to the
18 argument that common law claims change anything, again, the
19 principles of *OPM v. Richmond*, the principles of *Mohave* apply
20 equally to the common law claims as to the FCA claims. So
21 there is no difference there.

22 With respect to Judge Segal's ruling, on page 14 of
23 her order, Judge Segal outlines the categories of documents
24 that I mentioned earlier that emanated from the declarations,
25 but unfortunately there is no legal analysis and response to

1 the arguments that I presented earlier as to why internal
2 agency deliberations pertaining to those issues are relevant
3 in the case. And we think that her ruling was contrary to
4 law in that respect. And we would ask that her order be
5 overturned.

6 THE COURT: Thank you, counsel.

7 MR. HASEGAWA: Your Honor, may I?

8 THE COURT: Of course.

9 MR. HASEGAWA: Your Honor, Steve Hasegawa for Relator
10 Ben Poehling.

11 I wanted only to emphasize, Relator has not been
12 involved in this discovery dispute. Obviously they are not
13 our documents, so we haven't had an opportunity to ring in on
14 the issues. We have been talking about relevance.

15 And the only thing I wanted to point out is
16 relevance takes on a different tone with respect to different
17 categories of the documents that are at issue today and on
18 into the future.

19 I wanted to focus specifically, and I'll be very
20 brief, on one set of documents, and that is the documents
21 that relate to the agency's deliberations concerning the
22 payment model or the application of a fee-for-service
23 adjustor, things like that.

24 I understand in the context of the summary judgment
25 motion that there is a relevance question that, or there is a

1 relevance issue with respect to the documents that disclose
2 the agency's position on whether there is or is not a duty to
3 delete. And I get that. I think Mr. Freeborne has discussed
4 why those documents may still not be relevant, but I put
5 those in a different category from the documents about the
6 agency's internal deliberations about how to create a payment
7 model or whether a fee-for-service adjustor will apply in the
8 context of RADV audits. Because those are issues that do not
9 have anything to do with the interpretation of the statute,
10 the regulation or the contract language. Those are just the
11 business of an agency going about devising a way in which MA
12 insurers may get paid overall.

13 And as we veer away from the agency's opinion on
14 whether or not something must be deleted or not deleted or
15 when it must be deleted into the question of how do we
16 calibrate the entire model? Or how do we apply a
17 fee-for-service adjustor, if we apply a fee-for-service
18 adjustor, in the context of RADV audits that are
19 extrapolated, not claim by claim, but extrapolated across an
20 entire MA contract, billions of dollars, we start to veer
21 into the territory that I think is causing everybody a lot
22 of -- a lot of heartache, partly because it's not relevant in
23 any way to the question of how you construe the contract, but
24 also partly because it butts up right against the agency's
25 ability to make its independent determinations. And I think

1 that that causes everybody to be on edge.

2 What I think is going on, and this is maybe not the
3 right forum to resolve it, but it is an appropriate place to
4 bring it up, because I think it's going to be an issue as it
5 comes up again in the future, is that defendants are trying
6 to do something in this action that they would not be able to
7 do in another action. And that is they are trying to
8 challenge fundamental decisions by the agency about how to
9 pay insurers, and what the circumstances are under which
10 insurers will or will not get the benefit of a
11 fee-for-service adjustor. But they are trying to do it
12 outside the context of an APA action in which there are
13 procedures and safeguards that are specifically there to
14 protect the agency's decision.

15 THE COURT: That was made clear in the District
16 Court opinion, in the DC District Court opinion.

17 MR. HASEGAWA: Yes, Your Honor. But that is a good
18 example, Your Honor, because the DC District Court opinion on
19 a prior rule is different from the APA action that I think
20 that they would like to bring involving a current rulemaking
21 that involves a different record, a different administrative
22 record. Because of course as Judge Collyer made clear, there
23 are fundamental safeguards. The Court is not allowed to
24 substitute its judgment for the judgment of the agency. The
25 record is limited to the administrative record that the

1 agency had. And of course there is an arbitrary and
2 capricious standard that is applied. All of that is -- is
3 stuff that in this instance that defendants are trying to
4 circumvent by bringing a challenge to, for example, the
5 agency's determination as in the recent rulemaking that it
6 would be inappropriate to apply a fee-for-service adjustor,
7 and that even if it did apply a fee-for-service adjustor, the
8 amount would be negligible; and in fact, according to the
9 agency study, would result in overpayments rather than
10 underpayments to the MA insurers.

11 That is something that I think that defendants
12 intend to challenge in this case in a way that they would not
13 be able to challenge in an APA action.

14 THE COURT: All right. Thank you.

15 MR. MERON: May I respond?

16 THE COURT: You may.

17 MR. MERON: I appreciate the opportunity. I think
18 that should not have been done on reply.

19 Your Honor, we are not challenging -- and this has
20 come up over and over again -- we are not challenging the
21 payment amounts that were determined by CMS as being too low.
22 What our claim is repeatedly is that the payment amounts that
23 are set are perfectly fine so long as they are applied to
24 equivalent data containing equivalent levels of unsupported
25 codes. And if they are, we are not overpaid by the presence

1 of those codes, of the unsupported codes, and you would
2 violate actuarial equivalence and the same methodology that
3 would require us to delete. Those go to the hearts of our
4 defense.

5 Now talking about these as internal views is very
6 misleading. The government's position, and you heard it just
7 now from the Relator, is that these are empirical questions,
8 and that we are empirically wrong. That, in fact, if you
9 deleted all their unsupported codes, it would not have an
10 impact on the payment amounts. Well, we think that is
11 hogwash, but we get to test that, we get discovery on the
12 fundamental -- if the internal payment experts have looked at
13 it and agreed with us on that, that is clearly relevant to
14 our claim that we weren't overpaid, that it violates
15 actuarial equivalence.

16 With respect to the 2018 study that CMS released, we
17 are not seeking a ruling here that would vacate a regulation
18 or something like that. We are simply aware of the existence
19 of a study that the government itself submitted to you and
20 said was relevant to this case, and clearly that gives us an
21 insight that says, okay, we know the government is apparently
22 going to argue this and this empirical thing. We know that
23 because they have just done this study. Those empirical
24 questions are at the root of many of our defenses. And the
25 time period -- because I want to be clear on this, it's a

1 2018 study, but it addresses the 2009 payment year using 2004
2 and 2005 data, because that is how the 2009 payment year was
3 calculated. The 2009 payment year is at issue in this case.

4 In any case in which one party says, I've got an
5 internal empirical study that goes to a heart of one of the
6 issues, I would think the other side gets discovery on those
7 empirical issues. That is all we are trying to do. We are
8 not trying to get an order that vacates a rule.

9 THE COURT: Thank you, counsel. The matter is taken
10 under submission.

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

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20 Amy C. Diaz, RPR, CRR

April 9, 2019

21 S/ Amy Diaz
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