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7 WESTERN DIVISION
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA ex rel.
11 BENJAMIN POEHLING,
12 Plaintiffs,
13 vs.
14 UNITED HEALTH GROUP, INC., et. al.,
15 Defendants.

Case No. CV 16-8697 FMO (SSx)

ORDER DENYING WITHOUT PREJUDICE

UNITED'S MOTION TO COMPEL

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17 On September 23, 2020, Defendants United Health Group, et al., ("United") filed a motion
18 to compel (the "Motion") seeking an order regarding the government's attempt to recover or "claw
19 back" twenty-seven allegedly privileged documents. On October 13, 2020, the Special Master
20 held a telephonic hearing on the Motion. For the reasons discussed below, the Motion is DENIED,
21 without prejudice to any future challenge to the privilege designations.
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23 I. FACTUAL AND PROCEDURAL BACKGROUND
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25 The Motion challenges the government's claw back of twenty-seven documents on
26 privilege grounds. The parties filed a Joint Stipulation, which summarized the factual and
27 procedural background. (Jt. Stip. at 5-10). The Joint Stipulation and Supplemental Memoranda
28 reflect the parties' opposing views on whether the government is entitled to claw back the disputed

1 documents. The parties submitted multiple exhibits to the Special Master, including the
2 government's privilege log. The Special Master issued an order requiring the government to
3 submit the twenty-seven documents for in camera review. The government determined that it
4 could release redacted versions of some of the twenty-seven documents to United. Following
5 release of the redacted documents, the government filed the twenty-seven documents for in camera
6 review. The Special Master held a telephonic hearing on October 13, 2020.

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8 Earlier in the litigation, the Magistrate Judge ordered the government to disclose 20,000
9 documents withheld on deliberative process privilege grounds. The government sought review of
10 that order before the District Judge, who upheld the Magistrate Judge's order. On June 6, 2019,
11 the District Judge ordered all 20,000 documents disclosed within ten business days. (Dkt. 366).
12 The government included the twenty-seven disputed documents in that production.

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14 In the Motion, United contends that the government's claw back effort is "nothing more
15 than a transparent attempt to evade this Court's [prior] order [requiring production of documents]."
16 (Jt. Stip., at 1, ll. 1). United argues that parties must not be permitted to make "serial, piecemeal"
17 assertions of privilege. Otherwise, parties and the court would "waste resources in a never ending
18 series of discovery motions." (Id., ll. 14-16). United contends that the government should be
19 required to assert all privileges at one time, in a single motion opposing the production of
20 documents, (id. at 2), and that "a plainly deficient privilege review cannot be a justification for
21 claw back and cannot be good faith." (Id. at 2, ll. 26-27).

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24 United also argues that the government is precluded from asserting new privilege theories
25 to shield documents from disclosure that the court previously ordered produced. (Id. at 10).
26 Furthermore, United argues, even if the government is not precluded from raising new privilege
27 arguments, the government waived any privilege assertion over these documents. (Id.).
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1 The government contends that it is seeking to claw back the twenty-seven privileged
2 documents in good faith. (Id. at 3). The government notes that, in negotiating the claw back
3 agreement, the parties struck any reference to “inadvertence” and instead required that the claw
4 back simply be “in good faith.” The government contends that its claw back efforts followed the
5 protocols the parties agreed to and that the government is entitled to withhold these documents
6 from production. Finally, the government argues that even if the Rule 502 standards are applied,
7 the government should be permitted to claw back the twenty-seven disputed documents.
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9 II. DISCUSSION

10 A. UNITED DOES NOT DISPUTE IN THE CURRENT MOTION THAT THE 11 DOCUMENTS ARE PRIVILEGED 12

13 The government provided a privilege log claiming that twenty-six of the disputed
14 documents are protected by the attorney-client privilege and one document is protected by the law
15 enforcement privilege. United does not dispute, at least in the current motion, that the twenty-
16 seven documents at issue are privileged. Although United noted concerns about the government’s
17 log descriptions and “reserved all rights to challenge the government’s assertion of privilege,”
18 United declined to directly argue that the documents themselves are not privileged. (See Jt. Stip.
19 at 7, n. 6).
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21 United brought these documents to the attention of the government under the provision of
22 the parties’ document agreement that requires a party to notify the opposing party if it believes
23 privileged documents were produced. As such, United must have believed that these documents
24 to be arguably privileged when United brought the documents to the attention of the government.
25 Based on the above, the Special Master will treat the documents as privileged, but only for
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1 purposes of this Order. As noted, this finding of privilege is without prejudice to any subsequent
2 challenge by United to the privilege designation.

3 B. FEDERAL RULE OF EVIDENCE 502 GOVERNS THE MOTION

4 Whether the attorney-client privilege has been waived is a mixed question of law and fact.
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6 United States v. Sanmina Corp., 968 F.3d 1107, 1116 (9th Cir. 2020). Voluntarily disclosing
7 privileged documents to third parties (or adverse parties) will generally waive the attorney-client
8 privilege. Id. at 1116-1117. Disclosures that constitute an express waiver of the attorney-client
9 privilege are typically within the full control of the party holding the privilege. Id. at 1117 (citing
10 Bittaker v. Woodford, 331 F.3d 715, 719 (9th Cir. 2003)). Inadvertent disclosure, however, does
11 not necessarily waive the privilege. SEC v. Cassano, 189 F.R.D. 83, 85 (S.D.N.Y. 1999). In
12 appropriate circumstances, the disclosing party may demonstrate that such production should not
13 result in a waiver and the party is entitled to the return of the mistakenly produced documents. Id.
14 Federal Rule of Evidence 502 governs claw back agreements, which “essentially undo a document
15 production and allow the return of documents that a party belatedly determines are protected by
16 the attorney-client privilege.” Rajala v. McGuire Woods LLP, 2010 WL 2949582 (D. Kan. 2010)
17 (internal quotations and citations omitted).

18 During the hearing, the Special Master raised the question of whether the traditional
19 analysis under Rule 502 would govern the Motion, given that the Protective Order was drafted to
20 modify Rule 502’s protections. The Protective Order included a classic claw back provision, i.e.,
21 that a Producing Party may request the return of privileged material and set forth procedures for
22 such a request. The parties also agreed that the “Producing Party shall not request the return of
23 protected material the Receiving Party referred to, quoted, cited, etc., during the course of the
24 action without Objection from the Producing Party.” (Dkt. 198, p. 3, ll. 20-27). The Protective
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1 Order included a provision stating “If the Receiving Party determines that the Producing Party has
2 produced Protected Material, the Receiving Party shall notify the Producing Party and shall not
3 use the Protected Material until the Producing Party has had the opportunity to serve written notice
4 on the Receiving Party (i.e., begin the claw back process).” (Dkt. 198, p. 5, ll. 28; p. 6, ll. 1-11).
5 The parties deleted the requirement that a party demonstrate “inadvertence” and instead only
6 required that the claw back be made in good faith.
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8 Courts have found that while Rule 502 allows parties to modify individualized protective
9 orders, unless those modifications contain “concrete directives” regarding each prong of Rule
10 502(b), the prongs of Rule 502(b) remain the standard for evaluating a claw back request.
11 Particularly when the modifying language is not sufficiently clear and adequate, the prongs of Rule
12 502(b) control. See Great-West Life & Annuity v. American Economy Ins. Co., 2013 WL
13 5332410 at *12-13 (D. Nev. 2013) (quoting U.S. Home Corp. v. Settlers Crossing, LLC, 2012
14 WL 3025111 (D. Md. 2012) (“To find that a court order or agreement under Rule 502(d) or (e)
15 supplants the default Rule 502(b) test, courts have required that concrete directives be included in
16 the court order or agreement regarding each prong of Rule 502(b).”). Parties must adequately
17 articulate their desire to supplant the Rule 502 analysis in an agreement under 502 (d) or (e). Here,
18 the parties failed to express that desire in clear and adequate terms. There is no express statement
19 in the Protective Order demonstrating that the parties intended Rule 502 should not apply.
20 Accordingly, the Special Master will follow the established prongs of Rule 502(b) to determine
21 whether waiver occurred. Rule 502(b) holds that when a disclosure is made in a federal proceeding,
22 the disclosure does not operate as a waiver if (1) the disclosure is inadvertent; (2) the holder of the
23 privilege took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable
24 steps to rectify the error.
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1 i. Inadvertence

2 In Datel Holdings Ltd. v. Microsoft Corp., 2011 WL 866993 (N.D. Cal. 2011), the party
3 arguing for waiver claimed that “inadvertence” meant “unintended production,” not “ill-
4 considered” production or production made without bothering to acquire a complete understanding
5 of the four corners of a particular document. Id. at *4. The court rejected this position, concluding
6 that inadvertence could include any type of accidental or mistaken production, particularly when
7 that production occurs during the production of voluminous documents.
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9 Despite some review by the producing party of the documents in Datel, an unintentional
10 production of privileged material occurred. This was an “inadvertent” production because it was
11 completely accidental. Similarly, in the present case, the production of a small number of
12 privileged documents appears to be accidental and therefore “inadvertent” or a mistake.
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14 Even if Rule 502(b) does not apply here, because the parties intentionally deleted the word
15 “inadvertent” from their Protective Order, the Special Master would still conclude that the
16 government did not waive the privileges that they assert over the disputed documents. The removal
17 of the word “inadvertent” indicates the parties’ intent to eliminate the burden of showing an
18 accidental disclosure. Instead, a lower burden -- a showing that the claw back is made in “good
19 faith” -- is the burden. The sequence of events supports the government’s argument that its claw
20 back efforts were made in good faith. Initially, the fact that United brought to the government’s
21 attention the possibility that these produced documents were privileged undermines the argument
22 that the claw back was in bad faith. That is, these are not “smoking gun” documents that the
23 government, on its own, spontaneously decided to claw back because they are problematic for the
24 government’s legal position. Instead, once United notified the government that it discovered
25 privileged documents among a group of produced documents, the government took appropriate
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1 steps as outlined in the Protective Order, i.e., the government promptly requested that United return
2 the mistakenly produced documents.

3 As their Protective Order reflects, the parties entered into their claw back agreement for
4 this exact purpose. Due to “large quantities of information and documents” and the parties’ mutual
5 desire that discovery proceed in an expeditious and efficient manner without waiver of privileges,
6 the parties here agreed to their Rule 502 order. (Dkt. 198 at 2, ll. 4-13). The parties expressly
7 stated that the Protective Order “shall be interpreted to provide the maximum protection allowed
8 by Rule 502(d).” (Dkt. 198 at 3, ll. 17-19). Accordingly, whether a showing of “inadvertence” or
9 “good faith” is applied to the government’s conduct, the standard is satisfied.
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12 ii. Reasonable Steps To Review

13 The document collection and review process in this case was extensive and involved
14 millions of documents. In response to United’s 132 Requests for Production, the government
15 collected tens of millions of documents from the Department of Health and Human Services. The
16 government employed a technology assisted review process to review for responsiveness and then
17 conducted an eyes-on privilege review. The government produced approximately 2,490,000
18 documents from 195 custodians and logged approximately 7,500 documents withheld on the
19 attorney-client privilege, the work product doctrine, or the law enforcement privilege. (Jt. Stip.
20 at 16, ll. 5-17). The government also withheld 20,000 documents based on the deliberative process
21 privilege. After United challenged the government’s assertion of the deliberative process privilege,
22 the government conducted a second review of the 20,000 documents focused only on the
23 deliberative process privilege. (Jt. Stip. at 16, ll. 25-28). The Magistrate Judge later ordered those
24 documents produced, and the District Judge upheld that order.
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1 After the District Judge ordered the government to produce the 20,000 documents within
2 a short period, the government promptly complied with the court's order. The government
3 produced documents on June 13 and June 20, 2019, and subsequently revised its privilege log for
4 approximately 1,700 documents that continued to be withheld based on attorney-client privilege
5 and other grounds. (*Id.* at 18, ll. 1-4). Although the government did not review every page of
6 the 20,000 documents, it appears that more than fifty percent were subject to an "eyes-on" review.
7 (Jt. Stip. at 17, ll. 5-6). While it is possible that additional privilege review could have been done,
8 this level of review given the quantity of documents at issue, the court's orders, and the parties'
9 Protective Order, was reasonable. It is understandable that the government did not conduct an
10 additional review given that the District Judge ordered the government to disclose a significant
11 quantity of documents in less than two weeks.

14 The government reasonably relied on the protections of the Protective Order to avoid
15 additional review and delay. Had the government not proceeded in this manner, it would have
16 been necessary to seek additional time from the court to conduct a more thorough review of the
17 20,000 documents. An additional motion or ex parte application would have added another burden
18 for the court and further delay. Rule 502 was specifically designed to avoid such problems. The
19 government took reasonable steps to review under these circumstances.

21 iii. Reasonable Steps To Rectify

22 The government took reasonable steps to rectify the error. As soon as United notified the
23 government that potentially privileged documents had been produced, the government
24 immediately exercised its claw back rights. When the privilege holder objects immediately upon
25 discovery of the inadvertent disclosure, Rule 502(b)(3) is satisfied. Luna Gaming San Diego v.
26 Dorsey & Whitney, 2010 WL 275083 at *5 (S.D. Cal. 2010); see also California Inst. of Tech. v.
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1 Broadcom Ltd., 2018 WL 1468371, at *4 (C.D. Cal. 2018) (declining to find waiver where
2 producing party promptly acted to rectify error). Furthermore, the “inadvertent production of a
3 relatively low proportion of documents in a large production under a short timetable due to mistake
4 should be and usually is excused.” Luna, at *4 (citing Kandel v. Brother Int’l Corp., 683 F. Supp.
5 2d 1076, 1085 (C.D. Cal. 2010)). Here, the relatively low proportion -- twenty-seven documents
6 out of 20,000 -- under a short deadline imposed by the District Judge means that the mistake should
7 be excused. Because the production was inadvertent, reasonable steps were taken to prevent
8 disclosure, and reasonable steps were taken to rectify the error, Rule 502 mandates that waiver
9 cannot be found.
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12 C. THE GOVERNMENT IS NOT PRECLUDED FROM ASSERTING THE
13 ATTORNEY-CLIENT OR LAW ENFORCEMENT PRIVILEGE

14 United argues that the government’s claw back effort is “an inappropriate end-run around
15 the Court’s order.” (Jt. Stip. At 10, ll. 18-19). According to United, because the government failed
16 to assert the attorney-client and law enforcement privileges during the deliberative process
17 privilege briefing, the government is precluded from asserting these privileges. (Id.). While the
18 Special Master agrees that it would have been ideal if the Government had raised all defenses to
19 production in a single motion, the Special Master disagrees that the Government’s failure to do so
20 constitutes the type of gamesmanship or wrongful conduct that precludes raising those privileges
21 now.
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24 United cites multiple decisions holding that a party may not assert new privileges after
25 losing a motion to compel production of the same documents withheld under a different privilege.
26 Courts have noted that it is more efficient to require a party to raise all objections in one motion,
27 instead of piecemeal motion practice. See e.g., In re Honeywell Int’l, Inc. Sec. Litig., 230 F.R.D.
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293, 299 (S.D.N.Y. 2003) (“[P]arties generally must ‘raise all objections at once, rather than in staggered batches, so that discovery does not become a game.’” (citation omitted)). Raising new objections or privileges after a court has considered objections on an earlier motion can be evidence of bad faith. Again, the Special Master agrees that the better practice is to raise all objections in a single motion. However, a determination of bad faith conduct is highly fact specific and generally turns on a finding of gamesmanship or wrongful intent.

A close examination of the cases cited by United reveals that each one involved a far more egregious set of circumstances than the present case and did not include consideration of Rule 502. These cases reveal situations where the party asserting privilege was trying to game the system and courts did not wish to reward that behavior. For example, in Gen. Elec. Co. v. Johnson, 2007 WL 433095 (D.D.C. 2007), the court was clearly frustrated by the parties’ litigation over privilege issues for nearly two years. The EPA withheld over 6000 documents, asserting the deliberative process privilege, the attorney-client privilege, and the work product doctrine. After the privilege issues were fully briefed, on all privilege grounds, and after the Court ordered a significant amount of documents produced, the EPA continued to withhold over 4000 documents and asserted (or reasserted) various privileges over those documents. The court found that the EPA’s re-assertion of certain privileges, after full briefing and decisions on the merits, smacked of gamesmanship. The EPA’s troubling behavior of withholding large quantities of documents, after the court ordered the documents produced, and then making new or renewed privilege claims over 4000 documents is far more egregious conduct than the current claw back of twenty-seven documents.

In Banks v. Office of the Senate Sergeant-at-Arms, 233 F.R.D. 1 (D.D.C. 2005), another case cited by United, the party asserting the attorney-client privilege raised the privilege after the close of discovery, after omitting the documents from its privilege log, after it submitted

1 documents for in camera review and after the court ordered the documents produced. The conduct
2 of the party in Banks was significantly more abusive than the government's conduct here.

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4 United also argues that because United referred to some of the disputed documents in a
5 prior motion, the Protective Order precludes the government from clawing them back now. While
6 it is true that the Protective Order includes language prohibiting a Producing Party from "clawing
7 back" material that the Receiving Party has referred to, quoted, cited or relied upon, the Special
8 Master finds that this language does not bar the government's claw back effort. The reasonable
9 interpretation of the Protective Order's language is that it exists to prevent a party from clawing
10 back a specific document that an opponent relied upon to make a substantive argument, i.e. as
11 evidence in furtherance of an argument. That is, if a party specifically relies upon a produced
12 document in a court proceeding, their opponent cannot claw back that document after the party has
13 used it to support an argument. Here, the documents were referenced broadly, as part of a
14 discovery motion, but were not identified with any specificity in support of a particular argument.
15 As such, the Protective Order does not bar the government's claw back efforts simply because the
16 twenty-seven documents were included in a larger group of documents attached to a prior motion.
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1 III. CONCLUSION

2 The government acted in good faith when it clawed back the twenty-seven disputed
3 documents and did not waive the attorney-client or law enforcement privilege. Furthermore, the
4 government is not precluded from asserting the attorney-client or law enforcement privilege over
5 the twenty-seven documents. Accordingly, United's Motion to Compel is denied. However, the
6 Special Master's decision to permit the claw back is without prejudice to any future challenge by
7 United to the designation of these documents as privileged.
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10 **DATE: November 9, 2020**

DocuSigned by:
Hon. Suzanne Segal (Ret.)
2B739185DE71459
Hon. Suzanne H. Segal (Ret.)

PROOF OF SERVICE

RE: United States ex rel. Poehling v. United Health Group, Inc., et al.
Case ID: KEERX

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action. My business address is 633 West 5th Street, Suite 1000 Los Angeles, CA 90071

On November 9, 2020 I served the **ORDER DENYING WITHOUT PREJUDICE UNITED'S MOTION TO COMPEL** on the following parties. Placing a true copy to all parties as follows:

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Executed on November 9, 2020 at Los Angeles, California.

Alisa Martinez
Alisa Martinez
Signature Resolution