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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA *ex rel.*
BENJAMIN POEHLING,

Plaintiff,

v.

UNITEDHEALTH GROUP, INC. *et al.*,

Defendants.

CASE NO. 2:16-cv-08697-FMO(SSx)

**NOTICE OF LODGING OF
SPECIAL MASTER'S ORDER
DENYING PLAINTIFFS' MOTION
TO COMPEL FINDING OF
WAIVER OF ATTORNEY CLIENT
PRIVILEGE**

1 **TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that on May 13, 2022, the Honorable Suzanne
3 Segal (Ret.), Special Master in this Action, issued the attached Order Denying
4 Plaintiffs' Motion to Compel Finding of Waiver of Attorney Client Privilege.
5 Special Master Segal instructed the Parties to file the Order with the Court.

6 A true and correct copy of the Order Denying Plaintiffs' Motion to Compel
7 Finding of Waiver of Attorney Client Privilege is attached hereto as **EXHIBIT A**.

8
9 Dated: May 20, 2022

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14 By: /s/ David J. Schindler
15 David J. Schindler
16 Attorneys for UnitedHealth Defendants
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EXHIBIT A

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3 **UNITED STATES DISTRICT COURT**
4 **CENTRAL DISTRICT OF CALIFORNIA**
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8 UNITED STATES OF AMERICA *ex rel.*
9 BENJAMIN POEHLING,

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11 Plaintiff,

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13 v.

14 UNITEDHEALTH GROUP, INC. *et al.*,

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17 Defendants.
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CASE NO. 2:16-cv-08697-FMO (SSx)

[Discovery Document: Referred to
Special Master Suzanne H. Segal]

20
21 **ORDER DENYING PLAINTIFFS'**
22 **MOTION TO COMPEL FINDING**
23 **OF WAIVER OF ATTORNEY**
24 **CLIENT PRIVILEGE**
25
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On March 22, 2022, Plaintiffs United States of America and relator Benjamin Poehling ("Plaintiffs") filed a motion to compel (the "Motion"). The Motion seeks to compel a finding that Defendant UnitedHealth Group ("UnitedHealth") waived the attorney-client privilege or work product doctrine by providing deposition testimony that mentioned conversations with counsel and by disclosure of notes regarding a meeting between UnitedHealth and CMS. On April 8, 2022, United Health Group, Inc. ("UnitedHealth") filed an Opposition. On May 3, 2022, the Special Master held

1 a hearing on the motion to compel. For the reasons discussed below, the motion to
2 compel is DENIED.

3 4 **I. PLAINTIFFS' CONTENTIONS**

5
6 According to Plaintiffs, UnitedHealth has raised two related "state of mind"
7 defenses, both of which result in a waiver of privilege. Plaintiffs' arguments are
8 summarized below:

9
10 First, UnitedHealth affirmatively asserts that, by not deleting
11 unsupported diagnosis codes it submitted to CMS for risk adjustment
12 payments, and thereby not returning those payments to CMS, it acted
13 with a "good faith understanding" of its legal obligations. In particular,
14 UnitedHealth contends that two senior executives believed that CMS
15 rules permitted UnitedHealth to retain risk adjustment payments for
16 diagnosis codes it knew were unsupported by beneficiaries' medical
17 records. That assertion alone waives privilege as to the subject matter of
18 UnitedHealth's understanding of its legal obligations to delete
19 unsupported codes, because UnitedHealth has injected into this case the
20 issue of its understanding of the law. Fundamental fairness permits
21 Plaintiffs to examine documents and information that could support or
22 refute UnitedHealth's assertion, including all advice and discussion that
23 UnitedHealth conducted regarding its legal obligations to delete
24 unsupported codes. The simple and well-established rule that privilege is
25 waived upon assertion of this type of "good faith" defense is based in
26 fairness. No jury can fairly evaluate whether UnitedHealth and its
27 personnel held their belief in good faith without seeing all the advice they
28 received about the obligation to delete unsupported codes – including not

1 only advice UnitedHealth contends it relied on but also advice it ignored
2 or disregarded. [Plaintiffs] must be permitted to discover evidence that
3 UnitedHealth did not believe in good faith that it was following the law
4 if its own lawyers were telling it otherwise.

5
6 In addition, UnitedHealth's waiver is now unquestionably
7 established because relevant deposition testimony has revealed that the
8 "good faith understanding" that UnitedHealth relies on was based on
9 conversations with UnitedHealth counsel. The only two people
10 UnitedHealth contends held the belief that UnitedHealth was permitted
11 to retain risk adjustment payments for known unsupported diagnosis
12 codes, senior executives Scott Theisen and Brian Thompson, have both
13 failed to identify a single nonprivileged source for this belief and asserted
14 privilege and refused to testify about any conversations they did have on
15 the subject. Yet, UnitedHealth continues to withhold as privileged the
16 very discussions that formed the basis for Theisen's and Thompson's
17 asserted belief, as well as other documents and information that may have
18 contradicted it. UnitedHealth's conduct is akin to an impermissible
19 selective waiver of privilege: having its executives testify about legal
20 arguments informed by counsel, while withholding all of UnitedHealth's
21 internal, contemporaneous discussions with counsel about its obligations
22 to delete unsupported diagnosis codes. UnitedHealth is not permitted to
23 avoid a privilege waiver by having lay witnesses regurgitate views fed to
24 them by UnitedHealth's attorneys. UnitedHealth's use of privileged
25 advice as a sword (UnitedHealth's contention that it acted with a "good
26 faith understanding" that was based on legal advice), waives its ability to
27 use privilege as a shield (withholding documents and information
28 relating to that "good faith understanding").

1 Second, UnitedHealth affirmatively asserts that it relied in good
2 faith upon statements of employees of the Department of Health and
3 Human Services (HHS), relating to an April 2014 meeting between
4 UnitedHealth and HHS. UnitedHealth again has affirmatively injected its
5 good faith belief into the case and by doing so waives privilege about that
6 belief and the circumstances of UnitedHealth's discussions with HHS.
7 UnitedHealth's contention raises questions that cannot be evaluated
8 without disclosure of related documents and information UnitedHealth
9 continues to withhold as privileged – namely, whether it actually relied
10 upon statements by HHS and whether it did so in good faith. Third, in
11 addition to waiving privilege through its contentions, UnitedHealth has
12 waived privilege by affirmatively and selectively producing and using its
13 own attorney notes in litigation. UnitedHealth is not permitted to
14 selectively use privileged attorney notes that it believes are helpful to its
15 case, while withholding as privileged other attorney-client information
16 that UnitedHealth deems are not helpful and it does not intend to use. The
17 selective production and use of privileged attorney notes waives privilege
18 as to the subject matter of the notes.

19
20 (Plaintiffs' Memorandum of Points and Authorities at 2-3).

21 22 **II. UNITEDHEALTH'S CONTENTIONS**

23
24 In its Opposition, UnitedHealth argues that Plaintiffs fundamentally
25 misunderstand and misrepresent the law on waiver as well as UnitedHealth's position
26 in this action. UnitedHealth asserts that it is not injecting its attorney's advice or
27 opinions into this case. Instead, two witnesses identified confidential conversations
28 with counsel -- among other sources of information -- for their belief about the

1 regulations at issue in this litigation. UnitedHealth asserts that these limited deposition
2 answers do not result in waiver of the privilege. UnitedHealth's argument is
3 summarized below:

4
5 [A]s three circuits—the Third, Fifth, and Second—have held, a defendant
6 impliedly waives its privileges only when the defendant intends to rely
7 on advice of counsel or otherwise introduce into evidence or describe the
8 *substance* of a *privileged* communication. A defendant does not
9 impliedly waive privilege merely by introducing the testimony of lay
10 witnesses as to their understanding of a contract or regulation. In arguing
11 to the contrary, the government badly distorts the rule adopted in the
12 Second Circuit, and relies heavily on the lone appellate decision by the
13 Eleventh Circuit, which predates the decisions by the other circuits
14 rejecting such a rule. While the Ninth Circuit has not issued a
15 precedential ruling on whether an implied waiver can arise in the absence
16 of a party introducing or relying on privileged communications, in a 2016
17 unpublished opinion the Ninth Circuit followed the majority rule, and it
18 has *never* found an implied waiver except in cases where the party has
19 relied for its claim or defense on privileged communications. This Court
20 should likewise follow the majority rule. Moreover, a threshold
21 requirement for existence of an implied waiver in the Ninth Circuit is that
22 the party have voluntarily interjected the privilege by raising a *new issue*
23 into a case such as by bringing a lawsuit, asserting a counterclaim, or
24 raising an affirmative defense. Here, it is the *government* that interjected
25 the issue of United's understanding of the contract and any alleged legal
26 obligations; United simply wishes to rebut an issue that the government
27 has chosen to litigate. Unlike an affirmative defense, which comes into
28 play after the plaintiff has proven all of the elements of its case, and thus

1 introduces a new issue, introducing evidence merely to rebut an element
2 of the *plaintiff's* case does not. Every district court case within this
3 Circuit on which the government relies that did not involve a defendant
4 relying on the content of a privileged communication thus involved a
5 defendant raising an affirmative defense. The government cites no case
6 in this Circuit, and defendants are aware of none, in which a defendant
7 was held to have impliedly waived privilege by introducing non-
8 privileged testimony to rebut an element of the plaintiff's case. In the
9 alternative, the government half-heartedly suggests that the deposition of
10 two United witnesses, and the disclosure in discovery of notes of a
11 meeting taken by a United in-house lawyer has already resulted in a
12 waiver (although even the government admits that United could avoid a
13 waiver by disavowing certain contentions). Those alternative arguments
14 are baseless. Each of United's deponents testified as to their lay
15 understanding, as chief financial officers who signed the contracts at
16 issue, of the comparative nature of the payment model and of a
17 contractual attestation that diagnoses codes submitted by a plan be
18 "accurate" given the presence of unsupported codes in CMS's own data
19 and that such unsupported codes are already built into the payment rates
20 set by CMS. These are all issues well within the competence of these lay
21 witnesses, as CMS itself assumes when it requires that the attestations be
22 signed by plans' CEOs or CFOs and not by lawyers. Neither deponent
23 revealed the substance of any privileged communication, and the
24 government woefully distorts their testimony when it claims—falsely—
25 that the witnesses identified lawyers as the only sources of their
26 understandings. As for the meeting notes, those notes simply set forth the
27 statements made by participants in a non-privileged meeting between
28 CMS and United and could just as easily have been taken by a non-

1 lawyer. They do not contain any legal analysis or reveal any attorney
2 client communications, and thus are not privileged. United thus did not
3 selectively waive privilege in disclosing them. The most that the
4 government could argue is that the notes are fact work product, but under
5 Ninth Circuit law disclosure of fact work product would not waive either
6 attorney client privilege or opinion work product, and thus would not
7 provide a basis for granting the government's motion here which seeks
8 disclosure of legal advice and analysis.

9
10 [UnitedHealth's Opposition at 1-2].
11

12 **III. FACTUAL BACKGROUND**

13

14 UnitedHealth contends that it has never asserted an advice of counsel defense in
15 this litigation. Moreover, UnitedHealth in not asserting any affirmative defenses,
16 including that of good faith. Instead, UnitedHealth argues that it intends to hold the
17 government to its burden of proof on each element of the FCA case it brought with a
18 variety of evidence, including CMS public pronouncements and testimony from CMS
19 officials that agree with United's comparative understanding of "accuracy," as well as
20 testimony of its own lay witnesses as to their understanding of the contracts they signed
21 and programmatic obligations under this payment model. That evidence will be
22 introduced to rebut the government's allegation that UnitedHealth knew it had an
23 obligation to delete every unsupported code it identified, regardless of the
24 corresponding errors in CMS's data, and that UnitedHealth knowingly violated that
25 obligation. UnitedHealth asserts that it will not rely on or introduce any privileged
26 communications in rebutting the government's case.
27
28

1 Two of UnitedHealth's officers—Brian Thompson and Scott Theisen—
2 testified about their understanding of UnitedHealth's obligations. Thompson and
3 Theisen both previously served as CFO of UnitedHealth's Medicare & Retirement
4 business, which required them to be personally familiar with how the MA payment
5 model works, the impact of errors in CMS's own data, the comparative basis for MA
6 payment, and what data "accuracy" means in this context. In fact, CMS rules require
7 that an MA plan's CEO or CFO certify that the data the plans submits are accurate, *see*
8 42 C.F.R. § 422.504(l), and thus CMS expects CFOs like Thompson and Theisen, both
9 of whom signed such attestations, to have an understanding as to what accurate data
10 means.

11
12 Thompson testified about the basis for his understanding that UnitedHealth
13 would not have an obligation to delete a specific code it knew was unsupported, unless
14 it knew its overall rate of unsupported codes materially exceeded the rate of such codes
15 in CMS's data and by how much. Ex. J, Thompson Dep. Tr. at 357-69. He described
16 discussions with other non-legal personnel on these topics, including non-privileged
17 discussions on the relationship between the error rate in MA data and the inherent
18 error rate in FFS data, the lack of a requirement for MA plans to look for unsupported
19 codes, and when deletes were required. *Id.* at 108, 142-150, 319, 345-48. Among
20 other things, Theisen testified that the basis of his knowledge regarding how MA plans
21 are paid came from discussions with relator Ben Poehling and other non-lawyer
22 employees of UnitedHealth and Optum, including Stephanie Will, Jeff Dumcum, Jon
23 Bird, and others. Ex. K, Theisen Dep. Tr. at 74-76. Theisen explained that the basis of
24 his understanding of accuracy of MA data came from his professional background,
25 discussions with business colleagues, and common sense—and although he also noted
26 he discussed the issue with counsel, he never described the content of those
27 discussions. *Id.* at 157. Theisen also testified at length about the bases of his
28 understanding of risk adjustment, including that his education on the topic was largely

1 informal, but that he learned by “getting deeper into the day to-day,” and that he
2 “would learn more about what people did and how they did it and why they did it.”
3 Id. at 75:12-14; see also id. at 76:10-12 (recalling training presentations but stating
4 that “most of my knowledge came from interactions and discussions with individuals
5 that were closer to risk adjustment than I would have been”). Theisen recalled having
6 discussions about risk adjustment that helped inform his views with Ben Poehling,
7 Jeff Dumcum, Stephanie Will, Jon Bird, “and compliance people as well as actuarial
8 members.” Id. at 76:24-77:1.

9
10 Plaintiffs’ motion to compel also relates to UnitedHealth’s responses to the
11 government’s fifteenth and sixteenth interrogatories, in which UnitedHealth stated
12 that it intends to negate a showing of scienter by the government by introducing
13 evidence that UnitedHealth reasonably relied on statements and advice that HHS
14 officials made to UnitedHealth, as well as by introducing testimony from certain
15 UnitedHealth officers as to their lay understanding of their contractual and regulatory
16 obligations with respect to the accuracy of diagnosis data. In responding to both
17 interrogatories, UnitedHealth made clear that it is not intending to waive any
18 privileges, that it is not asserting an advice of counsel defense nor will it rely on the
19 content of any privileged communication in support of its defense, and that it is not
20 asserting an affirmative defense of good faith but is merely intending to rebut the
21 government’s burden of proof as to scienter. Plaintiffs also assert that UnitedHealth’s
22 response to Interrogatory No. 7 referenced attorney notes from an April 29, 2014
23 meeting. (Motion at 10).

24
25 According to Plaintiffs, once they chose to pursue a False Claims Act (“FCA”)
26 claim against UnitedHealth that requires the government to prove as one of its
27 essential elements that UnitedHealth knowingly violated a legal obligation to repay
28 money to the government, UnitedHealth was left with only two choices: either (1)

1 decline to put on evidence, such as in the form of testimony of its lay witnesses as to
2 their understanding of the contract and CMS pronouncements, to negate the
3 government's burden of proving scienter, thereby ceding a key part of the
4 government's case; or (2) waive its attorney-client and work product privileges. This
5 is so even if, as here, UnitedHealth has disclaimed any intent to rely on or proffer any
6 privileged communication and has likewise made clear that it is not asserting any
7 affirmative defense of good faith, but merely wishes to rebut the government's burden
8 of proof.

9
10 Plaintiffs suggest that the deposition of two UnitedHealth witnesses, and the
11 disclosure in discovery of notes of a meeting taken by a UnitedHealth in-house lawyer
12 has already resulted in a waiver. However, each witness testified as to their lay
13 understanding, as chief financial officers who signed the contracts at issue, of the
14 comparative nature of the payment model and of a contractual attestation that
15 diagnoses codes submitted by a plan be "accurate" given the presence of unsupported
16 codes in CMS's own data and that such unsupported codes are already built into the
17 payment rates set by CMS. Neither deponent revealed the substance of any privileged
18 communication. As for the meeting notes, those notes set forth the statements made
19 by participants in a non-privileged meeting between CMS and UnitedHealth and could
20 have been taken by a non-lawyer. They do not contain any legal analysis or reveal any
21 attorney client communications.

1 **IV. DISCUSSION**

2
3 **A. UNITEDHEALTH'S DISCOVERY RESPONSES AND DEPOSITION**
4 **TESTIMONY DO NOT WAIVE THE ATTORNEY-CLIENT**
5 **PRIVILEGE OR WORK PRODUCT DOCTRINE**
6

7 Plaintiffs' brief cites to certain Ninth Circuit decisions for the broad rule that
8 waiver may occur when a party affirmatively asserts the advice of counsel or the
9 substance of an attorney-client communication as a "sword" in litigation. This broad
10 rule, however, fails to address the specific circumstances presented by the limited
11 testimony of the two UnitedHealth witnesses here. Furthermore, in their original
12 motion, Plaintiffs rely primarily on an older Eleventh Circuit decision, Cox v.
13 Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994), to support their
14 contention that waiver applies to any situation where a party's state of mind and
15 communications with counsel are mentioned. As UnitedHealth notes, the
16 overwhelming majority of published circuit decisions apply a more focused rule than
17 the one adopted in Cox.¹
18

19 UnitedHealth discusses Rich v. Bank of America, N.A., 666 Fed. Appx. 635,
20 641-422 (9th Cir. 2006) in its Opposition.² In Rich, the plaintiffs asserted that the
21 defendant, Bank of America ("BANA"), engaged in an "affirmative act" that placed
22 communications between BANA and its attorneys at issue and waived the attorney-
23 client privilege. The Ninth Circuit rejected this argument, finding:
24
25
26

27 ¹ See U.S. Commodity Futures Trading Comm. v. Southern Trust Metals, Inc., 2015
28 WL 11233138 at * 4 (S.D. Fla. 2015) (recognizing limited holding of Cox).

² As an unpublished decision, Rich lacks the value of precedent. See FRAP 32-1.

1 Although BANA discussed the existence of these communications, it did
2 not use their contents as a basis for any claims or defenses. Accordingly,
3 the district court properly denied the plaintiffs’ motion seeking a waiver
4 of the attorney-client privilege.

5
6 Rich, 666 Fed. Appx. at 641-42 (emphasis added). See also
7 Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc., 552 F.3d 1033, 1043 (9th Cir.
8 2009) (no waiver where the client “did not actually rely on an advice-of-counsel
9 defense” although conversations with counsel mentioned in testimony); KCC v.
10 AETNA, Inc., 2019 WL 8060670, *1-2 (C.D. Cal. 2019) (J. McDermott) (waiver
11 requires “affirmative reliance on contents of privileged communication” (citing
12 Rich)). While Rich is unpublished, it is nevertheless relevant here as persuasive Ninth
13 Circuit authority.

14
15 The majority of courts recognize that merely consulting a lawyer and
16 identifying the existence of privileged conversations is insufficient to cause a waiver
17 of the privilege. See e.g., Labertew v. Chartis Property Casualty Company, 2018 WL
18 1876901, *3–4 (D. Ariz. 2018), appeal dismissed, 2019 WL 2592626 (9th Cir. 2019)
19 (“Thus, to waive the privilege under (Arizona law), ‘something more is required’ than
20 merely consulting with counsel and taking action based on the advice received.”); see
21 also State Farm v. Lee, 13 P.3d 1169, 1166 (Ariz. 2000) (“We assume client and
22 counsel will confer in every case, trading information for advice. This does not waive
23 the privilege. We assume most if not all actions will be taken on counsel’s advice.
24 This does not waive the privilege. Based on counsel’s advice, the client will always

1 have subjective evaluations of its claims and defenses. This does not waive the
2 privilege.”)³

3
4 In their motion, Plaintiffs also rely on U.S. v. Bilzerian, 926 F.2d 1285 (2d Cir.
5 1981), but the Special Master finds that Plaintiffs’ have misinterpreted Bilzerian’s
6 holding. Bilzerian does not stand for the rule that a defendant who refers to
7 conversations with counsel while discussing a good faith defense has waived
8 privilege. Instead, Bilzerian recognized that if the defendant (in a criminal matter)
9 offered specific testimony about legal advice on direct examination, that testimony
10 might provide grounds for cross-examination into privileged material. However, the
11 Second Circuit made it clear that the waiver would depend on the substance of the
12

13
14 ³ In a published opinion, In re Itron, Inc., 883 F.3d 553 (5th Cir. 2018), the Fifth
15 Circuit rejected the notion that a party waived the attorney-client privilege merely by
16 including allegations in a complaint that might involve or relate to attorney-client
17 communications. Because the plaintiff never asserted reliance on legal advice as a
18 basis for recovery, no waiver occurred. A Fifth Circuit decision that is factually similar
19 to the present case relied upon Itron to reject a waiver argument. In In Re
20 Schlumberger Technology Corp., 818 Fed. Appx. 304, 306 (5th Cir. 2020), the Fifth
21 Circuit again recognized that a client only waives the privilege when the client
22 affirmatively relies on attorney-client communications to support a claim or
23 defense. Id. at 558 (citations omitted). The panel noted that, when a client “uses
24 confidential information against his adversary,” it cannot simultaneously use the
25 privilege as a shield. Id. (citing Willy v. Admin. Review Bd., 423 F.3d 483, 497 (5th
26 Cir. 2005)). At the same time, however, the Fifth Circuit cautioned that asserting a
27 claim to which privileged material is merely relevant does not waive the privilege.
28 Instead, the client “must rely on privileged advice from his counsel to make his claim
or defense.” Id. at 561 (quoting In re Cty. of Erie, 546 F.3d 222, 229 (2d Cir. 2008);
citing Rhone-Poulenc Rorer Inc. v. Home Indem., 32 F.3d 851, 863 (3d Cir. 1994))
(emphasis in original). While the Fifth Circuit applied Mississippi privilege doctrine
in Itron, the court noted that Mississippi has adopted the general approach to this
question, supported by treatises and federal cases. Id.; accord McKee v. PetSmart,
Inc., 71 F. Supp. 3d 439, 443 (D. Del. 2014) (no waiver of privilege by invoking FLSA
good-faith defense).

1 direct testimony and the purpose for which that testimony was offered. Bilzerian, 926
2 F.2d at 1294.

3
4 In Plaintiffs' Reply Brief, Plaintiffs raise new arguments omitted from the
5 motion itself. Plaintiffs' Reply discusses U.S. v. Amlani, 169 F.3d 1189 (9th Cir.
6 1999), and describes Amlani as establishing a "clear three-prong test for implied
7 waiver." Plaintiffs' Reply argues that Amlani adopted the test set forth in Hearn v.
8 Rhay, 68 F.R.D. 574, 581 (E.D. 1975), and that the Hearn test controls the present
9 case. Plaintiffs contend that Amlani supplies the "rule of decision in implied waiver
10 cases." (Reply at 2, ll. 23-35).

11
12 In Amlani, a convicted defendant asserted that the prosecutor's criticism of his
13 lawyer violated the defendant's Sixth Amendment right to counsel. According to the
14 defendant, the prosecutor's criticism caused him to substitute in new counsel who
15 ultimately provided him with ineffective assistance. The Amlani defendant's claim
16 clearly placed his privileged communications at issue because his reasons for
17 changing counsel (likely reflected in the privileged communications) were central to
18 the defendant's claim for relief.

19
20 The Ninth Circuit applied Hearn's three-pronged test to the Amlani facts. Id.
21 at 1195. Under the Hearn test, the court initially considers whether the party is
22 asserting the "privilege as the result of some affirmative act, such as filing suit." Id.
23 (citing Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1326 (9th
24 Cir. 1995) and Hearn). The court then examines whether "through this affirmative
25 act, the asserting party puts the privileged information at issue." Id. Finally, the
26 court evaluates whether "allowing the privilege would deny. . . access to information
27 vital to its defense." Id.
28

1 The Ninth Circuit found that the affirmative act was the defendant's motion to
2 set aside his conviction which placed the privileged information directly at issue.
3 Moreover, the Amlani court concluded that the government demonstrated a "real
4 need" for the privileged information as the defendant's motion required disclosure of
5 communications relating to his attorney's substitution. The Amlani court also
6 observed that when "the sought-after evidence is only one of several forms of indirect
7 evidence about an issue, the privilege has not been waived." Amlani, 169 F.3d at 1195
8 (internal citations and quotations omitted.).
9

10 Here, under the Amlani and Hearn test, no implied waiver occurred. In contrast
11 to Amlani's motion to set aside the defendant's conviction, UnitedHealth's alleged
12 "affirmative act" only involved responding to Plaintiffs' discovery and claims.
13 Although UnitedHealth has asserted its good faith understanding of the regulations as
14 a defense, that assertion is not the type of affirmative act courts have looked to for
15 waiver. Instead, the contested testimony and discovery responses reflected
16 UnitedHealth's response to the government's burden to prove scienter. Like the
17 defendant in Rich, UnitedHealth did not engage in the type of affirmative act
18 necessary for waiver.⁴ In addition, the "sought-after evidence" is only one of several
19

20 ⁴ In Rich, the defendant discussed the existence of attorney-client communications but
21 did not "use their contents as a basis for any claims or defenses." Rich, 666 Fed.
22 Appx. at 640. Other courts have recognized that a mere denial of bad faith does not
23 result in a waiver. Allstate Ins. Co. v. Clancy, 936 N.E.2d 272, 277–78 (Ind. Ct. App.
24 2010); Bertelsen v. Allstate Ins. Co. 796 N.W.2d 685, 703 (S.D. 2011);
25 WLR Foods, Inc. v. Tyson Foods, Inc. 65 F.3d 1172, 1187 (4th Cir. 1995) (where the
26 court held that "[w]e find the district court's decision limiting discovery ... to be a
27 sound one under Virginia law. Knowledge of the substantive advice given to the WLR
28 Board was not reasonably calculated to lead to a determination regarding good faith
... and the district court acted within its discretion in limiting Tyson's access to that
information").

1 forms of indirect evidence, i.e., the witnesses here testified that they also relied upon
2 HHS statements and “common sense” for their understanding of the regulations.

3
4 Plaintiffs nevertheless argue that waiver occurred because UnitedHealth asserts
5 that it relied upon another form of indirect evidence, i.e., HHS statements:

6
7 UnitedHealth affirmatively asserts that it relied in good faith upon
8 statements of employees of the Department of Health and Human
9 Services (HHS), relating to an April 2014 meeting between UnitedHealth
10 and HHS. UnitedHealth again has affirmatively injected its good faith
11 belief into the case and by doing so waives privilege about that belief and
12 the circumstances of UnitedHealth’s discussions with HHS.
13 UnitedHealth’s contention raises questions that cannot be evaluated
14 without disclosure of related documents and information UnitedHealth
15 continues to withhold as privileged - namely, whether it actually relied
16 upon statements by HHS and whether it did so in good faith.

17
18 (Motion at 2-3).

19
20 However, reliance on statements by HHS representatives to UnitedHealth’s
21 representatives has no bearing whatsoever on the alleged waiver of privilege. In three
22 of the five cases on which the government relies for this particular argument, the party
23 asserting the privilege relied on the content of privileged communications in support
24 of its claim or defense. See Bodega Investments, LLC v. United States, 2009 WL
25 2634765, at *2 (S.D.N.Y. Aug. 21, 2009) (plaintiff claimed reliance on a
26 representation of an IRS agent “as communicated to him by his lawyer” making “the
27 substance of what his lawyer told him about the representation” a necessary element
28 of plaintiff’s case); Synalloy Corp. v. Gray, 142 F.R.D. 266, 268, 270 (D. Del. 1992)

(counterclaim plaintiff claimed fraudulent representation in formation of an agreement that had been negotiated entirely by its outside counsel, and thus could not prove its understandings without introducing the content of its conversations with counsel); McLaughlin v. Lunde Truck Sales, Inc., 714 F. Supp. 916, 919-20 (N.D. Ill. 1989) (defendant submitted “their counsel’s affidavit as proof of their good faith,” and cannot “control which of their counsel’s interpretations are discoverable”). In the present case, UnitedHealth is not relying on any privileged communication. Moreover, in all five of the cases relied on by the government the party asserting privilege had interjected the issue affirmatively by bringing a suit or counterclaim or raising an affirmative defense. Minebea Co. Ltd. v. Papst, 355 F. Supp. 2d 518 (D.D.C. 2005) (bringing suit); United States v. Exxon Corp., 94 F.R.D. 246 (D.D.C. 1981) (affirmative defense); McLaughlin, 714 F. Supp. at 917 (affirmative defense); Bodega, 2009 WL 2634765, at *1 (bringing suit); Synalloy, 142 F.R.D. at 267 (counterclaim). In none of these cases was a party found to waive privilege by raising reliance on statements merely to rebut an essential element of the plaintiff’s claim.⁵

Under Plaintiffs’ argument, anytime a defendant asserts “good faith” and acknowledges that it discussed the “good faith” issue with counsel, a waiver of privilege would occur. However, a party impliedly waives privilege only when it affirmatively injects the actual privileged communications into the case to support its claims or defenses. If Plaintiffs’ arguments were correct, then waiver of the privilege would occur every time a client discussed a regulation with counsel and later attempted to defend a lawsuit by claiming a good faith understanding of the regulation.

⁵ Plaintiffs’ reliance on Natural-Immunogenics Corp. v. Newport Trial Group, 2018 WL 6138160 (C.D. Cal. 2018), is misplaced. Natural-Immunogenics is distinguishable because defendants there expressly reserved the right to introduce privileged information in support of their defenses at trial. Here, UnitedHealth has made the opposite representation, i.e., UnitedHealth has affirmatively represented it has no intent to rely on privileged information at trial.

1 This result would discourage parties from consulting counsel and undermine the
2 purpose of the privilege.

3
4 In the present case, UnitedHealth's witnesses were simply responding to
5 counsel's questions in a deposition regarding who they talked to about the applicable
6 regulations. Merely referencing conversations with a party's attorney in answer to a
7 deposition question does not create a waiver. While the attorney's advice may be
8 relevant to the matters in issue, the privilege applies as the interests it is intended to
9 protect are still served by confidentiality. See United States v. White, 887 F.2d 267,
10 270 (D.C. Cir. 1989) (Ruth Bader Ginsburg, J.) (rejecting the argument that the
11 defendant "waived his attorney-client privilege ... by putting the government to its
12 proof on the issue of his criminal intent" because "[a] rule thus forfeiting the privilege
13 upon denial of mens rea would deter individuals from consulting with their lawyers to
14 ascertain the legality of contemplated actions" and "would therefore undermine the
15 animating purpose of the privilege"). Plaintiffs failed to demonstrate that
16 UnitedHealth waived the attorney-client privilege.

17
18 **B. THE DISCLOSURE OF NOTES REGARDING A NON-**
19 **CONFIDENTIAL MEETING DOES NOT WAIVE THE**
20 **ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT**
21 **PROTECTION**

22
23 Plaintiffs assert that UnitedHealth's production of notes describing a discussion
24 at a non-confidential meeting results in waiver of either the attorney-client privilege
25 or work product doctrine. According to Plaintiffs, these UnitedHealth attorney notes
26 relate to the same April 2014 meeting with HHS and the same purported advice from
27 HHS upon which UnitedHealth contends it relied in good faith. Mason Decl., Ex. 2,
28 at 14. The attorney notes contain a legend reading "Privileged and Confidential [¶]"

1 Attorney Work Product [¶] Attorney/Client Communication.” Id. According to
2 Plaintiffs, UnitedHealth not only selectively produced these attorney notes to
3 Plaintiffs, but also relied on them in responding to Interrogatory 7 and affirmatively
4 introduced them as a deposition exhibit and used them to question at least one witness
5 thus far. Plaintiffs also note that UnitedHealth asserts privilege over other
6 contemporaneous communications among meeting participants about the same
7 meeting, claiming these were “prepared in anticipation of litigation.” See Mason
8 Decl., Ex. 8.

9
10 UnitedHealth states that Thad Johnson, an in-house counsel for UnitedHealth,
11 prepared the notes regarding a 2014 meeting. The meeting involved representatives
12 of UnitedHealth and CMS. Mr. Johnson’s notes memorialize the non-privileged
13 discussion between UnitedHealth and CMS. See S.E.C. v. Roberts, 254 F.R.D. 371,
14 383 (N.D. Cal. 2008) (notes reflecting meeting between lawyer and non-clients are
15 not subject to attorney-client privilege). Accordingly, it was appropriate for
16 UnitedHealth to produce the non-privileged notes in discovery. Moreover, as noted
17 by UnitedHealth, the mere fact that someone labeled the document as “privileged”
18 does not determine whether or not a document is actually entitled to protection.
19 Finally, the notes are not work product because they do not represent an attorney’s
20 thoughts and mental impressions regarding the attorney’s legal work. Loftin v. Bande,
21 258 F.R.D. 31, 35 (D.D.C. 2009) (“if notes . . . transcribe an unprivileged conversation
22 . . . work product does not apply.”). Accordingly, the production of Mr. Johnson’s
23 notes fails to constitute a waiver of either attorney-client privilege or the work product
24 doctrine.

1 **V. CONCLUSION**

2

3 Plaintiffs fail to establish grounds for waiver of the attorney-client privilege or

4 work product doctrine. The motion to compel is DENIED.

5

6 IT IS SO ORDERED.

7

8 Dated: May 13, 2022

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 May 13, 2022 I served the **ORDER DENYING PLAINTIFFS' MOTION TO COMPEL FINDING OF WAIVER OF ATTORNEY CLIENT PRIVILEGE** on the following parties. Placing a true copy to all parties as follows:

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Executed on May 13, 2022 at Los Angeles, California.

Alisa Martinez
Alisa Martinez
Signature Resolution