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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 Plaintiffs,

12
13 v.

14 UNITEDHEALTH GROUP, INC. *et al.*,
15
16
17
18 Defendants.

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

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

19
20 **ORDER RE IN CAMERA REVIEW**
21 **AND ORDER RE DISCLOSURE**

22 **I. PLAINTIFFS' CONTENTIONS**
23

24 Plaintiffs challenge UnitedHealth's assertion of privilege over certain
25 categories of documents:

26 In 2012, UnitedHealth implemented its Claims Verification
27 program to delete diagnoses that it found were not supported based on its
28 review of the medical record, and thereby repay CMS for payments
received for those unsupported codes through reduced future revenues.

1 Shortly after implementing the program, UnitedHealth recognized that
2 deleting unsupported diagnosis codes through its CV program reduced
3 its expected revenue by hundreds of millions of dollars, and it began
4 entering an accrual each year on its financial statements to account for
5 that reduction in revenue. By February 2014, UnitedHealth estimated that
6 the value of the diagnosis codes it was required to delete did or would
7 result in a reduction of \$458-500 million in revenue associated with
8 payment years 2012-2014 reflecting the amounts to be repaid to CMS for
9 payments received for unsupported codes. In early 2014, however,
10 UnitedHealth's Medicare & Retirement ("M&R") division, the corporate
11 division of UnitedHealth that managed UnitedHealth's health plans,
12 found itself facing an unexpected budget shortfall of approximately \$500
13 million. M&R executives made a "management commitment" to
14 UnitedHealth's senior executives to "find \$250 million to cut [this
15 budget] miss in half." They did so primarily by cancelling the CV
16 program, which conveniently resulted in exactly the \$250 million budget
17 effect UnitedHealth sought. UnitedHealth did not repay to CMS \$125
18 million relating to the cancellation of the CV program for 2014, and \$125
19 million relating to the cancellation of CV deletes relating to prior years.
20 UnitedHealth's CV program was inherently a business activity.
21 UnitedHealth's termination of its CV program was inherently a business
22 decision, driven by M&R's "management commitment" to "find" \$250
23 million quickly to help close an unexpected budget shortfall. The
24 company's operation of the CV program, its decision to terminate An
25 MAO submits a delete to CMS's electronic payment system which
26 removes the previously submitted code from that system and results in
27 reductions in future payments to the MAO to repay CMS for payments
28 made for the unsupported code. the CV program and not repay CMS for

1 payments received for unsupported codes, the execution of that decision,
2 and any analysis of the financial impact of terminating the program were
3 all primarily business activities. Thus, documents concerning the
4 operation of CV, reasons why UnitedHealth cancelled CV, what factors
5 UnitedHealth considered in reaching that decision, how the cancellation
6 helped alleviate UnitedHealth's budget shortfall and save money, how to
7 operationalize the termination of the CV program, and what to do with
8 the diagnosis codes that were in process in the program that were created
9 primarily for a business purpose are not privileged. UnitedHealth
10 continues to withhold many of those business-related documents. The
11 law is clear that UnitedHealth cannot cloak in secrecy documents created
12 primarily for business purposes by including a lawyer in the
13 communication. That a lawyer sent or received a document does not
14 change the "primary" business purpose of the document. Otherwise,
15 companies could shield every business decision from discovery by the
16 simple expedient of including a lawyer in the communication.

17
18 (Plaintiffs' Brief Re Defendants' Privilege Log at 1-3)(citations omitted).
19

20 **II. UNITEDHEALTH'S CONTENTIONS**

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22 UnitedHealth disputes Plaintiffs' arguments regarding privilege:
23

24 The government's challenge to privilege rests on three contentions: (1)
25 the documents do not contain attorney authors or recipients or only
26 contain one attorney among multiple non-attorney recipients; (2) the
27 documents relate to a business operation, United's Claims Verification
28 ("CV") program, and therefore are not privileged unless the "primary

1 purpose” of these documents was to request, give, receive, or facilitate
2 legal advice; (3) documents in the In Camera Submission are not
3 privileged because they include third parties, which the government
4 asserts breaks privilege. Each of these contentions fail. Also pursuant to
5 paragraphs 1–2 of the Order, on March 2, 2022, United lodged a random
6 sample of 50 documents and the Plaintiffs’ selection of 50 documents for
7 the Special Master’s in camera review (“In Camera Submission”).
8 United is submitting this Supplemental Memorandum and the documents
9 and declarations described herein in camera. United expressly reserves
10 and is not waiving any privilege or protection to which it is entitled. The
11 government’s first and third contentions rest on the argument that
12 documents that do not include attorney recipients or authors, or were sent
13 to third parties, are not privileged, reasoning that these materials must
14 have been created for a business—not a legal—purpose. This argument
15 fails. The presence or absence of attorneys on a document is not
16 dispositive of privilege, and, in fact, courts have recognized privilege
17 extends to documents that do not include lawyers if the document reflects
18 work done at an attorney’s behest or work created for the purpose of
19 seeking legal advice. Similarly, the presence of third parties does not
20 automatically break privilege, and, as discussed below, courts have
21 recognized that, where third parties were engaged under privilege and at
22 the direction and oversight of lawyers, the documents are privileged. The
23 government’s second contention—claims that documents related to a
24 business program, like CV, inherently relate exclusively and primarily to
25 a business purpose, not a legal one—similarly fails. This claim is simply
26 incorrect, reflecting a misguided understanding of both the law of
27 privilege and the factual context related to a review process called CV
28 and to United’s MA business in 2014. As detailed in the Declaration of

1 Keith Dobbins, Deputy General Counsel, UnitedHealthcare, Medicare &
2 Retirement, from January 2014 to May 2014 United's Legal Department
3 was providing legal advice and requesting analyses necessary to facilitate
4 their rendition of legal advice related to the CV program and the broader
5 MA business. As described in Mr. Dobbins' Declaration, in January
6 2014, the Centers for Medicare and Medicaid Services ("CMS") issued
7 a proposed rule regarding Medicare Advantage medical record reviews,
8 79 Fed. Reg. 1918, 2000 (January 10, 2014) ("Proposed Medical Record
9 Review Rule"). The Proposed Medical Record Review Rule in part
10 sought to require Medicare Advantage Plans that perform chart
11 Citations to "Ex." materials refer to exhibits to the Declaration of David.
12 J. Schindler filed herewith. reviews to work to identify diagnosis codes
13 that are not supported by a medical record—as determined by the
14 subjective judgment of a coder. CMS's issuance of the Proposed Medical
15 Record Review Rule in January 2014 naturally caused confusion at
16 United because United was already conducting these reviews through its
17 CV program. In light of this confusion and the potential impact to
18 United's MA business, on April 29, 2014, representatives from United
19 met with representatives from CMS regarding the Proposed Medical
20 Record Review Rule and sought clarity regarding the implications and
21 meaning of this Rule ("April 2014 United/CMS Meeting"). Following
22 the April 2014 United/CMS Meeting and throughout the January to June
23 2014 time period, lawyers in United's various Legal Departments were
24 involved in providing legal advice to the business on the potential
25 implications of the Proposed Medical Record Review Rule as well as its
26 potential impact on United's CV program and MA business in general.
27 Many of the documents included in the In Camera Submission reflect
28 input from lawyers including: (1) direct involvement where lawyers

1 requested analyses necessary for them to render legal advice; (2)
2 discussion of legal advice; and (3) the provision of legal advice.
3 Additionally, as discussed in the Declarations of Mr. Dobbins and Dave
4 Thomas, former Deputy General Counsel at OptumInsight, the United
5 Legal Departments were aware of the ongoing Poehling investigation and
6 anticipated reasonably that litigation could arise from the investigation.
7 Given that the Poehling investigation involved allegations related to
8 United's CV program, United's Legal Departments—including both Mr.
9 Dobbins and Mr. Thomas—were often requesting analyses informed by
10 their mental impressions, ideas, and strategies as they contemplated
11 litigation arising from the government investigation. See *id.* The
12 documents reflecting analyses of Messrs. Dobbins and Thomas are
13 therefore protected from disclosure by the attorney work product
14 doctrine. Accordingly, the documents included in United's In Camera
15 Submission are protected by the attorney-client privilege or the attorney
16 work product doctrine because the documents at issue satisfy the
17 requirements of applicable case law. In short, the documents included in
18 the In Camera Submission were properly withheld because: (1) the
19 documents were either created primarily or exclusively for a legal
20 purpose; (2) they are protected by the attorney work product doctrine,
21 which applies in light of the ongoing Poehling investigation and
22 reasonable anticipation of litigation related to the same issues described
23 in the documents included in the In Camera Submission; (3) the
24 documents not authored by attorneys or that have limited attorney
25 recipients are privileged because they reflect analyses done at the
26 direction of lawyers necessary for the lawyers to render legal advice; and
27 (4) the documents that involve third parties like FTI Consulting, Inc.
28 ("FTI") and PricewaterhouseCoopers LLP ("PwC") reflect analyses

1 conducted under privilege at the specific direction and oversight of
2 lawyers in United's Legal Departments.

3
4 (UnitedHealth's Supplemental Memorandum Regarding Its Privilege Assertions Over
5 100 Documents Submitted For In Camera Review at 1-4) (citations omitted).

6
7 **III. DISCUSSION**

8
9 UnitedHealth contends that the withheld documents satisfy the "primary
10 purpose test," i.e., a dual-purpose communication is protected by the attorney-client
11 privilege if "the primary purpose of the communications is to give or receive legal
12 advice, as opposed to business or tax advice." (UnitedHealth Supp. Memo. At 4).
13 Plaintiffs contend that the documents relate to the CV program or broader MA
14 business and therefore are not privileged. Plaintiffs argue that "The company's
15 operation of the CV program, its decision to terminate the CV program and not repay
16 CMS for payments received for unsupported codes, the execution of that decision and
17 any analysis of the financial impact . . . were all primarily business decisions."
18 (Plaintiffs' Brief at 3). Plaintiffs assert that such business decisions are not privileged.

19 In support of its privilege assertions, UnitedHealth submitted detailed
20 declarations from key UnitedHealth attorneys who appear on the privilege log and
21 either provided legal advice or requested information necessary to facilitate the
22 provision of legal advice to UnitedHealth. UnitedHealth also submitted exhibits
23 demonstrating that its counsel requested various analyses from third parties to assist
24 in the provision of legal advice.

25 The Special Master agrees that a party seeking to withhold discovery based
26 upon the attorney-client privilege must prove that "the primary purpose of the
27 communication [was] to give or receive legal advice, as opposed to business or tax
28 advice." In re Grand Jury, 13 F.4th 710, 714 (9th Cir. 2021). However, if an attorney

1 provides advice on a business decision or requests a business analysis as part of the
2 attorney's legal advice, then the communication is privileged. See e.g. United States
3 v. Chen, 99 F.3d 1495, 1501-2 (9th Cir. 1996) (noting that "[a] client is entitled to hire
4 a lawyer, and have his secrets kept, for legal advice regarding the client's business
5 affairs"); Staley v. Gilead Sciences, Inc., 2021 WL 4318403, at * 2-3 (N.D. Cal. 2021)
6 (communications made to provide legal advice on business decisions are privileged).

7
8 The Court in Henderson Apartment Venture, LLC v. Miller, articulated the
9 primary purpose standard within the context of corporate communications:

10 [W]hen the primary purpose of the communication is [to] discern the
11 legal ramifications of a potential course of action, that communication is
12 for a 'legal' purpose.... Communications made between in-house counsel
13 in his or her capacity as such and employees in the scope of their
14 employment, must be made with knowledge that they are speaking to in-
15 house counsel for the purpose of securing legal advice.
16 2011 WL 1300143, at *9 (D. Nev. March 31, 2011) (quoting Premiere Digital Access
17 Inc. v. Central Telephone Co., 360 F.Supp.2d 1168, 1174 (D. Nev. 2005)).

18
19 Courts also have applied the privilege to communications among non-lawyer
20 employees of a corporation where the purpose of the communication was to provide
21 information to counsel or aid counsel in providing legal advice. Upjohn Co. v. U.S.,
22 449 U.S. 383, 394 (1981); see also Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 203
23 (E.D.N.Y. 1988) (attorney-client privilege protects the giving of information from an
24 employee to a superior for transmission to lawyer if made for the purpose of securing
25 legal advice, requested by corporate superior, provided within the scope of the
26 employees' corporate duties and confidentiality maintained).
27 Pearlstein v. BlackBerry Limited 2019 WL 1259382, at *5 (S.D.N.Y., Mar. 19, 2019)
28 (same).

1 Drafts of documents which may ultimately become public may be privileged if
2 the drafts reflect a party's confidential request for legal advice. See In re Grand Jury
3 Subpoena Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1037 (2d
4 Cir.1984) (“although some of the documents appear to be drafts of communications
5 the final version of which might eventually be sent to other persons. . . we see no basis
6 for inferring that [defendant] did not intend the drafts-which reflect its confidential
7 requests for legal advice and were not distributed-to be confidential.”).

8
9 Almost all courts have concluded that the process of drafting and editing,
10 reflecting as it often does both requests for and provision of legal advice, is protected
11 by the attorney-client privilege. See Kelley v. Lempesis, 2015 WL 4720054, at *4
12 (N.D. Ill. 2015); Acosta v. Target Corp., 281 F.R.D. 314, 321 (N.D.Ill.2012) (finding
13 under the federal privilege that “[c]ounsel's comments on, and revisions to, drafts of
14 documents that [we]re intended for ultimate disclosure to third parties can be
15 privileged to the extent that the comments and revisions communicate legal advice
16 and have been maintained as confidential”); advice were privileged); Muller v. Walt
17 Disney Productions, 871 F.Supp. 678, 682 (S.D.N.Y.1994)(preliminary drafts of
18 contracts are generally protected by the attorney-client privilege because they reflect
19 client confidences, legal advice, and opinions of attorneys).

20
21 The Special Master reviewed the 100 in camera documents, the privilege logs,
22 and the declarations and exhibits filed with the briefs. The in camera documents were
23 selected pursuant to a protocol that required both parties to submit 50 documents for
24 review, for a total review of 100 documents. Following her review, the Special Master
25 orders certain documents disclosed and finds other documents subject to withholding
26 as privileged.

1 The following documents reflect factual information that may be segregated
2 from legal advice or are documents that UnitedHealth has already agreed to produce,
3 but were included in the 100 documents. Some documents include comments from
4 counsel or indicate where future information shall be inserted. These comments or
5 indications may be redacted as work product. UnitedHealth shall redact attorney-client
6 communications or work product from the documents and then shall produce the
7 redacted document to Plaintiffs:

8
9 Ex. 03-MAPLERVIV108697 - DRAFT STANDARD OPERATING
10 PROCEDURE DOCUMENT, ETC. (PRODUCE WITH REDACTIONS)

11
12 Exh. 06-MAPLPRIV061620 - [See ¶ 30, Schindler Declaration; UnitedHealth
13 releasing this document in full]

14
15 Exh. 08-MAPLPRIV062513 - DRAFT STANDARD OPERATING
16 PROCEDURE DOCUMENT, ETC. (PRODUCE WITH REDACTIONS);

17
18 Exh. 09-MAPLPRIV062513 - DRAFT STANDARD OPERATING
19 PROCEDURE DOCUMENT, ETC. (PRODUCE WITH REDACTIONS)

20
21 Exh. 40-MAPLPRIV208441 - [See ¶ 30, Schindler Declaration, UnitedHealth
22 releasing this document in full];

23
24 Exh. 56-MAPLPRIV061180 - [See ¶ 30, Schindler Declaration, UnitedHealth
25 releasing this document in full];

26
27 Exh. 80-MAPLPRIV134000 - See ¶ 30, Schindler Declaration, UnitedHealth
28 releasing this document in full];

1 Exh. 99-MAPLPRIV254305 - DRAFT POLICY RE OPTUM RISK
2 ADJUSTMENT OPERATIONS (PRODUCE WITH REDACTIONS FOR WORK
3 PRODUCT OR ATTORNEY-CLIENT COMMUNICATIONS).

4
5 All in camera documents not mentioned above contain information that either
6 reveals attorney-client communications or, after consideration of the document in
7 conjunction with the declarations of UnitedHealth's counsel, the exhibits, and the
8 privilege log, the communications were made for the primary purpose of providing
9 legal advice or reflect work product. As such, the withheld documents are privileged
10 and need not be disclosed.

11
12 Any documents ordered disclosed or redacted and disclosed must be produced
13 to Plaintiffs within ten days¹ of the date of this Order.

14
15 IT IS SO ORDERED.

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18 Dated: May 31, 2022

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

Hon. Suzanne H. Segal (Ret.).

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¹ See FRCP 6(a)(1).

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 31, 2022 I served the **ORDER RE IN CAMERA REVIEW AND ORDER RE DISCLOSURE** on the following parties. Placing a true copy to all parties as follows:

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- | | |
|--------------------------|--|
| () BY U.S. MAIL: | I caused such envelope(s), with postage fully prepaid, to be placed in the U.S. Mail at Los Angeles, California. |
| () BY FACSIMILE: | I caused such document to be sent via facsimile to each person. |
| (X) BY ELECTRONIC MAIL: | I caused such document to be sent via electronic mail to each person. |
| () BY PERSONAL SERVICE: | I caused such envelope to be delivered by hand to the office of the addressee. |
| (X) STATE: | I declare under penalty of perjury under the laws of the State of California that the above is true and correct. |
| () FEDERAL: | I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. |

Executed on May 31, 2022 at Los Angeles, California.

Alisa Martinez
Alisa Martinez
Signature Resolution