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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

UNITEDHEALTH GROUP, INC. *et al.*,

Defendants.

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

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

SPECIAL MASTER'S ORDER RE  
PLAINTIFF'S BRIEF RE HANS  
DUTT

**I. DEFENDANTS' CONTENTIONS**

Defendants challenge the United States' assertion of privilege over 48 documents that reflect communications with Dr. Hans Dutt, a consultant of the Centers for Medicare and Medicaid Services (CMS), as summarized below:

Senior government officials at CMS recognized that diagnosis code errors in fee-for-service (FFS) data negatively impact payments to healthcare plans participating in Medicare Advantage (MA). In 2012, CMS publicly

1 announced that it was calculating a FFS Adjuster (or Model Calibration  
2 Factor) and would apply it to offset any “overpayments” associated with  
3 diagnosis code errors in MA plan data that CMS identified. CMS  
4 recognized that payments to MA plans are accurate—even if the MA plan  
5 has some unsupported codes in its data—if the rate of unsupported codes  
6 in the MA plan data does not exceed the rate of unsupported codes in FFS  
7 data. CMS officials, working together with outside consultants, calculated  
8 ranges for the FFS Adjuster varying from approximately 5 to 8% percent.  
9 These analyses were conducted by government officials and outside  
10 consultants without the involvement of any government lawyers. In short,  
11 the individuals responsible for overseeing the CMS payment models  
12 recognized that a FFS Adjuster was necessary and appropriate to account  
13 for a mathematical error that CMS observed when it evaluated whether  
14 a plan was “overpaid” as a result of diagnosis coding errors. But then the  
15 lawyers got involved. In 2017, recognizing from United’s filings that the  
16 existence of a FFS Adjuster would undermine their theory of False Claims  
17 Act liability in this case, DOJ and OGC attorneys intervened in the analysis  
18 and apparently persuaded CMS to reverse course. The agency declared  
19 in 2018 that—contrary to its earlier public announcement—no FFS  
20 Adjuster was required in determining overpayments to MA plans.

21 The government’s claim of privilege is overbroad. The attorney-  
22 client privilege does not extend to ordinary course analyses and  
23 communications undertaken by Dr. Hans Dutt, a third-party government  
24 subcontractor retained to perform non-privileged work. Moreover, sharing  
25 otherwise privileged information with Dr. Dutt breaks any privilege.  
26 Neither his role nor his work qualify Dr. Dutt as a functional employee  
27 of CMS. First, Dr. Dutt’s role as a CMS subcontractor reflects none of  
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1 the factual characteristics courts typically highlight in finding functional  
2 employee status: he did not have unfettered access to all CMS  
3 systems/records; he was not authorized to speak on behalf of CMS; he was  
4 not physically located at CMS facilities; and no one from CMS directly  
5 supervised his work. As described by one senior CMS official, Dr. Dutt  
6 was an “outsider.” The government itself did not treat him as a functional  
7 employee for any purpose other than to assert privilege in this case: The  
8 government failed to produce his materials in discovery in the same way it  
9 produced materials from CMS employees. The government never  
10 directly issued Dr. Dutt a litigation hold, in either this matter or a related  
11 APA litigation involving the FFS Adjuster.; and unlike CMS employees,  
12 Dr. Dutt is represented by his own counsel, a private, non-governmental  
13 attorney.

14 Second, his duties and responsibilities were no different than the  
15 duties and responsibilities of numerous other government contractors who  
16 assisted on the FFS Adjuster over a ten-year period whose work did not  
17 necessitate involvement with lawyers and whose documents have been  
18 produced. The government has not claimed that any of the other  
19 contractors who performed work on the FFS Adjuster were functional  
20 employees and is unable to explain why Dr. Dutt is entitled to special  
21 treatment: Dr. Dutt was not hired by attorneys, did not report to attorneys,  
22 and there is no evidence that Dr. Dutt conducted his work in consultation  
23 with or at the direction of attorneys. In fact, the government has identified  
24 no other litigation—*ever*—in which any federal agency has claimed a third-  
25 party contractor (let alone a subcontractor with no direct relationship with  
26 CMS between 2017 and 2019) was a functional employee for purposes  
27 of maintaining a claim of privilege.  
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1 (Defendants’ Opp’n. to Pltf’s Brief Re Hans Dutt at 1-4) (citations  
2 omitted).

3  
4 **II. PLAINTIFF S’ CONTENTIONS**

5  
6 Plaintiff United States (“Plaintiff”) disputes UnitedHealth’s arguments  
7 regarding its assertion of privilege over communications with Hans Dutt as  
8 summarized below:

9  
10 Typically, the presence of third parties on otherwise privileged  
11 communications would waive the attorney-client privilege. Here, however,  
12 Dr. Dutt was not simply a third party. Rather, he was acting as a functional  
13 equivalent to an employee of CMS, and therefore his inclusion on privileged  
14 communications does not waive the protections afforded by the attorney-  
15 client privilege. The 48 documents at issue relate to legal advice to CMS  
16 from OGC and DOJ attorneys on two topics: 1) CMS’s 2018 proposed rule,  
17 83 Fed. Reg. 54982 (Nov. 1, 2018) (“NPRM”), which cited an underlying  
18 Study and accompanying technical appendix (“the Study” and “the  
19 Appendix”), and CMS’s associated addendum to the Study (released June  
20 2019) (“the Addendum”)<sup>2</sup>, and 2) an Administrative Procedure Act case  
21 filed in the District Court for the District of Columbia on January 29, 2016,  
22 (collectively “APA Litigation”). Both centered on whether a Fee-for-  
23 service Adjuster (“FFSA”) is appropriate and necessary in the context of  
24 extrapolated Risk Adjustment Data Validation Audits (the NPRM) or  
25 recovering overpayments (APA Litigation). In order to provide CMS with  
26 legal advice regarding both the NPRM and the APA Litigation, attorneys  
27 for OGC and DOJ needed information, including often technical details,  
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1 regarding CMS's consideration of and calculation of a potential FFSA.  
2 Given the complex and technical nature of the FFSA analysis, from 2017  
3 through at least June 2019, OGC and DOJ attorneys needed Dr. Dutt's  
4 expertise to gain the technical understanding necessary to provide legal  
5 advice to CMS. Similarly, given Dr. Dutt's work for the agency, it was  
6 necessary for him to receive and understand the legal advice provided by  
7 OGC and DOJ on this topic. Since at least 2011, Dr. Dutt served as an  
8 independent statistical consultant and senior technical advisor for CMS,  
9 working closely with CMS employees on an assessment of the necessity of  
10 an FFSA. Since 2017, Dr. Dutt has worked with CMS's Center for Program  
11 Integrity ("CPI") and one of Dr. Dutt's primary projects during 2017-2019  
12 was drafting, analyzing, revising, commenting on, and finalizing the Study  
13 and Appendix, as well as the June 2019 Addendum. Dr. Dutt played a  
14 critical role in developing the underlying methodology and empirical  
15 analysis for the Study. Dr. Dutt was uniquely qualified to serve in this role  
16 because of his education and experience, including a PhD in Economics and  
17 significant experience in statistical analysis as a former government  
18 employee and contractor.

19 During the relevant time period, Dr. Dutt's work with CMS establishes  
20 that he was a functional employee. Dr. Dutt worked exclusively for CMS,  
21 his only client, on a daily basis with near-daily phone and email  
22 communications and near-weekly in person meetings with CMS employees.  
23 Dr. Dutt had duties and responsibilities consistent with a CMS employee,  
24 had access to confidential CMS information and systems while conducting  
25 this work, and was required to keep information he obtained in the course  
26 of his work confidential.

27 (Plaintiff's Brief re Hans Dutt at 1-3).  
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### III. DISCUSSION

Plaintiff contends that the attorney-client privilege extends to Mr. Dutt, a consultant, as a “functional employee” of CMS. (United States’ Br. at 3-4). Because of Mr. Dutt’s experience and duties, Plaintiff’s attorneys needed to communicate with Mr. Dutt to provide legal advice. (*Id.* at 2). According to Plaintiff, Mr. Dutt functioned as an employee because CMS was his only client, he interacted with CMS employees on a daily basis and his duties were consistent with those of employees. (United States Br. at 7, citing declarations). UnitedHealth contends that Plaintiff has no basis to assert privilege over communications shared with Dr. Dutt because he is a subcontractor, not an agent. In addition, Mr. Dutt’s normal duties did not involve legal advice, and his duties and access to confidential information are no different than those of other contractors working on the same project for whom the government has not asserted privilege based on a “functional employee” theory. (UnitedHealth Br. at 7-10).

The parties generally agree on the governing law. The Supreme Court has held that a corporation’s attorney-client privilege extends to communications between corporate employees and counsel as long as the communications are “made at the direction of corporate superiors in order to secure legal advice.” *Upjohn Co. v. United States*, 449 U.S. 383, 390-94 (1981). The proper inquiry for assessing the scope of the privilege in corporations is to determine which employees or agents possess relevant information the attorney needs to render legal advice to the corporation. *Id.* at 391-92. In *In re Bieter*, the Eighth Circuit considered whether communications between counsel and a consultant, or merely disclosed to the consultant, necessarily fall outside of the scope of the attorney-client privilege. *In re Bieter*, 16 F.3d 929, 934 (8th Cir. 1994). The court concluded that consistent with *Upjohn*, “it is inappropriate to distinguish between those on a client’s payroll and

1 those who are instead, and for whatever reason, employed as independent  
2 contractors.” *Id.* at 937. The court concluded that, because of the consultant’s  
3 involvement in the subject of the litigation, and because he likely possessed  
4 information no other person possessed, the consultant was precisely the sort of  
5 person with whom a lawyer would wish to confer confidentially in order to  
6 understand the company’s reasons for seeking representation. *Id.* at 938. The court  
7 found that while this individual served as a consultant, he was also the functional  
8 equivalent of an employee. *Id.* citing *McCaugherty v. Sifferman*, 132 F.R.D. 234,  
9 239 (N.D. Cal. 1990).

10 The Ninth Circuit has adopted the “functional employee” doctrine, holding  
11 that the attorney-client privilege extends to “functional employees” of an entity.  
12 *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010). “Functional employees” are  
13 agents of the corporation that fall within the privilege’s scope under *Upjohn*. In  
14 *Graf*, the Ninth Circuit adopted the reasoning of *In re Bieter Co.* and found that the  
15 privilege extended to communications between the entity’s attorneys and an outside  
16 consultant whose role was that of a functional employee. 610 F.3d at 1156-59. The  
17 consultant communicated with others on behalf of the entity, marketed the  
18 company’s insurance plans, managed company employees, and was authorized by  
19 the company to communicate with its attorneys regarding legal matters concerning  
20 the company. *Id.* *Graf* did not limit courts to any specific test or set of factors to use  
21 when evaluating whether a consultant is a “functional employee.”

22 Under these precedents, Dr. Dutt is a functional employee of CMS.  
23 According to Plaintiff, Dr. Dutt played a unique and integral role in working on  
24 CMS’s calculation and underlying statistical analysis of an FFSA. CPI employees  
25 relied on his statistical expertise because no one at CPI had the equivalent  
26 experience. Dr. Dutt also worked with CPI extensively on the Study and Appendix  
27 associated with the proposed rule. Dr. Dutt was a key developer in the methodology  
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1 for the Study and Appendix and his work with CPI was critical to their completion.  
2 For these reasons, the Special Master concludes that, like the consultants in *Bieter*  
3 and *Graf*, Mr. Dutt possessed unique information that the attorneys needed in order  
4 to provide legal advice. The Special Master also concludes that Dr. Dutt's duties  
5 were like those of an employee. Since at least 2011, Dr. Dutt has worked exclusively  
6 for CMS. He performed work for CMS on a daily basis and had daily or near-daily  
7 communications via phone or email with CMS employees. He had access to  
8 confidential information and systems while conducting this work. Further, one of  
9 Dr. Dutt's responsibilities was working with and providing direction on behalf of  
10 CMS to third-party contractors, specifically, providing "statistical guidance to CMS  
11 and contractors on payment error and validation analyses" for some of the contract's  
12 parts. For these reasons, the Special Master concludes that Dr. Dutt was a functional  
13 employee. Consequently, Dr. Dutt's communications with OGC and DOJ relating  
14 to the NPRM and the APA Litigation are covered by the attorney-client privilege.

15 UnitedHealth notes that the prime contract between CMS and SCG expressly  
16 disclaims agency or any relationship with the government other than being an  
17 independent contractor. UnitedHealth argues that such a disclaimer is a factor to be  
18 considered in evaluating whether a contractor is a functional employee.  
19 (UnitedHealth Br. at 4, citing *Fosbre v. Las Vegas Sands Corp.*, Case No. 2:10-cv-  
20 00765-APG-GWF, 2016 U.S. Dist. Lexis 5422, at \*17-20 (D. Nev. Jan. 14, 2016)).  
21 However, *Fosbre* also explains that the dispositive questions are whether the  
22 consultant performs duties similar to those that employees perform, and whether he  
23 therefore possesses information that would assist the attorneys in rendering legal  
24 advice. The disavowal of an agency relationship does not preclude a finding that a  
25 consultant is a functional employee. *Id.* at \*19. UnitedHealth also points to other  
26 employee "characteristics" of non-employees whom other courts found to be  
27 functional employees, which Dr. Dutt lacks. These characteristics were evidence  
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1 that a particular non-employee would have been someone who could help the  
2 entity's attorneys understand the context for the legal advice they were asked to  
3 provide. *See Bieter*, 16 F.3d at 938. Nonetheless, these factors are not absolute  
4 requirements for a finding that someone is a functional employee. Similarly, that  
5 Dr. Dutt was a subcontractor, not a contractor, is not dispositive of whether Mr. Dutt  
6 had special knowledge that the government attorneys would find helpful.  
7 UnitedHealth also argues that, in other contexts, courts reject the notion that federal  
8 contractors could be functional employees. (UnitedHealth Br. at 6, citing *Bernabe*  
9 *v. Office of Pers. Mgmt.*, 198 F. App'x 961, 965 (Fed. Cir. 2006); *Watts v. Office of*  
10 *Pers. Mgmt.*, 814 F.2d 1576 (Fed. Cir. 1987)). However, those courts were  
11 considering the contractors' claims for federal benefits, not whether an agency  
12 sharing privileged information with them waived any privilege. Accordingly, the  
13 Special Master concludes that Mr. Dutt is a functional employee of CMS and his  
14 communications with attorneys should be privileged, assuming those  
15 communications satisfy the requirements of the attorney-client privilege.

16 The Special Master finds it would be impractical for her to conduct an in  
17 camera review of the 48 privilege documents at issue until the decision regarding  
18 Mr. Dutt is final. That is, if UnitedHealth determines it is appropriate to seek review  
19 of the Special Master's functional employee finding, the Special Master shall not  
20 proceed to review the documents until the review is completed. A reversal of the  
21 functional employee finding would materially impact that review. The Special  
22 Master requests that UnitedHealth determine within 14 days if it intends to seek  
23 review with the District Judge of the Special Master's functional employee finding  
24 and notify the Special Master as well as all parties. If UnitedHealth intends to seek  
25 review, the Special Master shall delay any in camera review until after the District  
26 Judge issues an order on the request for review. If UnitedHealth declines to seek  
27 review, then the Special Master shall proceed with in camera review to determine if  
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1 the withheld documents satisfy the remaining elements of the attorney-client  
2 privilege, unless the parties notify her that no such review is necessary.  
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4 IT IS SO ORDERED.  
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7 Dated: July 27, 2022

DocuSigned by:

Hon. Suzanne Segal (Ret.)

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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 July 27, 2022 I served the **SPECIAL MASTER'S ORDER RE PLAINTIFF'S BRIEF RE HANS DUTT** 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.
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- ☐ 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 July 27, 2022 at Los Angeles, California.

Alisa Martinez  
Alisa Martinez  
Signature Resolution