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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
 GRANTING MOTION TO
 COMPEL REGARDING
 RELATOR DOCUMENTS**

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

PLEASE TAKE NOTICE that on September 12, 2022, the Honorable Suzanne Segal (Ret.), Special Master in this Action, issued the attached Order Granting Motion to Compel Re: Relator Documents. Special Master Segal instructed the Parties to file the Order with the Court. A true and correct copy of the Order Granting Motion to Compel Re: Relator Documents is attached hereto.

Dated: September 20, 2022

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

SPECIAL MASTER'S ORDER

GRANTING MOTION TO COMPEL RE
RELATOR DOCUMENTS

I. DEFENDANTS' CONTENTIONS

Defendants ("Defendants" or "UnitedHealth") challenge Relator Benjamin Poehling's ("Relator" or "Mr. Poehling") assertion of privilege over two documents created while he was employed at UnitedHealth, as summarized below:

Relator Benjamin Poehling worked at UnitedHealth from 2002 to December 2012. Mr. Poehling assumed the role of Director of Finance in 2005, a position he held until his termination from the company. While employed at UnitedHealth, Mr. Poehling created and stored two documents, Bates stamped MARA719365 and BPPRIV000002, on his UnitedHealth-issued laptop, which he now claims are protected by attorney-client privilege as being created in anticipation of litigation against UnitedHealth.

Mr. Poehling's claim of privilege fails because he cannot claim a reasonable

expectation of privacy. As part of his employment, Mr. Poehling was issued a UnitedHealth-owned laptop, and was provided with and trained on the company's policies and procedures regarding employee use of company-owned technology. These policies included the Principles of Ethics and Integrity ("Principles Policy"), Information Risk Management: Personnel Security Policy ("Personnel Security Policy"), and Information Risk Management: Security Monitoring and Response Policy ("Monitoring Policy"). UnitedHealth periodically trained its employees on these policies and records show that Mr. Poehling attended such trainings.

The Principles Policy provides that all communication systems, including phones, e-mail, Intranet, internet, and voice mail belong to UnitedHealth. The policy further allows limited reasonable personal use of UnitedHealth's communications systems but warns that the user should assume any communications are not private.

The Personnel Security Policy includes language that notifies UnitedHealth employees of the following: (1) UnitedHealth monitored usage of its information technology systems; (2) any information created, stored, transmitted, or received from UnitedHealth's information technology systems should not be considered personal or private; and (3) using UnitedHealth's information technology systems for any reason constituted consent to monitoring by authorized UnitedHealth employees or contractors. The Monitoring Policy warns of the same consent to monitor upon usage of any company-owned information technology systems. In addition, each time an employee turned on a UnitedHealth laptop, the laptop would display a pop-up message reminding the user that the computer belonged to UnitedHealth and requiring the user to acknowledge the message.

UnitedHealth not only has the ability to monitor its employees use of its technology, including laptop computers, it does so on a routine basis. For example, UnitedHealth has accessed employee e-mails from its central server without notifying the relevant employee, and UnitedHealth's eDiscovery, technology, and corporate security departments are able to access the entirety of any UnitedHealth laptop computer, including files saved on the computer's desktop or My Documents folder any time the computer is connected to

UnitedHealth's in-office network or through a virtual private network. Mr. Poehling therefore was on notice that UnitedHealth could and did access company-owned technology consistent with its policies, and he does not have an objectively reasonable expectation of privacy in his company-owned laptop.

(Defendants' Mtn. to Compel at 1-6) (citations omitted).

II. RELATOR'S CONTENTIONS

Relator disputes UnitedHealth's arguments regarding its assertion of privilege over the two documents Mr. Poehling created and stored on UnitedHealth's laptop computer as summarized below:

Mr. Poehling prepared the documents for the purpose of seeking legal advice and took reasonable precautions to maintain the confidentiality of his communications with counsel. His expectation of privacy is not destroyed simply because UnitedHealth was able to recover the documents. The presence of a reasonable expectation of privacy is a case-by-case determination that requires the detailed examination of all the surrounding facts.

As an initial matter, the two documents at issue were originally produced in late-2014, by UnitedHealth in response to a Civil Investigative Demand from the government. Approximately a year later, Mr. Poehling's counsel clawed back one of the documents, and UnitedHealth did nothing to challenge the claim of privilege until 2022. The other document was identified as potentially privileged three years after UnitedHealth's production, and was provided to Mr. Poehling's counsel, who determined that it indeed was created in confidence and to seek legal advice in anticipation of a potential lawsuit. Mr. Poehling has no recollection of saving the documents on his computer, and UnitedHealth provides no information to contradict that recollection.

UnitedHealth's computer and security policies are not inconsistent with an employee's expectation of privacy because the policies are focused on preserving the confidentiality and security of UnitedHealth's business information and on maintaining the

operation of UnitedHealth's systems. Additionally, UnitedHealth expressly authorizes employees to use its information technology systems, including its laptops, for limited personal use, and cautions that those files will not be backed up or protected. Moreover, access to laptops is limited; they are required to be password-protected and UnitedHealth warns that unauthorized attempts to access laptops is prohibited.

UnitedHealth's policies also state that information technology systems, including laptops, are overwritten, degaussed, or destroyed to help ensure information technology systems are sanitized of information once they are no longer needed or are to be re-used. Also, UnitedHealth's policies do not cover personal files on individual laptops. The statements about monitoring information technology systems and about an employee's expectation of privacy are found in a separate section from statements about personal use. Rather, the statements reserving UnitedHealth's right to access, monitor, and disclose contents within the "personal use" section are limited to phone calls, e-mail and voice mail messages, and internet usage. It does not address files saved on a laptop, and there is no other policy that clearly informs employees that UnitedHealth can and does read personal files on their laptops.

Finally, Mr. Poehling took steps to secure his communications with counsel. Mr. Poehling has a reasonable expectation of privacy because he does not recall intentionally saving the documents on his laptop, did not chose to intentionally send the documents over UnitedHealth's systems, and he did not intentionally choose to save them to any UnitedHealth-maintained shared drives.

(Relator's Opp'n to Mtn. to Compel at 1-6, 14) (citations omitted).

III. DISCUSSION

A. Relator Lacked A Reasonable Expectation of Privacy Over Documents Created on UnitedHealth's Laptop

UnitedHealth contends that Mr. Poehling has no reasonable expectation of privacy over two documents created and stored by Mr. Poehling, then-employee of UnitedHealth, on

UnitedHealth's laptop. According to UnitedHealth, several of UnitedHealth's policies warn employees that there is no expectation of privacy over any information created, stored, transmitted, or received from UnitedHealth's information technology systems. UnitedHealth can and does access and monitor information on employee's company-owned laptops. UnitedHealth further argues that Mr. Poehling was well aware of UnitedHealth's policies because he received copies of the company's policies and attended periodic training on company policies. Relator contends that UnitedHealth's policies expressly authorize limited personal use of its information systems technology, including laptops, and the statements concerning the expectation of privacy apply to phone calls, e-mail and voice mail messages, and internet usage, but not to documents created and stored on the laptop's hard drive or in the My Documents folder. Relator maintains that Mr. Poehling took reasonable precautions to keep the two documents private by not sending them using UnitedHealth's information systems technology, and by not storing the documents on a shared drive.

The parties generally agree that courts in the Ninth Circuit and elsewhere have applied a four-factor tests to assess whether an employee who has used company property to create or store documents had a reasonable belief that the information would be kept confidential. The factors are: (1) Is there a company policy banning personal use of computers or e-mails? (2) Does the company monitor use of its computers or e-mail?; (3) Does the company have access to the computers and all e-mails? and (4) Did the company notify the employee about these policies? *In Re Global Asia Crossing, LTD.*, 322 B.R. 247, 258 (S.D.N.Y. 2005); *In re Reserve Fund. Sec. & Derivative Litigation*, 275 F.R.D. 154, 159-60 (S.D.N.Y. 2011) (describing *Asia Crossing* test as "widely accepted"); *Eastman v. Thompson*, 2002 WL 894256, at *11 (C.D. Cal. Mar. 28, 2002). Applying the four factors requires a case-by-case factual determination. *Convertino v. U.S. Dep't of Justice*, 674 F. Supp. 2d 97, 110 (D.D.C. 2009). The burden of establishing each factor lies with the party asserting the privilege. *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010). Here, Relator has the burden.

Under this four-factor test, the Special Master concludes that Mr. Poehling has not met his burden of establishing a reasonable expectation of privacy for the two documents created and

stored on UnitedHealth's laptop while he was a UnitedHealth employee.

The first factor asks whether the company maintains a policy banning personal use of its computers or e-mails, i.e., its information technology systems. Here, UnitedHealth does not outright ban employees from using the company's information technology systems for personal use. Company policy allows "limited reasonable personal use," Principles Policy, Defs.' Mtn to Compel, Exh. E at 026, though it is not encouraged. *See* Personnel Security Policy, Defs.' Mtn to Compel, Exh. F at 049 ("All UnitedHealth Group information technology systems should be used primarily for UnitedHealth Group business purposes . . ."). UnitedHealth's policies further state that "[a]ll communication systems . . . belong to UnitedHealth Group" and that the user "should assume these communications are not private." Principles Policy, Exh. E at 026. Furthermore, the Personnel Security Policy states that "any and all information that is created/stored on or transmitted/retrieved from UnitedHealth Group information technology systems . . . should not be considered personal or private." Personnel Security Policy, Exh. F at 051.

Relator argues that privilege is not waived simply by an employee maintaining documents on a company's computer system. *See* Pl.'s Opp'n at 7, 9. The Special Master agrees. This fact, however, is not dispositive to finding an expectation of privacy and must be weighed against the other three factors, as discussed below. *See Aventa Learning, LLC v. K12, Inc.*, 830 F. Supp. 2d 1083, 1109 (W.D. Wash. 2011) (no expectation of privacy although personal use was allowed because employee received handbook which stated information is not private and employer maintained the right to search); *but see Mintz v. Mark Bartelstein & Assocs., Inc.*, 885 F. Supp. 2d 987, 997 (C.D. Cal. 2012) (expectation of privacy for personal use of phone that was partially paid for by employee and where employee never attested to reading employment manual or signed an acknowledgment of its terms).

The second factor asks whether the company monitors the use of its computers and e-mail. "[C]ourts have diverged on the issue of whether there must be evidence of actual monitoring or whether a policy reserving the right to monitor employee communications is sufficient to meet the second factor." *Bingham v. Baycare Health Sys.*, 2016 WL 397513, at *6 (M.D. Fla. July 20,

2016).¹ In this instance, however, UnitedHealth has both a policy notifying employees that it monitors computer usage and UnitedHealth provided evidence that it actually monitored computer usage.

UnitedHealth demonstrated that it maintains a policy that puts employees on notice that both usage of its communications system and usage of its information technology system is subject to monitoring by UnitedHealth. Specifically for its information technology system, which includes computers and laptops, UnitedHealth's Personnel Security Policy states that "UnitedHealth Group monitors usage of its information technology systems," that "any and all information that is created / stored on or transmitted / retrieved from UnitedHealth Group information technology systems . . . should not be considered personal or private," and that "[u]se of any UnitedHealth Group information technology system for any reason constitutes consent to monitoring . . ." Personnel Security Policy, Exh. F at 051; *see also* Monitoring Policy, United Mtn. to Compel, Exh. G at 057, 060.

Relator contends that the monitoring policy's omission of language specifying how UnitedHealth would monitor "personal files" suggests that "personal files" were excluded from the policy. (Opposition at 5). However, UnitedHealth's monitoring policy contained broad language ("any and all information") that clearly warned employees that all information – business or personal – would be subject to monitoring.

UnitedHealth has also demonstrated that it actually monitors computer usage. The Declaration of David Yerich, Director of eDiscovery at UnitedHealth, states that part of his responsibility is to lead teams in "monitoring and accessing UHG's computers" and "accessing, retrieving, and reviewing data created and/or stored on company-owned technology systems, including laptops" has been part of "formal policy" at UnitedHealth, and "standard practice."

¹ *Bingham* noted that the majority of courts find no reasonable expectation of privacy where an employer limits employees' personal use or otherwise restricts employees use of its system and notifies employees of its policy. *Bingham* also found that the majority of courts have relied on the existence of a workplace policy reserving the right to access and monitor employee communications rather than an actual showing that the employee accounts were monitored. *See Bingham*, 2016 WL 3917513 at * 4.

Decl. of David Yerich ¶¶ 4, 7, 10.

Relator argues that UnitedHealth's policies only apply to information "transmitted through any UnitedHealth communications systems," and not to documents stored on a laptop hard drive. Pl.'s Opp'n at 10-11. Many of the cases that Relator cites to support its contention discuss an employee's use of a personal web-based e-mail account on company property, *Bingham*, 2016 WL 3917513, at *9-*10, policies that were limited to "communications" only, *United States v. Nagle*, 2010 WL 3896200, at *1 (M.D. Penn. Sept. 30, 2010), or policies that did not expressly state that the company would monitor computer usage. *United States v. Hatfield*, 2009 WL 3806300, at *8 (E.D.N.Y. Nov. 13, 2009). As discussed above, UnitedHealth's policies not only broadly covered the usage of its "information technology system," but also stated that such usage would be monitored.

Therefore, the Special Master finds that UnitedHealth did maintain a policy that it reserved the right to monitor not only an employee's use of its communication systems, but also of "any and all information" from its information technology systems. UnitedHealth also demonstrated that it implemented and followed this policy. The Special Master therefore finds that this factor weighs against an expectation of privacy.

The third factor assesses whether the company has access to all its computers and e-mails. Here, the Yerich Declaration established that UnitedHealth maintained regular access to not just e-mail and other communications sent or received through its communication systems, but also access to computer or laptop hard drives. UnitedHealth's "Data and Technology Personnel possess full administrative privileges with respect to any company-owned computer, independent from the assigned user's login credentials. Consequently, Data and Technology Personnel may access, monitor, or modify an employee-owned computer without the user's awareness and without the user's unique login credentials." Yerich Decl. ¶ 8. Additionally, UnitedHealth installed EnCase forensic software as a standard practice on all company-owned computers, including Mr. Poehling's. *Id.* ¶ 12. EnCase is regularly used by the eDiscovery department "to collect information and data from company-owned computers." *Id.* ¶ 13. Encase can do this if the computer is connected to the company's computer network either in its offices or through a virtual

private network. *Id.* ¶ 12. These facts weigh against finding that Mr. Poehling had a reasonable expectation of privacy.

Courts have found that the third factor tipped in favor of the expectation of privacy when access to information from company-owned computers was pursued using forensic software only after the employee left the company, and not as a matter of course, *Sonrai Sys., LLC v. Romano*, 2020 WL 7027567, at *9 (N.D. Ill., Nov. 30, 2020), or where the employee used a company-owned computer only at a home office and not connected to the company's network. *Curto v. Med. World Commc'ns*, 2006 WL 1318387, at *5 (E.D.N.Y. May 15, 2006). Here, UnitedHealth has demonstrated that they have access to company-owned computers when they are connected to the computer network or virtual private network, and there is no assertion that Mr. Poehling used the laptop exclusively at home or that the laptop was never connected to UnitedHealth's computer network. The Special Master therefore finds that the third factor weighs against an expectation of privacy.

Finally, the fourth factor looks at whether the company notified the employee about these policies. According to UnitedHealth, all employees are required to complete data privacy and security trainings upon employment and periodically thereafter. Upon employment, employees are provided with the Principles Policy, the Personnel Security Policy, and Monitoring Policy. The Personnel Security Policy states that, among other things, UnitedHealth "monitors usage of . . . information technology systems," including, "but not limited to," communications sent or received and Internet activity of all employees and contractors. The Personnel Security Policy also provides that "any and all information that is created/stored on or transmitted/retrieved from" its computers "should not be considered personal or private" and employees should not have an expectation of privacy. Furthermore, the Personnel Security Policy notifies the employee that use of any company information technology system "constitutes consent to monitoring."

Mr. Poehling's employment records show that he received these company policies, attested to reading them, and received regular training regarding the policies. Moreover, Mr. Poehling's position in the company as a director also puts him on constructive notice of UnitedHealth's policies regarding usage of company-owned information systems technology. *See*

Aventa Learning, F. Supp. 2d at 1109 (“As a senior level manager, [the employee] was expected to know the contents of the company policies . . .”) (internal quotations omitted). The Special Master finds that the fourth factor weighs against finding that Mr. Poehling had a reasonable expectation of privacy in these two documents.

B. Work Product Doctrine Does Not Protect These Documents

Relator contends, in the alternative, that the two documents identified in the Motion to Compel are entitled to protection under the work product doctrine. The finding that the Relator lacks a reasonable expectation of privacy in these documents would apply equally to his assertion of the work product doctrine. In addition, if the doctrine applied here, it was waived by the Relator’s disclosure of these documents to his adversary. *See Long v. Marubeni America Corp.*, 2006 WL 2998671 at * 1 (S.D.N.Y. Oct. 19, 2006) (no work product protection when employee used company computer to create document).

IV. CONCLUSION

Accordingly, the Special Master finds that under the four-factor test articulated above, all factors weigh against a finding that Mr. Poehling had a reasonable expectation of privacy in the two documents, MARA719365 and BPPRIV000002, created and stored on his company-issued laptop. The Special Master GRANTS the Motion to Compel. It is FURTHER ORDERED that Mr. Poehling produce the two documents he is withholding or alternatively, that the documents are deemed not privileged and UnitedHealth may unsequester the two documents. If Mr. Poehling intends to seek review of this Order before the District Judge, the Order shall be STAYED until the District Judge issues an order on the Motion for Review.

IT IS SO ORDERED.

Dated: September 12, 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 September 12, 2022 I served the **SPECIAL MASTER'S ORDER GRANTING MOTION TO COMPEL RE RELATOR DOCUMENTS** on the following parties. Placing a true copy to all parties as follows:

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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 September 12, 2022 at Los Angeles, California.

Alisa Martinez
Alisa Martinez
Signature Resolution