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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
 REGARDING CLAWBACK OF
 "IM" STATEMENTS**

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

PLEASE TAKE NOTICE that on September 16, 2022, the Honorable Suzanne Segal (Ret.), Special Master in this Action, issued the attached Order Regarding the Clawback of “IM” Statements. A true and correct copy of the Order Regarding the Clawback of “IM” Statements is attached hereto.

Dated: October 4, 2022

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3 UNITED STATES DISTRICT COURT
4 CENTRAL DISTRICT OF CALIFORNIA
5

6 UNITED STATES OF AMERICA *ex rel.* BENJAMIN POEHLING,
7
8

9 Plaintiffs,

10 v.
11

12 UNITEDHEALTH GROUP, INC. *et al.*,
13
14

15 Defendants.
16

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

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

SPECIAL MASTER'S ORDER RE
CLAWBACK OF "IM" STATEMENTS

17 In August 2022, the Special Master held an informal discovery
18 conference regarding UnitedHealth's "clawback" of certain statements
19 contained in an instant messaging ("IM") document. Plaintiff United
20 States asserts that the clawback is improper because UnitedHealth
21 waived attorney-client privilege over the statements by repeatedly
22 offering testimony on the same topic or discussing the topic with
23 customers. While UnitedHealth does not dispute that it has offered
24 testimony on the topic or discussed the topic with customers,
25 UnitedHealth has not permitted the actual confidential
26 communications from counsel to client to be disclosed. On this
27 basis, UnitedHealth contends no waiver has occurred. The United
28 States filed a statement regarding this issue on August 31, 2022.

1 UnitedHealth filed a statement regarding this issue on September 2,
2 2022.

3
4 The Special Master agrees that the clawback was proper under
5 the existing Protective Order. The Protective Order's clawback
6 provision permits either party to clawback disclosed information if
7 the party requesting the clawback contends it is privileged.

8 The United States contends that UnitedHealth waived privilege
9 by disclosing to third parties that UnitedHealth's mandatory CV
10 policy was based upon guidance from counsel. (Statement of United
11 States ("U.S. Statement") at 3). The United States asserts that
12 UnitedHealth disclosed this information to customers of
13 UnitedHealth. (Id.). The United States also argues that
14 UnitedHealth waived attorney-client privilege by Jeff Dumcum's
15 testimony during the Civil Investigative Demand phase of this matter
16 and in the current proceeding. (U.S. Statement at 4-5). However,
17 in each instance of testimony, Mr. Dumcum was careful to limit his
18 testimony to the fact of counsel's guidance, not the actual content
19 of the conversation with counsel. The Special Master finds this
20 distinction meaningful.

21 The attorney-client privilege extends to non-attorney
22 employees of a party if they are discussing or repeating legal
23 advice. *U.S. v. Chevron*, 241 F. Supp. 2d 1065, 1077 (N.D. Cal.
24 2002); see also *AT&T Corp. v. Microsoft Corp.*, 2003 WL 21212614, at
25 *3 (N.D. Cal. April 18, 2003) (communications between non-lawyer
26 employees that concern legal advice are privileged). The difference
27 between mentioning counsel's advice and disclosing the actual advice
28 itself is an important distinction. See *Quiksilver v. Kymsta*, 247
F.R.D. 579, 584 (C.D. Cal. 2007) (. . . [There is a] difference
between indicating the fact or topic of a confidential

1 [communication] with an attorney and revealing its content. The
2 latter effects a waiver of the attorney-client privilege, but the
3 former does not.”).

4 A client does not waive the attorney-client privilege merely
5 by disclosing a subject that was discussed with an attorney. *United*
6 *States v. O'Malley*, 786 F.2d 786, 794 (7th Cir. 1986). “In order to
7 waive the privilege, the client must disclose the communication with
8 the attorney itself.” *Id.*; *Stein v. Tri-City Healthcare Dist.*, 2014
9 WL 12695385, at *2 (S.D. Cal. Dec. 5, 2014) (“The attorney-client
10 privilege attaches to the content of the communications between the
11 client and attorney, not the fact or general topic of the
12 confidential communication.”). General comments that an attorney
13 has “examined a certain matter,” without revealing the substance of
14 the attorney's advice does not constitute a waiver. *Guidiville*
15 *Rancheria of California v. United States*, 2013 WL 6571945, at *6
16 (N.D. Cal. Dec. 13, 2013). Instead, the content of the privileged
17 communication must be shared for there to be a waiver. *Id.*; *Stone*
18 *Brewing Co., LLC v. Molson Coors Brewing Company*, 2019 WL 2176792,
19 at *6 (S.D. Cal. May 20, 2019) (same).

20 Where “there is no showing that the *content* of [the] legal
21 advice was shared, [the party opposing the privilege] has not met
22 its prima facie burden” to show that a disclosure of privileged
23 information occurred. *Sleep Science Partners v. Lieberman*, 2010 WL
24 4316687, at *1 (N.D. Cal. Oct. 26, 2010) (emphasis supplied). For
25 instance, in *Sleep Science*, the plaintiffs contended that the
26 privilege had been waived because defendants had obtained legal
27 advice about whether plaintiffs' former CEO could work for
28 defendants, and later had conversations with investors regarding
the legal implications of working with the former CEO. However,
plaintiffs did not show that defendants shared the actual content

1 of the legal advice, only that they had obtained such advice. This
2 showing was insufficient to establish a disclosure of the privileged
3 legal advice. *Id.* at * 1.

4 The fact that a party visits an attorney or consults an
5 attorney about a particular topic is generally not privileged
6 information. Disclosure of this non-privileged information does not
7 result in a waiver of the attorney-client privilege. The actual
8 conversation between the lawyer and the client remains protected.
9 This protection would extend to UnitedHealth employees' IM message
10 that repeated an attorney's advice. UnitedHealth properly
11 recognized that the three sentences included in its clawback
12 reflected such legal advice. Accordingly, the clawback is proper.
13 The United States request to reverse the clawback is DENIED.

14 IT IS SO ORDERED.

15 Dated: September 16, 2022

16 DocuSigned by:

17 Hon. Suzanne Segal (Ret.)

28739185DE71459...

18 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 16, 2022 I served the **SPECIAL MASTER'S ORDER RE CLAWBACK OF "IM" STATEMENTS** 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 September 16, 2022 at Los Angeles, California.

Moonhey Kim
Moonhey Kim
Signature Resolution