

1 MICHAEL D. GRANSTON
Deputy Assistant Attorney General, Civil Division
2 E. MARTIN ESTRADA
United States Attorney
3 DAVID M. HARRIS
ROSS M. CUFF
4 JOHN E. LEE (CBN 128696)
JACK D. ROSS (CBN 265883)
5 Assistant United States Attorneys
300 N. Los Angeles Street, Room 7516
6 Los Angeles, California 90012
Tel: (213) 894-3995; Fax: (213) 894-7819
7 Email: john.lee2@usdoj.gov
JAMIE ANN YAVELBERG
8 ROBERT McAULIFFE
EDWARD CROOKE
9 LINDA McMAHON
JESSICA E. KRIEG
10 AMY L. LIKOFF
GREGORY A. MASON
11 MARTHA N. GLOVER
WENDY ZUPAC
12 Attorneys, Civil Division, U.S. Department of Justice
P.O. Box 261, Ben Franklin Station
13 Washington, D.C. 20044
Tel: (202) 307-0486; Fax: (202) 307-3852
14 Email: robert.mcauliffe@usdoj.gov
TRINI E. ROSS
15 United States Attorney
DAVID CORIELL
16 Assistant United States Attorney
138 Delaware Avenue
17 Buffalo, New York 14201
Tel: (716) 843-5830; Fax: (716) 551-3052
18 Email: david.corielli@usdoj.gov
Attorneys for the United States of America

19 UNITED STATES DISTRICT COURT
20 FOR THE CENTRAL DISTRICT OF CALIFORNIA
21 WESTERN DIVISION

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

24 Plaintiffs,

25 v.

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

27 Defendants.
28

No. CV 16-08697 FMO

**PLAINTIFFS' JOINT NOTICE OF
MOTION AND MOTION FOR
REVIEW OF SPECIAL MASTER'S
ORDER RE CLAWBACK OF "IM"
STATEMENTS**

DATE: December 1, 2022

TIME: 10:00 a.m.

COURT: 6D, Hon. Ferando M. Olguin

NOTICE OF MOTION AND MOTION FOR REVIEW

PLEASE TAKE NOTICE THAT, on December 1, 2022, at 10:00 a.m. or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Fernando M. Olguin, United States Courthouse, 350 W. First Street, Courtroom 6D, Los Angeles, California, Plaintiff United States of America and *qui tam* Plaintiff/Relator Benjamin Poehling (collectively, "Plaintiffs") will and hereby do respectfully move this Court for review of the Special Master' Order re Clawback of "IM" Statements (ECF 521-1).

Plaintiffs' motion is made pursuant to Rule 53(f), Fed. R. Civ. P., and is based on this Notice, the accompanying Memorandum of Points and Authorities; the Declaration of Gregory A. Mason; the statements and exhibits presented to the Special Master; all papers and pleadings on file in this action; and such evidence and argument as may be presented in connection with the hearing on this matter.

Dated: October 28, 2022

MICHAEL D. GRANSTON
Deputy Assistant Attorney General, Civil Division
E. MARTIN ESTRADA
United States Attorney
DAVID M. HARRIS
ROSS M. CUFF
JOHN E. LEE
JACK D. ROSS
Assistant United States Attorneys

JAMIE ANN YAVELBERG
ROBERT McAULIFFE
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GREGORY A. MASON
MARTHA N. GLOVER
WENDY ZUPAC
Civil Division, Department of Justice

TRINI E. ROSS
United States Attorney
DAVID CORIELL
Assistant United States Attorney

/S/ Gregory A. Mason

GREGORY A. MASON
Trial Attorney, Department of Justice
Attorneys for the United States of America

1 Dated: October 28, 2022

2 ERIC R. HAVIAN
3 HARRY LITMAN
4 ANNE HARTMAN
5 Constantine Cannon LLP

6 STEPHEN HASEGAWA
7 Phillips & Cohen LLP

8 WILLIAM CHRISTOPHER CARMODY
9 ARUN SUBRAMANIAN
10 WILLIAM R.H. MERRILL
11 GENG CHEN
12 Susman Godfrey LLP

13 /S/ Anne Hartman

14

ANNE HARTMAN
15 Attorneys for Relator Benjamin Poehling

16 Attestation

17 I hereby attest that the other signatory listed, on whose behalf the filing is
18 submitted, concurs in the filing's content and has authorized the filing.

19 Dated: October 28, 2022

20 /S/ Gregory A. Mason

21

GREGORY A. MASON
22 Trial Attorney, U.S. Department of Justice
23
24
25
26
27
28

1 MICHAEL D. GRANSTON
Deputy Assistant Attorney General, Civil Division
2 E. MARTIN ESTRADA
United States Attorney
3 DAVID M. HARRIS
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13 Washington, D.C. 20044
Tel: (202) 307-0486; Fax: (202) 307-3852
14 Email: robert.mcauliffe@usdoj.gov
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15 United States Attorney
DAVID CORIELL
16 Assistant United States Attorney
138 Delaware Avenue
17 Buffalo, New York 14201
Tel: (716) 843-5830; Fax: (716) 551-3052
18 Email: david.corielli@usdoj.gov
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19 UNITED STATES DISTRICT COURT
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22 UNITED STATES OF AMERICA *ex*
23 *rel.* BENJAMIN POEHLING,

24 Plaintiffs,

25 v.

26 UNITEDHEALTH GROUP, INC., *et*
27 *al.*,

28 Defendants.

No. CV 16-08697 FMO

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR REVIEW
OF SPECIAL MASTER'S ORDER RE
CLAWBACK OF "IM" STATEMENTS**

DATE: December 1, 2022

TIME: 10:00 a.m.

COURT: 6D, Hon. Ferando M. Olguin

I. INTRODUCTION

The United States seeks review of a ruling by the Special Master that UnitedHealth is permitted to redact three lines from a one-page Instant Messaging (“IM”) Conversation on the basis of privilege. *See* Special Master’s Order re Clawback of “IM” Statements (ECF 521-1) (the “Order”). Declaration of Gregory A. Mason, Ex. 6. The Special Master’s Order was erroneous and must be reversed for two fundamental reasons. First, the Special Master improperly ruled that any statement that UnitedHealth required its customers to identify and validate unsupported diagnosis codes submitted to the Medicare Advantage program (also known as a “mandatory Claims Verification policy” or “mandatory CV”) was privileged, *even though* UnitedHealth itself expressly admitted that this statement was a “nonprivileged fact.” Thus, the Special Master not only ruled on an issue that was not even in dispute, but did so in a way contrary to even UnitedHealth’s own admission of the nonprivileged nature of that statement. Second, although UnitedHealth has admitted that it told third parties, “[REDACTED]” the Special Master ruled that this statement does not disclose the content of counsel’s advice, and therefore incorrectly concluded that this statement does not waive privilege. [REDACTED]

[REDACTED]

[REDACTED]” To read this statement otherwise is contrary to any reasonable interpretation of that statement. Because UnitedHealth has repeatedly waived privilege over the relevant subject matter – by disclosing to third parties that [REDACTED]

[REDACTED], UnitedHealth’s attempt to shroud this subject matter in privilege now is improper. Accordingly, the Special Master erred and the Order must be reversed.¹

¹ Plaintiffs currently only have access to the *redacted* version of the IM Conversation (MAPL010976336), *see* Declaration of Gregory A. Mason, Ex. 2 (attached as Exhibit A to the Plaintiffs’ Statement to the Special Master). However, UnitedHealth
(footnote cont’d on next page)

II. BACKGROUND

The backdrop issue of this motion is UnitedHealth's understanding of its obligations upon learning of errors in the diagnosis codes it had submitted to the Centers for Medicare & Medicaid Services ("CMS") in the Medicare Advantage ("MA") risk adjustment program. In the MA program, private insurers, like UnitedHealth, insure Medicare-qualifying enrollees, and in exchange, CMS pays the insurers a risk-adjusted premium for each enrollee. The amount of the premium is based on diagnosis codes submitted by UnitedHealth to CMS. Generally, the more diagnosis codes reported, the higher the premium paid to the insurer. This risk adjustment system reflects the principle that an insurer is paid more for insuring a higher risk enrollee who is more likely to incur medical costs. CMS critically requires that only diagnosis codes supported in the medical record be submitted for risk adjustment.

In this context, UnitedHealth operated two key risk adjustment programs long after diagnosis codes were initially submitted by UnitedHealth to CMS: Chart Review and Claims Verification. In Chart Review, UnitedHealth reviewed enrollees' medical records, identified *all* diagnosis codes supported in them, compared those codes with those UnitedHealth had previously submitted, and then submitted to CMS any new and unique codes not yet submitted for risk adjustment. But through Chart Review, United also became aware of codes that it had previously submitted yet had not found supported in the medical record, codes that UnitedHealth identified as "potential deletes." Consequently, United implemented CV, a program through which it reviewed the potential deletes flagged in Chart Review and deleted any codes for which it could not

attached the unredacted version of the IM Conversation (MAPL001477246) as Exhibit 1 to its Statement to the Special Master for *in camera* review. As a result, UnitedHealth must submit an unredacted version of the document to this Court under seal so that it may properly review the Special Master's Order. *See* Order re: Appointment of Special Master (ECF 395), Para. 6 ("All papers submitted by the parties to the Special Master shall be filed with the court, with courtesy copies delivered to the court's chambers."). Although plaintiffs submit redacted documents with their moving papers, the parties have previously submitted a joint application to permit the filing of sealed documents and plaintiffs will do so upon receipt of the Court's order.

1 find medical record support. But, after operating the program for about four years,
2 UnitedHealth canceled CV in 2014.

3 The IM conversation before this Court is a critical piece of evidence in this story.
4 Plaintiffs' theory is that UnitedHealth has long known that it had an obligation to act on
5 the potential deletes from Chart Review. UnitedHealth now argues that it never had an
6 obligation to delete unsupported diagnosis codes and that it was not required to perform
7 CV or make any similar efforts to address such codes from Chart Review. But evidence
8 in the record shows that, at the time in question, UnitedHealth understood that it was
9 *required* to perform CV alongside Chart Review. Witnesses have also testified that

10 [REDACTED]
11 [REDACTED] Most critically, the record shows that UnitedHealth disclosed its legal counsel's
12 position numerous times externally, and has thus waived any claim of privilege over this
13 subject. Nor was this waiver inadvertent. As explained, because UnitedHealth sold its
14 Chart Review and Claims Verification products to third-party Medicare Advantage
15 insurers, it explained to these commercial clients that [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 The IM Conversation sheds further light on the relationship between Chart
22 Review and CV, and reveals UnitedHealth's contemporaneous understanding that CV
23 was required. In the IM Conversation, UnitedHealth employees Jon Bird and Patty
24 Brennan discuss [REDACTED]
25 [REDACTED]. While the effect of Chart Review is to increase the diagnosis codes (i.e.,
26 "adds") submitted to CMS and in turn the premiums paid to UnitedHealth, CV had the
27 opposite effect because it resulted in deletion of codes (i.e., "deletes") and in turn a
28 reduction in premiums paid to UnitedHealth. Thus, Bird refers to [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 Bird describes how [REDACTED]
4 [REDACTED].” Brennan comments that [REDACTED]
5 [REDACTED]” Coupled with other
6 evidence in the record discussed above – namely, Dumcum’s disclosure that [REDACTED]
7 [REDACTED] – the
8 clear import of the IM Conversation is that UnitedHealth understood that [REDACTED]
9 [REDACTED].

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 Second, to the extent the redactions in the IM Conversation describe the same legal
21 advice that UnitedHealth Vice President, General Management for commercial risk
22 adjustment services Jeff Dumcum disclosed to United’s commercial clients and disclosed
23 again in his depositions later, privilege over those statements has been waived, and those
24 redactions are also improper. UnitedHealth has already disclosed, and therefore waived
25 any claim of privilege over, the fact that [REDACTED]

26 [REDACTED]” *Id.*, Ex. 4 (Dumcum Depo. Tr.) at 232:15-22 [REDACTED]
27 [REDACTED]
28 [REDACTED]

[REDACTED] (emphasis added).

The Order therefore errs in two fundamental respects and must be reversed.

III. STANDARD OF REVIEW

The Court must decide all objections to the Special Master's conclusions of law *de novo*. Fed. R. Civ. Proc. 53(f)(4). Because the parties did not stipulate otherwise, the Court also must decide *de novo* all objections to the Special Master's findings of fact. Fed. R. Civ. Proc. 53(f)(3).

IV. ARGUMENT

A. The Special Master Erred in Allowing UnitedHealth to Redact Any Statement That Reveals Only the Nonprivileged Fact that UnitedHealth had a Mandatory Claims Verification Policy

To the extent United has redacted any statement to the effect that United had a mandatory CV policy, it is improper because even UnitedHealth has conceded that the fact that UnitedHealth implemented a mandatory CV policy is not privileged. *See* Mason Decl., Ex. 5 (Opp. Br.) at p. 3 (“[T]hat United[Health] ultimately made a ‘policy decision’ to require CV” is a “nonprivileged fact.”). This statement is consistent with previous UnitedHealth statements that it is not claiming any privilege [REDACTED]

[REDACTED] *Id.*, Ex. 3 (Dumcum CID Tr.) at 184:8-14. Thus, there is no dispute between the parties that the fact of the mandatory CV policy itself is not privileged and the Special Master clearly erred in ruling otherwise, contrary to UnitedHealth's admission.

Because UnitedHealth is not claiming privilege over the fact that it made a policy decision to implement a mandatory CV policy, it is not permitted to redact and claim privilege over non-attorney statements that merely recite this nonprivileged fact. The Plaintiffs have taken care in this brief not to reveal the contents of the three separately redacted statements in the IM Conversation. But a review of the IM Conversation will

1 demonstrate whether one of the three statements that United has redacted reveals nothing
2 other than a nonprivileged fact discussed between two non-attorney employees of
3 UnitedHealth.

4 The Special Master erred by failing to recognize or even address whether
5 UnitedHealth's redactions in the IM Conversation are inconsistent with its concession
6 that the fact of its mandatory CV policy is not privileged. The Order wholly ignores and
7 does not even mention that UnitedHealth concedes that the fact that it implemented a
8 mandatory CV policy is not privileged. The Order also fails to address whether one of
9 the three sentences redacted from the IM Conversation discloses only this nonprivileged
10 fact. To the extent the Special Master upheld UnitedHealth's redaction of a statement to
11 the effect that it had a mandatory CV policy, the Special Master erred and the redacted
12 statement should be produced to Plaintiffs.

13 **B. The Special Master Erred in Allowing UnitedHealth to Redact Any**
14 **Statements That Reveal Only that UnitedHealth's Mandatory Claims**
15 **Verification Policy** [REDACTED]

16 Additionally, to the extent the Special Master approved the redaction of statements
17 to the effect that UnitedHealth's mandatory CV policy [REDACTED]
18 [REDACTED], the Special Master erred. [REDACTED],
19 UnitedHealth has waived any privilege over the subject of this legal advice, and the fact
20 that its mandatory CV policy [REDACTED]. It is well-settled that
21 privilege is waived when information is deliberately disclosed to third parties, and once
22 waived, such material is no longer considered privileged. *See, e.g., United States v.*
23 *Ruehle*, 583 F.3d 600, 607–09 (9th Cir. 2009) (“[T]here is no dispute that Broadcom had
24 an existing attorney-client relationship with Irell and, by electing to reveal the
25 information gathered to Ernst & Young (and later to various agencies of the United
26 States), deliberately waived any corporate attorney-client privilege it held with respect to
27 all matters at issue”)); *Cargill Inc. v. Budine*, 2008 WL 2856642, *2 (E.D. Cal. July 21,
28 2008) (disclosure of privileged communications during a deposition waives privilege);

1 *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 460-61 (N.D. Cal. 1978) (same).
2 A finding of subject-matter waiver is appropriate when documents “contain[] subject
3 matter that overlaps with subject matter disclosed in the communications” released to
4 third parties. *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, No. 16-cv-06370-EJD
5 (VKD), 2018 U.S. Dist. LEXIS 191651, at *5 (N.D. Cal. Nov. 8, 2018).

6 In this case, a UnitedHealth witness previously disclosed in a deposition that he
7 had conveyed to third-party commercial clients that [REDACTED]
8 [REDACTED]. Specifically, Dumcum testified that he explained to
9 commercial clients that UnitedHealth’s [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED] Mason Decl., Ex. 4
13 (Dumcum Depo. Tr.) at 232:15-22 (emphasis added).

14 Thus, privilege [REDACTED] was waived in the
15 first instance by its disclosure to outside customers, and in the second instance by its
16 disclosure during deposition testimony. *See Ruehle*, 583 F.3d at 607; *Cargill Inc.* 2008
17 WL 2856642, *2; *Perrignon*, 77 F.R.D. at 460-61.

18 Contrary to the Special Master’s ruling, Dumcum’s statement is not just an
19 acknowledgement that legal counsel was consulted. Rather, Dumcum shared with third
20 party commercial clients *what* legal counsel had advised. His disclosure clearly waives
21 privilege over the *content* of that advice. The Special Master erred in ruling that “Mr.
22 Dumcum was careful to limit his testimony to the fact of counsel’s guidance, not the
23 actual content of the conversation with counsel.” *See* Mason Decl., Ex. 6 (Order) at 2.
24 Dumcum did not merely state the fact of counsel’s guidance, he testified that the
25 company had told third party clients about its substance. [REDACTED]
26 [REDACTED]
27 reveals the content of the guidance from counsel – namely, that it [REDACTED]
28 [REDACTED]

1 A review of the IM Conversation will demonstrate whether the Special Master
2 approved redacted statements in the IM Conversation that do not reveal anything beyond
3 what was already revealed by Dumcum's testimony and in the company's previous
4 statements to its clients – [REDACTED]

5 [REDACTED] Relatedly, the Special Master further erred by applying an
6 inconsistent approach to the IM Conversation. The Order concludes the IM
7 Conversation repeats the "attorney advice" from the "actual conversation between the
8 lawyer and the client," which "remains protected." *Id.*, Ex. 6 (Order) at 4. But if the IM
9 Conversation reveals nothing beyond what Dumcum's testimony already revealed
10 UnitedHealth told external third parties – [REDACTED]

11 [REDACTED] – then the Special Master's conclusion that the IM
12 conversation reveals legal advice would also apply to Dumcum's testimony. In other
13 words, if the IM Conversation reveals legal advice, then so too was that advice revealed
14 (and privileged waived), by Dumcum's testimony and the company's statements to third
15 party clients that [REDACTED]
16 [REDACTED]." *Id.*, Ex. 4 (Dumcum Depo. Tr.) at 232:15-22. UnitedHealth
17 therefore has waived any claim for privilege over the statements redacted from the IM
18 Conversation.

19 **V. CONCLUSION**

20 For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the
21 ruling of the Special Master and hold that UnitedHealth must produce the full unredacted
22 IM Conversation or, in the alternative, produce the IM Conversation with any statements
23 to the effect that United had a mandatory CV policy unredacted.

1 Dated: October 28, 2022

MICHAEL D. GRANSTON
Deputy Assistant Attorney General, Civil Division
E. MARTIN ESTRADA
United States Attorney
DAVID M. HARRIS
ROSS M. CUFF
JOHN E. LEE
JACK D. ROSS
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Civil Division, Department of Justice

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United States Attorney
DAVID CORIELL
Assistant United States Attorney

/S/ Gregory A. Mason

15 _____
16 GREGORY A. MASON
17 Trial Attorney, Department of Justice

Attorneys for the United States of America

18 Dated: October 28, 2022

ERIC R. HAVIAN
HARRY LITMAN
ANNE HARTMAN
Constantine Cannon LLP

STEPHEN HASEGAWA
Phillips & Cohen LLP

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ARUN SUBRAMANIAN
WILLIAM R.H. MERRILL
GENG CHEN
Susman Godfrey LLP

/S/ Anne Hartman

26 _____
27 ANNE HARTMAN
28 Attorneys for Relator Benjamin Poehling

Attestation

I hereby attest that the other signatory listed, on whose behalf the filing is submitted, concurs in the filing's content and has authorized the filing.

Dated: October 28, 2022

/s/ Gregory A. Mason

GREGORY A. MASON
Trial Attorney, U.S. Department of Justice

1 MICHAEL D. GRANSTON
Deputy Assistant Attorney General, Civil Division
2 E. MARTIN ESTRADA
United States Attorney
3 DAVID M. HARRIS
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12 Attorneys, Civil Division, U.S. Department of Justice
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13 Washington, D.C. 20044
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14 Email: robert.mcauliffe@usdoj.gov
TRINI E. ROSS
15 United States Attorney
DAVID CORIELL
16 Assistant United States Attorney (Admitted PHV)
138 Delaware Avenue
17 Buffalo, New York 14201
Tel: (716) 843-5830; Fax: (716) 551-3052
18 Email: david.corielli@usdoj.gov
Attorneys for the United States of America

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23 *rel.* BENJAMIN POEHLING,

24 Plaintiffs,

25 v.

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

27 Defendants.

No. CV 16-08697 FMO

**DECLARATION OF GREGORY A.
MASON IN SUPPORT OF
PLAINTIFFS' MOTION FOR
REVIEW OF SPECIAL MASTER'S
ORDER RE CLAWBACK OF "IM"
STATEMENTS**

DATE: December 1, 2022

TIME: 10:00 a.m.

COURT: 6D. Hon. Fernando M. Olguin

1 I, Gregory A. Mason, declare:

2 1. I am a Trial Attorney in the Commercial Fraud Section of the Civil Division
3 of the United States Department of Justice. Along with other Department of Justice Trial
4 Attorneys and Assistant United States Attorneys who are assigned to this matter, I have
5 been assigned to represent the United States in the above-captioned action. I have
6 personal knowledge of the matters set forth herein and, if called to testify, could and
7 would testify competently thereto.

8 2. Attached hereto is as Exhibit 1 is a true and correct copy of Plaintiffs'
9 Statement re UnitedHealth's Improper Clawback, submitted to the Special Master on
10 August 31, 2022, redacted in accordance with this Court's order permitting redaction.

11 3. Attached hereto is as Exhibit 2 is a true and correct copy of a redacted
12 version of the Instant Messaging Conversation at issue on this motion, submitted to the
13 Special Master as Exhibit A on August 31, 2022.

14 4. Attached hereto is as Exhibit 3 is a true and correct copy of relevant
15 excerpts of the Civil Investigative Demand ("CID") deposition transcript of Jeffrey
16 Dumcum, submitted to the Special Master as Exhibit B on August 31, 2022 (redacted).

17 5. Attached hereto is as Exhibit 4 is a true and correct copy of relevant
18 excerpts of the deposition transcript of Jeffrey Dumcum taken in this case, submitted to
19 the Special Master as Exhibit C on August 31, 2022 (redacted).

20 6. Attached hereto is as Exhibit 5 is a true and correct copy of UnitedHealth's
21 Opposition Statement, submitted to the Special Master on September 2, 2022 (redacted).

22 7. Attached hereto is as Exhibit 6 is a true and correct copy of the Special
23 Master's Order re Clawback of "IM" Statements, dated September 16, 2022 (ECF 521-
24 1).

25 I declare under penalty of perjury that the foregoing is true and correct.

26 Executed on October 28, 2022.

27 /S/ Gregory A. Mason

28 GREGORY A. MASON

Exhibit 1

MICHAEL D. GRANSTON
Deputy Assistant Attorney General, Civil Division
TRACY L. WILKISON
United States Attorney
DAVID M. HARRIS
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Attorneys, Civil Division, U.S. Department of Justice
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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

No. CV 16-08697 MWF (SSx)

PLAINTIFF'S STATEMENT RE
UNITEDHEALTH'S IMPROPER
CLAWBACK

[DISCOVERY MATTER]

[REDACTED VERSION OF
DOCUMENT PROPOSED TO
BE FILED UNDER SEAL]

1 The United States submits this statement in support of its objection to
2 UnitedHealth's inappropriate attempts to claw back and redact a non-attorney instant
3 messenger conversation ("IM Conversation"). UnitedHealth is not asserting privilege
4 over the fact that it had a mandatory Claims Verification ("CV") policy, and it has
5 repeatedly disclosed – both to third parties and to the government in this case – that it
6 had a mandatory CV policy, [REDACTED]
7 Because UnitedHealth made no attempt to keep confidential that it had a mandatory CV
8 policy, [REDACTED]
9 UnitedHealth has waived any privilege over that subject matter and, therefore, cannot
10 now claw back the IM Conversation on the basis that it discloses that fact.

11 **I. BACKGROUND**

12 On August 10, 2022, the United States deposed Jon Bird, a UnitedHealth
13 employee responsible for financial analysis and projections of UnitedHealth's risk
14 adjustment programs, who was one of the participants in the IM Conversation. During
15 the deposition, the United States attempted to mark the IM Conversation
16 (MAPL001477246) as an exhibit. Before the document was entered, Defendants clawed
17 the entire document back and claimed the document was privileged in its entirety. The
18 United States immediately objected to the clawback on the record. Nearly two weeks
19 later, on August 22, 2022, UnitedHealth produced a redacted version of the document,
20 which is now Bates labeled MAPL010976336 and is attached hereto as Exhibit A.
21 Because the document was clawed back in its entirety at the deposition, the United States
22 was not able to ask Bird any questions about it on August 10th, and noted on the record
23 that the deposition would be kept open on that basis.

24 The IM Conversation is a discussion between two non-attorney employees of
25 UnitedHealth about UnitedHealth's CV program, which is a program that has direct
26 implications on UnitedHealth's liability. The United States' theory of liability centers on
27 UnitedHealth's obligation to delete diagnosis codes submitted by providers when the
28 company's own coders did not find support for those codes in the underlying medical

1 record as part of UnitedHealth's Chart Review program. In CV, UnitedHealth re-
2 reviewed medical records that had already been reviewed in the Chart Review program,
3 in an effort to find support for diagnosis codes that were found to be unsupported. If
4 UnitedHealth did not find support for a given diagnosis code in the CV review process, it
5 was the company's practice to delete the unsupported code from its submission to the
6 Centers for Medicare and Medicaid Services. UnitedHealth now claims that it had no
7 obligation to delete unsupported diagnosis codes and that it was not required to perform
8 CV or make any similar efforts to address such codes from Chart Review.
9 Consequently, the fact that UnitedHealth made its CV program mandatory for its clients
10 and required them to delete unsupported diagnosis codes is highly relevant to the United
11 States' theory of liability.

12 **II. THE FACT THAT UNITEDHEALTH HAD A MANDATORY CV POLICY**
13 **IS NOT PRIVILEGED**

14 UnitedHealth has repeatedly acknowledged that the fact that it had a mandatory
15 CV policy is not privileged. For example, in the Informal Discovery Conference on
16 August 29, UnitedHealth asserted that it was not claiming any privilege over the fact that
17 it had a mandatory CV policy. Likewise, during a 2016 oral examination pursuant to a
18 Civil Investigative Demand as part of the investigation in this case, counsel for
19 UnitedHealth stated that the company was not asserting any privilege over "the fact of
20 the business decision that was ultimately made" to make CV mandatory for risk
21 adjustment clients. *See* Ex. B, Dumcum CID at 184:8-14.¹ Because UnitedHealth has
22 expressly and repeatedly stated that it is not asserting privilege over the fact that it had a
23 mandatory CV policy, it should not be allowed to claw back a statement that it had a
24 mandatory CV policy. UnitedHealth should therefore be required to remove any
25 redactions of the IM Conversation withholding statements describing the CV program as
26 mandatory.

27 _____
28 ¹ For ease of review, the United States has included the referenced portions of Exhibits B and C instead of full transcripts.

III. UNITEDHEALTH DISCLOSED TO THIRD PARTIES, AS WELL AS IN THIS CASE, THAT IT HAD A MANDATORY CV POLICY [REDACTED]

It is axiomatic that a party cannot claim privilege over information that has been shared with third parties. Privilege is waived by disclosure to third parties, once waived, such material is no longer considered privileged. *See, e.g., United States v. Ruehle*, 583 F.3d 600, 607–09 (9th Cir. 2009) (citations omitted).²

[REDACTED]
[REDACTED].³ UnitedHealth Vice President, General Management for commercial risk adjustment services Jeff Dumcum testified about those communications with outside parties, and said that UnitedHealth told its customers that “[REDACTED]

[REDACTED] Ex. C, Dumcum Tr. at 229:21-230:3. [REDACTED]
[REDACTED]

Dumcum further confirmed that this communication to outside parties disclosed not only the fact of UnitedHealth’s mandatory CV policy, [REDACTED]

² If helpful, the United States can provide the Special Master additional case law support relating to subject matter waiver.

³ Because UnitedHealth is not asserting privilege over statements disclosing the fact that it had a mandatory CV policy, [REDACTED]

[REDACTED]. UnitedHealth also widely communicated to outside parties the fact of the mandatory CV policy, but in the interest of brevity, and because UnitedHealth is not asserting privilege over such statements, those examples are not discussed herein. The United States can provide any further examples or explanation that is helpful to the Special Master.

1 [REDACTED]. See
2 *Ruehle*, 583 F.3d at 607 (stating the basic premise that disclosure of privileged material
3 to a third party waives privilege: “there is no dispute that Broadcom had an existing
4 attorney-client relationship with Irell and, by electing to reveal the information gathered
5 to Ernst & Young (and later to various agencies of the United States), deliberately
6 waived any corporate attorney-client privilege it held with respect to all matters at
7 issue”); *Cargill Inc. v. Budine*, 2008 WL 2856642, *2 (E.D. Cal. July 21, 2008)
8 (disclosure of privileged communications during a deposition waives privilege);
9 *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 460-61 (N.D. Cal. 1978) (same).

10 [REDACTED]
11 [REDACTED]
12 [REDACTED] Disclosure of privileged
13 material to the government (e.g., SEC, DOJ) during a government investigation waives
14 privilege. See *In re Banc of California Sec. Litig.*, 2018 WL 2373860, *1-2 (C.D. Cal.
15 May 23, 2018); *United States v. Reyes*, 239 F.R.D. 591, 596, 602 (N.D. Cal. 2006). [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 Ex. B, Dumcum CID Tr. at 178:7-179:2 (emphasis added). At the Informal
6 Discovery Conference, UnitedHealth stated that counsel at the CID deposition was
7 extremely “careful” to draw a line between what was privileged and what was not. As
8 seen in the two excerpts from Mr. Dumcum’s testimony quoted above, [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 [REDACTED] UnitedHealth’s counsel was quick to assert privilege over that reasoning:

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Ex. B, Dumcum CID Tr. . at 183:13-184:19 (emphasis added). [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

was further reinforced by Mr. Dumcum's testimony during his deposition in this litigation, which occurred over a year ago on July 28, 2021. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] [REDACTED]
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26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 Ex. C, Dumcum Tr. at 230:20-232:22 (emphasis added).

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED] Ex. E, MARA2061942 at p. 3 (September 5, 2012 minutes of regular
11 weekly meeting between Optum [REDACTED]

12 [REDACTED]) that confirms the discussion between Optum [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED] and Ex. F, MARA1734048, at p. 1
16 (emphasis added). [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

IV. THE PROTECTIVE ORDER DOES NOT PERMIT CLAWBACK OF NON-PRIVILEGED INFORMATION, OR WHERE PRIVILEGE WAS DELIBERATELY WAIVED

The protections of the parties' Protective Order Governing Non-Waiver of Privilege and Protected Material (Dkt. 512-1) ("Clawback Order") do not extend to non-privileged documents like the IM Conversation and do not apply where privilege was deliberately waived. The Clawback Order defines "Protected Material" to mean "Material that is subject to any claim of privilege that may lawfully be asserted without limitation and work-product protections, including protections afforded by Fed. R. Civ. P. 26(b)." Clawback Order, ¶ 2. Because UnitedHealth is not asserting privilege over the fact that it had a mandatory CV policy, that fact is not "Protected Material" under the Clawback Order and cannot be clawed back.

Similarly, where privilege is deliberately waived, the material is no longer "subject to any claim of privilege that may lawfully be asserted." *Id.* [REDACTED]

[REDACTED] Consequently, those facts are not "Protected Material" under the Clawback Order and cannot be clawed back. Parties may not selectively waive privilege; they cannot "pick and choose" to disclose protected communications by "waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others." *Reyes*, 239 F.R.D. at 603 (citation omitted).

While the Clawback Order allows the parties to claw back in good faith privileged materials, it does not allow the parties to claw back non-privileged materials or materials for which privilege has been deliberately waived. To find otherwise would allow the parties, for example, to deliberately disclose privileged information on the internet or in the Los Angeles Times and then later claw back that information by claiming good faith

1 in doing so. Such a manipulation is clearly not contemplated by the Clawback Order.

2 The United States maintains that UnitedHealth must produce all documents and
3 allow questioning of witnesses [REDACTED]

4 [REDACTED]
5 **IV. CONCLUSION**

6 The United States respectfully requests that the Special Master require
7 UnitedHealth to produce the IM Conversation without any redactions and reject any
8 effort by UnitedHealth to claw back statements [REDACTED]
9 [REDACTED]

10 Dated: August 31, 2022

11 MICHAEL D. GRANSTON
12 Deputy Assistant Attorney General, Civil
13 Division
14 TRACY L. WILKISON
15 United States Attorney
16 DAVID M. HARRIS
17 ROSS M. CUFF
18 JOHN E. LEE
19 JACK D. ROSS
20 Assistant United States Attorneys

21 JAMIE ANN YAVELBERG
22 ROBERT McAULIFFE
23 EDWARD CROOKE
24 LINDA McMAHON
25 JESSICA E. KRIEG
26 AMY L. LIKOFF
27 GREGORY A. MASON
28 WENDY ZUPAC
Civil Division, Department of Justice

TRINI E. ROSS
United States Attorney
DAVID CORIELL
Assistant United States Attorney



MARTHA N. GLOVER
Trial Attorney, United States Department of
Justice
Attorneys for the United States of America

Exhibit 2

Message

From: Brennan, Patty [/O=UHG-EXCHANGEMAIL/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=PBRENNA]
Sent: 12/2/2011 10:10:52 AM
To: Brennan, Patty [patty.brennan@optum.com]
Subject: Conversation with Bird, Jon H

Brennan, Patty [7:57 AM]:

Hi

Bird, Jon H [7:57 AM]:

hello

Brennan, Patty [7:57 AM]:

Just had a call with Scott and he was asking about CV financial impact

Brennan, Patty [7:57 AM]:

and attestation impact

Bird, Jon H [7:58 AM]:

I'm meeting with him later

Bird, Jon H [7:58 AM]:

The CV looks really bad

Bird, Jon H [7:59 AM]:

I wasn't planning to go over that until we have reviewed internally

Brennan, Patty [7:59 AM]:

I know...I told him I didn't think we were ready to share

Brennan, Patty [7:59 AM]:

but I wanted to give you a heads up.

Bird, Jon H [8:00 AM]:

but just as a quick heads up, we're looking at approx. \$380 of deletes per chart

Bird, Jon H [8:00 AM]:

total adds per chart are \$280

Bird, Jon H [8:00 AM]:

so negative \$100 for each chart through the CV process

Bird, Jon H [8:00 AM]:

doesn't bode well

Brennan, Patty [8:03 AM]:

i'll say

Brennan, Patty [8:03 AM]:

i think we just put ourselves out of the chart review business...

Bird, Jon H [8:04 AM]:

let's hope there's a problem with the process

Brennan, Patty [8:05 AM]:

i know...1st part of review came back with a minor flaw...which won't account for much, if anything

Bird, Jon H [8:06 AM]:

2012 could be interesting.....

Brennan, Patty [8:08 AM]:

Redacted: Privileged

Bird, Jon H [8:08 AM]:

but that's before we saw the results

Brennan, Patty [8:09 AM]:

Redacted: Privileged

Brennan, Patty [8:09 AM]:

Redacted: Privileged

Brennan, Patty [8:09 AM]:

good times

Bird, Jon H [8:09 AM]:

So, i will not disclose to Scott, Ben, Keith etc today.....this is sure to cause a mass panic

CONFIDENTIAL

MAPL010976336

Exhibit 3

In the Matter Of:

CIVIL INVESTIGATIVE DEMAND OF JEFFREY DUMCUM

JEFFREY DUMCUM

December 15, 2015

JEFFREY DUMCUM - 12/15/2015

Page 1

1 CIVIL INVESTIGATIVE DEMAND

2 -----X

3 IN RE: CIVIL INVESTIGATIVE DEMAND :

4 OF JEFFREY DUMCUM : Case No.: 15-278

5 -----X

6

7 DEPOSITION OF JEFFREY DUMCUM

8 Washington, D.C.

9 Tuesday, December 15, 2015

10 9:03 a.m.

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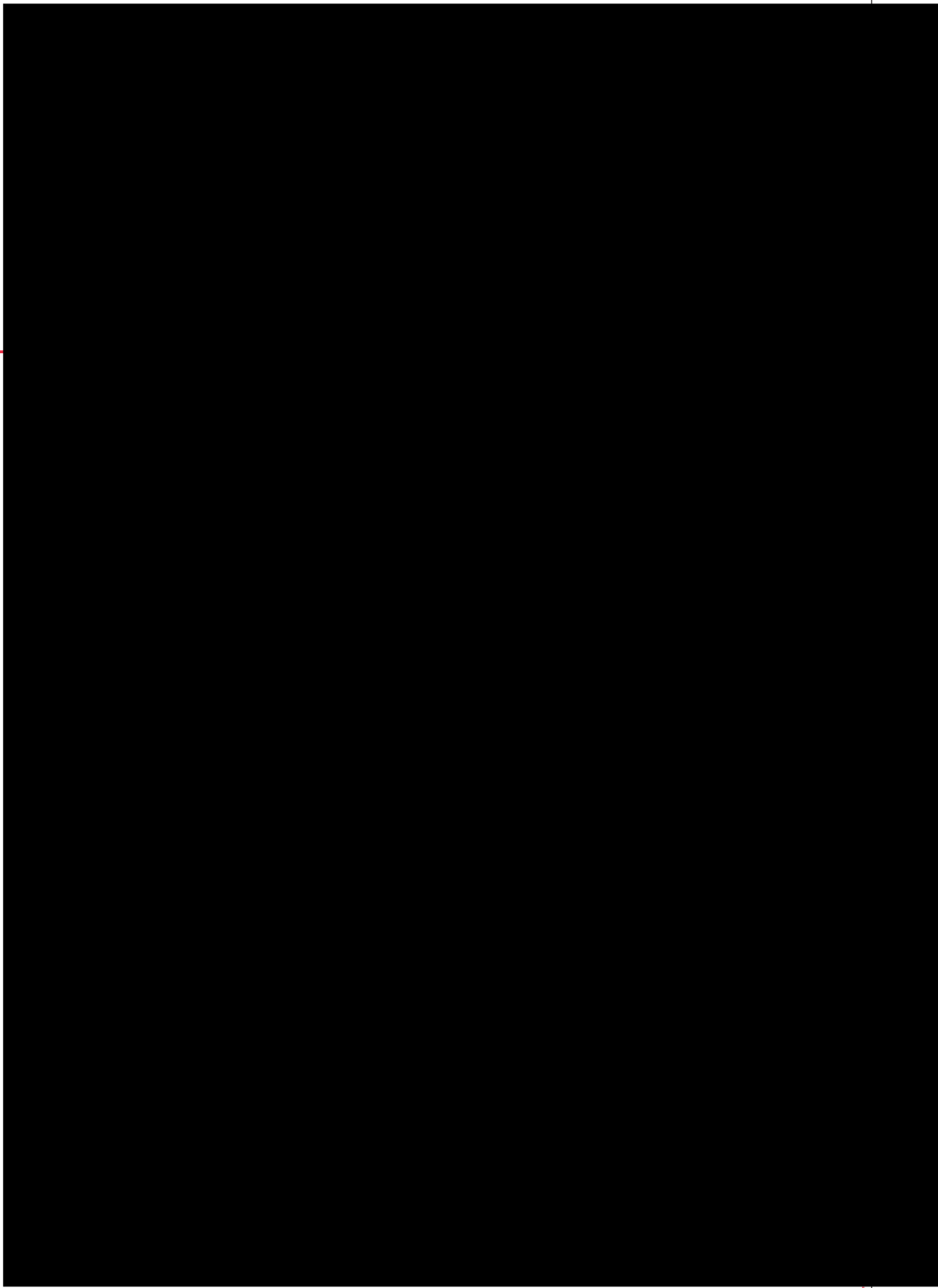
20 Job No.: WDC-056243

21 Pages: 1 - 330

22 Reported by: Elizabeth Mingione, RPR

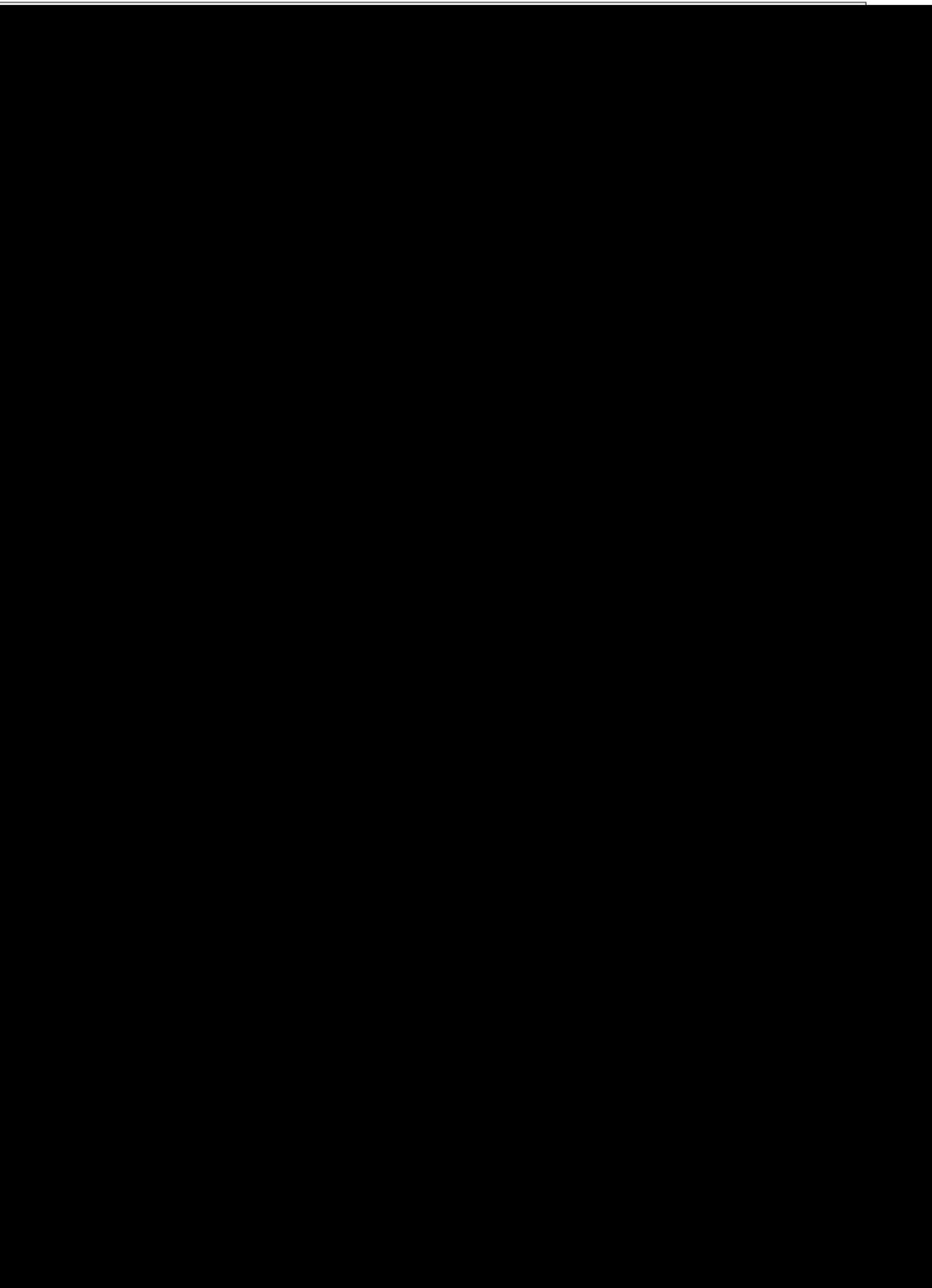
JEFFREY DUMCUM - 12/15/2015

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JEFFREY DUMCUM - 12/15/2015

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JEFFREY DUMCUM - 12/15/2015

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JEFFREY DUMCUM - 12/15/2015

Page 184

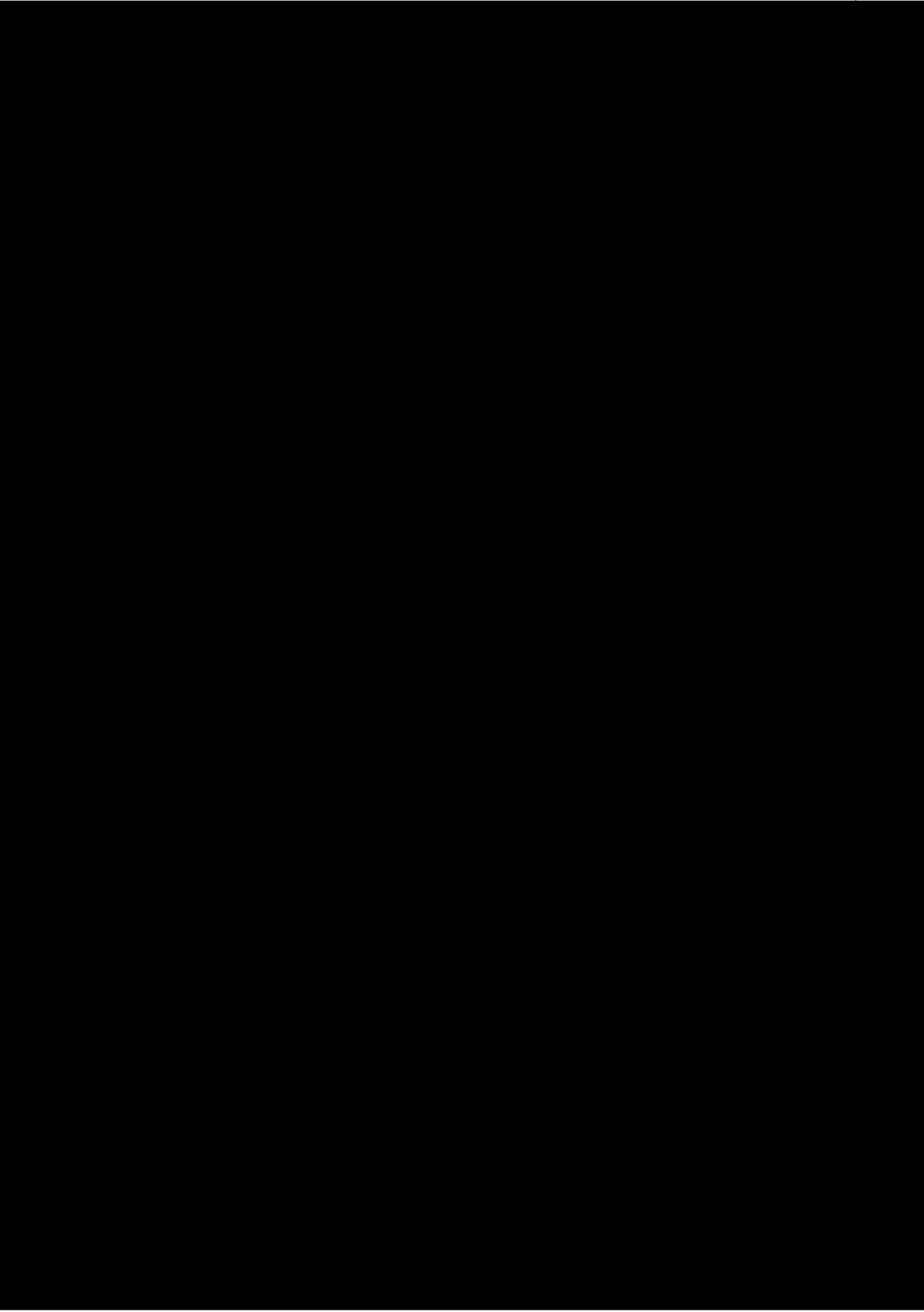
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Exhibit 4

Page 1

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA ex rel.) No. 16-08697 FMO
BENJAMIN POEHLING,)
)
Plaintiffs,)
)
v.)
)
UNITEDHEALTH GROUP, INC., et al.,)
)
Defendants.)
_____)

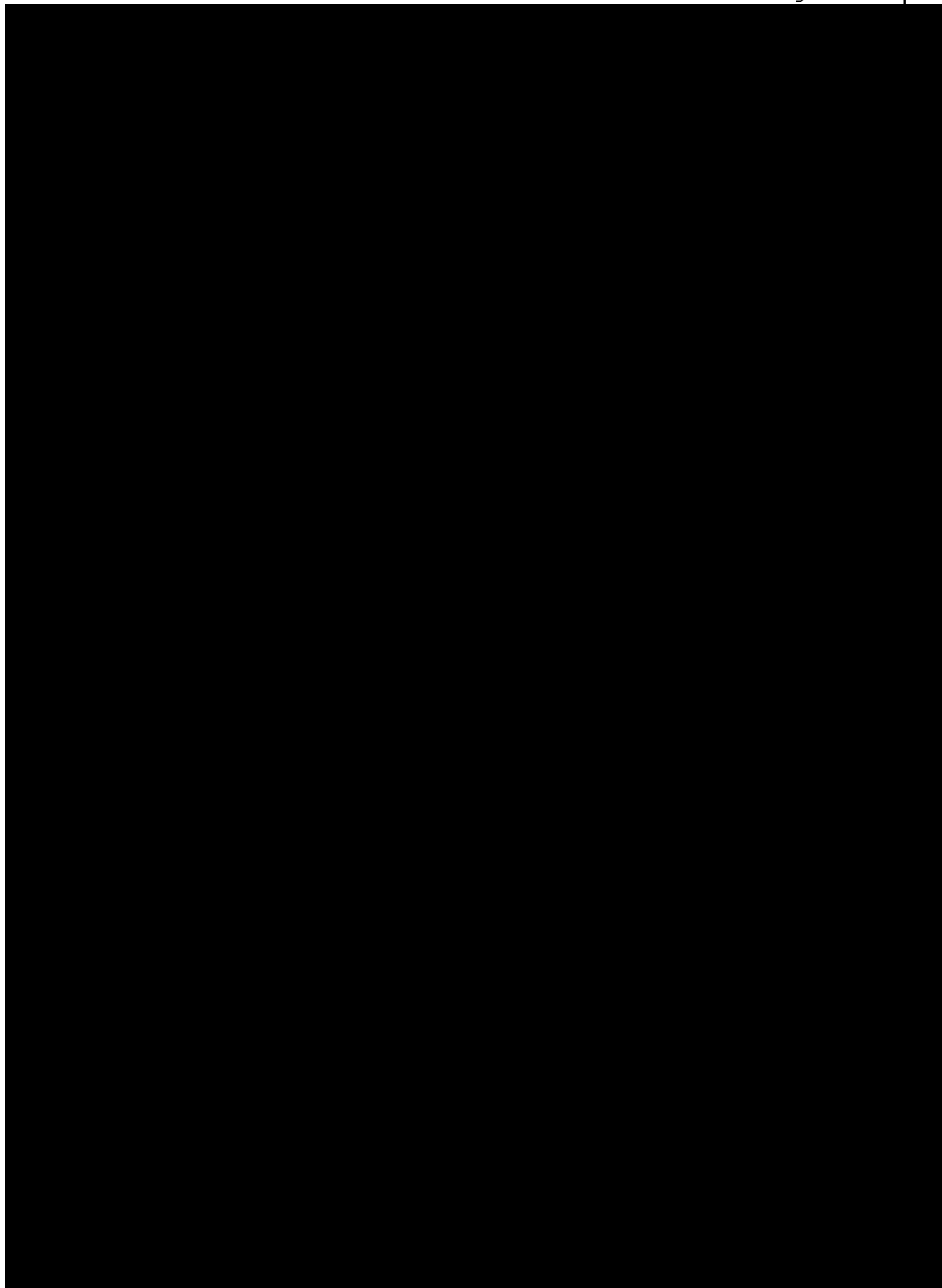
Videotaped Deposition of
JEFFERY S. DUMCUM
Given Remotely
Wednesday, July 28, 2021
9:12 a.m. Eastern Time

Reported by: Cindy A. Hayden, RMR, CRR

Magna Legal Services
866-624-6221
www.MagnaLS.com

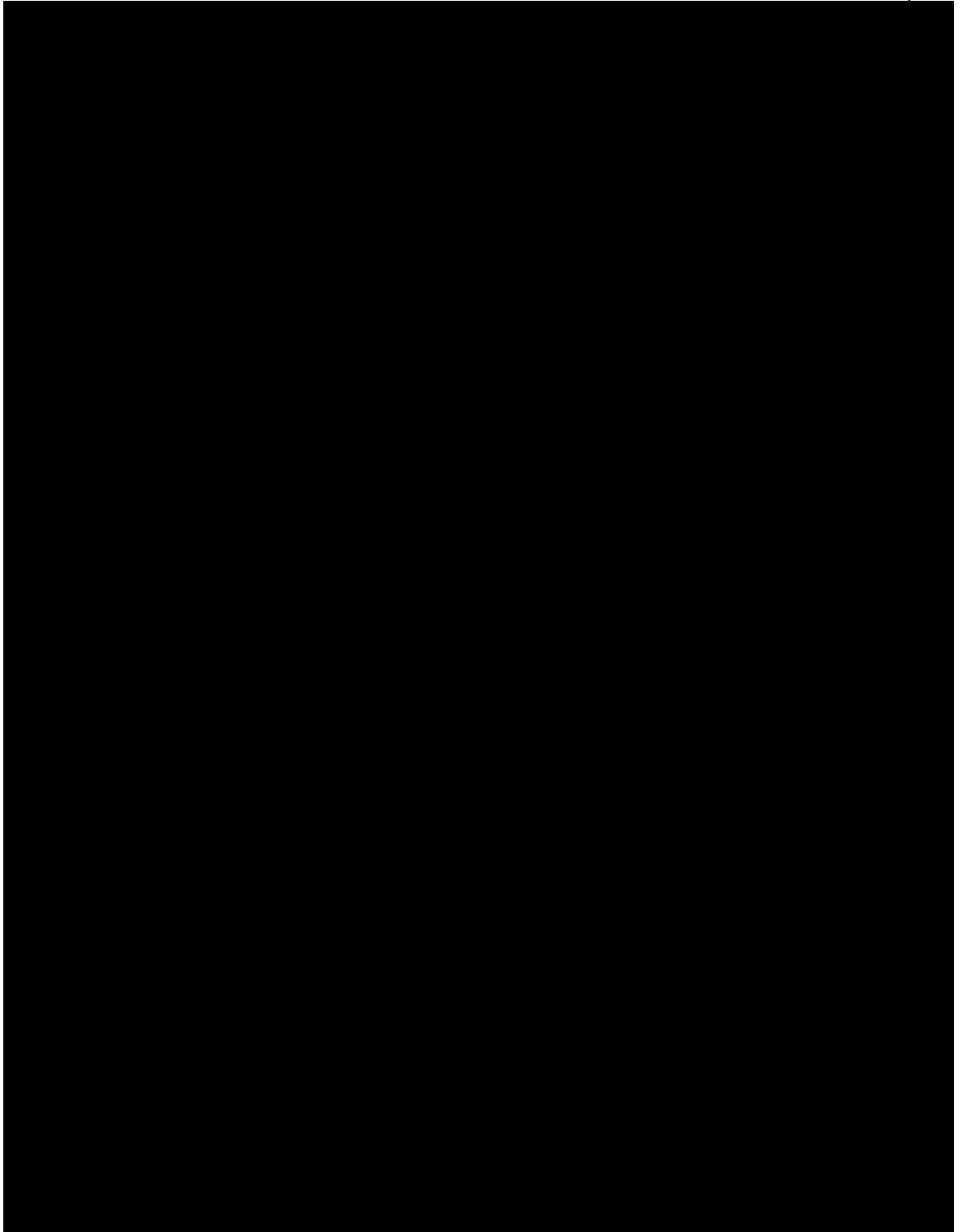


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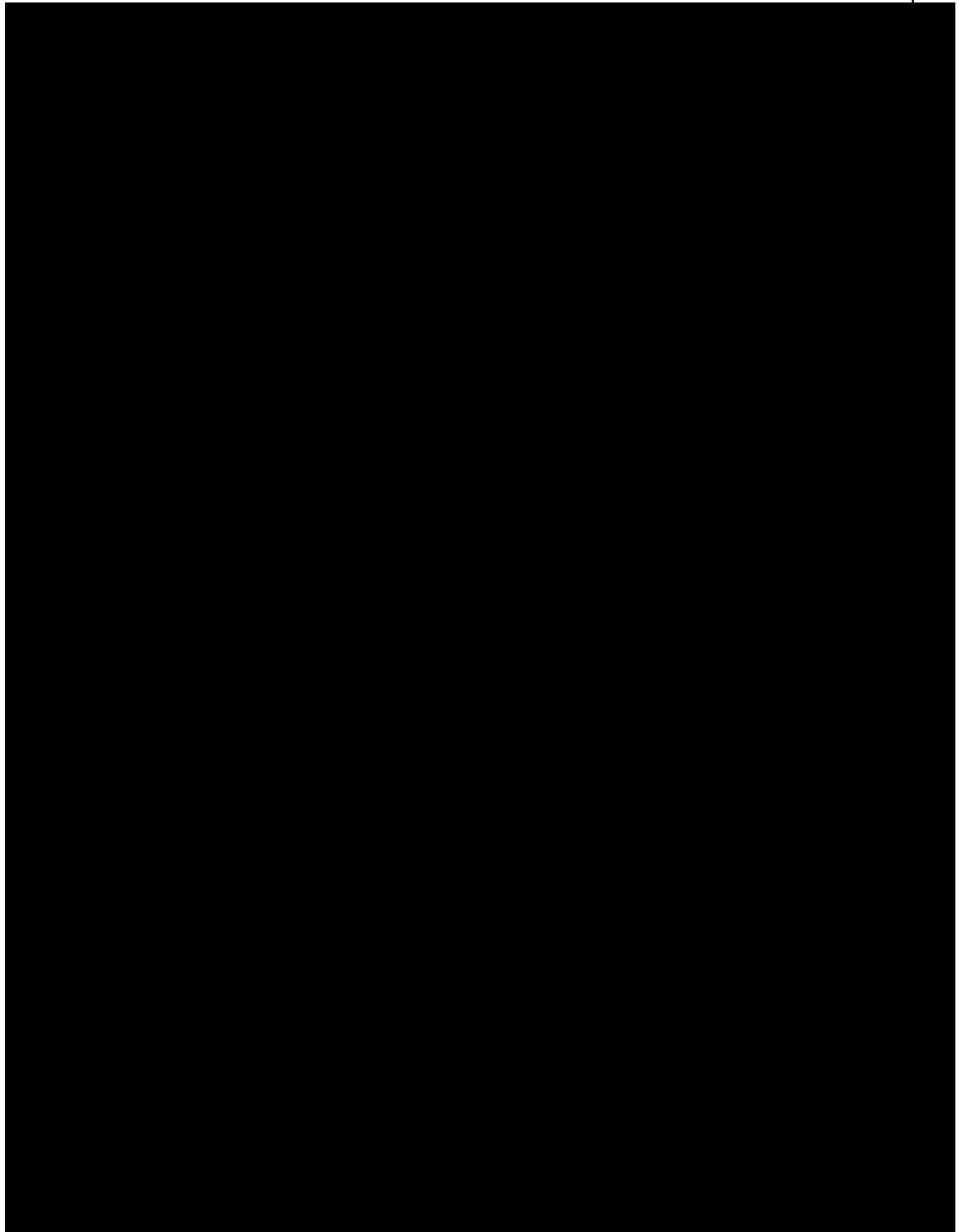


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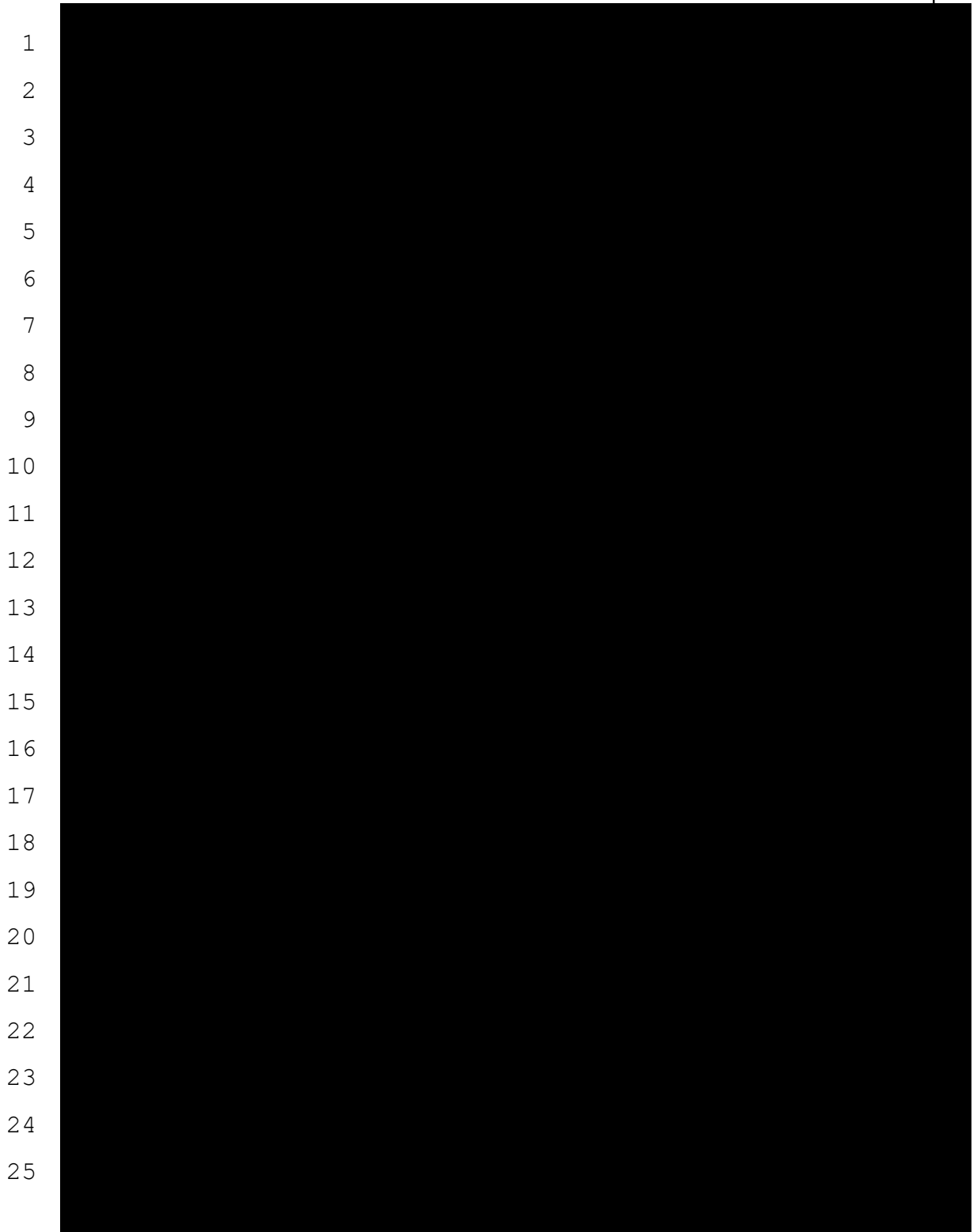


Exhibit 5

LATHAM & WATKINS LLP
David J. Schindler (Bar No. 130490)
david.schindler@lw.com
Manuel A. Abascal (Bar No. 171301)
manny.abascal@lw.com
355 South Grand Avenue, Suite 100
Los Angeles, California 90071-1560
Telephone: +1.213.485.1234
Facsimile: +1.213.891.8763

LATHAM & WATKINS LLP
Daniel Meron (appearing *pro hac vice*)
daniel.meron@lw.com
Abid R. Qureshi (appearing *pro hac vice*)
abid.qureshi@lw.com
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
Telephone: +1.202.637.2200
Facsimile: +1.202.637.2201

Attorneys for United Defendants

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. CV 16-08697 FMO (SSx)

**UNITED'S OPPOSITION TO
PLAINTIFFS' STATEMENT RE
UNITEDHEALTH'S
CLAWBACK**

[DISCOVERY MATTER]

**[REDACTED VERSION OF
DOCUMENT PROPOSED TO BE
FILED UNDER SEAL]**

I. INTRODUCTION

The government contends that United cannot claw back a document explicitly referencing advice from and the position of United's Legal Department because United has supposedly waived privilege over the content in question. The government's waiver arguments, however, are based on mischaracterizations of prior deposition testimony and United documents, unsupported inferences, and pure guesswork. Contrary to the government's assertion, United has not waived privilege over the content in question, and the Court should permit United to claw back the privileged material.

II. BACKGROUND

This dispute arose after the government attempted to use MAPL001477246 ("Subject Document") as an exhibit in the August 10, 2022 deposition of Jon Bird.¹ The Subject Document reflects an instant message conversation between two United employees, Patty Brennan and Jon Bird. A portion of the conversation reflects the express position and legal advice of United's legal department ("Legal Department") regarding United's Claims Verification ("CV") program.² When the government attempted to use the Subject Document during the deposition of Mr. Bird, United immediately halted questioning and clawed it back in its entirety. The government objected, and the parties met and conferred on August 19, 2022. After further review of the Subject Document, on August 22, 2022, United reproduced a redacted version, which is Bates-stamped MAPL010976336 and attached to the Government's Statement as Exhibit A. The government nevertheless still contends that United cannot claw back the Subject Document.

¹ United is submitting to the Special Master for *in camera* review the original version of the Subject Document, without redactions, as Exhibit 1.

² The government mischaracterizes the intent and function of United's CV program in its Statement. While the intent and function of the program is not relevant to this dispute, United notes for the record that CV was not "an effort to find support for diagnosis codes that were found to be unsupported." Gov't Stmt. at 1–2.

1 **III. ARGUMENT**

2 **A. The Subject Document contains privileged content.**

3 The attorney-client privilege extends to the discussion of legal advice between
4 two non-lawyer employees when they transmit that advice in order to carry out their
5 responsibilities. *See United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065,
6 1077 (N.D. Cal. 2002) (observing that attorney-client privilege “might protect a
7 communication between non-legal employees in which the employees discuss or
8 transmit legal advice given by counsel. Such communications obviously reveal
9 privileged communications.”). Because the Subject Document reflects legal advice,
10 it is squarely protected by the attorney-client privilege.³

11 **B. Jeff Dumcum’s testimony did not waive United’s privilege over the**
12 **Subject Document.**

13 On December 15, 2015 and again on July 28, 2021, the government deposed
14 Jeff Dumcum, who was an Optum vice president at the time of the communication
15 memorialized in the Subject Document. Mr. Dumcum is not, and has never been, a
16 lawyer. Mr. Dumcum was asked a series of questions regarding United’s then-policy
17 that commercial clients were required to perform CV, [REDACTED]
18 [REDACTED] and additionally made a policy decision to require CV for
19 such clients. Mr. Dumcum’s testimony did not waive United’s privilege over the
20 Subject Document or the legal advice it contains, because he stated only non-
21 privileged facts: he did not reveal United’s Legal Department’s position, advice, or
22 the content of privileged communications with United attorneys. *See, e.g.,*
23 *Quiksilver, Inc. v. Kymsta Corp.*, 247 F.R.D. 579, 584 (C.D. Cal. 2007) (“‘There is a

24 _____
25 ³ The government also claims in its Statement that “the fact that UnitedHealth made
26 its CV program mandatory for its clients and required them to delete unsupported
27 diagnosis codes is highly relevant to the United States’ theory of liability.” But the
28 fact that the Subject Document may contain information “highly relevant” to the
government’s theories has no bearing on whether the document is privileged. There
is no relevance exception for attorney-client privilege. *See Admiral Ins. Co. v. United*
States Dist. Court, 881 F.2d 1486, 1493-94 (9th Cir. 1989) (holding that there is no
exception to attorney-client privilege for information unavailable through other
means).

1 significant difference between indicating the fact or topic of a confidential
2 [communication] with an attorney and revealing its content. The latter effects a
3 waiver of the attorney-client privilege, while the former does not.”) (quoting
4 *Murata Mfg. Co., Ltd. v. Bel Fuse, Inc.*, 2007 WL 781252, at *3 (N.D. Ill. March 8,
5 2007)).

6 Mr. Dumcum’s testimony consisted only of such non-privileged facts: [REDACTED]
7 [REDACTED] and (2) that
8 United ultimately made a “policy decision” to require CV. Mr. Dumcum did not
9 reveal United’s Legal Department’s express position or advice or the content of any
10 communications with attorneys. *See, e.g.*, Ex. 2, CID Dep. Tr. 178:7–11 [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED] The government mischaracterizes
14 this testimony, suggesting—mistakenly—that reference to a policy decision [REDACTED]
15 [REDACTED] But the
16 government fails to acknowledge that, at both of Mr. Dumcum’s depositions, United
17 carefully guarded the content of his discussions with counsel. [REDACTED]

18 Throughout his deposition, United’s counsel objected and drew appropriate
19 boundaries to safeguard privilege. Mr. Dumcum was permitted to testify (1) that
20 United had a policy requiring CV at one time, and
21 [REDACTED]—but any discussions with or advice of counsel relating to this policy
22 are privileged. *See, e.g.*, Ex. 2, CID Dep. Tr. 217:18-22 [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 Contrary to the government's assertion, Mr. Dumcum did not describe at any
2 point the substance of communications with attorneys or the position or advice of
3 attorneys [REDACTED]

4 [REDACTED] Courts have held that in such circumstances, no waiver
5 occurs. *See, e.g., Quiksilver, Inc.*, 247 F.R.D. at 583–84 (deponent did not waive
6 privilege when he testified that certain decisions were made because “it was advised
7 by...legal counsel to use [the marks in those ways] as a legal strategy,” because he
8 “did not reveal the substance of any attorney-client communications...but simply
9 noted that [he received legal advice] as part of a broader discussion of the
10 commercial strategy[.]”); *accord* Special Master's Order re: Mot. Compel Finding
11 of ACP Waiver at 18:4–9 (Dkt. 499-1) (“In the present case, UnitedHealth's
12 witnesses were simply responding to counsel's questions in a deposition regarding
13 who they talked to about the applicable regulations. Merely referencing
14 conversations with a party's attorney in answer to a deposition question does not
15 create a waiver. While the attorney's advice may be relevant to the matters in issue,
16 the privilege applies as the interests it is intended to protect are still served by
17 confidentiality.”).

18 Most significantly, though, the government's semantic, hair-splitting
19 argument about the proper interpretation of the words Mr. Dumcum used misses the
20 point. For the sake of argument, even if Mr. Dumcum did unintentionally disclose
21 privileged information in his testimony (which he did not), it should not result in
22 waiver where the testimony was not disclosed to gain a legal advantage. *See, e.g.,*
23 *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340–41 (9th Cir. 1996) (“The
24 doctrine of waiver of the attorney-client privilege is rooted in notions of
25 fundamental fairness. Its principal purpose is to protect against the unfairness that
26 would result from a privilege holder selectively disclosing privileged
27 communications to an adversary, revealing those that support the cause while
28 claiming the shelter of the privilege to avoid disclosing those that are less

1 favorable.”); *Quiksilver, Inc.*, 247 F.R.D. at 584 (in holding no waiver occurred,
2 distinguishing circumstances of instant case from cases where privilege was waived
3 because a party disclosed such communications “to gain a legal advantage”).

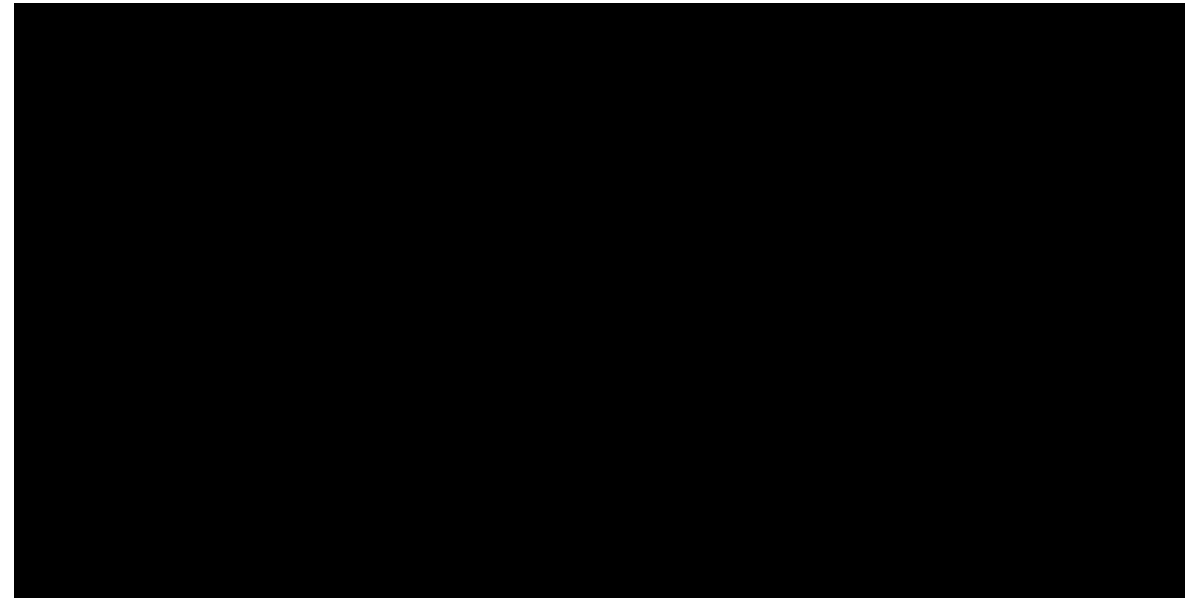
4 Here, United was not making a selective disclosure for strategic reasons—
5 contrary to the government’s assertions, no selective waiver could occur because
6 Mr. Dumcum’s statements of fact were not privileged to begin with. But regardless,
7 the government makes no claim that United made such a disclosure to achieve a
8 legal advantage. Indeed, United’s counsel was explicit during Mr. Dumcum’s
9 deposition that it was not asserting an advice of counsel defense. *See, e.g.*, Ex. 2,
10 CID Dep. Tr. 217:7-11 [REDACTED]

11 [REDACTED]
12 [REDACTED] Accordingly, even if the
13 Special Master were to find that Mr. Dumcum’s testimony crossed the line into
14 revealing privileged communications, the proper remedy would be to permit United
15 to claw back Mr. Dumcum’s testimony—not to find that it waived United’s
16 privilege.

17 **C. United did not otherwise disclose any legal advice relating to its**
18 **policy of requiring CV for commercial clients.**

19 United agrees with the government that the *fact* it—at one time—required
20 commercial clients to perform CV is not privileged. And United does not dispute
21 that it naturally shared this *fact* with its commercial clients as it implemented this
22 policy. Leaving aside these facts, nothing in the record suggests that United shared
23 with third parties the reasoning or the advice of its Legal Department related to this
24 policy. Mr. Dumcum’s testimony in his litigation deposition is not to the contrary.
25 Mr. Dumcum’s testimony revealed merely *facts*: [REDACTED]

26 [REDACTED] and that United made a policy decision to require commercial clients to do
27 CV. *See* Ex. 3, Lit. Dep. Tr. 231:23–232:22 [REDACTED]
28 [REDACTED]



Once again, Mr. Dumcum’s testimony did not reveal the substance of any advice received from counsel and as a result, did not waive privilege. *See Quiksilver, Inc.*, 247 F.R.D. at 584. He did not recall or testify as to “why” United had decided to require clients to participate in CV, only that [REDACTED]

[REDACTED] and reveals nothing more than what would be included in a privilege log.

The government’s assumption to the contrary, that the advice of United’s Legal Department can be inferred from United’s ultimate decisions with respect to CV, reflects the government’s mistaken belief at the core of this case—that it was or should have been obvious to United that plans were required to conduct two-way looks. In fact, CMS was intentionally ambiguous in its guidance to Medicare Advantage Organizations (“MAOs”) regarding their obligation to conduct two-way looks or other data validation programs. As a result, MAOs across the industry—not just United—were forced to make complex, difficult legal and business assessments about how to conduct their risk adjustment programs. Indeed, as subsequent events revealed—when CMS proposed implementing a requirement for two-way looks and

1 then withdrew the proposed rule—there never was any obligation to perform two-
2 way looks.

3 For these reasons, the advice of United’s Legal Department could have been
4 any number of things—for instance, that there were potential risks to not conducting
5 CV in light of inadequate guidance from CMS. Mr. Dumcum’s testimony does not
6 reveal either explicitly or by inference: (1) the express position or advice of United’s
7 Legal Department; (2) how they came to their position, including their legal
8 assessment of the issue; or (3) any specific advice given by United’s lawyers on this
9 issue. To the contrary, as in *Quiksilver*, Mr. Dumcum’s testimony merely reveals the
10 non-privileged *fact* that United [REDACTED] ultimately made a policy
11 decision.

12 After failing to show that Mr. Dumcum’s deposition testimony proves waiver,
13 the government then suggests United waived privilege years before Mr. Dumcum’s
14 testimony by disclosing confidential legal advice to a third party. This argument is
15 nothing more than innuendo, supposition, and mischaracterization. Nothing in the
16 record indicates United disclosed privileged advice to third parties.

17 The government also misleadingly claims that “UnitedHealth even sent its
18 own in-house legal counsel to meet with health plans to explain the mandatory CV
19 policy.” Gov’t Stmt. at 8. In fact, none of the documents cited by the government
20 support this assertion. For example, the government manipulates a quote from its
21 Ex. D, MARA641654, [REDACTED]

22 [REDACTED]. But Exhibit D says nothing
23 of the sort. The full quote says: [REDACTED]

24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED] (emphasis added). The
28 document does not say that Optum lawyers actually attended, nor does it say that the

1 lawyers—if they did attend—would discuss CV *at all*, let alone [REDACTED]
2 [REDACTED]⁴ In fact,
3 the final sentence suggests that someone from either legal *or* compliance—not
4 necessarily a lawyer—should attend the meeting *in addition to* whoever would
5 discuss the fact that CV was mandatory.

6 The government’s description of its Ex. E, MARA2061942, is similarly
7 misleading, and rests on nothing more than guesswork. [REDACTED]

8 [REDACTED]
9 [REDACTED]

10 [REDACTED] The government supposes that the presence of Optum Legal at the meeting
11 necessarily means “legal matters” were discussed, but the document provides no
12 such confirmation—let alone confirmation that Optum Legal disclosed its privileged
13 advice [REDACTED] Ex. F, MARA1734048, also lacks any indication that United
14 lawyers [REDACTED] The
15 government has not shown that United disclosed its privileged legal advice to third
16 parties nor has United disclosed such privileged information to third parties.

17 **IV. CONCLUSION**

18 The government has failed to establish that United has waived privilege over
19 the redacted content in the Subject Document. United should be permitted to claw
20 back the privileged portions of the Subject Document.

21
22
23
24 [SIGNATURE BLOCK FOLLOWS]
25
26

27 ⁴ Of course, even if Optum’s lawyers explained its policy that CV was mandatory
28 for commercial clients, that fact would not waive privilege (and United has
consistently not claimed privilege over the *fact* of its business decision to require
CV for commercial clients).

1
2 Dated: September 2, 2022

Respectfully submitted,

3 LATHAM & WATKINS LLP
4 DAVID J. SCHINDLER
5 MANUEL A. ABASCAL
6 DANIEL MERON
7 ABID R. QURESHI

8 By /s/ Abid R. Qureshi
9 Abid R. Qureshi
10 Attorneys for United Defendants
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Exhibit 6

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
CLAWBACK OF "IM" STATEMENTS

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

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 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:

Amy L. Likoff, Esq.
David Coriell, Esq.
Edward Crooke, Esq.
Gregory A. Mason, Esq.
Jessica Krieg, Esq.
Linda McMahon, Esq.
Martha Glover, Esq.
Robert McAuliffe, Esq.
Wendy Z. Zupac, Esq.

US DEPARTMENT OF JUSTICE, LEGAL DIVISION

175 N Street NE
Washington, DC 20002
amy.l.likoff@usdoj.gov
dcoriell@usa.doj.gov
edward.crooke@usdoj.gov
gregory.a.mason@usdoj.gov
jessica.e.krieg@usdoj.gov
linda.mcmahon2@usdoj.gov
martha.n.glover@usdoj.gov
robert.mcauliffe@usdoj.gov
wendy.z.zupac@usdoj.gov
cc: jessica.l.sweeney2@usdoj.gov

Andrew C. Baak, Esq.
BARTLIT BECK
1801 Wewatta Street
12th Floor
Denver, CO 80202
andrew.baak@bartlitbeck.com
cc: poehling@bartlitbeck.com

Arun Subramanian, Esq.
Cory Buland, Esq.
Geng Chen, Esq.
Lisa Jing, Esq.
SUSMAN GODFREY
1301 Avenue of the Americas
32nd Floor
New York, NY 10019
asubramanian@susmangodfrey.com
cbuland@susmangodfrey.com
gchen@susmangodfrey.com
ljing@susmangodfrey.com

Jack D. Ross, Esq.
John E. Lee, Esq.
AUSA - OFFICE OF US ATTORNEY
300 North Los Angeles Street
Los Angeles, CA 90012
jack.ross@usdoj.gov
john.lee2@usdoj.gov

Stephen S. Hasegawa, Esq.
PHILLIPS & COHEN
100 The Embarcadero
Suite 300
San Francisco, CA 94105
ssh@pcsf.com

Elizabeth Soltan, Esq.
CONSTANTINE CANNON
335 Madison Avenue
9th Floor
New York, NY 10017
esoltan@constantinecannon.com

Anne H. Hartman, Esq.
Eric R. Havian, Esq.
Hallie E. Noecker, Esq.
Marlene Koury, Esq.
CONSTANTINE CANNON
150 California Street
Suite 1600

San Francisco, CA 94111
ahartman@constantinecannon.com
ehavian@constantinecannon.com
hnoecker@constantinecannon.com
mkoury@constantinecannon.com

Max Voldman, Esq.
CONSTANTINE CANNON
1001 Pennsylvania Avenue NW
Suite 1300N
Washington, DC 20004
mvoldman@constantinecannon.com

David Schindler, Esq.
Manuel A. Abasal, Esq.
LATHAM & WATKINS LLP
355 South Grand Avenue
Suite 100
Los Angeles, CA 90071
david.schindler@lw.com
manny.abascal@lw.com

David C. Tolley, Esq.
David Rowe, Esq.
LATHAM & WATKINS LLP
200 Clarendon Street
Boston, MA 02116
david.tolley@lw.com
david.rowe@lw.com

Chanler A. Langham, Esq.
SUSMAN GODFREY, LLP
1000 Louisiana Street
Suite 5100
Houston, TX 77002
clangham@susmangodfrey.com

Abid Qureshi, Esq.
Daniel Meron, Esq.
Morgan Maddoux, Esq.
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004
abid.qureshi@lw.com
daniel.meron@lw.com
morgan.maddoux@lw.com

Kirstin Scheffler Do, Esq.
LATHAM & WATKINS LLP
330 North Wabash Avenue
Suite 2800
Chicago, IL 60611
kirstin.schefflerdo@lw.com

- () 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.

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- () 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

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8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

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

13 Plaintiffs,

14 v.

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

16 Defendants.

No. CV 16-08697 FMO

**[PROPOSED] ORDER GRANTING
MOTION FOR REVIEW OF SPECIAL
MASTER'S ORDER RE CLAWBACK
OF "IM" STATEMENTS**

DATE: December 1, 2022

TIME: 10:00 a.m.

COURT: 6D. Hon. Ferando M. Olguin

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21 Upon motion of plaintiff United States of America and relator Benjamin Poehling
22 for review of the Special Master's Order re Clawback of "IM" Statements (ECF 521-1),
23 and consideration of the papers filed in connection with the motion and arguments of
24 counsel, and good cause appearing, IT IS HEREBY ORDERED that said motion is
25 GRANTED.

26 ///

27 ///

28 ///

1 IT IS FURTHER ORDERED that the UnitedHealth defendants shall, within 10
2 business days of this Order, produce the complete Instant Messaging Conversation,
3 unredacted, to the plaintiffs.

4
5 IT IS SO ORDERED.

6 Date: _____

7 _____
8 UNITED STATES DISTRICT JUDGE
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