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Attorneys for United Defendants

**UNITED STATES DISTRICT COURT
FOR THE 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' MOTION FOR
REVIEW**

Date: December 1, 2022
Time: 10:00 a.m. PT
Judge: Hon. Fernando M. Olguin

I. INTRODUCTION

For at least the fifth time in this litigation, the government tries to subvert United’s assertion of privilege. The Special Master has rejected this latest attempt, just as she has done in every other ruling on the government’s improper efforts to pierce United’s privilege.

Special Master Segal properly concluded that portions of a document [REDACTED] reflect a privileged attorney-client communication. The government challenges this conclusion by repeating a legally and factually unsound theory of waiver considered and rejected by Special Master Segal. The government repeats two principal arguments. **First**, the government mischaracterizes Special Master Segal’s decision, arguing incorrectly that the Special Master concluded that a fact—the existence of a policy regarding a particular risk adjustment program—was privileged. But she did no such thing. Instead, she appropriately determined that [REDACTED] falls squarely within protected attorney-client privilege. **Second**, the government argues that any privilege [REDACTED] was waived through the deposition testimony of a single fact witness. But Special Master Segal reviewed this witness’s deposition testimony and concluded that he revealed [REDACTED]. She correctly held that no waiver had occurred, and United respectfully requests this Court affirm her decision.

II. BACKGROUND

This dispute first arose when the government attempted to use an instant message conversation (“IM Conversation”) between two United employees, Patty Brennan and Jon Bird, Bates-labeled MAPL001477246, as an exhibit in the

1 August 10, 2022 deposition of Jon Bird.¹ Three lines of the IM Conversation reflect
 2 [REDACTED]
 3 [REDACTED]² United
 4 promptly halted questioning on the IM Conversation at Mr. Bird's deposition, and
 5 clawed it back in full pursuant to the terms of the governing Protective Order. Dkt.
 6 512-1 ¶15. Following Mr. Bird's deposition, the parties met and conferred regarding
 7 United's clawback on August 19, 2022. After determining that it could release
 8 portions of the IM Conversation because they were not privileged, on August 22,
 9 2022, United reproduced a redacted version, which is Bates-stamped
 10 MAPL010976336.³ The government continued to object to United's clawback, and
 11 sought review of the issue before Special Master Segal. The government argued, as
 12 relevant here, that deposition testimony by Jeffrey Dumcum (a Vice President at
 13 Optum at the time of the IM Conversation) effectuated a subject-matter waiver of
 14 the attorney-client privilege over the same topic at issue in the IM Conversation.

15 The parties first met with the Special Master about this issue during an
 16 informal discovery conference on August 29, 2022. The government and United
 17 subsequently submitted briefs setting forth their positions, along with deposition
 18 transcript excerpts containing the relevant portions of Mr. Dumcum's testimony and
 19 redacted and unredacted versions of the IM Conversation.

20 The Special Master's order denying the government's motion to compel, Dkt.
 21 521-1 (the "Order"), followed an exhaustive presentation by the parties of the
 22 relevant facts and law. The Special Master's review of the relevant testimony

23 _____
 24 ¹ While the Order authorizing United to submit documents under seal references
 25 submission of the unredacted copy under seal, doing so would jeopardize privilege.
 Dkt. 533. United has explained this issue to the government and hopes to reach
 agreement such that United can file for leave to submit the document *in camera*.

26 ² Though not relevant to this dispute, United notes that the government has again
 27 mischaracterized its chart review and CV programs. While explained more
 28 thoroughly elsewhere (e.g., Dkt. 420-2 at 9-13), the factual record in this litigation
 undermines the government's suggestion that United identified "potential deletes"
 through its chart review process. Mem. at 2-3.

³ Dkt. 529-6.

1 indicated that Mr. Dumcum had disclosed only “the fact of counsel’s guidance, not
 2 the actual content of the conversation with counsel,” a “meaningful” distinction. *Id.*
 3 at 2 (emphasis in original). After explaining that the case law supported a conclusion
 4 that the IM Conversation was privileged, that Mr. Dumcum’s statements revealed
 5 only the fact that counsel was consulted and did not disclose the advice of counsel,
 6 and that the government had accordingly failed to make a *prima facie* showing that
 7 waiver occurred, the Special Master held that “UnitedHealth properly recognized
 8 that the three sentences included in its clawback reflected [privileged] legal advice.”
 9 *Id.* at 4. Following the issuance of the Special Master’s Order, the government
 10 improperly requested “clarification” of the Special Master’s decision. IDC Tr. 77:7-
 11 79:6 (Qureshi Decl. Ex. A). The Special Master again explained her view of the
 12 law, noting that she had “spent a lot of time” considering this issue before denying
 13 the government’s motion. *Id.* at 83:19-20.

14 **III. STANDARD OF REVIEW**

15 This Court has ordered that “any motion for review [of Special Master Segal’s
 16 discovery decisions] shall be governed by Federal Rule of Civil Procedure 53(f).”
 17 Order RE: Appointment of Special Master at 8 (Dkt. 395). Rule 53(f) provides for
 18 *de novo* review of special master rulings on conclusions of fact or law.

19 Special Master Segal’s ruling was correct, and reflects her knowledge of the
 20 complicated facts that underlie this litigation and her extensive consideration of the
 21 current discovery dispute. The Court specifically ordered the appointment of Special
 22 Master Segal was “necessary” and “warranted” to resolve pre-trial disputes between
 23 the parties. Order RE: Appointment of Special Master at 3, 6. As this Court
 24 recognized in appointing the Special Master, “Judge Segal’s knowledge and
 25 understanding of the complexities and nuances of this case... will not only assist the
 26 court in a time of crisis but result in careful, thoughtful and efficient decision-
 27 making.” *Id.* at 7.

1 **IV. ARGUMENT**

2 **A. The Special Master correctly held that redacted portions of the**
 3 **IM Conversation contain privileged legal information.**

4 The government contends that Special Master Segal “clearly erred” because
 5 she “ruled that any statement that UnitedHealth required its customers to [participate
 6 in CV] was privileged”. Dkt. 532-1 (“Mem.”) at 1, 3. Remarkably, the government
 7 argues that “the Special Master not only ruled on an issue that was not even in
 8 dispute, but did so in a way contrary to even UnitedHealth’s own admission of the
 9 nonprivileged nature of that statement.” *Id.* at 1. The government fails to cite any
 10 part of the Order that purports to hold as much. Nor could it—Special Master Segal
 11 held no such thing. To the contrary, the Special Master correctly held that “the three
 12 sentences included in its clawback reflected [...] legal advice.” Order at 4.

13 The government’s argument ignores the fact that for years, [REDACTED]
 14 [REDACTED] while acknowledging that the fact it
 15 made CV mandatory was just that—a non-privileged fact. But the government’s
 16 argument ignores this distinction, and fails to reckon with Special Master Segal’s
 17 conclusion that the redacted sentences in the IM Conversation do not merely convey
 18 facts, but rather legal advice from United’s lawyers. *Id.* That advice is privileged,
 19 even when repeated by two non-lawyers. *Id.* at 2; *U.S. v. Chevron*, 241 F. Supp. 2d
 20 1065, 1077 (N.D. Cal. 2002) (privilege protects communications between non-
 21 lawyers that “discuss or transmit legal advice given by counsel.”). As a result, the
 22 Special Master correctly held that United’s clawback was proper because United
 23 redacted only privileged information.⁴ Order at 4.

24 The government’s apparent attempt at misdirection is even more glaring in
 25 light of its prior attempts to obtain “clarification” on the Order at an informal
 26 _____

27 ⁴ The government’s brief inexcusably and improperly reveals information the
 28 Special Master has held is privileged, by repeating nearly verbatim key redacted
 portions of the IM Conversation. Mem. at 8. If the government persists in this
 improper conduct, United will not hesitate to seek appropriate relief.

discovery conference. Ex. A at 82:15–20 (M. Glover: “But if any statements were in there about the fact that United had a mandatory claims verification program, and you had a different reason for saying that that was privileged beyond just the fact that, you know, they had this in place, we want to know about that.”). Special Master Segal noted that she “spent a lot of time on this one, on the IM issue,” and explained that “[c]onversations that are repeated by employees -- and this is in my order -- are privileged if they’re repeating privileged information. And that’s how I see the law. And that’s what guided my decision making.” *Id.* at 83:19–20, 84:4–8. The government’s contentions that the Order permitted clawback of non-privileged factual information is simply wrong: Special Master Segal clearly held in her Order and further explained at the conference that the redacted sentences contained privileged legal advice and not merely *facts*. In light of her careful consideration of the issue, this Court should hold that Special Master Segal did not err in ruling that all three redacted sentences reflected privileged information.

B. The Special Master correctly held that Jeff Dumcum’s deposition testimony did not waive privilege.

In the alternative, the government asks the Court to hold that United waived privilege over the entire subject matter of its CV policy based on the government’s misinterpretation of a single statement by Mr. Dumcum in 2021 recounting a conversation from a decade earlier. Specifically, Mr. Dumcum testified:

[REDACTED]

[REDACTED]

[REDACTED] *See generally* Mem. at 6-8.

The government asserts that this statement effectuated a subject-matter waiver, either through the testimony itself or by establishing that United had previously waived privilege through disclosure to a third party.

Again, the government is wrong. As the Special Master explained, “[a] client does not waive the attorney-client privilege merely by disclosing a subject that was

1 discussed with an attorney...the content of the privileged communication must be
 2 shared for there to be a waiver.” Order at 3. Mr. Dumcum’s statement [REDACTED]
 3 [REDACTED] does not reveal the substance of any
 4 advice received from counsel [REDACTED]

5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 The full context of Mr. Dumcum’s statement only further demonstrates that
 9 he was careful not to reveal any advice received from counsel, and that United’s
 10 counsel objected by making the very same distinction between *the fact of receiving*
 11 *legal advice* and *the contents of that legal advice* the government seeks to re-litigate
 12 now. [REDACTED]

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED] [REDACTED]
 23 _____
 24 ⁵ While the government has not sought review of the Special Master’s ruling with
 25 respect to Mr. Dumcum’s 2015 Civil Investigative Demand deposition, it bears
 26 noting that United’s counsel Mr. Meron enforced the same distinction then between
 27 the fact of legal advice and the contents of that legal advice by objecting and
 28 instructing Mr. Dumcum not to answer questions related to why United had a policy
 that CV was required [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 After “spen[ding] a lot of time” considering the issue, Ex. A at 83:19-20, the
 5 Special Master agreed with United. *See* Order at 2 (“Mr. Dumcum was careful to
 6 limit his testimony to the fact of counsel’s guidance, not the actual content of the
 7 conversation with counsel.”) (emphasis in original). The Special Master cited
 8 precedent holding that very similar statements revealed only the fact that advice was
 9 obtained in connection with the decision—not the content of the advice itself—and
 10 that under such circumstances, the party opposing the privilege fails to meet its
 11 “‘prima face burden’ to show that a disclosure of privileged information occurred.”
 12 *Id.* at 2-3. For example, the court in *Quiksilver, Inc. v. Kymsta Corp.* held that a
 13 deponent did not waive privilege when he testified that certain decisions were made
 14 because “it was advised by...legal counsel to use [the marks in those ways] as a legal
 15 strategy,” because he “did not reveal the substance of any attorney-client
 16 communications...but simply noted that [he received legal advice] as part of a
 17 broader discussion of the commercial strategy[.]” 247 F.R.D. 579, 584 (C.D. Cal.
 18 2007).

19 In addition, as the Special Master explained, the Court in *Sleep Science*
 20 *Partners v. Lieberman* rejected a privilege-waiver argument very similar to the one
 21 the government pursues here. Order at 3-4 (citing *Sleep Science Partners v.*
 22 *Lieberman*, 2010 WL 4316687, at *1 (N.D. Cal. Oct. 26, 2010). In that case, the
 23 “defendants had obtained legal advice about whether plaintiffs’ former CEO could
 24 work for defendants, and later had conversations with investors regarding the legal
 25 implications of working with the former CEO.” *Id.* The court however rejected any
 26 claim of privilege waiver because the plaintiffs “did not show that defendants shared
 27 the actual content of the legal advice, only that they had obtained such advice.” *Id.*
 28 Likewise, the Special Master correctly held that United did not waive privilege

1 through purported disclosure to its commercial clients or through Mr. Dumcum's
2 testimony.

3 The government neither addresses the cases cited by the Special Master nor
4 offers any contradictory case law. In the cases the government does cite, there was
5 no factual dispute as to whether the advice of counsel had been disclosed to a third
6 party, as there is here. The government's cases addressed only the *subsequent*
7 question—whether circumstances surrounding that disclosure should result in
8 waiver. *See, e.g., United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009)
9 (explaining there was “no dispute that...by electing to reveal the information
10 gathered to Ernst & Young... [Broadcom] deliberately waived any corporate
11 attorney-client privilege it held”); *Cargill Inc. v. Budine*, 2008 WL 2856642, at *2
12 (E.D. Cal. July 21, 2008) (privilege waived when counsel failed to make a timely
13 objection to disclosure of undisputedly privileged information during a deposition,
14 having earlier expressly agreed that the witness was waiving privilege); *Perrignon*
15 *v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 461 (N.D. Cal. 1978) (privilege waived
16 where defendants failed to object in deposition to disclosure of undisputedly
17 privileged information, where it appeared that defendants “in actuality were not
18 opposed to [the deponent] answering the questions” because the testimony in
19 question may have been helpful to their case).

20 The circumstances here are also distinguishable from the cases cited by the
21 government because United's counsel carefully safeguarded United's privilege
22 during Mr. Dumcum's deposition and did not intend for Mr. Dumcum to reveal
23 privileged advice, as described above. But for sake of argument, even if the court
24 were to find that Mr. Dumcum's statement did disclose advice of counsel, meaning
25 that he had unintentionally disclosed privileged information (which he did not), it
26 should not result in waiver because the testimony was not disclosed to gain a legal
27 advantage. *See, e.g., Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340–41 (9th
28 Cir. 1996):

1 The doctrine of waiver of the attorney-client privilege is rooted in
2 notions of fundamental fairness. Its principal purpose is to protect
3 against the unfairness that would result from a privilege holder
4 selectively disclosing privileged communications to an adversary,
5 revealing those that support the cause while claiming the shelter of the
6 privilege to avoid disclosing those that are less favorable.

6 As United explained in its briefing before the Special Master (Dkt. 528-2 at
7 5), United's counsel has been explicit that it was not and is not asserting an advice
8 of counsel defense. Waiver of United's privilege would therefore be improper. The
9 government has accordingly failed to establish that Mr. Dumcum's testimony or any
10 previous disclosure to a commercial client waived United's privilege.

11 **IV. CONCLUSION**

12 The government has failed to provide any credible justification for its request
13 that the Court overturn the Special Master's carefully considered determination that
14 United's clawback and redactions of the privileged information in the IM
15 Conversation were proper and that United did not waive its privilege over the matter
16 at issue. The Court should reject the government's Motion.

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18 [SIGNATURE PAGE FOLLOWS]
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1 Dated: November 10, 2022

Respectfully submitted,

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3 DAVID J. SCHINDLER
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8 By /s/ Abid R. Qureshi
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Attorneys for United Defendants

**UNITED STATES DISTRICT COURT
FOR THE 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

**DECLARATION OF ABID R.
QURESHI IN SUPPORT OF
UNITED'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
REVIEW**

DECLARATION OF ABID R. QURESHI

I, Abid R. Qureshi, hereby declare as follows:

1. I am a partner at Latham & Watkins LLP and a member of the Bars of the Commonwealth of Virginia and the District of Columbia. Latham & Watkins LLP represents Defendant UnitedHealth Group Incorporated and its affiliated entities named as Defendants in this action (collectively, "United"). I submit this Declaration in support of United's Opposition to Plaintiff's Motion for Review.

2. Attached as Exhibit A is a true and correct copy of excerpts of the transcript from an Informal Discovery Conference heard before the Honorable Suzanne H. Segal on September 27, 2022.

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

Executed on November 10, 2022, at Washington, D.C.

By /s/ Abid R. Qureshi

Abid R. Qureshi

Attorney for United Defendants

EXHIBIT A

UNITES STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
UNITED STATES OF AMERICA, EX
REL. BENJAMIN POEHLING,

Plaintiffs,

vs.

CASE NO. 16-08697 FMO

UNITEDHEALTH GROUP, INC., ET
AL.

Defendants.

INFORMAL DISCOVERY CONFERENCE
HEARD BEFORE THE HONORABLE SUZANNE H. SEGAL (Ret.)
WITH ALL PARTIES APPEARING REMOTELY
Tuesday, September 27, 2022

Stenographically Reported by: Ashley Soevyn,
CSR No. 12019
APPEARING REMOTELY FROM MALIBU, CALIFORNIA
Job No. 877346
Pages 1 - 100

1 UNITED STATES DISTRICT COURT
2 FOR THE CENTRAL DISTRICT OF CALIFORNIA
3 WESTERN DIVISION

4 UNITED STATES OF AMERICA, EX
REL. BENJAMIN POEHLING,

5
Plaintiffs,

6
vs. CASE NO. 16-08697 FMO

7 UNITEDHEALTH GROUP, INC., ET
8 AL.
9 Defendants.

10
11
12
13
14 Informal Discovery Conference heard
before the Honorable Judge Suzanne H. Segal, with
15 all parties appearing remotely beginning at
11:02 a.m. and ending at 12:52 p.m. on Tuesday,
16 September 27, 2022, before ASHLEY SOEVYN, Certified
Shorthand Reporter No. 12019.

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1 that's resolved for now.

2 Now we can move on to issue number three,
3 which is the Government's request for clarification
4 of my order.

5 So Ms. Glover, did you want to bring that
6 up?

7 MS. GLOVER: Yes. Absolutely. We're
8 seeking clarification on your order. We understand
9 that you have found that the three statements in the
10 IM conversation were properly redacted. I'm not
11 here today to seek reconsideration of that order. I
12 want to be very clear about that.

13 But we do think it's helpful to get
14 clarification. And the reason is because the
15 parties, as we go forward, are going to be
16 addressing other documents on this topic. And in
17 fact, United has already clawed back some documents,
18 and we've objected to those clawbacks. But we think
19 we will be addressing those as we go forward, so we
20 want clarification as to exactly what your order is
21 saying and what it means. And also, we're seeking
22 clarification because we're considering whether we
23 seek a motion for review. So that's sort of why
24 we're here.

25 And here's specifically what we would

1 like clarified: It's whether your order allows for
2 UnitedHealth to clawback or to claim privilege over
3 statements about the fact of United's mandatory CV
4 program or CV policy. And for your order, we're
5 asking you to clarify that your order should not be
6 read to allow privilege claims over the fact that
7 United had a mandatory CV policy. So those are kind
8 of the clarifications that we're seeking.

9 We know that this fact is not privileged
10 because United said so in its briefing and also
11 allowed Mr. Duncum to testify to the fact that there
12 was a mandatory CV policy in place.

13 Now, your order, of course, as we
14 acknowledged, it concludes that the IM statements
15 are all privileged. And what we're trying to do is
16 to reconcile your determination with UnitedHealth's
17 own statements that they're not claiming privilege
18 over the concept that CV was at one point mandatory.

19 And also, as I mentioned, they've clawed
20 back several documents that we believe are on this
21 same topic since this IM conversation with you
22 began. And so what we would like guidance on is
23 whether those clawbacks were proper and how we go
24 forward with United and talking about those
25 clawbacks and our objections to those.

1 So that's kind of why I'm here today,
2 asking for clarification about exactly what you
3 meant in your order and the ramifications for other
4 documents and, in fact, statements about the fact
5 that UnitedHealth had a mandatory CV policy in
6 place.

7 JUDGE SEGAL: All right.

8 Mr. Schindler?

9 MR. SCHINDLER: Your Honor, this is
10 reconsideration. Let's be clear. There is no
11 provision in the local rules. There is no provision
12 anywhere for something called "clarification." And
13 I appreciate this is an informal discovery
14 conference, so I am not standing on ceremony.

15 But what Ms. Glover is asking for here is
16 a speculative advisory opinion of something that
17 hasn't occurred, and she's drawing lines that are
18 illusory. She is correct. We have never taken the
19 position that the fact that at one point United
20 undertook CV. Never disputed that that was true.
21 We've never disputed the fact that at one point
22 United discontinued CV.

23 But as you correctly point out in your
24 order, the legal advice surrounding those -- that
25 decision is privileged. Documents that reveal that

1 legal advice are privileged. The fact that the
2 Government is indeed sought to refer specifically to
3 the portions that you determined were privileged, is
4 itself improper. But let's put that to one side.

5 When Ms. Glover says we quote, unquote,
6 "want clarification so that we can apply it with
7 respect to other documents that United has clawed
8 back," first of all, that's a wholly inappropriate
9 attempt to sort of try and short circuit. If there
10 are particular clawbacks that the Government wants
11 to challenge under the protective order, there's a
12 mechanism. They should bring them to you. But this
13 notion that you're supposed to clarify your prior
14 order, your order was as clear as could be. If they
15 want to challenge that, the proper remedy is to go
16 seek review from Judge Olguin.

17 But this notion of, "Please clarify what
18 you meant." The order is quite clear on its face.
19 The order says, I've reviewed this document. The
20 document -- the portions of this message reflect
21 legal advice. I conclude United properly can
22 withhold that and could properly claw it back under
23 the protective order, just as the Government has
24 done. United is perfectly entitled to ask the
25 reporter to redact testimony, if necessary,

1 pertaining to privileged material that has been
2 disclosed invertedly.

3 And there's nothing here that requires
4 any further clarification. They may not like your
5 decision. They may disagree with the notion that
6 the portions of the instant message that were at
7 issue, they may contend that the reference or your
8 determination that that was legal advice is in
9 error, but that's for them to take up with
10 Judge Olguin. That is not the subject of quote,
11 unquote "clarification."

12 So there is no need for clarification.
13 If they want to challenge subsequent clawbacks,
14 they're perfectly entitled to do so and we'll come
15 back to you on a case-by-case basis.

16 JUDGE SEGAL: Ms. Glover?

17 MS. GLOVER: Yes. You know, one thing
18 that Mr. Schindler said, and I think we need to make
19 this clear. Mr. Schindler just said that United had
20 a claims verification program and at one point
21 decided to terminate it. I'm not saying just that.
22 I'm saying that UnitedHealth said that the fact that
23 it had a mandatory claims verification program was
24 not privileged, and they allowed a witness to
25 testify about it.

1 So I want to be very clear there. That
2 that's what we're talking about. We're not talking
3 about the existence of a claims verification
4 program. We're talking about the existence of a
5 mandatory claims verification policy at United. And
6 so I want to be clear there.

7 The second thing is, we're not seeking
8 reconsideration. We are seeking your guidance. And
9 we're seeking your guidance because in a motion for
10 review, in terms of the basis for finding that all
11 three of those IM statements were covered by a
12 privilege, I am looking for additional information
13 as to why, if any statements were in there -- and
14 again, I don't know the content of the redacted
15 statements. But if any statements were in there
16 about the fact that United had a mandatory claims
17 verification program, and you had a different reason
18 for saying that that was privileged beyond just the
19 fact that, you know, they had this in place, we want
20 to know about that.

21 It would help us in briefing the issue.
22 So I guess I'm looking for insight as to the basis
23 of your decision and additional clarification there.
24 I'm not asking you to reconsider it. I do think
25 your guidance is also helpful for addressing other

1 documents that have come up. I will be asking for
2 you to do in-camera review of other documents that
3 they've raised. Mr. Schindler's right, those
4 haven't come up to you yet. But we will plan to
5 bring them up. It's just that we could avoid doing
6 that if we had some clarification in the interim.

7 JUDGE SEGAL: So I appreciate that.

8 And the hardest thing, you know, in my
9 role as magistrate judge -- one of the hardest
10 things -- was privilege issues. They're very
11 difficult. And this is why I say -- and I haven't
12 been very effective today at it, but usually, you
13 know, I can resolve a lot of discovery disputes in
14 an informal discovery conference because they go to
15 burden or they go to breath or they go to, you know,
16 various things that you can kind of quickly just
17 say, Well, this is what I would do.

18 And the parties can take from that and
19 address it. But privilege is tricky. And I spent a
20 lot of time on this one, on the IM issue. And I
21 don't think it would be -- I don't think it would be
22 fair to UnitedHealth if I, you know, gave you, like,
23 you know, detailed information about how I reached
24 the decision. I don't think that's helpful to the
25 parties. It wouldn't be helpful to you if I had

1 ruled in your favor. So I don't think that's
2 appropriate.

3 The law is that conversations between
4 attorney and client are privileged. Conversations
5 that are repeated by employees -- and this is in my
6 order -- are privileged if they're repeating
7 privileged information. And that's how I see the
8 law. And that's what guided my decision making.
9 But beyond that, I'm not really comfortable
10 speculating. And I know it would be more helpful to
11 you if I could draw the lines more clearly, but I
12 can't. I mean, that's why privilege is tricky.
13 So -- and there's some gray areas in there that the
14 next person who comes along could see it differently
15 than I do.

16 So I'm just telling you that I believe
17 that when a lawyer speaks to a client, that's a
18 privileged conversation. If they both anticipate
19 that it's being made in confidence. And even if
20 that confidential conversation is repeated to two
21 employees, it's a confidential conversation. And
22 that's what I was trying to protect.

23 So I don't know if that's helpful to you.
24 It's just repeating what I put in the order. But
25 that's how I see the issue.

1 I, Ashley Soevyn, a Certified Shorthand
2 Reporter of the State of California, do hereby
3 certify:

4 That the foregoing proceedings were taken
5 remotely before me at the time and place herein set
6 forth; that any witnesses in the foregoing
7 proceedings, prior to testifying, were duly sworn;
8 that a record of the proceedings was made by me
9 using machine shorthand, which was thereafter
10 transcribed under my direction; further, that the
11 foregoing is a true record of the testimony given.

12 I further certify I am neither financially
13 interested in the action nor a relative or employee
14 of any attorney or party to this action.

15 IN WITNESS WHEREOF, I have this October 1,
16 2022 subscribed my name.

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21 ASHLEY SOEVYN
CSR No. 12019

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