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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*
27 *al.*,

28 Defendants.

No. CV 16-08697 FMO

**PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF
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

1 In the Order under review, Judge Segal held that the three lines redacted in the IM
 2 Conversation conveyed the privileged *content* of legal advice and that there was no
 3 waiver of privilege over that advice. Plaintiffs made two arguments in their motion for
 4 review, and UnitedHealth’s opposition fails to respond to either one. First, Plaintiffs
 5 argued that the Special Master erred in ruling that an admittedly non-privileged
 6 statement that UnitedHealth required its risk adjustment services clients to use Claims
 7 Verification (“CV”) (the “mandatory CV policy”) was privileged. Rather than
 8 responding to this argument, UnitedHealth instead attempts to obfuscate the issue by
 9 conflating the non-privileged statement that CV was mandatory together with other
 10 statements in the IM Conversation and then vaguely asserting privilege over the whole
 11 combination. Second, Plaintiffs argued that UnitedHealth waived privilege over such
 12 statements by disclosing them to third parties and in the sworn testimony of Jeffrey
 13 Dumcum. UnitedHealth improperly asks this Court to ignore these straightforward
 14 disclosures, as confirmed and evidenced in Dumcum’s testimony.

15 **A. UnitedHealth Redacted Statements from the IM Conversation That Merely**
 16 **Convey Non-Privileged Facts, Not Legal Advice**

17 Although UnitedHealth protests otherwise, *see* Opp. at 5, Judge Segal’s order
 18 bluntly decided that all three lines in the IM Conversation “repeated [the content of] an
 19 attorney’s advice” and thus were privileged. Order at 4. But this ruling sweeps too
 20 broadly. If any one of the redacted lines merely conveyed the *fact* that UnitedHealth had
 21 a mandatory CV policy, that is a “fact” that UnitedHealth has admitted over and over
 22 again, including in its opposition, that is “non-privileged.” Opp. at 4 (UnitedHealth
 23 “acknowledg[es] that the fact it made CV mandatory was just that—a non-privileged
 24 fact”).

25 In its opposition, UnitedHealth refuses to parse the three redacted statements in
 26 the IM Conversation separately. It instead broadly argues in the most general terms that
 27 the Special Master “correctly held that ‘the three sentences included in its clawback
 28 reflected [...] legal advice.’” *See* Opp. at 4. But UnitedHealth’s argument that the

1 redacted portions of the IM Conversation contain privileged legal information, and not
2 merely non-privileged facts, ignores the actual content of the three redacted statements.

3 This Court's review of the redacted portions of the IM Conversation¹ will
4 demonstrate whether UnitedHealth's argument is wrong – whether at least some of the
5 redacted statements simply reflect what UnitedHealth has conceded repeatedly to be the
6 non-privileged fact that the CV program was mandatory. Thus, any lines redacted in the
7 IM Conversation that merely convey this nonprivileged fact are improper.

8 **B. UnitedHealth Has Waived Any Privilege by Disclosing Such Advice to**
9 **Customers and in Deposition Testimony.**

10 In its opposition, UnitedHealth mischaracterizes the repeated disclosures made by
11 its employee, Jeffrey Dumcum, of the *content* of legal advice that UnitedHealth received
12 on the mandatory CV policy, thus effecting a waiver of privilege. UnitedHealth argues it
13 has not waived this privilege on the view that Dumcum merely disclosed the non-
14 privileged fact that UnitedHealth had sought legal advice about the mandatory CV
15 policy, rather than the content of such advice. This is fundamentally wrong and relies on
16 a strained reading of Dumcum's testimony. He clearly testified:

17 [REDACTED]
18 [REDACTED]

19
20 ¹ By a separate Notice accompanying this Reply, Plaintiffs have noted that
21 UnitedHealth has refused to comply with two orders of this Court requiring the company
22 to file the unredacted IM Conversation under seal. First, when appointing Special
23 Master Segal, the Court ordered that all papers submitted to the Special Master would be
24 filed with the Court. *See* Order re: Appointment of Special Master (ECF 395), Para. 6
25 (“All papers submitted by the parties to the Special Master shall be filed with the court,
26 with courtesy copies delivered to the court's chambers.”). Second, pursuant to a Joint
27 Application filed by UnitedHealth, this Court specifically ordered UnitedHealth to file
28 the un-redacted version of the IM Conversation under seal. *See* Order Granting Joint
Application for Sealing Order (ECF 533). Unless UnitedHealth files the unredacted IM
Conversation under seal, this Court cannot properly review the record at issue, and the
record of this Motion will not be properly preserved. Nevertheless, despite numerous
requests from the United States, UnitedHealth has refused to file the un-redacted version
of the IM Conversation under seal, and refuses to comply with two Court Orders (ECF
395 and 533).

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 Mason Decl., Ex. 4 (Dumcum Depo. Tr.) at 232:14-22. A straightforward reading of this
5 testimony is that Dumcum disclosed (both to clients and again during the deposition) the
6 content of the communications with counsel. [REDACTED]

7 [REDACTED] *Id.*
8 UnitedHealth’s tortured reading to the contrary – that Dumcum somehow only
9 referenced the non-privileged fact that UnitedHealth had sought legal advice on the topic
10 of the mandatory CV policy – reads out most of the words in his testimony and invites
11 the Court to ignore the obvious. The distinction the Special Master drew (and
12 UnitedHealth echoed) between disclosures that do not waive the attorney-client
13 privilege—*i.e.*, the mere disclosure of “a subject that was discussed with an attorney”—
14 and disclosures that do waive the privilege—*i.e.*, “the content of the privileged
15 communication must be shared for there to be a waiver,” Order at 3; Opp. at 5-6—

16 [REDACTED]
17 [REDACTED]
18 [REDACTED].
19 In its opposition, UnitedHealth attempts to divert attention away from the specific
20 statements that it has redacted in the IM Conversation, and instead makes only general
21 arguments about the nature of privilege communications. But this Court’s review of the
22 redacted portions of the IM Conversation will show whether the specific statements
23 which UnitedHealth has improperly redacted in the IM Conversation reveal nothing
24 more than what United previously disclosed, both to third-party clients and in deposition
25 testimony, as evidenced by Dumcum’s testimony.

26 UnitedHealth’s reliance on *Quiksilver* and *Sleep Science Partners* is inapposite.
27 In those cases, the courts did not find waiver because the party holding the privilege had
28 not in fact revealed the content of legal advice. *See* Opp. at 6-7; *Sleep Sci. Partners v.*

1 *Lieberman*, 2010 WL 4316687, at *1 (N.D. Cal. Oct. 26, 2010) (finding no waiver where
 2 prior disclosure did not “share[] the actual content of the legal advice, only that they had
 3 obtained such advice”); *Quiksilver, Inc. v. Kymsta Corp.*, 247 F.R.D. 579, 584 (C.D. Cal.
 4 2007) (“There is a significant difference between indicating the fact or topic of a
 5 confidential [communication] with an attorney and revealing its content. The latter
 6 effects a waiver of the attorney-client privilege, while the former does not.”). In this
 7 case, however, as Dumcum clearly testified, UnitedHealth purposefully shared with
 8 third-party clients the actual legal advice it received to justify the risk adjustment
 9 services they had to use—*i.e.*, [REDACTED]

10 [REDACTED].
 11 UnitedHealth’s reliance on *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337 (9th
 12 Cir. 1996), is similarly misplaced. UnitedHealth argues that, to the extent Dumcum
 13 disclosed legal advice, that disclosure was unintentional and “fundamental fairness”
 14 dictates that waiver should be found only where party discloses legal advice intentionally
 15 “to gain a legal advantage.” Opp. at 8-9. This cramped interpretation of the waiver
 16 doctrine goes much too far, and indeed, *Tennenbaum* actually emphasizes the opposite
 17 principle: “the focal point of privilege waiver analysis should be the holder’s disclosure
 18 of privileged communications to someone outside the attorney-client relationship, *not the*
 19 *holder’s intent to waive the privilege.*” *Id.* at 340-41 (emphasis added). In that case,
 20 Ninth Circuit drew a distinction between intent to disclose and actual disclosure in
 21 determining that a *promise* to waive privilege did not suffice to effectuate waiver, even if
 22 the client had had every intent to disclose privileged information at a future date. *Id.*
 23 Under *Tennenbaum*, UnitedHealth must be held to the disclosures it previously chose to
 24 make to its clients and then again to Plaintiffs in deposition testimony.

25 In any case, even if UnitedHealth’s intent did matter, UnitedHealth informed its
 26 clients [REDACTED]

27 [REDACTED]—a clearly purposeful and strategic disclosure.
 28 UnitedHealth experiences no unfairness in having to stand by that decision now. Its

improper attempt to claw back a document containing the same disclosure that it long ago made in the regular course of its business should be rejected. Indeed, it is Plaintiffs who experience fundamental unfairness if UnitedHealth is permitted to claw back the same statements that it habitually made for its business advantage now that those disclosures are inconvenient for its litigation position.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Plaintiffs' initial Memorandum of Law in support of this Motion, Plaintiffs respectfully request that the Court reverse the ruling of the Special Master and hold that UnitedHealth must produce the full unredacted IM Conversation or, in the alternative, produce the IM Conversation with any statements to the effect that UnitedHealth had a mandatory CV policy unredacted.

Dated: November 17, 2022

Respectfully submitted,

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22 Attestation

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

25 Dated: November 17, 2022

26 /s/ Gregory A. Mason

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