



1 UNITED STATES DISTRICT COURT
2 FOR THE CENTRAL DISTRICT OF CALIFORNIA
3 WESTERN DIVISION
4

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

7 Plaintiffs,

8 v.

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

10 Defendants.
11

No. CV 16-08697 FMO (PJWx)

SPECIAL MASTER'S ORDER RE
UNITED'S MOTION TO COMPEL
DOCUMENTS WITHHELD PURSUANT
TO LAW ENFORCEMENT PRIVILEGE

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13 **I. INTRODUCTION**
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15 Defendant UnitedHealth Group, Inc., et al. ("United") filed a motion to compel the
16 United States ("the government") to produce documents and orders withheld under the law
17 enforcement privilege. The government filed an Opposition, United filed a Reply and the
18 government filed a Surreply. For the reasons discussed below, the Special Master
19 GRANTS IN PART and DENIES IN PART the motion to compel.
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21 **II. UNITED'S CONTENTIONS**
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23 United's contentions are summarized below:
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25 The government is improperly withholding hundreds of highly relevant
26 documents related to risk adjustment investigations of United and other
27 Medicare Advantage Organizations ("MAOs") based on unsupportable
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1 assertions of the law enforcement privilege (“LEP”). As justification, the
2 government has provided only vague and conclusory assertions that
3 disclosure would cause unspecified harm to investigative and enforcement
4 efforts. The government’s failure to describe any purported “harm” with
5 specificity or to address why the parties’ robust protective order (“PO”)
6 would not protect against those harms is fatal. Even if the government had
7 properly asserted the LEP (and it has not), the privilege is qualified, and
8 United’s strong interest in these documents outweighs any such “harm” as
9 the documents are directly relevant to key issues in this case. The Court
10 should compel production of these documents (“LEP Documents”). The
11 Court should also compel disclosure of twelve documents the government
12 lists on its privilege log as subject to a “court order” privilege—even though
13 no such privilege exists. These include nine documents that supposedly
14 reference sealed investigations—though the documents are not themselves
15 sealed or privileged—and three documents that remain sealed despite the
16 resolution of the underlying litigation (the “Court Order Documents”). The
17 government has not shown why disclosure under the PO would not guard
18 against any alleged harm, and the burden on the government to seek unsealing
19 is minimal because the twelve documents relate to only three matters. Nor
20 has the government indicated why selective redaction (to remove names of
21 the cases) would not permit production of the documents at issue. The Court
22 should order the government to seek permission to disclose the Court Order
23 Documents, or at minimum, to produce them with appropriate redactions.

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III. THE GOVERNMENT'S CONTENTIONS

The government's Opposition is summarized below:

Within the vast scope of discovery in this case, the United States is properly withholding a small number of documents protected by the Law Enforcement Privilege (“LEP”) or material sealed by orders in another district court. The United States has articulated the clear and specific harms that would result from the release of these sensitive law enforcement documents. And the United States’ interest in protecting these materials far outweighs United’s purported need to review them. United has offered no basis for the court to order the United States to produce the 12 documents sealed by other district courts . . . On May 31, 2022, the United States provided United with a declaration from Adam Globerman supporting the assertion of LEP over the remaining 493 documents. Mr. Globerman is the Assistant Inspector General for Investigations at HHS-OIG. *See* Declaration of Adam Globerman (“Globerman Declaration”). Of these 493 documents, 337 are interview reports (91 related to the investigation of United underlying this litigation and 246 related to investigations of other entities), 88 are agents’ notes of interviews (6 related to the investigation of United underlying this litigation and 82 related to investigations of other entities), and 68 are documents that discuss or reflect consensual recordings made by cooperating witnesses unrelated to the investigation of United. . . . United's Motion is now limited to the 401 documents that are being withheld, in full or in part, solely on the basis of LEP (“the LEP documents”) and are not protected by another privilege (e.g., the attorney-client privilege) . . . The United States has withheld 51 documents from production, either in full or in part, because another District Court ordered that the documents remain sealed

1 or because the documents reveal the identity of a sealed qui tam action. On
2 May 31, 2022, Deputy Assistant Attorney General Michael Granston
3 submitted a Declaration representing that these materials were withheld
4 pursuant to the order of another District Court. . . All but 12 of the 51
5 documents referenced in the Granston Declaration are also protected by the
6 attorney client privilege and therefore are not at issue in this Motion. Of the
7 12 remaining documents, 8 contain references to sealed cases. United seeks
8 redacted version of the 8 documents that contain sealed material, and the
9 United States has now provided such versions of these documents to United
10 with only the references to sealed cases redacted. Of the 4 remaining
11 documents, one document (USBPPRIV00048909) has been withheld as both
12 LEP and because its production would reveal the identity of an under seal qui
13 tam. Thus, United's Motion is limited to 3 documents (the "Court Order
14 Documents"), which are themselves sealed by order of another District Court
15 and therefore withheld in full.

16 17 C. UNITED'S REPLY

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19 United's Reply is summarized below:

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21 [T]he government has failed to make the required threshold showing
22 that the Law Enforcement Privilege ("LEP") applies to the 402 documents it
23 withholds on that basis ("OIG LEP Documents") because its supporting
24 declaration ("Globerman Declaration") describes only vague and speculative
25 harms, and fails to explain why the parties' protective order ("PO") would
26 not mitigate any potential harm of disclosure. Yet even if the government had
27 established the privilege applies (it has not), disclosure is still warranted
28 because United's interest in obtaining these documents outweighs any

1 purported interest the government has in shielding them. The government's
2 response attempts to impose a burden of proof on United that has no support
3 in the law, faults United for not knowing exactly what the withheld materials
4 contain, and advances arguments the Court has already rejected. None of
5 these arguments overcome United's strong interest in disclosure.

6 7 D. THE GOVERNMENT'S SURREPLY

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9 The Special Master granted permission to the government to file a surreply
10 which is summarized below:

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12 United's Reply makes a new factual allegation about 41 documents that the
13 United States clawed back earlier in discovery (the "Clawback LEP
14 documents"). The United States submits this brief surreply to correct a
15 misunderstanding about these documents. In its Reply, United argues that
16 after Defendants filed their opening brief, the United States withdrew its
17 assertion of LEP over the 41 Clawback LEP documents and then asserted
18 new privileges over those documents and withheld them from production.
19 United suggests that because the United States produced a corrected privilege
20 log after United filed its opening brief, the Special Master should conclude
21 that the government was somehow acting strategically and should review the
22 41 documents in camera. However, United has incomplete information about
23 the timeline. In March 2022, the United States agreed to re-review
24 approximately 1,800 documents withheld on the basis of LEP. Based on this
25 re-review, which took place in Spring 2022, the United States made the
26 decision to withdraw its assertion of LEP over the 41 Clawback LEP
27 documents. At that time, the United States identified for its vendor (a) 13
28 documents to remove from the government's privilege log and produce to

1 United, and (b) 28 documents to continue withholding pursuant to the
2 attorney-client privilege and/or the work product protection. However, due to
3 a vendor miscommunication, these 41 documents remained on the United
4 States' June 24 clawback log as LEP. When United questioned the 41
5 Clawback LEP documents in its opening brief, the United States worked with
6 its vendor to produce the 13 non-privileged documents and provide United
7 with a corrected log removing the LEP designations and asserting the correct
8 privileges over the remaining 28 documents. Thus, the recent correction to
9 the United States' clawback log does not reflect strategic timing, but instead,
10 the type of simple error that both parties have experienced. . . Given this
11 clarification, the United States respectfully submits that an in camera review
12 is unnecessary.

13 14 **IV. DISCUSSION**

15
16 The government has withheld certain documents from production under the "law
17 enforcement privilege." The law enforcement privilege is "based primarily on the harm
18 to law enforcement efforts which might arise from public disclosure of . . . investigatory
19 files." *U.S. v. Winner*, 641 F.2d 825, 831 (10th Cir. 1981) (internal citations and quotations
20 omitted). The "law enforcement privilege" is similar to other governmental privileges,
21 such as the official information privilege. The Ninth Circuit has recognized that these
22 privileges are "qualified privileges," contingent upon the "competing interests of the
23 requesting litigant and subject to disclosure." *Venegas v. Mendoza*, 2022 10626-54 at *1
24 (E.D. Cal. October 18, 2022) (citing *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 511 F.2d
25 192, 198 (9th Cir. 1975)). To meet its initial burden of establishing that the LEP applies,
26 the government must make a "substantial threshold showing that disclosure of specific
27 information would result in specific harm to identified important interests." *Maria Del*
28 *Socorro Quintero Perez, CY v. United States*, 2016 WL 362508, at * 2 (S.D. Cal. Jan. 29,

1 2016). The government must consider the mitigating impact of a protective order. *Conan*
2 *v. City of Fontana*, 2017 WL 2874623 at *5 (C.D. Cal. July 6, 2017).

3
4 If the government meets its burden of establishing the applicability of the law
5 enforcement privilege to the withheld documents, the court must balance the interest in
6 non-disclosure against a particular litigant's need for the information. *Wagafe v. Trump*,
7 334 F.R.D. 619, 623 (W.D. Wash. 2020). The balancing approach is "moderately pre-
8 weighted in favor of disclosure." *Kelly v. City of San Jose*, 114 F.R.D. 653, 661-662 (N.D.
9 Cal. 1987). Courts may evaluate this balancing approach under the ten factors identified
10 in *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973), although it does not appear
11 that any Ninth Circuit published decision has adopted the *Frankenhauser* test.¹ No single
12 factor is dispositive. The Special Master applies this balancing approach to the categories
13 of documents set forth in the Globerman declaration.

14 15 A. INVESTIGATION INTERVIEW REPORTS AND RELATED DOCUMENTS

16
17 The Globerman Declaration describes the harm from the release of documents
18 withheld under the law enforcement privilege as follows:

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22 ¹ The ten factors include (1) the extent to which disclosure will thwart governmental
23 processes by discouraging citizens from giving the government information; (2) the impact
24 upon persons who have given information of having their identities disclosed; (3) the
25 degree to which governmental self-evaluation and consequent program improvement will
26 be chilled by disclosure; (4) whether the information sought is factual data or evaluative
27 summary; (5) whether the party seeking discovery is an actual or potential defendant in
28 any criminal proceeding either pending or reasonably likely to follow from the incident in
question; (6) whether the investigation has been completed; (7) whether any
interdepartmental disciplinary proceedings have arisen or may arise from the
investigation; (8) whether the suit is non-frivolous and brought in good faith; (9) whether
the information sought is available through other discovery or from other sources, and (10)
the importance of the information sought to the party's case." *Frankenhauser*, 59 F.R.D.
at 334

1 There are approximately 337 interview reports over which the United
2 States has asserted the Law Enforcement Privilege. These interview reports
3 are written summaries of information that agents have gathered through
4 interviews and discussions with witnesses. Certain of the interview reports
5 reflect interviews with whistleblower complainants in qui tam matters. Each
6 agent conducting an interview of a witness makes a conscious choice about
7 which facts, transactions, and persons to discuss during the interview to best
8 serve the needs of the investigation. Similarly, when writing a case report of
9 the interview, the agent determines what information provided by the witness
10 to highlight in the report. The following harm would result from the release
11 of these records: The release of witness interview reports and disclosure of
12 information provided by complainants and witnesses would reveal
13 investigative techniques and procedures of HHS-OIG given that the reports
14 of interviews discuss the investigator's choice of which facts, transactions,
15 and persons to discuss during each interview. Therefore, disclosure of these
16 interview reports would divulge specific details regarding how HHS-OIG
17 investigates cases involving MAOs or other subjects under federal
18 investigation. In addition, disclosure of such interview reports would
19 compromise the relationship HHS-OIG has formed with these individuals
20 who have assisted HHS-OIG in its investigations. Disclosure of witness
21 interview memos and notes of witness interviews would also seriously
22 damage the agency's efforts to recruit, develop, and retain future witnesses as
23 disclosure of the investigative file would compromise the trust between OIG
24 and its witnesses. HHS-OIG's investigations depend heavily on the
25 willingness of witnesses to voluntarily provide information. This chilling
26 effect on the willingness of individuals to disclose information to HHS-OIG
27 would hamper future investigations unrelated to this litigation. Further,
28 disclosure of these types of interview reports would also hamper any future

1 investigatory efforts because they could reveal to any subject of investigation
2 how to evade such investigations by disclosing the types of information HHS-
3 OIG is interested in when the agency undertakes specific types of
4 investigations. Disclosure of such information increases the likelihood that
5 subjects and potential subjects of such investigations will develop methods
6 to obscure or alter such information and thereby circumvent the agency's
7 efforts to collect information and evidence to thwart serious violations.

8
9 (Globerman Dec. ¶ 10 at 3-4).

10
11 According to the Globerman declaration, 85 of the interview reports pertain to
12 witness interviews related to the investigation in the *Poehling* matter. (Globerman Dec.
13 at 4). There are six documents that pertain to interviews of Relator Benjamin Poehling.

14
15 Mr. Globerman's declaration primarily identifies a generic form of harm. Mr.
16 Globerman's statement of harm could apply to any witness interview in almost any
17 circumstance and any government investigation. The government's statement of harm
18 does not satisfy the requirement that the moving party establish a "specific" and "non-
19 speculative" harm, at least as to the majority of withheld documents. Essentially, Mr.
20 Globerman's statement of harm suggests that the government could withhold all witness
21 interviews ever conducted by HHS-OIG on the theory that the disclosure of witness
22 interviews would always be harmful. The government argues that it has identified
23 "specific harms" (Opposition at 5), but these harms are not specific to the requested
24 investigatory documents. Instead, the identified harms would exist in any case involving
25 the HHS-OIG'S production of witness statements and related documents. The government
26 has failed to offer any empirical or specific support for its statement of harm. *See also*
27 *Conan*, 2017 WL 2874623 at *5 (rejecting contention that officers would refuse to
28 cooperate with investigations if statements subject to limited disclosure and noting

1 absence of empirical support for this contention); *cf. Kelly v. City of San Jose*, 114 F.R.D.
2 653, 666 (N.D. Cal. 1987) (rejecting argument that officers will be less forthright in
3 expressing their opinions if there is a risk of disclosure as "empirically" unsupported).

4
5 Even if the government had made a specific showing of harm, the balance of
6 interests favors United on several categories of documents described by Mr. Globberman.
7 United contends the investigatory documents (relating to the investigation of United)
8 could "bear on key factual questions, such as whether United even received an
9 overpayment at all, and evidence about the presence, extent, and impact of unsupported
10 codes in United's risk adjustment data gleaned from witnesses." (MTC at 13). United
11 further argues it needs the United investigative documents because it has no other way to
12 obtain the statements and beliefs of the witnesses in the investigations at issue as elicited
13 in OIG interviews or through consensual monitoring. United contends that "United cannot
14 replace (this information) through depositions given the passage of over 5 years since the
15 government filed its complaint in this litigation and likely longer to the extent the
16 government conducted these interviews in the more than 5 years preceding the filing of
17 the complaint." (MTC at 13). The Special Master agrees that United has articulated a
18 compelling need for the United investigation documents.

19
20 Courts have recognized that the witness interviews from the actual investigation
21 involving the requesting party are relevant and discoverable. *See Venegas v. Mendoza*,
22 2022 WL 10626054, at * 2 (E.D. Cal. October 18, 2022) (ordering the disclosure of
23 "witness interviews" that concern complaint's allegations as "highly relevant"). United's
24 need to discover these case-specific documents outweighs the generic harm suggested by
25 the government. Furthermore, the government may produce the United investigation
26 documents under the the AEO provision in the protective order to reduce the anticipated
27 harm.
28

1 As pertains to interviews or witness statements *not* related to the United
2 investigation, United argues that these documents "reflect the statements and beliefs of
3 government, company witnesses, and third parties as they relate to risk adjustment
4 investigations into United or other MAOs." (MTC at 11). Further, United argues "[t]hese
5 documents accordingly related directly to key issues in this case, including but not limited
6 to (1) materiality and scienter elements that the government must prove to establish
7 United's liability under the False Claims Act . . . (2) the meaning of contractual and
8 regulatory provisions the government argues are relevant here; and (3) the extent to which
9 United or other MAOs may have been overpaid because of the presence of unsupported
10 codes in risk adjustment data submitted to CMS." (MTC at 11).

11
12 Again, United's specific need for these documents outweighs the generic and
13 speculative harm described in the Globerman Declaration. Any concerns regarding harm
14 can be addressed by redacting identifying information and disclosing such documents
15 under the AEO designation of the protective order. While the government argues that
16 there will be a "chilling effect" on witnesses' willingness to participate in government
17 investigations, this "chilling effect" argument does not take into account the mitigating
18 impact of redacting witnesses names or disclosing documents under an AEO designation.
19 The "chilling effect" lacks any evidentiary support other than Mr. Globerman's generalized
20 and somewhat speculative statements of a potential chilling effect.

21
22 The Special Master recognizes that the government may have a heightened interest
23 in witness confidentiality in an *active* case that is currently under seal. Witnesses may be
24 employed by a potential target of an investigation and revealing their identity could be
25 harmful to the investigation and the witness's employment status. The Special Master
26 finds that witness statements and interview reports that are part of an open or active
27 investigation and are under seal may be withheld.
28

1 The Special Master rejects the contention that revealing the notes or reports of HHS-
2 OIG agents in closed cases would cause meaningful harm to the government (Globerman
3 Dec. ¶ 14), particularly if released with redactions and subject to a protective order. Many
4 former government agents and lawyers work in the private sector after completing their
5 government service and those individuals are fully aware of the "investigative techniques
6 and procedures" of HHS-OIG. These investigative techniques and procedures are not the
7 type of government information that is unavailable to lawyers and others working outside
8 of the government. Accordingly, the agents reports and notes may be produced, subject
9 to redactions and the protective order.

10
11 After consideration of the relevant *Frankenhauser* factors and other applicable
12 authorities, the Special Master finds that United's need for the majority of documents
13 described in the Globerman declaration outweighs the harm identified by the government.
14 The documents identified in the Globerman declaration shall be produced, unless they are
15 part of an active and open investigation that is currently under seal. Documents that are
16 part of a *closed* investigation and *no longer under seal* shall be produced with the
17 identifying information redacted and subject to the AEO provisions of the protective order.
18 The Special Master shall hold a conference with the parties to discuss the timing and
19 details of this production.

20 21 B. COURT ORDER DOCUMENTS

22
23 The Globerman declaration states that "a number of the documents identified [in the
24 Globerman declaration] remain under seal pursuant to 31 U.S.C. Section 3730(b)(2) . . .
25 While a *qui tam* complaint is subject to a court seal, the government, including HHS-OIG,
26 cannot disclose its existence." (Globerman Dec. ¶14). The Special Master finds that she
27 lacks the authority order the production of documents that are subject to a sealing order of
28 another court.

1 In the Motion to Compel, United requests that "[t]he Special Master should order
2 the disclosure of the twelve Court Order Documents. . . For the nine Non-Sealed
3 documents, the government does not justify why it cannot produce them subject to the
4 existing PO . . . The government also claims it cannot produce three Sealed Documents
5 from two settled *qui tam* cases." The Special Master agrees that documents that are no
6 longer under seal should be produced to United. If these documents raise concerns similar
7 to the earlier described documents (i.e., harm to witness confidentiality, etc.), then the
8 government may produce such documents subject to the AEO provision of the protective
9 order and with redactions.

10
11 The Special Master lacks authority to order the production of a document subject to
12 another court's sealing order. To obtain relief from a sealing order, the parties must seek
13 relief from the court that ordered the documents to be sealed. Accordingly, the MTC is
14 DENIED to the extent it seeks an order from the Special Master compelling the production
15 of a document currently filed under a sealing order of another court.

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1 **V. CONCLUSION**

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3 It is ORDERED that the Motion to Compel Documents Withheld Pursuant to Law

4 Enforcement Privilege is GRANTED IN PART and DENIED IN PART, as set forth

5 above. The Special Master requests a conference with the parties to determine the

6 appropriate steps for compliance with this order. The Special Master also seeks further

7 information regarding the request for *in camera* review of additional documents, as

8 described in the government's Surreply. The Special Master's Case Administrator will

9 reach out to the parties to schedule a conference at a mutually agreeable time.

10

11 IT IS SO ORDERED.

12 Dated: December 19, 2022

DocuSigned by:

Hon. Suzanne Segal (Ret.)

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HON. SUZANNE H. SEGAL (Ret.)

Special Master

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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 December 19, 2022 I served the **SPECIAL MASTER'S ORDER RE UNITED'S MOTION TO COMPEL DOCUMENTS WITHHELD PURSUANT TO LAW ENFORCEMENT PRIVILEGE** on the following parties. Placing a true copy to all parties as follows:

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- ☐ BY U.S. MAIL: I caused such envelope(s), with postage fully prepaid, to be placed in the U.S. Mail at Los Angeles, California.
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- ☒ 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 December 19, 2022 at Los Angeles, California.

Alisa Martinez
Alisa Martinez
Signature Resolution