UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA *ex rel.* ANDREW SHEA, *Plaintiff,* v. eHEALTH, Inc., *et al.*, *Defendants.*	**Civil Action No. 21-cv-11777-DJC** ***Leave to file granted on Jan. 5, 2026***

REPLY IN FURTHER SUPPORT OF MOTION FOR LEAVE TO CONDUCT LIMITED DISCOVERY REGARDING RELATOR'S UNAUTHORIZED POSSESSION OF PROTECTED MATERIALS

In opposing eHealth's motion for limited discovery, Relator defends his conduct despite his years-long delay in addressing his possession of eHealth's privileged materials. Relator's possession continued with his counsel's knowledge—indeed, his counsel reviewed some of the materials too—and without disclosing the issue to eHealth or, apparently, the Court. For its part, the Government argues that its case is untainted, even before the factual contours of Relator's privilege invasion have been fully explored or understood. In fact, it is the lack of a clear record as to Relator's invasion that necessitates the limited discovery eHealth is seeking.

The Government and Relator do not deny that (i) Relator sought to help his case by photographing and retaining privileged materials (protected by eHealth's attorney-client privilege or the work-product doctrine), (ii) many of the materials relate to the subject of this case, (iii) Relator's pleadings quote from materials he identified as potentially privileged (and that Relator's counsel assured eHealth he had not seen), and (iv) Relator's counsel personally reviewed some of the materials. The Government and Relator also do not deny that: it is unclear if (i) any steps were taken to prevent the privileged materials from tainting this case, (ii) Relator collected privileged materials at his counsel's direction, (iii) Relator's possession of privileged materials reflecting the

views of eHealth lawyers on the marketing agreements at issue here influenced the Government's or Relator's strategy, (iv) Relator (a non-lawyer) has comprehensively identified all privileged materials in his possession, and (v) Relator used access to privileged materials to bait co-workers into making statements he deemed beneficial to a case in which he hopes to profit.

Notwithstanding Relator's and the Government's repeated insinuations that the blame here somehow lies with eHealth, the sole issue before this Court is whether there is good cause for limited discovery to determine whether *Relator's* misconduct has tainted this case. On these facts, and for the reasons set forth below, there clearly is.

1. Relator and the Government principally contend that eHealth's motion should be denied because eHealth, at the time of filing, had not produced a privilege log. *See* ECF No. 131 ("Rel. Opp.") at 1, 4; ECF No. 132 ("DOJ Opp.") at 1, 4. eHealth is unaware of any case that imposes a privilege log as a prerequisite to probing admitted-to privilege violations and neither Relator nor the Government identifies any.[1] Moreover, neither the Relator nor the Government requested a privilege log during the extensive conferrals of this motion or raised the prospect that one was needed before eHealth filed its motion. Supp. Hafer Decl. ¶ 4. Grafting that requirement on would also not make sense. Typically, a party answering a discovery request prepares a privilege log to justify withholding materials; here, Relator and his counsel inverted that process by preemptively obtaining and reviewing protected materials that eHealth has not produced in this case. Thus, unlike an ordinary privilege dispute, the question is not whether a privilege log has validly asserted a protection but whether a conceded invasion has tainted the case. Nonetheless,

[1] In one case, a relator affirmatively sought "guidance from the court" on "handling potentially privileged documents" and was ordered to produce a "reverse privilege log." *In re Exam. of Privilege Claims*, 2016 WL 1164791, at *7 (W.D. Wash. May 20, 2016), *adopted by*, 2016 WL 8669870. Relator does not appear to have sought guidance from this Court.

to satisfy this formalistic objection, eHealth has now produced to Relator a list of the materials over which it asserts attorney-client privilege and/or work-product protection. *Id.* ¶ 9.

2. Relator and the Government next argue that unless a protected document is literally quoted in their pleadings, eHealth was not prejudiced. Rel. Opp. 5 ("Nor has eHealth explained how Relator's possession of eHealth's privileged documents … would inhibit eHealth's ability to defend itself in this case."); DOJ Opp. 5 (similar). But whether eHealth faced "prejudice," Rel. Opp. 5–6, is a question that bears on whether remedies like dismissal or disqualification are needed to purge the taint of the unlawful access. *See, e.g.*, *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 2013 WL 2278122, at *3 (C.D. Cal. May 20, 2013) (assessing if "exposure to privileged materials caused sufficient prejudice to warrant disqualification"); *State ex rel. Rogers v. Bancorp Bank*, 307 A.3d 360, 374 (Del. Super. Ct. 2023) (same); *In re Exam. of Privilege Claims*, 2016 WL 11164791, at *5 (same). As the Government accepts, eHealth presently seeks only discovery on the extent to which it has been prejudiced, not remedies for the invasion. DOJ Opp. 7.

Moreover, Relator and his counsel were not free to peruse eHealth's protected files so long as the materials are not quoted in pleadings. To be sure, quoting from protected files is plainly *sufficient* to warrant a remedy.[2] But it is hardly *necessary*. If, for example, eHealth obtained and used in litigation a privileged memorandum with the Government's strategy for opposing a motion to dismiss, eHealth could not evade inquiry by pointing to its decision not to quote from the memorandum itself. Or, in a real example from this case, the protected files in Relator's possession

[2] As the Government acknowledges, paragraph 161 of Relator's Amended Complaint quotes from a file in the Second Tranche of materials that Relator identified as potentially protected (the Tranche that Relator's counsel stated he had not seen or relied upon). DOJ Opp. 4. The Government downplays this, calling the quoted material a "squarely unprivileged quotation." *Id.* But assessing privilege and work product entails more than looking at a quotation in isolation; it requires context. And here, the context is clear: the quoted email is part of a chain that contains multiple back-and-forth messages with eHealth's Associate General Counsel regarding a marketing agreement between eHealth and Anthem.

include communications in which eHealth attorneys discussed whether marketing agreements—including agreements that are featured in the pleadings—were legally permissible.[3] Relator and the Government could have used access to this information to—knowingly or not—shape their strategies (*e.g.*, by eliciting evidence meant to undercut eHealth attorneys' views on the legality of the marketing contracts). Courts assessing prejudice have thus taken a wider view that looks to whether the protected files were *material*. *See, e.g.*, *Rogers*, 307 A.3d at 377 ("Access alone to inconsequential information does not support disqualification, but review of information material to the underlying litigation weighs in favor of disqualification." (citation modified)); *In re Exam. of Privilege Claims*, 2016 WL 11164791, at *7 ("[P]rejudice turns on the significance and materiality of the privileged information to the underlying litigation" (citation modified)). Indeed, in some cases, remedies can be appropriate "as a prophylactic measure"—before any demonstrated "misuse"—to "prevent future prejudice to the opposing party from information the attorney should not have possessed." *Clark v. Superior Court*, 196 Cal. App. 4th 37, 55 (Cal. Ct. App. 2011).

If Relator and the Government are confident that Relator's unauthorized access to protected materials did not influence Relator's or the Government's cases, they should welcome the limited discovery eHealth has requested.

3. Relator implies that eHealth took too long to file its motion for discovery. Rel. Opp. 1 ("Nearly two months have passed…"). That is disingenuous. Relator's counsel disclosed that Relator may possess protected materials on October 24, 2025. *Id.* 3. In the six and a half weeks between that disclosure and eHealth's motion (which included the Thanksgiving holiday), eHealth (a) exchanged dozens of emails with the Government and Relator's counsel; (b) tried to

[3] eHealth remains prepared to provide any or all of the materials to the Court for *in camera* review.

learn if steps were taken to prevent taint, only to receive conflicting information (*e.g.*, Relator's counsel stating he had not seen materials in the Second Tranche, even though those materials are quoted in Relator's pleadings); (c) reviewed the 314 pages of materials Relator provided in a format that made expeditious review difficult[4]; (d) attempted to trace, to the extent possible without a deposition, whether protected materials were referenced in the 300-plus pages of pleadings; and (e) deferred filing its motion as a courtesy to accommodate requests by Relator's counsel to further confer even after it became clear that eHealth would need to file a motion. *See* Supp. Hafer Decl. ¶¶ 4, 6, 8; ECF No. 126 ("Mot.") at 3–5. Ultimately, eHealth filed its motion on December 9, 2025, *one* day after Relator produced the Third Tranche of material. Mot. 5.

By contrast, Relator's brief indicates that his counsel reviewed the protected materials in or around the "summer or early fall of 2021," Rel. Opp. 4, yet never sought guidance from this Court and did not alert eHealth until six months after the case was unsealed.

4. Relator and the Government do not engage with cases they deem inconvenient. For example, eHealth cited a decision granting leave to depose a relator on his unauthorized access to privileged materials (*U.S. ex rel. Ferris v. Afognak Native Corp.*, 15-CV-150, ECF No. 199 (D. Alaska Sept. 13, 2016)) and a case in which a False Claims Act defendant in this District deposed an individual on his unauthorized access to defendant's files (*United States v. Regeneron Pharm., Inc.*, 20-CV-11217, ECF No. 169-18 (D. Mass. May 26, 2022)), but the Government and Relator address neither. eHealth also cited cases, Mot. 8, disqualifying a relator's counsel for unauthorized access to protected files—*U.S. ex rel. Frazier v. IASIS Healthcare Corp.*, 2012 WL 130332 (D.

[4] Relator produced the materials to eHealth not as easily sortable native files, but as hundreds of loose-leaf pages merged into three PDF files that were unclear as to where one file transitions into another, whether the files were excerpted (and if so, how), and who was sending or receiving a particular communication.

Ariz. 2012), *Bancorp Bank*, 307 A.3d 360, and *Hartpence*, 2013 WL 2278122—and neither the Government nor Relator attempt to distinguish them.

5. The Government suggests that because the mechanics of deposing Relator may be complicated, that complexity warrants denying any deposition. DOJ Opp. 5–6. But whether eHealth is entitled to take a deposition and how to structure it are distinct questions—eHealth only seeks a ruling on the former. Mot. 10. And as eHealth has noted, at least one court faced with a substantively analogous request granted a motion for a deposition and left it to the parties to confer on the mechanics. *Id.* (citing *U.S. ex rel. Ferris v. Afognak Native Corp.*, 15-CV-150, ECF No. 199 (D. Alaska Sept. 13, 2016)). Further, to the extent there is complexity here, that is entirely the fault of Relator and his counsel for taking eHealth's protected materials, reviewing them, and failing to alert this Court or eHealth for four years.

6. Relator appears to concede that his 31 U.S.C. § 3730(b)(2) written disclosure is not privileged (Mot. 10–11), but claims it is protected work product. Rel. Opp. 6. Courts, however, have recognized that "[d]isclosure statements are loaded with material, producible facts." *U.S. ex rel. O'Laughlin v. Radiation Therapy Servs. P.S.C.*, 2023 WL 12007336, at *3 (E.D. Ky. July 27, 2023). When, as here, a relator objects to producing a disclosure statement, the cases "share one common thread": courts ask if the party seeking the disclosure statement can show "substantial need and undue hardship" and, if so, courts "consider the content of the disclosure statement on a case-by-case basis to determine whether production—in full, in-part, or at all—is appropriate." *Id.* at *4; *see id.* at *4–5 (collecting cases).

eHealth can show substantial need and undue hardship. Relator and Relator's counsel have had access to eHealth's protected materials since 2021 and it appears no meaningful steps were taken to prevent that access from tainting the case, including in the Relator's original presentation

of the case to the Government. To the best of eHealth's knowledge, the disclosure statement is the only record documenting which materials Relator sent to the Government at the outset of this case. *See* 31 U.S.C. § 3730(b)(2) (relators must disclose "all material evidence and information" to Government). Relator's suggestion that because the complaints here are "detailed" eHealth can use the allegations to ascertain whether "privileged information somehow formed the basis for any part of the government's case," Rel. Opp. 7, is off-base. As noted, there are myriad ways in which having access to an adversary's protected files and legal opinions can be prejudicial apart from quotations in pleadings. *Supra* pp. 3–4.[5]

To be clear, eHealth only seeks the disclosure statement's factual content regarding what "evidence and information" Relator provided to the Government. 31 U.S.C. § 3730(b)(2). This Court should, at minimum, "examine the disclosure statement *in camera* to determine whether it can be produced in full, in part, or at all." *O'Laughlin*, 2023 WL 12007336, at *5

7. Last, eHealth corrects a material misstatement in Relator's brief. Relator states that he "took photographs of materials that mentioned eHealth attorneys," Rel. Opp. 2, suggesting that Relator only possesses materials that *mention* eHealth attorneys and that he does not possess any communications *with* eHealth attorneys. *See id.* 3 ("Relator's counsel himself possessed a limited number of documents that *referenced* eHealth attorneys …." (emphasis added)); ECF No. 131-2 ¶ 2 (Declaration of Gregg Shapiro stating that the materials "*referenced* eHealth attorneys or

[5] In Relator's lead case, the court did not compel production because—unlike here—the relator had sent defendant "all of the documents attached as exhibits to the disclosure statements." *U.S. ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 563 (C.D. Cal. 2003) (cited at Rel. Opp. 6). Here, Relator has not provided a copy of what was provided to the Government. And in Relator's other cases, the courts "reviewed [the] written disclosure *in-camera*"—as eHealth has proposed doing here—to assess eligibility for work-product protection. *Bingham v. Baycare Health Sys.*, 2016 WL 1546504, at *5 (M.D. Fla. Apr. 15, 2016) (cited at Rel. Opp. 6); *U.S. ex rel. Samandi v. Materials & Electrochemical Rsch. Corp.*, 2009 WL 10690273, at *7 (noting "*en camera* review of the Relator's disclosure statement") (cited at Rel. Opp. 6).

paralegals" (emphasis added)). But that is not true. Relator is in possession not only of documents that mention eHealth's attorneys, but also of documents that contain communications directly with eHealth's attorneys. Supp. Hafer Decl. ¶ 7.

CONCLUSION

For the foregoing reasons, and those set forth in eHealth's opening brief, eHealth's motion for limited early discovery should be granted.

Dated: January 5, 2026

Respectfully submitted,

/s/ Zachary R. Hafer

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon all counsel of record via ECF on January 5, 2026.

/s/ Zachary R. Hafer
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA *ex rel.* ANDREW SHEA, *Plaintiff*, v. eHEALTH, Inc., *et al.*, *Defendants.*	**Civil Action No. 21-cv-11777-DJC**

SUPPLEMENTAL DECLARATION OF ZACHARY R. HAFER IN SUPPORT OF MOTION FOR LEAVE TO CONDUCT LIMITED DISCOVERY REGARDING RELATOR'S UNAUTHORIZED POSSESSION OF PROTECTED MATERIALS

I, Zachary R. Hafer, declare as follows:

1. I am an attorney licensed to practice law and in good standing with the Bar of the States of Massachusetts and New York. I am a partner at the law firm of Simpson Thacher & Bartlett LLP, which is counsel for Defendants eHealth Inc. and eHealthInsurance Services, Inc. (together, "eHealth") in the above-captioned matter. I respectfully submit this supplemental declaration in further support of eHealth's motion for leave to conduct limited early discovery regarding the relator Andrew Shea's ("Relator") unauthorized possession of protected materials. The following is based on my personal knowledge and understanding.

2. On October 24, 2025, Relator's counsel, Gregg Shapiro of Gregg Shapiro Law, LLC, contacted me by telephone and stated that Relator possessed materials that were potentially protected by eHealth's attorney-client privilege or the work-product doctrine. During that call, Relator's counsel offered to destroy the potentially protected files. I declined the offer, stated that eHealth's counsel needed to review the files, and asked that Relator's counsel arrange for the files

to be produced to eHealth. Later that day, Relator's counsel produced the first tranche of documents to eHealth ("First Tranche"), which was a 20-page PDF.

3. On November 1, 2025, Relator produced the second tranche of documents ("Second Tranche"), which was a 273-page PDF.

4. Between October 24, 2025 and December 8, 2025, I conferred extensively with counsel for Relator and the Government by phone, email, and Zoom videoconference. During those conferrals, neither Relator's counsel nor the Government requested a privilege log.

5. On December 8, 2025, Relator's counsel produced a third tranche of potentially protected materials ("Third Tranche"), which was a 21-page PDF.

6. Counsel for eHealth reviewed the First, Second, and Third Tranches to assess, *inter alia*, whether the Relator or his counsel possessed the attachments that appeared to be embedded in the emails that Relator had taken from eHealth, whether those Tranches contained materials that were protected by attorney-client privilege or the work-product doctrine, and whether materials in those Tranches were quoted in, referenced in, or otherwise linked to Relator's and the Government's pleadings. The format of the Tranches made that review more difficult, including because the Tranches are PDF files that appear to merge together multiple separate documents and because the merged documents sometimes appear not to be complete versions of the native file.

7. Several of the documents produced by Relator and his counsel are communications with eHealth attorneys seeking, or containing, legal advice.

8. eHealth deferred filing its motion as a courtesy to accommodate Relator's counsel's desire to further confer.

9. On December 30, 2025, I sent Relator's counsel a list of the documents from the First, Second, and Third Tranches, which eHealth asserts are protected by the attorney client privilege or the work product doctrine.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 5th day of January,
in Boston, Massachusetts.

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Zachary R. Hafer