UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES *ex rel.* ANDREW SHEA, Plaintiff, v. eHEALTH, INC., eHEALTHINSURANCE SERVICES, INC., *et al.*, Defendants.	Civil Action No. 1:21-cv-11777-DJC

PLAINTIFF-RELATOR ANDREW SHEA'S OPPOSITION TO
<u>EHEALTH'S MOTION TO CONDUCT LIMITED DISCOVERY</u>

Relator Andrew Shea respectfully opposes eHealth's Motion to Conduct Limited Discovery ("Motion"). Nearly two months have passed since Relator first voluntarily provided eHealth with images of potentially privileged eHealth documents and offered to destroy any that eHealth identified as privileged, but eHealth has not told Relator which, if any, of those documents is actually privileged and should be destroyed. Nor has eHealth explained how a privileged communication forms the basis for any allegation in Relator's complaints, let alone in the Government's complaint. In short, there is no evidence that Relator misused eHealth's privileged information, and no basis for granting eHealth's request for early discovery.

<u>Background</u>

Relator's Collection Of Information About eHealth's Solicitation And Receipt Of "Sponsorship" Money From Carriers

Shortly after joining eHealth in 2017, Relator began to have concerns that eHealth was accepting "sponsorship" money from Medicare Advantage carriers in exchange for steering Medicare beneficiaries to those carriers and that the money was not fair market value for legitimate services rendered. *See* accompanying Declaration of Andrew Shea ("Shea Dec."), ¶ 3;

cf. 42 C.F.R. § 422.2274(e)(1) (2021) ("Payments [from carriers to brokers] made for services other than enrollment of beneficiaries (for example, training, customer service, agent recruitment, operational overhead, or assistance with completion of health risk assessments) must not exceed the value of those services in the marketplace."). In 2021, Relator transferred to a new position with responsibilities that included more contact with insurance carriers and, ultimately, executive oversight of eHealth's carrier account managers. This role gave Relator more exposure to the dynamics of eHealth's carrier relationships – including the contracts that underlay those relationships – and rekindled his concerns about the true purpose of the "sponsorship" money eHealth was receiving from carriers. Shea Dec., ¶ 4.

Because of Relator's growing doubts about the propriety of eHealth's relationships with carriers, he began to use a tablet to photograph his computer screen showing eHealth materials that he believed might bear on his concerns. *Id.*, ¶ 5; *see generally United States ex rel. Gohil v. Sanofi U.S. Servs. Inc.*, No. 02-2964, 2016 WL 9185141, at *2 n.3 (E.D. Pa. Sept. 29, 2016) ("Federal courts recognize that there is a strong public policy to allow relators to use corporate documents from the defendant in the prosecution of FCA claims.") (citing cases); *United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1038 (C.D. Cal. 2012) ("Relators sought to expose a fraud against the government and limited their taking to documents relevant to the alleged fraud. Thus, this taking and publication was not wrongful, even in light of nondisclosure agreements, given the strong public policy in favor of protecting whistleblowers who report fraud against the government.") (quotation omitted). In some instances, Relator took photographs of materials that mentioned eHealth attorneys, often in the context of communications among many non-attorneys. Shea Dec., ¶ 5.

Relator Voluntarily Notified eHealth That He Possessed Images Of Potentially Privileged Material.

On October 24, 2025, Relator's counsel called eHealth's counsel and told him that Relator possessed images of eHealth documents that were potentially privileged and that Relator's counsel himself possessed a limited number of documents that referenced eHealth attorneys or paralegals.[1] *See* accompanying Declaration of Gregg Shapiro ("Shapiro Dec."), ¶ 2. Relator's counsel said that, following the call, he would email a group of documents in his possession to eHealth's counsel and he asked that eHealth's counsel provide a link so that Relator could upload documents in his possession that might not be in the possession of Relator's counsel. *Id.*, ¶ 3. Relator's counsel further asked that, once eHealth's counsel had an opportunity to review the documents, eHealth's counsel identify any of the documents that eHealth believed to be privileged. *Id*. Relator's counsel stated that Relator and/or his counsel would destroy any of the documents for which eHealth asserted privilege. *Id*.

Shortly after the call on October 24, 2025, Relator's counsel emailed to eHealth's counsel a .pdf file of documents. *Id.*, ¶ 4. Three days later, Relator used a link provided by eHealth's counsel to upload a separate .pdf file. Shea Dec., ¶ 6. Relator's counsel did not review that .pdf file before Relator uploaded it. *Id*.[2]

[1] eHealth suggests that this notification was not sufficiently "prompt[]," Motion at 6, but it occurred well prior to the commencement of discovery in this matter. Since the unsealing of this case, Relator and Relator's counsel have been working to assemble Relator's documents for potential production to the defendants once discovery commences. Shapiro Dec., ¶ 2. Relator's counsel contacted eHealth's counsel only after that process was largely complete. *Id*. eHealth has not identified any prejudice from the timing of the notification from Relator. Notably, as discussed below, eHealth itself still has not clawed back or asserted privilege for any of the specific documents Relator and Relator's counsel have provided to eHealth's counsel.

[2] eHealth's Motion asserts that Relator provided these materials to eHealth's counsel only "at eHealth's request," Motion at 3, but in fact Relator offered and provided them without any prompting by eHealth. Shapiro Dec., ¶¶ 2-3.

On December 8, 2025, Relator's counsel emailed to eHealth's counsel a limited amount of additional potentially privileged material from the images of eHealth materials that Relator initially had provided to Relator's counsel. *Id.*, ¶ 5.

As Relator's counsel explained to eHealth's counsel with respect to the documents at issue in the possession of Relator's counsel, when Relator's counsel first reviewed those documents in the late summer or early fall of 2021, Relator's counsel stopped reading them after assessing that they might be privileged. *Id.*, ¶ 2.

Relator has now provided eHealth with all of the images of potentially privileged eHealth documents that he has been able to identify as such. Shea Dec., ¶ 7. Because Relator cannot guarantee that eHealth would not assert privilege for other documents in Relator's possession, Relator has offered to make available to eHealth's counsel all of the images of eHealth documents in Relator's possession prior to producing them to any of the other parties when discovery commences. Shapiro Dec., ¶ 6.

Argument

eHealth Has Not Provided Any Justification For An Early Deposition.

eHealth accurately states in its Motion that "assertions of privilege and work-product protection must be made expeditiously," Motion at 7 (quotation and citation omitted), but it has not done so. *Cf. Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 292 (D. Mass. 2000) (finding waiver of attorney-client privilege where, *inter alia*, party did not seek to claw back documents until five days after their disclosure); *Figueras v. Puerto Rico Elec. Power Auth.*, 250 F.R.D. 94, 97-98 (D.P.R. 2008) ("The passage of a month and a half before [defendant] moved for the return of the privileged document weighs in favor of finding a waiver."). As of the date of this filing, eHealth has not identified or clawed back as privileged

any of the materials that Relator and Relator's counsel have provided to eHealth's counsel. Shapiro Dec., ¶ 7. Accordingly, Relator and Relator's counsel have not yet destroyed any of them. *Id*.

Moreover, as of the date of this filing, eHealth has not identified any allegation in the Relator's original complaint, the Relator's amended complaint, or the Government's complaint that reflects a privileged communication. While eHealth's Motion asserts that "[s]everal documents in the Second Tranche—that is, the tranche that Relator's counsel stated was neither seen nor relied upon in preparing any pleadings—are quoted or otherwise referenced in the original *Qui Tam* Complaint and/or Relator's Amended Complaint," Motion at 4, eHealth has not identified any of these documents or the alleged references to them in Relator's complaints. More importantly, eHealth does not assert that any of those quoted or referenced documents is actually privileged. Thus, eHealth has not provided a basis to find that any of those quotations or references was improper.

In its Motion, eHealth nonetheless asserts that it needs an early deposition of Relator to understand "whether and to what extent Relator's unauthorized access to protected materials has tainted this case." Motion at 6. eHealth, however, already has the information necessary to assess whether Relator somehow misused its privileged materials, and eHealth has made no showing of such misuse. If there was a "taint," it would be apparent in the extensive complaints that the Relator and the government have filed, yet eHealth has not identified a single allegation in any of those complaints that reflects improper use of eHealth's information. Nor has eHealth explained how Relator's possession of eHealth's privileged documents – assuming eHealth eventually asserts privilege for at least some of the documents that Relator voluntarily provided to eHealth – would inhibit eHealth's ability to defend itself in this case. Because of the absence of any

explanation of prejudice – or even potential prejudice – to eHealth, Relator respectfully submits that eHealth has not provided a justification for taking an early deposition of Relator outside the normal course of discovery.

eHealth Has Not Shown A Substantial Need For Discovery Of Relator's Written Disclosure, Which Is Work Product.

eHealth also has not explained what relevant information – beyond what is already in the government's complaint – eHealth might glean from Relator's written disclosure to the Government pursuant to 31 U.S.C. § 3730(b)(2). eHealth merely asserts that "reviewing Relator's disclosure statement will be an important step in determining whether and when Relator revealed eHealth's protected materials to the Government." Motion at 10. Given that eHealth already has Relator's documents and the government's 213-page complaint, such sheer speculation is not sufficient to justify production of Relator's disclosure statement.

Relator's disclosure statement is work product: it contains both factual narrative and legal discussion. *See* Shapiro Dec., ¶ 8. Many courts have held that the entirety of a disclosure statement, including the factual narrative as well as any legal analysis, constitutes opinion work product. *See, e.g.*, *United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 564-65 (C.D. Cal. 2003); *Bingham v. Baycare Health Sys*., No. 8:14-CV-73-T-23JSS, 2016 WL 1546504, at *6 (M.D. Fla. Apr. 15, 2016) (holding that "the factual portions of the disclosure statement reveal the relator and counsel's mental impressions in that they reflect their analysis and selection of certain facts, which in turn reflects their insight and impressions of the case, and thus cannot simply be extracted"); *United States v. ex rel. Samandi v. Materials and Electrochemical Research Corp.*, No. CV 05-124, 2009 WL 10690273, at *7 (D. Ariz. July 14, 2009) (finding disclosure statement was opinion work product even though "some factual narrative exists, which might be isolated for disclosure, [because] for the most part, the factual recitations are

intermixed with or reflect mental impressions, conclusions, opinions, or legal theories of the relator or his attorney").

Even if the Court were to determine that the factual narrative in Relator's disclosure statement was subject to mere fact work product protection that could be overcome by a showing of substantial need, eHealth has not attempted to make such a showing here. *See United States ex rel. Ortiz v. Mount Sinai Hosp*., 185 F. Supp. 3d 383, 400 (S.D.N.Y. 2016) (denying defendant's motion to compel production of disclosure statement where defendant failed to make "a persuasive showing of need or hardship"). In the sole case that eHealth cites in support of its request for *in camera* review of the disclosure statement, *United States ex rel. O'Laughlin v. Radiation Therapy Servs. P.S.C.*, No. 0:16-CV-00148, 2023 WL 12007336 (E.D. Ky. July 27, 2023), the relator had asserted in his objection to defendants' request for production that the factual basis for one of the claims in his complaint was "'included in' the disclosure statement" he had provided to the government. *Id.* at *4. The court thus concluded that "a more complete recitation of the facts cannot be found outside the disclosure statement." *Id.* at *5 (quotation omitted). Here, by contrast, Relator's original complaint included over 200 paragraphs of detailed factual allegations in support of his claims; it leaves no ambiguity that could be resolved only by review of the disclosure statement.

The government's complaint is even more detailed than Relator's complaints. If eHealth wanted to show that privileged information somehow formed the basis for any part of the government's case, it could have done that already. eHealth has the Relator's materials, and it knows exactly what the government is alleging. Notwithstanding the information already available to eHealth, it has not identified a single allegation by the government that reflects or relies upon a purportedly privileged communication.

Because eHealth has not made a showing of need sufficient to abrogate the work product protection that courts traditionally afford to relator disclosure statements to the government in False Claims Act cases, Relator respectfully requests that the Court deny eHealth's request for production of Relator's disclosure statement.

Conclusion

For the foregoing reasons, Relator respectfully requests that the Court deny eHealth's Motion to Conduct Limited Discovery.

Respectfully submitted,

Dated: December 23, 2025

ANDREW SHEA

By his attorney

/s/ Gregg Shapiro
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Certificate of Service

I hereby certify that, on December 23, 2025, a copy of the foregoing was served on all counsel of record via ECF.

/s/ Gregg Shapiro
Gregg Shapiro

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES *ex rel.* ANDREW SHEA,

Plaintiff,

v.

eHEALTH, INC., eHEALTHINSURANCE SERVICES, INC., *et al.*,

Defendants.

Civil Action No. 1:21-cv-11777-DJC

DECLARATION OF ANDREW SHEA

I, Andrew Shea, declare as follows:

1. I am the relator in the above-captioned action.

2. I worked at eHealth from January 2017 until December 2021. Until December 31, 2020, my responsibilities at eHealth included direct-to-consumer marketing of Medicare Advantage, Medicare Part D, and Medicare Supplement insurance plans, primarily through direct mail and direct response television. On January 1, 2021, I moved into a new role in which I was responsible for, among other things, efforts to diversify eHealth's sources of revenue.

3. Shortly after joining eHealth in 2017, I began to have concerns that eHealth was accepting "sponsorship" money from Medicare Advantage carriers in exchange for steering Medicare beneficiaries to those carriers and that the money was not fair market value for legitimate services rendered.

4. In 2021, my new position included more contact with insurance carriers and, ultimately, executive oversight of eHealth's carrier account managers. This role gave me more exposure to the dynamics of eHealth's carrier relationships – including the contracts that

underlay those relationships – and rekindled my concerns about the true purpose of the "sponsorship" money eHealth was receiving from carriers.

5. Because of my growing doubts about the propriety of eHealth's relationships with carriers, I began to use a tablet to photograph my computer screen showing eHealth materials that I believed might bear on my concerns. In some instances, I took photographs of materials that mentioned eHealth attorneys, often in the context of communications among many non-attorneys.

6. On October 27, 2025, I used a link provided by eHealth's counsel to upload a .pdf file with images of eHealth materials that mentioned eHealth attorneys or paralegals. My own attorney did not review that .pdf file before I uploaded it.

7. I have now provided eHealth with all of the images of potentially privileged eHealth documents that I have been able to identify as such.

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

Executed on December 22, 2025.

Andrew Shea

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES *ex rel.* ANDREW SHEA, Plaintiff, v. eHEALTH, INC., eHEALTHINSURANCE SERVICES, INC., *et al.*, Defendants.	Civil Action No. 1:21-cv-11777-DJC

DECLARATION OF GREGG SHAPIRO

I, Gregg Shapiro, declare as follows:

1. I am counsel for relator Andrew Shea ("Relator") in the above-captioned action.

2. Since the unsealing of this case, Relator and I have been working to assemble Relator's documents for potential production to the defendants once discovery commences. On October 24, 2025, once that process was largely complete, I called eHealth's counsel, Zachary Hafer, and told him that Relator possessed images of eHealth documents that were potentially privileged and that I possessed a limited number of documents that referenced eHealth attorneys or paralegals. I said that, when I first reviewed the latter group of documents in the late summer or early fall of 2021, I stopped reading them after assessing that they might be privileged

3. During my conversation with Mr. Hafer on October 24, 2025, I said that, following the call, I would email to him a group of documents in my possession, and I asked that he provide a link so that Relator could upload documents in his possession that might not be in my possession. I further asked that, once eHealth's counsel had an opportunity to review the documents, eHealth's counsel identify any of the documents that eHealth believed to be

privileged. I said that Relator and/or I would destroy any of the documents for which eHealth asserted privilege.

4. Shortly after the call on October 24, 2025, I emailed to Mr. Hafer a .pdf file of documents.

5. On December 8, 2025, I emailed to Mr. Hafer a limited amount of additional potentially privileged material from the images of eHealth materials Relator initially had provided to me.

6. During a call with Mr. Hafer on December 4, 2025, I said that, because Relator cannot guarantee that eHealth would not assert privilege for other documents in Relator's possession, Relator was willing to make available to eHealth's counsel all of the images of eHealth documents in Relator's possession prior to producing them to any of the other parties when discovery commences.

7. As of today's date, eHealth has not identified or clawed back as privileged any of the materials that Relator and I have provided to eHealth's counsel. Accordingly, neither Relator nor I have yet destroyed any of them. *Id.*

8. In conjunction with the filing of the complaint in this action, I served the government with Relator's written disclosure pursuant to 31 U.S.C. § 3730(b)(2). That disclosure is attorney work product: it contains both factual narrative and legal discussion

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

Executed on December 23, 2025.

/s/ *Gregg Shapiro*
Gregg Shapiro