

1 IN THE UNITED STATES DISTRICT COURT
2 MIDDLE DISTRICT OF FLORIDA
3 TAMPA DIVISION

4 CLARISSA ZAFIROV,)
5 Plaintiff,)
6 vs.) Case No.
7) 8:19-CV-01236-KKM-SPF
8 Florida Medical Associates, LLC,)
9 doing business as VIPCARE, et al.,)
10 Defendants.)

11
12 MOTION HEARING
13 (Taken via Zoom Videoconference)

14 BEFORE THE HONORABLE SEAN P. FLYNN
15 UNITED STATES MAGISTRATE JUDGE

16 JUNE 18, 2024
17 10:00 A.M.
18 TAMPA, FLORIDA

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P R O C E E D I N G S

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THE COURT: All right. Good morning, everyone.

VOICES: Good morning, Your Honor.

THE COURT: Mr. Calderon, would you please call the case.

COURTROOM DEPUTY: In the matter of Zafirov versus Florida Medical Associates, LLC, Civil Case Number 8:19-CV-1236-KKM-SPF.

THE COURT: All right. Would Counsel please make appearances, and if you could do me a favor and identify who is going to be taking the lead for each party during oral arguments, I would appreciate it, beginning with the relator.

MS. ESTES: Good morning, Your Honor. This is Jillian Estes for relator Dr. Clarissa Zafirov. I'll be taking the lead with respect to the arguments regarding the affiliate providers, grievant's motion to compel, and relator's motion to compel to the provider defendants, with the exception of the medical records, which really overlaps two of the motions to compel, and my colleague, Anne Hartman, will handle that part of the argument.

MR. SWANSON: Good morning, Your Honor. Joe Swanson from Foley & Lardner appearing on behalf of the provider defendants, which in this case is Florida Medical Associates d.b.a. VIPCARE, Physician Partners, LLC, and Anion

1 Technologies. I'll be handling the argument on behalf of those
2 entities.

3 I am joined this morning by my colleagues
4 Lauren Valiente, Mike Matthews, Samantha Gerencir; and
5 Mike Haber from the company and Priyanka Ghosh-Murthy from the
6 company as well are present, but I'll be handling the argument.

7 Thank you.

8 THE COURT: All right. Thank you.

9 MR. DRAKE: Good morning, Your Honor. This is Scott
10 Drake from O'Melveny & Myers on behalf of Freedom Health and
11 Optimum Healthcare. I'm joined by my partner, Amanda Santella.
12 Ms. Santella will be handling the portion relating to the
13 medical records, I will be handling the grievant's motion to
14 compel the agreement between relator and Dr. Mansour and also
15 the portions of the relator's motion to compel other than the
16 medical records. So essentially Ms. Santella will handle the
17 medical records issue and I'll handle everything else on behalf
18 of Freedom.

19 THE COURT: All right. Anyone else?

20 MR. RABIN: Good morning, Your Honor. Adam Rabin and
21 Havan Clark from Rabin Kammerer Johnson. We are co-counsel for
22 the relator.

23 THE COURT: Okay. Thank you.

24 MR. LISCHAK: Jonathan Lischak, Your Honor. I'm with
25 Ms. Estes and Ms. Hartman, for relator.

1 THE COURT: All right.

2 MS. NAPORA: Chandra Napora --

3 THE COURT: Anyone else?

4 MS. NAPORA: -- here as well. I'm so sorry,
5 Your Honor. Chandra Napora, also here for the relator, from
6 Morgan Verkamp.

7 MR. McDONNELL: Hi. I'm Kelly McDonnell with Freedom
8 and Optimum.

9 MS. NAGLE: And Catherine Nagle with Freedom and
10 optimum.

11 THE COURT: All right. Thank you all for being here.
12 We're here to handle -- we have four pending motions
13 that have been noticed for this hearing. I would like to begin
14 with relator's motion. Let's start with the first filed one,
15 which is relator's motion to compel discovery from provider
16 defendants, which can be found at docket entry 178.

17 Let me hear from relator first, please.

18 MS. ESTES: Thank you, Your Honor, and, again, for
19 the record, this is Jillian Estes.

20 Your Honor, this -- the briefs in this particular
21 motion I think are pretty thorough, and so I don't want to use
22 the Court's time renewing all of those. I'd just like to
23 highlight a couple portions of it.

24 One is that really this motion only arose because
25 provider defendants changed their posture on production midway

1 through discovery. So the initial responses agreed to produce
2 regarding both affiliate and employed physicians, and that was
3 our understanding at the beginning, and about halfway through
4 the discovery period, maybe a little further in, in fact, we
5 were notified that they had changed their opinion on that
6 production and would no longer do so. They did not ever serve
7 amended responses to the original requests for production
8 changing their definition, but notified us that they would not
9 be producing responsive to anything other than employed
10 physicians.

11 One of the things that I think really goes to the
12 heart of this is that the distinctions that really they have
13 drawn between the provider and the affiliate defendant -- or,
14 excuse me, the employed and the affiliate physicians is --
15 mainly goes to billing and the access through the, you know,
16 EMR to get to the claims submission, but the False Claims Act
17 prohibits both submitted and caused to be submitted false
18 claims, and so really regardless of whether they hit the button
19 for the provider defendants or for the affiliate defend --
20 physicians. Excuse me. I've been using the same terminology
21 for a while, it gets confused.

22 Whether they hit the submission button for the
23 affiliate providers the same way that they do for the employed
24 providers doesn't change the pressure that is consistent among
25 all of their physicians, the way that they're trained, the way

1 that they use these steering tools and documents to coach and
2 induce unsupported codes is consistent to all of their
3 providers, which would render the claims false whether they hit
4 the submit button for them or not. So really it's a
5 distinction without a difference, and it shouldn't be material
6 to whether they are responsive for all of them.

7 There's a few things that have come up in their
8 briefs that I do want to address also just briefly in that the
9 provider defendants have identified the fact that Dr. Zafirov
10 doesn't do sort of -- we call it cradle to grave tracing for
11 affiliate physicians and saying that she had access to
12 Freedom's portal so she should have been able to do that also,
13 but that's simply not true. She had access to Freedom's portal
14 for her patients. She didn't have access universally for all
15 patients of all sorts. She did see patients who had previously
16 been seen by provider defendant -- by affiliate physicians, and
17 she provided information related to some of those in the
18 Complaint, but she wouldn't have a way to go in, for example,
19 to just select a random physician who was affiliated with
20 Physician Partners and go through their records top to bottom.

21 What she knows is that they were all trained the same
22 way. What all the evidence in this case has shown is that
23 they're all subject to the same pressures, to the same types of
24 inducements, to the same training and use of those five star
25 forms, which are really at the heart of this case, the reworks

1 that come from that to encourage them to change their codes.
2 So all of that is consistent and none of that matters with
3 respect to whether they were employed or affiliated.

4 We did submit some transcript language from their
5 defendants identifying how it was done universally. More of
6 that type of testimony was induced in the remaining of
7 the depositions that just ended on Friday. We'd be happy to
8 supplement with more, but we didn't feel like adding more paper
9 to the Court at this point was helpful because it's all
10 incredibly consistent, they -- everybody used the exact same
11 methodology that led to the false claims as we've alleged them.

12 THE COURT: All right. Response, Mr. Swanson?

13 MR. SWANSON: Thank you, Your Honor.

14 On the affiliate issue, I would say a few -- a few
15 points.

16 First, we disagree, you'll not be surprised to hear,
17 with how the record in this case in discovery has borne out the
18 distinctions that we maintain are very fundamental between
19 affiliated physicians and employed physicians. We outline
20 those significant differences in a deposition that Daniel
21 Kolllefrath, the Company's former president, submitted, that's
22 at docket number 193-1. In our view the depositions that have
23 occurred over the last six weeks have only confirmed those
24 distinctions, including when he testified on Friday through the
25 better part of seven hours, Your Honor, and reiterated what

1 some of those very important distinctions are, and I'll just
2 mention a few of them here, and of course we would be happy to
3 submit his transcript or excerpts from it, if the Court would
4 find that useful.

5 But he explains in his declaration, and was confirmed
6 again on Friday in his -- in his deposition that not only are
7 there important distinctions between the affiliates writ large
8 and employed physicians, but there are important distinctions
9 even among the affiliates themselves, which is just a further
10 wrinkle that makes this discovery inappropriate and burdensome.

11 All of the terms in the affiliate agreements were
12 negotiable, Mr. Kolllefrath testified on Friday, and there were
13 varying compensation agreements among the affiliate providers.
14 And I highlight compensation because it's an important point,
15 because in the First Amended Complaint the relator goes to
16 great lengths to talk about the importance of the compensation
17 program at the provider defendants, which she maintains
18 incentivized them to find conditions that did not exist, and so
19 a prominent feature in her Complaint is that there was an
20 incentive compensation program that encouraged providers like
21 her to find codes that -- find conditions that did not exist
22 and to submit those codes. The discovery has borne out,
23 however, that that incentive program was different for the
24 affiliate providers than it was for the VIPCARE physicians. So
25 there are important distinctions, and I think it's simply

1 incorrect to maintain, as Ms. Estes does, that the distinctions
2 don't have a difference.

3 You know, we could go on and on about how we believe
4 the record in this case has vindicated our position about those
5 distinctions, and I would encourage the Court to review
6 Mr. Kolllefrath's declaration at 193-1, but I would also say
7 that in -- you know, in an effort to be pragmatic here and make
8 this as efficient for the Court as possible, you could also set
9 the discovery record aside, and -- and we and Ms. Estes can
10 agree to disagree, because what is fundamental and what has not
11 changed when it comes to the affiliate discovery is the legal
12 principles that govern this. And, quite honestly, Your Honor,
13 the legal principles that prompted this Court to rule in
14 November that the temporal scope in this case was for our
15 clients 2017 to 2020 command the same outcome here.

16 You talked about in your order that discovery needs
17 to be limited and tailored to the specificity of the Complaint,
18 and you cited the *Bane* case written by Judge Pizzo to explain
19 that superficial allegations of ongoing misconduct don't meet
20 the particularity requirement of Rule 9(b), and you cited other
21 authorities to support the point that what is in the Complaint
22 is what matters when it comes to the scope of discovery in
23 False Claims Act cases, and that was true in November when you
24 issued that ruling and it's true in June here as we ask you to
25 reject this request for affiliate discovery.

1 The relator filed her First Amended Complaint in
2 November of '21, almost a year and a half after she had left
3 the company. She had all the incentives in the world to
4 provide as many examples as she could in that Complaint after
5 the original Complaint had been dismissed for failure to plead
6 fraud with particularity. She alleges that she had access to
7 five star checklists, access to billing records, access to
8 Freedom's portal, to see the codes that were submitted, and
9 that she could trace the false claims from cradle to grave, and
10 she didn't draw a distinction in that Complaint about affiliate
11 providers versus employed physicians, she just said writ large
12 she had this access and as a result provided 20 examples.
13 Well, none of those 20 examples contain an allegedly false
14 claim submitted by an affiliate, and so, you know, in light of
15 that reality and -- and -- and in light of we think the -- the
16 legal principles that led the Court to issue the temporal scope
17 ruling that it did in November, the -- the request for
18 affiliate discovery here should be rejected, setting aside what
19 discovery in this case may have shown and who said what at what
20 depositions.

21 The fact of the matter is the references to affiliate
22 physicians in the Complaint are paradigmatic, superficial
23 allegations, there are maybe a half dozen references to them,
24 Your Honor, they are in meaningless boilerplate allegations
25 about the knowledge that the provider defendants had about

1 allegedly false claims being submitted, and so we would
2 maintain that the legal principles dictate that you reject the
3 request here to provide discovery into affiliates.

4 A second reason to do so, independent, again, of what
5 the discovery record has shown in this case is the highly
6 unreasonable burden that this discovery would impose on our
7 clients. And, again, Mr. Kollfrath's declaration at 193-1,
8 paragraph 10 in particular, really lays this out. We could be
9 talking about millions of pages of documents, hundreds of
10 thousands of dollars, perhaps more, to gather, review and
11 produce these. It may require in-person collection, and it may
12 very well -- will require coordination with affiliates with
13 whom we don't have a contractual relationship anymore.

14 And Ram Moorthy's declaration, which was submitted
15 last Wednesday with our opposition at 290-2, discusses what --
16 the burden attendant to collecting the records that have been
17 requested as part of the medical records request, which I know
18 has not been talked about yet this morning, but his
19 observations about the burden that are attendant to collecting
20 those records are germane to this discussion, and that is
21 because the affiliate records -- of the records that had been
22 requested in May, a good number of those are affiliate
23 providers, and so these burdens, which we'll talk about a bit
24 later this morning when we talk about the medical records, are
25 going to be very, very significant.

1 We are required to collect affiliate records. It
2 will require a manual review and pull from eClinicalWorks and
3 from another database called Scope. One patient alone can take
4 two to four hours. It may take longer. It would take hundreds
5 of thousands of dollars, and weeks if not months of effort to
6 collect these records, and that is in addition to the fact that
7 the legal principles that I've just talked about dictate that
8 they shouldn't get this discovery at all.

9 And I'll end by just commenting on Ms. Estes' point
10 at the outset of her presentation about our supposed change in
11 position. I think as a -- as a matter of the calendar, it is
12 probably true that it was midway through discovery, but as a
13 practical matter, Your Honor, it was before any document
14 production, certainly depositions, had been undertaken in this
15 case, and so we were very clear once we arrived at this
16 position, which was based on really wading into what was going
17 to be required of our clients if we needed to collect affiliate
18 records, and it became clear that this was going to be
19 exceedingly burdensome and also not supported by the law.

20 We articulated our position to Ms. Estes and her
21 colleagues very, very clearly last fall, I mean, months ago,
22 and when she filed her motion on this issue in February, among
23 the things that she sought relief for was to be able to test
24 our assertions of burden and the like through discovery. Well,
25 she's done that, and as I've explained, we maintain that that

1 discovery record has vindicated our position, but what
2 certainly has not changed are the legal principles. And so for
3 all of those reasons, Your Honor, we respectfully request that
4 you reject the request for affiliate records.

5 THE COURT: Mr. Swanson, it may be true the legal
6 principles have not changed. It appears your client's position
7 has changed. So if the legal principles were the same at the
8 beginning of the case as they were halfway through the case
9 when you apparently changed positions regarding the affiliate
10 providers, why should the Court go along with your change in --
11 I'll put it this way. It appears in the beginning of the case,
12 anyway, that you thought the affiliate providers were fair
13 game, in fact were responding on behalf of them, but then
14 midway through changed positions, but the law didn't change,
15 there was no intervening change in the law, so why is it that
16 at the beginning of the case you took one position but then
17 midway through the case you take another?

18 MR. SWANSON: Your Honor, I think the fact of the
19 matter is our appreciation -- well, the law has not changed.
20 You know, our appreciation of -- of -- of the law crystalized
21 as we were talking with Ms. Estes about an extension for
22 discovery in this case, because part and parcel of that request
23 was also going to be the burden that would be associated with
24 collecting all of these records. And so I think that,
25 you know, those factors coalesced for us in the fall,

1 Your Honor, to justify this position, which we clearly
2 articulated, and -- and -- and to no prejudice -- with no
3 prejudice to Ms. Estes and her colleagues, given that discovery
4 had not begun at that point.

5 And so whether our appreciation of the law changed or
6 was, you know, fully appreciated at that point, one, doesn't
7 change what the legal principles are, and so we would submit,
8 Your Honor, that it -- what ought to be done is -- is an
9 application of the legal principles as they -- as they are
10 today and as they were in November when you issued your ruling
11 on a temporal scope; and, two, and an independent reason to
12 reject this request is the burden is unchanged, it's
13 unreasonable, it's disproportionate under Rule 26; and a third
14 and final reason is that the discovery that Ms. Estes asked for
15 in her motion in February she has now had several months of,
16 and it has vindicated our position not only on the burden but
17 also on the very meaningful distinctions between affiliates and
18 providers. I'm sorry. Affiliates and employed physicians.

19 THE COURT: And what additional discovery in
20 particular has vindicated that position?

21 MR. SWANSON: Mr. Kollfrath's deposition on Friday,
22 Your Honor, articulated some very important distinctions. The
23 corporate rep deposition for Physician Partners, which
24 Chris Barber was the company's corporate rep, he was deposed
25 for a full seven hours on Friday June 7th. Those are two in

1 particular that I think are particularly useful, especially
2 when it comes to the distinctions in how affiliate providers
3 and employed physicians are compensated, which, again, is a
4 central feature of relator's case. And, again, we would be
5 happy to submit excerpts of those for the Court's
6 consideration.

7 THE COURT: All right. But as I understand,
8 Mr. Swanson, initially your clients conceded that the
9 affiliate -- the affiliate discovery was relevant to the claims
10 in this case, but once we got the discovery requests you --
11 because of the burden associated with responding to those
12 requests, your clients decided that it was not proportional to
13 the needs of the case, and so it's not a relevance issue, at
14 least initially, it was a proportionality issue, it was unduly
15 burdensome to comply with these requests, but then when you got
16 further along in discovery, including the recent depositions of
17 the corporate rep, Mr. Kollfrath, you now believe that it's no
18 longer -- the discovery request is also no longer relevant to
19 the claims in this case. Is that my understanding of your
20 argument?

21 MR. SWANSON: In part, Your Honor. I think when we
22 articulated our position to Ms. Estes in the fall of 2023 that
23 we felt discovery from affiliates was not justified in this
24 case. It was based not only on the burden, which has remained
25 true throughout our discussions with her, but it was also based

1 on relevance. And what I'm saying about the discovery since
2 then is that the discovery since then has further confirmed the
3 points we made to Ms. Estes at the outset of these discussions
4 about why these two constituencies, the affiliates on the one
5 hand and the employed physicians, are fundamentally different.

6 So we maintain they're fundamentally different, we
7 told her that now eight, nine months ago. Discovery in the
8 intervening months has confirmed that, we believe. In addition
9 to that, and maybe even most importantly, the legal principles
10 which -- the legal principles also make the discovery into the
11 affiliates improper here. And third and finally, excuse me,
12 the burden associated with collecting these records articulated
13 throughout these discussions with Ms. Estes and further
14 confirmed throughout discovery make this request unreasonable
15 and disproportionate under Rule 26.

16 THE COURT: Thank you, Mr. Swanson.

17 Ms. Estes, anything further?

18 MS. ESTES: I do have just a couple points, if I
19 could follow up, Your Honor.

20 One is that proportionality really only came up at
21 the very end of Mr. Swanson's discussion, and the reality is
22 these are large companies and they used the same fraudulent
23 methods that we've alleged through -- for all of their
24 providers, it doesn't matter whether they were affiliated or
25 employed, and so that is proportional, it's not -- there's not

1 a proportionality pass by committing fraud on a large scale or
2 we wouldn't have False Claims Act cases like we have all around
3 the country all the time, and like you have here, with an
4 entity that chose to use the same methodology across the board.

5 So it really has never been a discussion of
6 proportionality until it's sort of thrown in to sort of meet
7 the discovery standards, but it is not a question of
8 proportionality here. The allegations expand to all of these
9 providers, and getting discovery through them is relevant to
10 the case, it has been from the beginning, and I would submit
11 that, as Your Honor recognized, that they had the position at
12 the beginning that these were relevant, employees and
13 affiliates, and actually Mr. Kollfrath's testimony on Friday
14 at the very end said the very same thing, the definition of
15 Physician Partners physician to him is both employed and
16 affiliate providers.

17 The other thing that I think is not entirely accurate
18 regarding his testimony is with respect to the compensation.
19 Although there are different compensation bonuses, just the way
20 that it works with affiliated versus employed, he also
21 testified very clearly that the affiliates also have
22 surplus-based bonusing, which is really the crux of how the
23 inducement to the physicians works here, is to either -- induce
24 them to have a higher surplus, which is get more money, spend
25 less money. That worked across -- the same for both affiliate

1 and employed, under a different name, you know, they titled the
2 programs differently, but the crux of it was universal to all
3 of their employees.

4 And the other testimony that we've discussed that was
5 in our brief and that came up in other depositions regarding
6 the training, all of them were onboarded by -- the same way,
7 they were explained the Medicare Advantage system the same way,
8 they were given the same documents, they were given the same
9 monthly reports which showed the way that they coded and their
10 MRA scores, they were given the same video instruction, all of
11 that is universal. Those are not superficial allegations that
12 relator made in her Complaint, those are the heart of the
13 allegations that relator made in her Complaint, and that has no
14 distinction between the two groups of physicians.

15 There was one other thing I wanted to note regarding
16 that 193-1, that declaration. One, self-serving declarations
17 have not a ton of utility with discovery disputes like this,
18 typically, but even in that, during Mr. Kolllefrath's
19 declaration I went through paragraph by paragraph with him to
20 really understand what he meant, and in fact some of the things
21 that he put in there as distinctions when we talked about it
22 really weren't distinctions at all.

23 So, for example, he made an allegation regarding --
24 that it was the affiliate physicians that, you know, selected
25 their own codes in the EMR. Well, it's also the employee

1 physicians that ultimately select their codes, they're just
2 doing it on the basis of the pressure that's being put on them.
3 That's the same between the two groups of providers. It wasn't
4 like someone else is entering codes for employed physicians
5 while the affiliate physicians are doing it on their own. So
6 when we really broke down what was set forth in that, there
7 wasn't a lot of practical difference as much as it was sort of
8 surface level descriptions.

9 THE COURT: All right. I want to see
10 Mr. Kolllefrath's deposition transcript. I know you just took
11 him -- took it on Friday. When will the transcript be ready?
12 Have the parties ordered the transcript yet?

13 MS. ESTES: We've ordered it, Your Honor. I actually
14 conferred with our typist this morning to see if it was
15 available. We've put them under a lot of pressure these last
16 two weeks to get everything done. We can certainly ask him to
17 put that to the top of the pile and to get it done as soon as
18 possible. I would -- on behalf of him, I'd hate to give a date
19 and not -- you know, that he cannot meet.

20 THE COURT: I understand.

21 MS. ESTES: But we can certainly ask him to rush the
22 completed version. He has a rough almost done, but it sounds
23 like Your Honor would like more than a rough, to get the actual
24 transcript.

25 THE COURT: Yeah, I don't -- I do not want a rough,

1 I want the actual transcript, and I understand that takes time,
2 especially if it was a long deposition, but you can expedite
3 transcripts, I think the cost associated with doing so is
4 justified in this case, it's a major issue, and so I would like
5 to see that deposition transcript and like the parties to file
6 that transcript as soon as it's available.

7 As far as the corporate rep deposition, Mr. Swanson,
8 if you believe there's relevant portions of that that you would
9 like to file, I'll allow you to do that as well, but I'm mostly
10 interested in Mr. Kollfrath's deposition transcript. So I'm
11 going to defer ruling on this motion until I've had an
12 opportunity to review that deposition transcript, and, again,
13 ask the parties to please expedite the transcript and file the
14 transcript as soon as it's available.

15 MS. ESTES: Your Honor, may I clarify that relator
16 can also submit portions of the --

17 THE COURT: Yes.

18 MS. ESTES: -- corporate representative and -- there
19 was actually two, there was a corporate representative from
20 Physician Partners and from VIPCARE, which is the employed
21 entity, and some of her testimony I think speaks to this also.
22 Are both of those corporate rep depositions available for
23 accepting?

24 THE COURT: They are, yes.

25 MS. ESTES: Thank you.

1 THE COURT: And if there's any way for the parties
2 just to coordinate on this so we don't have competing excerpts
3 from the deposition transcripts of these individuals, the
4 parties, you know, just designate what portions that you think
5 are relevant and then jointly submit them and I'll review them
6 and determine what portions, if any, I think are relevant, but
7 just so we don't have just competing transcript -- transcript
8 excerpts being filed on the docket, I'd like the parties to
9 confer and file one portion of it. There's going to be no
10 objection to another party's portion, just file everything that
11 either party would like -- believes is relevant and would like
12 to bring to the Court's attention in connection with this
13 motion, and if there's a need to file it under seal then the
14 parties can move to file it under seal as well.

15 MS. ESTES: Thank you, Your Honor.

16 MR. SWANSON: Thank you, Your Honor.

17 THE COURT: All right. Anything further on that
18 motion?

19 MS. ESTES: Not today, Your Honor.

20 THE COURT: Okay. Let's move on then to the next
21 motion, which is relator's motion to compel discovery from
22 Freedom defendants, which is docket entry 279.

23 Ms. Estes, is that you as well?

24 MS. ESTES: No, sir, that's my colleague,
25 Ms. Hartman.

1 MS. HARTMAN: Yeah. Good morning, Your Honor.

2 THE COURT: Ms. Hartman.

3 MS. HARTMAN: Yeah. On the motion to compel,
4 especially the Freedom defendants, that also -- one of the
5 issues in that case overlaps with the provider defendants as
6 well, and that's the motion to compel the medical records.
7 That's a request that went to both parties, so, you know,
8 I think it makes sense to start with that medical records one,
9 which involves both -- both parties.

10 THE COURT: That's fine, but there's a big
11 distinction in the response in that Freedom defendants are
12 saying they don't actually have access to the medical records,
13 correct?

14 MS. HARTMAN: Yes, that's correct, and I'll -- let
15 me -- let me jump in on that then.

16 So on the medical records request, which went to both
17 the provider defendants and the Freedom defendants, I think
18 sort of -- I want to back up a little and address that issue of
19 where these records fit into the Medicare Advantage system,
20 because I think it sort of helps to have that background and
21 that context.

22 So in this case the defendants have already produced
23 what we refer to as claims data for beneficiaries enrolled in
24 Freedom and receiving primary care from the provider
25 defendants. That claims data came in to relator in March of

1 2024.

2 Now, claims data is just that, it's the claims that
3 are submitted by the providers to the Medicare Advantage
4 organization. Claims are not medical records, but they do
5 include a lot of information, beneficiary, provider, diagnosis,
6 dates of service, et cetera, and including the medical
7 diagnoses for that patient. So providers send --

8 THE COURT: I'm familiar with claims data.

9 MS. HARTMAN: Yeah. Okay.

10 So providers send that to the MAO and the MAO submits
11 it to CMS. So while it's only that claims data that is
12 submitted to the Government, CMS regulations and contracts
13 between CMS and Freedom require that all diagnoses submitted by
14 those providers must be unambiguously supported by
15 beneficiaries' medical records from face-to-face encounters
16 with specific types of providers, and medical -- those medical
17 records that plaintiff has requested in this case are the
18 source of truth for the purpose of receiving and retaining risk
19 adjustment payments.

20 So because those medical records are the source of
21 truth but aren't routinely themselves submitted to CMS, MAOs
22 are subject to regular audit by CMS to ensure that the
23 diagnoses they submit are supported by those medical records,
24 you know, and those are -- they're referred to as RADV audits,
25 Risk Adjustment Data Validation audits, where CMS can select a

1 contract for audit, and when a contract is selected for the
2 audit CMS does what plaintiffs are doing here, request a random
3 sample of beneficiaries' medical records, and then the MAO has
4 to obtain those medical records and validate those diagnoses
5 within them. So for the RADV audit for a large provider like
6 Freedom, that would be 200 beneficiaries per contract year.

7 In addition, of course, MAOs perform their own chart
8 reviews, have their own process of going out and sampling
9 medical records and requesting those from providers. They do
10 that for their own compliance programs, because they want to
11 mine those charts to add additional diagnoses, because their
12 financial team wants to check on revenue projections that
13 depend on that risk adjustment data, or because, as is the case
14 here, they're subject to a monitoring agreement.

15 There's a corporate integrity agreement here that
16 requires Freedom and Optimum to conduct that chart -- pull a
17 chart review and sampling, and so in this case they had to
18 do -- 100 beneficiaries were randomly selected for audit per
19 year as part of the corporate integrity agreement that they
20 were subject to, and we just got testimony last week from the
21 independent monitor there, and his impression was that there
22 was no problem getting those records, that they were able to
23 turn those requests around quickly.

24 So, you know --

25 THE COURT: When you say "getting those records," you

1 mean they were able to turn it around for the audit?

2 MS. HARTMAN: Correct. Yes. Exactly.

3 So, you know, because this sort of chart review
4 process is, you know, bread and butter for what MAOs do in
5 different contexts and they have written policies on it, and

6 **(REDACTED)**

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24 So that's an example of the kind of chart review that
25 Freedom, like other MAOs, is regularly involved in. And,

1 of course, on the provider side, you know, providers similarly
2 conduct their own chart reviews for similar compliance,
3 financial, et cetera, reasons.

4 So this is really, as I said, you know, the bread and
5 better of the chart review MAO programs, and because this is
6 such an important part of the program, because of Medicare
7 regulations that these charts have to be maintained, they're
8 the source of truth, you know, MAOs have to maintain access to
9 those medical records, that's in the CMS regulations, it's in
10 the contract between CMS and the MAOs, it's in the contract
11 between the provider defendants and Freedom, it's in the
12 Freedom provider guide that is incorporated in the contract,
13 and it's, frankly, disingenuous for Freedom to claim that
14 there's a barrier arising from some purported lack of access to
15 the medical charts of the provider defendants. It's not
16 something, I assume, that they'd want to say to CMS,
17 for example.

18 You know, but most significantly, the provider
19 defendants are here too, you know, they're in this room,
20 they're subject to this discovery as well, so any way you look
21 at it, a party with custody and control of the requested
22 medical records is here today to answer this discovery.
23 They've been served with a document request that covers those
24 medical records. So I think the question of, you know, custody
25 and control disappears because of that, like the -- these

1 medical records are subject to discovery from one party or
2 another.

3 THE COURT: Right. Ms. Hartman, is it your
4 understanding that the Freedom defendants still have custody,
5 not control but custody of the **(REDACTED)**

6
7 MS. HARTMAN: For that one -- just for that one year,
8 yes, it is my understanding that they do, and those have not
9 been produced.

10 THE COURT: All right. And do you believe there's
11 any distinction between their control over patients' medical
12 records for purposes of responding to a Government audit
13 request or a request from CMS versus a request from a relator?

14 MS. HARTMAN: No, I don't. I don't believe that
15 there is a difference there, Your Honor. This is a discovery
16 process as part of, you know, litigation, and they -- there's
17 no reason to draw a distinction on that basis.

18 THE COURT: All right. Based on the contract that
19 they have with the physicians as to what needs to be -- what
20 they have control over, what they can gather from the
21 providers; isn't that correct?

22 MS. HARTMAN: I don't believe that they have created
23 a record on that and shown what the limitations on that basis
24 are, so I'm not able to respond in terms of what their
25 limitations are.

1 THE COURT: Okay.

2 MS. HARTMAN: And this is, you know, litigation that,
3 you know, relator has brought under the False Claims Act, it's,
4 you know, in the -- in the name of the United States funds
5 recovered and this will go to the United States, so that's
6 another reason for their -- a lack of distinction between
7 whether there's a CMS audit or in litigation.

8 THE COURT: Now, talk to me about the statistically
9 valid random sample that you're seeking.

10 MS. HARTMAN: Yeah. Exactly.

11 So plaintiff had originally sought medical records,
12 the original request was for medical records for all Freedom
13 beneficiaries, and she's narrowed that to 1,200, and then
14 intends to use that sample to extrapolate from that sample and
15 show the rate of diagnoses errors in claims that are submitted
16 by the provider defendants to Freedom and thereafter by Freedom
17 to CMS, so what -- more specifically, there are six relevant
18 years in this case between the different defendants, 2015 to
19 2020, and relator alleges that during that time period, during
20 that relevant time period defendants engaged in specific
21 patterns and practices that resulted in the submission of false
22 claims in the form of false and unsupported diagnoses.

23 The claims data that defendants produced included
24 189,000 member years, that's the term, and so just to sort of
25 put that in context a little, if there's a -- Jane Doe is a

1 beneficiary under the Freedom plan, seeing Physician Partner
2 doctors for three calendar years during that relevant time
3 period, she accounts for three member years. If you had 10,000
4 customers, no one joins, no one leaves over the course of
5 three years, that would be 30,000 member years. So from that,
6 that's how you get to 189 -- that's what that 189,000 number
7 is, and from that 189,000 member years plaintiff's -- it was
8 plaintiff's expert who took this random sample of 1,200
9 patients, which represents roughly 300 in each year.

10 Now, that expert work took some time after production
11 of the claims data. As I said, we received this claims data
12 only in March of this year, and defendants provided that,
13 you know, raw claims data in a number of different files with
14 different elements collected in different files. Originally I
15 don't believe we got all the data dictionary information
16 required -- that was required by the ESI stipulation.
17 Defendants revised their production on at least one occasion.

18 So those disparate files had to be combined and were
19 combined into a single database consisting of over 16 million
20 lines of data. So there was some processing involved. This
21 wasn't something that we could just turn around. So, you know,
22 relator did not sit on this data or delay her requests.
23 You know, we didn't receive the claims data in total as revised
24 until mid-March, had to figure out what we were looking at, do
25 that processing, and then get the expert to turn around that

1 sample.

2 And, you know, plaintiff's intent to use a random
3 sample though was not a surprise to the defendants, this had
4 previously been discussed between the parties, and as the
5 correspondence submitted by the provider defendant shows, the
6 parties had discussed this as far back as the fall of 2023, and
7 that was before, of course, defendants had even produced a
8 complete set of claims data.

9 And indeed in those earlier discussions counsel for
10 the provider defendants, you know, acknowledged plaintiff's
11 planned sample and, in fact, offered 75 charts per year from
12 the providers, and that offer applied to years in Freedom's
13 relevant time period, 2015 to 2020, and not in provider's
14 relevant time period.

15 So the defendants have acknowledged the relevance for
16 discovery purposes of charts beyond those individuals that
17 are -- happen to be named in the Complaint. What we're
18 fighting over here is how many charts that should mean.
19 Provider defendant's counsel earlier offered what amounts to
20 75 charts a year over six years, that's 450 charts. Relator
21 suggests 1,200 charts. That's based on our expert's random
22 sample. That's the gap we need to cover. That's what we're
23 fighting over, is the number of charts subject to production
24 here.

25 THE COURT: All right. Have the provider defendants

1 agreed that if they provide you with the number of charts that
2 they think is appropriate that that would constitute a
3 statistically valid random sample?

4 MS. HARTMAN: They have not.

5 THE COURT: Has that been discussed between the
6 parties?

7 MS. HARTMAN: It has not.

8 THE COURT: Why not?

9 MS. HARTMAN: It's not something we've been able to
10 engage with the provider defendants on. They are now taking
11 the position that they won't produce any.

12 THE COURT: All right. Anything further,
13 Ms. Hartman?

14 MS. HARTMAN: Not at this time, Your Honor, but
15 I reserve the -- subject to replying to defense.

16 THE COURT: All right. Let me hear a response.

17 MR. SWANSON: Your Honor, what is the Court's
18 preference for the order in which we would take up the
19 response? Ms. Santella and I are both prepared to speak to
20 some of these cross-cutting arguments, although each of us also
21 has some idiosyncratic arguments, for example, the Freedom
22 possession, custody and control. So what would the Court
23 prefer?

24 THE COURT: However you want, Mr. Swanson. Whatever
25 you prefer is fine with me.

1 MR. SWANSON: Ms. Santella, I know we're doing this
2 on the fly. Is it all right if I just start in on the
3 cross-cutting arguments?

4 MS. SANTELLA: Absolutely.

5 MR. SWANSON: All right. Thank you.

6 And thanks again, Your Honor, for your flexibility
7 there.

8 You know, our position on the request for medical
9 records I think can be -- can be summarized in three bullet
10 points. One, the characterization of what has happened in this
11 case, the record is incorrect, and we spell this out at length
12 in the first six or seven pages in the opposition to the motion
13 that we filed last week. Two, the request for these medical
14 records, for many of the reasons that I just talked about when
15 we were discussing the affiliate issue, is not supported by the
16 case law, is not supported by Eleventh Circuit precedent and
17 the principles that animated your ruling on temporal scope.
18 And, finally, this request imposes an undue burden on the
19 provider defendants and is not proportional to the needs of the
20 case.

21 So taking up the first of those, we have been trying
22 for over a year, we and the Freedom defendants, to get the
23 relator to identify the other patients whose diagnoses she
24 contends are false. We served an interrogatory in January of
25 2023, and, again, relator in her First Amended Complaint

1 professes to have had full access to all medical records and
2 claims data while employed at VIPCARE and as a result could
3 trace the false claims from cradle to the grave.

4 After 19 months of discovery and two weeks left
5 before the close of discovery, we were -- we received this
6 request for 1200 patients, with 600 alternates, most of whom
7 were patients seen by affiliates, and, you know, the
8 Ram Moorthy declaration that we provided with our opposition
9 last week spells out how much work would be attendant to
10 collecting those records.

11 Just the 1200 would be 2400 to 4800 hours, a million
12 pages, and that assumes that we have all of the records at our
13 disposal in the first instance. For the reasons I've already
14 talked about with regard to affiliates and the fact that many
15 of those affiliates are no longer contracting with us, frankly,
16 it would be very, very difficult to collect those records that
17 we -- that we do not have.

18 And I mentioned the burden point there, which was my
19 third point, only because I think it's very important to be
20 cognizant of that burden as we think about what the controlling
21 legal principles are here.

22 It's simply grossly disproportionate to make a
23 request for these -- for these records where there's not been
24 any articulation of how those records, those patients, are
25 substantially similar to those described in the First

1 Amended Complaint and that similarly fit a pattern of conduct
2 on which the Complaint is based. And that's a paraphrase
3 I just took from one of relator's leading cases, the *McCartor*
4 case, and we don't even have that explanation from relator in
5 this case and yet we're being asked to undertake this extreme
6 burden.

7 Our opposition cites *Phalp* and a number of other
8 Eleventh Circuit cases, including *Clausen*, for the legal
9 principle that False Claims Act cases are unique and -- and
10 they're particularly unique in a declined qui tam case, and,
11 you know, Your Honor cited those principles when you issued
12 your ruling in November about the temporal scope, you cited the
13 *Bane* case again from Judge Pizzo to say discovery should be
14 limited and tailored to the specificity of the -- of the
15 Complaint, and you cited *Bledsoe* and a number of other cases
16 for the point that there will -- you know, there will be a
17 justification for broader discovery only where there are
18 representative samples of that broader class of claims in the
19 Complaint, and, quite honestly, they're just -- they're just
20 not present in the First Amended Complaint, and it has not been
21 explained to us at all how they would meet the standards that
22 I have just talked about.

23 And so, you know, I think all of those legal
24 principles are important to think about in light of this
25 request, I think they're particularly important in light of the

1 pending motion for judgment on the pleadings challenging the
2 Constitutionality of the False Claims Act, and so if much of
3 what has animated the case law that we've cited in our brief
4 last week and that I've talked about this morning is driven by
5 a concern about False Claims Act and the scope of discovery and
6 how unwieldy and burdensome it can become, I think those --
7 those observations from those courts are all the more pertinent
8 in light of the pending motion.

9 And, you know, on the topic of case law, we feel that
10 the relator's cases are simply distinguishable. I mean, the
11 *McCartor* case, which did allow discovery outside of some
12 examples in the Complaint, also contained observations that we
13 think vindicate our position. I mean, the Court said discovery
14 must skew closely to matters specifically described in the
15 Complaint, less the discovery, because of its burden and
16 expense become the centerpiece of litigation strategy, and the
17 Court stressed its concern that there is a high risk for
18 discovery to significantly outsize its worth and impose an
19 unfair burden and expense.

20 And so, again, even offering, as they have, to pare
21 it back to 1200 patients, there's still no explanation for how
22 those were selected.

23 And, you know, one other case to contemplate,
24 Your Honor, as we talk about these issues is the *CKD versus*
25 *Fresenius* case, 333 F.R.D. 25, also cited in our brief. The

1 relator there sought nationwide discovery based on bald
2 assertions about the scope of the scheme, and the Court
3 distilled a number of these cases and said, you know, the
4 thread running through all of them is that discovery is limited
5 to the universe of transactions about which the relator had
6 knowledge or could plausibly allege were similar to the known
7 transactions, and the Court on that basis rejected the request,
8 and we'd argue here that for many of the same reasons that we
9 believe the affiliate request is unwarranted, here too the case
10 law just does not support the request for -- for these records,
11 particularly given the burden, and I would encourage the Court
12 to consider Mr. Moorthy's declaration filed with our opposition
13 last week. Again, that is a conservative estimate and assumes
14 that those records are present with us already. It would only
15 be compounded if, as I suspect, many of these records would be
16 with affiliates with whom we no longer have contractual
17 relationships. And so I think as you -- as you consider the
18 legal principles, that that burden is inescapable.

19 And I would just add too that if -- if the animating
20 feature of many of these cases is that the Court needs to
21 consider what is in the Complaint, I know we're not here on a
22 motion for summary judgment, but I think it is also important
23 for the Court to be cognizant of what discovery has shown in
24 this case, as it is asked to order us and the Freedom
25 defendants to produce what could be significant amounts of

1 records at considerable expense, you know, a centerpiece, as I
2 said a few minutes ago, of the relator's case is that the
3 compensation, among other things, was structured at the
4 provider defendants to incentivize physicians to find and
5 submit diagnoses that did not exist; and another feature of the
6 Complaint is that there was a conspiracy between our clients
7 and the Freedom defendants.

8 Well, those critical allegations have been proven to
9 be totally false in the course of discovery, and I know that's
10 not directly on point to this issue of the propriety of the
11 medical records request, but as you consider this request to
12 order the discovery of potentially millions of pages of
13 records, I think it's useful to consider that the impetus for
14 that, Your Honor, are allegations that we believe in the
15 Complaint do nothing to support that request, and allegations
16 on other critical issues in that Complaint have proven to be
17 wildly incorrect.

18 THE COURT: Mr. Swanson, is it an all-or-nothing? Is
19 it the Court should order the production of the 1200 patient
20 years or -- that's being requested or no patient records at
21 all, or is there a smaller universe of medical records which
22 your clients believe are relevant and proportional to the needs
23 of the case? It's been suggested that there's been an offer to
24 produce some documents at least or medical records at previous
25 times during discovery.

1 MR. SWANSON: Your Honor, it is true that several
2 months ago, I think before the first of the year, there were
3 discussions about providing a set, I think it was 100 to 150,
4 of records back when we were engaged in discussions with
5 relator's counsel about medical records from the period outside
6 of our temporal scope but within the temporal scope for the
7 Freedom defendants, that was in 20 -- you know, 2015 and 2016.
8 We made an offer there of 100, 150 records. We were rebuffed,
9 and the next, you know, we heard about this was a request
10 two weeks before the close of discovery for 1200.

11 And so, you know, the legal principles that require
12 some explanation and justification and tethering of the request
13 for the medical records, we would suggest the Court not lose
14 site of those, regardless of the number of records being
15 requested here, and, you know, the -- Mr. Moorthy's declaration
16 is -- you know, he's laid out the work that would be attendant
17 to collecting any records, and so, you know, the examples he
18 gave were in response to this request for 1200. I think it
19 would depend on what the number might ultimately be, and it
20 very well still could be exceedingly burdensome and
21 disproportionate and not consistent with Rule 26.

22 THE COURT: Right, but at least at one point the
23 offer was 75 patient charts per year over two years, so 150
24 charts, right?

25 MR. SWANSON: That's what it was in discussing a

1 different issue, Your Honor, yes, that -- that was an offer --
2 an offer we made.

3 THE COURT: Explain to me how you derived at that
4 offer. What's significant about the 75 per year?

5 MR. SWANSON: I think that was just the course of the
6 negotiations that were being had at that -- at that time,
7 Your Honor. I honestly do not have the details to, you know,
8 furnish the propriety for that, given the passage of time, but
9 I would say too that what should not be lost in this discussion
10 is we have produced a full set of medical records for the
11 20 patients whose claims are alleged as exemplars in the
12 Complaint. We produced all of those. I would submit that they
13 show the examples in the Complaint to be dubious at best, and,
14 you know, I think that is -- and we explored this with relator
15 at her deposition, and the transcript of her deposition was
16 submitted with our motion to seal, and we cited at page 3 of
17 our opposition the relevant pages where we walked through one
18 of the examples that she had alleged in the Complaint and
19 confronted her with a number of medical records.

20 So I -- you know, to be -- to be candid, Your Honor,
21 I don't -- I could tell you that we offered, you know, the
22 figure that I gave you back in the end of 2023 and then have
23 not heard anything since then, and, you know, the burdens we've
24 articulated I think would be -- would be important to consider
25 regardless of what the number might end up being.

1 THE COURT: All right. So there's no universe of
2 patients that are similarly situated to the exemplar patients
3 in the Amended Complaint?

4 MR. SWANSON: Well, we have -- we have -- we have the
5 20 we've produced, and then we have a list -- an Excel
6 spreadsheet, Your Honor, that is 1200 names, dates of birth and
7 other identifying information that -- it's -- for the
8 reasons -- you know, per the cases -- per the cases we've
9 talked about this morning, it's incumbent on the relator to
10 explain to us why those 1200 have anything to do with the
11 exemplars, and I'm not sure she knows.

12 THE COURT: All right. Anything further from you,
13 Mr. Swanson?

14 MR. SWANSON: No. Thank you, Your Honor.

15 THE COURT: Ms. Santella?

16 MS. SANTELLA: Thank you, Your Honor.
17 Amanda Santella for Freedom defendants.

18 I'll try not to be too repetitive of Mr. Swanson's
19 points, but there are a few points I'd like to highlight from
20 Freedom's opposition and to respond to Ms. Hartman's arguments.

21 The first is that, you know, as you have alluded to
22 at the outset, Your Honor, these medical records are not
23 Freedom's records, they're not a medical provider, these charts
24 are not our documents and we don't collect them, or even most
25 of them, in the ordinary course.

1 Ms. Hartman is correct that we collect a small number
2 of medical records for certain specific audits. For instance,
3 for the IRO or corporate integrity agreement audits that we
4 mentioned in our brief, that is 100 patient records per year,
5 so clearly the scale of relator's request here is vastly
6 different from that. But even more importantly than the number
7 of records -- or, I'm sorry, the number of members is the
8 specific diagnosis codes, HCCs, or dates of service that those
9 audits target. This is why relator's request is apples and
10 oranges with Freedom's typical much more narrowly tailored
11 audits in response to CMS requests or the corporate integrity
12 agreement requests.

13 So in those audits what CMS or the IRO officer sought
14 are -- are records supporting specific dates of service for
15 specific diagnosis codes. In other words, the patient was seen
16 on this date, provide the encounter note for that date, or
17 patient was diagnosed with this condition, provide the specific
18 record that supports that condition. That's not what relator
19 is asking for here. Here relator is asking for all medical
20 records for an entire year for the 12 to 1800 patient years
21 she's identified. That's a vastly more burdensome request than
22 identifying 100 specific dates of service and pulling the
23 encounter notes for those dates, which is typically how Freedom
24 pulls records in response to audits.

25 Again, I don't think it's even in dispute at this

1 point that Freedom doesn't have the vast majority of these
2 records. I'm not suggesting that this request is proper or not
3 burdensome as directed at provider defendants, I agree with
4 everything Mr. Swanson said, but it's doubly improper for us,
5 because our co-defendants whose records these actually are
6 are here, and so this is, you know, fundamentally a duplicative
7 request.

8 Ms. Hartman mentioned that -- that we haven't
9 established what the limitations are on our constructive
10 possession of these records, but it's relator's burden when
11 there is an issue of constructive possession and whether we are
12 able to get control or possession of these records, it's her
13 burden to show that we have constructive possession of the
14 records, and she hasn't done that.

15 Relator addressed this issue in a footnote in her
16 brief, she mentioned the agreement between Freedom and
17 Physician Partners without citing any particular provision of
18 that agreement and simply asserts that we had constructive
19 possession of the records. That's not true, and, you know,
20 I think our brief addresses this point pretty thoroughly.

21 I just want to make a couple of other points in
22 response to --

23 THE COURT: Before you move on --

24 MS. SANTELLA: Sure.

25 THE COURT: -- Ms. Santella, if I may.

1 MS. SANTELLA: Yes.

2 THE COURT: So you're representing to the Court that
3 the agreements that you have with the providers do not give you
4 access to the medical records for purposes of responding to
5 relator's requests for production?

6 MS. SANTELLA: I'm not saying that we never have
7 access to medical records from provider -- I mean, we collect
8 medical records from providers, as I've noted, for specific
9 audits.

10 THE COURT: That's not my question. That's not my
11 question.

12 You have access to the medical records in response to
13 audits, or some medical records in response to, you know,
14 having to support the claims that are submitted, but as far as
15 responding to the requests for production in this case from
16 relator, you're representing to the Court that the agreements
17 that you have with the providers do not give you access or
18 control over the medical records for purposes of responding to
19 requests for production?

20 MS. SANTELLA: Your Honor, I don't know -- I don't
21 believe that Freedom has ever requested from the medical
22 provider a production of records at the scale relator is
23 requesting. So I do think there is a -- there is a distinction
24 to be made between **(REDACTED)**

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4 This may be a question better posed to provider
5 defendants of how they read the agreement **(REDACTED)**
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10 THE COURT: Well, I'd like to know how the Freedom
11 defendant would view the contract. Again, do you believe that
12 you have **(REDACTED)**
13
14

15 MS. SANTELLA: Our -- **(REDACTED)**
16

17 Again, our co-defendant
18 who possesses these records is -- is here.

19 THE COURT: I understand.

20 MS. SANTELLA: So --

21 THE COURT: I understand, but I'm asking you, I want
22 to know **(REDACTED)**
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25 MS. SANTELLA: That's right.

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THE COURT: Okay. **(REDACTED)**

I feel like you're being a little evasive, and perhaps not intentionally, but evasive in response to my question. I'm trying to drill down as to what actual right you believe your client has to access medical records that are responsive to the requests for production.

MS. SANTELLA: I -- I certainly don't mean to be evasive. I suppose the reason it's difficult to answer this question is that **(REDACTED)**

THE COURT: All right. Thank you.
You can continue.

1 MS. SANTELLA: Okay. Thank you, Your Honor.

2 Next, I want to just -- again, hopefully without
3 being too repetitive, just highlight a few points from
4 Mr. Swanson's argument and from our opposition brief that
5 relator's request here is an improper use of discovery.

6 Relator has asked for a broad, undifferentiated set
7 of records that are not tied to any of the allegations or
8 theories in the Complaint. Her justification is that the
9 universality, that's a quote, universality of the alleged fraud
10 justifies this approach, but that's just another way of saying
11 that she hasn't nailed down any particular theories or
12 allegations of false claims beyond the examples in her
13 Complaint even after many months of discovery.

14 You know, to emphasize the point I just made on the
15 constructive possession and burden argument, relator isn't
16 asking for particular diagnoses or HCCs for these patients.
17 For instance, she's not asking for records that correspond to
18 certain types of cancer or diabetes or other diagnoses that she
19 discusses in the Complaint. Instead, relator is asking for the
20 entire medical record for these patients, because she doesn't
21 actually know what diagnoses she's looking for.

22 We understand from relator's Counsel that relator's
23 plan is to have her experts look at these records, root around
24 in them to find diagnosis codes that she will then claim are
25 false. And even the cases relator cites in her brief warn

1 against this type of fishing expedition in discovery.

2 To be clear, relator's -- allowing relator to conduct
3 this broad discovery and root around in the medical records for
4 new theories of false claims will functionally reopen discovery
5 in this case. This isn't just a matter of the defendants
6 producing a closed universe of documents to relator and then we
7 go on our merry way into expert discovery, because once relator
8 and her experts go through the exercise of looking at the
9 records to figure out what claims they think are false and
10 hopefully finally respond to our interrogatory asking her to
11 identify the universe of false claims, we then need to defend
12 ourself. That may involve, for instance, seeking third-party
13 discovery, issuing third-party subpoenas to specialists whose
14 diagnoses support the claims that relator will eventually
15 allege are false.

16 So I say all of this to underscore that whether you
17 look at relator's very broad request for all records or her
18 purportedly narrowed request for 12 to 1800 member years of
19 records, this is still an expedition for relator to figure out
20 what her theories of fraud are, which is an improper use of
21 discovery in a False Claims Act case, as Mr. Swanson also
22 highlighted.

23 Finally, you know, I will note that Ms. Hartman said
24 that her -- that relator's random sample that they provided to
25 us two weeks before the close of discovery isn't a surprise

1 because they've always stated that they're going to use a
2 random sampling methodology.

3 Our opposition to that methodology similarly should
4 not be a surprise to relator. We have said from the very
5 beginning, when relator mentioned a sampling exercise, that we
6 would oppose such a sampling exercise, that it's an
7 inappropriate way to prove false claims in an FCA case, and,
8 you know, so I -- I just -- I want to highlight that point for
9 the Court, because this is not, you know, a sudden about-face
10 on Freedom defendant's part where we are substantively against
11 a sample. We have always maintained with relator that she must
12 tether her allegedly false claims to the false claims in the
13 Complaint or identify additional false claims during fact
14 discovery, and relator has not done that.

15 I'm happy to answer any questions the Court has, but
16 I think I'm -- I think I've addressed all the points from
17 Ms. Hartman's argument that I meant to.

18 THE COURT: Thank you, Ms. Santella. I do have some
19 questions for you, if I may.

20 With respect to the exemplar patients that are in the
21 Amended Complaint, is Freedom defendant able to identify the
22 diagnosis codes or HCCs for those exemplar defendants and apply
23 them to the universe of patient records for patients which
24 Freedom estimated claims for?

25 MS. SANTELLA: Well, I'll note first that -- that

1 the -- so -- let me back up for a second.

2 We have produced diagnosis code data submitted to
3 CMS.

4 THE COURT: Right.

5 MS. SANTELLA: To the extent relator's Complaint
6 identifies specific diagnosis codes that she alleges are false
7 associated with the patients described in the Complaint,
8 I expect that we could look at the claims data and find those
9 same diagnosis codes in the patient population. To be clear,
10 that's not what relator has requested.

11 THE COURT: I understand.

12 MS. SANTELLA: And, of course, fact discovery is
13 closed, so -- you know, so that would be a new request.

14 THE COURT: But they're asking for more than that.
15 They're not limiting -- I mean, part of your argument is that
16 it's not narrowly tailored, they're asking for all patient
17 records, they're not limiting it to a diagnosis code or HCC
18 that's similar to those of the exemplar patients, that you're
19 suggesting that they're just doing a fishing expedition asking
20 for all medical records, unrelated to any specific diagnosis
21 code or HCC, and then they're going to turn it over to their
22 experts and they're going to run through them and try to
23 generate new diagnosis codes or new theories of their -- of
24 their claims after just getting broad access to all medical
25 records, right?

1 So if it isn't -- it seems to me that you're
2 suggesting that there may be a universe of medical records that
3 would be relevant and proportional to the needs of this case,
4 but those would be limited to the diagnosis codes of the
5 exemplar patients that are listed in the Amended Complaint, or
6 the HCCs for the exemplar patients listed in the
7 Amended Complaint, and that would then prevent the kind of
8 concern that you have of then just getting all medical records
9 for the patient unrelated to any specific diagnosis code --
10 diagnosis code and just rummaging through patients' medical
11 records in order to identify some claim that they could advance
12 or some theory that they could advance in this case.

13 MS. SANTELLA: No, Your Honor, I was responding to
14 your factual question about whether we could figure out what
15 diagnosis codes similar to the ones in the Complaint appear in
16 the claims data for Freedom defendants, and I believe we could
17 figure that out. To be clear, that doesn't mean that we have
18 the medical records for those.

19 THE COURT: No. I'm sorry.

20 MS. SANTELLA: But I under -- I under -- I understand
21 your point.

22 You know, I don't know that -- I mean, I guess the
23 topline response to this is that relator hasn't tried to do
24 this narrowing herself. I mean, her Complaint doesn't state
25 that the defendants had a pattern of, you know, addressing this

1 certain type of cancer diagnosis in a certain way and,
2 you know, outputting it across patients. That's not what her
3 Complaint says and she hasn't even attempted to narrow it that
4 way.

5 I was providing an example of how a relator might
6 connect a claims or medical records request to allegations in
7 the Complaint. There are theoretical ways that a relator or
8 this relator could do that, she hasn't done that, and so,
9 you know, I -- I don't know that it would be reasonable either
10 to simply search the claims data for all of the diagnosis codes
11 that appear in the Complaint, though that would certainly at
12 least, you know, have some connection with the Complaint.
13 Again, that's never what relator has requested in all of
14 the months and years of discovery. Her request has only been
15 for either all medical records or an undifferentiated random
16 sample of medical records.

17 Discovery is now closed, and so, you know, Freedom's
18 position is that relator shouldn't be able to rehabilitate her
19 discovery requests after the discovery window has closed with a
20 broad new request when she refused to date to narrow her
21 request in any way that's reasonably tethered to the Complaint.

22 THE COURT: All right. But we have an outstanding
23 broad discovery request, at least you characterize it as a
24 broad discovery request, that was submitted during the
25 discovery period and is before the Court on motion to compel,

1 and you think it would be inappropriate for the Court to narrow
2 that request to make it more proportional to the needs of the
3 case?

4 MS. SANTELLA: That is our position at this point.
5 Just to be clear about the record, relator issued the -- these
6 RFPs, virtually identical or perhaps exactly identical RFPs to
7 Freedom defendants and provider defendants in February.
8 Freedom defendants objected on burden grounds and the fact that
9 we don't have -- these aren't our records, we don't have
10 possession of them.

11 I understand from Mr. Swanson that there was some
12 negotiation on provider defendants' part, I can't speak to
13 that, but we issued this objection, and relator did not engage
14 with us further on this issue until I believe it was end of
15 April or May and then ultimately issued this revised request
16 for 12 to 1800 years of -- member years of medical records.

17 Ms. Hartman mentioned that relator was unable to
18 engage or couldn't engage with the defendants on this point.
19 You know, that's not because the defendants refused to engage,
20 it's because we received this request two weeks before the end
21 of discovery, so -- so I do believe it would be inappropriate
22 to allow relator to issue a facially overbroad request, narrow
23 her request to something still overbroad and burdensome at the
24 eleventh hour, and, you know, get another shot at this
25 discovery after the discovery window has closed. It's not

1 defendant's discovery conduct that has prevented relator from
2 receiving a reasonable set of medical records.

3 THE COURT: Okay. Explain to me your client's
4 position regarding a statistically valid random sample. From
5 what I'm hearing, you object to the use of a statistically
6 valid random sample in order to prove false claims, that the
7 argument is that relator must support each false claim
8 individually and not just extrapolate it based on a random
9 sample.

10 If that's the case then why shouldn't the relator be
11 entitled to more discovery on more patient records beyond what
12 they believe is a statistically valid random sample?

13 MS. SANTELLA: Well, let me -- I will address that
14 question. Let me clarify just one point, which is that our
15 objection to this discovery is not based on an objection to
16 random sampling, so I just want to be very clear that we
17 haven't refused to provide medical records on the basis that
18 random sampling is inappropriate in a False Claims Act case.
19 You know, that is an issue to be addressed, you know,
20 potentially maybe down the line through various, you know,
21 dispositive and expert-related motions, but our position -- so
22 our position in not responding to this request is on the scale
23 and the scope and the burden of the medical records and the
24 inappropriate use of discovery for a fishing expedition to
25 figure out what relator's theories of false claims are.

1 Relator is not entitled to the broader set of medical
2 records I think for the reasons we've already mentioned and
3 mentioned in our briefing, which is that it's overbroad,
4 burdensome, untethered to the allegations in the Complaint, and
5 relator didn't issue an appropriately-scoped discovery request
6 during fact discovery.

7 I mean, there are various ways that relator could
8 have requested a reasonable population of medical records. I'm
9 not saying that there's no world in which she would ever be
10 entitled to medical records, though, again, I would reiterate,
11 she wouldn't be entitled to receive them from Freedom
12 defendants. But putting that aside, she's never made that sort
13 of reasonable request. So if the question is whether,
14 you know, relator's undifferentiated "the fraud is universal"
15 allegation requires -- entitles her to all of these records,
16 I would say that, you know, for the reasons stated in our
17 opposition discussed today, that's not the case.

18 THE COURT: All right. Now, if Freedom takes the
19 position that they don't have control and custody over the
20 medical records that are in the possession of the providers,
21 but Freedom does acknowledge that they do have in their
22 possession some medical records, why shouldn't Freedom be
23 ordered to produce those medical records that are actually in
24 their possession to the relator that are responsive to the
25 requests for production?

1 MS. SANTELLA: Well, I will note that relator's
2 request for the 12 to 1800 member years of medical records is
3 not -- there is no relation to what we have actually collected
4 or not collected for our targeted RADV and IRO audits, so we
5 would need to explore whether we actually have anything, all,
6 some portions of those records corresponding to those 12 to
7 1800 medical -- member years.

8 I would suspect, you know, because those other audits
9 are targeted at specific HCC diagnosis codes and dates of
10 service, it's very unlikely that we have the full medical
11 record for very many of these patients, if any of them. So,
12 you know, again, if we're talking -- is it practically -- or is
13 it theoretically a possibility that we could endeavor to find
14 specific dates of service within the broader medical record for
15 some of these 12 to 1800 patients, you know, I suppose we could
16 look for that. I think that would be a massive undertaking,
17 for us to try to match up those member years with the ad hoc
18 dates of service that they've collected for other purposes.
19 I can't speak to exactly what the burden would be, but I think
20 our opposition highlights that, you know, for just 100 dates of
21 service or diagnosis codes, you know, it took a full team of
22 employees several months to collect those, so, you know, the
23 effort to match those up and then augment what we have with
24 remaining records, you know, I expect that would be a
25 burdensome exercise that would take a very long time.

1 THE COURT: Even though you already gathered those
2 records in response to an audit, you already have them in your
3 possession, you have them by dates of service, so you know the
4 timeframe of the records that you gathered, it's going to be
5 unduly burdensome for you to look at those records to see
6 whether there's any portion of those that are responsive to the
7 requests for production?

8 MS. SANTELLA: To match those records up to the 12 to
9 1800 member years that relator has requested in her sample,
10 yeah, I do suspect that that would be quite a burdensome
11 undertaking that -- you know, and again, that isn't what
12 relator had requested from us. She hasn't requested produce
13 the results of your IRO audit, produce the charts that you've
14 collected in response to RADV audits, that's not been her
15 request, and so Freedom's position is that relator shouldn't be
16 able to rehabilitate her unreasonable request for things she
17 hasn't asked for after fact discovery is closed.

18 THE COURT: But isn't it incumbent upon -- for
19 already responding to requests for production, if they're
20 making -- if they believe that the request is objectionable on
21 the basis it's overly broad or unduly burdensome, that they are
22 to limit their response to what is not in their view unduly
23 burdensome or overly broad? If there's a -- there's a
24 different way, there's a small subset that is not
25 objectionable, shouldn't it -- doesn't the responding party

1 have the obligation to provide that in response to a request
2 for production and not just make a blanket objection that
3 everything is unduly burdensome or overly broad?

4 MS. SANTELLA: Freedom's position in this
5 circumstance is that relator's request for us to find ad hoc
6 records that we've collected a portion of in response to a
7 request for 12 to 1800 medical year -- member years is unduly
8 burdensome. Again, we -- we collect records for specific dates
9 of service for diagnoses, so we would need to take the member
10 year relator has identified, figure out all of the dates of
11 service and or diagnoses within that year for these often sick,
12 elderly patients, and then cross-reference them with what we've
13 collected for much more targeted specific audits over the years
14 to see if one of those diagnosis codes or dates of service for
15 that number was collected in response to one of these different
16 audits over the years.

17 Freedom's position is that that is an unduly
18 burdensome exercise, and, you know, again, had relator
19 negotiated with us and attempted to narrow her request to
20 records that Freedom possessed in response to our objections,
21 we might be in a different world here, but that's not how
22 discovery materialized in this case.

23 THE COURT: But my question is what's your obligation
24 in response to a request for production. You make an objection
25 and you say that it's unduly burdensome or overly broad or not

1 proportional. Don't you have an obligation to identify what is
2 not objectionable, what subset of that request would not be
3 objectionable?

4 MS. SANTELLA: We -- Freedom's position is that
5 that -- there is not a portion of that request that is
6 unobjectionable with respect to Freedom defendants for the
7 reason of the burden, for the reasons of us not having
8 possession of the records, for the reasons of it being an
9 improper request not tethered to the allegations in relator's
10 Complaint.

11 THE COURT: All right. Thank you, Ms. Santella.
12 Anything further from you?

13 MS. SANTELLA: No, Your Honor.

14 THE COURT: All right. Mr. Swanson, we addressed
15 some issues that I don't think were addressed by your argument
16 as an initial matter. Do you want to weigh in on any of those?

17 MR. SWANSON: I would just add, Your Honor, that --
18 and I said this before, but just to reiterate, we did produce
19 the medical records for the 20 patients identified in the
20 Complaint, you know, approaching 20,000 pages of documents.
21 We served an interrogatory a year and a half ago asking for
22 identification of claims. We had these negotiations very early
23 stages with the relator many, many months ago and never heard
24 anything more on it, and, you know, weren't given another
25 alternative to consider until two weeks before the close of

1 fact discovery this list of 1200 patients with no explanation
2 other than this is derived from work our experts have done
3 landed in our -- our laps, and so I would just -- I would just
4 add those additional points or amplify those previously made.

5 THE COURT: All right. Thank you.

6 Ms. Hartman?

7 MS. HARTMAN: Yes. Just briefly, Your Honor.

8 Relator did serve a document request within the
9 discovery period, and what the parties are trying to do here is
10 narrow that. As I said earlier here, we're fighting about the
11 number of charts that should be produced and also, apparently,
12 how that sample is selected, whether it should be targeted to
13 certain HCCs. You know, if that's something that the parties
14 can discuss further, you know, we're happy to do so. That's
15 not something that had been raised before.

16 You know, relator is not trying to find new theories
17 of liability here, relator is quite happy with the theories of
18 liability she already has, and, you know, if there's
19 something -- this does not need to be an all-or-nothing
20 request, you know. As your -- as the Court has pointed out,
21 you know, what has already happened here includes that we
22 served a valid discovery request before we even narrowed it,
23 you know, to this 1200 random sample, Freedom was sitting on a
24 cache of responsive medical charts that they didn't even review
25 at that point for production. So I think that given that

1 the -- where we are in this case, with a valid outstanding --
2 with a discovery request outstanding within the discovery
3 window for medical charts that are relevant to relator's
4 claims, that some discovery should be ordered here.

5 THE COURT: But, Ms. Hartman, your request is not at
6 all tailored to any specific diagnosis code for HCC; is that
7 correct?

8 MS. HARTMAN: At this point it was not tailored to
9 specific diagnosis codes. You know, happy to discuss that
10 further with defendants, you know, if we have an agreement
11 about -- you know, our concern, of course, was that, you know,
12 we have something that was statistically valid as a random
13 sample. You know, if defendants will agree to some other
14 process, perhaps targeted to HCCs, happy to explore that with
15 them.

16 THE COURT: Well, statistically valid based on the
17 claim, the universe of the claim, right? So if the universe --

18 MS. HARTMAN: Right.

19 THE COURT: -- of the claim that you're asserting is
20 based on a diagnosis code that's been submitted, you know, the
21 false claim is routinely submitted under one diagnosis code or
22 multiple diagnosis codes or HCCs, then that's the universe of
23 claims of which there's statistically valid random samples
24 drawn from, but it appears from what I'm hearing that that's
25 not what relator is doing, relator is just going to the

1 universe of all patients from Freedom, that Freedom submitted
2 claims on their behalf, and you're taking that universe and
3 trying to draw a statistically valid random sample from, and
4 what I'm hearing from the defendants is that if you are
5 entitled -- I mean, they're taking the position you're not
6 entitled to any medical records, it appears, but even if you
7 were entitled to some, you would need to identify what's the
8 actual false claims that are being submitted to the Government
9 and tie your request for medical records to the exemplar
10 patients that you have in your Complaint, or if you've
11 developed, you know, new theories based on the discovery to
12 date, that you articulate what those are, and so your requests
13 for patient records are tied to the exemplar patients or the
14 information that you've learned through discovery, and what I'm
15 hearing is that it's not at all, it's just you want to look at
16 a statistically valid random sample, at least what your experts
17 believe to be a statistically valid random sample of the
18 universe of all patient records of claims submitted by Freedom.

19 MS. HARTMAN: Correct, Your Honor. And just to back
20 up a little on what our expert did, you know, we did ask
21 originally -- and I'd need to look at this further, and I think
22 it would be something to meet and confer on. We looked at the
23 claims data, and those -- the diagnoses in question that are,
24 for example, the diagnoses identified in the Complaint appear
25 in 90 percent of the claims data, is my recollection, and

1 I don't want to -- you know, I would need to confirm that, but
2 my recollection is that that wasn't a meaningfully -- a
3 meaningful way to narrow it, by only focusing on those HCCs,
4 but I would want to confirm that.

5 THE COURT: But, again, it seems to me that as an
6 initial matter that would be the first step of relator, would
7 be to look at the claims data and see the claims that are being
8 submitted that you are alleging to be false claims that were
9 submitted to the Government and look to see what claims were
10 actually submitted and see if there is similarities between the
11 exemplar patients that you've alleged in your Complaint, and
12 you have that information, you have the claims data, right?

13 MS. HARTMAN: Yes, we do have the claims data, and it
14 is -- you know, as I said, we did have our expert look at
15 whether it could be narrowed to the member years that had those
16 HCCs of interest, and of the HCCs that were identified,
17 90 percent of the member years had one of those HCCs of
18 interest, so with that vast majority of member years would
19 already be in that population, so it was not a meaningful
20 restriction or would not, in our expert's view, have made the
21 sample more precise. But if that's something, you know, to cut
22 out some 10 percent as -- again, you know, if we're talking
23 about how to target this sample or what size it should be, we
24 can provide further information on that.

25 THE COURT: All right. And explain to me the member

1 years, because my understanding is, you know, one patient, but
2 if they saw different providers those are considered different
3 member years even if it's occurred in the same year, correct?

4 MS. HARTMAN: No, Your Honor. The member years are
5 not tied to providers, they're tied to the member. So,
6 you know, if I am a member of Freedom for three years then
7 that's three member years, regardless of how many doctors,
8 different providers, I see during that year, during those
9 years.

10 THE COURT: Okay. And when you ask for the patient
11 records for those patients, you're asking for their entire
12 medical record, their entire -- the universe of medical records
13 for the given member year?

14 MS. HARTMAN: That's something also we'd be happy to
15 meet and confer on. You know, the defendant in this case is --
16 is -- the provider defendants, you know, according to them
17 these are supported diagnoses, so if there's some way to stage
18 this and start with medical records only from the provider
19 defendants, you know, the provider declaration suggests that
20 they have to go get things from DME providers or, you know,
21 things that aren't even risk adjusting sources of data,
22 you know, if there's some staging that would be appropriate
23 there, that's something I think would make sense, to start with
24 what is supported in the provider records, the provider
25 training records.

1 THE COURT: But isn't it that that's what they're
2 required to have in order to support the claims that are
3 submitted to the Government? It's a --

4 MS. HARTMAN: Correct. That's what the Medicare
5 Advantage program requires. Yes.

6 THE COURT: Right. It's a smaller subset of the
7 patient records, it's not the entire patient record, it's just
8 that which supports the claim that's being submitted.

9 MS. HARTMAN: Correct, Your Honor.

10 THE COURT: All right. So why aren't you asking just
11 for that?

12 MS. HARTMAN: If that's something that would make
13 defendants more able to respond, we'd be happy to narrow it in
14 that way.

15 THE COURT: Mr. Swanson, is that how your clients
16 maintain the medical records? Are they maintained in a way
17 which it's easier to pull just the medical records that support
18 a claim submitted for a specific HCC or diagnosis code?

19 MR. SWANSON: It may be, Your Honor, but I think,
20 you know, particularly if the Court is, as I get the sense
21 here, directing the parties to try to come up with some
22 compromise, that would have to be something we would need to
23 confirm with our client, if that is to be made part of some
24 discussions with -- with relator's counsel.

25 And to that end, and to the extent the Court is

1 considering some alternative here to the request that we've
2 heretofore been dealing with, I would just reiterate what's
3 clear from the cases, that the relator can't, you know,
4 bootstrap these theories based on what she's learned during
5 discovery. She -- we -- we -- we only need to -- we should
6 only need to contend with what she brought to this case, and --
7 and that's what's in the Complaint. And I agree with
8 Ms. Santella wholeheartedly, it's -- there is not some coherent
9 theory in there about certain HCCs or, you know, other --
10 you know, diagnosis codes, and so we're left with, you know,
11 the 20 exemplar -- examples and we've provided them and -- and
12 have not heard any of these other alternative formulations
13 until really this morning.

14 THE COURT: I understand, but my frustration with the
15 parties is that there's a request that the defendants believe
16 is overly broad and it doesn't appear to me that there's been
17 any meaningful conferral process between the parties in order
18 to determine what isn't overbroad, what is an appropriate
19 subset of the request. It seems to me that relators submitted
20 a request for production that perhaps is overly broad and
21 unduly burdensome and not proportional to the needs of the
22 case, but yet defendants just made the objection and there's
23 been no effort to narrow down the request to what is not
24 objectionable and what should be provided to relator, and,
25 quite frankly, I'm just -- I'm surprised that the parties have

1 not engaged in these discussions in order to determine what is
2 appropriate. I find it hard to believe that there are no
3 subset of medical records that are relevant and proportional to
4 the needs of this case, but yet that seems to be the position
5 of the defendants, is throwing their hands up in the air and
6 saying this is -- this is too much, this is not narrowly
7 tailored to the -- to the claims in the Complaint, and that's
8 it, we're not going to give you anything.

9 MR. SWANSON: Well, I think --

10 THE COURT: Other than the 20 exemplar patient
11 records that we've given you.

12 MR. SWANSON: I think -- I think, first of all, there
13 were efforts to work through this with the relator many,
14 many months ago, as I've talked about, and it was then radio
15 silence on this issue until two weeks before discovery, and so
16 we are -- we are left with, you know, a world in which there's
17 a request for everything, which is, you know, we think, grossly
18 disproportionate to the case for all the reasons we've talked
19 about, and the alternative is 1200 patients with no explanation
20 given for those, and so I -- Your Honor, I understand,
21 you know, your desire, it seems, for the parties to have found
22 some way forward here, but, you know, in our shoes, where we
23 had produced nearly 20,000 pages of records for the 20 who are
24 in the Complaint, had made these efforts, had served an
25 interrogatory on them 18 months earlier to identify the claims,

1 and then, you know, our consolation prize was a list of 1200
2 patient with no explanation for the provenance of those
3 patients, you know, we're -- and -- and where the obligation
4 lies with the relator to articulate some theory to justify
5 this, you know, we -- I understand -- I understand, you know,
6 your -- your frustration, but I think the record, at least
7 where we sit, is -- is defensible, but we're also mindful of
8 the observations you've made this morning and, frankly,
9 revelations we've heard for the first time, such as the
10 expert's assessment that, you know, these HCCs are present in
11 90 percent of the -- of the claims. I mean, we're -- if -- if
12 the Court's directive is for us to meet and confer about this
13 further and reserve our rights subject to those discussions,
14 you know, we're -- we're happy to do that.

15 THE COURT: And I don't mean to suggest by my
16 arguments that it's -- my frustration is solely with the
17 defendants, it is not, it's a two-way street. The relator,
18 after receiving the objection to this request, should have
19 tried to articulate what exactly they need and what exactly is
20 relevant and proportional to the needs of their case in order
21 to help defendants narrow the patient records that should be
22 provided, and, you know, we're discussing these issues for the
23 first time at this hearing, and I'm just -- again, I'm just
24 surprised, with all the attorneys that are on this Zoom
25 hearing, that there hasn't been a meaningful effort by all

1 parties in order to determine, okay, what is a reasonable
2 subset of medical records that are both relevant to the claims
3 asserted in the Amended Complaint and proportional to the needs
4 of this case, and it doesn't seem like the parties have really
5 undergone that effort.

6 There appears there was at least some discussion
7 early on about providing a smaller subset, perhaps 75 patient
8 records per year for two years, and I understand why you're not
9 in a position to articulate how defendants came up with that
10 number, but there -- at this hearing there is no explanation as
11 to why that offer was made or what that was based on. I mean,
12 I think these are discussions that need to be had between the
13 parties, is if 75 is the appropriate number, then why is that
14 the appropriate number? What are we looking at? How are we
15 narrowing this down to something that makes sense?

16 So if the parties are asking the Court to do all or
17 nothing, to either grant the motion to compel as to the request
18 for production in total or deny it in total, then that's --
19 then that's what I'll do, but I think that the parties are
20 really doing themselves a disservice by not meaningfully
21 engaging in a conferral process in order to narrow it down to
22 what is actually needed in this case.

23 So I am going to order the parties to confer on this
24 issue, I'm going to give you two weeks to do that and to narrow
25 it down. If you can't narrow it down then you just need to

1 file a joint notice to the Court saying that the parties have
2 been unable to narrow the issues and the parties request that
3 the Court either grant in full or deny in full the motion to
4 compel as to the requests for production.

5 Does that make sense, Ms. Hartman?

6 MS. HARTMAN: Yes. Thank you, Your Honor.

7 THE COURT: Mr. Swanson?

8 MR. SWANSON: Yes. Thank you, Your Honor.

9 THE COURT: And Ms. Santella?

10 MS. SANTELLA: Yes, Your Honor.

11 THE COURT: Anything further on this motion before
12 I move on?

13 MS. HARTMAN: Your Honor, plaintiff did have other
14 categories of Freedom documents that we moved to compel on as
15 well, and I want to briefly hit a couple of those.

16 You know, as we have taken depositions in this case,
17 you know, it's become apparent that there are certain
18 categories of Freedom documents that were not produced, and
19 that, of course, often happens in discovery, but here again
20 we're hitting in many cases a brick wall, and the motion is --
21 has been necessary.

22 You know, because when we raise these issues with
23 Freedom about these missing categories of documents, the reply
24 typically is that they produced documents based on the search
25 terms and custodians, but, you know, that really misses the

1 point. You know, the ESI protocol that was agreed on, the
2 search terms and custodians, that's a floor, not a ceiling.
3 Where there are responsive documents defendants are not excused
4 from producing them simply because they don't hit on some
5 search terms that were provided by defendants or happen not to
6 be found in some custodian's files, where those custodians were
7 identified by defendants, and I want to focus on a couple of
8 categories.

9 **(REDACTED)**

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18 What relator received, as far as I can tell, in the
19 production -- as we can tell in the production, is there's a
20 single PowerPoint presentation from such a meeting related to
21 the fourth quarter 2016 meeting, held in December 2016. That
22 one document has been produced three times, but it's the only
23 one, for something that they say happened on a quarterly basis.

24 That document, you know, provides information about
25 this 3,405 member records, et cetera, but we don't see others,

1 and there's no indication that Freedom undertook to look for
2 that shared drive and produce those documents, so -- and also
3 that document makes clear that **(REDACTED)** and,
4 there again, Freedom said, well, we don't have to produce, we
5 don't have to query a database, and that's just not true.

6 The parties' ESI protocol, which, again, is a floor
7 and not a ceiling, says that if an existing report format is
8 not reasonably available or usable, the parties will meet and
9 confer to attempt to identify a mutually agreeable form of
10 production based on the specific needs and the content and
11 format of data within that structured data source. So if that
12 **(REDACTED)**

13 let's meet and confer
14 instead of just getting an answer that, you know, they have
15 done -- run the search terms against the custodians. That's
16 not an answer.

17 **(REDACTED)**

18 The second category I want to highlight is there's a
19 **(REDACTED)**

20
21
22 We have not received a complete set of those at all.
23 So it's just something that as far as we can tell that Freedom
24 has not reviewed their own systems, aside from running search
25 terms against a database and not actually doing that work.

1 And they, you know, identify these on their Rule 26
2 disclosures, the issue of the compliance meetings as being
3 relevant, so I'm not sure why we haven't got those.

4 One other category of documents, there's a service
5 fund report that Mr. Kollfrath just testified about that
6 Physician Partners received from Freedom and Optimum, we don't
7 have those documents, those haven't been produced, and
8 they're -- they're about the funding, they're about how much is
9 spent from -- how much money Physician Partners receives from
10 Freedom and Optimum, it really goes to the core of the
11 allegations in this case, and we haven't received those from
12 Freedom and Optimum.

13 So those are the three categories of documents that
14 I would really highlight as just sort of confused why we
15 haven't received those.

16 THE COURT: All right. Who is responding on behalf
17 of Freedom?

18 MR. DRAKE: Thank you, Judge. Scott Drake on behalf
19 of Freedom.

20 Your Honor, I think some of this motion practice is
21 due to the timeline which we outlined in our opposition, but
22 I think one of the issues, Judge, is that these documents,
23 PowerPoints and things like that, weren't called for until
24 relator served their final set of requests for production, and
25 we walked through this timeline, but for the Court's

1 recollection, they were served April 29th, the last day
2 possible, and the motion that relator filed was filed on
3 May 29th, the same due that our -- the same day, rather, that
4 our responses were due, and they sent a letter on the Sunday of
5 Memorial Day Weekend, May 26th. We responded to that on
6 Wednesday, addressing a lot of these things that specifically
7 said they were going to be produced in response to that final
8 set, and they filed their motion 20 minutes after we sent our
9 letter, and, you know, to be fair to them, they probably felt
10 like it was the last day and they filed it without really
11 having time to analyze our letter, so not necessarily
12 criticizing them, I'm just saying that's the timeline, and
13 these -- these PowerPoints -- and we said this in our letter
14 and we said it in our motion that they were going to be
15 produced that day, and we made a production that includes these
16 compliance department PowerPoints and things like that that
17 they were complaining about.

18 It was a little hard to tell from their motion, they
19 have a bulleted list on page 15 and another bulleted list on
20 page 16, but, Judge, we've largely addressed this in our
21 response, and I don't know, Judge, if they have had time since
22 we made that production to review that production. It was made
23 timely. I mean, in fact, it was made on the day the responses
24 were due. We didn't ask for extensions. In fact, we worked
25 hard to produce things voluntarily before the deadline, which

1 we were criticized for. We tried to get documents that they
2 had just requested on the very last day they could, and we
3 tried to get them before the depositions, even though our
4 responses weren't due, and, you know, they've complained about
5 that in their motion, but I don't know, Judge, if relator's
6 team has had time to analyze that final production where they
7 think those documents are still -- still haven't been produced,
8 because, as we said in our response, we believe those
9 PowerPoints Ms. Hartman just referenced were -- were produced,
10 so I'm not understanding that.

11 The other thing --

12 THE COURT: I'm sorry, Mr. Drake. Before you move
13 on, Ms. Hartman says there's only one PowerPoint that was
14 produced three times, and you're saying that that's not
15 accurate?

16 MR. DRAKE: I believe -- and, Judge, she can
17 obviously correct me, but I believe one version of that
18 document was produced in the earlier productions that predated
19 those -- final set that specifically requested those materials,
20 and I believe that's what she's referring to, not that the same
21 document was produced three times in that final May 29
22 production. I don't know --

23 THE COURT: In your response you're basically telling
24 the Court that you've complied, that you've produced
25 everything. Is that -- is that correct?

1 MR. DRAKE: Well, I -- I think -- you know, we break
2 our response into four categories. We say some things were
3 produced previously; we say some things were being produced in
4 connection with the final report; the Gareau issue, which she
5 hasn't addressed specifically, but we said that was already
6 teed up and decided by Your Honor; and then there is a category
7 we do just say there is some limit and -- for instance,
8 generating reports and things like that, that we're not
9 required to do.

10 So I don't want to overstate -- I don't want to make
11 a representation, yes, we've produced every single document
12 they've asked for, you know, that's -- that's not -- that's not
13 fair.

14 THE COURT: But other than the fourth category, where
15 you say discovery not permitted under the rules, which is the
16 generating reports, documents that are not or have not already
17 been created but require you to actually create a document,
18 generate a report, other than that, you're representing that
19 you've either -- that you've produced the documents either
20 previously or in response to this request for production,
21 right?

22 MR. DRAKE: Well, again, I want to be careful not
23 to -- not to overstate. There are some things --

24 THE COURT: Well, Mr. Drake, maybe it's easier to do
25 it this way. What have you not -- what are you withholding?

1 What have you not produced?

2 MR. DRAKE: Well, I think, Judge, if you look at
3 their list, on page 15 of their motion, the first bullet is
4 Excel files from a shared drive, and throughout the lengthy
5 process we identified various -- not just custodians, but
6 shared drives and reviewed those shared drives and made
7 productions based on the agreed scope of the shared drives and
8 custodians and the search terms, and we produced what was
9 responsive to those.

10 On bullet 2, that is something we believe, again,
11 we're not obligated to query something and generate a report,
12 **(REDACTED)**

13
14 Number 3 is medical records, which I think you
15 discussed at length with Ms. Santella and Mr. Swanson.

16 Number 4, again, is another query and app to generate
17 a list or response. We have produced, as I've said, Judge,
18 many, many documents about the
19 **(REDACTED)**

20
21 they're very -- they're very informed, and so, again, what
22 I would say, as I've highlighted in our opposition, this was a
23 very lengthy, lengthy discovery process that started months if
24 not over years ago, where we agreed through compromise charts
25 about their requests, and, Judge, I think we did what you were

1 talking about you wished had been done more with the medical
2 records.

3 You know, saying any document that in any way relates
4 to any audit, that's overly broad, in our view, and so we had
5 multiple, multiple conferences with relator's counsel, and we
6 had a chart we called a compromise chart, and we narrowed it by
7 agreement and said, okay, within, for instance, the audit
8 topic, this is what we will agree to produce, and that was on
9 their first and second set, and then what happened, Judge, is
10 they asked for more specific documents in the third set and we
11 made that production.

12 So what I would say is we have complied with
13 producing things responsive to their requests as narrowed by
14 agreement of counsel, because our view is that when initially
15 served they were overly broad, and we spent months narrowing
16 them by agreement and said, okay, within this topic, this
17 request, here's what we'll agree to give you, and everybody
18 agreed to that and we complied with that.

19 THE COURT: All right. Thank you, Mr. Drake.

20 Anything further, Ms. Hartman?

21 MS. HARTMAN: Just that these requests, as Mr. Drake
22 acknowledges, you know, aren't -- these documents that we're
23 asking -- talking about now are not responsive to -- only to
24 these -- those -- the document requests that were served later.
25 In the case of the -- for example

1 (REDACTED)

2 I mean, those are documents that were identified in
3 defendant's initial disclosures, and I have had a chance to
4 look at these late requests, and we still only have for that
5 (REDACTED) that one that we didn't receive.

6 You know, they collect all these medical records and
7 review them and come up with an error rate for these --
8 you know (REDACTED) I don't know what the
9 results of that review are, they haven't produced documents
10 that show that, and I have reviewed the most recent productions
11 as well.

12 You know, in terms of their narrowing and, you know,
13 what the parties -- we relied on them to tell us, and,
14 you know, they had said in the -- for example, in their initial
15 disclosures that they would be producing -- or that these
16 documents were relevant, these (REDACTED)
17 for example, yet we don't have them.

18 THE COURT: All right. Thank you.

19 All right. Let's move on to relator's last motion.

20 MS. ESTES: Thank you. Excuse me. Thank you,
21 Your Honor. This is Jillian Estes again.

22 A lot of the issues with this motion, of course, also
23 overlap with the medical records, so I won't go into any of
24 those, I'll focus instead on the other specific documents that
25 we've requested.

1 What I painted here and I think is really instructive
2 to our requests here is this is sort of -- maybe an analogy,
3 but it strikes me a little bit as like playing the game of
4 Battleship, if you remember, like they're incumbent upon
5 relator to say -- like to call our specific coordinates, and if
6 we didn't do that there was no giving us those documents. So
7 it's sort of been, well, you didn't say these words, you didn't
8 say these names, you didn't identify this spot where you would
9 have no way of knowing that we kept documents except for our
10 representations to you of what was responsive and relevant, and
11 so we've relied on those things and we did the best we could
12 with the information we had, and what's happened and what
13 precipitated these motions was the Freedom motion ANRs with
14 respect to the provider defendants, is through depositions we
15 found out we didn't have the right information, that the things
16 that we've relied on didn't get us to the categories of
17 information that we would need to prove our case or need to
18 supplement what we already have.

19 So it's not a failure of meeting and conferring.
20 I think Mr. Drake is correct that we did have a lot of those
21 conversations with respect to documents from early on.
22 Mr. Swanson is also correct in the representation he made
23 earlier that halfway through the discovery period we hadn't
24 gotten any documents yet. So it was a really difficult,
25 challenging process to get anything to come to us, and we've

1 tried in all of that, and only now, as we're in these late
2 stages, are we realizing really how deficient that ended up
3 being.

4 So it's not for lack of participating in the process.
5 It has been an ongoing effort to participate in this process,
6 and where we are now is with the deficits that we have
7 identified. So I just wanted to sort of explain where we were.
8 It's not for lack of anyone trying and hoping to get these
9 things.

10 THE COURT: I understand, but isn't it an issue of
11 the parties agreed to certain protocols and certain ways of
12 responding to the requests for production, that was agreed, the
13 defendants complied with their obligations as agreed by the
14 parties, and then now you're realizing there's additional
15 information that you want, but is it a question of whether they
16 didn't comply with the agreements that you reached in the
17 conferral process or is it a question of you've now identified
18 new sources of information that you want?

19 MS. ESTES: I think it's a little bit of a chicken
20 and the egg thing there. So I think we agreed to things that
21 we understood would get us the documents that we had requested
22 and that then we relied upon what they told us would do that
23 and gave us some, although not all of those things, because as
24 Ms. Hartman identified, there's still things where we would get
25 a single document, and that exists very much as well in the

1 Physician Partners productions, like these surplus reports that
2 are very much at the heart of the compensation agreement for
3 the employed physicians that we have a few what we've come to
4 understand are monthly reports created for all employed
5 physicians and we don't have a subset of that for the entire
6 four year period for the Physician Partners.

7 Same thing, there is these KOS reports, which
8 identify the number of providers -- excuse me, the providers
9 and the number of patients they had for the entire network that
10 were generated every single day, and we have a very small
11 number, certainly not a daily report over four years, but
12 there's patterning to those numbers that are really helpful for
13 us to be able to see trends and things that -- and clearly they
14 were responsive reports in that we got some of them but not all
15 of them.

16 So it's a little bit of both, and both that we didn't
17 get a complete set of what we agreed upon, and what we agreed
18 upon is not a complete set of what we requested, because we
19 relied on the representations made during that meet and confer
20 process.

21 And so, with that, that sort of gets us to the
22 surplus reports, as I mentioned, and these Google Drives.
23 That's an issue that has come up very frequently now. When we
24 were negotiating the ESI protocol, this was a very hotly
25 debated topic between counsel as to how searching would work,

1 what would be searched, and there was a lot of discussion that
2 the possessors of the documents are the ones who are in the
3 best position to tell us what they needed to search and where,
4 because we asked, you know, for directories of all of these
5 things and, you know, they -- the representations were, look,
6 we're the ones who know where the responsive information will
7 be, we don't need to give you a directory of our whole system
8 for you to be able to pick categories, but as it turns out,
9 that wasn't the case. So there were very relevant, responsive
10 records, and this Johnson report I think is maybe the most
11 emblematic of that.

12 So the document that's in a report identified by
13 Sajitha Johnson in her deposition for the first time, she
14 described it as like a spreadsheet where people could go to
15 enter in concerns about unsupported diagnosis codes being
16 submitted. We have never heard of that document before.
17 In fact, in Ms. Gallman's 30(b)(6) testimony on behalf of
18 VIP Partners we asked if there was sort of a consolidated area
19 where there -- and she said no.

20 So we're -- we had very conflicting information as to
21 what that was. It didn't get -- finally something was
22 identified on June 12th, the report was produced to us after
23 the 30(b)(6) from VIPCARE, after the 30(b)(6) from Physician
24 Partners, where the VIPCARE person had denied that there was
25 any such repository. The document was produced to us for only

1 one year, it has data only for 2020, we have no idea if it
2 exists for '17, '18, '19, if it was versioned so that it's
3 overwritten and we'd have to go back and create, we don't have
4 any information about it, and of course the 30(b)(6)s are done.

5 It came the night before a person who I think
6 probably would have been able to speak to it a little bit, but
7 coming in at eight o'clock the night before a deposition
8 doesn't give us time to evaluate it and understand how,
9 you know, to work it into the deposition a couple hours later.
10 And Mr. Kolllefrath, whom we deposed the following day, denied
11 having any knowledge of claims data, so he wouldn't have been
12 instructive on that.

13 But that's a really emblematic thing to us, because
14 it's hard to imagine a report more fundamental to our
15 allegations of the submission of false claims than a place that
16 generates complaints on the submission of false claims, and
17 that that didn't come to us, either because the document -- we
18 still don't know what it's called, I can't refer to it by name
19 so I call it the Johnson report, because it didn't come named
20 to us still, so we can't search on any of our production to see
21 if other people talked about it, we can't get prior years of
22 it, because we don't know about it.

23 So that's been our concern, is that we relied on
24 things, and when we find out there's something like that that
25 existed that we didn't have, we really question the completion

1 of the information that was provided to us.

2 So I think maybe what was provided to us in large
3 part was -- excuse me, the information that was provided to us
4 in large part was provided, with the exception of some of these
5 multiple reports, but the concern is what else is there that we
6 don't know about, and it seems, unfortunately, like there's
7 really foundational information in that section of information.

8 And just to supplement that, this -- there were --
9 there was testimony about scripts that were very, very
10 important because that's universal training information that
11 went to all of the providers. The person who read the scripts
12 said there was multiple. We've only received one. We don't
13 know what repository or place those would live that we didn't
14 get more, but we only have one.

15 And I think those are the main areas of things that
16 need to be searched that we didn't get. I can pause there,
17 because there are two sort of distinct issues on linked e-mails
18 and the destroyed documents, if you want me to answer any
19 questions about where we've been so far.

20 THE COURT: No, you can continue.

21 MS. ESTES: Okay. So the other two areas that are
22 presented in this motion and I think are sort of the most --
23 not to say they're most important, all of the information is
24 very important to us, especially including those -- the Johnson
25 report and the versions -- versioning of that, but as this

1 process in e-mails of the way that -- once data started coming
2 in, we understood that e-mails are used largely in the system
3 through their Google drive system using links instead of
4 attachments, and I think it's probably a technology update,
5 you know, it's probably far more efficient to send things that
6 way. The problem is that the links were not produced to us as
7 attachments.

8 We've looked at I think it's just over 2,000
9 documents that have those sorts of links, sometimes they're
10 videos, sometimes they're -- they seem to be identifying a
11 document, and we understand from the defendants that sometimes
12 it's attaching an entire directory, and I think with respect to
13 whether -- you know, if someone attaches an entire directory,
14 it's probably safe to have some agreement that we don't need
15 the entirety of that directory, but it would be helpful for us
16 to know what the directory is and what part of it was
17 responsive, because clearly the e-mail conveying it hit on the
18 search terms and the custodian, so there's something in it that
19 is relevant and responsive to what we're talking about here.
20 It's not, you know, totally out of left field that -- that this
21 e-mail was produced to us.

22 So we have gotten some but not all, and the response,
23 as I understand it from defendants, is a little bit flipped on
24 its head, which is, you know, you tell us which ones are really
25 important and we'll see about getting those, it would be too

1 burdensome for us to produce the other 1300 or so that haven't
2 been produced, they gave us about 700 of them, and we're just
3 not in a position to do that.

4 1300 in the size of a case like this is not a large
5 number, it's supported by other cases that did a very similar
6 review of Google drive attachments, and given that it's already
7 a culled set of e-mails, it's already been narrowed for what's
8 relevant and responsive, so going beyond that to say we have to
9 kind of pick a subset or identify why we think those things are
10 important is putting the burden in the wrong place. That's not
11 on us. We've already asked for relevant documents, they've
12 already identified these as relevant documents, and we're
13 entitled to the production of them, and the case law developing
14 around these Google drives is really supportive of that.

15 THE COURT: But there wasn't an agreement in the ESI
16 protocol regarding these hyperlink documents, right?

17 MS. ESTES: It's not in the ESI protocol, Your Honor.
18 We didn't have an understanding of the volume of e-mails that
19 would be produced that way. We do think that was incumbent
20 upon defendants, to identify to us that that's the primary way
21 that e-mails are used, and a little disingenuous to negotiate
22 so much around attachments without --

23 THE COURT: I understand.

24 MS. ESTES: -- articulating that.

25 THE COURT: And I understand. And the e-mails that

1 you do have are in response to a keyword search that the
2 parties agreed to?

3 MS. ESTES: That's correct.

4 THE COURT: But you -- you would agree that just
5 because it was -- it hit on a keyword search doesn't
6 necessarily mean that it's relevant to the case?

7 MS. ESTES: Well, I mean, at this point it was
8 produced to us, and not every single thing is immediately
9 relevant, of course, to the facts, but that's -- the idea
10 behind doing the word search was to narrow what was reviewed
11 and produced.

12 THE COURT: Right.

13 MS. ESTES: So some of them may be less relevant
14 maybe to the core issues of it, but we've already narrowed it
15 down to a set of documents that are relevant by virtue of the
16 fact that we have them.

17 THE COURT: Yeah, but any time you do a keyword
18 search, I mean, you recognize that there's going to be false
19 hits, you're going to get documents that aren't truly relevant
20 to the case just because they hit on one of the words that the
21 parties agree to, to make sure -- because you want to
22 over-capture, not under-capture, right? So --

23 MS. ESTES: Certainly. Oh, I'm sorry.

24 THE COURT: That's okay.

25 MS. ESTES: I think that that was done already in the

1 production to us. My understanding wasn't that there was
2 searches done and we received the entirety of the response to
3 that. I think that search narrowed the responsive documents
4 for their review to produce relevant documents. I don't think
5 that it was a search and an automatic send-off to us.

6 THE COURT: All right. So all the documents, the
7 e-mails that you have with these hyperlinks, it's your position
8 all of them are relevant to the claims in this case?

9 MS. ESTES: I -- that's my understanding, yes.

10 THE COURT: Okay.

11 MS. ESTES: And like I said, I do think some of the
12 directories, to the extent they were attaching directories,
13 I will not represent to the Court that I think every document
14 in an attached directory is immediately relevant and responsive
15 to this case by virtue of the directory being attached to a
16 responsive e-mail.

17 THE COURT: So what would you want then, a screenshot
18 of the directory? I mean, my concern is it's a link, and
19 directories change over time. I guess I'll hear from the
20 defendant, but is that -- is it your understanding that the
21 link now would take you to the directory as it existed at the
22 time of the e-mail, or it would take you to the current
23 directory, which may not be the same?

24 MS. ESTES: So I think your question is actually the
25 same both for directories and attachments, because that issue

1 arises with both of those, and I want to be candid about that.
2 I don't think that that's limited necessarily to the directory.

3 I do think we see from case law that there are
4 products that can identify the version that existed at the time
5 of the e-mail, and that for companies who are using this type
6 of program, that it's incumbent upon them to use that software
7 to identify the attachment as it existed at the time that it
8 was transmitted by e-mail. So whether that exists, I will say
9 I don't know for the entirety of the directory. I think we
10 could certainly come to some compromise and it would be fair to
11 say that we're -- you know, perhaps a tree, just to see what
12 the files were in there, so we could understand why they were
13 being transmitted in this responsive way, of, you know, what
14 was in the directory at the time rather than -- it -- who knows
15 what -- what volume could be attached to that, and I understand
16 that, but I think --

17 THE COURT: Like a screenshot of the directory tree?

18 MS. ESTES: I think that would be fair, at the time
19 that the e-mail was sent. Same thing with the versioning of
20 the document, we would want it at the time that it was sent.

21 THE COURT: All right. Any further argument?

22 MS. ESTES: The last part, Your Honor, is on the
23 spoliation issue with respect to the documents that were
24 destroyed well into the production here, and this is identified
25 in the motion primarily with respect to the Zoom recordings.

1 Our biggest concern here is that the defendant's
2 response doesn't actually ameliorate the issue but rather
3 highlights it to us. They produced this declaration from a
4 person, and I'm sorry, I don't know if the name is a male or a
5 female, so -- but I'll say "the declarant," with respect to
6 their use of the Zoom profile, whatever it was that housed
7 these things, and the response was that that person hadn't
8 received the litigation hold, which is supposedly why it led to
9 these -- this destruction happening.

10 The problem is that that person didn't receive the
11 litigation hold. I'm not implying malice or, you know,
12 mal-intent on behalf of that person at all, I don't have any
13 reason to suspect that they were acting out-of-line, but the
14 company had an obligation to identify people who had access to
15 relevant, responsive records, and to identify them and tell
16 them not to destroy these things if they had the capacity to do
17 so, and clearly this person did have access to be able to
18 direct the destruction of relevant and responsive records and
19 never received the litigation hold. That's the problem that we
20 have here.

21 And as we've gone through discovery we've asked more
22 people, now that we know about this litigation hold, who
23 received it and who didn't, and I believe Chris Barber, who was
24 the 30(b)(6) representative for Physician Partners, told us he
25 hadn't received a litigation hold. He is the person identified

1 to speak on all of these topics. So it's really hard to
2 understand who got it and who didn't, except that I understand
3 from his testimony it sounds like maybe it was only people who
4 directly interfaced with Dr. Zafirov. That's plainly not the
5 scope of this case and it hasn't been, and even if the
6 defendant somehow narrowed it to that at the time that they,
7 you know, learned of the case, it's -- when we pass the motions
8 to dismiss it's certainly a broader case than that, and I think
9 it would be a little intentionally narrow to say only people
10 who interfaced directly with Dr. Zafirov were directed not to
11 destroy records, and even that doesn't seem to be true when
12 it's with respect to the person holding, for example, the
13 recordings related to Dr. Zafirov.

14 So I don't have -- it does not require malice to get
15 an adverse inference as to the content of destroyed records,
16 but it doesn't require bad faith, and we do assert that it was
17 bad faith not to identify the people who had the capacity to
18 destroy relevant, responsive records and instruct them not to.

19 THE COURT: All right. The records that have been
20 destroyed, you've only identified the Zoom recordings that were
21 on the cloud that were allegedly -- or they were deleted when
22 they had a new vendor, IT vendor, come in; is that right?

23 MS. ESTES: So I don't know that it's a new IT vendor
24 who came in. It was -- it seems it was actually the same
25 person, according to the declarant's testimony, from October of

1 2020 through now, she was just hired by the company rather than
2 an outside vendor. So she was working in that capacity for all
3 three years, from -- I think her testimony was October '20 to
4 October 2023, but still was never instructed on the litigation
5 hold. So it's -- in title, I believe she became an employee
6 versus a vendor after that window, but it was the same person
7 throughout that time.

8 THE COURT: Okay. But, again, it's just the Zoom --
9 I mean, I'm not minimizing it, but it's the Zoom video
10 recordings that were -- that we're talking about that you're
11 aware that have been destroyed?

12 MS. ESTES: So the other issue that has come up,
13 Your Honor, is with respect to cell phone records, it's
14 something we've asked for from the early parts of this case, is
15 for cell phones to be searched, and we understood from early
16 communications that they didn't have cell phones that were
17 searched. It seems there's been some varying testimony over
18 time whether Physician Partners employees did have cell phones,
19 most have testified that they did in fact, but the -- certain
20 of the people who had cell phones have informed us that they
21 did not preserve them.

22 For example, one of the people who worked directly
23 with Dr. Zafirov, who was the regional director for her
24 offices, switched at some point during this case from an
25 Android to an iPhone and lost all of the data on his previous

1 phone. We asked him for where that phone was. I believe his
2 testimony, and I would have to pull it up to quote directly,
3 was that he was told to keep it and it's no longer in his
4 possession, he lost it, whether he threw it away or gave it
5 away or something, he doesn't have it. So there are text
6 messages that are also part of our concern. Now, they're not
7 identified in the motion, because those were really highlighted
8 in the last two weeks of depositions.

9 THE COURT: But they're not part of the motion?

10 MS. ESTES: The identity -- the spoliation is part of
11 the motion, I mean, the spoliation of evidence is, but that --
12 identifying them as cell phones is not in there because that
13 came up in the last couple of weeks.

14 THE COURT: I understand, but the spoliation that
15 you're asking me to rule on in the motion is the -- this Zoom
16 recordings that were on the cloud.

17 MS. ESTES: That's correct, Your Honor.

18 THE COURT: Okay. That's what's before the Court,
19 right?

20 MS. ESTES: Yes. I'm sorry. I thought you were
21 asking if we had other concerns and I was identifying them.
22 This motion identifies the Zoom recordings, yes.

23 THE COURT: Okay. I just want to make sure that
24 I understand the universe of what I'm being asked to rule upon,
25 and that's the spoliation of the Zoom recorded meetings that

1 were on the cloud that were destroyed when they were increasing
2 more space from the cloud server.

3 MS. ESTES: Correct, Your Honor. Yes.

4 THE COURT: All right. Now, how specifically is
5 relator prejudiced by the destruction of those recordings?

6 MS. ESTES: So -- because those recordings really get
7 to the training that -- and the pressure that is involved in
8 all of these things. Our understanding is that they were part
9 of these huddles, which is Physician Partners' term for their
10 meetings, where they would have these conversations challenging
11 Dr. Zafirov on her diagnoses, pressuring her to increase --
12 only ever pressuring her to increase to higher risk adjusting
13 conditions, there was never discussions to go to other
14 conditions or non-risk-adjusting, which is really important in
15 our explanation of how their pressure worked. It was always
16 up, always up. And all of that would be relevant and
17 responsive on those recordings, to hear how they went.

18 There is some notes from them in -- they call them
19 REIC notes, but they certainly don't get to the actual words
20 that were being said, and that's really the importance of it.
21 I have a hard time thinking any employee is going to go and
22 say, you know, pressure Dr. Zafirov to up-code her conditions
23 today, that really only comes from the actual verbal
24 interactions between them, and those are -- my understanding is
25 those are lost and the ability to reflect how those

1 conversations went.

2 I will say I believe there is one of the
3 conversations that was also part of the recordings that
4 Dr. Zafirov made for the Government as a confidential
5 informant. We would not assert that there's burden to that
6 because that is captured in another way, but for the remainder
7 of them, and -- and I think what is not addressed in
8 Mr. Swanson's e-mail to me but -- is that it would be to other
9 providers as well, even if it was only to the VIPCARE
10 providers. I don't think it was Dr. Zafirov's set that was not
11 produced or that was destroyed, I think it was those huddles
12 with other providers as well, which also should have been
13 produced to us.

14 THE COURT: All right. So what's the specific remedy
15 that would be no greater than necessary to cure the prejudice?

16 MS. ESTES: So I think there's two of them possible.
17 I think an adverse inference to a jury is the most appropriate,
18 to instruct that there were recordings of these meetings that
19 were made in which the communications that are at -- as
20 alleged, and I'm not trying to craft the language of the
21 instruction right now, but just the nature of it would be to
22 explain that these recordings existed and were deleted during
23 the case.

24 I think it could also -- you know, to the extent that
25 Dr. Zafirov is the only one with a memory of those things, that

1 they can just not be able to oppose her representations of it,
2 but I find that one a little more challenging because,
3 of course, you know, they already have and will continue to
4 challenge her impressions of these conversations, which is why
5 the actual words are so important.

6 But I think an adverse instruction to the jury
7 explaining that there were captures of these exact
8 conversations that are alleged here and are not available to
9 them and so that they can assume that the content would not
10 have been responsive of the defendant's testimony.

11 THE COURT: All right. Response?

12 MR. SWANSON: Your Honor, I'll start with -- I guess
13 in the same order that Ms. Estes walked through them, and I
14 believe that that was first with the Sajitha Johnson chart, as
15 it's been referred to this morning.

16 You know, we have -- we have operated throughout this
17 case with diligence and good faith, and I believe all sides
18 have tried to do that here, and I think that's important to
19 state at the outset as you consider these myriad issues about
20 these remaining items, and that is entirely the case with this
21 spreadsheet.

22 It was identified for the first time in a May 7th
23 deposition that they took of Ms. Johnson. Ms. Estes did not
24 follow up with us on it for almost three weeks later. And
25 I don't mention that to malign anyone for a lack of follow-up,

1 but I think a subtext from a lot of the argument we've heard
2 certainly in the last 20 to 30 minutes is that there's been
3 some kind of, you know, dilatory action on our part, and
4 nothing could be further from the truth.

5 I mean, the last six weeks there have been
6 depositions nearly every day, Your Honor, the parties have been
7 working very, very hard, and that includes, apart from getting
8 witnesses ready and defending their depositions, following up
9 on, as Ms. Hartman acknowledged is routine in these cases,
10 somebody mentions a document that heretofore was not on
11 someone's radar screen. That's what happened here.

12 So, you know, we're also trying to prioritize the
13 issues that seem important to the relator and work through all
14 of the -- you know, this scheduling May and June, and so
15 I think it's relevant to note that this was not something they
16 followed up with us on for a few weeks later, and when they
17 did, we looked into it promptly. We got that letter over
18 Memorial Day Weekend, we worked with the client to try to
19 identify what this file was, and then we produced it last
20 Wednesday, and we made sure to produce it on Wednesday in time
21 for Rajit Patel's deposition the following day.

22 Rajit Patel was Sajitha Johnson's supervisor. At her
23 deposition on May 7th she testified that he was her supervisor
24 and that she would have shared this chart with him.

25 I will grant you that it was produced in the evening

1 on June 12th, that is again a function of all that we've been
2 trying to do to accomplish and meet the deadlines set for us in
3 this case, but nonetheless it was produced on the evening of
4 the 12th and Mr. -- Dr. Patel was deposed the following day for
5 seven hours and there was not one question about this document,
6 despite the fact that the relator's counsel had downloaded it
7 within 30 minutes of our having provided it last Wednesday.

8 Again, I'm not casting aspersions, they've had a lot
9 on their plate too, but I want the Court to have a full picture
10 of the efforts that have been undertaken to try to deal with
11 what is inherent in these cases, which is a document is
12 identified and we chased it.

13 So we produced it, we produced it as quickly as we
14 could, and there was no questioning of the witnesses over the
15 next two days, totaling nearly 14 hours. That may be because
16 they were busy on the relator's side, it may also have been a
17 strategic prerogative of theirs, I don't know, but I can just
18 assure you that we acted diligently and in good faith in
19 finding it and producing it.

20 And I will say too, again, as part of the bigger
21 picture, the Sajitha Johnson spreadsheet I think is germane to
22 whether codes were supported or not or had sufficient
23 documentation. We had produced documents sufficient to
24 identify deleted codes to the relator back on March 1st, so we
25 have been cognizant of this issue and have timely produced

1 many, many, many other things when we've been aware of them and
2 able to produce them.

3 THE COURT: How did this particular document fall
4 through the cracks though?

5 MR. SWANSON: I -- I think it's a function,
6 Your Honor, of a discovery period here that's now, you know,
7 three, four years prior to the current date, a lot of materials
8 for us to try to identify and collect. I think we produced
9 here for 31 custodians in this case. It -- frankly, the fact
10 that this was a file that was otherwise a surprise to the
11 client and the folks with whom we've worked in large part to
12 gather documents throughout this process I think shows that
13 this just was not something that was otherwise on the company's
14 radar screen, and when it was brought to our attention, we
15 moved on it and we got it to them.

16 THE COURT: All right.

17 MR. SWANSON: I think the next topic was the
18 hyperlink document issue, and a few preliminary points about
19 the case law and the record in this case.

20 First, and the Court noted this, and I think it's
21 very, very significant, the ESI protocol talks about
22 attachments, it doesn't talk about hyperlink documents, and
23 I don't have any reason to believe there was any gamesmanship
24 there to avoid that. It's just not part of the ESI protocol.
25 And the cases that we've cited, you know, have Courts

1 explaining attachments are not hyperlink documents, they're two
2 different things. So we take issue with relator's
3 characterization of what the case law shows.

4 And, you know, I think the emerging law in this area
5 reflects the technological difficulties attendant to these
6 kinds of materials. In one of the cases that relator cites,
7 the Stubhub case in the Northern District of California, just a
8 month ago, the Court there removed the hyperlink from the ESI
9 protocol and did not require production of hyperlink documents
10 because it was proving to be too technologically challenging,
11 and that's the situation we end up with here, Your Honor.

12 When this issue, like the others, was brought to our
13 attention by Ms. Estes, we acted promptly and in good faith.
14 We had a meet and confer, asked them to identify other
15 documents that they believed would be responsive, cognizant
16 again of the burden that's otherwise associated with these
17 kinds of materials, and the burden in particular here is -- and
18 this has been talked about a bit during Ms. Estes' discussion,
19 many of these links link to folders, and that is inherently
20 difficult, if not impossible, to collect from, certainly in a
21 way that's not highly burdensome.

22 The links also link to live documents, and so,
23 you know, that's just a function of how the technology
24 operates. That also can make it challenging to collect these
25 materials.

1 The links may be to employees who have left, and
2 left -- you know, and it's just not possible to access those
3 documents anymore.

4 So I think all of these practical realities,
5 you know, explain why in the first instance the ESI protocol
6 doesn't have hyperlink documents in it and explains why the
7 cases that we've cited stand for the proposition that this is
8 not otherwise a requirement where it's not otherwise negotiated
9 among the parties.

10 THE COURT: All right.

11 MR. SWANSON: On the -- on the Zoom issue, which I
12 believe is the third and final one, there's a two part test,
13 and we lay this out in our -- in our opposition. There has to
14 be bad faith in the Eleventh Circuit and there has to be a
15 significant impairment in the ability of the relator to prove
16 her lawsuit, or as some courts or cases have described it, the
17 lost evidence has to have been crucial. Neither of those have
18 been met in this case, Your Honor.

19 The -- the finding of bad faith requires something
20 even more than gross negligence, it requires something akin to
21 an affirmative intent to harm the plaintiff, obstruct the
22 lawsuit or conceal evidence, and that is simply not borne out
23 by the record in this case, and it sounds like relator's theory
24 is that because this one individual did not receive the
25 litigation hold, that that is in and of itself bad faith. I'm

1 not aware of case law that stands for the proposition that,
2 you know, one person in a case as large and complex as this who
3 does not receive a litigation hold and then, completely
4 unrelated to this litigation, inadvertently destroys those
5 materials, that that is somehow bad faith or comes anywhere
6 near bad faith, and I just don't think it's even close under
7 the -- under the Eleventh Circuit cases and the cases that have
8 implemented that standard.

9 I think our -- you know, the record we've laid out in
10 our brief and in our affidavits explains the chronology here,
11 and so I won't -- I won't belabor it, but I do think that at
12 the end of the day, Your Honor, this is at worst the right hand
13 not talking to the left, it's regrettable, but the *Tesoriero*
14 case in the Eleventh Circuit makes clear that that is at worst
15 negligence and that does not suffice for bad faith, and even if
16 it did, relator still has not explained, both in her motion and
17 I would suggest today, how the loss of those recordings was
18 otherwise crucial to her case. You know, I think her motion
19 refers to these as may be crucial. Well, that's not showing
20 that they are.

21 And as you evaluate this second prong, and we suggest
22 you not even get to the second prong, I do want to, you know,
23 mention a few other items from the record that do bear on this
24 second factor. One is that, as she -- as Ms. Estes
25 acknowledged, the relator made a number of recordings for the

1 Government in this case, so there is already -- and I think she
2 feels quite good about what those recordings show -- a record,
3 contemporaneous record of conversations that were had with
4 relator and employees at the provider defendants.

5 Two, we have produced 139 recordings to relator in
6 this case in addition to the recordings that she already made,
7 and, again, for strategic reasons or otherwise, you know, I'm
8 not -- I'm not casting aspersions on them one bit, but the
9 relator did not ask any -- or did not play any of these
10 recordings for any of the -- any of the deponents, and so
11 I just want the Court to be cognizant of that record.

12 Under the case law we don't believe there's anything
13 coming close to bad faith here, and there's certainly not a
14 showing that these records were otherwise crucial.

15 And I do want to also be clear about, you know, what
16 it is that we are talking about here in terms of the recordings
17 and, you know, in the spirit of good faith here too.

18 As our declarations make clear, these are recordings
19 from January 3rd, 2020 and earlier, and we've identified the
20 ones that involved Dr. Zafirov. As our declaration has also
21 made clear, it was all of the Zoom recordings from that period
22 and before, again, because there was no targeting of the
23 recordings for Dr. Zafirov or, frankly, anything having to do
24 with this case, and so that's the state of affairs for those.

25 It turns out that there are some Zoom recordings

1 after January 3rd, 2020 that we've just become aware of in the
2 last few days. Those do not involve Dr. Zafirov. She left the
3 company I think six weeks after early January. The early
4 indications are that the vast majority of them are with
5 affiliate providers. Of course, we maintain, you'll recall
6 from a couple of hours ago, that that discovery is not
7 warranted here, but we are operating in good faith, reviewing
8 those and assessing whether they are responsive and
9 proportional to any pending requests.

10 THE COURT: All right. Let's move on to the last
11 pending motion, and that's defendant Freedom Health, Inc. and
12 Optimum Healthcare, Inc.'s motion to compel documents in
13 response to request for production number 11, and this is the
14 joint prosecution agreement between the relator -- let me pull
15 this up -- and Dr. Mansour, who at one time was a relator in
16 a -- in a separate action.

17 Now the relator in this case's response to the motion
18 was, one, they don't believe it should be produced but have
19 invited the Court to review it in camera to determine whether
20 it -- a portion of it should be produced or it should be
21 withheld in its entirety.

22 I'm inclined to look at it in camera. If the parties
23 want to provide any additional oral argument -- I mean, I think
24 the issue is pretty straightforward and briefed in the -- in
25 the documents, but since we are here, it's noticed for the

1 hearing, if the parties would like to be heard on this, I'll
2 hear it now, but I do intend to order the relator to produce
3 this document in camera for the Court to inspect and then the
4 Court will rule on that, that document. But let me hear from
5 Freedom, if they would like additional oral argument or any
6 oral argument on this motion.

7 MR. DRAKE: Yeah. Thank you, Judge. Scott Drake on
8 behalf of Freedom.

9 Judge, if I may just make two comments quickly for
10 the Court's benefit on the prior motions. I didn't want to
11 interrupt counsel.

12 One, on the motion that relator filed, while the
13 other motion was being heard, I did confirm in our production
14 May 29th, Ms. Hartman suggested there was only one version of a
15 committee declaration produced three times. We produced
16 624 documents in response to request for production 46, which
17 **(REDACTED)**

18
19 PowerPoints produced in that. So, again, just for the Court's
20 benefit, just for that one request, 624 documents.

21 On this motion that was just heard relating to the
22 Zoom recordings, Judge, I viewed that motion, docket 281, filed
23 only against the provider defendants -- I viewed it kind of as
24 Freedom didn't really have a dog in that fight, so to speak.
25 The relief requested in it was not very specific, it just said

1 sanctions. I think they asked for terminating sanctions or
2 possibly in footnote 8 they said, if not, then, you know, the
3 defendant should be prevented from offering con --
4 converting -- contradictory evidence. Excuse me. Just now
5 Ms. Estes suggested they would like an adverse inference.

6 All I would say, Judge, is -- obviously I'm not
7 weighing in on the appropriateness of whether there has been
8 discovery conduct that warrants any type of sanction, that --
9 I believe there's no allegations Freedom was involved in that,
10 had these recordings or was involved in the unintentional
11 deletion, but I would say, to the extent there is an adverse
12 instruction or inference given to this jury, should this case
13 be tried, Freedom would want to be heard on that, because the
14 nature of the relator's allegations are that everybody acted
15 together, all the defendants, including the Freedom defendants,
16 and I would want -- again, I think this is an issue to the
17 extent the Court entertains any type of relief or sanction, we
18 would want to be heard to the extent this was a -- something at
19 trial as opposed to a monetary sanction, because I think we
20 would be unfairly prejudiced by an instruction.

21 I'm just flagging that issue. We didn't jump into
22 the fight, but as relator's counsel mentioned that just a
23 minute ago, I wanted to just flag the issue. I don't think
24 it's something that we have to deal with today, but to the
25 extent the jury was being instructed any -- any type of adverse

1 inference, we would want to be heard, so that Freedom is not
2 unfairly prejudiced, since we're not alleged to have been
3 involved in the conduct forming the basis of the motion.

4 So I just wanted to flag those two issues.

5 I'll be very brief, Judge. I heard your comments.
6 It's been briefed.

7 I'll just raise -- I think the relevance and all that
8 we've briefed, but I would just take a minute or two to
9 highlight -- I think the Court is aware of this from the
10 briefing, but the cases relator cites in their opposition and
11 even their characterization as a joint prosecution agreement,
12 Dr. Mansour is a fact witness, he had his own qui tam case that
13 he voluntarily dismissed, he also was then given a 30 percent
14 interest in the relator's case, but he's not a party, he is not
15 a party, and we think, Judge, that's a very important
16 distinction, because what the relator has done is entered into
17 a financial agreement to share 30 percent of the recovery in
18 this case, to the extent there is one, with a fact witness who
19 we believe is going to be their main corroborating non-party
20 fact witness. Mr. -- Dr. Mansour will presumably come to trial
21 and allege he too saw the same thing relator complains about,
22 and we're entitled to know what this arrangement is, not just
23 the economic terms but all the terms, the circumstances around
24 it, why it was entered into, and you can't couch that as a
25 joint defense agreement or joint prosecution agreement like

1 Freedom has with PPC, that's a very classic joint defense,
2 common interest. We're both parties in the same lawsuit, being
3 sued by this relator, alleged to have jointly engaged in this
4 conduct.

5 Dr. Mansour is a fact witness, and I don't think the
6 law or the cases relator cites supports the notion that you can
7 effectively enter into a financial arrangement with a fact
8 witness and then couch that as, oh, this is all protected by a
9 common interest or attorney-client or work product when we
10 don't think any of those apply, especially to a fact witness,
11 because you could essentially go out and arrange a contractual
12 arrangement with any fact witness in the case, offer them
13 financial compensation and then shield the terms of that from
14 the other party by saying, oh, we have a common interest, we're
15 jointly prosecuting this.

16 There is one relator, it's Dr. Zafirov. Dr. Mansour
17 had very similar claims which he voluntarily dismissed, and I'd
18 just ask, Judge, when you review the document and look at the
19 cases the relator cites, you remember that this is not a party,
20 this is not a relator, this is not someone jointly prosecuting
21 anything, this is a fact witness, and we don't think it's
22 appropriate to couch contractual arrangements, especially
23 involving financial compensation, which relator has alleged,
24 and this came up in the deposition, without any support, that
25 this is a billion dollar case, so Dr. Mansour's financial

1 recovery could be very, very significant, and we're entitled to
2 know the circumstances of this arrangement with a fact witness.

3 And so we would ask, Your Honor, when you review the
4 document in camera that you keep the relationship of the
5 parties and, in Dr. Mansour's case, a non-party fact witness in
6 mind as you do your analysis.

7 Thank you, Judge.

8 THE COURT: Thank you, sir.

9 Relator, would you like to make a brief argument?

10 MS. ESTES: Very brief, Your Honor.

11 I appreciate that your -- your willingness to review
12 it in camera. We'll certainly contact your chambers for how to
13 best transmit it to you, and we think that the document speaks
14 exactly to what Mr. Drake said on its face as to the
15 relationships of the parties and why it is in fact a protected
16 document.

17 I will only just note, as we put in our response
18 brief, that Freedom had the opportunity to question Dr. Mansour
19 on any other obligations that arise from this, case law fully
20 supports that as a basis for getting to more information about
21 a protected document, they had it, he answered in sworn
22 testimony, they did not question Dr. Zafirov on it at all,
23 which certainly belies their, you know, meaning that it had
24 some great weight, but the record will speak for itself, and we
25 are more than happy to answer any other questions the Court

1 has, you know, in camera as well, if any of it needs context
2 during your evaluation, but we think it will speak for itself.

3 If I could, Your Honor --

4 THE COURT: I'm not going to do that. I'm not going
5 to allow you to make argument, ex parte argument in camera, but
6 I am going to ask you to submit the document to the Court by
7 close of business on Thursday, and you can submit it to the
8 Court's chambers e-mail address.

9 MS. ESTES: Certainly.

10 If I -- I'm sorry.

11 MR. DRAKE: Oh, I didn't know you had something else.
12 Go ahead.

13 I do have one other comment, Judge, about the --

14 THE COURT: Hold on. Let Ms. Estes finish, please.

15 MR. DRAKE: Yeah. I didn't realize she wasn't
16 finished. I apologize.

17 MS. ESTES: Your Honor, close of business by
18 Thursday, we'll submit it, of course.

19 I just wanted to respond to one of the things that
20 Mr. Drake said with respect to the arguments of Mr. Swanson, if
21 that's -- if we can go back to the -- that motion for a minute,
22 if Your Honor is prepared to resolve it. I also understand
23 we've been here probably longer than --

24 THE COURT: No, it's okay, I allowed Mr. Drake to go
25 back, so I'll let you address it.

1 MS. ESTES: Thank you.

2 I just wanted to -- with respect to the Zoom
3 documents, I will say we did address adverse inference in the
4 motion, so I don't think this is the first time kind of coming
5 up sort of thing today, but Your Honor did ask, and I think the
6 law supports a wide latitude on what is an appropriate
7 sanction, and one of the things that Mr. Swanson raised is that
8 there are other recordings that, you know, address other
9 communications, not all the ones that were lost here, and
10 I think it might -- to the extent appropriate, and I know that
11 there's dispute between Physician Partners and the Government
12 as to the creation of some of those recordings and the agent
13 that's involved there, it's not a motion I'm familiar with
14 right now, but to the extent that the -- it may be an
15 appropriate sanction to say that those records are -- you know,
16 have to be admissible or can't be challenged in place of that,
17 because if those recordings are not permitted for any reason
18 and the recordings were dismissed, then it's an even more
19 crucial lack of evidence for relator as to the content of those
20 communications, so it's perhaps an alternative and somewhat
21 creative approach to how to resolve it if the use of those
22 recordings is directed in place of the ones that were dismissed
23 or some way of doing that. So I just wanted to raise that as
24 an alternative, given the representation by Mr. Swanson that
25 they had similar content on those recordings.

1 And the last thing, and I promise I'm done after
2 that, is with respect to that Johnson document. What
3 Mr. Swanson didn't address is that we only ever received the
4 2020 version. Even after all those things, I think, by all
5 means, we've all been working really hard, no one is, you know,
6 casting aspersions on any of the -- getting on those dates, but
7 with respect to the fact that we just got it and it only had
8 one year, we would request, and it might be an appropriate
9 thing here, is -- because it came after the 30(b)(6), days
10 after the 30(b)(6) witnesses, that we could either open one of
11 those for the limited purpose of asking about that document and
12 the creation and use of it, or submit questions in a late
13 interrogatory targeted only at that document, just so we have
14 some way to get context around something that is a really
15 foundational document that seems to have fallen through the
16 cracks, as Counsel described.

17 THE COURT: I'm going to ask you, Mr. Swanson, to
18 confer on that. I think you can probably work out that issue,
19 and if not then you can let me know and I'll address it.
20 I don't require a full briefing on the issue, but just confer
21 with Mr. Swanson. I'm confident that you two can work it out,
22 and if not then just advise the Court that there's an issue and
23 I'll address it.

24 MS. ESTES: Thank you, Your Honor.

25 THE COURT: All right. Mr. Drake, you want to be

1 heard?

2 MR. DRAKE: Yes, very briefly.

3 Judge, I would just ask, in light of Ms. Estes'
4 comments on -- this is about the Mansour agreement, that we
5 didn't elicit any testimony. I would ask, Judge, that when
6 they submit the document, we submit the testimony, because
7 Dr. Mansour -- or, excuse me, Dr. Zafirov was asked --

8 THE COURT: No. Mr. Drake, I'm not worried about
9 that.

10 MR. DRAKE: Okay.

11 THE COURT: I'm not concerned about that.

12 MR. DRAKE: Okay. Thank you, Judge.

13 THE COURT: All right. Anything further from anyone?

14 MS. ESTES: Not for us today, Your Honor. We
15 appreciate all your time.

16 THE COURT: Yeah. Well, I want to thank all the
17 parties for their time. I know this hearing went long, but we
18 had a lot of issues and substantive issues that I appreciate
19 the benefit of oral argument that I heard today, so thank you
20 all for being so prepared and ready to provide your arguments
21 to the Court, it was helpful, and we will rule on it as soon as
22 we can.

23 The parties -- again, relator is going to submit the
24 joint prosecution agreement with Dr. Mansour in camera by close
25 of business on Thursday, and the parties are also going to

1 provide the deposition transcripts that we've previously
2 discussed at the hearing.

3 All right. Is there -- and if there's nothing
4 further then, we'll be adjourned. Thank you.

5 MS. ESTES: Thank you.

6 MR. SWANSON: Thank you.

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8 (Proceedings concluded at 12:46 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript of proceedings taken in a motion hearing in the United States District Court is a true and accurate transcript of the proceedings taken by me in machine shorthand and transcribed by computer under my supervision, this the 25th day of June, 2024.

/S/ DAVID J. COLLIER

DAVID J. COLLIER
OFFICIAL COURT REPORTER