

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Joseph C. Spero, Magistrate Judge

UNITED STATES OF AMERICA ex)	
rel. RONDA OSINEK,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 13-03891 EMC (JCS)
)	
KAISER PERMANENTE, et al.,)	
)	
Defendants.)	
)	

San Francisco, California
Friday, November 4, 2022

TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS

APPEARANCES: (via videoconference)

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REPORTED BY: Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter

1 Friday - November 4, 2022

10:40 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Court resumes session with the Honorable
5 Joseph C. Spero now presiding. And the parties are reminded of
6 the admonition about recording of these proceedings.

7 (Pause in the proceedings.)

8 **THE CLERK:** The next matter that we are calling is
9 13-CV-03891, Osinek versus Kaiser Permanete.

10 Counsel, could you please raise your hands.

11 (Pause in proceedings.)

12 **THE COURT:** All right.

13 **THE CLERK:** Judge, I think we have everybody here, so
14 we will do appearances please first starting with the
15 Plaintiffs and then the Defendant.

16 **MR. DYAL:** Sure, it's Gary Dyal --

17 **MR. CHOE:** Good --

18 **MR. DYAL:** Sorry, Shiwon -- Gary Dyal with Plaintiff,
19 United States of America.

20 **MR. CHOE:** Shiwon Choe, also on behalf of the United
21 States.

22 **THE COURT:** Welcome.

23 **MS. OBEREMBT:** Laurie Oberembt, also on behalf of the
24 United States.

25 **THE COURT:** And for the Defense.

1 **MR. BLALACK:** Good morning, Your Honor, Lee Blalack on
2 behalf of the Defendant, Kaiser Foundation Health Plan, along
3 with my colleague Stephen Sullivan who is joining.

4 **THE COURT:** All right. Thank you-all.

5 So I wanted to talk to you in general about how I handle
6 discovery disputes. Some of you have had the opportunity to
7 hear this discussion before, so I apologize for repeating it
8 for you; and then about in general about my reaction to the
9 dispute here; give you some guidance; maybe answer some
10 questions; and then send you off to try again.

11 The discovery disputes in my view on the scope of
12 discovery, things having to do with, you know, the borderline
13 between relevance and irrelevance, how much to delve into a
14 subject, et cetera, et cetera, are for the lawyers and not for
15 the Court.

16 You know, that is a slight exaggeration; but I guarantee
17 that if in every case that we have the kinds of discovery
18 disputes that you have in this case had to be decided, no
19 magistrate judge or district judge would do anything other than
20 decide discovery disputes.

21 So that's why my general rule is to push back and insist
22 that the parties do a better job resolving these
23 scope-of-discovery disputes than they have.

24 The reason I insist is because what usually happens is a
25 Defendant will take a hard and fast position on something that

1 they think is about relevance even though it makes no
2 difference if they produce a few thousand extra pieces of
3 paper, and the Plaintiff will take a hard and fast view on
4 relevance -- even if they got every single piece of paper that
5 they are getting, it would have almost no effect on the case
6 because, as we all know, these cases boil down to a very few
7 documents -- when you get to the end summary judgment or trial,
8 a hundred documents that are relevant.

9 And so the idea that people are going to spend tens of
10 thousands of dollars fighting about this and take up the
11 Court's time, I think is nothing short of outrageous.

12 So what happens is I insist that you do better. And if
13 you don't do better, I'm going to have your clients here.

14 What that means is I would require, if you don't do
15 better, that the CEO of Kaiser attend every meet-and-confer and
16 that the highest level official at the Plaintiff attend every
17 meet-and-confer and every court appearance so they can figure
18 out what the lawyers are actually spending their time on.

19 I have only gotten to that -- pulled the trigger on that
20 threat maybe half a dozen times in the past 24 years; and I
21 don't expect to here because I -- you know, these are very
22 sophisticated counsel on both sides, and I expect you to do a
23 better job. Okay, that's the general lecture.

24 The access of the dispute, now that the Plaintiff has
25 clarified that they are searching for documents that refer or

1 concern the standards at issue, not explicitly discuss
2 Plaintiffs' standards, that's a -- that's a good addition,
3 which was made in the -- in the joint letter.

4 The axis of the dispute is as to what standards they are
5 looking for -- non-public documents I think -- am I right;
6 that's really what the fight is about right now?

7 **MR. BLALACK:** Yes, Your Honor.

8 **THE COURT:** So as to that, you are going to have to --
9 I will say two things. Number one is I am going to find for
10 discovery purposes that non-public documents regarding -- the
11 non-public documents are to be produced regarding whatever
12 standards we decide are the appropriate scope of the re-search.

13 I'm not going to rule on ultimate admissibility. That
14 will be for Judge Chen, but I think that's a real fight. And
15 so since it is a real fight, I'm not going to decide it here.

16 So I'm going to hold as a matter of discovery that the
17 government has to produce non-public documents. Okay. That
18 deals with one legal issue that I could deal with.

19 The next is which of these -- I'm not going to get into
20 the fight about how you count them -- but which of these
21 phrases in the various standards Government is going to search
22 for documents concerning.

23 And my view is that Kaiser has done a huge overreach.
24 It's very clear that the question is what narrow scope of
25 documents that are relevance, that are cabined what is actually

1 in dispute -- in other words, we know there are very particular
2 standards that the Plaintiff says that Kaiser violated.

3 Okay, those are the ones that are actually in dispute.
4 Now, it may be that there are other standards that bear on the
5 interpretation of those standards. I appreciate that. That's
6 the lens through which it all has to be done.

7 So the idea that every of the six phrases in the preamble
8 have to be researched from the ICD's guidelines is ridiculous.
9 That's a clear overreach.

10 Not all the documents concerning all of the references
11 internally to whether or not the guidelines have been developed
12 to assist healthcare providers is irrelevant to this dispute
13 about particular violations.

14 So that is -- and, on the other hand, some of these are
15 more relevant than others. There is no question as you go
16 through them that some of them bear a little closer scrutiny.

17 And I don't think you have done the work because basically
18 the Government said: "No, we are not going to do this" and
19 Kaiser said: "Yes, you are;" and that's where the end of the
20 discussion was as to these.

21 So my -- my -- so now that we know that I'm rejecting the
22 argument that you don't have to produce internal documents,
23 non-public documents, for the reasons that I stated, the
24 question is: Can we narrow what has been set up as the various
25 phrases over this -- you know, I don't know, 10 or 15-page --

1 10-page document -- it's more than that. It is a 25-page
2 document -- because not -- it is a clear overreach to try to do
3 this.

4 I mean, you are just grasping at straws when you do this.
5 I mean, I understand why you did it. I have been practicing in
6 this area, but I know the mechanism. The mechanism is you look
7 at all of these various participant guides and all of these
8 various technical issues -- technical publications, and you
9 say: Well, that might have something to do with this; that
10 might have something to do with this.

11 That's not the test here. It's got to be narrowly
12 confined. If we are going to go into the non-public
13 documents -- in which there is a question of admissibility to
14 begin with, I want -- you can get access to things that might
15 reasonably bear on interpretation of the specific problem at
16 issue that has been charged by the Government.

17 Now, that may be that some of these are going to be done
18 because many of the Government's responses to these are: Well,
19 it's non-public so it doesn't matter or, you know, the Court is
20 going to decide that issue anyways, so it doesn't matter.
21 Well, that's not -- that's not an acceptable answer.

22 So what I think I want you to do -- and I'm happy to have
23 your comments on this -- is go back through these 25 pages and
24 reach agreement.

25 There should be a narrow scope of ones that are, you know,

1 pretty clearly relevant to interpretation of the particular
2 problem at issue here and not -- not just "well, there might be
3 something" because "there might be something" won't get you
4 this level of intrusion into all of the Government's documents.

5 So that's my general answer on this, and I will hear
6 from -- I guess I should hear from Kaiser first about that; and
7 then happy to hear from the Plaintiffs as well.

8 **MR. BLALACK:** Thank you, Your Honor, Lee Blalack for
9 the Defendant. And that guidance is welcome, and we are
10 prepared to meet and confer further with the Government.
11 I believe we have a session calendared for this afternoon in
12 anticipation that this might have been your guidance, so we are
13 prepared to engage -- continue in that dialogue.

14 I want to assure the Court that we started this process in
15 April. We have had three separate in-person meet-and-confers,
16 letter writing campaigns; and we have been -- we thought we
17 could get to some reasonable compromise. And, frankly, just
18 met some hard-and-fast rules that we couldn't overcome; but
19 with this guidance, hopefully we can reach a resolution with
20 the United States.

21 I will ask the Court one indulgence. There is a
22 fundamental dispute between the parties about the time period
23 for searching for communications about these documents, which I
24 fear if we don't have some feedback on, it's going to
25 complicate the meet-and-confer process.

1 You know, their position is that anything before the
2 period at issue, 2009, would be unduly burdensome,
3 disproportional.

4 Our view -- the parties said in the 26(f) that while the
5 period in dispute would be the general period for discovery,
6 there would be occasions when the parties would need documents
7 from earlier.

8 It's my expectation the United States will pursue
9 documents from us prior to the period at issue.

10 Some of these Government documents, the standards, are
11 iterative documents that have had similar language that has
12 evolved over time that is relevant to how our client went about
13 building its processes and programs.

14 So I think that's going to be a sticking point. I think
15 we can working around specific passages and provisions and
16 prioritize on our end what is most important to try to reach
17 agreement with the United States to help narrow their scope of
18 search, but I do think that's a fund -- not unlike the two
19 items you just mentioned at the start of your presentation to
20 the parties -- I think that fundamental threshold issue is one
21 where if it is a hard-and-fast rule, we are not going to --
22 they are not going to search for anything before 2009, you
23 know, we are likely to be back here whether our COO is in tow
24 or not.

25 So that's one of the things I was hoping we could -- to

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1 the extent the Court is willing -- solicit some direction.

2 **THE COURT:** Yeah, I do have some thoughts on that.

3 My thoughts are, I will give you a little leeway. That is
4 to say, I think that generally restricting the documentation to
5 2009 on is fine plus a little bit.

6 I think if there were, you know, documents shortly before
7 2009, I'm not going to put a period of, you know, two months or
8 two years on that, but that were -- bear on the interpretation
9 of the regulations or the guidance that is in place post-2009,
10 well, I think the Government still has to produce this.

11 It can't just cut off -- it should generally cut off at
12 2009; but, you know, like any of these things, if there are
13 things that are reasonably proximate in time to 2009, I don't
14 think the Government should be excused from producing those.

15 So, you know, that's up to you. You can negotiate that
16 time period, you know, I could suggest a year but that might --
17 you know, it might be a shorter period. It might be a slightly
18 longer period. It's not going to be ten years.

19 I'm not going to make them go back through the whole
20 history of how something developed; but if there is some
21 reasonably proximate in time to 2009, that's okay.

22 **MR. BLALACK:** Thank you, Your Honor, for that.

23 **THE COURT:** One thing I would caution you about,
24 Mr. Blalack, is I did actually read the meet-and-confer letters
25 and your justifications are for each of the contested ones in

1 your -- in those letters, generally both opaque and weak.

2 So I think the reason I said Kaiser is overreaching is
3 because I have actually read Exhibit 7 and gone through all of
4 the justifications you have, and the justifications are -- are
5 thin.

6 I think that the way that letter was written -- and I'm
7 not -- I am faulting you for it, I guess -- but the way that
8 letter was written was: We want this and here is the
9 justification because we think that we might find something
10 here.

11 That's not how I do discovery. I want you to get what's
12 important. I don't want you to get there just might be
13 something there.

14 So there has to be a very specific reason why a particular
15 standard, interpretation would help you or hurt you, right, I
16 mean, either way; not -- the way that it has been done so far
17 has been much too far of a reach. It's got to -- you can have
18 something narrow in this regard for some of these things but
19 not all of these standards. All of this guidance seems too
20 far.

21 **MR. BLALACK:** Understood. Thank you, Your Honor.

22 **THE COURT:** Thank you. Let me hear from the United
23 States if they would like to comment.

24 **MR. DYAL:** Thanks, Your Honor. We are happy to
25 continue the meet-and-confer process with this guidance in

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1 mind.

2 **THE COURT:** Yeah, okay. So I -- you know, I think
3 that you have always -- you have already shown some willingness
4 to do the kind of searches for relevant materials in the
5 non-public sector that I'm asking you to do -- non-public
6 documents.

7 I just think you need to be a little more flexible about
8 what might be relevant to interpretation of the standards at
9 issue.

10 **MR. DYAL:** Yeah. And once we are cabined to that, you
11 know, smaller universe, that flexibility is going to be much
12 easier for us to discuss those things specifically with
13 specific examples of the kind that we have either seen or not
14 seen.

15 **THE COURT:** Well, okay, so this is a two-way street.
16 I don't want you to go that way. That's -- if the Government
17 goes down that way and says: "Well you prove it to us, exactly
18 what you want" -- this is a two-way street. The Government has
19 been too obstructionist on this saying: "Oh, well, this is not
20 relevant. I don't see the relevance. We don't see the
21 connection."

22 That -- you know, I want you to be more flexible. I
23 want -- it's not that important to protect all of this
24 information. It's just not.

25 So I want you to be flexible. And even if you think well,

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1 it is not really that relevant but we will produce it, I want
2 you to be more flexible and produce things. Otherwise, we are
3 going to spend a hell of a lot of time doing this; and the
4 Assistant Attorney General is not going to be like being in the
5 room with me.

6 So let's not go down this road if we don't have to. I
7 want the Government and Kaiser both to be more flexible and
8 not -- you know, you might go through this list and say: Well,
9 you know, we -- although we did put our foot to the brake on
10 these six items or these ten items or whatever twenty items and
11 as a matter of compromise, we can now offer to do A, B, C and
12 D. That's what I'm looking for. I think you understand me.

13 **MR. DYAL:** Yes, understood.

14 **THE COURT:** Meet and confer -- you are going to meet
15 and confer this afternoon. I will expect that will be an
16 iterative process, as it always is with these things; but I
17 will expect a supplemental report from the parties either in
18 the support of a very narrow dispute that's left over or a
19 one-liner saying "this is resolved" within two weeks from
20 today.

21 **MR. BLALACK:** Thank you, Your Honor.

22 **MR. DYAL:** Thank you.

23 **THE COURT:** Great. Thank you-all.

24 **MR. CHOE:** Thank you.

25 (Proceedings adjourned at 11:00 a..m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Tuesday, November 8, 2022

A handwritten signature in blue ink that reads "Marla Knox". The signature is written in a cursive style and is positioned above a horizontal line.

Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter