

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Joseph C. Spero, Judge

RONDA OSINEK, et al.,)

)

Plaintiffs,)

)

VS.)

NO. 3:13-CV-03891-EMC

)

PERMANENTE MEDICAL GROUP,)

INC., et al.,)

)

Defendants.)

)

San Francisco, California

Wednesday, November 20, 2024

TRANSCRIPT OF REMOTE ZOOM PROCEEDINGS

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(Appearances continued on Page 2.)

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1 Wednesday - November 20, 2024

9:36 a.m.

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

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4 **THE COURTROOM DEPUTY:** We are calling case
5 number 13-CV-3891, Osinek versus Kaiser Permanente. Counsel
6 please raise your hands. Appearances, please. We're starting
7 with the plaintiff and then the defendant.

8 **MS. OBEREMBT:** Laurie Oberembt for the United States.

9 **MR. DYAL:** Gary Dyal for the United States.

10 **MR. LEVINE:** Adam Levine for defendants, and Lee
11 Blalack, lead counsel for defendants.

12 **THE COURTROOM DEPUTY:** Thank you.

13 **THE COURT:** All right. Thank you all.

14 I have a series of questions that I want to ask you, and
15 I'll ask them I think basically one at a time rather than lay
16 them all out, and I have one of them is particularly important.
17 We'll get to that one last. And then if you have some
18 additional comments you'd like to make, you're welcome to make
19 them. These are very much down-in-the-weeds kind of questions
20 to begin with.

21 Shapiro documents, Category 1, the things he calls
22 briefing documents.

23 **MR. LEVINE:** I don't know if others are having
24 difficulty hearing you, but I am.

25 **THE COURT:** Can you hear me? Adjust your speakers,

1 please.

2 As to the briefing documents -- and this is a question for
3 the United States, really. For Ms. Shapiro and her documents,
4 she describes them as briefing documents. There's no
5 information on who the recipients of the documents were for any
6 specific document or for whom any specific document was
7 prepared. Why is that not fatal to the question of whether or
8 not this document, these documents is deliberative?

9 **MR. DYAL:** So I think the declaration does state the
10 process by which the proposed rule overall was -- made its way
11 through the deliberative process through ultimate approval, and
12 to the extent the briefing documents, you know, they may not
13 indicate the particular recipients, but they, per the
14 declaration they form part of that process.

15 It's also true that these were e-mailed among various
16 participants in that process, and there's additional
17 information on the privilege log that would indicate -- you
18 know, I can't say that was, you know, preserved for every
19 document, as we just produced what was retained and stored in
20 the government's systems as to the metadata of those documents,
21 but that would further indicate how these briefing documents
22 were shared among officials in the deliberative process.

23 **THE COURT:** So that second bit is what we like to
24 call obfuscation. There is not the slightest hint in the
25 declaration as to where these particular documents went, and

1 there's nothing in your briefing or in the declaration that
2 says, oh, and by the way, they went here, because you could see
3 it because of this e-mail. So I have no intention of affirming
4 the assertion of this kind of privilege based on that sort of
5 thing.

6 So what you're saying is -- so you've gotta answer my
7 question. If I conclude that you have not sufficiently
8 identified where these briefing documents went, if I conclude
9 that the general descriptions of the process is insufficient,
10 why should I sustain, cannot sustain the assertion of the
11 deliberative process privilege with that kind of a gap? That's
12 the question.

13 **MR. DYAL:** I think what the case law recognizes is
14 that the government needs to provide enough information -- and
15 this is from the *California Native Plant* case in this district.
16 It needs to provide enough information to demonstrate how
17 documents, and the quote is: "Logically fall within the
18 deliberative process." And so, you know, it's not necessarily
19 necessary to show, oh, this document was sent to this person on
20 this day, when we have a very specific decision, a publicly
21 available regulation that, you know, is not hidden from anyone.
22 It's very logical that as part of the deliberative process
23 there is going to be drafts of that regulation, there's going
24 to be e-mails exchanged as part of that drafting process, and
25 there are going to be briefing documents for senior officials

1 to brief them in a more summary fashion as to what the
2 e-mail -- what the agency is proposing throughout that process
3 before they seek approval for a final regulation.

4 And so I think that the descriptions, together with the
5 descriptions of the overall process, sufficiently show how the
6 documents at issue logically fall within the deliberative
7 process, without -- you know, of course, of course there's
8 always additional detail about every single document that could
9 be provided, and to the extent something's viewed as
10 particularly essential and it's just not clear at all how a
11 document is part of the deliberative process without that
12 information, the United States is happy to amend its
13 declarations to provide --

14 **THE COURT:** No, I guarantee you what will not be
15 coming out of this hearing is any further briefing. You've had
16 plenty of time and multiple rounds of declarations to get this
17 right. You've either gotten it right or you haven't gotten it
18 right. I'm going to make a decision, but I'm not going to have
19 any more additional declarations.

20 So any response from the plaintiff on that one question?
21 You don't have to respond to every question.

22 **MR. LEVINE:** To the issue that Your Honor has
23 identified as a key issue here, that the tie between the
24 specific documents that the government is seeking to shield
25 from production, from disclosure, and the decision that was

1 made, the deliberation that was engaged in needs to be
2 specific. It needs to be as to each document, and it needs to
3 be specific.

4 **THE COURT:** Where is the case that says it has to
5 be -- you have to identify for each and every document exactly
6 where it went?

7 **MR. LEVINE:** Not to that level, that's correct, Your
8 Honor.

9 **THE COURT:** Okay. So you don't have to identify for
10 each and every document where it went?

11 **MR. LEVINE:** Well, the case law is somewhat ambiguous
12 on this point. The *McKesson* case that Your Honor knows well,
13 the *Poehling* case that was recently decided on similar subject
14 matter made -- you know, emphasized the tie that needed to be
15 drawn between the documents and the decisions and the
16 deliberations associated with those decisions, and knowing who
17 the participants were, where they rank, are they, you know, are
18 they more junior people speaking to superiors, that sort of
19 level of detail is a level of detail that is cited in the case
20 law as an appropriate level of detail, and it's missing here.

21 **THE COURT:** Well, it's an appropriate level of
22 detail. It's not cited as a mandatory level of detail. So you
23 don't think that it's sufficient to say this is the decision,
24 and within that decision-making process, briefing documents
25 were prepared for officials making those decisions and here are

1 the briefing documents, that's not enough?

2 **MR. LEVINE:** Correct.

3 **THE COURT:** Second question. Category 1,
4 communications regarding -- this is also on her declaration,
5 Shapiro declaration, communications regarding the proposed
6 rule. I guess this is where I want to talk about there are
7 some -- some of these are designated as nonresponsive, and I
8 want to talk about what that means.

9 First, am I right that in this particular subcategory,
10 Category 1, the only document that is not listed as
11 nonresponsive -- it's listed as responsive -- is 1476. I mean,
12 I've been through them, my law clerk went through them, and I
13 just want to make sure we didn't miss of it. It sounds like
14 all the rest are listed in this communications category listed
15 as nonresponsive.

16 **MR. DYAL:** That, you know, without going through, I
17 mean, that fits with my understanding that generally the ones
18 that are going to remain in Category 1 are going to be
19 responsive, and that was actually an outcome of our extensive
20 meet and confer efforts and providing defendants with
21 additional information about the documents.

22 There were originally I think about 2500 additional
23 documents in Category 1 that as a result of the meet and confer
24 process, we were able to provide enough nonprivileged
25 information about those documents to convince defendants to --

1 that they were not -- not only not relevant, which applies to a
2 much broader category of documents, but not responsive to any
3 of their discovery requests. And therefore Category 1, among
4 the different categories, has a much higher volume of
5 responsive documents based on removing those 2500.

6 **THE COURT:** So the -- but the ones that are, in fact,
7 listed as nonresponsive, which is most of the ones in this
8 communications regarding proposed rule category, you're saying
9 the parties have reached an agreement that I don't have to
10 decide the motion as to that? They're not going to be
11 produced?

12 **MR. DYAL:** Correct; they're not presented in Kaiser's
13 motion. They're not among the 688 documents that Kaiser is
14 moving to compel. The parties have reached -- to my knowledge,
15 the parties have reached an agreement about those documents.

16 **THE COURT:** Mr. Levine?

17 **MR. LEVINE:** Yeah, just to echo what Mr. Dyal just
18 said, there were originally a far greater number of documents
19 that were in dispute that had been listed on the -- on
20 plaintiffs' log as responsive to the RFPs and yet being
21 shielded based on the deliberative process privilege.

22 Through the meet and confer process, we learned that some
23 of those documents were non -- you know, standing alone were
24 nonresponsive family members of responsive documents, and in
25 the context of our discussions, we agreed not to seek

1 disclosure of those. Normally family members would be produced
2 with responsive documents, but in this case, given the
3 privilege and given our effort, you know, our desire to narrow
4 the issues that are presented to the Court, we agreed not to
5 seek those documents.

6 **THE COURT:** So let me just broaden that.

7 Exhibit B, which is the, I guess the amended Levine
8 redline declaration is the exhibit that has all the documents.
9 I thought those were the documents at issue. Maybe they're
10 not. Because a lot of the documents on that list are listed as
11 nonresponsive. So ...

12 **MR. DYAL:** Correct. I can clarify if you want, Your
13 Honor.

14 **THE COURT:** Yes, please.

15 **MR. DYAL:** Yes. Everything that's been presented to
16 you and everything in the exhibits is currently in dispute. It
17 remains the United States' view that many of the documents
18 currently in dispute -- I think it's about 200 -- are not
19 individually responsive to any Kaiser request, but as
20 Mr. Levine mentioned, are nonresponsive family members of
21 responsive documents.

22 Now, for a large number of those documents in the original
23 volume of documents in dispute, the United States was able to
24 provide sufficient nonprivileged information about the
25 documents for the parties to agree to take them off the table.

1 However, there remain about 200 documents for which the United
2 States' view is if we just had encountered these documents in
3 isolation in attempting to respond to Kaiser's discovery
4 requests, they would not have been deemed responsive. However,
5 we couldn't provide Kaiser with enough nonprivilege information
6 about those remaining 200 documents for the parties to actually
7 agree to take them off the table, and that's why they're still
8 that issue.

9 **THE COURT:** So what happens? I mean, what happens?
10 I decide they're not covered by the privilege. Then what
11 happens?

12 **MR. DYAL:** Yes, we would produce them. To the extent
13 you order production because they're not covered by the
14 privilege, we would produce them pursuant to the current ESI
15 protocol, because that protocol requires family members to be
16 produced together and also logged to the extent they're being
17 withheld as privileged. And so that's where this aspect of the
18 dispute arises from.

19 **THE COURT:** Okay. Excellent answer, because I just
20 wanted to make sure I didn't have to decide responsiveness,
21 which I think you're all agreeing I do not.

22 **MR. DYAL:** No.

23 **THE COURT:** Next question. Continuing in her
24 declaration, Category 1, communications of the proposed rule,
25 1292 is a document or a collection of documents, this e-mail

1 that has very little substance to it. It doesn't have any
2 comments, as many of the other documents do, on the proposed
3 rule. It -- the most -- the biggest thing it says is the
4 parties are involved in deliberating on the subject.

5 I'm wondering how, if -- how that can be sufficient, how
6 the disclosure of the fact of deliberations on a subject
7 matter, something that, you know, is pretty obvious, I think,
8 can harm the agency's ability to have frank discussions if the
9 content of the comments that one might make are covered by the
10 privilege. I'm just wondering how it can be sufficient for
11 showing this is a deliberative piece of the deliberation, that
12 the e-mail just says -- the most substantive thing it says is
13 that the parties are involved in deliberations on the subject.
14 That's Shapiro 1292.

15 **MR. DYAL:** Yes, I'm aware of the document. I'm going
16 to be as -- say as much as I can, being wary of revealing too
17 much about the contents.

18 So I believe that there -- the subject line and/or the
19 header of the e-mail, the subject that they're discussing in
20 this e-mail is a section of the regulation that was -- it's not
21 in the final regulation. It was a proposed topic to be
22 included potentially proposed by individual officials that was
23 not included in the final regulation. And so --

24 **THE COURT:** Got it. Understood, understood.
25 That's -- I don't know if that's sufficient, but that's

1 different.

2 Category 2, manual revision communications. The one --
3 actually I think -- the spreadsheet, manual of the
4 spreadsheets. On the spreadsheets, I'm, having looked at them,
5 I'm not actually going to go with the United States' argument
6 that these are so densely populated by comments and facts that
7 they couldn't produce them in redacted form so the public
8 comments were disclosed. I'm going to require that all
9 spreadsheets regarding public comments be produced in redacted
10 form with the public comments not redacted.

11 **MR. DYAL:** I believe that's what we've done thus far.

12 **THE COURT:** Well, it's not -- you actually argue
13 about that, so I'm not entirely sure that's correct. But in
14 any event, go through and make sure that all spreadsheets about
15 public comments, public comments are disclosed and the
16 privilege portions are redacted.

17 Drafts. The Shapiro declaration has some drafts all in
18 each of the categories. There are two documents particular in
19 this category that didn't look like drafts, 1881 and 1882. And
20 the only thing in Shapiro's has only conclusory statements
21 about these documents, which did not include who created the
22 documents, who they're aimed at, how they fit in the decision-
23 making process. That -- why is that sufficient for those two
24 documents?

25 **MR. DYAL:** I mean, the -- I mean, this was based on

1 her experience with and role in the process and her
2 determination that these two documents were drafts. To the
3 extent, you know, you did a redline of these drafts comparing
4 them to the final published versions and found that there were
5 no differences, there were little to no differences, I'm not --
6 I don't think it would result in any relief to Kaiser. What
7 they're seeking is incremental information beyond what is
8 publicly available. So I would defer to the agency's
9 experience with the process and their knowledge of what their
10 drafts versus final versions look like, but also to the extent
11 for whatever reason that was incorrect, I mean, the final
12 drafts are both publicly available, or the final copies are
13 both publicly available and have been produced multiple times
14 over in this litigation.

15 **THE COURT:** Well, let me just be more specific.

16 So take a look at Shapiro 1881 and tell me why I'm wrong
17 this is not a draft, and 1882 similarly. But look at those. I
18 just don't -- I just don't think her comments about drafts
19 apply to those. And if they are something else, when she
20 had -- there's no description of, you know, who they're
21 directed at or how they fit into the process. All she says
22 about 1881 and 1882 is they're created as part of the
23 deliberative process leading to publication of the rule.

24 **MR. DYAL:** Understood, Your Honor.

25 Again, I'm not in a position to second-guess my client's

1 determination based on her role in the process and concede that
2 these are not drafts.

3 **THE COURT:** Okay. I'll just ... I am.

4 **MR. DYAL:** Yeah, that's understood.

5 **THE COURT:** Right. Gotcha.

6 Okay. Waiver. This is a legal question probably for you
7 both. I'm trying to figure out where -- how the approach of
8 the Ninth Circuit in the *Assembly of the State of California*
9 fits in. In that case, the circuit cautioned against applying
10 traditional waiver rules to the deliberative process privilege
11 and instead focused on a question of whether the subsequent
12 disclosure, as I understand it, would expose the decision-
13 making process any more than it already had been exposed. I'm
14 not entirely sure where that fits into the waiver analysis.
15 Does it replace the waiver analysis, or on the other hand, you
16 know, if the disclosure is involuntary, do we still apply on
17 top of this analysis by the -- as in *Assembly of the State of*
18 *California*, the traditional analysis, which might lead to the
19 conclusion that in certain circumstances there's no loss of
20 privilege in a subsequent way for certain voluntary
21 disclosures.

22 That's my question. I'll start with the government.

23 **MR. DYAL:** So our reading of the case is that it does
24 replace traditional waiver analysis, and that the question is
25 instead whether there is a risk of additional exposure to the

1 deliberative process, the government's deliberative process,
2 and that that is the case here, given that --

3 **THE COURT:** I see. So that even if it's -- if there
4 had -- so the voluntary/involuntary doesn't have any relevance
5 anymore after --

6 **MR. DYAL:** That's our reading of the Ninth Circuit,
7 and then pretty directly it's also the *Young* case out of the
8 District of Hawaii's --

9 **THE COURT:** Right.

10 **MR. DYAL:** -- reading of the case. And it's to
11 encourage at bottom government transparency in circumstances
12 where the government deems it's appropriate.

13 Here we don't think that that part of the analysis
14 applies, because this was not -- shouldn't be considered
15 voluntary when you look at the circumstances of the production
16 in *Poehling*, and I'm happy to go into that.

17 **THE COURT:** But it doesn't matter whether it's
18 voluntary or involuntary. What matters is --

19 **MR. DYAL:** Correct.

20 No, I'm saying that the -- what they were trying to
21 encourage, the Ninth Circuit, in having this more nuanced
22 approach to, you know, basically not applying traditional
23 waiver rule to the deliberative process privilege is to
24 encourage the government to be transparent in appropriate
25 circumstances. That, that rationale doesn't necessarily apply

1 here, but the Court's overall analysis of how waiver should not
2 be applied still holds.

3 **THE COURT:** Okay. I assume you agree with that,
4 Mr. Levine.

5 **MR. LEVINE:** I do agree that the traditional analysis
6 holds, yes.

7 **THE COURT:** The traditional analysis is replaced by
8 this?

9 **MR. LEVINE:** Well, the *Carter* decision -- it depends
10 what you mean, I guess, by the traditional analysis.

11 **THE COURT:** So just to be specific, in the
12 traditional analysis whether the disclosure was voluntary or
13 involuntary would have some relevance in the traditional
14 analysis of waiver. It no longer does, because that's been
15 replaced for the deliberative process privilege by the analysis
16 of the type that the circuit wants, which has to do with, you
17 know, what's the risk here, is there some additional,
18 additional exposure of the decision-making process that is
19 dangerous that hadn't been true before. Is that correct?

20 **MR. LEVINE:** Well, the *Carter* case to which you
21 reference is a 2002 case, a Ninth Circuit case. There have
22 been cases that have been decided since, including *McKesson*,
23 including -- well, *McKesson* being a primary one that Your
24 Honor's very familiar with, where whether the prior disclosure
25 took was voluntary was a relevant factor. We would argue that

1 it is still -- it is a relevant factor, and in this case the
2 government did voluntarily disclose --

3 **THE COURT:** Relevant factor to what analysis?

4 **MR. LEVINE:** To the waiver.

5 **THE COURT:** How -- what kind of analysis am I doing?
6 Am I doing the analysis that the circuit said, or something
7 else? I mean, I'm troubled by -- it's interesting you're
8 making this argument, and the reason it's interesting you're
9 making this argument is because I think it puts you in a worse
10 position in winning the ultimate battle here. So I'm wondering
11 why -- what's -- so, I'm -- but I appreciate your frankness.
12 Into -- well, what's this -- how do I analyze waiver if I don't
13 analyze it the way the circuit said in the *Assembly* case?

14 **MR. LEVINE:** The waiver -- the question as we framed
15 it is whether the documents at issue were previously disclosed,
16 and the easy answer to that question in this case is "yes".

17 Then the secondary question is: Were they voluntarily
18 disclosed or involuntarily disclosed. As to that question, in
19 this case we would argue, and we think the facts support it,
20 that they were voluntarily disclosed. The ones -- we're
21 talking here about 262 documents among the 688 at issue, but as
22 to those 262, we would contend that they were voluntarily
23 disclosed.

24 **THE COURT:** I guess I don't under' -- so what's the
25 point of the Ninth Circuit's *Assembly of the State of*

1 *California* case? Because you're ignoring it. You're doing the
2 traditional analysis of waiver, and that focuses in part on
3 voluntary versus ...

4 **MR. LEVINE:** And I apologize because I'm not hearing
5 you a hundred percent, maybe 95 percent.

6 **THE COURT:** So my point is this. Your approach
7 ignores the *Assembly of the State of California* case. What is
8 the relevance of that case to this decision?

9 **MR. LEVINE:** I would contend that it has a -- well,
10 the relevance of that case is not something I could speak to in
11 this exact moment. I would say that the waiver argument that
12 we've made is based on Your Honor's ruling in *McKesson* and in
13 the *Friends of the Earth* case where it was concluded, where it
14 was determined that the documents at issue had already been
15 disclosed, the information at issue had already been disclosed.
16 And in those circumstances where a party seeks after the fact
17 to make a deliberative process privilege claim over such
18 documents, that those documents, you know, that that claim has
19 been waived.

20 **THE COURT:** It's not quite such a straight line.
21 Yes, I understand that approach as I took in *McKesson*. I'm not
22 sure I was right taking *McKesson* in light of the *Assembly's*
23 case, but I understand your position. And thank you for
24 following my case, right or wrong. I wish the circuit would be
25 so generous with me.

1 So the big question here is whether any of this matters.
2 These cases, these documents, like the documents in the
3 *Poehling* decision, seem to be extremely relevant to Kaiser's
4 defense. Why shouldn't I just order their production on the
5 basis that they are of such importance, that that outweighs the
6 very limited harm from, in some case, decades-old discussions
7 about them within the government?

8 That's for defendant.

9 **MR. DYAL:** So we would certainly dispute the notion
10 that certainly the documents as a whole, all 688 of them, are
11 relevant to Kaiser's defenses. And frankly I think if Kaiser
12 saw them, they would agree with us as to most of them. That
13 was, you know, our effort. Again, our ability was constrained
14 in that we can't actually reveal too much information about the
15 documents, but that was our -- an effort that was made during
16 our months-long meet and confer process to explain to Kaiser,
17 you know, you have -- the majority of the documents at issue
18 are either not responsive to any Kaiser request, or they are
19 responsive to Kaiser's request for documents specifically about
20 these two sentences in the Medicare Managed Care Manual. Those
21 are the sentences that Kaiser has targeted with its own
22 discovery requests, but its brief doesn't even attempt to argue
23 how those sentences now have any relevance to this case,
24 particularly given the Court's decision on the motion to
25 dismiss, because they deal with the overall requirement that

1 Kaiser is required to follow the Managed Care Manual or the ICD
2 guidelines that's in the Medicare Managed Care Manual.

3 So instead of making any argument about those specific
4 provisions -- which, again, Kaiser targeted in its own
5 discovery request. It then retreats to, okay, well, maybe
6 these are only responsive to that request, but we're just
7 entitled to risk adjustment standards generally. And that's
8 contrary to the Court's order of nearly two years ago, which
9 said that discovery in this case should focus on the risk
10 adjustment requirements that are actually at issue.

11 So that's what I would say in response to relevance
12 arguments regarding, A, the ones that are not responsive to any
13 Kaiser request, and the ones that are only responsive because
14 they deal with these provisions of the Medicare Managed Care
15 Manual that, to our view, are no longer at issue and Kaiser has
16 not made any specific arguments about in its briefing. As to
17 the -- I believe that would take approximately 450 of the
18 documents off of the table.

19 As to the remaining documents, again, Kaiser just isn't
20 making relevance arguments specific to the documents at issue.
21 The -- we told them that the documents concerning the OEI
22 reports on chart review and HRAs are responsive to their
23 requests about queries. But, you know, even though queries
24 form an important part of Kaiser's scheme, we're not suing
25 them, there are no violations specifically based on standards

1 for queries at issue in this case. And again, Kaiser doesn't
2 focus on the request that it actually issued. It posits some
3 other reasons that documents could -- you know, in that
4 category could be relevant, even though those aren't the
5 reasons that Kaiser requested these documents in the first
6 place.

7 And then, so those are the documents addressed in Bisguyer
8 (phonetic) declaration, and then finally you get to the
9 documents in the Brissette (phonetic) declaration which
10 admittedly do deal with the specifically requirements at issue
11 in this case that are targeted by Kaiser's request. And Kaiser
12 does make relevance arguments about those specific standards in
13 its brief, but that has also been what the bulk of discovery
14 and the other 60,000 documents that the government has produced
15 in this case concern. They're about those provisions and the
16 government's application of those provisions, and there's also
17 myriad documents publicly available on those provisions, and
18 the OIG reports that were the culmination of the deliberative
19 process that these e-mails are about are publicly available.

20 And so, yes, the provisions discussed in these documents
21 are relevant, but the specific need just isn't there given the
22 other discovery and publicly available materials at Kaiser's
23 disposal. These are just preliminary views of individuals in
24 OIG as they prepare to conduct a series of audits of MAOs, not
25 of Kaiser, and then make publicly available their findings in

1 those audits.

2 And so the need -- you know, those are -- that's the only
3 category that's even, you know, about the specific requirements
4 at issue in this case. And even there, Kaiser can't show a
5 need for the documents in question.

6 **THE COURT:** Mr. Levine?

7 **MR. LEVINE:** There's a lot to break down there.

8 It sounds to me in part that the government's basically
9 conceding that the Brissette documents should be produced here.
10 They have relevance.

11 **THE COURT:** No, they're not.

12 **MR. LEVINE:** They're not fully conceding it.

13 **THE COURT:** They're not even slightly conceding.
14 They're doing the exact opposite. I want you to actually make
15 the argu' -- I want you to break down by category the documents
16 and explain to me why you think these particular documents are
17 central to your defense. Because they're saying they're not,
18 and for the limited category that is actually on the question
19 raised by the defense, the arguments are -- the argument is
20 you've got a ton of information all over the public and
21 discovery record for it.

22 So break down by category, like the government did, each
23 thing and tell me why it's important.

24 **MR. LEVINE:** Let me start with the 158 documents that
25 are cited in the Brissette declaration.

1 Okay. Those documents are communications as described by
2 the government, communications between two agencies of the
3 government, HHS OIG, OAS, OAS, the Office of Audit Standards,
4 and CMS. Okay? And they're communicating, according to the
5 declaration that Mr. Brissette submitted, about how CMS applies
6 certain standards in the agency's own audits of risk
7 adjustment, that that -- that's what they're communicating
8 about. That is the standards apply that are at issue in this
9 case, that are central to this case, standards apply in
10 determining whether diagnosis codes submitted to the government
11 are properly submitted. That's -- if you're going to sum up in
12 a sentence what is at issue in this case, that might be the
13 sentence.

14 And given the relevance and the limited harm of those
15 communications, that would be something we can very much raise
16 in favor of production here. It's a qualified privilege, would
17 weigh in favor of production.

18 **THE COURT:** So very briefly, that's directly
19 responsive to what I asked for, and I appreciate that. What's
20 your response to his point that you've got so much information
21 on this exact topic, both in the rest of the discovery and in
22 the public documentation?

23 **MR. LEVINE:** Well, we don't have in the public
24 documentation the communications between CMS employees and the
25 HHS OIG, OAS people about the ambiguities, you know, potential

1 ambiguities in the standards, and other discussions about what,
2 you know, the interpretation of these standards. We have the
3 quote-unquote standards, but we don't have the discussion about
4 it. That's what we're seeking, and that's what could be highly
5 relevant to our defense in this case.

6 And also in terms of the volume of documents, counsel
7 cites, I think he said 60,000 documents. That's the number of
8 documents they produced total, not necessarily about this
9 subject. You know, in a case of this size, that's hardly a
10 vast amount number of documents, and again, untethered to these
11 specific issues.

12 I would also say as to the 158 documents that are
13 addressed by the Brissette declaration, that the description in
14 that declaration of what those documents are -- so this goes a
15 little bit beyond Your Honor's question about relevance, but
16 nevertheless it says that these are communications with CMS
17 employees and contractors in which OAS representatives ask
18 questions about how CMS applies certain standards in the
19 context of RADV audits and CMS responds to those questions.
20 That's a quote from the Brissette declaration. That is what
21 these documents are.

22 That is about how they're applying standards, not about
23 future standards, not about some decision yet to be made. It's
24 a question about the price.

25 **THE COURT:** So a *Safeway* argument.

1 **MR. LEVINE:** Yes.

2 **THE COURT:** Right.

3 **MR. LEVINE:** So the -- you know, I would say as to
4 those documents, while Your Honor is right, the government's
5 not conceding it in a single document here, fully conceded, as
6 I think the government understands that those documents, the
7 deliberative process privilege claim associated with them and
8 the balancing, is, you know, is a strained argument. But
9 putting aside their understanding, that's our argument.

10 So as to the -- let's talk about the next volume of
11 documents here. So documents that Ms. Shapiro addresses
12 related to the Medicare Managed Care Manual. You know, these
13 documents relate to a specific chapter. It's a 75-page chapter
14 of the Medicare Managed Care Manual. That is the chapter
15 related to risk adjustment. While the government says, hey,
16 you know, that's not the standard, that's not the guideline,
17 that's not the provision that our case is focused on, that is
18 not -- they have not been clear. They've reserved the right to
19 argue that other program standards, any standards may be
20 relevant to this case.

21 There has been a lot of discovery on the Medicare Managed
22 Care Manual. There's been 30(b)(6) testimony on the -- you
23 know, certain provisions within the Medicare Managed Care
24 Manual. There has been meet and confer discussions with the
25 government about the scope of the requests that we were

1 propounding and narrowed, you know, to be specific as to
2 portions of the Medicare Managed Care Manual at issue. And it
3 is -- these documents are the documents in question related to
4 the Shapiro declaration, there are 237 of those documents, are
5 responsive to those narrowed requests.

6 The government has deemed them responsive. Yes, there are
7 other documents that are family members of those responsive
8 documents. That's a small number of them relatively speaking.
9 But so they're -- to the extent they're nonresponsive --

10 **THE COURT:** So treat me like I'm a child for a moment
11 at least, please, and explain to me how the -- a document on
12 the government's interpretation of a particular part of the
13 chapter on risk adjustment is going to be used by the
14 government against you. Because I think that's what you're
15 worried about.

16 **MR. LEVINE:** Because documents -- the document -- the
17 Medicare Managed Care Manual includes interpretations and
18 references to the ICD guidelines, the particular contested
19 provisions that the government is, at this point, having, you
20 know, submitted a shifting target, Your Honor. But this is the
21 standard that we understand the government is saying that
22 Kaiser has violated, and the chapter -- this chapter covers the
23 government's -- you know, in part covers the government's
24 interpretations of those guidelines. And if there are
25 communications, which exist among the documents that are not

1 being disclosed about the government's interpretation of that
2 chapter, the government's --

3 **THE COURT:** So it's not the whole chapter.

4 **MR. LEVINE:** Well, the Medicare Managed Care Manual
5 is huge. Then there's Chapter 7, which focuses on risk
6 adjustment itself. And what -- and the government, in its --
7 well, in its declaration has not been specific about which
8 portions of the chapter the documents relate. So we're working
9 blind in that regard.

10 **THE COURT:** Okay. But which portions of the chapter
11 would it have to relate for it to be important to your case?

12 **MR. LEVINE:** Well, we would argue the whole chapter,
13 because the whole chapter is -- it's on -- the chapter relates
14 to risk adjustment, which is the key issue, you know, which is,
15 broadly speaking, the issue in this case.

16 Now, if the government were to say that, hey, we are not
17 going to cite any portions of these chap' -- this chapter as a
18 standard that the defendants have not met, we are not going to
19 cite it as relevant in any way to this case, we're only going
20 to limit our use of this chapter to particular components of
21 it, then maybe we would be able to narrow within the chapter to
22 which specific sentences or paragraphs within the chapter that
23 are most relevant. And then we would want a dec' -- you know,
24 the declaration would have to be clear that that's what, you
25 know, that these -- you know, if they did the A, they narrowed

1 it that way, then the declaration would have to be clear that
2 these documents only relate to the specific portions that the
3 government is saying they may use in this case. If the
4 government is --

5 **THE COURT:** So let me just interrupt your flow there
6 to turn to counsel for the United States.

7 What do you think about that last point?

8 **MR. DYAL:** Yes.

9 So, Your Honor, this all already happened. Right? In
10 November of 2022, the parties came to you with a dispute that
11 concerned in part Kaiser's request for all documents concerning
12 Chapter 7 of the Medicare Managed Care Manual. Your guidance
13 coming out of that was to focus on the specific provisions that
14 are actually potentially at issue in this case.

15 Kaiser, then based on the United States' complaint and
16 additional information provided in discovery, agreed to narrow
17 its discovery requests to two sentences concerning the Medicare
18 Managed Care Manual. Now apparently in the context of a
19 privilege dispute, it is retreating from that argument and
20 saying -- I have not heard one sound from Mr. Levine about the
21 two sentences that are about the Medicare Managed Care Manual
22 that are targeted in Kaiser's own discovery requests. Right?

23 These are not -- the government didn't want to produce any
24 of this material. Our position, if you'll recall, was that all
25 of this nonpublic, these nonpublic government documents are

1 irrelevant, and the agency has made its publicly -- its actual
2 positions relevant to this dispute known publicly. We,
3 nonetheless as a compromise, agreed to search for documents
4 concerning specific provisions that Kaiser identified, among
5 them these two sentences of the Medicare Managed Care Manual.
6 Some documents responsive to that request were privileged; some
7 are not.

8 Now that we're in this privilege dispute, Kaiser cannot
9 present any argument as to why the two sentences that it
10 targeted in its own discovery requests are relevant to this
11 case.

12 **THE COURT:** So the -- let me just make sure I
13 understand.

14 What you're saying is your list of documents is already
15 limited to documents that are about those two sentences insofar
16 as it concerns the manual. Is that correct?

17 **MR. DYAL:** It's -- that was our -- that was the
18 request to which we were responding to.

19 Now, we took a reasonable approach in responding to that
20 request that, you know, might be viewed as overly expansive,
21 but that would include drafts of the Medicare Managed Care
22 Manual that include the two sentences targeted by Kaiser's
23 requests. And we explained this to them during the meet and
24 confer process. We said, look, most of the documents at issue
25 about the Medicare Managed Care Manual are just drafts that

1 contain these two sentences exactly as they appear in their
2 final form; please explain why those documents -- even they
3 contain -- they may contain privilege discussions about other
4 aspects of the Medicare Managed Care Manual not directly
5 relevant to Kaiser's discovery request. But as far as it
6 concerns these two sentences, why is this relevant.

7 And just like in this argument, Your Honor, we received no
8 response.

9 **THE COURT:** Well, Mr. Levine, what's the response?

10 **MR. LEVINE:** I have two responses, if I may.

11 **THE COURT:** Yes, please.

12 **MR. LEVINE:** Number one, I think counsel just made
13 his point before us, but just to highlight it, if these
14 documents are responsive to the narrowed request focusing on
15 the two sentences, then that's -- you know, that explains why
16 they're relevant.

17 **THE COURT:** Well, it doesn't explain why they're
18 relevant, because we're talking about the balancing part of
19 this test. And so you can't just say they're responsive and
20 they're relevant. You've gotta say a lot more than that to say
21 that the disclosure is worthy even if they are privilege, and
22 that's what I'm asking you about, number one.

23 Number two is he didn't say they're just about this, these
24 two sentences. What he said is actually most of them are not
25 about these two sentences.

1 **MR. LEVINE:** Well, if they are responsive, Your
2 Honor, and if the RFP is limited, as we all know it is, to
3 specific provisions within the Chapter 7 of the Medicare
4 Managed Care Manual and these documents are responsive to that
5 RFP, then presumably -- we don't have the documents, they do.
6 They've determined they are responsive. Then I am presuming,
7 without seeing the documents, that they relate to those two
8 provisions.

9 If they want to tell me they do not relate to those two
10 provisions, then I would ask, well, then why are they
11 responsive. But nevertheless, that's why I make --

12 **THE COURT:** Well, it's an argument that only a lawyer
13 could love, because it ignores what the other side says, and I
14 want you to step back and stop doing it.

15 What he said was there are two kinds of documents here.
16 There are the documents we've produced because it's -- they are
17 much broader than your request, but it happens that in there,
18 there is some reference -- not an interpretive reference, not a
19 disclosure about them, not some change in them, nothing
20 substantive to the two sentences that you cite in your RFPs,
21 number one.

22 There's the second category which is directly about the
23 two sentences. His question and my question, because I think
24 it's a good question, is: So what?

25 **MR. LEVINE:** So we're only talking about the category

1 that is not related to the two sentences. Is that correct?

2 That's what your --

3 **THE COURT:** No, no. Both. Because the second -- I
4 mean, obviously the connection, you're having difficulty
5 hearing me, I think. But the second part of my question is
6 some of these, I think counsel admitted, are directly about the
7 two sentences and not just happened to coincidentally include
8 the two sentences in the document in a discussion of the rest
9 of the Chapter 7. Now, as to that category, the question is --
10 as to the first question, said category, the ones that are not,
11 you know, not really directly about the two sentences, but they
12 are coincidentally included, what's the central importance to
13 your case that would justify overruling a privilege, if I find
14 one, number one?

15 Number two, as to the second category, which is documents
16 that are directly about these two sentences, why do I care?
17 Why is documents -- why are those two sentences directly
18 important, really central to your defense?

19 **MR. LEVINE:** Okay. As to the first issue, the
20 government has told us that they -- you know, despite the
21 hearing two years ago that the counsel referenced, has told us
22 that they are reserving the right to argue that other standards
23 are relevant to interpreting the contested provision and may be
24 at issue. They have --

25 **THE COURT:** Other standards, you could ask for every

1 draft of every chapter of the entire Medicaid -- Medicare
2 manual.

3 **MR. LEVINE:** No, we're not asking for that. We're
4 asking for a chapter related to risk adjustments.

5 **THE COURT:** Stop.

6 I will not agree with you that the government's
7 reservation in a general way that there might be some other
8 provision, risk adjustment or otherwise, justifies a fishing
9 expedition into risk adjustment. That's -- I'm not going to
10 agree with it. So I -- so that, that reservation by itself
11 seems to me unbearably broad, and if they bring up some
12 provision that you haven't had discovery into, I'm sure there's
13 going to be a big hullabaloo. So we'll get to that hullabaloo
14 if we ever get to it.

15 **MR. LEVINE:** Okay.

16 **THE COURT:** My question is as to these two
17 sentences -- because I understand your point as to the other
18 documents. As to these two sentences, why do I care about
19 things that are directly about the interpretation of those two
20 sentences? Why does it matter?

21 **MR. LEVINE:** Because those two sentences interpret,
22 in part, the ICD guidelines that are the key provision. Those
23 two sentences directly tie to the key provision, the standard
24 that we -- that the government is alleging the defendants did
25 not meet.

1 **THE COURT:** What do they say about those standards?

2 **MR. DYAL:** Your Honor, yeah. I --

3 **THE COURT:** Let me just -- just don't interrupt.

4 **MR. DYAL:** Apologies, Your Honor.

5 **THE COURT:** I promise to call on you for a response.
6 I don't -- I let everybody speak.

7 But I want to know why those two sentences, what those two
8 sentences say about the ICD guidelines that you say are
9 critical?

10 **MR. LEVINE:** I would have to pull those two sentences
11 for you, Your Honor. I do not have them in front of me.

12 **THE COURT:** Get them in front of you and tell me.

13 **MR. LEVINE:** Okay.

14 **THE COURT:** Because that should be -- if it's so
15 central to your case, it should be at the top of your head.

16 There's a lot of things going on.

17 **MR. LEVINE:** Give me a moment, Your Honor.

18 **THE COURT:** Yes, let's take five minutes.

19 (A recess was taken from 10:31 a.m. to 10:37 a.m.)

20 **THE COURT:** All right. Let's go back on the record.

21 So Mr. Levine, you were going to mention about the two
22 sentences and why they're important.

23 **MR. LEVINE:** I have the two sentences. I also have
24 the contested provision in the ICD guidelines, and we compare
25 the language, and you'll see how similar.

1 **THE COURT:** Go ahead.

2 **MR. LEVINE:** That's why we are interested in this
3 issue.

4 Okay. So I'll start with the contested provision in the
5 ICD guidelines, which are not the two sentences, just so you
6 have that top of mind.

7 "Code all documented conditions that coexist at the time
8 of the encounter/visit and require or affect patient care,
9 treatment or management. Do not code conditions that were
10 previously treated and no longer exist. However, history codes
11 may be used as secondary codes if the historical condition of
12 family history has an impact on current care or influences
13 treatment."

14 And then the -- I'm going to read you the sentences
15 straight from the Medicare Managed Care Manual, but they're
16 also cited in the briefing. So the sentences are:

17 "Plan sponsors, MAOs, must ensure the accuracy/integrity
18 of risk adjustment data submitted to CMS. All diagnosis codes
19 submitted must be documented in the medical record and must be
20 documented as a result of a face-to-face visit. The diagnosis
21 must be coded according to the International Classification of
22 Diseases," that's ICD, "clinical modification guidelines for
23 coding and reporting."

24 So those are the sentences that, you know, that are at
25 issue, and those are the sentences that, according to the

1 government, these documents are responsive to. The RFP
2 associated with those sentences are the -- is the RFP to which
3 these documents are apparently responsive.

4 **THE COURT:** So that is essentially why -- what I
5 thought. But I guess I'm not understanding the key piece of
6 the manual for your purposes, it says code according to the ICD
7 guidelines, but that's the key. That's the substance of that
8 provision that you are alleged to have violated or not
9 violated.

10 **MR. LEVINE:** Well, again, it's a bit of a moving
11 target, but, yes, the -- that --

12 **THE COURT:** Okay. But that's why you're asking about
13 these two sentences.

14 **MR. LEVINE:** Correct.

15 **THE COURT:** It's because of that provision.

16 **MR. LEVINE:** Correct.

17 **THE COURT:** The relevance of that provision depends
18 on whether or not you violated the ICD guidelines that you --
19 that you quoted.

20 **MR. LEVINE:** Correct.

21 **THE COURT:** And so what I'm thinking about is this is
22 a pretty vanilla provision. This doesn't say how -- exactly
23 how to code. It doesn't say do it this way, do it that way,
24 don't do it this way. I'm wondering why interpretation of
25 manual language is of such great importance. I can understand

1 how interpretation of the ICD guidelines might be important,
2 but why is the interpretation of the sentence that says follow
3 those guidelines important?

4 **MR. LEVINE:** Well, if there is discussion or
5 commentary on what those guidelines mean and how they -- I
6 mean, it's not just -- it's the sentence before it, as well,
7 what those guidelines mean and --

8 **THE COURT:** Yeah, the ICD guidelines.

9 **MR. LEVINE:** That would be what -- you know, that
10 would be I think highly relevant.

11 **THE COURT:** So it would have to be -- it'd actually
12 have to be a piece that is a communication that is about the --
13 those two sentences in the manual, which also -- and maybe it
14 does and maybe it doesn't -- says something about what the ICD
15 guidelines mean. At that point it's very important to you.

16 **MR. LEVINE:** For sure that would be very important to
17 us. I mean, we would of course argue, Your Honor, that unless
18 the government is not going to cite one other sentence in that
19 manual, in that chapter of the manual in connection with this
20 case, there may be other portions that are relevant, but, yes,
21 that would be the most relevant, correct.

22 **THE COURT:** Well, but, see, so this is -- I
23 understand why you did an RFP. This is for the last piece,
24 where notwithstanding there is, if I decide there's a
25 deliberative process privilege, I'm going to override it, and

1 that's a much tougher piece than just it's responsive, just in
2 case kind of responsive. So what I'm asking for is is the
3 position with respect to why I should make that weigh in your
4 favor. And in particular, what I'm getting from that is unless
5 the documents say something about the content of the ICD
6 guidelines, it is not that important.

7 **MR. LEVINE:** Well, I think the way I would answer
8 that question, Your Honor, is surely if they say something
9 about the content of the ICD guidelines it would be highly
10 relevant. So full stop there. The question then is short of
11 using the words or the phrase or the acronym "ICD guidelines,"
12 where, you know, where does something get so attenuated that I
13 would agree with you it's not relevant, I can't theorize about
14 that without seeing the documents. Clearly I could think of
15 documents that would be completely irrelevant.

16 **THE COURT:** We're not talking about relevance.
17 Remember, we're not talking about relevance. Okay? We're
18 talking about importance. And so would it be important to your
19 case to get documents that talk about the interpretation and
20 the content, the meaning, meaning of the ICD guidelines, I
21 suppose they might talk about the meaning of the ICD guidelines
22 without mentioning the ICD guidelines themselves.

23 **MR. LEVINE:** Correct; it could be provisions that
24 are --

25 **THE COURT:** Well, or it could be they just don't --

1 they say, well, of course when you're doing this, you have to
2 do that, and they don't cite the language of the ICD guidelines
3 in doing it, or something like that. So if it's focused on the
4 content of the ICD guidelines, whether it's explicitly or
5 implicitly, that is -- that's the core of your issue with what
6 the government's case is and your issue with the government's
7 case.

8 **MR. LEVINE:** Those are surely the important
9 documents.

10 **THE COURT:** Well ...

11 **MR. LEVINE:** I mean ...

12 **THE COURT:** You want to say that we've coded it
13 properly under the ICD guidelines under our interpretation of
14 this ICD guidelines, and the government according to your
15 understanding is saying you did not.

16 **MR. LEVINE:** I mean, it depends on the content of the
17 communication, but, you know, it could easily --

18 **THE COURT:** No, I'm not talking about documents or
19 anything. I'm talking about the case. I'm talking about the
20 case.

21 **MR. LEVINE:** Okay.

22 **THE COURT:** That's the case, right? Or that's the
23 centerpiece, centerpiece that you're saying this is relevant
24 to, that is, the government says we violated.

25 **MR. LEVINE:** Yes.

1 **THE COURT:** The ICD guidelines, these particular
2 ones, this coding section that you just quoted.

3 And you're saying, no, we didn't, because our
4 interpretation is "X". And the question, the reason you want
5 these documents is because they're about interpreting the
6 provisions of the ICD guidelines that you are say are in
7 dispute. Am I understanding this correctly?

8 **MR. LEVINE:** You are understanding it correctly. I
9 could not have said that better.

10 **THE COURT:** Okay, good. Fine.

11 So that's for documents that actually talk about,
12 explicitly or implicitly, the ICD guidelines manual-related
13 documents. What about the documents that don't have anything
14 to do and don't mention and don't implicitly mention the IC' --
15 the content, the meaning of the ICD guidelines? Why are those
16 important?

17 **MR. LEVINE:** Well, that gets back to my other point.
18 So we're leaving the IC' -- I'm completely departing from the
19 ICD guideline portion of this discussion. And, you know,
20 again, in our view this has been a moving target. What
21 provisions, what standards, what guidelines are going to be the
22 ones that the government, you know, ultimately alleges were
23 violated here.

24 Now, if there's an unequivocal understanding that nothing
25 beyond those ICD guidelines are at issue here, the government

1 is not going to cite other portions of the risk adjustment
2 chapter in the Medicare Managed Care Manual related to
3 documentation, or coding, or anything else, then maybe there is
4 nothing beyond those two sentences. But I don't think the
5 government has gone that far. I don't -- you know, and, you
6 know, this is discovery.

7 I understand we're talking about a deliberative process
8 privilege claim here, so it's not just like any discovery.
9 We're not simply talking about, hey, give us potentially
10 responsive, you know, stuff that's potentially important. It's
11 a higher standard. But I would emphasize the low level of harm
12 at issue here and the fact that the government has not
13 unequivocally shed all other standards, said that all other
14 standards are -- portions of the Medicare Managed Care Manual
15 are completely irrelevant to this case, that -- the Managed
16 Care Manual has been the subject of significant discovery in
17 this case, and under those circumstances I would suggest that
18 the balancing weighs in our favor, even as to, again,
19 theoretically communications that go beyond just those two
20 sentences.

21 Now, you're looking at the documents. The government has
22 the documents. If the communications are non-substantive,
23 then, no, I'm not arguing that it's relevant. We just don't
24 know. We're at a point in discovery where we have a
25 description of a document, we know it pertains to, you know, an

1 important chapter in the Medicare Managed Care Manual. We
2 don't know based on the declaration. Keep in mind, we don't
3 know this, what -- you know, exactly what portion of the
4 Medicare Managed Care Manual they relate to based on the
5 declaration. You know, the attorneys have made some
6 statements, but the declaration itself does not. It points to
7 the chapter in its entirety, 75 pages, and we're left to, you
8 know, make a guess on that.

9 Now, what we've done is we've narrowed the universe of
10 documents pretty tightly, but as to the universe within that
11 tight narrowing, we are -- you know, this is the type of
12 document that seems relevant to someone who is not looking at
13 the document.

14 **THE COURT:** Okay. I want to -- so I want to move on.
15 I'm going to ask you the next question, and I'll ask counsel
16 for the government to put a pin in that question about
17 documents that focus explicitly or implicitly on the ICD
18 guidelines and why they're important, even though they're about
19 the manual provisions that relate to the ICD guidelines, and
20 those that are outside of it, because I want a response after I
21 get done with Mr. Levine, but ...

22 So the next question is, okay, we've talked about the
23 Brissette documents. What about the rest?

24 **MR. LEVINE:** Okay. So we're moving on to the next
25 category of documents, which, at least on~-- as I've

1 categorized these, this would be the documents addressed by the
2 Bisguyer declaration. Okay? That's 54 documents. That's
3 Joanna Bisguyer. I don't know if I'm pronouncing her name
4 perfectly. And they concern, according to her declaration,
5 valuations by a division of HHS OIG called OEI, or the Office
6 of Evaluates and Inspections, conducted of the Medicare
7 Advantage program relating to two topics, chart reviews and
8 health risk assessments. Okay?

9 I think the government's argument here is that, as I
10 understand it, that the reports that these documents -- that
11 these documents relate to are irrelevant reports because they
12 relate to chart review, and this case is not about chart
13 review. This case is about addending medical records, and they
14 focus on the precise theory of liability that they believe
15 exist.

16 Well, the complaint itself references chart review. Okay?
17 And I can quote from it if you would like. It's in our papers.
18 And plaintiff has not said, we welcome them to say it on the
19 record, that chart review is not in any way at issue in this
20 case. We recently had a series of 30(b)(6) depositions where
21 plaintiff took the deposition of representatives from all five
22 defendants, and one of the topics did relate to chart review.
23 Okay. So it is not something they have cast aside as
24 irrelevant.

25 In addition to that, the communications, they say, also

1 relate to a white paper regarding the propriety of queries MAO
2 sent to providers regarding diagnoses to be documented in
3 medical records; queries. Now, queries are also at issue in
4 this case. Different animal a little bit. Okay. They are
5 queries that are sent to medical care providers that have --
6 that are, you know, central to this case in part that relate to
7 attending medical records or the like.

8 So, you know, the commentary of government officials
9 related to the propriety of queries, albeit in the context of
10 chart review, not necessarily in the context, the precise
11 context at issue here, would be instructive and potentially
12 useful. But it's for those two reasons we would contend that
13 these documents are relevant. Again, we're putting aside the
14 fact that they haven't asserted the claim properly over these
15 documents. I'm putting that aside. I'm talking only about the
16 importance of these documents relative to the harm they may --
17 the word "relevant," I apologize for that, I know Your Honor --

18 **THE COURT:** I understand you. Importance.

19 **MR. LEVINE:** Yeah. I hope that explains it. I don't
20 know if you had a follow-up on that.

21 **THE COURT:** Yeah, my follow-up is this. I just want
22 to make sure I understand it.

23 So the -- I understand that the document is -- documents
24 are in part about chart reviews and the abuse of chart reviews
25 to, you know, add codes and not subtract them.

1 **MR. LEVINE:** Yeah.

2 **THE COURT:** And so it's -- the reports are about that
3 practice and why it's abusive, et cetera, et cetera.

4 And the United States' answer is, we're not accusing you
5 of doing anything wrong with respect to your chart reviews. I
6 guess that's the United States' answer. And your -- the answer
7 to that is, okay, we don't trust you on what you're going to
8 raise. You might raise it some other day.

9 **MR. LEVINE:** Their answer is that. Right? That they
10 haven't unequivocally cast chart review to the side. In fact,
11 just the opposite. It's in their complaint. It's in their
12 recent 30(b)(6) notices. Okay? That's part one to the answer.

13 The second part of their answer is even if they did cast
14 it aside, even if it was not at all at issue in this case,
15 okay, there are parallels. Not random attenuated parallels,
16 actual, you know, closely tied parallels between conduct
17 associated with chart review and conduct at issue in this case
18 as we would understand it, the addending of medical records.
19 And that relates to these queries that MAOs send to providers
20 regarding diagnoses to be documented, to be potentially
21 documented in medical records. These are -- this is the --
22 this is an effort that, as described by the plaintiff, was
23 undertaken in connection with the, you know, chart review
24 programs, relates to chart review programs, and these documents
25 relate to that effort or that practice, and that practice is

1 also at issue in this case.

2 **THE COURT:** You're talking about the questionnaires?

3 **MR. LEVINE:** What's that?

4 **THE COURT:** The questionnaires?

5 **MR. LEVINE:** They're queries. They're queries.

6 They're -- how would I describe them? They're communications
7 to providers about the potential addition -- or not addition,
8 to the potentially addressing diagnoses that are not otherwise
9 addressed in the medical records for a particular patient.

10 **THE COURT:** Okay. And those are -- I didn't see
11 those in -- that's in her -- in Bisguyer's categories?

12 **MR. LEVINE:** Yes. Documents -- among the documents
13 that are at issue in her category are communications between
14 HHS OIG/OEI.

15 **THE COURT:** I see.

16 **MR. LEVINE:** -- CMS about reports -- about a white
17 paper regarding the propriety of queries MAOs, you know, send
18 to providers regarding diagnoses.

19 **THE COURT:** Okay. The queries in this case, I mean,
20 what's the -- why is that parallel to what's going on in this
21 case?

22 **MR. LEVINE:** Because it's alleged that defendants had
23 a practice of pressuring providers through sending queries to
24 those providers to add diagnoses that were not otherwise in a
25 medical record during an encounter, not documented in the

1 medical record during an encounter. And so, you know,
2 encounter with patient happens, documentation takes place --
3 these are the allegations -- queries are sent, and provider
4 addends the medical record to document a condition that was not
5 in their -- in the original medical, you know, medical record.

6 **THE COURT:** So the only documents you're thinking in
7 Bisguyer, those 40' -- 54 documents are documents regarding the
8 white paper on queries?

9 **MR. LEVINE:** Well, there are two types of -- Bisguyer
10 talks about two types, two types of documents. They're reports
11 concerning the, quote, "the evaluations OEI conducted of the
12 Medicare Advantage program relating to two topics, chart review
13 and health risk assessments." The evaluations -- "the
14 evaluations and corresponding reports at issue focus on the
15 alleged misuse of these tools by MAOs to fraudulently inflate
16 diagnoses and revenue from the MA program."

17 **THE COURT:** But I thought it's a very -- what you're
18 talking about is a much more focused inquiry about queries, not
19 broadly chart reviews and those things.

20 **MR. LEVINE:** Well, these -- we -- again, we don't
21 know what these reports have in them. But, yes, we are talking
22 about reports related to the propriety of chart reviews, to the
23 standards associated with chart reviews. Chart reviews, again,
24 have not been taken completely out of this case. They're in
25 the complaint.

1 **THE COURT:** Okay. I understand.

2 I'm just saying as to those that you think are actually in
3 the complaint, queries you think are -- the abuse of queries
4 the government asserts is in the complaint, not one of those
5 ones you're worried about, well, they might add it.

6 **MR. LEVINE:** The abusive queries in the context of
7 this case is -- that is an allegation that the government
8 maintains.

9 **THE COURT:** Okay. All right. Bisguyer, what ...
10 next group of documents.

11 **MR. LEVINE:** Okay. Next group of documents, we go
12 back to Ms. Shapiro, Jennifer Shapiro.

13 **THE COURT:** Uh-huh.

14 **MR. LEVINE:** And these are documents related to what
15 is called an HHS proposed rule and a CMS RADV rule. And the
16 HHS proposed rule itself relates to chronic medical conditions,
17 which is a -- an, you know, important issue in this case,
18 because how -- how MAOs, including the defendants, determine
19 whether their enrollees, their patients that their providers
20 see, have a chronic condition is a -- is one of the core issues
21 in the case in the sense that one of -- the allegations are
22 that some of the -- to use our example before with queries,
23 that the providers were being queried about not including
24 certain chronic conditions in their documentation. Okay?

25 So take a chronic condition that, you know, that we're all

1 probably family with one way or another, diabetes. That is a
2 condition that may have -- you know, that how you actually
3 document and when you document that condition would be of
4 relevance to this case. And this proposed rule relates to how
5 MAOs, how, you know, determine whether to code -- to document
6 that condition. So ...

7 **THE COURT:** So just to finish the thought, because
8 the allegation is that Kaiser did it improperly. That is to
9 say they caused providers to add codes about chronic conditions
10 in supplements after the fact, which were not apparent at the
11 time of the evaluation, or whatever the standard is. Is that
12 the allegation?

13 **MR. LEVINE:** Yes, Your Honor.

14 **THE COURT:** Okay.

15 **MR. LEVINE:** So these are not -- it's not like we're
16 casting a broad net here. There were many, many documents that
17 were on the privilege log that where we're not seeking them.
18 Okay. We're seeking them where the subject matter as described
19 by the declarants, albeit in limited fashion, albeit in
20 inadequate fashion, okay, is a subject matter that is at issue
21 in this case. The exact degree to which, you know, the exact
22 level of importance, the exact relevance of the communications
23 at issue we can't speak to. We don't see it. But we see that
24 this is about chronic conditions, and that is a key issue in
25 the case, so that's why we're targeting it.

1 The same goes with the RADV rule, which is the other
2 category of documents, subcategory of documents within this
3 category we're talking about here in the Jennifer Shapiro
4 declaration. And, you know, RADV audits focus on codes that
5 are material to the, you know, to the payments in this case, to
6 payments that the government makes to MAOs. And a RADV rule,
7 the manner in which audits are conducted, the codes that the
8 RADV rule focuses on, that the RADV audits focus on, speak to
9 what conditions the government thinks are material to their
10 payment, to the payments they make.

11 So when you have communications about the generation of a
12 RADV rule that's not just any old rule -- RADV is an essential
13 issue in this case, RADV audits, risk adjustment data
14 validation audits, okay, these are audits that are validating
15 whether risk adjustment submissions for those who are subject
16 to the audit were proper, whether there was an overpayment that
17 was generated based on an improper submission. That's what
18 this is focused on. This is the RADV rule that these documents
19 relate to, and therefore we would contend that they're
20 important. And again, relative to the low harm, what we would
21 contend is very low harm at issue here, especially given the
22 fact that many of these documents are quite old, and as old as
23 2008, and we have a protective order in place in this case,
24 both factors that in *McKesson* were considered important.

25 **THE COURT:** Yeah. What about -- that's two

1 categories in the Shapiro declaration, Category 1 and 3. What
2 about Category 2?

3 **MR. LEVINE:** We -- sorry, I don't know that our
4 categories are fully aligning. Are you ...

5 **THE COURT:** You divide it into documents -- manual
6 revision communications, draft of manual chapters, manual
7 spreadsheet and briefing papers.

8 **MR. LEVINE:** I believe that's the one we talked about
9 at length.

10 **THE COURT:** Okay.

11 **MR. LEVINE:** That's the Medicare Managed Care Manual,
12 Chapter 7, the two sentences versus the whole, you know,
13 chapter part of our conversation. If you'd like, I can recount
14 the four categories just so we're aligned on what they are.

15 **THE COURT:** Well, I've got the Shapiro categories,
16 and I think we've covered those. We've covered the Brissette
17 category, covered the Bisguyer category.

18 **MR. LEVINE:** We have.

19 **THE COURT:** Okay. Well, let me hear from the United
20 States on their statement about the importance of these various
21 categories of documents.

22 **MR. DYAL:** Sure. We're going back to, I think we've
23 covered the Brissette declaration categories. Those are ones
24 that we have informed Kaiser that they do concern the ICD
25 guidelines at issue in this case.

1 And again, just to reiterate that this case is about
2 Kaiser's violation of specific provisions of the ICD
3 guidelines, not the ICD guidelines as a general matter. And we
4 have been very clear with Kaiser about the provisions of the
5 ICD guidelines that we allege that they violated as forming the
6 basis for our claims in this case, which is the requirement
7 that all conditions coded have to require -- have to coexist at
8 the time of the visit and require/effect care, treatment or
9 management, and that is the provision that they violated
10 through their addenda practices, where Kaiser consistently --

11 **THE COURT:** I'm sorry. You're not alleging, the
12 government is not making a claim for a violation of any other
13 ICD guideline?

14 **MR. DYAL:** No. They've taken issue with our
15 inability to stipulate that we're never going to reference any
16 other requirement at any other point in this case to somehow --

17 **THE COURT:** I'm not asking you that. I understand
18 that problem.

19 **MR. DYAL:** Okay.

20 **THE COURT:** I understand that problem. But I'm
21 not -- I want -- you're saying for the record the government is
22 not claiming that Kaiser violated any other ICD guidelines
23 other than the one you just cited.

24 **MR. DYAL:** There are two others that are immediately
25 adjacent that I'm not prepared on the record to say. We've

1 included them likewise in the same interrogatory response that
2 we provided in response to Kaiser's direct question on this
3 subject, and so I think that's what I'll stick to on the record
4 here.

5 **THE COURT:** So with that limitation my statement is
6 correct, that's the assertion.

7 **MR. DYAL:** Yes, yes.

8 **THE COURT:** Okay. So when you say you agree, the
9 things -- the Brissette documents that you are saying are
10 responsive -- and I'm ignoring the nonresponses, so I guess the
11 Brissette documents, those are about the ICD guidelines at
12 issue in the case. Is that right?

13 **MR. DYAL:** Correct, correct.

14 I can't speak to all 163. I -- we've told defendants
15 which ones are responsive. It's either all of them or very
16 close to all of them.

17 **THE COURT:** Okay.

18 **MR. DYAL:** As provided in the exhibits the defendant
19 provided to the Court.

20 **THE COURT:** Okay. That was his -- what about his
21 point about the Bisguyer documents?

22 **MR. DYAL:** The Bisguyer, I think Kaiser's argument is
23 mainly relying on a -- an overgeneralization as to what the
24 term "chart review" means, and they're resting entirely too
25 much about the similarity between that term, as it's used in

1 the -- or that's the same term used in these reports as Kaiser
2 used internally to describe its own very different practice
3 that's actually what the United States is -- describes as part
4 of its allegations in the complaint. Your Honor is correct
5 that the reports address this practice by other MAOs that the
6 United States also has active cases about, about this practice
7 of reviewing charts, medical records, and only adding codes
8 that were -- that it found that could be supported but not
9 deleting previously submitted codes that it found were not
10 supported in the record.

11 Kaiser's chart review practices are entirely different
12 because it had another trick up its sleeve because of its
13 unique structure in terms of employing its own doctors. It
14 could just query its doctors and say, hey, we really want to
15 submit this condition so we can get paid for this this year.
16 Too bad we can't find it in any of your records for this year
17 because you didn't actually address it in any of the visits,
18 can you just add it via an addendum to a visit record for this
19 year.

20 So when Kaiser was reviewing its charts in a way that at
21 least colloquially would be respons' -- you know, called chart
22 review, it was doing so with a very different purpose and
23 giving rise to different, a different fraudulent scheme than is
24 discussed in the OEI reports and that the United States is not
25 alleging here in this case.

1 And so there also, that goes to the relevance of queries
2 that -- the queries that other MAOs conduct in the main are
3 going to be asking for clarifications about aspects of, you
4 know, again, doctors that they don't employ, you know, what
5 does this mean in this medical record, et cetera. They're not
6 going to be essentially telling doctors to amend their medical
7 records after the fact in the way that Kaiser does.

8 **THE COURT:** Well, how do I know that?

9 **MR. DYAL:** How do you know that the other -- that
10 these documents --

11 **THE COURT:** How do I know the documents -- yeah, how
12 do I know that one of the abuses that people you put queries to
13 is trying to directly or indirectly influence providers to add
14 codes? I assume that's actually what they're trying to do, and
15 that's why it's objectionable.

16 **MR. DYAL:** That may well be.

17 We're not -- I mean, to the extent that those documents
18 then discuss that type of use of queries to encourage -- the
19 documents at issue discuss using queries to ask doctors to add
20 stuff that had nothing to do with the visit in violation of the
21 ICD guidelines at issue in this case, we would have told Kaiser
22 that they were responsive to those more central requests to
23 this case. Kaiser has this broad request for standards
24 regarding queries as a general matter that these documents are
25 responsive to, and they haven't provided specific evidence --

1 sorry, Your Honor. You can go ahead if you ...

2 **THE COURT:** So I guess these documents, the ones that
3 are the Bisguyer documents, none of those concern using queries
4 to add codes?

5 **MR. DYAL:** After the fact via addenda? No.

6 **THE COURT:** Well, at all.

7 **MR. DYAL:** Well, I don't want to -- I just don't want
8 to misspeak to Your Honor.

9 The goal of queries would be, could be to get a
10 clarification of something in the medical record to -- in order
11 to be able to submit something to CMS as supported by something
12 in the existing medical record.

13 **THE COURT:** No, I understand there's legitimate uses
14 for all these things. The question is illegitimate uses. And
15 you didn't have a white paper report on queries because there
16 was no abuses. My question is, is there nothing in any of
17 these documents about the abuse of queries to get people to add
18 codes that weren't justified?

19 **MR. DYAL:** That weren't -- I can't say that there's
20 nothing in them about getting people to add codes as a -- that
21 weren't justified as a general matter.

22 **THE COURT:** But the documents within Bisguyer that
23 are about queries are what? Is that a limited set, or is that
24 all of them?

25 **MR. DYAL:** They're -- it's a limited set.

1 **THE COURT:** And is it just the ones about -- okay.

2 **MR. LEVINE:** Your Honor, for sense of scale, the
3 only --

4 **THE COURT:** Hang on a second. Just don't interrupt.
5 You can talk -- I know there's 54 Bisguyer documents.

6 Okay. You want to respond to his comments about the other
7 couple categories of documents?

8 **MR. DYAL:** Sure.

9 **MR. LEVINE:** Sorry.

10 **THE COURT:** No, I'm talking to the counsel for the
11 United States.

12 **MR. LEVINE:** Go ahead, sorry.

13 **MR. DYAL:** Sure.

14 So there's -- the remaining categories are both within the
15 Shapiro declaration. I'll go with the proposed rule documents
16 first.

17 This reference to diagnosing patients with chronic
18 conditions, I mean, the mention of chronic conditions that
19 Kaiser is referencing comes in a section called "Special
20 Supplemental Benefits for the Chronically Ill." It has nothing
21 to do with coding chronic conditions under the ICD guidelines,
22 much less the chronic conditions, the ICD guidelines at issue
23 in this case. Kaiser doesn't have any discovery request
24 targeting this publicly available provision. It's just
25 incidentally responsive. Like these documents are not

1 responsive because they contain this provision of the rule,
2 they're responsive or family members of responsive documents,
3 because, again, they discussed the sentences of the Medicare
4 Managed Care Manual that Kaiser has targeted in its discovery
5 requests. And so I think that's a good segue into I still
6 haven't really heard an argument from Kaiser as to why the two
7 sentences in the Medicare Managed Care Manual that it targeted
8 through its discovery request, why documents related to those
9 provisions are relevant to this case.

10 The Court ruled as a matter of law on the motion to
11 dismiss that both as a matter of contract and regulation, that
12 sentence in the Medicare Managed Care Manual that Kaiser was
13 required to comply with the ICD guidelines is legally binding.
14 From our perspective that's no longer an issue in this case.
15 It's been decided as a matter of law. Now, whether documents
16 about the Medicare Managed Care Manual discuss the specific ICD
17 guidelines provisions at issue in this case is another matter,
18 but that's a -- we've told Kaiser which those might be, and
19 it's at most a tiny subset of the more than 200 documents at
20 issue in that category.

21 **THE COURT:** In which category?

22 **MR. DYAL:** In the Medicare Managed Care Manual
23 category.

24 **THE COURT:** All right.

25 **MR. DYAL:** And it's not in any of the proposed

1 regulation categories.

2 **THE COURT:** So the documents that Shapiro's talking
3 about, she's talking about regarding the chronic conditions,
4 has nothing to do with how to properly determine whether
5 patients have a chronic condition?

6 **MR. DYAL:** It -- the rule does govern how to
7 determine whether patients have a chronic condition in a
8 different context, like for determining their eligibility for
9 special supplemental benefits.

10 **THE COURT:** Well, then I don't know why it matters
11 the context. You're allowed -- there's a proper way to
12 determine if someone has a chronic condition, I assume. Does
13 it matter that it's for these supplemental benefits, or for its
14 basic benefits or whatever it is?

15 **MR. DYAL:** I can't speak to whether there's a
16 distinction there.

17 **THE COURT:** Okay. So then you can't make the
18 distinction. Right?

19 **MR. DYAL:** Yes.

20 **THE COURT:** So the question is ... okay.

21 **MR. DYAL:** I think the question, you know, to the
22 extent, you know, to really get at relevance, is to the extent
23 documents regarding this specific provision of, again, a very
24 lengthy proposed rule, to the extent documents specifically
25 discuss the coding -- related to that rule discuss the coding

1 of chronic conditions, you know, in relation to the provision
2 of the ICD guidelines we allege Kaiser violated, you know,
3 again, we would have told Kaiser that as part of the meet and
4 confer process, and that's just not the case here.

5 I understand that Kaiser might be wondering -- you know,
6 we still think it's a stretch, oh, but this discusses chronic
7 conditions, maybe documents about this provision of the
8 proposed rule discuss, you know, whether chronic conditions
9 have to require/affect patient care, treatment or management,
10 since that's what the ICD guidelines say. But that was, you
11 know, part of our meet and confer process was saying, you know,
12 these documents don't -- aren't responsive to that discovery
13 request. They're being pulled in for other reasons.

14 **THE COURT:** But there are some that directly concern
15 the ICD guidelines at issue.

16 **MR. DYAL:** None of the documents regarding the
17 proposed rule concern the ICD guidelines at issue.

18 **THE COURT:** Any of the Shapiro documents?

19 **MR. DYAL:** A Shap' -- a small subset. And I
20 apologize there were subcategories of categories.

21 **THE COURT:** Right.

22 **MR. DYAL:** A small subset of the Medicare Managed
23 Care Manual documents --

24 **THE COURT:** Got it.

25 **MR. DYAL:** -- discuss the provision, the specific ICD

1 guidelines provisions. I believe it's like -- it's five.

2 **THE COURT:** Okay. Anything else you wanted to
3 respond to?

4 **MR. DYAL:** I believe that covers the four categories,
5 Your Honor.

6 **THE COURT:** Okay. We've reached the end of my
7 questions. Anyone else want to say anything? I'll start with
8 the United States and then go to counsel for Kaiser.

9 **MR. DYAL:** This is more forward looking.

10 We're going to have additional deliberative process
11 privilege assertions in the main as a result of additional
12 discovery requests that Kaiser issued in August and we just
13 reached an agreement about a couple weeks ago as to their
14 scope. We don't have any view -- like we're -- you know, of
15 course, you know, the Court's decision on these specific
16 documents is going to provide a lot of guidance as to properly
17 asserting the privilege, what the Court views as relevant,
18 et cetera, and we're going to take those learnings to heart,
19 you know, to the extent we can. But what we can't do is simply
20 say -- and this is a direct result of the experience in
21 *Poehling* is, oh, well, the Court, you know, ruled as to these
22 specific documents. It's undoubtedly the case that they're
23 going to rule -- that the Court will rule as to, you know,
24 these future documents in the same way, and therefore we don't
25 need to have a dispute about it. That's just not some -- you

1 know, given the, you know, differing views among defendants
2 that we've -- basically I'm just making the Court aware of
3 this. I don't have a direct solution to the problem now. But
4 absent a court order, the United States isn't, you know,
5 notwithstanding our views as to waiver given the different
6 decisions the courts have raised about waiver, we're not going
7 to be in the position to produce additional deliberative
8 documents absent a court order.

9 **THE COURT:** Well, let me -- I have two solutions for
10 that. One is I'm not sure you're right. I think you're
11 actually probably wrong to take that position. I think once
12 you have guidance as to exactly what is and is not deliberative
13 process privilege, you have a Rule 11 obligation to take that
14 into account. You can't just say --

15 **MR. DYAL:** Yes.

16 **THE COURT:** -- I got to continue to assert it even if
17 I know that the government -- the judge is going to overrule.
18 You can't do that --

19 **MR. DYAL:** Yes.

20 **THE COURT:** -- under Rule 11, number one.

21 Number two is maybe there's a way to stipulate to an
22 order.

23 **MR. DYAL:** Okay.

24 **THE COURT:** Maybe you could figure out a way. I
25 mean, there are various provisions of the evidence code that

1 come with stipulated order possibilities. You could come with
2 some other creative way to do a stipulated order as to the
3 things you think that you're not going to -- you don't have a
4 reasonable chance of prevailing in front of me on.

5 So I would encourage you to explore those, because I don't
6 want to rule twice on the same kind of thing.

7 **MR. DYAL:** Yeah, that's exactly why I brought it up
8 today, Your Honor.

9 **THE COURT:** Good. That's my guidance.

10 Okay. Mr. Levine, did you want to say anything further?

11 **MR. LEVINE:** Your Honor, I'll address that last
12 first, and then one or two other comments.

13 With all due respect to the Rule 11 obligations, which I
14 don't disagree with, in *Poehling* many of the documents there
15 was no claim made whatsoever. There wasn't even -- they never
16 run a log and then withdrawn. They were not made at all. Many
17 documents that were produced after that order were produced
18 without any regard, without any indication that there was a
19 claim of DPP over them. So when they are voluntarily produced
20 in that context, as every document found in that order was
21 whether or not it related to that order, it would be a --

22 **THE COURT:** Some -- well, that's not entirely
23 correct. Some had assertions, and many did not.

24 **MR. LEVINE:** Correct.

25 I'm saying many doc' -- I am speaking more broadly at

1 first, and then I'll get a little narrower.

2 There were many documents produced in that case after the
3 order that had nothing to do with the order. Some documents
4 were produced after that order that the government now says, we
5 wouldn't have produced these but for that order. We don't know
6 what those documents are because they never asserted DPP over
7 them, over those documents.

8 Then there was some small number of documents, okay, a
9 smaller number in terms of the ones at issue here -- and I can
10 give you the exact numbers in a moment -- but that actually
11 were on a log, not addressed by the order, but then withdrawn
12 from the log, okay, and produced. So there was a claim made
13 over them of DPP. It was withdrawn, and the government says,
14 we withdrew it because we got guidance from the Court. So
15 those are a different category.

16 And to give you a sense of the scale here, we are
17 seeking -- the documents we, the defendants, claim where the
18 waiver applies to it are 262 documents. Only 24 of those were
19 produced in direct response to the order or addressed by the
20 order specifically. Okay? 172 of those were not addressed by
21 the order and also were never logged. I believe the number if
22 you do the math on that is 66 were actually not subject to the
23 order but were logged and then taken off the log and produced.

24 So maybe, you know, to reconcile with what Your Honor said
25 in terms of the Rule 11 obligations, that could apply to the

1 ones where DPP was claimed and then you're withdrawing it. But
2 to never claim DPP in any regard and then years later say, oh,
3 our fault, you know, we meant that some percentage --

4 **THE COURT:** Well, going forward he can figure -- you
5 could figure a way through that. You can log them all and you
6 could have a discussion about it.

7 **MR. LEVINE:** Correct, correct. Going forward we
8 could do that, and Your Honor, you know, gave us some guidance
9 on a potential solution to a stipulation. Maybe that would
10 work, as well.

11 I'm just saying in terms of the waiver argument as it
12 applies to the documents at issue in this motion, okay, the 262
13 documents that were produced in *Poehling*, 172 of 262, there was
14 never a claim of privilege in any way, shape or form made over
15 those documents in *Poehling*, they were just produced. And it
16 is only now that the government says, oh --

17 **THE COURT:** No, no, no. We're not arguing about
18 *Poehling*. We're arguing about what to happen next in this
19 case.

20 **MR. LEVINE:** Sorry.

21 Okay. Last thought, Your Honor. We've spent a lot of
22 today talking about the relevance or importance of the
23 documents relative to the harm. That's obviously an important
24 inquiry. One of the reasons defendants have been somewhat
25 handicapped in that analysis is because the first part, the

1 procedural part. We're not sticklers here. Okay? We reduced
2 the number of documents at issue from over 2000 down to 668.
3 But as to those 668 we have declarations that are inadequate,
4 and we are unable to fully assess the importance of the
5 documents based on those descriptions. We've assessed them as
6 best we can, and that's why we're before Your Honor. But
7 the -- that is, in part, why those requirements are there.

8 And so with that, you know, it's the combination of both
9 those issues. We think both weigh in favor of disclosing the
10 documents that are before Your Honor, the 688. But they're
11 independent inquiries, and one handicaps the inquiry into the
12 other at least on our side of the fence.

13 **THE COURT:** I'm well aware of that. That often
14 happens in the privilege context. Always happens in the
15 privilege context.

16 Okay. Well, thank you all very much. We'll take this
17 under submission. It's going to take me a little bit to sort
18 through all the additional good information you've given me
19 today and figure out how that fits into our tentative thoughts
20 about it. Then we'll get something out. I want to get it out
21 relatively soon so you have it as guidance for the future,
22 because you've got ongoing issues coming up. And we do have a
23 discovery cutoff sometime next year, middle of the year maybe.
24 So there's some urgency to it. But this will take a while to
25 get out, so it won't be this week and it certainly won't be by

1 Thanksgiving.

2 Thank you.

3 **VOICES:** Thank you, Your Honor.

4 **THE COURTROOM DEPUTY:** Court stands in recess.

5 (Proceedings concluded at 11:28 a.m.)

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8 **CERTIFICATE OF REPORTER**

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

11 DATE: Wednesday, December 4, 2024

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15 Stephen W. Franklin, RMR, CRR, CPE
16 Official Reporter, U.S. District Court

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