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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In Re: In the matter of)
the search of UDF, 1301)
Municipal Way, Grapevine,)
Texas 76051)
_____))
) CASE NO. 4:21-mc-00016-O
)
)
) NOVEMBER 23, 2021

VOLUME 1 of 1
TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE REED C. O'CONNOR
UNITED STATES DISTRICT COURT

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P R O C E E D I N G S

November 23, 2021

oOo

THE COURT: Next case is 4:21-mc-16. Who is here for this case?

MR. PELLETIER: Your Honor, Paul Pelletier. I'm here with Stewart Thomas, local counsel on behalf of UDF. Corporate representative is James Keeney, who is the chief compliance officer with UDF, is also present.

MR. BRASHER: Good afternoon, your Honor. Doug Brasher along with Stephen Fahey.

THE COURT: Okay. All right. Well, you called the meeting. So come on up here and tell me what you want this status conference for.

MR. PELLETIER: Yes, your Honor. We filed a motion, I think it was back in August, asking for the return of all of our privileged documents.

THE COURT: Uh-huh.

MR. PELLETIER: We had a hearing in October. October 27th to be exact. At that hearing, we presented the case to the magistrate. After that hearing, as I'm sure this Court's very aware, the magistrate transferred it to this district and this Court, for whatever this Court wanted to do. I requested a status conference. We're here because the Court set it for hearing on my status conference, and I

1 thank you for that.

2 So we're asking for the return of the privileged
3 documents that were seized by the government in September --
4 excuse me, in February of 2018. The basis for that request
5 is is that we asserted privilege over these documents within
6 about seven days of the search and we were told at that time
7 that the government --

8 THE COURT: You asserted, you gave them a list of
9 privileged documents --

10 MR. PELLETIER: Of privilege --

11 THE COURT: -- asserting privilege over all the
12 terabytes of documents?

13 MR. PELLETIER: No. No. That's correct. That's
14 correct. All we could do at the time, given that 43
15 terabytes of information that had been seized.

16 During that period of time we continued to access
17 our documents at FBI in order to run our business; it was an
18 active, ongoing business. We continued to do that.

19 In March of 2019, excuse me, January of 2019, we
20 requested from an earlier 41(g) in Dallas to actually get
21 back our documents, because we needed to file our financials
22 and continue to run our business by continuing our loan
23 practices. You need original documents for those.

24 We got back 104 documents on that day. And on the
25 day we filed it, unbeknownst to us, the prosecution team,

1 AUSA, his name was Nicholas Bunch who is no longer with the
2 office, he went in there and started looking -- we didn't
3 know this at this time -- went in there and started looking
4 through the documents before they had been cleared by the
5 privilege team. Went in and looked at four executives'
6 offices full of documents before the privilege team had
7 cleared it. We were notified of this two days before our
8 hearing on October 27th.

9 He looked at approximately 130 boxes of documents
10 that had not been cleared for privilege. As a matter of
11 fact, at the time, we didn't know it either, there hadn't
12 been an attorney assigned to the team for more than two
13 years.

14 So at the hearing we asked for those documents --

15 THE COURT: Let me just stop you there.

16 MR. PELLETIER: Sure.

17 THE COURT: Because I've read the docket and I've
18 read the transcript of the hearing. And so I know about the
19 two days before and I know your supplemental briefing.

20 It seems to me the standoff here is who's going to
21 determine whether these documents are privileged. However
22 many truckloads of documents are not privileged.

23 MR. PELLETIER: Uh-huh.

24 THE COURT: And they've done some sort of search
25 with these names, it appears, and they've hit on some number

1 of documents, and I don't remember the number.

2 MR. PELLETIER: 7.4 million.

3 THE COURT: Okay. So some 7.4 million documents
4 are triggered by this list of names that you've given to me.
5 So do you contend that all 7.4 million of those documents,
6 as an officer of the Court, are privileged?

7 MR. PELLETIER: Oh, I doubt it. I doubt it.

8 THE COURT: Okay. Do you think they are in a
9 position to determine whether those documents are
10 privileged?

11 MR. PELLETIER: They are not in a position to
12 determine if those documents --

13 THE COURT: Okay. Well, then, they have those
14 documents, you need to go through those documents and you
15 need to determine which ones are privileged and they need to
16 turn those over to you immediately.

17 MR. PELLETIER: Well, your Honor, the way it
18 normally happens --

19 THE COURT: You don't have to repeat everything
20 that you've said in your writing and everything you've said
21 in the courtroom.

22 MR. PELLETIER: Okay. Fair enough. There's two
23 sets of documents. There's the electronic documents and
24 then there's the physical documents. All right.

25 So there's physical documents that have already

1 been, for lack of a better word, rooted through by the
2 prosecution.

3 THE COURT: Shouldn't you be asking in this
4 miscellaneous case, is the best way to do it, shouldn't you
5 be asking me to sanction some of these people?

6 And if it's costing you guys a bunch of money to
7 have to go through these documents because these guys didn't
8 do what they were supposed to do to prevent that from
9 happening, shouldn't these guys have to compensate you for
10 that?

11 But I find it very difficult that I'm going to ask
12 these guys to look at these documents and determine, since
13 Greenlaw's name is going to be hit on several millions of
14 these documents, to determine which ones of those documents
15 Greenlaw is providing legal advice to versus Greenlaw is
16 engaging in some commercial transaction.

17 MR. PELLETIER: Greenlaw's name was not on that --

18 THE COURT: Whomever. Whomever. I don't care
19 whose name it is. That's just an example.

20 MR. PELLETIER: I get it. I get it completely.

21 THE COURT: Okay. Well, don't belabor the record.
22 If you get it, then don't correct me.

23 MR. PELLETIER: No. No.

24 THE COURT: Take into account what I'm saying and
25 then tell me why I'm wrong.

1 MR. PELLETIER: I'm not trying to belabor the
2 record.

3 What I'm trying to say, sanctions? Sure. What
4 form do those sanctions come in?

5 THE COURT: So about money damages, right?

6 Whoever, several years ago who didn't follow -- I
7 know he's new -- but whoever it is who didn't follow this
8 process several years ago, that apparently, according to you
9 and according to the manual, is crystal clear and everybody
10 does it and nobody deviates from it, and everybody tells the
11 magistrate judge, we're going to seize privileged documents,
12 please let us do it and we have this in place.

13 But whoever didn't do that, clearly didn't do
14 that, why shouldn't they be on the hook for paying whatever
15 consequential damages are coming about for their failure?

16 MR. PELLETIER: All right.

17 THE COURT: Now, maybe the law doesn't allow me to
18 do that. I don't know.

19 MR. PELLETIER: Sanctions come in two forms,
20 Judge, right?

21 Sanctions come in one form of monetary, what it's
22 going to cost. And also sanctions come in another form is,
23 if the prosecution did breach the privilege, and we don't
24 know because we haven't seen the stuff yet --

25 THE COURT: Yes. Yes.

1 MR. PELLETIER: So if they have, it has Fifth,
2 Sixth, and Fourth Amendment issues as well. And so, as you
3 know, we have a trial coming up in the very near future, and
4 I don't want to be telling the Court, Judge, we're still
5 looking for the documents to determine what the Fourth,
6 Sixth and Eighth Amendment -- excuse me, Fourth, Fifth, and
7 Sixth Amendment issues are.

8 So in order to do that, I think the remedy is
9 different. One, I think because they've waited five years
10 and because the Fifth Circuit says, four years is too long,
11 give them back. I don't want --

12 THE COURT: But they said give back the documents
13 that you have identified as privileged?

14 MR. PELLETIER: No.

15 THE COURT: Well, then why did they draw a
16 distinction between the law office of the Allen Brown case
17 in their opinion?

18 MR. PELLETIER: Because in this case, what
19 happened --

20 THE COURT: No. No. No. In that case --

21 MR. PELLETIER: Yes.

22 THE COURT: -- in the opinion that you are relying
23 on.

24 MR. PELLETIER: Uh-huh.

25 THE COURT: Why did the Fifth Circuit draw a

1 distinction between why the Allen Brown case was different
2 than the Harbor case?

3 MR. PELLETIER: I think two reasons: One, because
4 the Fifth Circuit, for the first time that I'm aware of,
5 found a privacy -- a constitutional privacy interest in
6 those documents that didn't exist in the case law before.

7 THE COURT: Well, but for sure one issue is, they
8 said, in the Allen Brown case, they failed to identify
9 privileged documents.

10 MR. PELLETIER: Uh-huh. Right.

11 THE COURT: That was a difference between the
12 Allen Brown case and this Harbor case where the claimant
13 identified privileged documents and the government continued
14 to hold those documents. And the Fifth Circuit says, you
15 can't do that. There's too much harm in disregarding the
16 privacy interest in these documents.

17 MR. PELLETIER: I understand that. There's two
18 sets of privileged documents in the Harbor Health Care case.
19 The one set, if you remember, the Court said, let's do a
20 test run -- the district court says, let's do a test run.
21 That test run produced 3,223 emails of which the Harbor
22 Health Care said are privileged.

23 There were still laptop computers, hard drives,
24 reams -- I think they said 3.7 terabytes of information that
25 still had not been looked at at the time of hearing at the

1 Fifth Circuit that still had not been evaluated for
2 privilege.

3 We have the same problem here, Judge, because
4 we've identified -- to the extent that we've looked through
5 14 boxes of Melissa Youngblood's, we've actually identified
6 privileged documents, and we did that three years ago. They
7 just gave them back last week. We have those.

8 But the terabytes of the information, we have, as
9 the Court said, we have these seven million documents, and
10 then we have the hundred and whatever number of boxes that
11 are still at the FBI that we know have privileged
12 information in them because they, at least when they looked
13 through it without a taint team, identified some.

14 There's no way for us to figure out, number one,
15 what those are without actually getting the boxes back and
16 being able to look at them, number one.

17 And number two, to determine what the infection of
18 the criminal case is, the prosecution team having looked at
19 those privileged documents.

20 So I think there are two different problems. And
21 I think that in Harbor Health Care, they didn't address,
22 really, what about the 3.5 terabytes -- 3.23 terabytes of
23 information that nobody has looked at yet?

24 The Court was very clear: Whatever is privileged,
25 give it back. Four years is too long. Again, I agree with

1 the Court, there's the tension now of inequity, how do we
2 look through 7.5 million that they sat on for five years?

3 And now the burden is on me while I'm getting
4 ready for a criminal trial to figure out what is privileged
5 and what's not? I know it costs money. And quite frankly,
6 I'm not asking the Court for that sanction.

7 The sanction is really time. Right? Do I have
8 time to do that to protect my client's interest? And what I
9 would suggest to the Court of those 7.5 million, 7.4
10 million, just destroy the originals. They don't need them
11 for trial anyway. Just destroy the originals; that solves
12 that problem.

13 They've given us, last week on October 28, they
14 gave us a hard drive with all those 7.4, I think we're done.
15 If the Court orders them to destroy them, which I don't
16 think they intend on using them anyway, then I think we've
17 solved that problem and we don't have to worry about
18 sanctions or anything like that.

19 As it relates to the physical documents, I need to
20 look at them. There's two batches. There's about 600
21 boxes. There's the 140 -- estimate it's about 120, 140 that
22 they actually looked at without a privilege team.

23 What I would like the Court to do is order them to
24 give those to us so that we can look through them, and I
25 don't have to tell the Court, I didn't have time to do it,

1 right? Turn those documents over to us.

2 We will promise that we're not going to destroy
3 anything, but I need to look through them in all due haste
4 to find out what privileged documents they had access to.
5 That's what I would ask the Court.

6 THE COURT: Okay. Very good.

7 Okay. What about these 7.4?

8 MR. BRASHER: Okay. So I think I need to make a
9 correction. The 7.4 million documents that hit on the UDF
10 supplied search terms, those are on a hard drive. I have
11 five hard drives here, one for each of the four criminal
12 defendants, plus one for UDF. I've offered to return them
13 as of October 28th.

14 THE COURT: The question though is, are you
15 keeping your own copy or your own version, so the originals?

16 MR. BRASHER: We do have a copy in our e-discovery
17 platform. And our position all along has been, if UDF will
18 tell us which ones of those are privileged, we will delete
19 those copies so that we don't have any -- any versions of
20 them anymore.

21 THE COURT: So why do you want do keep them at
22 this point?

23 It sounds to me, and I take it you're ready to
24 represent to me that your prosecution team has not looked at
25 any of those 7.4, whatever they're called, million documents

1 or terabytes, whatever they are.

2 MR. BRASHER: Correct.

3 THE COURT: Is that true?

4 MR. BRASHER: They've never had access until --

5 THE COURT: As a practical matter, why do you want
6 to keep them?

7 They're six years in your pocket at this point.

8 MR. BRASHER: Right.

9 THE COURT: No one has looked at them.

10 MR. BRASHER: I mean, if the Court were to order
11 us to turn those over right now, we'd be happy to do that.

12 THE COURT: Okay. Very good.

13 MR. BRASHER: If that would solve the problem, we
14 could do that.

15 THE COURT: 7.4 is off the table. I don't know
16 whose they are, give to whoever is entitled to it, your
17 discs, and then you destroy your 7.4.

18 All right. Now, where are the 150 boxes of
19 documents? Roughly 100 to 150, where are those?

20 MR. BRASHER: All of the remaining boxes,
21 whatever -- however Mr. Pelletier has tried to characterize
22 them, they're all in the FBI's possession in Dallas.

23 THE COURT: All right.

24 MR. BRASHER: We can make them -- they've always
25 been available. Mr. Barrett Howell, who was representing

1 UDF in the beginning, came over to the FBI and reviewed
2 them. They are always available. They have always been
3 available. And if counsel wants to come and review those
4 and make additional privilege calls out of those, we will
5 make those available.

6 THE COURT: Okay.

7 MR. BRASHER: That's never been a problem. We're
8 willing to do that.

9 They've also had scans of those materials. I know
10 scans are not perfect, when you get with handwritten
11 documents and other --

12 THE COURT: The scans that you are talking about
13 are segregated to these particular boxes?

14 MR. BRASHER: No. The scans of all 750-some-odd
15 boxes.

16 THE COURT: Right. But he needs to know the 150
17 that somehow breached, or not really breached, he's saying
18 that it was gone through before there was a taint team.

19 How would you describe it?

20 Was there a taint team or not?

21 MR. BRASHER: There was a taint team for the boxes
22 that were taken from Melissa Youngblood's, the in-house
23 counsel's office, those were taken by the taint team and
24 have -- the prosecution team never had access to those boxes
25 until UDF's counsel, Mr. Howell, came and reviewed those

1 boxes and tagged this stuff as privileged and that was then
2 segregated permanently.

3 The stuff that he essentially cleared, you know,
4 that he didn't claim privilege over, those were provided to
5 the prosecution team. The ones that he tagged as privileged
6 have been returned recently.

7 THE COURT: Well, you filed a notice two days
8 before the hearing before the magistrate judge in Dallas.
9 And as I read through the notice, you disclosed that you
10 have recently learned that, I guess, AUSA Bunch, and maybe
11 someone else, I don't recall now --

12 MR. BRASHER: Yeah.

13 THE COURT: -- had looked through documents that
14 they should not have looked through, because it wasn't
15 cleared by the taint team.

16 So describe for me, explain for me why you made
17 that notice, and what is the significance of that.

18 MR. BRASHER: So those boxes, as I understand it,
19 those boxes were documents that were not from Melissa
20 Youngblood's office.

21 THE COURT: Okay. And so these 100 to 150 boxes
22 that we're talking about is a Melissa Youngblood set?

23 MR. BRASHER: No.

24 THE COURT: So then why are you drawing that
25 distinction?

1 MR. BRASHER: Because, as the prosecution team and
2 AUSA Bunch was only present during one day of the five days,
3 I think that are covered by that notice.

4 THE COURT: Uh-huh.

5 MR. BRASHER: As the prosecution was going through
6 these boxes, that were from other people's boxes, came
7 across documents that they thought might be privileged.

8 Without reviewing them, without looking at them to
9 make an actual privilege call or reviewing them for
10 substance, they segregated them and never looked at them
11 again.

12 The total number of those boxes, I don't know if
13 it's 150, if that's what we're talking about, I believe that
14 that's that universe.

15 THE COURT: Okay. So the people who were
16 looking -- the government agents who were looking at that
17 universe of documents --

18 MR. BRASHER: Right.

19 THE COURT: -- 100 to 150 boxes your colleague is
20 suggesting, they looked at it, Bunch did it on one day?

21 MR. BRASHER: Yes. And then the investigative
22 agents looked at it on other days.

23 THE COURT: On other days.

24 And they, in going through those documents,
25 realized that they contain -- some of the documents were

1 privileged?

2 MR. BRASHER: No. Slight nuance. They found
3 documents, and what's been explained to me as we've
4 interviewed them is, if they came across an attorney's name,
5 Melissa Youngblood's name or any other attorney's name, they
6 immediately segregated it as potentially privileged. They
7 didn't make a privilege call one way or the other on them.

8 THE COURT: Okay. Just for my benefit, why are
9 they going through as opposed to a taint team, if there was
10 a taint team already in place?

11 Because your colleague here suggested there was no
12 taint team in place.

13 MR. BRASHER: There was. I'm not sure I have the
14 reason as to why it was done that way. What's been
15 explained to me is that it was just much easier to use the
16 physical boxes than it was to use the electronic scans of
17 those boxes, where those filter terms would have been
18 applied to them. Just the system was slow and --

19 THE COURT: But the filter terms being applied,
20 would be applied by a filter team?

21 MR. BRASHER: Right, to the electronic version.

22 THE COURT: Right.

23 And so my question to you though is, why are
24 nonfiltered team individuals then --

25 MR. BRASHER: Right.

1 THE COURT: -- looking at boxes that have not been
2 cleared by the filter team?

3 MR. BRASHER: I don't have a great answer for
4 that. And that's why I filed that notice was to let the
5 Court know that this has happened.

6 THE COURT: Uh-huh.

7 MR. BRASHER: I don't think that's best practices.

8 THE COURT: Really?

9 MR. BRASHER: It doesn't rise to the level of
10 sanctions or anything like that.

11 THE COURT: Why is that?

12 MR. BRASHER: Well, for one, I think UDF counsel
13 had access to those boxes, and he came and was interested in
14 reviewing the boxes from Melissa Youngblood's office, and
15 never made a request to view any of the other boxes.

16 And this was during a period when those boxes had
17 not been scanned yet for the electronic terms to be applied
18 to them.

19 THE COURT: So was that UDF's fault that they
20 hadn't been scanned yet so the filter team could do it?

21 Did they somehow inhibit the government's ability
22 to get those scanned to submit them to the filter team so
23 that the filter team could then clear or not clear those
24 boxes?

25 MR. BRASHER: No.

1 THE COURT: Okay. What's your point in saying
2 they hadn't been scanned yet?

3 MR. BRASHER: That they were available for review
4 and to make privilege calls on. That's what had happened
5 with Melissa Youngblood's boxes. Mr. Howell came and
6 reviewed these boxes --

7 THE COURT: So I guess what is confusing me here
8 is you seem to be indicating, at the time that AUSA Bunch
9 and his coagents went through these documents improperly,
10 although you say not intentionally or not sanctionable, that
11 it's UDF's fault that they did so. I don't think I follow
12 you.

13 MR. BRASHER: Right. I'm not saying it's UDF's
14 fault that that happened.

15 THE COURT: Or they that tap-dallied somehow that
16 allowed that mistake to occur.

17 MR. BRASHER: Well, and that's where I think the
18 case law does suggest that -- and that goes, you know, to
19 our waiver argument -- the speed with which and the
20 specificity with which they identify their privilege and
21 assert their privilege.

22 THE COURT: Well, but if they say, hey, look, you
23 guys have taken privileged documents -- you've taken all of
24 our documents. We have no documents left.

25 MR. BRASHER: Right.

1 THE COURT: You've taken them all. We're going to
2 give you a list of names and a list of terms, I don't know
3 what they gave you, some list of things and you run this
4 search, and if any of these documents are alerted because of
5 these terms, you need to put your people on hold until
6 either you determine that it's privileged or we can get in
7 and see those documents and determine they're privileged.

8 So I don't understand how that you're just getting
9 around to it. Maybe you are operating on government time,
10 to get around to it, after bankers hours doesn't apply, so
11 you hadn't scanned them.

12 So Mr. Bunch and his people are like, well, I
13 don't know whose fault this is, but we're going to look at
14 these documents. I don't find that to be waiver at all.

15 MR. BRASHER: Well, and I would just add that it's
16 the last point, which is, once there's a disagreement as to
17 privilege, how long does the privileger wait to assert --

18 THE COURT: Okay. That's fine. But you haven't
19 even identified -- you haven't even gotten the hits on the
20 150 boxes to at least segregate out some number of 150 boxes
21 that the trial team should not look at until we determine
22 that they're privileged or not privileged or the other side
23 has been able to make the case to it, that it's privileged
24 or not privileged, or we ask some judge to rule whether it's
25 privileged or not privileged.

1 As to that 150 boxes, and they have given you the
2 terms to run on that 150 boxes, and your team just hasn't
3 gotten around to it yet. And because your team hasn't
4 gotten around to it yet, your other team is impatient, they
5 want to look at it, I find -- I'll have to look at your
6 briefing more -- but the argument that they have somehow
7 waived the right to allow Mr. Bunch and his agents to go
8 through those boxes seems almost frivolous to me.

9 MR. BRASHER: The one last thing I can add on that
10 is, I don't know, I was not -- again, not part of the
11 discussions between the government and the parties when it
12 was discussing those filter terms, and I don't know if there
13 was an understanding at the time whether those would be used
14 for the electronic data or for everything, that's a question
15 I don't know the answer to.

16 THE COURT: Well, who knows then?

17 MR. BRASHER: Mr. Howell and AUSA Bunch or former
18 AUSA Bunch.

19 THE COURT: And you have not asked either one of
20 those?

21 MR. BRASHER: That precise issue I have not
22 discussed with them.

23 THE COURT: And why not?

24 MR. BRASHER: I hadn't focused on it yet.

25 THE COURT: All right. So you will get rid of

1 7.4 million, whatever those are.

2 And then, as it relates to the 150, 100 to 150
3 boxes, whatever the number is, has the filter team run those
4 documents and gotten hits or not hits?

5 MR. BRASHER: On the electronic versions, yes.

6 THE COURT: Okay. And so are you able, then, to
7 identify the hits and then pull the hard copies of those
8 documents and segregate those hard copies in the documents?

9 MR. BRASHER: Am I able to? Yes. But I think I
10 have a better, easier, faster solution, which is I've
11 already instructed the prosecution team, don't access any of
12 the boxes.

13 If you think you need something for trial that's
14 in a box, you need an original of something you already
15 have, let me know. I will go get the original. So the
16 prosecution team has never had access.

17 If, in terms of deleting it, the process the Court
18 has described is essentially what would have to be done.

19 THE COURT: Well, it's not just deleting it,
20 though. It sounds as if you have hard copies in a physical
21 box?

22 MR. BRASHER: Yes.

23 THE COURT: So you actually have it in two places?

24 MR. BRASHER: Yes.

25 THE COURT: And all I'm saying is, if your filter

1 team has run this search and has received hits, what I need
2 you to do is to identify the hits on the electronic version,
3 and I need you to pull the hard copies out of the boxes and
4 segregate those, because those are either clearly privileged
5 or arguably privileged and the balance of them are not.

6 MR. BRASHER: Well, I think the issue comes -- I
7 would disagree that they're either clearly privileged or
8 likely privileged.

9 THE COURT: Well, I said arguably.

10 MR. BRASHER: Arguably. I think that's even going
11 too far. My point is these have a filter term on them.

12 THE COURT: These what?

13 MR. BRASHER: They just have an attorney's name.
14 Most of the filter terms, if I'm not mistaken, all of them
15 are just attorneys' names or law firm names.

16 THE COURT: Yeah.

17 MR. BRASHER: So, you know, for example, if it is
18 an attorney sending a letter or receiving a letter from the
19 SEC, that is not privileged.

20 THE COURT: I understand. I understand.

21 MR. BRASHER: And I know there are some of those
22 types of documents in that set.

23 THE COURT: Okay. Well, it sounds like it's going
24 to be easy.

25 MR. BRASHER: Well, no --

1 THE COURT: I mean, right? If the SEC sends a
2 lawyer from UDF a document, that's clearly not privileged.

3 MR. BRASHER: Yes.

4 THE COURT: And so why isn't this going to be easy
5 to resolve? Because they are entitled to return privileged
6 documents. So if they are arguably privileged documents,
7 UDF's president sending a letter its law firm, they are
8 entitled to that document back immediately.

9 MR. BRASHER: Well, I agree. And so the question
10 is, how to do that?

11 THE COURT: Right.

12 MR. BRASHER: And --

13 THE COURT: And we've got a system in place.
14 You've got a list of names.

15 MR. BRASHER: Right.

16 THE COURT: And so run it against the 150 boxes,
17 pull the documents out. You are the head of the taint team,
18 I gather you get to look at it. And if it is the CEO of
19 this company writing to his law firm about legal matters,
20 you will know and you put it aside.

21 If you don't know, you can ask them. And if you
22 can't agree at that point, then you could ask me to look at
23 it.

24 MR. BRASHER: Yes.

25 THE COURT: I don't understand why we can't do

1 this.

2 MR. BRASHER: I misunderstood the Court. I
3 thought the Court was saying anything that hit on the search
4 terms would just be returned.

5 THE COURT: No. Huh-uh.

6 MR. BRASHER: Okay.

7 THE COURT: No. They are entitled to privileged
8 documents, at this point, immediately. And so you need to
9 put in place, probably either you or your team, you need to
10 put in place a process, once you get rid of the 7.4, put in
11 a process as its relates to these 150 boxes to cull out
12 those that get hit and review those documents and determine
13 if they're privileged or not privileged.

14 And then, if they are privileged, they need to be
15 returned. If there's an argument about a privilege, and you
16 can't reach an agreement, then you need to ask me to make
17 the call.

18 MR. BRASHER: And I have two issues that I need to
19 address with that. First is the sequence. I need to be
20 able to retain our copy of the electronic documents so that
21 I can know what hit the terms to know what to go look for in
22 the boxes. So I can't delete my 7.4 until I do that.

23 THE COURT: Right.

24 MR. BRASHER: The second is the question the Court
25 started with, which is, whose burden is it?

1 THE COURT: This is what I want you to do.

2 MR. BRASHER: I understand.

3 THE COURT: Okay. I understand the back-and-forth
4 that you all have done in the papers and in your last
5 hearing. This is what I want you to do.

6 MR. BRASHER: Understood. As long as I can
7 clarify that you want me to do that, despite the fact that
8 Mr. Pelletier doesn't want me to do that?

9 THE COURT: I want you, as head of the taint team,
10 to in this segment of documents that he's talking about that
11 he's very concerned about given the time crunch --

12 MR. BRASHER: Right.

13 THE COURT: -- I want you to take a list of the
14 documents that have been triggered by your search protocols,
15 and then I want you to pull the hard copies of those
16 documents, and I want you to determine whether they're
17 privileged or not privileged. Obviously privileged or not
18 privileged.

19 If they're obviously privileged, I want you to
20 return those documents to your colleague. And then let him
21 know what you don't believe is privileged and why. And then
22 if you all can't reach an agreement on that, then you or
23 they ask me to review them.

24 MR. BRASHER: Okay. And then, once that's done,
25 then we can delete the electronic versions of the 7.4.

1 THE COURT: Yes. I mean, once that's done, if
2 they are not privileged --

3 MR. BRASHER: Yes.

4 THE COURT: -- then these cases about the danger
5 of you holding privileged documents too long don't apply.
6 So then you just fall under normal search warrant protocols.

7 MR. BRASHER: Right. Okay.

8 THE COURT: Now, they have asked you to preserve
9 any communication Mr. Bunch has had with Kyle Bass or this
10 Hayman Group and that sort of thing. Have you done that?

11 MR. BRASHER: Yes.

12 THE COURT: All right. And where are those?

13 MR. BRASHER: We have them in a database. I don't
14 know where the server is actually located, but they're in
15 electronic form in our office.

16 THE COURT: And what is the quantity of documents
17 in that universe?

18 MR. BRASHER: I don't know. I would have to look
19 and update the Court on that.

20 THE COURT: Well, update me on that.

21 MR. BRASHER: That's just communications between
22 AUSA Bunch and Bass and his group?

23 THE COURT: Bass, Hayman, or about Bass and
24 Hayman.

25 MR. BRASHER: Or about?

1 THE COURT: That's what the preservation letter
2 said. Okay?

3 MR. BRASHER: Okay.

4 THE COURT: Okay. What else?

5 MR. PELLETIER: Thank you, your Honor. May I
6 suggest something maybe, maybe easier? The Court may not
7 think so, but I think it's easier.

8 A lot of the documents that were scanned, that
9 they attempted to scan, they didn't scan. And there's a
10 declaration in there from a witness who reviewed it. And
11 there's a lot of documents that weren't scanned, original
12 documents.

13 I think it might be easier with these, 100 and
14 whatever boxes, for us to be given access to them at UDF,
15 promising to not destroy anything, to actually be able to go
16 through them ourselves to identify what's privileged. I
17 think if there's an argument, no, then we could do it that
18 way.

19 The other problem that that solves is, as the
20 Fifth Circuit said, and I think other circuits have said,
21 it's the taint team actually reviewing documents and making
22 a determination as to what is privileged is a difficult
23 thing.

24 THE COURT: I agree.

25 MR. PELLETIER: Some circuits --

1 THE COURT: And you all went back and forth before
2 the magistrate judge on that.

3 MR. PELLETIER: Right. So I would prefer, and I
4 think the law prefers them not to make it privileged to you,
5 if there is a battle. I really don't think there's going to
6 be a battle, Judge, on that.

7 THE COURT: Right.

8 MR. PELLETIER: So I think the easier thing is, as
9 an officer of this Court, to take custody of these boxes
10 that they've identified. It's a specific number. It's the
11 documents in his file, FBI 302 list.

12 If they can make them available to us, it will
13 save a lot of time on everybody's part. We will look
14 through them. They have copies of the nonprivileged stuff
15 anyway. So we're not going to have an evidentiary per se if
16 something is missing, but I would prefer we make that call.

17 Again, we will give it to them or the Court and
18 say, it's not privileged, it is privileged. They can say
19 that. But that's not really why we're doing the exercise
20 anyway. Obviously, we want to get our privileged stuff
21 back, but the privilege determination is not really what's
22 critical here.

23 THE COURT: Well, it is critical as relates to
24 Rule 41, though.

25 MR. PELLETIER: Yeah. Yeah. For sure. For sure.

1 The time is what's critical to me.

2 THE COURT: I understand. But you have the boxes,
3 you have those documents.

4 MR. PELLETIER: We have a scanned copy of some of
5 them.

6 THE COURT: Okay. But they've been available to
7 you?

8 MR. PELLETIER: Oh, sure. And to the extent you
9 can search them --

10 THE COURT: Okay.

11 MR. PELLETIER: -- it's an extremely
12 time-consuming process. I will tell the Court that these
13 are documents -- this isn't just to Joe Blow attorney, that
14 kind of privilege. It's our defense in this case -- not in
15 this case, in the underlying criminal case. And there are
16 many documents like that of which I have attached to one of
17 my pleadings that's ex parte, under seal.

18 THE COURT: Okay.

19 MR. PELLETIER: Thank you, your Honor.

20 THE COURT: Well, how long is this -- the process
21 I have outlined, how long will that take? A week?

22 MR. BRASHER: Your Honor, I was just discussing
23 with Mr. Fahey how many people we can throw at this and we
24 will do this as expeditiously as we can. It's hard for me
25 to commit until I --

1 THE COURT: Get it done by next Friday. And then,
2 once that is done, once you have done that, is there any
3 reason why you could not give them these hard copies?

4 MR. BRASHER: Of the ones that we admit are
5 privileged?

6 THE COURT: No. No. No. All of them.

7 MR. BRASHER: Or -- no?

8 THE COURT: The universe of the hard copies in the
9 boxes. Right?

10 You've got hard copies of these documents in 100
11 to 150 boxes somewhere?

12 MR. BRASHER: Right.

13 THE COURT: And you've got them scanned on your
14 server?

15 MR. BRASHER: (Nods head.)

16 THE COURT: And so you're going to get the hits
17 off the server and you're going to go and you're going to
18 pull the actual documents out of the box?

19 MR. BRASHER: (Nods head.)

20 THE COURT: And that's going to be some smaller
21 universe of documents, and then you guys are going to
22 resolve these issues.

23 MR. BRASHER: Right.

24 THE COURT: And all I'm asking is, once that is
25 done, the full universe of the boxes, wherever they are, is

1 there any reason why you could not then give them back to
2 your colleague?

3 MR. BRASHER: Yes. I believe because they were
4 seized validly pursuant to a search warrant and the
5 government is using those in an active criminal case.

6 THE COURT: So they are using those?

7 MR. BRASHER: Are we still talking about the 150?

8 THE COURT: The 150, yes.

9 MR. BRASHER: Yes, they are.

10 THE COURT: Okay. All right. Well, I'll have to
11 think about that.

12 But meanwhile, we'll get the privileged, do this,
13 get it done by next Friday. Any documents that are clearly
14 privileged need to be returned immediately.

15 And any documents that there's an argument over,
16 you can ask me to look at them, and I will get it done. And
17 then I will think further about the hard copies.

18 MR. BRASHER: Okay. Thank you, your Honor.

19 THE COURT: Okay. What else?

20 MR. PELLETIER: Your Honor, Happy Thanksgiving.

21 THE COURT: Oh, yes. Thank you. Thank you, all
22 of you.

23 What else?

24 MR. BRASHER: Nothing else, your Honor. I don't
25 have anything else.

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THE COURT: Nothing?
Okay. We're in recess. Thank you.
(The proceedings concluded at 2:42 p.m.)

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REPORTER'S CERTIFICATE

I, ZOIE WILLIAMS, RMR, RDR, FCRR, certify that the foregoing is a true and correct transcript from the record of proceedings in the foregoing entitled matter to the best of my ability to hear.

Further, due to the COVID-19 pandemic, some participants are wearing masks, and/or appeared via videoconferencing, so proceedings were transcribed to the best of my ability.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

Signed this 26th day of November, 2021.

_____/s/ Zoie Williams_____
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MR. BRASHER: [81]
MR. PELLETIER: [36]
THE COURT: [117]

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