

12EVNATC Conference
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NATIONAL DAY LABORER
ORGANIZING NETWORK, ET AL,

Plaintiffs,

v.

10 CV 3488 (SAS)

UNITED STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT AGENCY, ET
AL,

Defendants.

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New York, N.Y.
February 14, 2011
3:30 p.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

MAYER BROWN
Attorneys for Plaintiffs

BY: ANTHONY J. DIANA
NORMAN R. CERULLO
-AND-

CARDOZO IMMIGRATION JUSTICE CLINIC
BY: PETER L. MARKOWITZ
BRIDGET P. KESSLER

PREET BHARARA,
United States Attorney for the
Southern District of New York
CHRISTOPHER CONNOLLY
JOSEPH N. CORDARO
Assistant United States Attorneys

ALSO PRESENT: CAROLINE E. GLICKLER, Intern

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1 (In open court)

2 THE COURT: Mr. Diana, is that you?

3 MR. DIANA: Yes.

4 THE COURT: Is that how you pronounce it?

5 MR. DIANA: Yes, your Honor.

6 THE COURT: Mr. Cerullo?

7 MR. CERULLO: Good afternoon, your Honor.

8 THE COURT: Ms. Kessler?

9 MS. KESSLER: Yes, your Honor.

10 THE COURT: Mr. Markowitz?

11 MR. MARKOWITZ: Hello, your Honor.

12 THE COURT: Ms. Glickler?

13 MS. GLICKLER: Yes, your Honor.

14 THE COURT: Mr. Connolly?

15 MR. CONNOLLY: Good afternoon, your Honor.

16 THE COURT: Mr. Cordaro?

17 MR. CORDARO: Good afternoon, your Honor.

18 THE COURT: OK. I received a letter dated February
19 11th, 2011 from everybody. I'm sorry, it seems to be a joint
20 letter from all counsel. But it's not an agreement, it's just
21 a joint update. Is that it?

22 MR. DIANA: Yes, your Honor.

23 MR. CERULLO: That's right.

24 THE COURT: I was confused. I didn't think there was
25 an agreement. But, anyhow, it's a jointly submitted letter

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1 that's an update.

2 And it seems that plaintiffs suggested a sampling
3 proposal to replace Request No. 3 of their February 2010 FOIA
4 request in the hopes of making it easier for defendants to
5 respond.

6 Defendants say the request was not practical; it was
7 too voluminous. And so plaintiffs tried again. They hired a
8 statistician to maybe come up with a sampling proposal that
9 would reduce the scope of the request, and now plaintiffs have
10 submitted a revised sampling proposal that allegedly would
11 reduce the number of records sought and get them produced
12 faster. And now they seem to request 3,000 A files by April
13 30th.

14 MR. DIANA: That's correct, your Honor.

15 THE COURT: And that would be a sample number.

16 But defendants say this still won't work because even
17 to produce 3,000 of these in, essentially, two and-a-half more
18 months would turn ICE agents into full-time document
19 responders, because it would require an agency to process 54 A
20 files every working day between now and April 30th.

21 So that's a summary. Fair summary of the request and
22 the objection?

23 MR. DIANA: Yes, your Honor.

24 MR. CONNOLLY: Yes, your Honor.

25 THE COURT: Yes? OK.

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1 And then I received a letter just a few minutes ago by
2 fax, 3:13 -- that really is a few minutes ago -- from the
3 government.

4 Have the plaintiffs even seen this 3:13 fax?

5 MR. CERULLO: They just handed it to us a few minutes
6 ago, your Honor.

7 THE COURT: Have you had a chance to read it?

8 MR. CERULLO: We just skimmed it very quickly.

9 THE COURT: Me, too. But then I skimmed it again very
10 quickly to make sure I got the idea. And I found it a bit
11 breathtaking for a couple of reasons.

12 The argument in the February 14th letter asking for a
13 stay of the Court's February 7th order is that it impermissibly
14 expands the scope of a previously filed FOIA request, and
15 that's not permitted.

16 The reason I thought it was a little breathtaking is
17 the letter refers to productions already made. And I went back
18 over the February 7th order. And for productions already made,
19 including what at that time was unclear, but that the January
20 17th production had been made or is still being made. But for
21 all the prior productions, I did not order that metadata be
22 produced for the ones that were already done. The only
23 do-overs aspect of the prior productions were spreadsheets in
24 negative format, which is absolutely something the government
25 understood from the oral argument transcript, realized would

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1 probably have to be done, because you can't search a -- you
2 can't use a database really without it, and single-file format
3 so people could tell where pages began and pages ended. But no
4 metadata was required.

5 And yet the February 14th letter seems to imply that
6 the Court is making the agency go back, after it has produced
7 thousands of records and do it all over again with metadata.

8 Very carefully, that was not what the order said. The
9 order said, I just happen to be quoting, I will not require
10 defendants to reproduce all the records with metadata, and
11 including the production for January 17th.

12 It says, The January 17th production shall be made or
13 remade, already completed in the same format that I've now
14 required for the earlier production.

15 So the metadata isn't the issue for anything already
16 produced.

17 What I guess the government is saying is that anything
18 else that's responsive from here going forward, somehow the
19 Court's order requiring metadata expands the initial request.
20 And that's impermissible under FOIA, because the metadata
21 wasn't explicitly requested. But I don't know that that's true
22 at all; it has to do with what is a record.

23 What is an electronic record in the first place, and
24 that's where the trouble comes, meaning, records were
25 requested. The government strips out the metadata, produces it

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1 in a totally useless format; and then the Court orders
2 metadata, and the government accuses the Court of expanding the
3 request. I don't get it.

4 The Court ruled that metadata is part of an electronic
5 record in the first place; several state courts have taken the
6 same position. It's all part of the record. While it's
7 certainly the better practice in civil discovery requests,
8 which the government points out doesn't control in FOIA. So if
9 it's good for the goose, it's good for the gander. If it's not
10 civil discovery, well, then, they don't have to request the
11 metadata. All they requested was the electronic record.

12 What seems to be in dispute is whether metadata is
13 part of an electronic record. Frankly, I think that's a
14 no-brainer. I think metadata is part of an electronic record.
15 One can take it out and thereby change the record and probably
16 degrade it. But it's part of a record.

17 So the request for the stay is going to fall on very
18 deaf ears.

19 The government has been terribly slow in production in
20 this case. And to think that this Court will grant a stay that
21 might last a year is out of the question. You can go ask for
22 your stay from a higher court, and I will respect their
23 decision, whatever it might be. But don't get it in your head
24 I'm going to grant this stay.

25 So while you're briefing it, and while I'm considering

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1 it, you go right forward and keep on producing. Don't count on
2 a stay, which will only cause a long delay here.

3 As far as declarations -- no, wait, I wanted more
4 comment before I get to declarations.

5 I also reviewed the transcript of the oral argument.
6 In the whole oral argument we had, which was over an hour --
7 very fine argument, well-lawyered on all sides -- the
8 government never argued what it's now arguing, that it's
9 impermissible to request the metadata now because that
10 impermissibly expands a FOIA request. You won't find that in
11 the transcript.

12 You made lots of interesting arguments, lots of good
13 arguments, but not that it was impermissible and impermissibly
14 amended the FOIA. That's clearly an afterthought. And the law
15 on reconsideration is very strict. No new arguments that could
16 have been raised and weren't raised in the district court in
17 the first place.

18 So you go ahead and move for reconsideration; but when
19 you do it, please keep in mind your obligation to follow the
20 law on what's permissible on reconsideration requests. And
21 when you're thinking about declarations, please keep in mind
22 the law, that you can't put new evidence before the Court that
23 you could have put before the Court at the appropriate time.

24 We had a lot of briefing; we had an oral argument.
25 Everybody knew the issue was so juicy.

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1 The whole point is -- and these are quotes from all
2 kinds of cases on reconsideration. The whole point is not to
3 get the Court's opinion and then plug the gaps of what you
4 could have done in the first place.

5 So I don't really -- I'm not about to hear argument,
6 so you can be seated on that issue. We're not here to have an
7 oral argument. You want to move for reconsideration, follow
8 the law. You want to move for a stay, follow the law. You
9 want to have an appeal to the Second Circuit, follow the law,
10 just like every other litigant.

11 Now let's talk about the February 11th sampling
12 problem.

13 I don't know where to begin. Sampling sounds like a
14 good idea in theory; 3,000 sounded like a good idea, but the
15 government says in the two and-a-half months between now and
16 April 30th, agents will become nothing but document gatherers
17 and reviewers, and they do have important work to do. I don't
18 know why it takes that long.

19 What is 54 days? Is that 54 times 75 days, roughly,
20 or 60 working days between now and April 30th?

21 MR. CONNOLLY: Your Honor, that was 3,000 divided by
22 the number of working days beginning on the date of the letter.
23 So Friday, February 11th.

24 THE COURT: So that's exactly right. Sort of like 60
25 working days times 50 is 3,000.

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1 MR. CONNOLLY: Correct.

2 MR. DIANA: Your Honor, if I could just address this.
3 I think it's important to think about a few things.

4 No. 1, really focusing on what's at stake and what the
5 government is really saying in this. As we pointed out, I
6 don't know if your Honor has had an opportunity to review the
7 declaration that we submitted --

8 THE COURT: No, I haven't. Basically, what I gave you
9 is the summary of the letter that I --

10 MR. DIANA: I understand.

11 THE COURT: To be honest, that I've been given. You
12 got the summary that I got.

13 MR. DIANA: So what I wanted to do is point for your
14 Honor's attention to particularly paragraph 7 and 8 of the
15 declaration. The reason why we put this declaration in is --

16 THE COURT: Well, one second.

17 MR. DIANA: -- we wanted to have a clear record for
18 you to understand what really is at stake.

19 THE COURT: Well, well, well, one second, one second.

20 This is the declaration of somebody named Garth
21 Davies?

22 MR. DIANA: Yes. He's the statistician that we've
23 been working with since last December in coming up with these
24 proposals.

25 THE COURT: OK. And paragraph 7?

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1 MR. DIANA: Paragraph 7 and 8 really talk about, in
2 essence, what's at stake. The fact that there is presently no
3 information, crucial information, we believe, about Secured
4 Communities and how it's being implemented.

5 THE COURT: Say it again, I'm sorry.

6 MR. DIANA: There's crucial information, statistics
7 and the like, about Secured Communities and how it's being
8 implemented. So there's a gap right now in the public
9 discourse, let's say, on this topic.

10 We point out here some of the things that are missing
11 in terms of the type of information that at least our clients
12 believe is important for government officials to understand in
13 terms of how this Secured Communities is being implemented. So
14 that's basically what we are trying to get here, is
15 information.

16 Historically, just to give you some context --

17 THE COURT: You seem to be way off the subject of A
18 files, 3,000 A files.

19 MR. DIANA: I'm going to get to it.

20 THE COURT: Why don't we get to it.

21 MR. DIANA: So the issue was we specifically asked for
22 these statistics back in the original FOIA request. Then we
23 had discussions with ICE and the government about providing the
24 statistics.

25 There was some back and forth; we gave them a detailed

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1 description of the type of statistics that we wanted that we
2 thought were necessary. They came back and say there are
3 certain things we track, certain things we don't track. They
4 came back and say a lot of the information that you're
5 requesting, you have to get from the individual files. So
6 that's how we got there.

7 So it started with we want the statistics; they said
8 we don't keep those statistics.

9 We think they are necessary for public discourse, for
10 state and local agencies to understand what they are getting
11 into.

12 THE COURT: All right. But you accept the
13 government's representation, the only way to get them from your
14 perspective is to review thousands of A files.

15 MR. DIANA: Absolutely. So we said that's fine.

16 So what we said is, OK, we're going to need -- so
17 you've told us -- you've made representations the only way to
18 do this is is to get the individual files.

19 So then we said, OK, fine. We went and said, OK,
20 we're going to do the work. We hired a statistician; came up
21 with, OK, let's do a sample, because we realized that asking
22 for all of them would be unrealistic. So we started down this
23 process of trying to get a sample.

24 So what this declaration does is lay out originally we
25 tried to get the ideal sample working with the statistician; we

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1 came up with a number, I think it was like 16 to 19,000.
2 Government said that's completely out of -- you know, that was
3 the ideal sample; they said that's ridiculous, can't do it. We
4 said, OK fine.

5 We went back to the statistician, said, OK, let's pare
6 it down. What is the minimum number?

7 Now, you'll see in the declaration, in doing this,
8 we're losing things. We're losing reliability. But we're
9 moving down.

10 We also decided, if your Honor recalls, last time we
11 were here, we were talking about whether we wanted
12 jurisdictional samples versus national samples and the like.
13 So to get to the 3,000, our client is willing to give up this
14 jurisdictional sampling concept. It's frankly a pretty big
15 deal for them to give that up.

16 THE COURT: What is jurisdictional?

17 MR. DIANA: Meaning sampling on a
18 jurisdiction-by-jurisdiction basis.

19 THE COURT: You mean like state-by-state or
20 region-by-region?

21 MR. DIANA: Exactly.

22 So we'd be able to go to the State of California and
23 say, As this is being applied in California, these are the
24 concerns we have. We're giving that up. We're giving that up
25 because we need the information now. So we did a national

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1 sample. So that's where we got to this 3,000.

2 THE COURT: OK.

3 MR. DIANA: We've pared it down as much as we can.

4 This is pretty much the minimum.

5 THE COURT: OK.

6 MR. DIANA: But at the same time -- I just want to say
7 one more thing. The same time, we also have a declaration
8 from -- that we submitted in another -- in our other papers
9 just to give you a sense of what's going on here.

10 Our clients are making representations to governors
11 saying, We're trying to get this information. Before you sign
12 this memorandum of understanding, give us a chance to get the
13 information so you know what you're getting yourself into.

14 So I hear what they are saying, and they are saying
15 they'll get us a 150 by April. But what that means is we can't
16 have that conversation with the governors and state and local
17 agencies until fall, maybe next year some time. And that's --
18 I mean we don't control how Secured Communities is being
19 implemented; they are doing it anyway. I think it's 100 a
20 month -- or 100 a week are being implemented in terms of
21 counties.

22 So it's happening. So we can't stop it. We're not
23 asking you to enjoin them from doing it; what we are saying is
24 get us the information as quickly as possible.

25 THE COURT: Well, once you add "as quickly as

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1 possible," the government responded and said, Fine. It's not
2 possible. That to do 3,000 by April 30th is roughly 50 a day.
3 And to review 50 A files a day, I don't know how many agents or
4 agent hours that takes, Mr. Connolly.

5 MR. CONNOLLY: Connolly. Yes, your Honor.

6 THE COURT: So how many days or agent hours would it
7 take to do 50 A files? What are they being reviewed for
8 anyway, for redactions?

9 MR. CONNOLLY: For redactions, exactly, as your Honor
10 is, of course, well aware what's in an A file.

11 And we provided as an exhibit to the joint letter one
12 of the 25 A files that we obtained and redacted pursuant to
13 your Honor's order at the January 20th hearing, which gives you
14 a sense of the amount of personally identifying information
15 that's contained in an A file and what it takes to review the
16 responsive records within an A file, which, of course, will be
17 much larger than what you see before you. In other words,
18 those are just the pages that are responsive to plaintiffs'
19 request.

20 We estimate that it would take between nine and 12,000
21 man-hours for the processing portion of 3,000 A files.

22 THE COURT: Wait. OK. It would take between nine and
23 12,000 hours?

24 MR. CONNOLLY: For the processing portion, your Honor.
25 And that's based on how long it took us to possess.

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1 THE COURT: What is the processing portion?

2 MR. CONNOLLY: Well, in other words, your Honor, it's
3 going to take a certain amount of time for us even to obtain
4 the A files. And that's a separate issue.

5 THE COURT: Which is the nine to 12,000 hours?

6 MR. CONNOLLY: Once we get the A files, reviewing each
7 file and determining which pages in the file --

8 THE COURT: I thought you called that the review
9 process.

10 MR. CONNOLLY: Fair enough.

11 The review process would take between nine and 12,000.

12 THE COURT: For 3,000 files?

13 MR. CONNOLLY: For 3,000, your Honor.

14 THE COURT: So it's three hours --

15 MR. CONNOLLY: Three to four hours; correct.

16 THE COURT: Three to four hours per file.

17 Does it take a trained agent to do that? In other
18 words, I don't mean to tell you your business, but I'm curious.
19 If you, AUSA Connolly, got an unredacted A file and gave it to
20 a paralegal at the U.S. Attorney's Office and timed the
21 redactions, you think it would take three to four hours?
22 Because one gets practice; it's the same redactions on each
23 one. After you get with the program, it's just automatic.
24 You're taking out the Social Security numbers, you're taking
25 out the name, you're taking out date of birth. It's hard for

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1 me to believe it would run three to four hours. And ICE agents
2 maybe have better things to do like border patrols and whatnot.

3 But you guys hire paralegals all the time, and they do
4 work for you folks on litigations, which this is or isn't, I
5 don't know. Seems there's a discussion of whether this is a
6 litigation. I don't know whether it is. Sounds like it to me.
7 There's a plaintiff and a defendant, and a CV number, but, OK.
8 What if a paralegal redacted the documents? You think it would
9 take three to four hours per A file?

10 MR. CONNOLLY: Your Honor, the three to four hours
11 includes not just the redactions.

12 We receive an A file. I believe that out of the 25 A
13 files we received from Maricopa County, pursuant to your
14 January 20th order, the average number of pages in those files
15 was about 200.

16 And as your Honor is well aware, these are single hard
17 copy files with pages that span -- you know, they may be --
18 they are old pages, whatever. We scan those in, and then we
19 review first -- the first step is to review those pages to
20 determine which pages out of that, say, roughly 200 -- although
21 sometimes many more -- are responsive to plaintiffs' request.
22 Then we can cull out those pages that are responsive, and then
23 review those for the redactions.

24 Now, to a certain extent, once you become familiar
25 with those 17 forms that plaintiffs are looking for, will

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1 certain things be in the same place? Oftentimes, yes; but
2 oftentimes, no.

3 Again, as your Honor is well aware, the contents of an
4 A file can go back many years. The forms that the government
5 uses change over time, so that there may be -- where there may
6 have been, for example, an A number up here, now no longer
7 appears up there, when you see it on, say, an older version of
8 the document.

9 Also, these documents frequently contain narrative
10 sections, which would not conform to simply just marking out
11 the same box every time, but which require actually reading the
12 narrative to determine where the redactions need to be taken.

13 And I think on the broader level, your Honor, we are
14 talking about very sensitive personally identifying information
15 for individuals who oftentimes may be in the midst of criminal
16 proceedings or immigration proceedings.

17 And even when we become, say, your Honor, more
18 proficient with making those types of redactions, there still
19 has to be a level of care here and a level of thoroughness;
20 because to inadvertently disclose the type of information that
21 we're redacting out of these records: Names, names of next of
22 kin, aspects of criminal history, application numbers --

23 THE COURT: Yeah, but who are you disclosing it to?
24 It's not The New York Times; it's to the plaintiffs' lawyers
25 here who can sign a confidentiality order and be done with it.

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1 Excuse me one minute.

2 (Pause)

3 THE COURT: I'm sorry for the interruption.

4 MR. CONNOLLY: Thank you, your Honor.

5 With respect to your last question, yes, we are
6 providing this to plaintiffs' counsel. But this is a FOIA
7 matter. And in FOIA, production of documents is production to
8 the public at large.

9 THE COURT: No such thing as there can't be
10 attorney --

11 MR. CONNOLLY: There's no such thing as a protective
12 order, there's no such thing as necessarily some sort of
13 clawback agreement.

14 And we understand what plaintiffs want to take these
15 files and use them for. But when we are making these
16 redactions and we're producing these documents, we have to --
17 we have to act as though this information is going to The New
18 York Times, because when we produce it to them, there would be
19 nothing to stop them from -- although I don't think they would
20 do it -- from putting this file up on their website.

21 THE COURT: OK. I didn't understand. So there can't
22 be protective orders or confidentiality for any of that under
23 FOIA.

24 MR. CONNOLLY: Not to my knowledge, your Honor. The
25 release is released to the public at large.

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1 THE COURT: Do you agree?

2 MR. DIANA: I think that's true.

3 A few points I want to make, though, your Honor.

4 My understanding, as part of this process, is they
5 were going to make redactions, and they made this privacy
6 argument previously. And we are certainly sensitive to that.

7 My understanding is that the redactions that they've
8 done, based on those redactions, they are comfortable with the
9 redactions that they've done. So if we are comfortable with
10 what we've seen, that's enough information for us to use it.
11 And I think that part of this pilot program I think has been
12 successful. I think we need to talk to them a little bit about
13 the -- there were some inconsistencies in terms of what was
14 redacted.

15 THE COURT: Have you seen 25 redacted files?

16 MR. DIANA: Yes. So we've looked at them. We got
17 them last week. We haven't done a full analysis, but our
18 general sense is that this is giving us the information we
19 need.

20 So I think, unless you're telling me I'm wrong, is
21 that the privacy concerns, at least in terms of producing the
22 documents, is no longer an issue. You have quality control
23 issues. But in terms of --

24 THE COURT: You're talking to him or are you talking
25 to me? You're looking both ways.

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1 MR. DIANA: I'm sorry.

2 THE COURT: But the point is I think what he's saying
3 is it averaged three to four hours; that he used the 25 --

4 MR. DIANA: No, I understand.

5 THE COURT: -- as a lesson in timing. And that's what
6 it took on average, right?

7 MR. CONNOLLY: Yes, your Honor. And, again, of
8 course, just from the time that we received it --

9 THE COURT: I understand. That didn't include the
10 gathering phase.

11 MR. CONNOLLY: Yes.

12 MR. DIANA: What I would say, your Honor, is we
13 certainly can sit down with them and work through what they've
14 done to come up with -- and this is what I think we would do in
15 civil litigation all the time -- we would come up with a
16 proposal which says which fields -- and if you look at it, I
17 think 90 percent of the documents are just fields being
18 redacted, the whole field.

19 So if everyone is comfortable with the fields being
20 redacted, to me, the redaction process, as you've noted,
21 doesn't have to be done by someone who actually knows anything
22 about the files; they just make sure all those fields are
23 redacted, then during the quality control issue, they can
24 check. There's some narrative, but even the narrative, it's
25 pretty clear what's being redacted from the narrative.

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1 Sometimes it's just the date, some of the dates, I think, so
2 that there's not a sense that they could be sort of
3 reverse-engineered, which they talked about.

4 So it doesn't seem to me, based on my review, that it
5 would take all that much time once you come up with a protocol
6 of this is what we're going to be doing.

7 I understand the burdens of document review very well
8 from the corporate defendants side. But, you know, we have
9 obligations in civil litigation, and we meet them by coming up
10 with these processes that make it more efficient.

11 Even under their estimate, which I think is a little
12 high, we're talking about 78,000 pages of documents in two
13 and-a-half months, which --

14 THE COURT: How do you reach --

15 MR. DIANA: That's their estimate from the letter.
16 They say that 3,000 A files redacted and what they have to come
17 back with, they'll end up reproducing 78,000 pages, which is --

18 THE COURT: Oh, they'd be producing 78,000; but they'd
19 be going through --

20 MR. DIANA: They may be going through more,
21 absolutely.

22 THE COURT: Many more.

23 MR. DIANA: I understand. But when they are going
24 through the A files, what they are doing is they are looking
25 for specific forms.

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1 THE COURT: Right. I think the flaw in the
2 government's argument to me is that it has to be an ICE agent.
3 You've got important law enforcement responsibilities;
4 shouldn't have to be doing this first-cut document review. Any
5 paralegal or less could look for the forms. And once the forms
6 are found, your adversary is right, too, it's fields nine, 13,
7 and 21 that are blacked out. So this process could be made
8 less onerous.

9 Obviously the test process should always take longer
10 than after that, because you're doing it the first time. It's
11 like teaching a course; the first time is hard, the second time
12 is easier. So the agents or somebody did it the first time,
13 but now that it's been done, somebody follows the protocol, and
14 that somebody doesn't have to be an ICE agent; it can be an ICE
15 employee, if you wish, but it could be a paralegal or secretary
16 or whatever the next title is.

17 MR. CONNOLLY: Your Honor, even accepting what you're
18 saying about who could do this, it still leaves the question of
19 how long it is going to take. And I accept what your Honor is
20 saying, that as people gain more proficiency, three to four
21 hours might go down to, for example, two to three hours.

22 THE COURT: Right.

23 MR. CONNOLLY: Two to three hours is still 6,000 to
24 9,000 man-hours.

25 THE COURT: Well, yes, but I'm really questioning even

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1 two to three hours. I'm questioning that it's two to three
2 hours once you know what you're looking for in a 200-page file;
3 you're looking for the five forms that have a certain form
4 number on them. Once you find the five forms, you're taking
5 your black pen and taking out certain numbered entries, numbers
6 whatever, three, 17, and 21 or whatever on the forms and you're
7 done.

8 MR. CONNOLLY: Well, a couple points, your Honor.

9 First of all, there are 17 forms that plaintiffs
10 identify.

11 THE COURT: Okay. But --

12 MR. CONNOLLY: And not all of these forms necessarily
13 are forms with certain sections and a number that identifies it
14 as such at the beginning.

15 Some of these would be -- and we didn't have this in,
16 for example, what we gave your Honor today, but, for example,
17 they could be oral decisions from an immigration judge or
18 something like that which requires -- that's not just looking
19 in the upper right-hand corner to see if there's a certain
20 number assigned to that document.

21 Again, these documents, as your Honor is well aware,
22 track a person's entire immigration history from, say, for
23 example, someone whose immigration history began in the 1970s
24 or 1980s up to someone today --

25 THE COURT: But your adversary says this may just be a

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1 matter of more negotiation. Maybe they can say automatically
2 we don't want any record that predates 2000 or something. I
3 mean I don't know. Then the paralegal gets rid of any
4 document, oral decision of an immigration judge or anything
5 else that predates 2000. So that knocks out 150 pages in five
6 minutes.

7 So I'm just saying you want them, I guess, to reduce
8 the number 3,000 even further or extend the date even longer.
9 And I'm suggesting that you can streamline the process so much
10 that the number and/or the date are realistic.

11 MR. CONNOLLY: There's one other aspect of this, your
12 Honor, which does not deal with the processing time that I'm
13 talking about. And that's the time it takes to obtain these A
14 files.

15 THE COURT: Tell me about that.

16 MR. CONNOLLY: OK. Your Honor is well aware that an A
17 file is one file, and it's a hard copy file, and it could be
18 found any number of places in the country, depending on where
19 the individual might be and so forth.

20 Once we -- and I presume --

21 THE COURT: Wait. Let me interrupt.

22 Are you looking for certain people or are you looking
23 for files that are in a certain place?

24 MR. CONNOLLY: As I understand it, your Honor, there
25 are certain criteria that their sample would need to meet.

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1 So the first step -- and this would inevitably require
2 at least some period of talking with plaintiffs -- would be to
3 determine how ICE can put together a list of the A numbers that
4 correspond to files that would meet the plaintiffs' criteria.

5 So once that negotiation has been taken care of and we
6 have that list, then we would have to determine how you're
7 going to pull a randomized sample of those A numbers. It would
8 be 1500 for individuals who are identified through Secured
9 Communities, and 1500 for individuals who are identified
10 through another program called criminal alien program.

11 So we have the 3,000 A numbers that we're going to use
12 for this sample, say, whenever that could be kind of finalized.

13 Then what we need to do is we need to put out requests
14 for those specific A files. And, again, those A files could be
15 anywhere in the country, depending on where the individual
16 happens to be.

17 THE COURT: That's what I didn't know. You agree they
18 could be anywhere in the country?

19 MR. DIANA: Yes.

20 THE COURT: What was the point that it must be out of
21 certain geographic locations?

22 MR. DIANA: Originally, we were thinking about doing
23 jurisdictional samples.

24 THE COURT: I remember.

25 MR. DIANA: Now we're doing a national sample.

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1 THE COURT: Oh. I'm confused. Remember last time we
2 talked about --

3 MR. DIANA: When we did the 25, we focused on one
4 jurisdiction.

5 THE COURT: Right.

6 MR. DIANA: So we didn't do a -- we just said let's
7 find 25 --

8 THE COURT: I see. I remember --

9 MR. DIANA: Absolutely.

10 THE COURT: It was a little bit humorous.

11 MR. DIANA: In order to get down to the 3,000, we gave
12 up on the jurisdictional.

13 THE COURT: It could be anywhere in the country.

14 MR. DIANA: Yeah.

15 MR. CONNOLLY: And, your Honor, just obviously under
16 the national sample, this doesn't necessarily matter as much
17 anymore, but even when we took 25 individuals from Maricopa
18 County, only four of the 25 A files were in Arizona. At that
19 point, 21 of the A files had gone to other places. So even
20 when you're looking at jurisdictions, the A files could be
21 anywhere.

22 Now, once we ask for those A files, it's obviously
23 going to take some time for them to be obtained and shipped to
24 a location.

25 THE COURT: Let me ask a few more questions.

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1 MR. CONNOLLY: Sure.

2 THE COURT: So do we have the 3,000 randomly-selected
3 A numbers yet?

4 MR. CONNOLLY: We do not.

5 THE COURT: We do not.

6 But how long would it take to get that, just that
7 step, Step 1?

8 MR. MARKOWITZ: As soon as they can get us the list.

9 MR. DIANA: They have to give us a list, and we can do
10 it.

11 THE COURT: List of what?

12 MR. DIANA: Of the A files that meet the criteria.

13 MR. CONNOLLY: And we just received -- we just
14 received this -- the declaration. And that kind of spells out
15 what they are looking for with this most recent --

16 THE COURT: All right. How long would it take you to
17 get them the list, whatever that means?

18 MR. CONNOLLY: I think that we would need to have some
19 further discussions. I think Mr. Diana would agree we would
20 need to have some further discussions about what that list
21 would look like to determine how long it would take us to
22 generate it.

23 THE COURT: OK. Then I can't set that date.

24 But now once the list is set, OK, I won't know when
25 that is because you're not ready to tell me, but once the list

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1 of 3,000 is set, then how long does it take to pull files that
2 are on the list? Let's say the first 100 of them or the first
3 50 of them, how long does it take to pull --

4 MR. CONNOLLY: It depends, your Honor, and here's why
5 it depends:

6 There's only one file. And there are competing
7 demands for this file. The most obvious competing demand in
8 this case would be somebody who, for example, has a hearing
9 before an immigration judge, or whose A file is with a law
10 enforcement agency for investigation purposes.

11 THE COURT: Well, then just skip that number; keep
12 going.

13 MR. CONNOLLY: I suppose that we could always then go
14 back to the list and generate another number, if that's
15 going --

16 THE COURT: No. If you have a 3,000, and you start
17 with the first number on the list, and that file isn't
18 available because it's in the U.S. Attorney's Office on a
19 reentry after deportation case -- which is what we see the A
20 files on the most -- but, in any event, it isn't available or
21 it's before an immigration judge for deportation or whatever.
22 So you go to the next number on the list until you find the
23 first 50.

24 MR. CONNOLLY: That might be a way of working around
25 those types of problems, your Honor. But let me -- and this

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1 is -- and I'm just -- I'm just talking here in pure
2 hypotheticals based, at least in part, on what we had with the
3 Maricopa County A files.

4 So let's say that it would take the parties another
5 week to negotiate how this sample is going to be randomized and
6 to get the list. Frankly, your Honor, I think it might take
7 somewhere between a week and two weeks.

8 THE COURT: To get the list.

9 MR. CONNOLLY: To get the list.

10 THE COURT: OK.

11 MR. CONNOLLY: But if we said it was another week, and
12 then we were able to immediately request however many A files
13 we're going to request, now, it took two full weeks for us to
14 obtain the 25 Maricopa -- all of the 25 Maricopa County A
15 files. And, frankly, your Honor, we thought that that was
16 actually quite quick.

17 THE COURT: Twenty-five files in two weeks?

18 MR. CONNOLLY: It took us two full weeks to obtain all
19 25.

20 THE COURT: You thought that was quick?

21 MR. CONNOLLY: We did, because as it turned out, only
22 one of the 25 was being involved in an immigration hearing,
23 which requires us to not pull that A file out from --

24 THE COURT: Right. But I would have said skip that,
25 and how long would it have taken for the 24?

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1 MR. CONNOLLY: I'm not sure, your Honor. I'm not
2 sure.

3 But even if we were to say that in three or four weeks
4 from today we could have negotiated what the randomized sample
5 was going to look like, and put out our request and received
6 back some proportion of whatever number we had asked for,
7 plaintiffs would want us to be asking for 3,000. We then
8 receive 3,000 A files in, say, mid to late March, and we would
9 only have five to six weeks to take these redactions.

10 And, now, I know your Honor suggests that the
11 number -- the total number of man-hours might come down, but
12 right now what I can represent to the Court is it's about three
13 to four hours per file. So 9,000 to 12,000 man-hours in order
14 to process those A files, once we even receive them.

15 THE COURT: I don't accept the nine to 12,000. I
16 think that's way high for what has to be done.

17 But I'm thinking of how to structure this in a way
18 that makes sense. So here's what I think. I'm speaking out
19 loud to some extent.

20 You negotiate with your adversary the criteria to
21 create the list. You create a list not of 3,000, but of 4,000,
22 so that if one of every four is unavailable, so what? Move
23 right on. Do not wait for the A file that is tied up in the
24 U.S. Attorney's Office or an immigration judge or whatever.
25 Hopefully, 4,000 will easily yield 3,000.

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1 Then the collection should be incomplete. In other
2 words, as soon as you get an A file, it should go into the
3 redaction process. You don't need to wait for 3,000 to start
4 the redactions. You tell the people who are doing the pulling,
5 you expect a package on your desk every morning. You expect a
6 Red Well on your desk every morning. It may have two A files,
7 it may have ten, it may have four, but you want it there every
8 morning.

9 By the same token, you put your, I hope, paralegals on
10 the job of redacting, and it turns around that day.

11 So I would say that every week, from -- today's
12 February 14th. Every week from March 14th on, you should be
13 delivering 25 A files redacted to the plaintiffs. Every single
14 week. Now that seems very reasonable. Too reasonable from the
15 plaintiffs' perspective; you won't have very many at that rate;
16 you'll have 100 by mid March.

17 But every week you'll know you get another 25, another
18 25, and it will add up. That's the only suggestion I have.
19 It's not quite a ruling yet, but it makes sense to me. You
20 tell the people in the field that every time they find one,
21 they got to mail it. And every morning there will be this
22 package on your desk; and every day the redactions will start,
23 and 25 a week redacted will be sent to the plaintiffs every
24 week, until it's done.

25 Now, I didn't do the math. Doesn't sound good for

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1 you.

2 MR. DIANA: No, not at all.

3 THE COURT: I don't know how many -- that's not good.

4 MR. DIANA: No, it means that --

5 THE COURT: How many weeks would it take you to get to
6 3,000 at 25 a week?

7 MR. DIANA: I think it's probably 2012.

8 MR. MARKOWITZ: Two years.

9 MR. DIANA: Two years.

10 THE COURT: Two years?

11 MR. DIANA: Yeah.

12 THE COURT: Two hundred weeks? Is that what it is,
13 200 weeks times 25; is that right? Is 200 times 25? I've got
14 some scientists back there. What did you come up with?

15 MR. MARKOWITZ: About 120.

16 THE COURT: Hundred twenty; two years. It's two
17 years. That's not going to do it.

18 MR. DIANA: By that time Secured Communities is up and
19 running.

20 THE COURT: Right. No, that doesn't make sense. So
21 if it was 50 a week, it's one year to get up to 3,000.

22 MR. DIANA: I think, your Honor, let's go back to what
23 Mr. Connolly was saying and sort of the process. I don't think
24 we have a problem with the first few weeks; we work it out; we
25 figure out the numbers and the like.

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1 But in terms of the next step, my understanding is
2 requesting 25 or 3,000, the amount is going to be the same.

3 THE COURT: Pardon me?

4 MR. DIANA: The amount is going to be the same.

5 If you're asking for -- we did this pilot program, we
6 did 25, right? I said, OK, for 25 it took two weeks. I would
7 think if we asked for three or 4,000, it would take to get all
8 of them back two to three weeks, right?

9 THE COURT: I wasn't talking about the collection. It
10 takes a different amount of time to find these things. No, but
11 they waited. The reason it took two weeks for 25 was they
12 waited; I guess one or two were missing, they waited till they
13 could find them all. Then they sent the whole package of 25.

14 When I said 4,000, I said they should be mailing them
15 in as they're found every single day.

16 I agree with you though that the whole subset of 4,000
17 should be found within a month; I realize that, that by March
18 14th or so they probably will have all 4,000. But the good
19 news is they should have some of that much earlier. It should
20 be pouring in, and hopefully the redactions start. But where I
21 obviously went wrong in the math is 25 a week will take two
22 years, and that's not acceptable.

23 MR. DIANA: What I'm saying, in a month they should
24 have all of them in their possession.

25 THE COURT: I understand that. But I was staggering

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1 the review and saying just get you X number per week. But 25
2 is the wrong number. If it was 100 per week, then it would be
3 30 weeks?

4 MR. DIANA: Yeah. That's still --

5 THE COURT: Yeah, but it's not that bad; because if
6 you've got 100 a week, if, at least the statistician might find
7 out along the way that at 1500 he's got enough to analyze, or
8 even at 1,000 he's got enough to analyze. At least it's an
9 argument to be made -- at least it's an argument to be made to
10 the governors. If you've got 1,000 in the first ten weeks,
11 which is well short of the 3,000, but at least they'd be doing
12 this on a rolling basis, it may be that after you review 1,000,
13 you have an argument you can make to a governor.

14 MR. DIANA: One of the things that we had proposed in
15 the affidavit itself was having a subsection of 700 by -- we
16 had asked for March 30th, which obviously --

17 THE COURT: Well, that's what I'm getting to. Mine
18 would be at 1,000, if they did 100 a week; just did not wait
19 till they could complete the 9,000 to 12,000 alleged hours.
20 And I say "alleged" because everybody knows review times does
21 decrease dramatically with experience.

22 MR. DIANA: I agree with you. I think we would be
23 comfortable -- but part of it depends, for our own purposes, is
24 what information we're getting; so we make sure it's a
25 representative sample.

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1 THE COURT: Well, that's good, too, because it would
2 be coming in theoretically random. As soon as the file is
3 found somewhere in the U.S., it's sent to them, they get 100.
4 Let's say the collection process takes till March 14th, then
5 it's 100 a week; you would have 1,000 ten weeks from March
6 14th. End of May. Only one month. I mean you would want
7 3,000, but you would have 1,000 at the end of May.

8 I think that's the compromise, Mr. Connolly; 100 a
9 week starting after the collection, which hopefully would be
10 done March 14th. But you wouldn't wait for it to be done. As
11 soon as they're collected, they're in review. I don't think it
12 has to be ICE agents; because I agree with you, I don't want to
13 feel that I'm calling off our nation's border patrol to do a
14 document review, nor do I think it has to be at that level for
15 these relatively simple-minded redactions. Any paralegal knows
16 what they are looking for and less than paralegal. Any staff
17 person.

18 MR. CONNOLLY: A few responses.

19 THE COURT: Wait a minute.

20 Can you narrow the request even further by saying,
21 yes, I realize some of these files go back 20 years. You can
22 immediately pull up all pages that predates 2000 or 2001 or
23 whatever you want.

24 MR. DIANA: We think so.

25 If we go along something like this, we would need to

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1 talk to our statistician, because I think it will be important
2 for us to craft it from our client's perspective. So if we're
3 getting things a certain way, and certain types of information
4 at a certain time period, we can use it.

5 THE COURT: Well, maybe I should cut this short, given
6 that I have a roomful of the lawyers who for some reason want
7 my time. That we'll say this is, at this point, a suggestion,
8 a strong suggestion. You need to have your negotiating
9 session; you need to cut the criteria back; you need to cut the
10 time frames back as best you can; you need to make this as easy
11 as you can. But everybody has heard these suggestions in terms
12 of rolling basis, in terms of collection efforts, in terms of
13 the manpower to do it. There are a lot of suggestions here,
14 not yet rulings.

15 Why don't we schedule a conference in a week, and
16 hopefully you'll be much advanced from today.

17 MR. DIANA: That works for the plaintiffs, your Honor.

18 MR. CONNOLLY: Certainly, your Honor.

19 THE COURT: OK. Let me just open the calendar, then,
20 which unfortunately will take a minute or two to get the
21 computer going.

22 Now, assuming you get this motion that we started out
23 talking about the motion to reargue, reconsideration, have you
24 worked out -- can you work out a schedule with your adversaries
25 for response and replies --

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1 MR. DIANA: We can certainly do that, your Honor.

2 I think the other thing that we need to discuss is we
3 have two motions that are pending that haven't been fully
4 briefed yet. We want to get a sense of when you wanted to hear
5 those motions.

6 THE COURT: I'm not sure I want to hear them at all.
7 I usually don't have oral argument. It's rare that I have oral
8 argument. I have it when I think it will be helpful.

9 When are they to --

10 MR. DIANA: They're -- well, that's the issue.

11 MR. CORDARO: Your Honor, at this point, there are
12 motions on the search cutoff date and on the exemptions.
13 Plaintiffs cross-moved on both of them.

14 The government's next, and, I think, final submission
15 on both motions is due this Friday. And one of the
16 conversations that Mr. Diana and I had before the conference
17 was given that the government wishes to move for
18 reconsideration on the metadata order, we were wondering if we
19 could push out that deadline for both of those by one week.

20 THE COURT: No. So that's the answer on that.

21 Now, given all of that, will you work out your own
22 schedule on reconsideration?

23 MR. DIANA: Absolutely, your Honor.

24 THE COURT: On the other hand, I'd be willing to
25 extend the time frame for which to move to reconsider, if you

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1 want. You usually have, I think, ten days. If you want more
2 time on that, that's OK, too.

3 MR. CORDARO: Thank you, your Honor. We'll discuss
4 that.

5 THE COURT: You work out your own schedule on that.

6 MR. CORDARO: At present, the motion is due on
7 Tuesday.

8 THE COURT: But I'm amenable to extending that.

9 MR. CORDARO: Thank you, your Honor.

10 THE COURT: Rather get the merits thing in so I get to
11 see what's going on there.

12 MR. DIANA: I understand.

13 So in terms of a hearing date for this matter --

14 THE COURT: You're right. I was pulling up the
15 calendar.

16 I said next week. Hopefully you'll have -- today is
17 Monday, right?

18 MR. DIANA: Monday.

19 THE COURT: So maybe next Monday.

20 MR. DIANA: I think the court is closed.

21 THE COURT: Well, yes, it technically is. I will be
22 here. I'm always here.

23 Who wants to work on that Monday? Anybody doesn't
24 want to work, seriously, on that Monday?

25 MR. DIANA: I don't, if I can help it.

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1 THE COURT: You don't?

2 What is there to do, anyway, that day?

3 MR. DIANA: I have plans to be out of the city, your
4 Honor.

5 THE COURT: Oh, OK. Does make things tough.

6 OK. I guess it will have to be Wednesday the 23rd at
7 11:30. Is that OK or not OK? February 23rd at 11:30?

8 MR. CONNOLLY: That's fine for the government, your
9 Honor.

10 MR. DIANA: That's fine for us, your Honor.

11 And just so I understand, your Honor -- and everyone
12 understands -- for the 11:30 next Wednesday, the 23rd, the idea
13 is that we would have already gotten the list together?

14 THE COURT: No. The idea is you would have negotiated
15 as much as possible to reach agreement as to the criteria for
16 the list, and possibly following up on a lot of the suggestions
17 here on how the schedule to produce -- or to first gather, then
18 review, then produce might work out. It may be that you come
19 in and say we did it; we don't even need the Court's help. We
20 bargained and gotten this done pursuant to your suggestions and
21 what we think we can achieve. Or we've agreed on some things
22 and not others, and we need a tie-breaker for where we can't
23 agree.

24 MR. DIANA: OK.

25 THE COURT: So it wasn't exactly we have a list. I

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1 mean you may find out as you negotiate that you can, that's
2 great. I'm sure the government will negotiate in good faith.
3 And if it's one day to figure out the criteria, maybe they can
4 produce the list in the other nine days, I don't know.

5 MR. DIANA: OK, your Honor.

6 THE COURT: I think that covers everything.

7 Is there anything else that anybody thinks we haven't
8 covered?

9 MR. CONNOLLY: Nothing from the government.

10 THE COURT: I have a question. On the so-called
11 January 17th production, did it ever get completed?

12 MR. CERULLO: Your Honor, it was -- that's the opt-out
13 production. It was produced what seems to plaintiffs, at
14 least, so far, roughly in accordance with plaintiffs' July
15 format of production specifications.

16 One thing that's still pending right now is that your
17 Honor had indicated to the government that they need to
18 reproduce earlier productions.

19 THE COURT: In certain respects. Two respects in
20 particular, spreadsheets and single-file format.

21 MR. CERULLO: Right. We're still waiting for that
22 production. Your Honor asked the government to turn to that
23 immediately after the opt-out production. We've requested and
24 we're still waiting for that.

25 THE COURT: And the opt-out can be redone that way,

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1 too. What you've got wasn't usable?

2 MR. CERULLO: The opt-out production, like I said, was
3 roughly in accordance with our July specifications.

4 THE COURT: Oh, in accordance with your July --

5 MR. CERULLO: That's correct.

6 THE COURT: So you're pretty much satisfied with that.
7 That wouldn't have to be a do-over.

8 MR. CERULLO: Wouldn't have to be a do-over; we're
9 still reviewing it. However, none of the spreadsheets have
10 been produced in negative; so we have requests for that, as
11 well.

12 THE COURT: OK. Just wanted an update on that.

13 OK. I think that is everything.

14 Thank you.

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