

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air)	File No. 15-MD-2666
Warming Devices Products)	(JNE/FLN)
Liability Litigation)	
)	September 8, 2016
)	Minneapolis, Minnesota
)	Courtroom 12W
)	1:37 p.m.
)	
)	

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

And THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

(HEARING ON CUSTODIAN DISCOVERY DISPUTE)

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P R O C E E D I N G S

(1:37 p.m.)

1 THE COURT: Good afternoon. Please be seated.
2
3 Judge Noel will be talking to you primarily on the discovery
4 issues. That's no surprise.
5

6 MAGISTRATE JUDGE NOEL: Okay. Shall I just go?

7 THE COURT: Go ahead.

8 MAGISTRATE JUDGE NOEL: Good afternoon. Welcome.
9 We're here for some argument on the issue of
10 whether the defendants have or have not done all they need
11 to with regard to identifying custodians for the purpose of
12 responding to discovery. So let's start with who is
13 speaking for whom? Who is on the plaintiff's side?
14 Ms. Zimmerman, let's start with you.

15 MS. ZIMMERMAN: Thank you, Your Honor. Genevieve
16 Zimmerman for the plaintiffs.

17 May it please the Court, there were three issues
18 that were presented to the Court, and the Court assisted us
19 in framing. And those three questions were:

20 First, whether the defendant's process was
21 consistent with the regulations or the requirements under
22 the federal rules.

23 Second, if not, what more needs to be done to
24 identify the custodians?

25 And then, third, regardless of what process the

1 defendants have used to identify the custodians, whether
2 they have in fact fully met their obligations under the
3 federal rules.

4 Respectfully, I think that from a plaintiff's
5 perspective, the answers to the first and third are no.
6 Regardless of the process, the defendants have not met their
7 burden under the Federal Rules of Civil Procedure. And I'll
8 take the Court briefly through that from a legal
9 perspective, and then my co-counsel, Mr. Parekh, will deal
10 with the technical aspects about the answer to the second
11 question, what more needs to be done.

12 THE COURT: Okay. Let me just, for whatever it's
13 worth observe that to me that second question in light of
14 your response to one and three is the most important
15 question. So what is it we're supposed to do? But I don't
16 want to cut you off.

17 MS. ZIMMERMAN: Certainly. Mr. Parekh could
18 certainly come up and address some of the technical aspects
19 of what has happened already, and why we think that there is
20 a deficiency in what has been done by the defendants thus
21 far. That would be helpful to jump to those questions.

22 THE COURT: I understand. The more important
23 question is not why you think they haven't fulfilled their
24 obligation, but what do they need to do going forward now to
25 do that? What more should we -- what is it you want us to

1 order them to do that they haven't done? Is that him or is
2 that you?

3 MS. ZIMMERMAN: I think that it may be Mr. Parekh.
4 To segueway there --

5 THE COURT: But I don't want to cut you off, so go
6 ahead.

7 MS. ZIMMERMAN: Sure, thank you. We identified in
8 our papers at least eight different custodians and provided
9 some examples of documents that support our belief that the
10 defendant's identification of both custodians and documents
11 are insufficient under the Federal Rules of Civil Procedure.

12 The examples that we provide demonstrate just by
13 brief way of example different documents that should have
14 been identified and custodians that should have been
15 identified on filtration issues, on design issues, on
16 contamination issues, on whether or not to conduct a hazard
17 team analysis, about the kinds of complaints that they were
18 receiving from the field from various customers, and the
19 certain kinds of complaints that they saw in hearing back
20 from the hospitals across the country.

21 So I think that probably with those specific
22 examples in mind and those documents attached to the Court's
23 reference, I'll have Mr. Parekh come up and talk about what
24 more we should do going forward to ensure that a robust and
25 complete production is made by the defendants.

1 MAGISTRATE JUDGE NOEL: Okay.

2 MR. PAREKH: Good afternoon, Your Honors, Behram
3 Parekh on behalf of plaintiffs.

4 To get to the point of saying what more they
5 should do, we need to at least look very briefly at what
6 they have done. And the key items that come through from
7 what they have done is that they have limited their
8 interviews to approximately 25 custodians given the fact
9 that plaintiffs identified 39 custodians of which they said
10 24 they have responsive documents for and the rest of them
11 they don't.

12 We're not sure what the overlap is between the 24
13 and the 25 that they interviewed, but my guess is they're
14 pretty much the same people. And so there doesn't appear to
15 have been anything the defendants did above and beyond the
16 people that plaintiff identified in order to determine
17 whether or not there were additional individuals for whom
18 custodial documents existed that were responsive to the
19 RFPs, and that is an obligation that defendants have in the
20 first instance not plaintiffs.

21 So the first thing that we would ask that the
22 Court order defendants to do is to do a thorough
23 investigation of individuals at 3M including interviews to
24 determine what additional people do exist that may have
25 responsive documents to the RFPs. So that's number one.

1 Number two is they need to actually look for
2 sources of documents that contain information that may have
3 been sent to or received from at least the 24 custodians and
4 the 39 custodians that the plaintiffs have identified
5 outside of just the individual e-mail box for that
6 particular custodian.

7 The eleven custodians that defendants say they
8 have no e-mails for, they don't say they actually don't have
9 any e-mails for them. They say they don't have a specific
10 e-mail box that was their e-mail box. But they do have this
11 e-mail server that has lots of e-mails of lots of other
12 custodians. They have chosen not to look through those
13 e-mails and just even do a cursory look to see whether or
14 not e-mails from or to that person exists that plaintiffs
15 identified in their list of 39.

16 So at the very least, they need to go back and
17 look for those e-mails. But what we would actually suggest
18 is that they need to do a search of the entire e-mail server
19 and look for responsive documents regardless of custodians,
20 because of the fact that there are so many custodians who
21 plaintiffs have identified who they claim they don't have
22 e-mails for. So that is number two.

23 Number three, they have to make clear to
24 plaintiffs what it is that they've actually done so that
25 when we run across e-mails or we run across certain items,

1 we can go, oh, okay, we likely believe that additional
2 e-mails of this type or additional documents of this type
3 will still be coming on a going-forward basis.

4 And defendants do a lot of talking about how many
5 documents they've produced and how many millions of pages
6 and things like that, but when it comes down to it, they
7 actually have not produced very much in terms of actual
8 individual e-mails and documents and things where the
9 information would exist.

10 Out of the 1.3 million odd pages that they
11 produced, over 500,000 of those pages come from just a
12 little under 500 documents, and these documents consist of
13 thousands and thousands of pages of Excel files with streams
14 of data that really are meaningless in terms of the page
15 count.

16 The fact that you have, you know, a 2,000 page or
17 a 10,000 page in one instance, Excel file that has data that
18 was produced from a computer during testing does not mean
19 that it's 10,000 pages of relevant information.

20

21

22 The other thing that they have is about 35,000 of
23 the 90 or so thousand documents that they produced so far
24 are simply either studies that were generated in the public
25 domain and kept by 3M or testing data on things like how

1 much heat does the Bair Hugger generate, how much air flow
2 does it generate, what's the volume, testing on different
3 types of motors that they use? Well, all of that data may
4 be interesting, none of it really goes to the heart of the
5 case. None of it really talks about whether or not they
6 looked for contaminants or whether they look for whether or
7 not contaminants were blowing.

8 If negative data, plaintiffs need that data in
9 order to show, look, you did, you know, 3,000 tests and not
10 a single one of them look for contaminants, but the fact
11 that they produced it doesn't mean that it's actually stuff
12 that's useful to us.

13 So when you actually come down to it, there's not
14 a whole lot of stuff that they've produced today that really
15 consists of substantive information about what it is they
16 did and didn't do that advance and actually respond to
17 plaintiff's RFPs. And so what we need for defendants to do
18 is identify as we put in our papers what exactly they have
19 looked at and what else is out there.

20 Another example of what they haven't done is there
21 are archived tapes that exist at Iron Mountain, and
22 defendants didn't identify those archived tapes until a meet
23 and confer that was about a month or so ago. So we ask for
24 more information about the archived tapes. And we asked
25 will you look at them? Will you figure out what is on them

1 or at least tell us what they are? We only got that data
2 today. And their position currently is if you want to do
3 anything with the archived tapes, you have to pay for it.
4 You have to pay for attorneys to review anything that comes
5 out of the archived tapes, and you have to pay for the
6 production of that.

7 And while we're okay with sharing costs in terms
8 of the actual, you know, taking the tape and making it
9 accessible, there's nothing that says that we should be
10 paying for attorney review of that data. I mean it just
11 doesn't make any sense. If they want to review it, great,
12 they can review it. If they don't want to review it, they
13 don't have to review it. They can just produce it to us
14 wholesale. We'll take it.

15 But it's that kind of thing where they won't even
16 tell us, you know, they're not even taking that first step
17 to say, okay, here we have these tapes. We don't know
18 what's on them other than, you know, certain labels but, you
19 know, we're willing to take a look and see what's actually
20 on the tapes. Some of those tapes are labelled things like
21 "potential e-mails." And given the fact that they claim we
22 have no e-mails from 11 of these custodians, perhaps some of
23 those e-mails are on those tapes. We don't know.

24 But it's those kinds of things where we're
25 concerned that they're not taking their obligations to

1 respond to our discovery and doing it affirmatively unless
2 we find out about it and call them on it, and that in a
3 nutshell is what we want defendants to do.

4 THE COURT: So let me ask you this question:
5 Throughout the defendant's memo, they keep referring to this
6 what they call an agreement on the 25 or 24 custodians and
7 that the plaintiffs have reneged on the agreement. Was
8 there an agreement? And why did the defendants think there
9 was if there wasn't?

10 MR. PAREKH: Respectfully, Your Honor, I don't
11 believe that there was an agreement, and I was the primary
12 attorney involved in talking to Mr. Hulse about the
13 custodians' issue. What we said was we think it's your
14 obligation to identify custodians, but in order to get the
15 process moving, here's the 39 that we've identified in our
16 Rule 26 disclosure. You've only identified five. We think
17 you need to identify more. And they said, well, we think
18 your 39 is good, but we have this time crunch. And so we
19 said, okay, fine, let's start with the 39, which you and I
20 both agree to are at least at the bare minimum people that
21 you're willing to search.

22 We never said they don't have to go out and search
23 more. In fact, we always maintained the position that it
24 was their obligation in the first instance to identify
25 custodians, but we have a short time schedule. We needed to

1 get the process moving. And so that was the agreement. The
2 agreement was this is the initial list. Let's get started
3 with this. Let's get documents being produced, so that we
4 can at least -- we need time to review the documents before
5 we can take depositions, so at least we get this stuff out
6 of the way.

7 It was never an agreement or even an
8 acknowledgement that they did not have a burden in the first
9 instance to identify the relevant custodians and produce
10 documents.

11 THE COURT: Let me ask this question then:

12 So as I understand the defendant's memo, also they
13 say by whatever method we got here, whether it's overly
14 reliant on the plaintiff to identify people or whatever,
15 we've covered the waterfront now. We've got finance. We've
16 got R&D. We've got marketing. We've got sales. Whatever
17 the different categories of departments within 3M and
18 Arizant. We've got the representative people from each of
19 those departments. Do you have a sense that they don't?

20 MR. PAREKH: I think the e-mails that we
21 identified and the documents we identified attached to our
22 memo are examples of why we think they don't. Is those
23 memos or those e-mails, some of them were just forwarded to
24 one of the custodians that we've identified. Other ones,
25 you know, they were cc'd on somewhere. And some of them, if

1 you look further down the chain, those custodians don't
2 exist. They weren't on the initial chain of e-mails. They
3 only ended up with, you know, the e-mail in their memo
4 because somebody decided to forward it to them.

5 So other than by happenstance of that particular
6 e-mail being forwarded or cc'd, we would have never seen
7 that e-mail. And so that's why we do believe that there are
8 people out there who 3M should know and should be able to
9 find through interviews and a real process of going through
10 and finding answers that they have missed and that we only
11 find out by happenstance exists.

12 MAGISTRATE JUDGE NOEL: Okay. Thank you.

13 Ms. Zimmerman, I'm feeling really bad that I cut
14 you off because you had prepared so well. Is there
15 something else you want to say to add before I go to
16 defendants?

17 MS. ZIMMERMAN: Not at this time, Your Honor.
18 Thank you though.

19 MAGISTRATE JUDGE NOEL: Mr. Hulse?

20 MR. HULSE: Your Honors, if I may, and thank you
21 for the time on this issue, I'd like to start just briefly
22 on the agreement and then proceed to what plaintiffs are
23 asking to be done here. Also, their characterization of our
24 review, which frankly just indicates to me with due respect
25 that they haven't really reviewed our documents and what

1 we've produced.

2 So the agreement they don't deny that it existed.
3 It's documented. We mentioned the --

4 THE COURT: They did deny it existed. I asked
5 him, and he said there wasn't an agreement. The agreement
6 to the extent there is an agreement, it's a floor not a
7 ceiling. If this is the minimum, because so we can get
8 started, but they never agreed this is the universe. And as
9 I read your memo, your vision is that this is the universe
10 of custodians.

11 MR. HULSE: Well, it was certainly an open-ended
12 agreement, and we made clear from the beginning that we
13 understood that as they review, they started with a hundred
14 thousand pages of our documents and 20 depositions. And as
15 they went forward, they could identify additional custodians
16 for us, which is something that they went despite our
17 production for months before they identified any more. When
18 they did identify two more, we agreed to that. This list
19 that's in the submission, that was never a list that they
20 gave us.

21 And what's interesting, by the way, is seven of
22 eight of the documents that they point to and sent to the
23 Court are documents that were produced in the Walton and
24 Johnson case and certain of plaintiffs executive committee
25 have had for over a year and sometimes two years. And

1 they've certainly been available to all of plaintiff's
2 counsel for a year. That's seven of eight.

3 The last one was simply a meeting invite that we
4 produced back in July. But none of the rest of the
5 documents that they brought to the Court's attention are
6 from our more recent production. So those are all e-mails
7 they had absolutely the capability if they thought that
8 there was a deficiency in custodians to identify to us
9 during this process that we contemplated. And we didn't
10 hear from them that they no longer saw this process as
11 sufficient until this August meet and confer, which was the
12 day that they -- the day before the Court's hearing.

13 And the reason why this agreement was so essential
14 is because they had 230 document requests. And if you sum
15 all of those 230 up together, it's essentially all documents
16 related to Bair Hugger and forced air warming for a 25 year
17 period. That's what they sum up to. We had, of course,
18 breadth, burden, and relevance objections to nearly every
19 single one of those because each one was written very
20 expansively. Obviously, we could have become bogged down
21 interminably in those 230 issues.

22 But what we saw that we could do, and Mr. Parekh
23 and Ms. Zimmerman, who were my counterparts in this
24 negotiation, saw that we could do is we could get past those
25 issues if we had agreement on custodians. If we had a world

1 of custodians that we could focus on, then we could produce
2 much more expansively and not have to bring these issues
3 about breadth and burden to Your Honors. That was
4 foundational.

5 If we had not had that agreement on custodians, we
6 would have spent the last two months in telephone
7 conferences and Court conferences dealing with those 230
8 issues. And I think that --

9 MAGISTRATE JUDGE NOEL: Where do we find in the
10 record this agreement that the plaintiffs agreed to what you
11 think you agreed to?

12 MR. HULSE: And, Your Honors, by the way, there
13 are a couple of places. One is in the submission to Your
14 Honor, Judge Noel, that we made for our first discovery
15 conference. It's referenced in our position statement with
16 no rebuttal from the plaintiffs, and there was never a
17 dispute when we had that status conference that it existed.

18 It's reflected in Ms. Zimmerman's e-mail, which is
19 quoted, where she says they reserve the right based on our
20 document production to identify additional custodians. It
21 is also in my work product notes from our meet and confer
22 clearly reflected, which I'm happy to offer Your Honors for
23 in camera inspection if there really is an inspection about
24 the existence of this agreement.

25 So we operated, and they knew that we were

1 operating for several months under this agreement, and it
2 was a good agreement, and it was an agreement that worked.
3 And the proof of it is again that the eight documents that
4 were shared with Your Honor not only were documents they've
5 had a long time, but each and every one of those documents
6 had at least two and in some cases three or four of our
7 custodians on it.

8 So for each one, we were catching the documents in
9 an e-mail sent by a non-custodian, two, three, four other
10 ways, and that's just the ones they provided. There will be
11 many others where we will have ten of our custodians copied
12 on it.

13 And we also provided the plaintiffs, and there's
14 certainly a group that were on their initial disclosures,
15 people who left Arizant, the predecessor company, back in
16 2005, 2004, who we don't have e-mail archives for.

17 However, the plaintiffs have through the
18 production of people who continued as Arizant employees and
19 then 3M employees, thousands upon thousands of e-mails that
20 were sent by those individuals. And we provided to the
21 plaintiffs a listing for each of those individuals of the
22 number, thousands of e-mails, thousands of e-mails for each
23 of those individuals who we did not have document
24 repositories for.

25 And another point, they've got their list of 16

1 custodians who they say should be added as custodians. So,
2 of course, we saw that in their submission, of course, we
3 took a look at that. Several of those individuals we don't
4 have e-mail for, some we do.

5 But what we did is we looked in our document
6 database, and we said, okay, how many e-mails do we have
7 from each of those individuals to, from, received? Some are
8 an existing group of custodians. And in all cases but one,
9 it's thousands and as high as 25,000 e-mails to, from a
10 non-custodian. In the one case where it's a smaller number,
11 it's a guy who moonlighted on the Bair Hugger project for
12 about a month in 2015.

13 So what the custodians have done here is they have
14 really covered the waterfront. And plaintiff's submissions
15 and these e-mails that they offered Your Honors only confirm
16 the sufficiency of it. And so, and that's what's after all
17 of the argument back in chambers about this is frustrating
18 to us, because when it came to actually showing a
19 deficiency, all they showed is that this group of custodians
20 worked and that it was sufficient. And they know that it
21 was the foundation of not having to belabor and waste Your
22 Honor's time with a whole bunch of other discovery disputes.

23 MAGISTRATE JUDGE NOEL: So let me ask this
24 question:

25 As I read your memo, and I'm particularly looking

1 at the heading "C," under the relevant background where you
2 described 3M's own investigation of validated the agreed
3 list of custodians, of the things that you list there, it
4 appears to me that most of them of the four things, the one
5 that sounds most like an independent thing you did on your
6 own as opposed to just checking what plaintiffs have given
7 you is number two, where you say, "3M conducted 25 custodian
8 interviews."

9 Are those the custodian interviews you conducted
10 of the, include the 24 folks that plaintiffs have identified
11 or that you came to what you're calling the agreement on?

12 MR. HULSE: Yes and no. And I want to clarify
13 that many, in fact, the majority of those custodial
14 interviews actually predate the agreement. So we went in to
15 the meet and confer knowing from the custodial interviews
16 that we had conducted that plaintiffs actually, and no
17 surprise, I mean some of them have been litigating this for
18 two years and had our documents and 20 deposition, they done
19 a good job of figuring out who the custodians should be.

20 And so what we did, and I want to be clear too
21 that 3M has a formal process for multi-hour document
22 collection interviews. Okay. And we've done 25. It's
23 actually now a little higher than that of those. They are,
24 some were custodials --

25 MAGISTRATE JUDGE NOEL: Let me make sure I'm

1 clear on --

2 MR. HULSE: I'm sorry, I didn't answer your
3 question, Your Honor --

4 MAGISTRATE JUDGE NOEL: No, just on that point
5 though, so this process, this multi-hour thing is like a
6 standard operating procedure that --

7 MR. HULSE: It is indeed.

8 MAGISTRATE JUDGE NOEL: -- 3M legal goes through
9 whenever it gets sued in a major case.

10 MR. HULSE: It is, Your Honor, yes.

11 MAGISTRATE JUDGE NOEL: And you did that for these
12 25 people?

13 MR. HULSE: Some of them are former employees who
14 we just happen to have documents for. So we did it for
15 some formers. Mostly, they were current, okay, but they
16 helped lead us to the right group. Some people we
17 interviewed and they clearly weren't the right person. Or
18 they had a subset of documents that we then made targeted
19 collections of.

20 One thing that plaintiffs didn't mention is we
21 actually have in addition to the 26 now agreed custodians,
22 we have 30 other sources of documents. Most of which are
23 custodial that we have done targeted collections for. Most
24 people, I mean there are hundreds and hundreds of people who
25 have touched some aspect of the Bair Hugger forced air

1 warming over the course of the last 25 years, but many of
2 them have only an incidental role. That doesn't make them a
3 all purpose custodian that we go and collect and review all
4 of their documents for. It means we know they have a
5 specific thing. They've got this document or work charts,
6 whatever it is, and so we consider them a special purpose
7 custodian, go collect from them. We have 30 of those --

8 MAGISTRATE JUDGE NOEL: That's what you're calling
9 or they're describing in their memo as what you've described
10 as a limited custodian?

11 MR. HULSE: Yes, exactly. Exactly.

12 MAGISTRATE JUDGE NOEL: So if we were to ask you
13 to identify by name, title, and job description who these 25
14 are, is that something that can be done fairly readily?

15 MR. HULSE: It is. It can be done fairly readily,
16 and that's in addition to, I mean we consider all of this,
17 of course, to be work product and prefer not to wreck
18 privilege on it, but whatever Your Honors require you
19 require.

20 And in addition to that, we have, I mean I
21 personally can say I've conducted many, many, many
22 custodian-type interviews or employee interviews that don't
23 fall under that formal multi-hour process in order to
24 identify documents. I mean I speak to this personally
25 because I did it.

1 And so it's, but what we again don't have here,
2 Your Honors, is a demonstration that this comprehensive,
3 robust production is in fact deficient. And I want to say
4 that I have been, and my colleagues have been extremely
5 transparent through the process. We have answered dozens
6 and dozens and dozens of e-mails inquiring if we're, you
7 know, some litigants would say now send me an interrogatory.
8 We answer them informally all the time. We answer them in
9 phone calls. We have tried to answer everything they have
10 asked.

11 MAGISTRATE JUDGE NOEL: Right, but I guess where
12 they are coming from and to some degree me, it appears to me
13 that you've been overly reliant on them to show where you're
14 deficient. In other words, as I understand it, you came up
15 with five or less custodians, and they said, wait a minute,
16 there are at least 39. And then you had this meet and
17 confer process, and you came to what you're now calling an
18 agreement on 24. And so how could you start with only five?

19 MR. HULSE: Well, with respect, the initial
20 disclosures, I mean we all know what initial disclosures
21 are, right? They require you to disclose the people who you
22 may rely upon for the defense of your claims or in support
23 -- defense of claims or support. It's not list all
24 custodians. Okay. And so what we were required to do under
25 PTO4 was make initial disclosures on the issue of general

1 causation, and we have always been explicit about including
2 in our initial disclosures about what we understood general
3 causation to mean. It's a science issue. It's whether the
4 Bair Hugger system is capable of causing surgical site
5 infections, the type of infections that plaintiffs are
6 alleging, and whether there's a methodology for ruling out
7 other causes that we know to be possibilities. That's a
8 science issue. And so we see that general causation as an
9 expert issue fundamentally, one that will be resolved by
10 experts.

11 But we said, okay, well, if we need fact witnesses
12 to authenticate our testing documents, R&D documents,
13 regulatory documents, which are the only kind of documents
14 upon which a scientific expert could rely. They're not
15 going to rely on e-mails. Then who are those people? And
16 those are the five we listed.

17 They never served us with an interrogatory or to
18 identify every possible custodian. They never did, and
19 essentially they may regret that. They've actually now
20 served it in the last couple of days, that interrogatory
21 that I suppose they wished they had served. But they didn't
22 serve it, and they are essentially now asking the Court to
23 just to order us to answer that interrogatory immediately.

24 But it's -- let me I want to make sure I answered
25 your question, Your Honor. But that explains the initial

1 disclosures.

2 MAGISTRATE JUDGE NOEL: Okay.

3 MR. HULSE: Okay. However, I want to be clear
4 that this validation did not happen exclusively after the
5 fact, that we knew from the prior litigation and then also
6 from the preparation and internal diligence that we did
7 leading up to the receipt of the plaintiff's discovery who
8 the appropriate custodians were. And when we got
9 plaintiff's list, it was, again, perhaps partially by
10 coincidence a good list, but I don't think it's coincidence
11 because they knew the case and have been litigating it.

12 However, there are also people that we knew, and
13 we had already collected from or continue to collect from
14 documents on a limited basis. So it was not purely a let's
15 see list and then we'll figure out if that looks okay. It's
16 not that at all. Most of the work was done before we ever
17 got their initial disclosures.

18 And I'll say the process could have worked. And
19 in fact, this list that plaintiffs gave us is a list that if
20 it had come in a meet and confer instead of a court
21 submission could have been the foundation for a resolution.
22 But it either was a decision for whatever reason to
23 repudiate the process that we had agreed to that we sat
24 there in that room and agreed to on this.

25 I also want to be clear about our production, our

1 document production. Again, this is a science case. We all
2 know it's a science case. And Mr. Parekh may run down the
3 fact that we have produced reams of testing data, data that
4 they requested, but that is precisely the most important
5 information in the case. Research and development,
6 regulatory and testing is the documents that the experts are
7 going to look at.

8 This case is not going to be made one way or the
9 other by that extra, that millionth e-mail that gets
10 produced. And I want to be clear that we have produced
11 400,000 pages of e-mails and attachments at this point. And
12 the representations in their submissions that we have not
13 produced e-mail are just wrong. They're not right. And it
14 stands in incredible contrast to plaintiff's own approach to
15 discovery, which is to produce very little and maintain that
16 it's too burdensome for them to produce documents beyond
17 those documents held by the plaintiff's executive committee.
18 That's too burdensome.

19 And so this expansive approach, which is more than
20 any court in a comparable case has ever required that you go
21 and search and produce from anybody who can conceivably
22 have, anybody who can conceivably have a relevant document,
23 it's not only not supported by the law, it's a striking
24 contrast to their own approach.

25 MAGISTRATE JUDGE NOEL: Okay. Thank you.

1 MR. HULSE: Thank you.

2 MAGISTRATE JUDGE NOEL: Since we had simultaneous
3 memos, and I just chose who went first, I don't think we
4 need rebuttal. I think I have a sense, unless you have a
5 different view.

6 So with that, we'll take our break to get the
7 folks on the phone. Or is there other stuff?

8 THE COURT: The people on the phone are expected
9 to be call in at 2:30.

10 MAGISTRATE JUDGE NOEL: Okay. We'll be in recess
11 until 2:30.

12 (Recess at 2:10 p.m.)

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18 I, Maria V. Weinbeck, certify that the foregoing is
19 a correct transcript from the record of proceedings in the
20 above-entitled matter.

21

22 Certified by: s/ Maria V. Weinbeck

23

Maria V. Weinbeck, RMR-FCRR

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