

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)	
)	November 17, 2016
)	Minneapolis, Minnesota
)	Courtroom 12W
)	1:00 p.m.
)	
)	

THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

(MOTIONS HEARING)

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P R O C E E D I N G S
(1:06 p.m.)

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3 THE COURT: Good afternoon. Please be seated.

4 Okay. We are here in connection with the motion of 3M in
5 the Bair Hugger Forced Air Warming Device Products Liability
6 Litigation. Let's get everybody's appearance on the record.
7 Starting with 3M.

8 MR. BLACKWELL: Jerry Blackwell for 3M, Your
9 Honor.

10 MS. AHMANN: Bridget Ahmann for 3M.

11 THE COURT: We'll get all of 3M who is here.

12 MR. HULSE: Ben Hulse, Your Honor.

13 MS. YOUNG: Mary Young.

14 THE COURT: Okay. And for Dr. Augustine?

15 MR. BENHAM: For Dr. Augustine and the Augustine
16 entities, J. Randall Benham.

17 THE COURT: And for plaintiffs in the MDL?

18 MS. ZIMMERMAN: Thank you, Your Honor. Genevieve
19 Zimmerman.

20 MS. CONLIN: Jan Conlin.

21 MS. ASSAAD: Gabriel Assaad.

22 MR. PAREKH: Behram Parekh.

23 MR. ORIBELLO: Noel Oribello.

24 THE COURT: We're getting everybody's appearance
25 on the record. Do you want to speak up?

1 MS. HINES: My apologies. Micah Hines, Your
2 Honor.

3 MR. BLACKWELL: For 3M.

4 THE COURT: Thank you. Welcome. Okay, so we're
5 here on 3M's motion to compel discovery from third party
6 witness Scott Augustine and Augustine Entities. Who is up?
7 Mr. Blackwell?

8 MR. BLACKWELL: Yes, Your Honor, thank you.

9 Good afternoon again, Your Honor. Jerry Blackwell
10 for 3M. We're here on the July 2016 subpoena that we served
11 on Dr. Augustine and his various entities requesting various
12 documents related to this litigation. I want to take just a
13 second to talk about why it is that Dr. Augustine and his
14 documents are relevant at all to what we're trying to do.

15 THE COURT: Let me just start by saying I have
16 this feeling of dejavu all over again. Just about a year
17 ago, we were here before there was an MDL, correct? Just in
18 the Johnson case?

19 MR. BLACKWELL: That's right, Your Honor. And
20 that was back in 2015. I think Your Honor's order was in
21 November 2, 2015. And this will in part relate to rulings
22 that Your Honor gave even then prior to the MDL. This then
23 went into the MDL, and the restart button, the reset button
24 was pushed then so we served another subpoena that in some
25 ways overlap, but in some ways is broader than that

1 subpoena.

2 THE COURT: Okay.

3 MR. BLACKWELL: But we are interested in these
4 documents in part for what we discussed just this morning.
5 That is that plaintiffs are relying on Augustine-related
6 Bair Hugger studies, and they even cite them in a long form
7 Complaint. And they have brought these cases in the MDL
8 against 3M for the Bair Hugger, and they claim that there
9 are independent scientific studies that show that the Bair
10 Hugger system is dangerous and defective. So that's the one
11 reason.

12 They also contend that there's a safer alternative
13 design, which is a part of the plaintiffs' burden in a
14 number of jurisdictions, according to various jurisdictions
15 of law. They identify what they refer to in quotes as an
16 "air flow free warming technology" in their long form
17 Complaint at paragraph 95, which they say is a safe
18 alternative design. And this is exactly how the HotDog is
19 described as this air flow free warming technology, and we
20 refer to that in our brief at page 37,

21 THE COURT: Did they refer to the HotDog by name
22 in the Complaint?

23 MR. BLACKWELL: No, Your Honor.

24 THE COURT: Just reference a safer design.

25 MR. BLACKWELL: An air flow free warming

1 technology with which is descriptive of the HotDog, perhaps
2 amongst others.

3 The third reason is that the plaintiffs have
4 adopted lock, stock and barrel the theories of the Bair
5 Hugger defect that were espoused by Dr. Augustine before
6 there was any litigation. So he said it first, then they
7 said the same thing second, whether it is disruption of
8 laminer or air flow contamination of internal components of
9 the machine equal surgical site infections in the operating
10 room or improper filtration equals causation of surgical
11 site infection. So he said it first.

12 The plaintiffs' lawyer said it second in their
13 Complaint. And then in between, there were discussions of
14 some kind between either Dr. Scott Augustine or his cohorts
15 with the Kennedy Hodges Law Firm here. That's a firm that's
16 on the plaintiffs' steering committee before this litigation
17 began. And we've not been able to get any documents related
18 to that nexus, those discussions, to find out what exactly
19 was said, took place, shared, et cetera, in that regard.

20 So we feel we're entitled to show through
21 Dr. Augustine, given the plaintiffs' reliance upon him, his
22 studies, his work that he either funded, supported or did
23 himself at ground zero for the plaintiffs' case, that he
24 developed this alternative technology to HotDog, and then he
25 immediately launched into this campaign that's been prolific

1 and in many ways hidden and deceptive in attacking the Bair
2 Hugger.

3 We, in Exhibit D in our papers, attach, include a
4 copy of a letter where he in fact threatened 3M and Arizant
5 that if we did not buy his HotDog technology to replace the
6 Bair Hugger, that we would be facing this product liability
7 lawsuit if we didn't do that.

8 And, number 3, we believe we'll be able to show
9 that he then orchestrated the very science from which the
10 plaintiffs are relying that there's highly relevant research
11 that goes directly to the issue of whether the Bair Hugger
12 can in fact cause surgical site infections that's been
13 hidden. There were manufactured medical device reporting
14 reports at one of the hearings. Your Honor may recall I
15 asked whether any of the plaintiffs' lawyers in the
16 courtroom knew where these MDR reports were coming from
17 because they looked amazingly like the plaintiffs'
18 Complaints all of a sudden when there have been next to none
19 before this lawsuit started, which they're waiting for that
20 discovery. But we did learn that Dr. Augustine's hand was
21 in some of those that I want to talk about.

22 And we learned also that Dr. Augustine has even
23 tainted the so-called independent scientific research that
24 the plaintiffs have referred to early on in this litigation,
25 and this was not revealed, and it was in fact concealed from

1 this litigation until now.

2 So why is it that we're here? It's because, Your
3 Honor, we've gotten totally incomplete discovery responses.
4 We've had five meet and confers with Mr. Benham going back
5 to the summer, July 20th, the 21st, August 9th,
6 October 20th, and October 24th. And we could see that we
7 weren't receiving all of the documents, but we weren't
8 getting explanations as to what was being withheld or why.
9 So we have requested discovery on 29 of our requests in the
10 current motion to compel, and we set those out in our motion
11 papers.

12 Between July 20th and August 2nd, Mr. Benham made
13 production, some production to us, it was sort of rolling
14 that came in via e-mail. They were all labelled "Responses
15 To Requests Number 47," which related to information on the
16 plaintiffs' studies with the exception of four pages that
17 responded to request number 15, which related to documents
18 sent to any media outlet regarding the Bair Hugger system.

19 So for the various other categories, we didn't
20 receive anything that expressly provided documents in
21 response to those with the exception of objections, with
22 respect to those.

23 So we served our discovery on all of the various
24 Augustine entities, and there are six of them that we set
25 forth. The -- well, Mr. Benham and Dr. Augustine are

1 claiming that they have responded to all of our requests,
2 but as I pointed out to Your Honor, they specifically
3 responded to just two, and I want to point out why it is
4 that we know that we're not getting fulsome responses with
5 respect to any of them.

6 So what we know we've gotten is we've got next to
7 nothing in response to most of these requests. We did hear
8 from Mr. Benham that Mr. -- sorry, Dr. Augustine's computer
9 was stolen and then we heard that his computer was stolen
10 again. It was stolen twice, and so this is part of the
11 reason that we don't have complete disclosures of documents.

12 There is no discussion as to what happened to the
13 e-mails that would have been on the company server and
14 documents, and what about all of the other e-mails and
15 documents that pertain to all of the other principles in the
16 Augustine entities, including Mr. Benham and the president
17 of the Augustine's company, President Brent Augustine, and
18 there are other principles and key leaders from whom we have
19 again next to nothing. So there are 23 e-mails that are
20 listed on the plaintiffs' privilege log, and by and large we
21 haven't gotten them.

22 So the number one reason we're here is because we
23 have incomplete discovery responses; and number 2 is because
24 we're here once again on the whole issue of the privilege
25 log. When we were here back here in October of 2015, the

1 problem was that there was no privilege log created, which
2 is not going to give you the documents and didn't create a
3 published log. Now, there's been one created, but it
4 doesn't comport with the rules. There's not sufficient
5 information in the privilege log to be able to assess
6 whether a privilege applies or not, which is the minimum
7 that's required under Rule 26 for privilege log.

8 So, Judge Noel, I want to take a few minutes to
9 talk about how it is that we absolutely know that we've
10 received incomplete discovery, and that is apart from the
11 fact that we only had documents produced in two categories
12 in the first place. And the reason relates to the third
13 party discovery that we have gotten and what it shows us.

14 There is no more fundamental question in this
15 entire litigation than whether the Bair Hugger system
16 releases bacteria, sufficient bacteria in its exhaust air to
17 cause surgical site infections. We learned from third party
18 discovery essentially that Dr. Augustine had in fact been
19 involved in studies on two different occasions where the
20 goal was to attempt to colonize bacteria from a properly
21 functioning assembled Bair Hugger system.

22 There was one done in 2007 right here in Minnesota
23 down at the Regina Surgical Center in 2007. And this was
24 done in the operating room. It tested whether the Bair
25 Hugger system could cause this type of bacterial

1 contamination. It's cited as Exhibit I in our papers, and
2 the brief at page 22. They weren't able to generate any
3 significant contamination when the system was used and
4 assembled properly.

5 THE COURT: Is this a published study?

6 MR. BLACKWELL: It's not a published study.

7 THE COURT: When you say it's cited in your
8 things, where is it cited to?

9 MR. BLACKWELL: To e-mails that we've gotten from
10 third parties that relate to the fact that this testing was
11 done.

12 THE COURT: Okay.

13 MR. BLACKWELL: And so we don't have e-mails at
14 least from Dr. Augustine. We don't have the particulars
15 around that testing that was done. And no reason to believe
16 that we received either full data documents, results or any
17 electronically stored information around it.

18 THE COURT: And the third party from which you got
19 this information doesn't have or wouldn't have the full data
20 and stuff that you're looking for?

21 MR. BLACKWELL: No, I'm looking here that we only
22 got the e-mail from the third party, but didn't have the
23 full data. And, Judge Noel, actually I'm just recalling a
24 different instance where one of the third parties was saying
25 that his data was being sought after by 3M, and he was

1 actually writing to Dr. Augustine saying you've got all of
2 this data stuff as Augustine Medical, so could you help me
3 with this?

4 But the point here being we didn't know this
5 existed at all but for the fact it came up through a third
6 party, and that was in 2007. It was a fail. They weren't
7 able to get conde-forming (phonetic) units from the Bair
8 Hugger when it was assembled in the operating room at Regina
9 Surgical Center in Hastings. Well, they tried again in
10 2009, and this was at that North Umbria in the UK, at that
11 hospital.

12 And you, again, might remember from the very first
13 hearing we had where the plaintiffs brought up a certain
14 study McGovern, and I asked the Judge, "put a red circle
15 around that and wait until you hear about McGovern." And
16 they haven't said much about it since since it ultimately
17 concluded that this study doesn't establish causation.

18 Well, at that same hospital, Dr. Augustine was
19 involved in a study there also where he financed and
20 supplied equipment for a microbiology study at North Umbria
21 Health Care in the UK. And, again, the goal was to try to
22 culture bacteria from the Bair Hugger system. Again, the
23 effort failed to produce the bacterial contamination that he
24 hoped for. And it was insufficient data to even have been
25 accepted for publication anywhere.

1 So we failed to receive the e-mails related to
2 that testing. And, again, given that it wasn't even
3 referenced, we have no reason to believe that we've gotten
4 any fulsome data, results, or other documents of ESI related
5 to that either. And if we had known about this, we would
6 have discussed it during the science day. We only talked
7 about the Avedon study in 1997 in South Africa where they
8 tried to do the same thing with the Bair Hugger and got the
9 same result, but we didn't get documents related to that.

10 So not stopping there. There is an issue about
11 the medical device reporting. And Your Honor might remember
12 that these medical device reports are reports that are filed
13 with the FDA that are concerning alleged adverse events or
14 problems associated with the medical device.

15 THE COURT: This is what the paper you referred to
16 as a Med Watch report?

17 MR. BLACKWELL: Yes, that's right, Your Honor.
18 It's referred to the Med Watch report from 2010. And what
19 we learned, and I'll put this in just for the record, that
20 Exhibits D, J, and K of our papers refer to this Med Watch
21 reporting and how it was utilized by Dr. Augustine and
22 Mr. Benham. And it's referred to in our brief on pages 16
23 and 17.

24 And so Augustine there repeatedly claimed to both
25 industry figures and maybe even the Court given that there's

1 an affidavit, that this Med Watch report from 2010 is a long
2 and detailed MDR Complaint about Bair Hugger warning that in
3 quotes "an independent anesthesiologist Dr. Robert Gauthier
4 filed with the FDA."

5 Well, I deposed Dr. Robert Gauthier, and we're
6 surprised at what we learned. And he told us that he in
7 fact, number one, was not the person who filed the Med Watch
8 report that's attributed to him. And, number 2, he wasn't
9 really the person who wrote the Med Watch report that was
10 attributed to him. He says this report that is touted as
11 having his name was in fact drafted by Mr. Benham himself
12 and Dr. Augustine.

13 THE COURT: I don't think you were really
14 surprised when you learned that, were you?

15 MR. BLACKWELL: Well, I like to say I was, but I
16 should have been, but I wasn't, Your Honor. So we learned
17 that in fact this had been written by Dr. Augustine and
18 Mr. Benham, that he had put edits on it, and the tenor of
19 his edits were to tone down the language that Dr. Augustine
20 and he says Mr. Benham had put into this report.

21 It's significant here because this particular Med
22 Watch report was circulated to an Arizant board member in an
23 attempt to encourage this board member to withdraw their
24 investment in Arizant and claiming that this was an
25 independent report, that was a report from the independent

1 anesthesiologist. And we set forth here in Exhibit D a copy
2 of that reference that where they claim that there was this
3 independent Med Watch report when it was really kind of a
4 puppet scenario where the head was Dr. Augustine and
5 Mr. Benham.

6 So we haven't been able to obtain documents that
7 Dr. Augustine or Mr. Benham have showing their involvement
8 in this Med Watch report, no e-mails, documents, don't know
9 of this correspondence, but we just don't have the data or
10 the information surrounding it, and it should have been
11 produced in response to our request.

12 So when we had asked to produce documents related
13 to FDA filings, they claim confidentiality and privacy. And
14 Your Honor may not recall, but this very issue was brought
15 up when we were here last October, the issue of this Med
16 Watch report. And what was told to the Court then, first
17 off, Dr. Augustine pretended not to know what the letter was
18 we're talking about that went to Med Watch, though he was
19 the one who sent it. And we had to move to compel to
20 produce documents regarding that letter, and that motion,
21 that's at Exhibit N in our papers.

22 And then at the hearing on October 26, 2015, on
23 the motion to compel, the charade continued, and Mr. Benham
24 told this Court that -- and this is a quote -- "absent
25 looking at the letter and reading the references they are

1 talking about, I have to make a guess as to what they're
2 talking about." And what we were talking about is a letter
3 he wrote with Dr. Augustine and a letter he sent with
4 Dr. Augustine. He claimed he couldn't find the letter and
5 didn't even know what we were talking about, and that's
6 referred to in our brief on page 19. The Court rightly saw
7 through this and ordered him to produce the document.

8 He then produced only the Med Watch report itself
9 and attachments, which you'll see at Exhibit P, and never
10 produced e-mails, correspondence, drafts or anything else
11 regarding the report, which we learned from Dr. Gauthier.
12 And at the end of this, Judge Noel, I will say that there
13 are certain aspects of this that are worthy of consideration
14 for some form of a sanction because getting discovery ought
15 not be this hard, frankly.

16 So that's the Med Watch report. But then in
17 addition, they failed to produce documents related to
18 Dr. Augustine or his employees' involvement in the so-called
19 independent studies that I made reference to in starting
20 this. And what we learned in relation to Mark Albrecht, a
21 person whose name came up this morning, Mark Albrecht. And
22 so he's a former Augustine employee. He's not only that,
23 Dr. Augustine helped to pay his way through college. He is
24 one of his researchers.

25 Dr. Albrecht, I think he's a doctor, authored six

1 of the studies upon which plaintiffs rely. Some of those
2 studies contained disclosures indicating financial report by
3 Augustine or his company, but two of the studies purported
4 to be independent ones, and we discussed these at footnote 7
5 on page 15 of our brief.

6 We learned in fact that this Augustine-Albrecht
7 taint is also only so-called independent studies. When we
8 deposed Dr. Albrecht, he testified that he had his hand in
9 both of those so-called independent studies, the Legg
10 studies, L-E-G-G, Legg studies, and that he was an employee
11 of Dr. Augustine at the time. There's nothing in those
12 studies that would indicate Dr. Albrecht's involvement, but
13 he said he was involved, and there's no way to know that.
14 But we know it from third party discovery.

15 We also know that Dr. Augustine was communicating
16 with the authors of the so-called independent scientific
17 studies that the plaintiff is relying on. And if you look
18 at Exhibits S-X, as in Sam through X, these are e-mails that
19 reveal that Dr. Augustine was also involved in a campaign to
20 involve himself in the scientific literature to try to
21 discredit the Bair Hugger. And there wasn't any disclosure
22 about his involvement in the so-called independent studies
23 either. We found this from third party e-mails, but we
24 didn't get anything from Dr. Augustine that shows his
25 involvement or that of his cohort Mark Albrecht.

1 So the other two areas Your Honor relate to this
2 an e-mail campaign that Dr. Augustine has been involved in.
3 He has a number of web entities, www.entities. That he is
4 really the hand again behind the puppet in these, and he
5 uses those to send out blast mails, primarily on the Bair
6 Hugger and in commenting on the litigation, et cetera, with
7 a real agenda and an ax to grind. And he sent these out
8 again for his proxy companies. And they've included from
9 time to time videos, very social media activities,
10 communications with health care entities. But he sent it
11 out all these e-mails. And under the one guise or another
12 of these various entities criticizing the Bair Hugger and
13 characterizing the litigation.

14 If you look at Exhibit R, as in Ralph is an
15 example of those, we haven't had those produced yet. They
16 are related to this campaign that he's been engaged in. He
17 sent these out to anesthesiologists promoting investment in
18 his competing HotDog system. And in one instance, he
19 claimed to rely on an article that he wrote that's called,
20 "Forced Air Warming Is Associated With Periprosthetic Total
21 Joint Replacement Infections." And it was described as
22 submitted for publication. And you'll see that at Exhibit
23 DD. And this was just weeks ago, October 4, 2016.

24 We asked where is the study? You sent it around
25 to these anesthesiologists, produce it. They refused. No

1 explanation given other than we don't think the Court is
2 going to let you have it. And we didn't get it. And they
3 wouldn't produce it to us, though he's been sending it about
4 without stating any legal basis for it.

5 And last but not least, Your Honor, are the
6 documents that relate to the HotDog warming system itself,
7 and we believe those documents will show bias and that is
8 this bias that underlies the plaintiffs' very science case.
9 They essentially took the poisoned bait or the tainted bait.
10 And while at this point they may be kind of cutting the ties
11 with Dr. Augustine. When we hear back in October 2015, we
12 pointed out to the Court that at one point it listed him as
13 an expert of their's. Then there was a letter that we
14 showed where they said they withdrew that, that he was not
15 an expert of their's.

16 But you want to see documents that relate to this
17 HotDog system for the reasons that we referred to earlier
18 about the alternative design and to what extent his
19 statements about an error-free technology and its relevance
20 to this litigation is part of the underpinning for the
21 plaintiffs' case factually. We want to know what's been
22 communicated in that regard and have an opportunity to
23 explore that too. It goes to issues of credibility and bias
24 for the plaintiffs' case given that he has a very
25 significant ax to grind with his competitor.

1 So that's the ball of wax with respect to what we
2 know we have not gotten, but in terms of by way of the third
3 party discovery that revealed to us what we haven't gotten.
4 The issues with respect to the privilege log, I think are
5 more straightforward. It's pretty clear that the obligation
6 under the rules, Rule 26, it's clear that a privilege log
7 has to contain enough information to determine whether the
8 privilege truly applies to each individual document, and
9 that is not what we've gotten. There are, if you look at
10 Exhibit H, which contains the privilege log, there are a
11 number of deficiencies and problems with it that are fairly
12 obvious in just even looking at the rule.

13 For example, every single document on the
14 privilege log presently lists the same people as both
15 authors and recipients as though they are somehow writing to
16 themselves. We need to know the dates, the number of
17 exchanges, and parties to each exchange to evaluate a claim
18 of privilege.

19 Your Honor can see that every entry now everyone
20 also search both attorney-client privilege for all parties
21 to the communication and work product protection for all
22 attorneys lumping together all information and advice in
23 each document. Again, that's not sufficient information for
24 us to determine with respect to a given document if a
25 privilege applies or not. We need to know the specific

1 claimed basis for each of the documents.

2 And then, last, every assertion of privilege
3 asserts that the communications relate to "potential product
4 liability, unfair competition, and/or other claims." Now,
5 this is a vague and indefinite description that omits the
6 information necessary to evaluate the claim of privilege
7 including what particular litigation is even at issue.

8 So, Judge Noel, what we want with respect to the
9 privilege log is, first and foremost, an order that would
10 require Dr. Augustine to provide additional detail for each
11 document such that we know the parties to the communication,
12 the date of the communications, the specific litigation
13 addressed by the communication, the basis for the claim of
14 privilege or other protection, and a sworn statement
15 identifying the beginning and ending dates during which
16 Dr. Augustine claims he had an attorney-client or litigation
17 consultant relationship with the Kennedy Hodges firm.

18 And that last part is important. I just want to
19 bring back to Your Honor's recollection from our last
20 hearing, we had quite a discussion about whether there was
21 an attorney-client relationship between Dr. Augustine and
22 the Kennedy Hodges firm. And there we had pointed out to
23 the Court that the Kennedy Hodges that represented in the
24 *Walton* case, that Dr. Augustine had no attorney-client
25 communications with the firm related to the Bair Hugger.

1 And we talk about this at pages 31 and 32 of our brief, 31
2 and 32. And at the same time, Dr. Augustine is invoking the
3 attorney-client privilege with respect to communications
4 with the firm that Kennedy Hodges says doesn't exist. So
5 there's no indication that they represented him beyond the
6 time period of 2009 anyway much less that they had anything
7 to do with the representation related to the Bair Hugger.
8 And not only that, they also were clear that they didn't
9 have a role as an expert or a consultant, which knocks out
10 any claim of the work product protection, unless he is
11 claiming that he is now working with another one of the
12 lawyers on the plaintiffs' side, which we haven't heard. So
13 there ought not be the claim or privilege based on
14 attorney-client privilege.

15 And what we want with respect to the other
16 discovery we've talked about, and it may be by the time this
17 is done, Judge Noel, we'll just end up having to have some
18 discovery on discovery, which is not the most fun thing to
19 do, but sometimes it's necessary to get at what was done
20 since they are making the claim that we haven't completely
21 responded. And so to get at what was done to come up with
22 this complete response, we knew at the very least that we'd
23 like to have an order requiring Dr. Augustine to identify
24 and produce documents, e-mails, other electronically stored
25 information responsive to our list of requests. The ones

1 that we've set forth in our motion papers.

2 And then for number 2, which is the real punch
3 line here, this is the part that we don't know that we may
4 need discovery on discovery at deposition to get at. But
5 failing that, deposition would want a sworn statement that
6 identifies all the records custodians whose documents,
7 e-mails or other electronic documents were searched, which
8 files and electronic files were searched, such as personal
9 e-mails, company e-mails, computer drives, and what key
10 words or other methods were used to identify responsive
11 documents. The same sorts of things that we have spent much
12 time in the MDL status hearings on a monthly basis talking
13 about generally with respect to discovery on discovery. And
14 it would help us then to be clearer about what was searched,
15 what wasn't, and what still remains outstanding.

16 And, finally, Judge Noel, I'll sit down after
17 this. As I mentioned to Your Honor, I do think there are
18 grounds here for sanctions. You know, the MDR reporting in
19 and of and by itself, the fact that, first, there had to be
20 a motion to compel brought around the Med Watch report
21 first. We got in front of Your Honor, and it was clear then
22 that they should produce those documents. They were in
23 front of this Court and on the record on behalf of
24 Dr. Augustine and Mr. Benham, essentially said we don't know
25 what they're referring to when they're the ones who wrote

1 it, when they're the ones who sent it. And I point out,
2 Your Honor, as far as we know, they haven't sent a hundred
3 such reports to the FDA, so it isn't hard to remember this
4 one, and they said they didn't do it. And so now we're here
5 again on another motion to compel, because now we have
6 complete discovery around that. And so how many times is
7 enough time is the question?

8 The issue of the article that Dr. Augustine
9 drafted in October and sent around to these
10 anesthesiologists they refused to produce. There's no
11 justification or basis for that, when he says that it is
12 going to be released for publication. He's already
13 communicated to the anesthesiologists about it. They have
14 it, and have no good faith basis for not having given it up.

15 Third, the privilege log, it's not that hard to
16 read the rules about what's required for a proper privilege
17 log, and this wasn't making a minimal effort. And if I may,
18 Your Honor, just point out, and I won't belabor this, but I
19 wanted to hand it up to the Court for whatever it's worth.
20 What this is, if I may, Your Honor, just approach and
21 explain.

22 THE COURT: Tell me what it is.

23 MR. BLACKWELL: I will. This just simply
24 chronicles our many discussions with Mr. Benham on our meet
25 and confers in an effort, so it just puts them all on a

1 chart. And, Your Honor, they can see how much work we've
2 put into it.

3 THE COURT: Let me ask this question, so when we
4 were here before in October of 2015, one of the items being
5 sought and one of the things I ordered was that
6 Dr. Augustine sit for a deposition. And I understand that
7 did not happen or that did happen?

8 MR. BLACKWELL: Your Honor, it did not happen. It
9 was right at the lip of going into the MDL.

10 THE COURT: And that's not part of the relief
11 you're seeking here today, is that correct or incorrect?

12 MR. BLACKWELL: That's correct. And I will point
13 out to Your Honor, that's not part of the relief. We have
14 currently a deposition date set for Dr. Augustine of
15 December 13th, which depending on what happens to the
16 document we'd like to have the documents before there's a
17 deposition. And the discovery deadline for general issues
18 as Your Honor knows is January 20th.

19 THE COURT: Okay.

20 MR. BLACKWELL: Thank you, Your Honor.

21 THE COURT: Thank you. Mr. Benham?

22 MR. BENHAM: Thank you, Your Honor. I think
23 there's something unusual happening here. I think there's
24 an agenda that's being pursued which goes beyond discovery.
25 I'm completely confident that no matter what my client

1 produced in response to the discovery that I would still be
2 standing here today. And the reason is clear, there are 900
3 or so cases out there. The research is strong. The
4 journals are renowned. The scientists are real scientists.
5 And so 3M has apparently decided that it's only hope of
6 success is to destroy the credibility of Dr. Augustine, who
7 was the inspiration for some of this discovery. And rather
8 than actually attacking the research, it attacks
9 Dr. Augustine to cast doubt in your eyes, cast doubt in
10 Judge Ericksen's eyes and, ultimately, to cast doubt in the
11 eyes of the jury. That's background. So let me address the
12 issue.

13 As I said in the affidavit I'll put into the
14 Court, I put a hundred hours or so, although I don't keep
15 track of my hours. Maybe it's 80, maybe it's 120. I put a
16 lot of time finding, producing documents, and dealing with
17 these issues. But 3M alleges that my client and I have not
18 properly searched for and produced documents. They
19 apparently have a fantasy of what documents they think exist
20 even though some of them are seven or eight or nine years
21 old. And because those fantasy documents weren't produced,
22 they believe that they're sitting under some chair someplace
23 smoking, and I'm refusing to produce them. Well, that's
24 just not true.

25 On the other hand, if they really did believe

1 that, they would have taken me up on the offer that I made
2 last week or slightly longer to engage outside counsel,
3 start all over, confirm and redo what I did, and all I ask
4 is that they pay for it rather than me. I'm perfectly
5 willing to step aside and get the Fredrikson law firm
6 involved, redo the whole discovery from scratch,
7 electronically compare what they find with what we've
8 already produced, and let them produce whatever is new.
9 That offer remains open. Otherwise, I urge that they accept
10 what I've produced because I've produced what I found.

11 THE COURT: Let's take one example that was just
12 mentioned. So apparently there was some e-mails sent out to
13 anesthesiologists within the last month or so referencing
14 some research that's about to be published, and
15 Mr. Blackwell says that hasn't been produced, yet it came
16 from Dr. Augustine. So why would that not have been
17 produced?

18 MR. BENHAM: There was an e-mail that was sent to
19 potential investors, some of whom were anesthesiologists,
20 and it addressed a large number of things. You know, I'm
21 uncertain. I heard him say that the article was attached to
22 it. I'm uncertain if that's true. I don't want to tell you
23 it's not just because I don't know. But I do know that
24 there was a reference to an unpublished article, and it said
25 it was submitted for publication. And I urge you that an

1 article, what you told me was tell them what Dr. Augustine
2 is communicating to the world out there. An unpublished
3 article is not something that he's communicated to the
4 world. It's got to go through peer review. It's got, you
5 know, maybe it will be accepted or rejected. It's going to
6 be edited by the journal. It may be rewritten. And if 3M
7 gets to see research before it's published, how far back do
8 they get to go? If Dr. Augustine has an idea for another
9 article --

10 THE COURT: Well, except that their request isn't
11 anything that he tells the world. The request was any
12 social media content, which is defined to include blah,
13 blah, blah and/or e-mail, drafted, created and/or sent by
14 you, any person or entity you sponsor, sponsored or any
15 other -- or and/or any person who acts, acted on your behalf
16 or at your direction concerning the Bair Hugger warming
17 system, forced air warming, the Bair Hugger warming system
18 litigation and/or the defendants. Isn't this the e-mail
19 that we're talking about fall precisely in that request?

20 MR. BENHAM: Until this instant, my understanding
21 that their interest was in the underlying article that was
22 referenced, not the e-mail itself. If it's the e-mail there
23 itself that is the issue, I have to ask is this an ongoing
24 obligation forever, any e-mail not the date of discovery
25 back, but forward into the future? Every e-mail that my

1 company sends to anybody about our number one competitor has
2 to be shared with our number one competitor? Is that really
3 the obligation? Because I understood that it was the
4 communications from the date of discovery, first discovery
5 back from the date of the second discovery back, and
6 anything related to the safety or effectiveness of Bair
7 Hugger, and that's what I produced. That's my
8 understanding.

9 My hope is research that's inchoate, research
10 that's being thought of, research that's being negotiated
11 with researchers, communications with universities around
12 the world, that should not be revealed to our number one
13 competitor for several reasons, including the fact that 3M
14 is a behemoth out there. They have the power to thwart our
15 ability to do research, and so sharing that sort of
16 information with them in advance will effectively thwart it.

17 The next question I'd like to address is documents
18 concerning HotDog itself. Now, their argument is they have
19 to deal with whether there's a reasonable alternative out
20 there. I understand a little bit about that area of the
21 law, not much, but I know that that's true. But does that
22 actually mean that they get to look at all the
23 communications with our customers? They get to find out
24 what our customers like and didn't like? If we had a
25 product that failed because of an electrical reason, and we

1 do internal work and improvement it, they get to see that.
2 That's a level of detail, which I would argue is not
3 necessary to deal with the question of whether there's an
4 alternative product. They know from their own sales force
5 that there are alternative products. As I put in my papers,
6 there are several alternative products, and the Bair Hugger
7 product loses business to them sometimes. That in itself is
8 proof that there's an alternative product.

9 There's a product out there called buy heat, which
10 is very similar to a significant part of the HotDog product,
11 and 3M must know that it's an alternative product because
12 they just acquired the rights to exclusively distribute it.
13 So 3M is now distributing its own error-free product out
14 there. How can there be any doubt that there's an
15 alternative product that's out there that's acceptable?

16 And, you know, under ordinary circumstances, no
17 company should be required to reveal that sort of private
18 confidential information about its relationship with its
19 customers, but especially to its behemoth of a competitor.
20 A competitor whose goal is to destroy it, and especially to
21 the Blackwell firm. I mean they're not just a law firm
22 representing 3M. They host a website that attacks
23 Dr. Augustine and promotes 3M products. There is a
24 difference between being a litigation firm in support of a
25 client and being an advertising and PR firm in support of a

1 client. I submit that you would not ask us to reveal my
2 clients inner most secrets to 3M's PR firm. That seems a
3 bit too far.

4 The Med Watch issue, I mean they asked for the
5 documents. I wrote back to them and said the FDA says this
6 is anonymous. The FDA requires filings in Med Watch of a
7 medical device manufacturer who has any reason to believe
8 that its product has hurt someone. It doesn't make any
9 difference whether they agreed with it or not. They have to
10 file. And there's nothing quite as clear that someone
11 thinks your product has hurt someone. It's when they sue
12 you, and the documents that I filed give language in the
13 FDA, which makes that clear. There have been 900 or so of
14 those filings, and 3M has not filed a single Med Watch
15 report in violation of their obligations to the FDA.

16 The FDA also encourages others to anonymously file
17 Med Watch reports if they have reason to believe that a
18 product has hurt someone, and they protect the anonymity of
19 those filers.

20 Your Honor, if you decide that FDA rule should be
21 violated, breached, circumvented, I'll respond promptly.
22 But I do need to tell you I've looked at the Med Watch
23 website, and I know that it is an electronic website. One
24 fills it out, hits a button, it goes to the FDA, and it's
25 gone. So I'm not exactly certain what documents they think

1 exist. But they are going to take --

2 THE COURT: I told you what documents they're
3 looking for. They said they talked to this other guy
4 Gauthier who said I got a draft written by Augustine. I
5 edited it, sent it back to Augustine, and I assume that
6 draft then becomes the content that you're describing going
7 into the website. Are you telling me that the drafts don't
8 exist?

9 MR. BENHAM: No, we're talking about two different
10 things. There is the initial 2010 or so Med Watch report
11 that was submitted by Dr. Gauthier. I submitted what -- I
12 produced what documents I found related to that. If they
13 think there are other documents, let them take me up on my
14 offer and bring the Fredrikson firm in and look for them. I
15 can't find them.

16 They are going to take Dr. Augustine's deposition
17 on the 13th of December. And when asked what role did you
18 have in the Med Watch report filed by Dr. Gauthier, he's
19 going to answer it fully and honestly and with not the
20 slightest embarrassment about what his role was. You know,
21 there's no hiding there. I mean there are things in that
22 Med Watch report that on their face of it, it would be
23 impossible for Dr. Gauthier to know. There's really not
24 much argument about that, that Dr. Augustine had a role in
25 creating that. I mean if they want to talk about what my

1 role is, our view, I'll certainly answer that question, but
2 I mean there's nothing being hidden there.

3 The Med Watch reports that I was referring to were
4 related to the hundreds of Med Watch reports that 3M should
5 have filed, didn't file, and have been filed by a voluntary
6 filer. I think the FDA allows that voluntary filer to
7 remain anonymous. I'm not certain that I deeply care. But
8 if you require that anonymity to be breached, we'll respond
9 appropriately.

10 The privilege log is a complicated issue for me.
11 I mean I sought guidance from the Faegre firm and the
12 Blackwell firm from the very beginning about what should be
13 on the privilege log. I did readings and I submitted an
14 initial privilege log. I had several conversations with
15 them on the phone and said, "what do you think should be on
16 it? What do you think should be on it? And I won't produce
17 it until you send me an e-mail confirming what you think
18 should be on it." I put on it what they said should be on
19 it, and that was apparently insufficient.

20 Now, as I wrote to the Court, there are facts
21 surrounding the various claims of privilege, which neither
22 side on this case has a right to see. But I would be happy
23 to provide the Court with the Court's Eyes Only affidavit
24 explaining it all. In fact, I have a hard copy of the
25 affidavit right here with me. And if you would accept it, I

1 would hand it in at this very minute.

2 THE COURT: I'm sorry. I'm confused. You have an
3 affidavit doing what?

4 MR. BENHAM: An affidavit from me explaining the
5 various legal relationships and support for the privileges
6 claimed in the privilege log. There's a level of detail
7 that I don't -- that I can't share with either of these
8 parties without destroying the privilege. And so I offer it
9 to share it with you.

10 MR. BLACKWELL: And we would object to that at
11 this time. There's not a proper foundation for it, Your
12 Honor.

13 THE COURT: All right. I'll ponder that before I
14 decide about it, so.

15 MR. BENHAM: A foundation objection for something
16 that I will purport that I wrote seems a little odd.

17 So, Your Honor, my client has complied as well as
18 it can 80, 100, 120 hours of time has been put into it. We
19 have produced the documents that we have found. The only
20 documents we haven't produced are those to which we have
21 objected. If they don't believe me, let them pay for the
22 Fredrikson firm to come in and do it all over again. Thank
23 you, sir.

24 THE COURT: Okay.

25 MR. BLACKWELL: May I respond briefly, Your Honor?

1 THE COURT: Yes, let me ask you this: What about
2 this anonymity law that Mr. Benham says the FDA provides to
3 the Med Watch filers?

4 MR. BLACKWELL: Well, Your Honor, there's no such
5 thing, even if you accept it as true, which I don't. I just
6 heard Mr. Benham refer to that. Any anonymity law or rights
7 to it can be waived by a party. They can choose to make it
8 not anonymous, which is exactly what Dr. Augustine and
9 Mr. Benham did.

10 And you'll look at Exhibit D in our papers where I
11 quote from the Augustine Biomedical and Design letter dated
12 July 9, 2010, signed by Dr. Scott Augustine, where he writes
13 to an anesthesiologist for funding purposes,
14 "Coincidentally, last week an independent anesthesiologist
15 filed a long and detailed MDR Complaint about Bair Hugger
16 warming and Arizant to the FDA. A copy of the Complaint is
17 enclosed for your review."

18 So here they are out touting this as independent,
19 first of all, when it was written by the two of these. And
20 it's only considered confidential and protected when we seek
21 discovery of what it is they're in fact sending out to the
22 public with respect to this, and they have made it public.
23 They have put it in contention. They have put it at issue.
24 And to the extent they are now using this --

25 THE COURT: Right, I understand that, and then

1 we'll get -- as I understand Mr. Benham, when Dr. Augustine
2 is deposed, he's going to tell you all about that 2010
3 Gauthier filing, but he says there is all of these hundreds
4 of others that are protected by the anonymity protection
5 that the FDA provides. And I'm asking you what is your
6 position regarding whether there is anonymity provided for
7 in the law. And if it is, do I have the power in the
8 context of the discovery dispute between a defendant and a
9 third party witness in a multi-district litigation to
10 overrule it?

11 MR. BLACKWELL: And, Your Honor, I don't want to
12 misstate the law in that regard. I take Your Honor's
13 question to heart. We would request leave to submit a
14 supplement that addresses that because I want to make sure
15 we get it right. But I think to the extent it relates to
16 the Bair Hugger that they've put at issue, that that
17 privilege, number one, is not inviolate, and that it can be
18 protected by a proper protective order with respect to it.
19 But we would like Judge Noel to be able to submit just
20 something brief and supplemental in that regard to address
21 that issue.

22 THE COURT: All right. I'll let you know if I
23 need that.

24 MR. BENHAM: Your Honor, would you allow me to
25 address that?

1 THE COURT: Hold on, one second. One at a time.

2 MR. BLACKWELL: And so, Your Honor, with respect
3 to these other matters to the extent that there have been
4 again e-mails sent out related to the article that
5 Dr. Augustine is referring to, and he is sending this out to
6 investors for purposes of a spawning or encouraging funding
7 and it exists, it's a fact that's relevant. And to the
8 extent he's concerned about it being properly protected and
9 privileged, again, that can be addressed through a proper
10 protective order also.

11 THE COURT: And what about his argument that the
12 discovery requests, as I understand it, were served back in
13 July. And the thing we're talking about right now and that
14 I asked that you mentioned in your argument, and that I
15 asked Mr. Benham about is something that has occurred since
16 those discovery requests are served. Is it your contention
17 that he has an ongoing obligation to continue to update
18 discovery just as a party would in litigation?

19 MR. BLACKWELL: Yes, Your Honor, but the fact is
20 with respect to our negotiations with Mr. Benham, these
21 discussions have been ongoing with respect to all of these
22 requests. And so it isn't as though in July there was a
23 production in August, there was a production, and we had
24 everything. So he has been given us a rolling production
25 ever since has never said that this is all there is as of

1 July 2016. And it is in a way it's a bit of gamesmanship in
2 that that's never been raised until now is an issue. And if
3 it's related to the case, there is still time to go and get
4 it in a supplemental way, but it just seems to be an
5 unnecessary loop if it exists, and he knows what we're
6 seeking --

7 THE COURT: Okay.

8 MR. BLACKWELL: -- if it exists. With respect to
9 the HotDog and communication about the HotDog, Your Honor,
10 we'd be content to have what, if anything, has been sent to
11 consultants, experts, Kennedy Hodges firm, et cetera,
12 related to the HotDog, that may be informing the kinds of
13 claims and positions taken by plaintiffs in the litigation.
14 We should be able to explore that, and to that extent that
15 is relevant.

16 I do want to address he had thrown out this idea
17 of bringing in the Fredrikson & Byron firm and saying we can
18 use Fredrikson, and he would use Fredrikson, but we'll send
19 you the bill. And at this point, there's just really no
20 explanation for what's happened up to this point, that have
21 e-mails been properly searched, what custodians did you look
22 to? What terms did you use? It's not that we didn't get a
23 production. We just don't know what went into it.

24 And before we decide that discovery is somehow
25 inaccessible, and it needs to be some form of a

1 cost-sharing, a cost-shifting, we first have to know if that
2 is indeed the fact.

3 And there was in fact a case that Your Honor was
4 involved in, *Lindsay v. Clear Wireless LLC* in 2014, where
5 there was some issues that came up around whether there
6 should be some cost-shifting sort of thing, and it turns on
7 whether or not the evidence is in fact inaccessible, whether
8 the alleged difficulty is that it was so costly have been
9 created by the producing party itself.

10 THE COURT: Well I don't accept it here, and the
11 issue, I have no recollection of the issue you're talking
12 about, although, I do remember that case quite well. But
13 as I understand Mr. Benham's position, it is we're a third
14 party witness. We're here under Rule 45, not under any of
15 the discovery rules that govern parties. And we have
16 certain rights and protections that parties don't have in
17 discovery. Namely, we are protected by the rule that says
18 you have to do something to minimize burden. And I forget
19 the precise words, but they have -- they're in a better
20 place than a party would be in terms of not being compelled
21 to spend a whole bunch of time, money and effort, and
22 especially in this case, attorney's fees, responding to
23 discovery in a case to which they're not a party.

24 MR. BLACKWELL: I'd say, first and foremost, Your
25 Honor, under Rule 45(d)(1), and the advisory committee notes

1 in the 1991 amendment, a nonparty served with a subpoena is
2 subject to the same scope of discovery as a party, first
3 off.

4 And, second, invoking a rule that speaks to the
5 undue burden of a third party hardly justifies the third
6 party simply producing inadequate and slip shod discovery,
7 passing it off as a complete response, and then when called
8 to account for it in the motion to compel, either claiming
9 at that point undue hardship or as they did in the papers I
10 just read from Dr. Augustine, crying almost poverty. We
11 can't afford to do it, and we would get Fredrikson & Byron,
12 except we can't afford to do it. And that's the first time
13 we've heard anything about there being an issue about cost
14 involved or cost issue since this was served I think back in
15 June. I think it was served in June.

16 So and, Your Honor, it hadn't been a showing yet
17 that there's anything that's unduly burdensome about this.
18 From all accounts, it simply looks like they just simply did
19 not do the proper job in canvassing the company to get
20 responsive documents, and we've been subject to delay.
21 We've been here on repeated motions before Your Honor in
22 this Court to compel to get these responses. It's been
23 delay, delay, delay. And suggesting that another firm be
24 brought in, and then claiming undue hardship is simply the
25 last round in this kind of behavior.

1 And sure enough, there are things we can ask
2 Dr. Augustine at his deposition, but the point is to have
3 the documents before the deposition, so you know what you
4 want to ask about, and this has been a long train at this
5 point. And there's one thing if they're not end this kind
6 of undertaking that we found out was incomplete when they
7 purported for it to have been complete and then we learned
8 we didn't get the e-mails, and we learned all kinds of
9 things that existed that they never admitted existed before,
10 and then when called to account for it, undue hardship,
11 unduly burdensome, can't afford it, et cetera. And I think
12 in the context of the facts as they're presented here, that
13 argument may not be well taken, Your Honor.

14 THE COURT: Okay. Is there something in
15 particular you wanted to respond to, Mr. Benham?

16 MR. BENHAM: Well, there are three quick comments
17 on each of them. I'll be less than a minute.

18 THE COURT: Tell me first before each one what it
19 is you are responding before you give the response.

20 MR. BENHAM: Whether you have the power or not to
21 breach the anonymity.

22 THE COURT: Okay.

23 MR. BENHAM: I'm not asserting that you don't have
24 the power. I've seen citations or suggestions in articles
25 that the FDA has intervened in some circumstances, but I

1 don't know what those circumstances are. I simply say that
2 you shouldn't.

3 As regards whether we have an obligation to share
4 all ongoing communications with anyone about Bair Hugger or
5 not, I hope you understand that this is our only significant
6 competitor. What 3M might well accomplish here is that we
7 essentially stop talking about them. That would be the very
8 best thing they could ever hope for coming out of this case,
9 and it would do us tremendous harm.

10 I mean we shouldn't have to -- I mean this is not
11 a Lanham Act case. This is not an unfair competition case
12 in which they're saying we said wrong things about their
13 product. And I think it's too much of a burden to ask us to
14 share with them every communication we ever have in the
15 future about their product.

16 And, finally, I want to make sure I understand as
17 regards information about the HotDog. They have revised
18 their incredibly expansive demands and said all they want is
19 anything we've shared with plaintiff's counsel or
20 consultants. Is that correct? I mean is that what you
21 heard, Your Honor?

22 THE COURT: Don't look to me to answer your
23 questions.

24 MR. BENHAM: But I will represent to you that that
25 means nothing because there have been none. I'll go look

1 when I get back from my 40th anniversary trip. But short of
2 that, I believe they just walked away from that entire area
3 of discovery. Thank you, sir.

4 THE COURT: I'll just make this closing
5 observation that apparently both Mr. Blackwell and
6 Mr. Benham have made wise choices in choosing their wives
7 over the Court in terms of their obligations to do whatever
8 they need to do in the future. Mr. Blackwell told us this
9 morning he's not going to be here for the next status
10 conference because he's going to be visiting the birth place
11 of Alexander Hamilton, I believe he said, correct?

12 MR. BLACKWELL: I didn't characterize it that way.
13 Saint Kitts.

14 THE COURT: Okay.

15 MR. BENHAM: Thank you.

16 THE COURT: Thank you. And just to complete the
17 record, I assume by reason of the state of the docket, the
18 plaintiffs have no dog in this fight. Is that correct,
19 Ms. Zimmerman or, I'm sorry, Ms. Conlin?

20 MS. CONLIN: You're correct, Your Honor. I mean
21 I'd be happy to respond briefly.

22 THE COURT: No, I don't want to encourage more
23 argument. I want to make sure the record was clear I wasn't
24 rejecting something you wanted to offer.

25 MS. CONLIN: We have no dog in this fight. We

1 have been very clear with the Court since day one. With
2 respect to inadequate filtration and disruption of air flow,
3 we are making those claims, but we're not making them
4 because Dr. Augustine has said them. We've made them
5 because we've independently verified them to be true, and
6 that's our position.

7 THE COURT: All right. Thank you very much. I
8 will issue an order shortly. We are in recess.

9 (Court adjourned at 2:08 p.m.).

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11 * * * * *

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14 REPORTER'S CERTIFICATE

15 I, Maria V. Weinbeck, certify that the foregoing is
16 a correct transcript from the record of proceedings in the
17 above-entitled matter.

18
19 Certified by: s/ Maria V. Weinbeck

20 Maria V. Weinbeck, RMR-FCRR
21
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25