

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)	
)	December 15, 2016
)	Minneapolis, Minnesota
)	Courtroom 12W
)	9:45 a.m.
)	
)	

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

THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

(STATUS CONFERENCE)

APPEARANCES

FOR THE PLAINTIFFS:

MESHBESHER & SPENCE
Genevieve M. Zimmerman
1616 Park Avenue
Minneapolis, MN 55404

LEVIN PAPANTONIO
Ben W. Gordon, Jr.
316 S. Baylen Street
Suite 600
Pensacola, FL 32502

CIRESI CONLIN
Michael V. Ciresi
Michael A. Sacchet
225 South 6th Street
Suite 4600
Minneapolis, MN

(Appearances continued next page)

1 FOR THE PLAINTIFFS (cont'd):

2 KIRTLAND AND PACKARD LLP
3 Behram V. Parekh
4 2041 Rosecreans Avenue
5 Third Floor, Suite 300
6 El Segundo, CA 90245

7 KENNEDY HODGES, LLP
8 Gabriel Assaad
9 4409 Montrose Blvd
10 Suite 200
11 Houston, TX 77006

12 KENNEDY HODGES, LLP
13 David W. Hodges
14 711 W. Alabama Street
15 Houston, TX 77006

16 PRITZKER HAGEMAN, P.A.
17 David Szerlag
18 45 South 7th Street, #2950
19 Minneapolis, MN 55402-1652

20 PENDLEY BAUDIN & COFFIN
21 Chris Coffin
22 1515 Poydras Street
23 Suite 1400
24 New Orleans, LA 70112

25 FARRAR & BALL, LLP
Mark Bankston
1010 Lamar, Suite 1600
Houston, TX 77002

FOR THE PLAINTIFFS (APPEARING BY PHONE:)

PETERSON & ASSOCIATES, P.C.
Brian Emerson Tadtman
801 W. 47th Street, Suite 107
Kansas City, MO 64112

BERNSTEIN LIEBHARD LLP
Dae Lee
10 East 40th Street
New York, NY 10016

Telephone Appearances cont'd next page:

1 FOR THE PLAINTIFFS (appearing by phone):

2 PAPPAS & HEALY LLC
3 John J. Pappas
4 221 No. LaSalle Street, #3410
5 Chicago, IL 60601

6 THE LANIER LAW FIRM, PLLC
7 Jason Goldstein
8 Erika Mohabir
9 126 East 56th Street, 6th Floor
10 New York, NY 10022

11 THE OLINDE FIRM, LLC
12 Wesley G. Barr
13 400 Poydras Street
14 Suite 1980
15 New Orleans, LA 70130

16 ZIMMERMAN REED, PLLP
17 Jacqueline A. Olson
18 1100 IDS Center
19 80 South Eighth Street
20 Minneapolis, MN 55402

21 SIDNEY P. COMINSKY, LLC
22 Amy Tao
23 109 S. Warren Street, #1500
24 Syracuse, NY 13202

25 GROSSMAN & MOORE, PLLC
Emily A. DeVuono
Jennifer Moore
Kara Lane
401 W. Main Street
Suite 1810
Louisville, KY 40202

HARE WYNN NEWELL & NEWTON
Peggy Little
Massey Building
2025 Third Avenue North
Suite 800
Birmingham, AL 35203

MCEWEN LAW FIRM, LTD
Melissa Schmid
5850 Blackshire Path
Inver Grove Heights, MN 55076

1 FOR THE PLAINTIFFS APPEARING BY PHONE:

2 MORGAN & MORGAN, PA
3 Michael S. Goetz
4 Joseph T. Waechter
5 Heather Cullen
6 201 N. Franklin St 7th Floor
7 Tampa, FL 33602

8 RAIZNER SLANIA, LLP
9 Jeffrey L. Raizner
10 Amy Hargis
11 Erin Stacener
12 Alejandrina Lopez
13 Jane Munoz
14 Rica Rinoso
15 2402 Dunlavy Street
16 Houston, TX 77006

17 LONCAR & ASSOCIATES
18 John L. Coveney
19 424 S. Cesar Chavez Blvd
20 Dallas, TX 75201

21 CAPRETZ & ASSOCIATES
22 Don K. Ledgard
23 5000 Birch St, Suite 2500
24 Newport Beach, ca 92660

25 MICHAEL HINGLE & ASSOCIATES
Bruce Brown
220 Gause Blvd
Slidell, LA 70005

HOUSSIERE DURANT & HOUSSIERE
Randall A. Kauffman
Monica Vaughan
1990 Post Oak Blvd Suite 800
Houston, TX 77056

DAVIS & CRUMP, PC
Martin D. Crump
Robert D. Cain, Jr.
2601 Fourteenth Street
Gulfpost, MS 39507

Appearances continued on next page:

1 FOR THE PLAINTIFFS APPEARING BY PHONE:

2 LEWIS & CAPLAN
3 Pete Lewis
4 Sarah Delahoussaye Call
5 Amy Webster
6 3631 Canal Street
7 New Orleans, LA 70119

8 SKIKOS CRAWFORD SKIKOS &
9 JOSEPH, LLP
10 Melissa Erin Mielke
11 One Sansome Street, Suite 2830
12 San Francisco, CA 94104

13 THE RUTH TEAM
14 Austin Grinder
15 Steven C. Ruth
16 842 Ramond Avenue
17 Suite 200
18 Saint Paul, MN 33733-5157

19 TATE LAW GROUP, LLC
20 Mark Tate
21 Arlene Nicole
22 2 East Bryan Street, Suite 600
23 Savannah, GA 31328

24 LAW OFFICES OF TRAVIS R. WALKER
25 Travis R. Walker
1235 SE Indian Street
Suite 101
Stuart, FL 34997

LAW OFFICES OF JAMES S. ROGERS
Elizabeth J. McLafferty
1500 4th Avenue #500
Seattle, WA 98101

ANDREWS & THORNTON
Anne Andrews
John Thornton
Lauren Davis
2 Corporate Park, Suite 110
Irvine, CA 92606

GOZA & HONNOLD, LLC
Kaitlyn Neufeld
11181 Overbrook Road
Suite 200
Leawood, KS 66211

1 FOR THE PLAINTIFFS APPEARING BY PHONE:

2 JOHNSON BECKER PLLC
3 Rolf T. Fiebiger
4 444 Cedar Street
5 Suite 1800
6 Saint Paul, MN 55101

7 HAUSFELD, LLP
8 Angel Dorsey
9 1700 K St NW Suite 650
10 Washington, DC 20006

11 JOHNSON JOHNSON & SCHALLER PC
12 Leslie O'Leary
13 975 Oak Street
14 Citizens Building, Suite 1050
15 Eugene, OR 97401

16 JONES WARD PLC
17 Alex C. Davis
18 Marion E. Taylor Building
19 312 S. Fourth Street, 6th Floor
20 Louisville, KY 40202

21 LORD & ASSOCIATES
22 Priscilla Lord
23 309 Clifton Avenue
24 Minneapolis, MN 55403

25 MURRAY LAW FIRM
Caroline Whitney Thomas
650 Poydras Street
Suite 2150
New Orleans, LA 70130

BROWN & CROUPPEN, PC
Abby Cordray
211 North Broadway, Suite 1600
St. Louis, MO 63102

HURLEY MCKENNA & MERTZ
Molly Condon
33 North Dearborn Street
Suite 1430
Chicago, IL 60602

1 FOR THE PLAINTIFFS

APPEARING BY PHONE:

2
3 PAGLIALUNGA & HARRIS, PS
James Humann
4 Charles T. Paglialunga
1001 4th Avenue, Suite 3200
5 Seattle, WA 98154

6 BEASLEY ALLEN
Megan Robinson
7 218 Commerce Street
Montgomery, AL 36104

8
9 CARR & CARR ATTORNEYS
Patrick E. Carr
4416 S. Harvard Avenue
10 Tulsa, OK 74135

11
12 HOLLIS LEGAL SOLUTIONS, PPLC
Scott Hollis
13 6814 Crumpler Boulevard,
Suite 101
14 Olive Branch, MS 38654

15 THE LAW OFFICES OF PETER
ANGELOS, P.C.
16 Nicholas Bonadino
100 North Charles Street
17 Baltimore, MD 21201

18 MCGARTLAND LAW FIRM, PLLC
Lee Ann McGartland
19 1300 South University Drive #500
20 Fort Worth, TX 76107

21 MESHBESHER & SPENCE, LTD
Holly Sternquist
22 1616 Park Avenue
Minneapolis, MN 55404

23 PARKER WAICHMAN, LLP
Nicole Eisner
24 59 Maiden Lane
6th Floor
25 New York, NY 10038

1 FOR THE PLAINTIFFS

APPEARING BY PHONE:

2 PRITZKER HAGEMAN, PA
Wendy Thayer
3 PWC Plaza Building
Suite 2950
4 45 South Seventh Street
Minneapolis, MN 55402-1652

5
6 RANDALL J. TROST, P.C.
Carrie Hancock
Pam Rodriguez
7 Randall T. Trost
801 Main Street
8 Lynchburg, VA 24504

9 SCHNEIDER SCHNEIDER & SCHNEIDER
Scott Haider
10 815 Third Avenue South
Fargo, ND 58103

11
12 SHELTON LAW GROUP
Rob Shelton
13 9300 Shelbyville Road #215C
Louisville, KY 40222

14
15 THE MILLER FIRM, LLC
Tayjes M. Shah
The Sherman Building
16 108 Railroad Avenue
Orange, VA 22960

17
18 POGUST BRASLOW & MILLROOD, LLC
Matt Leckman
Jessica Lowe
19 8 Tower Bridge, Suite 940
161 Washington Street
20 Conshohocken, PA 19428

21 DEGARIS LAW GROUP, LLC
Wayne Rogers, Jr.
22 2 North 20th Street
Suite 1030
23 Birmingham, AL 35223

24 NEAL R. ELLIOTT, JR.
P.O. Box 80136
25 Baton Rouge, LA 70898

P R O C E E D I N G S

(9:45 a.m.)

1 THE COURT: Good morning. Please be seated.
2
3 Welcome to Minnesota. It's minus 2.

4 All right. We have your appearances. Are the
5 people on the telephone?
6

7 THE CLERK: They should be able to hear and talk.

8 THE COURT: Okay. And talk? All right, somebody
9 on the phone say something?

10 UNIDENTIFIED VOICE: Good morning, Your Honor.

11 THE COURT: Okay.

12 MAGISTRATE JUDGE NOEL: Thank you.

13 THE COURT: All right. I think I know what we're
14 going to be spending most of our time talking about this
15 morning, but we'll go through the joint agenda. Someone is
16 missing on your side.

17 MR. HULSE: Mr. Blackwell is.

18 THE COURT: Oh, right, doesn't he have some kind
19 of anniversary?

20 MR. HULSE: Yes, he's got a trip to Saint Kitts.

21 THE COURT: Some kind of romantic thing. All
22 right. Well, plaintiffs will try and take advantage of you.

23 MR. HULSE: We're ready for it.

24 THE COURT: Okay. There's nothing to say about
25 the pretrial order.

1 The plaintiff fact sheets? Anything to say about
2 that?

3 MS. ZIMMERMAN: Good morning, Your Honors. With
4 respect to the plaintiff fact sheets, I think that we have a
5 near agreement. The plaintiffs have proposed that the
6 service protocol be done through an FTP website, which is
7 how we have done all other productions thus far in this
8 case, wherein the defendants are provided a log-in and a
9 password and then they will then get an e-mail every time a
10 plaintiff fact sheet is uploaded. I believe that we have
11 basic agreement, but we're waiting for final confirmation
12 for 3M with respect to that proposal.

13 THE COURT: Ms. Young?

14 MS. YOUNG: Yes, Your Honor, we expect to be able
15 to reach an agreement. And we were also proposed just
16 yesterday the Ramsey County plaintiff fact sheet, and we
17 just do have one concern because it requires a due date
18 within 45 days of entry of that order, and how we'll put
19 that cases into the bellwether pool as contemplated in
20 PTO-15, if they're not due until early February.

21 THE COURT: Well, they might have to be separate
22 then. We might have to just pick a few.

23 MS. YOUNG: Okay.

24 THE COURT: Anyway, we won't let that hold up the
25 whole process of selecting the bellwethers. And Judge Leary

1 is not here, so we can't do much about that.

2 Okay. Plaintiffs' additional statement.

3 MAGISTRATE JUDGE NOEL: This is bellwether.
4 There is nothing to say about that.

5 THE COURT: Nothing to say, yeah.

6 MAGISTRATE JUDGE NOEL: I think you may have
7 skipped a page.

8 THE COURT: Oh, yes, that's why it didn't make any
9 sense. The foreign discovery?

10 MS. ZIMMERMAN: Thank you, Your Honor. And I
11 think that some of the relevant facts have been outlined for
12 the Court in our submission, but just for completeness of
13 Your Honors' information, we did want to take at least a
14 somewhat brief journey through what has happened with
15 respect to the United Kingdom depositions.

16 The plaintiffs have cooperated at every angle at
17 every turn with allowing the defendants to go forward with
18 this discovery that we really didn't think was necessary of
19 these UK authors. And as you know, there was letters
20 rogatory that were submitted for Your Honor's review and
21 signature, and they were presented to the High Court in the
22 United Kingdom. Those were eventually signed somewhere
23 around about November 8th.

24 We did have one aborted trip, I guess, to the
25 United Kingdom back in September. There were the four

1 depositions that were supposed to go forward. One was
2 cancelled by 3M, the others were cancelled by the witnesses.
3 And during that trip, we were scheduled to be deposing
4 Dr. McGovern then as well. And as the Court is certainly
5 aware, we returned and no depositions were taken in
6 September.

7 We then went forward. We had the United Kingdom
8 issue the order on I think the 8th of November. The
9 plaintiffs again throughout the process have really said
10 we're not going to stand in your way, so long as we're
11 provided equal access, we're provided copies of
12 communications with any of those solicitors or barristers or
13 the witnesses that were included in all of this, that we
14 share equally in time, and we were expected to share equally
15 in costs.

16 Unfortunately, we learned over the course of the
17 last month that that has not been the case. We have not
18 been copied on the communications. We have not been copied
19 on orders that have been submitted to the High Court for
20 signature. We learned when we got to Manchester in the
21 United Kingdom to take the first deposition of Mr. Legg that
22 the orders that had been prepared by 3M and submitted and
23 ultimately sealed by the High Court were actually a
24 departure from what is typically done in a very atypical
25 process.

1 As I think you know, depositions are not typically
2 done in the United Kingdom the same way that they are done
3 here, but we were informed by the examiner, who is as I
4 guess I would say the referee for the process, that there
5 was some atypical language wherein the plaintiffs were
6 denied equal access in terms of time. And we were also
7 denied the ability to cross examine the witness. And these
8 were departures from a standard order as we were advised by
9 the examiner. He said he's done a couple hundred of these.
10 He's never seen this kind of language in these orders, and
11 they were orders prepared and drafted by 3M.

12 We brought that issue to the examiner's attention.
13 The examiner noted the discrepancy from standard protocol
14 and said that he did not have authority to overrule the
15 Court, but did say that this was inconsistent with certainly
16 the process in the UK and his understanding of American law
17 as well. And so we had an emergency hearing, a telephone
18 hearing before the High Court and Senior Master Fontaine
19 actually appeared, perhaps without a license, on the phone
20 with Senior Master Fontaine to outline our issues. And,
21 ultimately, Senior Master Fontaine agreed that this was a
22 departure from general practice and issued new sealed
23 orders, and ordered that 3M pay the study authors both
24 additional time for sitting there. This was a six hour
25 delay in Manchester where we all waited to get this sorted

1 out. They had to pay the barrister and the solicitor their
2 additional time for being involved.

3 So the deposition then of Mr. Legg went forward,
4 and we were informed that in the UK when you become a
5 surgeon, you're not a doctor anymore, you're a mister, so I
6 guess that's a promotion. But so Mr. Legg's deposition went
7 forward. We traveled down to London. We conducted back to
8 back depositions on Sunday of Mr. Hamer and Mr. Reed. We
9 learned in the course of that discovery that Mr. Reed was
10 really the primary author on the main McGovern studies that
11 have been the subject to some discussion before the Court
12 throughout the course of this MDL.

13 We had a deposition later that week of Professor
14 Leaper, and then we were scheduled to have the deposition of
15 Dr. McGovern on Friday. I concluded the questioning of
16 Professor Leaper around 4:00 on Thursday, and we were
17 advised around about 5:45 that Mr. Gordon, Mr. Corey Gordon
18 had a sudden onset illness, and he was going to be
19 postponing the deposition of Dr. McGovern set for the
20 following day. We, and I should also say that about 36
21 hours before the start of the deposition, we were presented
22 with around about 10 three-inch binders full of materials
23 from Dr. McGovern along with a flash drive with 45 videos,
24 so we were seeing these for the first time. And I trust
25 that the defense counsel was also seeing this for the first

1 time. And so we stayed up, we prepared for these
2 depositions and expected them to go forward and then they
3 were postponed. We hoped to try to get it rescheduled while
4 were all in the UK given this was our second trip, and this
5 is a significant expenditure of both time and resources for
6 all parties involved, and our requests were flatly rejected.

7 They have now over our objection rescheduled this
8 deposition to happen in the first week of January, after
9 already being advised that those were dates that were not
10 going to work for the plaintiffs' side given long standing
11 travel that had been arranged last April.

12 And so at this point the plaintiffs would request,
13 first of all, that it is not necessary that we go all the
14 way back over to the United Kingdom to have Dr. McGovern's
15 deposition taken. And we would request that to the extent
16 that the defendants continue to seek the testimony of
17 Dr. McGovern, that they make a proffer to this Court about
18 what they expect to learn that would be different from the
19 discovery that they have already conducted on the authors of
20 the various studies.

21 We have already deposed Dr. Nachsheim here in
22 Minneapolis. Mr. Albrecht has already been deposed. Dr.
23 Reed or Mr. Reed has been deposed. While his name appears
24 not as the first listed author, he is the main author,
25 according to his testimony, and according to the e-mails

1 that we have now received from Dr. McGovern. And so we --
2 and then Dr. Augustine also will be scheduled for deposition
3 I believe on January 9th.

4 So from the plaintiffs' perspective, the
5 defendants have come in and said to this Court that this is
6 some sort of -- that all of these studies are some sort of
7 Dr. Augustine conspiracy, that all of the authors are
8 somehow financially tied to Dr. Augustine and his company,
9 and/or that the science behind the relative risk of 3.8 in
10 the McGovern and Reed study is somehow unreliable.

11 Well, the, testimony that they have received in
12 depositions both in the United Kingdom and here in the
13 United States is not consistent with that. That is not what
14 these witnesses have testified, and the plaintiffs would
15 gladly offer the deposition transcripts from these witnesses
16 for the Court to review. But at this point, we would
17 request that the defendants make a proffer about what
18 additional information they expect to learn from this
19 witness that justifies a third trip across the Atlantic
20 Ocean to depose Dr. McGovern.

21 We just think that at this point it is unduly
22 burdensome and, alternatively, perhaps given that the
23 defense counsel had arranged to pay Dr. McGovern and his
24 lawyers \$50,000 in connection with his testimony that was
25 scheduled and then cancelled last week, that perhaps the

1 more efficient approach if this is to go forward is to have
2 Dr. McGovern and his lawyers flown to the United States
3 rather than having a team of lawyers from here fly over for
4 a third time.

5 So I think that that is at least a brief
6 explanation of some of the issues that came up as we were in
7 the United Kingdom last week and returned on Saturday, and
8 we appreciate having the opportunity to update the Court on
9 that.

10 THE COURT: Mr. Hulse.

11 MR. HULSE: Good morning, Your Honors, first off,
12 Corey Gordon can't be here today to address this because he
13 is still in the hospital. He developed a fever shortly
14 before the McGovern deposition. He was put on bed rest. He
15 did come back to the United States on Monday, but then
16 shortly thereafter was admitted to hospital where last I
17 heard last night he remains.

18 And so there was no question with Mr. Gordon being
19 the only 3M of the U.S. counsel there that it couldn't
20 proceed, and it certainly wouldn't have been able to proceed
21 while the counsel were over there given his serious health
22 condition.

23 Dr. McGovern's counsel, who we've worked with on
24 securing his voluntary appearance, offered the dates of
25 January 4th through 6th as the next available option for him

1 to be deposed. Those are the only available dates that they
2 have in January before the discovery cut-off. They have
3 offered also to present Dr. McGovern for two full days so
4 that each of the parties can have a full day of examination.

5 As to the importance of Dr. McGovern, I don't
6 think that really is something that is worthy of further
7 discussion. On the very first appearance that was made by
8 plaintiffs' counsel before this Court when the issue of
9 general causation came up, plaintiffs' counsel handed up and
10 delivered the Court a copy of the McGovern study and said
11 this is what was established in general causation. He is
12 true one of several authors. Dr. Reed is also an author
13 too, but he is a vitally important person to the litigation.

14 What we have suggested to plaintiffs, if they
15 don't want to make another trip over there, is that we can
16 set up for them to participate by video as is often done
17 with overseas depositions. We can certainly make that
18 accommodation. But, basically, at this point, we have a
19 very important deposition. We have been, contrary to
20 plaintiffs' counsel's statements, establishing conclusively
21 the ties between these study authors and Dr. Augustine and
22 his surrogates as we expected to do, and Dr. McGovern, the
23 deposition of Dr. McGovern will continue that.

24 What we don't understand is why on four weeks of
25 notice the plaintiffs cannot identify a single member of

1 their team, and I note that there are several counsel
2 present here, who can do this deposition on December 4th,
3 5h, or 6th.

4 THE COURT: January.

5 MR. HULSE: I'm sorry, yes, Your Honor. January
6 4th, 5th, 6th. We don't think any further proffer is
7 needed. We think we should just proceed on those dates, and
8 plaintiff should identify somebody who can take the
9 deposition whether it's overseas or by video conference.

10 THE COURT: Okay. We're going to come back to
11 that. We'll go through the remaining matters on the agenda
12 here.

13 Cases? Almost to a thousand? Like the stocks
14 going almost to?

15 MR. SZERLAG: Good morning, Your Honor.

16 THE COURT: The psychological emotional barrier,
17 is it?

18 MR. SZERLAG: Currently in the MDL, we have
19 961 cases that are on file. I think in the agenda in the
20 joint report, there are still a number of state court cases.
21 I believe there were four or five in state court. I'm
22 sorry, five that are filed in State Courts other than Ramsey
23 County, and I believe the Ramsey County still stands at 45.

24 THE COURT: And it doesn't look like anything is
25 happening in the non-Ramsey State cases that we have to be

1 concerned about at this point?

2 MR. SZERLAG: That seems to be the case. Yes,
3 Your Honor.

4 THE COURT: Okay. And same anything with Canada?

5 MR. SZERLAG: Canada, I -- it doesn't appear that
6 anything has happened, and I have to say I think that
7 information was provided by defense counsel.

8 THE COURT: All right. Ms. Young?

9 MS. YOUNG: Your Honor, just two brief points on
10 the state court case. One is the Patita case filed in
11 Hidalgo County, Texas. Those claims are joined with medical
12 malpractice claims, include a Bair Hugger claim, and it is
13 duplicative of a previously filed MDL claim. And I spoke
14 with plaintiffs' state court counsel last week, and he
15 related, his assistant related to me that he's having
16 trouble getting in touch with MDL Counsel so that they can
17 resolve the duplicate filing and whether his federal case or
18 his state case would go forward. So that is one we just
19 would like to have resolved by the two plaintiffs' counsel
20 that are involved in that case. The federal case was filed
21 first, and I believe it's Mr. Gordon's firm that is on that
22 file.

23 And then second, just last week 3M received a city
24 of St. Louis, Missouri, case that names 52 plaintiffs and
25 joining their Bair Hugger claims together. 3M's initial

1 reaction to that Complaint is that it's an issue of
2 fraudulent joinder. There's one Minnesota plaintiff, and 13
3 Missouri plaintiffs, and then plaintiffs from a wide variety
4 of cases. We understand that jurisdiction is a place where
5 joinder is done to defeat diversity jurisdiction, so we are
6 looking into all of our options and intend to pursue removal
7 and transfer to the MDL.

8 THE COURT: Okay. We'll just have to wait on that
9 then. Isn't that funny that the plaintiff in the Texas case
10 doesn't know who he or she is represented by?

11 MS. YOUNG: I would probably have to ask
12 Mr. Gordon that.

13 MR. GORDON: Your Honor, we haven't heard from --
14 are you talking about the Martinez firm? Garcia Martinez,
15 isn't that the case?

16 MS. YOUNG: I e-mailed a couple times all counsel,
17 and the last e-mail I did speak with state court counsel
18 last Friday. His assistant said we understand the issue.
19 We're trying to get a call back from MDL counsel. Perhaps,
20 he's reaching out to the wrong --

21 MR. GORDON: Yeah, it must be, because I've seen
22 the e-mails, but I haven't received any phone calls or
23 messages. I don't think any of us have from that law firm.

24 MR. SZERLAG: I'll reach out to them. I have not
25 heard anything from them.

1 THE COURT: You'll liaise with them.

2 MR. GORDON: You'll liaise. Thank you, Judge.

3 MS. YOUNG: Okay, thank you.

4 THE COURT: Thank you. All right, discovery?

5 MR. HULSE: Your Honors, just briefly on
6 Dr. Augustine and the motion that we had. We have received
7 the first two installments that were due from Dr. Augustine,
8 the two declarations that were ordered. We believe that
9 they are not consistent with the Court's Orders. There's
10 the document production that's forthcoming on the 20th.
11 It's our expectation that will probably not be in compliance
12 either, so we expect that we will be bringing a further
13 motion based on the Court's prior discovery motion within
14 this month.

15 I don't know that there's anything to spend much
16 time on here other than the predictive coding issue, which
17 I'm happy to address first.

18 THE COURT: Why don't we move to that?

19 MR. HULSE: So, and this has been of course an
20 ongoing discussion between us and plaintiffs' counsel. The
21 basic result having gone through five rounds of training on
22 the predictive coding is that at the recall rate that we've
23 been targeting, which is 80 percent, we cannot achieve an
24 acceptable precision rate. And precision is basically the
25 number that tells you of the documents that have been

1 identified as relevant by the system, what percentage of
2 them are actually relevant? And so we are stuck after
3 multiple trainings at a precision rate that's roughly
4 20 percent.

5 The prior predictive coding that was done for the
6 Walton and Johnson cases ended up with a precision that was
7 far higher than that. But in that case, 3M and its counsel
8 trained on their own. We were basically able to be very
9 focused on telling the system what was relevant.

10 Here, we used a random set and applied broad
11 relevance criteria, and the bottom line is that the computer
12 cannot figure out a good rule for determining what is and is
13 not relevant.

14 So the approach that we are taking to this is that
15 there is another criterion that predictive, that predictive
16 coding uses, which is called threshold, which is essentially
17 rates the relevance of documents in the pool. And so up to,
18 you know, a hundred percent likelihood that the document is
19 going to be relevant.

20 And so what we have told plaintiffs' counsel that
21 we intend to do is take the top two tiers of documents on
22 that relevance ranking, which is over 200,000 documents,
23 which is consistent with a number that we believe based on
24 our training is going to be actually relevant, and we are
25 accelerating them for production over the next several

1 weeks, and that review is underway.

2 Our proposal for the remainder of the documents
3 given the low precision rating here is to apply a set of key
4 words and other screening criteria to get directly at the
5 documents most likely to be relevant.

6 I want to reiterate that we have produced a large
7 quantity of e-mail already in the case both through the
8 prior use of predictive coding and through the use of key
9 words, and plaintiffs have been able to use those e-mails
10 throughout. And it remains our expectation that
11 overwhelmingly what would be produced through the remainder
12 of this process by the close of discovery is going to be of
13 minimal relevance, and so, and we continue to believe that
14 we will be able to accomplish this so long as we can proceed
15 along with the plan I've outlined by the close of fact
16 discovery.

17 THE COURT: What do you think should happen?

18 MR. HULSE: I'm sorry, Your Honor?

19 THE COURT: What do you propose?

20 MR. HULSE: So what we propose is that we proceed
21 as I've just outlined and have shared with plaintiffs'
22 counsel. And if plaintiffs reach the conclusion at the
23 close of fact discovery that based on documents that have
24 come in in January, that there is additional discovery that
25 they need to take or that they need to do re-deposition of

1 witnesses, that they should make a showing on that, and we
2 will cooperate with them based on the showing that they
3 make.

4 But, of course, we recognize that there's going to
5 be a substantial quantity of e-mails that are still produced
6 in January.

7 MAGISTRATE JUDGE NOEL: So what -- I guess I'm not
8 sure I'm following exactly what is your plan for getting to
9 this?

10 MR. HULSE: So our plan is we take the 200,000
11 e-mails that our system tells us are the most likely to be
12 relevant, and we have got those prioritized for review and
13 production. For the remainder, what we propose to do is
14 apply key words and other screening criteria to identify the
15 relevant documents within that group because we know that
16 they, that group, even though the system has flagged them as
17 particularly relevant, we know from the training that they
18 are in fact likely to be 80 to 90 percent nonrelevant.

19 It's just that the system after all of this
20 training cannot figure out a good rule for deciding what is
21 and is not a relevant e-mail. And, again, we were able to
22 achieve in the predictive coding that was done in Walton and
23 Johnson, an acceptable precision rate by this point, and we
24 couldn't accomplish it here.

25 THE COURT: Okay. Do you have a 502 Order in your

1 protective order?

2 MAGISTRATE JUDGE NOEL: A clawback thing? A
3 Rule 502 protection for clawback of --

4 MR. HULSE: Yes, we do, yes.

5 THE COURT: Could you turn over all those 20,000,
6 all those 200 million over to them, and let them see if they
7 can do a better job?

8 MR. HULSE: Your Honors, we -- no. No, and
9 especially given, again, that we know from the training
10 which was done on a random set, that the relevance rate is
11 about, is probably about 16 percent of the whole. So,
12 obviously, Rule 26 limits discovery to relevance documents.
13 We're talking about turning over a massive quantity of
14 irrelevant documents, not to mention that privilege, we've
15 got privilege too that we need to go through.

16 THE COURT: Which is why I asked about the 502
17 Order.

18 MR. HULSE: Right, we do, but we're talking about
19 massive, massive quantities of privileged and irrelevant
20 documents.

21 MAGISTRATE JUDGE NOEL: Okay.

22 THE COURT: All right.

23 MR. HULSE: And here's what I suggest if the Court
24 is contemplating anything along these lines, we've had no --
25 this is being raised in a status report. We haven't had

1 motion practice on it, and we would suggest that we go to
2 full briefing. I think it's a better use of our time to
3 follow this plan. It's an acceptable plan. It will get at
4 the most relevant documents within the time frame left for
5 discovery.

6 MAGISTRATE JUDGE NOEL: Okay.

7 MR. PAREKH: Your Honors, we obviously do not have
8 an agreement on this and what Mr. Hulse has represented, to
9 date, 3M has produced 131,000 documents total to date.
10 They're talking about an additional 200,000 documents just
11 in the top 20 percent. If you look at the total number of
12 documents that reach the recall rate of 80 percent, which
13 was the agreed to recall rate in July between us and
14 defendants, we're talking at least 1.2 million documents,
15 not pages, 1.2 million additional documents, and possibly up
16 to 1.9 million additional documents.

17 This is not something that we contemplated when we
18 entered into the CAR protocol. We did not anticipate this
19 kind of delay from 3M. And 3M only started, only started
20 the training process in November. There was no reason for
21 them to have waited from July to November to start this
22 training process. All of this could have been avoided had
23 3M diligently pursued its training process and diligently
24 pursued its course. We have an agreed to order that says 3M
25 must produce documents that reach an 80 percent recall rate.

1 MAGISTRATE JUDGE NOEL: As I understand it,
2 whatever they're using isn't generating it. You're not
3 getting 80 percent, so how do you make the computer get
4 there?

5 MR. PAREKH: Your Honor, we are getting
6 80 percent. What we're not getting is a precision rate.
7 The CAR protocol does not have a threshold for precision.
8 We wanted to negotiate one. Defendant said, you know, we
9 don't need a precision threshold, as long as we have a
10 recall threshold. So the difference between, if I may for
11 just a moment.

12 THE COURT: I mean it's like having a grid with
13 only an X axis.

14 MR. PAREKH: Well, you do need both, but if you
15 have an 80 percent recall rate, that means we're already
16 losing 20 percent of relevant documents. We're not even
17 seeing those. What they want to do is effectively reduce
18 that recall rate to about 20 percent. So 80 percent of the
19 relevant documents will be missed. If they can't get their
20 CAR to work properly, what they need to do is turn over the
21 entire 1.9 or 1.2 million e-mails. It's not clear because
22 of the way the data was presented which number that is that
23 hit the 80 percent recall rate, which is the agreed to rate
24 in the CAR protocol, and let us deal with trying to get the
25 precision rate down for purposes of our review.

1 We have a robust clawback provision. They can
2 review for privilege if they want. They don't have to.
3 They can review for relevance if they want. They don't have
4 to. But at this point, we're stuck, and we don't even have
5 half the documents.

6 Like I said, even taking their number of 200,000
7 additional documents, that's more documents than they have
8 produced to date. And they're saying that they can only get
9 those 200,000 documents produced by January 20th. That
10 leaves us no time to review the documents, no time to
11 analyze the documents, and no time to take depositions at
12 the end of discovery. I mean it's just, it's just, it's not
13 possible to do it that way.

14 THE COURT: Well, what do you suggest short of
15 turning over everything?

16 MR. PAREKH: We're not asking them to turn over
17 everything. Everything would be approximately 2.5 million
18 documents. We're saying do what you said you were going to
19 do, which is turn over all the documents that using your own
20 system hit the 80 percent recall rate.

21 THE COURT: But they don't. I mean they don't
22 have their own -- they can't reach an 80 percent recall
23 rate.

24 MR. PAREKH: No, they can. They can reach an
25 80 percent recall rate. What they can't reach is a

1 precision rate that's acceptable to them. It's acceptable
2 to us. We'll take the 17.1 percent precision rate.

3 THE COURT: Mr. Hulse? You can both be up there.

4 MR. HULSE: Let me clarify, Your Honor. And so
5 the issue here is not that they were ever entitled under the
6 CAR protocol to simply get everything that hits the
7 80 percent recall. We still are entitled to review for
8 privilege and relevance. This is a system to get to that
9 set.

10 What we agreed on is that because it's very, very
11 difficult to achieve an 80 percent precision rate without
12 training forever months and months and months and months of
13 training, is that we would leave that blank and see if we
14 could simply reach agreement on an acceptable precision.

15 Now, what's happened here is we've trained, and
16 this is not, we've litigated several times here why the
17 timing is what it is. And this is a collaborative process
18 that the plaintiffs insisted on, and the reason we got
19 started when we did is because of them not because of us.

20 But once we went through the training and
21 following the process that was prescribed by the protocol,
22 it simply couldn't get to a point where the system could
23 effectively at the 80 percent recall rate distinguish
24 garbage from non-garbage. And so what that means --

25 THE COURT: Let me just ask one question, and I

1 think Judge Noel has a question too.

2 Suppose you turn over what you do have even though
3 it's not, you know, you've got the subset that meets the --
4 and you haven't had a chance to review it for everything
5 else, but you work with them, those documents are all out
6 there. You've got your clawback, you've got your 502
7 protection, and use that evidentiary and discovery tool to
8 work together using that set of documents. And there will
9 be some privilege information in there, and there will be a
10 lot of irrelevant information because you haven't been able
11 to narrow it down. But at least it would be, then you could
12 work collaboratively with a universe of documents and, you
13 know, maybe we have to bring in a discovery expert or
14 something.

15 MR. HULSE: I suggest, Your Honors, there's no
16 need for that because we already have the tools here to get
17 where we need to go. And while there's been a lot of
18 resistance on the other side to use of a keyword type
19 approach, that can help us get where we want to get.

20 What we're struggling with here is we have an
21 extremely broad set of relevance criteria that the parties
22 have worked out. That means that, you know, much of what
23 just relates to Bair Hugger in some sense gets deemed
24 relevant. So all that we would -- there's no magic in here
25 in all of a sudden working with the plaintiffs' counsel on

1 predictive coding. All we would end up doing is more
2 training and taking more time. What makes more sense is for
3 us to just get through these documents, get through the top
4 tier, apply key words to the lower tier, and get those
5 reviewed and get to them, but otherwise I think that if we
6 try to go back and retrain collaboratively, we're just going
7 to end up taking more time.

8 THE COURT: How long is it going to take you to do
9 that?

10 MR. HULSE: Well, we will accomplish it by the
11 close of discovery in the first tier.

12 THE COURT: What was the qualifier?

13 MR. HULSE: I'm sorry?

14 THE COURT: You said the first tier you'd be done
15 by January?

16 MR. HULSE: Yes, so what we are trying to do is we
17 are trying to get the first two tiers reviewed and produced
18 by the end of the first week of January. And, again, I want
19 to reiterate, there has been substantial e-mail production.
20 It was the product of predictive coding in the first
21 instance, and we ran agreed key words per agreement with the
22 plaintiffs' lawyers, so this is -- we've captured a lot of
23 stuff.

24 MAGISTRATE JUDGE NOEL: Is it a fair evaluation to
25 say that the predictive coding process that you have agreed

1 upon simply isn't working or is that an overstatement?

2 MR. HULSE: It's only overstated in this regard,
3 Judge Noel, that the threshold ranking that I mentioned that
4 comes out of this that we have allows us to identify the
5 documents that are most likely to be relevant, and so that
6 is very useful for us. It allows us to prioritize and focus
7 on the documents that have the highest probability to be
8 relevant.

9 THE COURT: Same question for you, Mr. Parekh.

10 MR. PAREKH: I think the system isn't working for
11 a couple of different reasons. One is that the system that
12 they're using for predictive coding Clearwell is essentially
13 outdated at this point in terms of current technology versus
14 the system that we would be using internally to do our
15 review of these documents.

16 THE COURT: What system is that?

17 MR. PAREKH: It's a system called "Relativity,"
18 but we would also be using a system called "Catalyst" on the
19 back end to do some of the predictive coding, which allows
20 you as you review documents to in real time have the system
21 learn, and it's called "Continuous Learning." That's the
22 system that works much, much better than the Clearwell
23 system that 3M insisted they wanted to use.

24 Number two, the relevance criteria, we had no
25 input into in terms of the total way it was defined. We

1 were allowed under the protocol, despite our initial
2 suggestion that we collaboratively both of us in a same room
3 work to define what is a relevant and nonrelevant document.
4 3M refused to do that, and said we agree to a set of quality
5 control criteria.

6 At the last status conference, in order to
7 expedite this process, plaintiffs waived all of their
8 protections. All of the quality control criteria that we
9 had painfully negotiated, we agreed to give up so that we
10 could get this process done faster, and yet we're still here
11 today. We bent over backwards to do what we can to get this
12 to work, and we've been stymied at every point. And we just
13 think at this point they need to do what they were going to
14 do, which is turn over the documents that their system has
15 marked as being relevant, and let us deal with that. And
16 then we can come back to the Court once we see those and say
17 this is how much additional time we need based upon what
18 we're finding.

19 MR. HULSE: What predictive coding has never meant
20 in any case that I've ever seen is that once you hit the
21 recall criteria, you turn everything over, Maybe minus
22 privilege. That's not what it means.

23 What it means is it's a methodology that can be
24 more or less successful for identifying, for getting more
25 quickly to the set of documents that are then going to be

1 reviewed for relevance. That's the process.

2 THE COURT: So, Mr. Hulse, do you need more time
3 or not, if you are going to do it your way?

4 MR. HULSE: If we do it our way, we do not need
5 more time, Your Honor.

6 MR. PAREKH: But, Your Honor, their way leaves
7 80 percent of the documents that the system has marked
8 relevant out of the equation.

9 MR. HULSE: It would not. It would simply use
10 another methodology, which is keywords, which is what we've
11 all used up until the error of predictive coding, to cut
12 through that mass of irrelevant documents and hone in on the
13 relevant ones.

14 MR. PAREKH: Which would result in a negotiation
15 on keywords that would again take a period of time.

16 THE COURT: What about the information that the
17 plaintiffs have gotten so far? What themes have emerged
18 from that discovery? What do you see in that?

19 MR. HULSE: What themes?

20 THE COURT: From the plaintiffs' point of view.

21 MR. HULSE: I would be hard pressed to articulate
22 their themes. I could try.

23 THE COURT: No, I'm asking them.

24 MR. PAREKH: I'm probably not the best person to
25 answer it, but I will give it a shot. The themes that we're

1 seeing are primarily the fact that 3M put their head in the
2 sand and intentionally chose not to do testing on the Bair
3 Hugger system in terms of error and contamination, despite
4 the fact that there were things that were brought to the
5 attention of 3M on that process.

6 THE COURT: Okay, so what you've seen is
7 information that was transmitted to 3M that you allege
8 should have alerted them that there was a potential problem?

9 MR. PAREKH: Right, in fact the model --

10 THE COURT: So you have those things? Or you have
11 some of those?

12 MR. PAREKH: We have some. We don't, I mean we
13 obviously don't have everything, but we've seen some of
14 that. One of the things that we recently found on the
15 production that was actually just produced a couple of weeks
16 ago was the label for the Bair Hugger 500, one of the older
17 ones, and that label specifically states on it, "please
18 don't use this over a wound site because there is the
19 possibility of airborne contamination." That warning did
20 not make it to any of the subsequent devices.

21 So, I mean, yes, we found things where it shows
22 that 3M had knowledge of the possibility of airborne
23 contamination as we've been saying from day one, and they
24 either didn't do it or took it off or took steps to hide it.

25 We also have a lot of stuff that we've seen where

1 any time anyone criticized the Bair Hugger system in any
2 way, 3M aggressively went through and tried to attack them
3 both personally and professionally. And they had an entire
4 team that's entire job was let's take anything that possibly
5 discredits the Bair Hugger and do whatever we can to stop it
6 including Dear Doctor letters and other things like that.
7 Those are the themes that we're seeing underlying the --

8 MR. HULSE: I think what I was referring to is us
9 responding to Dr. Augustine, but --

10 THE COURT: So, no, I just was asking if there
11 were themes that had emerged for the purpose of asking a
12 followup question, which is does the information that the
13 plaintiffs have received so far give you an idea of how you
14 might be more specific in what you're asking for?

15 Can you go deeper on some of the warnings or the
16 complaints or the attack, the complainer, are you following
17 up in that way?

18 MR. PAREKH: Yes, absolutely.

19 THE COURT: Okay.

20 MR. PAREKH: And we've been doing that in depositions,
21 but we've also been what one of the things that we would be
22 doing if we get them to turn over the documents to us is
23 using the documents that we've currently identified as being
24 hot or, you know, important to the case and using that to
25 then use predictive coding to evaluate those additional

1 documents that would be produced to us and rank them and
2 review them that way as well, which is also one of the
3 reasons why we think that, you know, having 3M turn over the
4 80 percent criteria documents makes sense. Let us do the
5 work to figure out what's good and what's not because they
6 can't.

7 MR. HULSE: It would be remarkable if this
8 process, which they insisted on and then did not work as
9 well as they like, that because it did not work as well as
10 they'd like --

11 THE COURT: Yeah, we're not listening.

12 MR. HULSE: I'm sorry, Your Honor. I couldn't
13 help myself.

14 MAGISTRATE JUDGE NOEL: And I apologize for not
15 listening. It was my fault that I engaged Judge Ericksen in
16 a private conversation.

17 MR. HULSE: You're entitled not to listen, Your
18 Honors.

19 THE COURT: Is there anything on the depositions
20 to discuss? Enough on this predictive coding business for
21 the moment.

22 MR. CIRESI: Good morning, Your Honors.

23 THE COURT: Good morning.

24 MR. CIRESI: As one of the individuals who has
25 taken many of the depositions, and Your Honor asked would

1 they need more time? I think there has been some
2 discussions among those who are dealing with this issue
3 about extending some of the discovery deadlines, but let me
4 just give one example.

5 I think it's 10 days after the documents have to
6 be produced, we need to submit expert reports. Documents
7 are critical in this case. I know that from taking the
8 depositions. They are suggesting that, and I'm not going to
9 get into the granularity of what they've been discussing,
10 but I think it's impossible for the plaintiffs to take the
11 types of depositions that need to be taken without a robust
12 production of documents.

13 THE COURT: So that would be the ones that are
14 scheduled that are listed here the --

15 MR. CIRESI: Your Honor, yes, none of the ones
16 listed. I have one coming up Monday, the ones we've taken,
17 I mean I've taken the director of R&D.

18 THE COURT: Is that Michelle Holt Stevens?

19 MR. CIRESI: Stevens, yes, that's Monday, Your
20 Honor. And I don't have the whole schedule in front of me
21 right now, but that is one. I have another one in January,
22 but what's being suggested here is that at least two times
23 the amount of documents that have already been produced are
24 going to be produced. I have no idea as I stand here today,
25 and I don't think anybody does, how relevant and critical

1 some of those documents may be to the depositions that we've
2 already taken, let alone that we need to take.

3 So we have to get all of these documents, review
4 them, and then use them in the depositions. And there is a
5 list here of the depositions. And I believe, Your Honor,
6 it's on the joint agenda and report for this conference on
7 page 11. So that shows the ones that have been completed
8 and the ones that are still noticed. And we have some
9 30(b)(6) that we haven't yet noticed so, and that would
10 depend upon what documents we see.

11 I say this because I know there's been some
12 discussion about extending the deadlines, and everybody has
13 got schedules, and I know the Court has an extremely heavy
14 schedule in this district. So I'm just forewarning that
15 we're probably going to request an extension. We're going
16 to have to. And if the defense wasn't want to admit that,
17 I'm going to tell you that that might be necessary.

18 We're working as diligently and as hard as we can
19 to comply with the discovery orders that exist today, but to
20 suggest that you're going to come in with double the
21 documents and then we have to get to our experts, evaluate
22 them, let them evaluate them, and get it to them within
23 10 days after the production comes in, it's impossible, let
24 alone to take the depositions, which the experts would also
25 need to compile their reports. So I don't know how this

1 addresses the granularity of what the protocol should be.

2 THE COURT: No, we're done talking about that.

3 MR. CIRESI: Yeah, but we need to find some
4 rational way that we can get these documents and that we
5 have a workable schedule that gives us an ability to take
6 the depositions that need to be done. And for that matter,
7 for the defense to be able to ask whatever questions they
8 have to to get this prepared without prejudice to either
9 party.

10 THE COURT: Okay, thank you.

11 MR. HULSE: Your Honors, there has not been any
12 discussion that I'm aware of between lead counsel about what
13 a discovery extension would be. From my role, what I can
14 speak to is that just simply that we have a plan to get the
15 documents produced within the current schedule, and that our
16 viewpoint is that to the extent that plaintiffs view that
17 they need more time for particular things, whether it's
18 specific depositions or re-depositions and so forth, then
19 they should make the case for that.

20 Certainly, however, from our perspective, it is
21 preferable to have an extension of discovery than a
22 procedure, which would infringe on our rights under Rule 26
23 not to have to turn over nonrelevant and privileged
24 documents to the other side.

25 THE COURT: Okay. Well, I think we're going to go

1 confer here momentarily, but while I have you, you said with
2 respect to Dr. McGovern that the dates that were given
3 within the current schedule were these first week of January
4 dates.

5 MR. HULSE: Right, Your Honor.

6 THE COURT: Were there dates that were later in
7 which the doctor would be available, but they just weren't
8 before January 20th?

9 MR. HULSE: We do not. We haven't discussed later
10 dates with Dr. McGovern's counsel, so I couldn't speak to
11 that.

12 MR. GORDON: Your Honor, they've addressed that --

13 MR. CIRESI: I believe, Your Honor, on the joint
14 agenda report that's submitted at page 4, it says that it
15 might be more problematical to find available consecutive
16 dates later in January, so I don't think it's been fully
17 explored with respect to whether those dates are or are not
18 available.

19 MR. HULSE: It might be more problematical, our
20 British solicitor informs us.

21 THE COURT: I know, I lived there for two years.
22 I know what that means.

23 MR. HULSE: We have revisited it with them, with
24 Dr. McGovern's counsel, Your Honor, and they've said that's
25 it for January. And we have not explored later months.

1 THE COURT: Well, I suppose the reason
2 Dr. McGovern is available those days might be the same
3 reason that at least some, I mean I'm sure the whole
4 plaintiffs' team isn't taking the week off.

5 MR. HULSE: It has to do with the academic
6 calendar, I believe actually, Your Honor.

7 THE COURT: Oh, does it?

8 MR. HULSE: Yes.

9 THE COURT: But they have those short -- then they
10 must have another break at the end of February or something.

11 MR. HULSE: I admit it's a bit arcane to me but.

12 THE COURT: Michaelmas and --

13 MR. HULSE: Michaelmas, yes.

14 MR. ASSAAD: Your Honor, on the e-mail from
15 Dr. McGovern's solicitor, those were the only two dates
16 available, if they want to do two days of depositions back
17 to back. He did indicate that they had days available for
18 one day for deposition in January, and I don't think his
19 deposition needs two days. I think one day would be plenty
20 of time that we'll agree to as to when, and now after they
21 cancelled another one --

22 THE COURT: Yeah, we understand how they
23 cancelled. I mean the guy is sick. You're not questioning
24 that he's sick.

25 MR. ASSAAD: Yes, I understand that --

1 MR. HULSE: Well, they did question it, Your
2 Honor, and he's in the hospital.

3 THE COURT: Okay. We'll take a 10-minute recess.

4 (Morning Recess at 10:35 a.m.)

5 (10:49 a.m.)

6 (In open court)

7 THE COURT: Go ahead and be seated, thank you.

8 We've heard plenty, I think, this morning, and you
9 need a decision like now so here it is.

10 MAGISTRATE JUDGE NOEL: And with that
11 introduction, so on the first issue, which is this
12 predictive coding thing, we've concluded that the
13 defendant's proposal to, as I understand it, essentially do
14 a traditional ESI search of the relevant universe of
15 documents and produce what you come up with is what should
16 happen, and you should go forth and do that as quickly and
17 as efficiently as you can within the current schedule.

18 Then it appears that there will also be some need
19 to adjust dates in the schedule to allow all of the
20 discovery that needs to be done to be completed. And for
21 that, we're going to order that each side submit to us a
22 proposed amended scheduling order. And you should get those
23 competing proposals to us by the first of January.

24 As to the deposition of Dr. McGovern, we are of a
25 mind that it should remain on the dates that it is currently

1 scheduled and that the plaintiffs should be permitted to
2 participate by video conference, if that's what they choose
3 to do as opposed to sending a lawyer to the United Kingdom
4 for a third time.

5 And then once we get your competing proposals as
6 to what the amended scheduling order should look like, we
7 will issue an amended scheduling order that will either pick
8 one or the other. And I guess we're not eliminating, which
9 sometimes I will do, the potential to pick and choose and/or
10 cut and paste. But bear in mind as you're preparing your
11 proposed competing schedules, that we may well just pick one
12 or the other, so you want to make yours the most reasonable
13 and most likely for the Court to pick.

14 THE COURT: I think that's everything.

15 MR. GORDON: One housekeeping question, Your
16 Honor, if I may. I noticed that January 1st is a Sunday,
17 and I maybe will just throw this out there without having
18 conferred yet. I wonder whether I mean you said no later,
19 then maybe we could do it before January 1st, given a couple
20 of dates that occur in December, I wonder if we should talk
21 about something a little sooner perhaps.

22 MR. HULSE: I think that makes sense from our
23 perspective, Your Honor.

24 THE COURT: Okay. Mr. Gordon, pick a date.

25 MAGISTRATE JUDGE NOEL: If you want to agree on an

1 earlier date, agree on whatever date you want to agree to,
2 but we want it by the first of January. And if it is in
3 fact a Sunday, what that means is whatever Rule 6 or
4 whatever the rule is that tells you how to count days, I
5 think it would be the next day that's not a Saturday, Sunday
6 or holiday, which I believe would be Tuesday the 3rd,
7 because I believe the 2nd is the day we celebrate if the 1st
8 is a Sunday. But if you want to agree to an earlier date,
9 we'll be happy to receive it on whatever day you agree upon.

10 MR. HULSE: We'll confer with Mr. Gordon and his
11 co-counsel.

12 MR. GORDON: Thank you, Your Honor.

13 THE COURT: All right.

14 MAGISTRATE JUDGE NOEL: Anything else?

15 MR. HULSE: No, Your Honors.

16 MR. CIRESI: Nothing, Your Honor.

17 THE COURT: All right. Thank you all very much.

18 (Court adjourned at 10:53 a.m.)

19 * * *

20 REPORTER'S CERTIFICATE

21 I, Maria V. Weinbeck, certify that the foregoing is
22 a correct transcript from the record of proceedings in the
23 above-entitled matter.

24 Certified by: s/ Maria V. Weinbeck

25 Maria V. Weinbeck, RMR-FCRR