

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced-Air )  
Warming Devices Products )  
Liability Litigation )

) File No. 15-MD-2666  
) (JNE/FLN)

) February 7, 2017  
) Minneapolis, Minnesota  
) Courtroom 9 West  
) 2:00 P.M.  
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( HEARING ON MOTIONS )

BEFORE THE HONORABLE FRANKLIN L. NOEL  
UNITED STATES MAGISTRATE JUDGE

**TIMOTHY J. WILLETTE, RDR, CRR, CRC**  
Official Court Reporter - United States District Court  
1005 U.S. Courthouse - 300 South Fourth Street  
Minneapolis, Minnesota 55415  
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1 (2:00 p.m.)

2 **P R O C E E D I N G S**

3 **I N O P E N C O U R T**

4 THE COURT: Good afternoon. Please be seated.

5 Okay. So this is In Re: Bair Hugger Forced-Air  
6 Warming Devices Products Liability Litigation, MDL Number  
7 15-2666. We're here for a hearing on the defendant's motion  
8 to compel documents from Augustine, and there's also a  
9 defendant's request to strike Plaintiffs' submission in  
10 response to Defendant's motion.

11 So let's get everybody's appearance on the record  
12 first and then we'll talk about how we're going to proceed.

13 For Defendants?

14 MR. BLACKWELL: Jerry Blackwell speaking for 3M,  
15 Your Honor.

16 MS. YOUNG: Mary Young here for 3M as well.

17 MS. AHMANN: Bridget Ahmann for 3M.

18 MR. BENHAM: And representing Dr. Augustine and  
19 Augustine-related companies, J. Randall Benham.

20 MR. HODGES: And David Hodges, Your Honor, on  
21 behalf of Kennedy Hodges.

22 MS. ZIMMERMAN: Genevieve Zimmerman for  
23 Plaintiffs.

24 MS. CONLIN: Jan Conlin for Plaintiffs.

25 MR. SACCHET: Mike Sacchet for Plaintiffs.

1 MR. ASSAAD: Gabriel Assaad for Plaintiffs.

2 THE COURT: So let me start with the defendant's  
3 request to strike Plaintiffs' submission. That request is  
4 denied, but in terms of oral argument here today, I believe  
5 we've already communicated that it's going to be 20 minutes  
6 for Defendant -- you can split it up however you want  
7 between opening and rebuttal -- 20 minutes for Augustine, 20  
8 minutes for Kennedy Hodges, and the plaintiffs by my reading  
9 of their memo concede that they don't really have a dog in  
10 this fight.

11 MS. CONLIN: That's correct, Your Honor.

12 THE COURT: Okay. So with that, Mr. Blackwell,  
13 you're up.

14 MR. BLACKWELL: Your Honor, on the motion to  
15 strike or the other motion?

16 THE COURT: On the motion -- the substantive  
17 motion that we're here for, to compel the documents from  
18 Augustine.

19 MR. BLACKWELL: Thank you, Your Honor.

20 First of all, Happy New Year. I think this is the  
21 first time I've seen Your Honor since we started this year.

22 THE COURT: Welcome back. I trust everything was  
23 warm and sunny in Nevis or --

24 MR. BLACKWELL: Nevis and St. Kitts. And so I did  
25 get to see where Hamilton was from and where Thomas

1 Jefferson's granddaddy was from in St. Kitts.

2 But here we are again, Your Honor, to some extent,  
3 the third verse same as the first. We are still attempting  
4 to get documents from Dr. Augustine. We've now had two  
5 orders from Your Honor. The first order was issued because  
6 there was no privilege log issued at all, and the second  
7 order was because the privilege log was insufficient to be  
8 able to assess the nature of the privilege claimed.

9 Your Honor I think was very clear in this Court's  
10 November 23rd order in terms of what Dr. Augustine was  
11 required to provide by way of a privilege log, and I want to  
12 hone in on what's I think most significant for the time I'll  
13 take today. I will rely heavily on my papers and I'll take  
14 up all the time I have and save the rest whatever the  
15 rebuttal.

16 But Your Honor was clear that Dr. Augustine's  
17 privilege log had to contain details sufficient to permit  
18 Defendants and the Court to evaluate his claim of privilege  
19 specifically as to each document, amongst other things,  
20 number four, the basis for the claim of privilege or other  
21 protection, and that was very clear.

22 What we received, Your Honor, was not a log that  
23 set forth a particular document that's claimed to be  
24 privileged with a specific claim for privilege. We set  
25 forth in our papers many instances where there is simply a

1 number of communications lumped together and then a number  
2 of claimed privileges simply lumped together and no way to  
3 sort out which is related to what and which is not what Rule  
4 26 permits and what's not the intent of Your Honor's order  
5 either. It simply obfuscated the issue once again as to  
6 which privilege applied to which particular document.

7 In addition, if Your Honor has had an opportunity  
8 to peruse that privilege log, a number of the subject matter  
9 descriptions are just completely vague. You will see  
10 references such as a reference to meeting on the filter, for  
11 example. It was very vague one-liners. And I've got some  
12 examples of that should Your Honor like to discuss it, but  
13 we do set it out in our papers. But it wasn't what Your  
14 Honor ordered. It wasn't what Rule 26 requires. And where  
15 the law is clear is that where the privilege has not been  
16 established by the party claiming that privilege, then the  
17 documents have to be produced and the claimed privilege  
18 ought to be waived. From 3M's point of view, the analysis  
19 could stop right there. There's been one order, there's  
20 been two orders, and the rule itself required there be the  
21 production of a proper privilege log and it hasn't happened.  
22 The question is how many orders, Your Honor, does it take.

23 So what we are seeking here today is, first of  
24 all, all 23 documents that were on the Augustine August 17th  
25 log, which would be contained at Exhibit J in our papers,

1 and then the first 84 documents that are on the  
2 December 22nd log, which is Exhibit H.

3 THE COURT: Let me stop right there, because I  
4 have some questions about both of those statements.

5 So first of all, as I understand it, am I correct,  
6 that as to privilege log entries 84 through 115 on the  
7 December log, that you're not seeking those, correct?

8 MR. BLACKWELL: That's right, Your Honor.

9 THE COURT: And do you concede that they're  
10 privileged or you just decided not to argue about it?

11 MR. BLACKWELL: We decided not to argue about it.

12 THE COURT: Okay. But you don't want them. I  
13 don't have to make any decisions about them.

14 MR. BLACKWELL: That's right, Your Honor.

15 THE COURT: Okay. So then the second question is,  
16 to what degree, if at all -- and maybe your answer is going  
17 to be you don't know because you can't tell, but I'll ask it  
18 anyway -- to what degree do these two logs, the 23 documents  
19 on the first one --

20 MR. BLACKWELL: Yes, Your Honor.

21 THE COURT: -- and the 115 on the second, to what  
22 degree do they overlap, if at all, or are they cumulative?

23 MR. BLACKWELL: They appear to be cumulative, Your  
24 Honor, and to the extent they do overlap, it is as Your  
25 Honor states. We can't tell from the descriptions given,

1 but they appear to be cumulative.

2 THE COURT: Okay.

3 MR. BLACKWELL: So that's the relief we're  
4 seeking. We want the documents.

5 Alternatively, if Your Honor feels that it's not  
6 really possible to determine whether the documents are  
7 privileged in total or not, then we request an *in camera*  
8 review. Your Honor may want to assess whether parts of  
9 documents are privileged and protected, but not the entire  
10 document. We think the Court need not reach that position  
11 because there's not been compliance in the first instance  
12 and the privilege should be deemed waived.

13 Now, to the extent -- to the extent that  
14 Dr. Augustine or now Kennedy Hodges want to assert that  
15 there is some kind of attorney-client relationship or  
16 work-product protection, the burning questions are  
17 fundamental to what is attorney-client privilege and what is  
18 work product. Attorney-client privilege is only going to  
19 apply to communications made for the purposes of determining  
20 legal advice and only those that are necessary to obtain  
21 answers to legal questions, attorney-client privilege.

22 What we know from Dr. Augustine in terms of what  
23 the nature of the relationship was, he was very clear at  
24 Exhibit A to our papers, which is his affidavit, and he  
25 lists three purposes for which he says all of his

1 communications to Kennedy Hodges, they were all subsumed in  
2 these three purposes:

3 Number one, to learn about product liability  
4 litigation. That might be the stuff of a high school civics  
5 class, certainly not protected.

6 Number two, to understand why personal injury  
7 firms virtually never file cases on behalf of patients  
8 injured by surgical infections. There's nothing  
9 particularly privileged about that inquiry either.

10 And then the third one was the fact to educate  
11 Kennedy Hodges about forced-air warming, was the third  
12 purpose.

13 So none of those purposes have anything to do with  
14 seeking advice or to get answers to legal questions, Your  
15 Honor, but to make it abundantly clear that the true  
16 motivation for Dr. Augustine contacting Kennedy Hodges was a  
17 business purpose.

18 He makes it clear also in that same affidavit at  
19 Exhibit A when he says that his communications with Kennedy  
20 Hodges were all, I quote, consistent with his two goals:  
21 Number one, to stop Bair Hugger, number one, and number two,  
22 to promote the use of his competing product, the Hot Dog.  
23 He says that in paragraph 8 of his own affidavit that that's  
24 what he's up to. So he has decided that he's going to  
25 pursue a litigation strategy to find plaintiffs lawyers to

1 sue his competitor, to essentially chop off their head to  
2 make his product look taller, and that's what he was up to.

3 And he didn't just stop there. If Your Honor  
4 reads on in the papers, you can see exactly how he's  
5 carrying this out. The last time we were before Your Honor  
6 we were here talking about MedWatch reports to the FDA and  
7 Dr. Gauthier that we learned wasn't the person submitting  
8 these MedWatch reports. It was Mr. Benham and Dr. Augustine  
9 behind them.

10 He didn't stop there. I think Your Honor will see  
11 that at Exhibit K we have 80 pages of letters that  
12 Dr. Augustine and Mr. Benham are sending to hospitals and  
13 other healthcare professionals around the country touting  
14 the MDL litigation as a reason to switch to the Hot Dog.

15 And so he didn't stop there. If Your Honor looks  
16 at Exhibit B, this is a presentation that Dr. Augustine has  
17 given all over the country when he wants to talk about all  
18 the dangers of forced-air warming compared to his product,  
19 the Hot Dog.

20 And the very last page of this was really  
21 interesting, because the last page of it is a slide that  
22 says, you know, "New Wave of Litigation," and here he is  
23 calling for these health professionals, these healthcare  
24 professionals, to get engaged in the new wave of litigation,  
25 and there's a shilling there for the Kennedy Hodges law firm

1 to end that presentation at Exhibit B in our papers.

2 So he is not only, Your Honor, interested in  
3 learning about product liability litigation. He is actively  
4 fomenting and encouraging product liability litigation.

5 The story of Rosie Bartel, Your Honor will see in  
6 our papers, was a woman who didn't even know that she used a  
7 Bair Hugger or not, and she had been in contact with  
8 Mr. Benham and Scott Augustine, and they asked her to write  
9 a story telling her story about surgical site infection.  
10 And Your Honor will see that what came of that is her story  
11 apparently wasn't sufficiently detailed enough because it  
12 didn't disparage the Bair Hugger. So, being very helpful  
13 persons, Dr. Augustine and Mr. Benham offered to write the  
14 statement for her such that it would be a fair  
15 characterization in the view of the Bair Hugger. And as  
16 they said, we care about personal safety, or patient safety,  
17 but this has to make sense for our business too, they said,  
18 and pointed out to her that her tragedy, her tragedy, was  
19 the business of the Kennedy Hodges law firm is what they  
20 said in the paper.

21 And so the point to all of this is that the mere  
22 fact that a competitor, 3M, decides as a business strategy  
23 to foment litigation against 3M and its product -- and it's  
24 a win-win for them; he gets to promote his product and the  
25 plaintiffs' lawyers, they're able to get a case and

1 presumably come out on it -- doesn't make the by-product of  
2 that meeting either work product, since it's not prepared by  
3 or for another party as required under 26(b)(3)(A), and it  
4 doesn't make it attorney-client privilege, either one.

5 THE COURT: Well, let me ask you this, though:

6 Isn't it possible that you can have a business  
7 purpose and at the same time engage a lawyer to give you  
8 advice about your business purpose? And I notice in your  
9 papers you talk about they haven't produced any engagement  
10 letter or attorney-client contract thing. If there were  
11 such a document, would that change your argument in any way?

12 MR. BLACKWELL: Your Honor, it wouldn't for a  
13 couple of reasons, and these are the facts that we know.

14 And first, again, from Dr. Augustine's affidavit,  
15 he makes it very clear that it has been several years, he  
16 says in Exhibit A, since there was any attorney-client  
17 relationship between Kennedy Hodges, if there ever was one,  
18 and that was in December of 2016.

19 THE COURT: But if there is one, the  
20 attorney-client privilege and work product to the extent it  
21 exists during the time that that is there, the privilege  
22 doesn't disappear when the relationship ends, right? The  
23 lawyer still has an obligation to keep the confidences of  
24 the client and to not disclose privileged information that  
25 he learned during the course of the relationship, correct or

1 incorrect?

2 MR. BLACKWELL: Your Honor, I think that's  
3 incorrect in this sense, and I believe the case, Your Honor,  
4 ***Simon vs. Searle*** that the Eighth Circuit decided was a  
5 question of whether or not the involvement of in-house  
6 counsel was *per se* protected or privileged simply because,  
7 for example, there's some type of relationship involving a  
8 lawyer. And what the court came to was really kind of a  
9 commonsense conclusion, that you have to look to what is the  
10 essence or nature of that particular engagement. Did it  
11 sound primarily in business, or was it really seeking advice  
12 for purposes of getting legal advice? In this instance,  
13 Scott Augustine has been clear when he says: All of my  
14 communications with Kennedy Hodges were directed toward two  
15 goals, and one was to stop Bair Hugger, which is a business  
16 purpose, and number two was to promote his product, the Hot  
17 Dog.

18 THE COURT: Right. But do you agree or disagree  
19 that it's possible to have those purposes and at the same  
20 time retain a lawyer to give you advice about what you can  
21 do, what you can't do, how do I go about achieving these  
22 business purposes, what's legal, what's not legal, how do I  
23 impose a Muslim ban without legally or illegally doing that?  
24 Often you consult the lawyer for the purpose of finding a  
25 lawful way to do what you want to do, correct?

1           MR. BLACKWELL: Your Honor, obviously that's  
2 correct, that's possible, and what we have here now is no  
3 evidence that took place. There's no indicia of a typical  
4 attorney-client relationship.

5           The retainer agreement which we've been told  
6 exists and we've asked for and never gotten, it's not itself  
7 privileged, so we ought to be able to see what it is, what  
8 the scope of it was, et cetera. What time period did it  
9 apply to? And so to the extent any of this work product --  
10 we have plenty of instances in the privilege log where  
11 Mr. Benham claims that he was a consulting expert and it  
12 related to the **Walton** and **Johnson** cases.

13           And Your Honor will see in the papers where the  
14 **Walton** court itself represented in its order, which is one  
15 of the exhibits to our papers, that the Kennedy Hodges firm  
16 had indicated that they'd only had one discussion with  
17 Dr. Augustine with respect to **Walton** and none about the  
18 second filed case, **Johnson**, zero. Mr. Benham himself makes  
19 the same statement, Your Honor, that one discussion about  
20 **Walton** and none at all about the **Johnson** case, and you'll  
21 find that in our papers, the Benham affidavit, Exhibit M at  
22 paragraph 13.

23           So, Your Honor, I'm going to stop there because I  
24 do want to leave a couple minutes to respond to what it is  
25 they have to say, but we'll rely on everything that is said

1 in our papers on the issue. I think being able to establish  
2 just an attorney-client relationship across the board in the  
3 absence of any indicia of one, no proof that the documents  
4 for which the privilege is invoked arose out of seeking  
5 advice, legal advice, that's not there. There's no work  
6 product because it's not in relation to any specific case  
7 that we know of that's been identified.

8 And in terms of Mr. Augustine being an expert, the  
9 best they could say is that he was a non-retained,  
10 non-testifying consulting expert. I'm not sure that annal  
11 exists in the law, Your Honor. Non-retained means not  
12 retained, means not my expert, and they were very clear that  
13 he was never consulted for any specific case.

14 So I'll sit down, Your Honor.

15 THE COURT: Okay. Thank you.

16 Mr. Benham?

17 MR. BENHAM: Thank you, Your Honor.

18 I had hoped not to be standing here again,  
19 especially standing here listening to Mr. Blackwell demonize  
20 my client and complain about what is essentially aggressive  
21 business competition as if it were somehow improper.  
22 Aggressively competing against 3M is not improper, putting  
23 on legal educational seminars is not improper. So -- after  
24 all, my client is not a plaintiff, is not a defendant. It's  
25 a third party.

1           And given that, what 3M is asking for is  
2 extraordinary. They're asking for communications between  
3 the lawyer for their chief competitor and the lawyer for the  
4 attorneys representing a hundred or maybe hundreds of  
5 plaintiffs out there, lawyer-to-lawyer communications.  
6 Virtually none of these communications involve  
7 Dr. Augustine, although he's copied on some of them.

8           THE COURT: So the argument as I understood from  
9 what Mr. Blackwell said, it's not that there's anything  
10 necessarily improper about what your client is doing, simply  
11 that what he's doing doesn't shroud the documents with the  
12 privilege, that the privilege is not there and therefore  
13 they should be able to look at them because they're relevant  
14 to these cases.

15           MR. BENHAM: In the descriptions of what the  
16 general reasons were that Kennedy Hodges was retained,  
17 Dr. Augustine, obviously with my advice, has had to walk a  
18 very fine line for not violating the very privilege we're  
19 trying to protect. So when one says --

20           THE COURT: So tell me, whose privilege is it?  
21 What privilege is being asserted as to these documents? Is  
22 it the privilege that Dr. Augustine has with you? Is it a  
23 privilege that you and the Kennedy Hodges lawyers somehow  
24 have? Is it Kennedy Hodges' work product? Is it your work  
25 product? What exactly is the privilege --

1           MR. BENHAM: That is an extraordinary question and  
2 the answer is yes, varying between document to document.

3           When Mr. Blackwell says there's a lump mixture of  
4 all sorts of privileges put on there -- and that's not  
5 because it's a lump. It's because there are multiple  
6 privileges involved.

7           I am the Augustine lawyer. In some cases Kennedy  
8 Hodges was the Augustine lawyer. In some cases I was acting  
9 in my own stead, as I explain in the affidavit. In some  
10 cases I was sharing my work product with Kennedy Hodges. In  
11 some cases it's Kennedy Hodges' work product because  
12 Dr. Augustine was the consultant. And not just  
13 Dr. Augustine the consultant. The Augustine companies were  
14 the consultant and I'm an employee of the Augustine  
15 companies. So it's a mishmash of different privileges, all  
16 of which have to be looked through, I believe. I did not  
17 see a way to explain that other than the way that I did it  
18 in the privilege log.

19           Now, they argue that this was a business  
20 relationship and not an attorney-client relationship, and  
21 their evidence for that is Rosie Bartel. And as I expressed  
22 briefly in my affidavit, Rosie and David Bartel are my  
23 friends. We got to know each other because Rosie is an MSRA  
24 advocate. I gave her some information, the research that's  
25 out there. I've been in their home. We have had meals

1 together. I have pushed her wheelchair. She's amputated up  
2 through one hip. And, you know, we share a lot of  
3 background and we are friends.

4 And after some time she asked me for a referral.  
5 I referred her to David Hodges. She rejected David Hodges,  
6 and I learned that she had filed a lawsuit ultimately when I  
7 read about it on the federal court website. There have been  
8 no other referrals. The suggestion that this is a *quid pro*  
9 *quo* business relationship is just false.

10 THE COURT: Is there a retainer agreement between  
11 Dr. Augustine and Kennedy Hodges?

12 MR. BENHAM: A retainer agreement was signed.  
13 Dollars were paid. It was a long time ago. I don't have  
14 it. I don't know whether Kennedy Hodges has it or not.

15 THE COURT: You don't have it. Does Dr. Augustine  
16 have it?

17 MR. BENHAM: No. When I say "I" --

18 THE COURT: When you said "you," you mean your  
19 client.

20 MR. BENHAM: I as general counsel. You know, this  
21 was years ago and we're simply not well organized enough to  
22 have that document.

23 THE COURT: Well, let me ask you this question  
24 which I just asked Mr. Blackwell:

25 As between the first privilege log with the 23

1 documents and the 115 on the second privilege log, is there  
2 overlap between those two or are they cumulative?

3 MR. BENHAM: My belief is there is 100 percent  
4 overlap between those two. And the reason that there's 23  
5 in the first one and whatever number there is in the second  
6 one is because you told me how to do it properly.

7 The first time I did the privilege log, I listed  
8 it by strings of e-mails. So, if there were a half dozen of  
9 them going back and forth, I listed recipient and sender on  
10 each side because sometimes one was the recipient and the  
11 other was the sender. Your order made it clear that I had  
12 to do it iteration by iteration by iteration, even if it was  
13 one-word responses. So, that's how 23 turned into whatever  
14 number that there was. And it might be -- I don't know; I'm  
15 not going to reveal anything -- "Can we meet on Thursday?"  
16 "What time?" "Yes, two." "Two won't work." And you get it  
17 over and over and over again. That's how a few turn into a  
18 lot.

19 The vast majority of the documents and the  
20 privilege being asserted here is Kennedy Hodges' work  
21 product. Some of it is mine and I talked about that. The  
22 part that's mine I shared with Kennedy Hodges, so there are  
23 other levels of protection there as well.

24 I'm standing here because my client is in  
25 possession of the documents that I identified as being

1 Kennedy Hodges' work product. At that point my  
2 responsibility was to reveal it through the privilege log  
3 and to avoid accidentally destroying the privilege until  
4 Kennedy Hodges and the 3M attorneys could be standing here  
5 arguing on their own behalf what was appropriate and what  
6 wasn't. That was very difficult, because 3M was unwilling  
7 to include Kennedy Hodges on communications and rejected my  
8 invitation to involve Kennedy Hodges in a meet-and-confer.  
9 They simply didn't want to get Kennedy Hodges involved in  
10 this. They wanted to come through me through the back door  
11 to get work product which wasn't mine in a lot of cases, was  
12 Kennedy Hodges', and I didn't exactly have standing to  
13 defend.

14 In the other times we've stood before you -- I  
15 mean, I don't know if you recall, but I do -- I attempted to  
16 offer you an *in camera* affidavit which would have explained  
17 this, and you said, "No, let's not do that," but now we're  
18 here talking about that. It was my job to get us to this  
19 point so that Kennedy Hodges can defend its own work  
20 product.

21 Now, if --

22 THE COURT: Work product on behalf of whom? Is it  
23 work product that Kennedy Hodges did on behalf of  
24 Dr. Augustine, or work product that Kennedy Hodges did on  
25 behalf of plaintiffs that ultimately filed lawsuits in this

1 MDL?

2 MR. BENHAM: Well, I'll let David Hodges make his  
3 own arguments on that, but my belief is that it's his work  
4 product representing his client related to communications  
5 with a consultant, an outside consultant, non-testifying  
6 consultant apparently, that they had retained to understand  
7 the research, understand the world of patient warming, all  
8 of the things that Dr. Augustine and the Augustine companies  
9 and the Augustine employees, me included, were retained to  
10 do.

11 Mr. Blackwell complains about the quality of the  
12 summaries that I put into the privilege log. When last I  
13 stood before you, I admitted that I didn't fully understand  
14 the obligations under the privilege log and you cited that  
15 back to me in an order. That's not quite what I meant.

16 What I meant was, the federal rules don't give  
17 explicit instructions as to what you should say and what you  
18 shouldn't say. They just say explain enough so that people  
19 can tell what the scope is and whether the document is  
20 privileged or not.

21 I repeatedly asked for samples, I repeatedly asked  
22 for case citations, and ultimately I asked to get Kennedy  
23 Hodges involved in the meet-and-confer. And my goal was to  
24 say: "3M attorneys, if you don't like my summaries of them,  
25 let me give all the documents to Kennedy Hodges, because

1 it's their privilege. It's their work product. If they  
2 want to rewrite new summaries for you" -- I mean, I have to  
3 stay far back in the line, because I fear accidentally  
4 destroying the privilege that's not mine.

5 So I would have been perfectly happy for the  
6 meet-and-confer to have led to Kennedy Hodges redoing my  
7 summaries, because I really don't care. I mean, I have a  
8 favorite in these cases, we're interested in the cases, but  
9 in this particular aspect of it, I -- as they say, I don't  
10 have a dog in this fight and my intention is to perform my  
11 responsibility in my own eyes as well as in your eyes and  
12 escape unscathed.

13 So with that I'll defer to Mr. Hodges.

14 THE COURT: Okay. Thank you.

15 MR. HODGES: Good afternoon, Your Honor.

16 To answer your question, there is a fee agreement,  
17 a retainer agreement. It was submitted *in camera*. We also  
18 submitted a copy of the retainer receipt. That's not at  
19 issue. If the Court doesn't have it --

20 THE COURT: Why is that *in camera*?

21 MR. HODGES: Well, as you know, the privilege  
22 belongs to the client. I didn't feel comfortable without  
23 the client giving me authority to reveal the contents of the  
24 retainer agreement or the retainer receipt. Of course, if  
25 you order its production, then we'll produce it.

1 THE COURT: Do you contend that it's privileged?

2 MR. HODGES: I don't know that anything in there  
3 is privileged *per se*, but again, because it was not my  
4 privilege to waive, I felt uncomfortable not submitting it  
5 *in camera*. And the three previous times that we had this  
6 issue come before three different judges, it was submitted  
7 *in camera* and was never ordered produced, so this fourth  
8 time I went ahead and produced it *in camera*. But if the  
9 Court doesn't have it -- I assume the Court is in possession  
10 of it. If not, then we're happy to resubmit it.

11 THE COURT: I am in possession of it, I have seen  
12 it, and I couched my question in terms of "Is there one?"  
13 because you had submitted it *in camera*. I didn't know  
14 whether or not -- so I do not believe it's privileged and I  
15 see no reason why you shouldn't share it with Defendants.

16 MR. HODGES: And we can do that, Your Honor.

17 And then I also wanted to point out that I  
18 believe, you know, Mr. Blackwell took Dr. Augustine's  
19 affidavit out of context when he left out portions where he  
20 was talking about a potential *qui tam* action or False Claims  
21 Act. He also mentioned Lanham Act claims.

22 But I think the key here, Your Honor, is,  
23 listening to Mr. Blackwell, you would think that this is a  
24 lawsuit between 3M and Dr. Augustine, and it's not, okay?  
25 We are in Multi-District Litigation involving tort claims

1 surrounding the product known as the Bair Hugger. The issue  
2 is whether this Court should issue an order granting  
3 extraordinary relief and allow 3M's -- its chief  
4 competitor's attorneys' communications with another lawyer  
5 who's currently suing it. And as we've stated in our brief,  
6 Your Honor, the case law on this is clear. The answer is  
7 no, they are not entitled to these documents.

8 And I also want to make it very clear. As you go  
9 through the privilege log, none of these communications are  
10 with Dr. Augustine. I know they say Dr. Augustine has his  
11 personal campaign against 3M. He's copied -- and I counted  
12 them -- on that December privilege log, I think there's a  
13 total of 12 e-mails or e-mail strings where he's copied, but  
14 he never says anything. There's no indication that this was  
15 designed as some sort of pure business relationship. And as  
16 even you yourself, Your Honor, had recognized, you can have  
17 a strategic interest and work-product privilege will apply.

18 The one thing, though, that I think that we've  
19 gotten away from -- and this issue hasn't come before the  
20 Court, even though I believe that 3M is punting on it -- is  
21 really the question of is this information relevant to this  
22 case. And to be very clear, 3M's plan is to use this  
23 information against my clients and the other 1100 plaintiffs  
24 in this litigation. Their plan is not to use it against  
25 Dr. Augustine. And so if we look at the test for relevant

1 evidence, it has a tendency to make any fact more or less  
2 probable than it would be without the evidence, and the fact  
3 is of consequence in determining the action. The action in  
4 this case is the tort claims against 3M.

5 Now, though invited, 3M has repeatedly failed to  
6 offer any explanation whatsoever, any credible argument, how  
7 this makes any MDL fact more or less probable and case  
8 determinative.

9 But, Your Honor, let's assume that 3M is correct.  
10 Let's assume that Dr. Augustine came up with this idea of  
11 litigation. He worked over eight years to recruit lawyers  
12 and got all these cases on file and talked to a hundred  
13 different law firms across the country. So what, okay? How  
14 does that make anything of what he said wrong, and the  
15 answer is it doesn't. And again, they've not given us any  
16 argument at all how this is relevant.

17 And I know that there's -- the issues in this case  
18 were spelled out in our brief -- that I don't know if the  
19 Court had the opportunity to review -- by the PSC in this  
20 case. But I think if we distill this down to, you know,  
21 what is this case about, and 3M's own paid consultant on the  
22 topic of normothermia was asked: Have you ever told them  
23 that there is evidence that maintaining normothermia reduces  
24 the incidence of paraprosthetic joint infection? She said  
25 no. Have you ever informed them that there's no evidence

1 that paraprosthetic -- maintaining normothermia reduces the  
2 incidence of paraprosthetic joint infection? And she says  
3 yes. So she's informed 3M, look, there's no evidence of  
4 this, yet they use this to promote the product.

5 These are the issues in this case, Your Honor.  
6 Whether or not Dr. Augustine, who had left the company --  
7 it's been over 14 years now since he left the company -- are  
8 not issues in this case.

9 That's one example of --

10 THE COURT: Let me interrupt for a quick second --

11 MR. HODGES: Yes, Your Honor.

12 THE COURT: -- to make sure I'm going to get to a  
13 point where it's more logical.

14 Do you have a view on my question as to whether  
15 these two different privilege logs are cumulative or  
16 overlapping?

17 MR. HODGES: I take Mr. Benham at his word that  
18 it's the same e-mails. He just broke down the e-mail  
19 strings into separate e-mails, which is why the second one  
20 is so much longer than the first.

21 THE COURT: Okay.

22 MR. HODGES: Now, I want to address **Walton** since  
23 it was brought up by Mr. Blackwell.

24 3M in the very first case that was filed was a  
25 **Walton** case.

1 THE COURT: Before you get to that, what was the  
2 agreement between Dr. Augustine and Kennedy Hodges? Why was  
3 the law firm retained? Is that spelled out in the retention  
4 agreement?

5 MR. HODGES: I think it's relatively broad, but I  
6 also take Dr. Augustine at his word that he was thinking  
7 along the lines initially of a False Claims Act claim, which  
8 I have prosecuted those types of claims before. My  
9 understanding is he was referred to me. And I don't know.  
10 I guess that would be a good question for him as far as why  
11 he first approached us. And again, this was nine years ago,  
12 but that I believe is consistent with the purposes for which  
13 we were first contacted and retained.

14 THE COURT: All right. Go back to where you were.

15 MR. HODGES: Okay. So, going back to the **Walton**  
16 case, 3M did a pretty good job arguing for a very broad  
17 protective order in the **Walton** case. And pursuant to the  
18 protective order, if we were going to give any information  
19 to any expert that had ever worked not just in forced-air  
20 warming, but had ever consulted on any patient-warming  
21 modality, we had to disclose the identity to 3M.

22 And so we sent a letter to 3M. We identified 25  
23 potential experts that were potential consulting at that  
24 point because we didn't have our deadline yet to designate  
25 experts, and one of them was Dr. Augustine.

1           3M was very upset with the idea that any of their  
2 information would go to Dr. Augustine, so they filed a  
3 motion for a protective order and we indicated -- and if you  
4 look at what we actually represented to the Court, we said  
5 for this case we are not going to give him any of the  
6 documents. We're not retaining him for this case. The  
7 order makes it clear we're talking about the **Walton** case.  
8 It says "in this case" in two or three different places.  
9 Our briefing and representations to the Court say the same  
10 thing.

11           The documents that are at issue here are very  
12 broad in nature and at this point Kennedy Hodges represents  
13 I believe it's 125 clients in the MDL. The fact that the  
14 documents are protected by the work-product protection,  
15 which is what we've argued in our briefing, and the  
16 attorney-client privilege are not clearly inconsistent, as  
17 they're arguing that we're somehow judicially estopped to  
18 argue that these are -- that the work-product protection  
19 doesn't exist.

20           So the real issue here is -- there's about six  
21 different reasons how this information can be protected,  
22 Your Honor, contained in our briefing.

23           First, the attorney client privilege. Second, the  
24 consulting expert privilege.

25           THE COURT: Let's take those one at a time.

1 MR. HODGES: Sure.

2 THE COURT: First of all, does there have to be --  
3 I'm just going to focus on the 84 documents on the  
4 December privilege log, because as I understand both you and  
5 Mr. Benham, they encompass the 23 documents that were on the  
6 earlier privilege log.

7 Does there need to be an attorney-client  
8 relationship between Kennedy Hodges and Dr. Augustine in  
9 order for your work product to be protected?

10 MR. HODGES: No, Your Honor.

11 THE COURT: Okay. And if the answer to that is  
12 no, why does -- why is not your work-product protection  
13 waived by disclosing this information to Dr. Augustine?

14 MR. HODGES: Okay. And again, this is in our  
15 brief as well. Disclosure to a non-adversarial party  
16 doesn't waive that and disclosure to someone who has common  
17 interest does not waive it either.

18 And, Your Honor, you've actually wrote yourself on  
19 this issue in the ***Transunion Intelligence*** case. And as you  
20 indicated, controlling Eighth Circuit law on the  
21 common-interest doctrine is broader in scope than what some  
22 circuits have adopted, and you cite the compare ***In re Grand***  
23 ***Jury Subpoena Duces Tecum***, holding that the common interest  
24 between two parties may be legal, factual, or strategic.

25 And this is important, because if we take

1 Mr. Blackwell at his word and that he's accurate that this  
2 is some sort of common business interest, as you've pointed  
3 out, can it not be more than that? And the answer is  
4 absolutely. You could have a strategic. You could have a  
5 legal interest. You could have a factual interest as well.  
6 Any one of those three, Your Honor, brings it under this  
7 rubric. And as you indicated: Thus, in this district, the  
8 common-interest doctrine protects already privileged  
9 information when it is shared amongst two or more parties  
10 who are both represented by counsel and share a common  
11 legal, factual, or strategic interest.

12 THE COURT: That wasn't the one where I was  
13 reversed by the Eighth Circuit, was it?

14 (Laughter)

15 MR. HODGES: I don't think you were, Judge. You  
16 were actually quoting the Eighth Circuit here, so --

17 THE COURT: On more than one of these subject  
18 issues, I have been reversed by the Eighth Circuit.

19 MR. HODGES: Well, and there's other Eighth  
20 Circuit case law that also supports that, Judge. Your  
21 statements there are not outside of what the Eighth Circuit  
22 has pronounced.

23 So, you know, the Court is well aware, obviously,  
24 of the attorney-client privilege. I'm not going to belabor  
25 that.

1           The question as far as whether or not 3M's  
2           entitled to this falls under Rule 26 and 26(b) (4) (D), which  
3           protects against another party's discovery of facts and  
4           opinions of consulting experts. 3M wouldn't be entitled to  
5           it under that doctrine either. Under Rule 26(b) (3), the  
6           work-product doctrine protects against disclosure of the  
7           mental impressions, conclusions, opinions, or legal theories  
8           of an attorney.

9           And again, to be clear, Your Honor, this is  
10          attorney-to-attorney communications that we're talking here.  
11          Under 3M's theory, an attorney can draft an opinion letter  
12          and it's not work product. Anticipation of litigation is  
13          broad and we're talking about the attorney's anticipation of  
14          litigation here. It doesn't have to be a case that's  
15          already on file. It doesn't have to be a specific case  
16          that's on file. It's anticipation of litigation. And  
17          again, as this Court is aware, my firm has filed over a  
18          hundred of these cases.

19          THE COURT: And what is the anticipated  
20          litigation? Is it what you just mentioned, the hundred-plus  
21          cases that you have in the MDL, or the anticipation that  
22          maybe you'd be suing 3M on behalf of Augustine over some  
23          Lanham Act violation?

24          MR. HODGES: I think that these documents are in  
25          anticipation of litigation of my clients in this MDL.

1           The Eighth Circuit recognizes two different kinds  
2 of work product. It's ordinary and opinion work product.  
3 Because we're not talking about notes that I made or  
4 something like that. It's going to take it out of ordinary  
5 work product to opinion work product. And pursuant to the  
6 Eighth Circuit's opinions in both **Baker** and **Murphy** that are  
7 again cited in our briefing, the documents on that privilege  
8 enjoy, quote, almost absolute protection against disclosure.  
9 So 3M can only get these documents in only very rare and  
10 extraordinary circumstances. They've made absolutely no  
11 showing on either one of those. And because this was  
12 disclosed to Mr. Benham does not waive that privilege. His  
13 company is a non-adversarial third party. And as Mr. Benham  
14 indicated and as he testified in his affidavit, he also  
15 stepped aside from his role as general counsel and is  
16 thinking about bringing some of these cases himself. Some  
17 of these documents deal with things such as the law in  
18 Minnesota, statute of limitations --

19           THE COURT: Let me ask this question while you're  
20 on that point.

21           As I understand it, the privilege log that we're  
22 talking about, whether it's one or two, were all prepared by  
23 Mr. Benham; isn't that a correct statement?

24           MR. HODGES: The privilege log?

25           THE COURT: Yes.

1 MR. HODGES: Yes, Your Honor.

2 THE COURT: And have you or someone at -- a lawyer  
3 at Kennedy Hodges reviewed independently and made an  
4 independent legal determination that each of the documents  
5 on the privilege log is in fact privileged?

6 MR. HODGES: The documents --

7 THE COURT: Or the flip side of that is --

8 MR. HODGES: Sure.

9 THE COURT: -- are you just relying on  
10 Mr. Benham's work in that regard?

11 MR. HODGES: No, Your Honor. We conducted our own  
12 review and determined that there were a number of these  
13 documents that we did not believe would be our work product  
14 and those documents have been produced to 3M.

15 THE COURT: Okay.

16 MR. HODGES: So I think we've produced about 31  
17 pages' worth of these e-mails to 3M and however many  
18 documents that entails, so they've gotten a chunk of these  
19 documents already.

20 THE COURT: As to the first 84, which are the only  
21 ones at issue here today, I believe every single one of them  
22 has at least in part Kennedy Hodges work product as the  
23 asserted basis for withholding, is that correct?

24 MR. HODGES: The log says what it says. I'm not  
25 sure, Your Honor, whether it's asserted for every one or

1 not.

2 THE COURT: Okay. If I'm right about that, your  
3 answer to my earlier question is that the work product  
4 that's being asserted is the work product that Kennedy  
5 Hodges has done on behalf of Plaintiffs in the  
6 Multi-District Litigation case here in Minnesota.

7 MR. HODGES: Or it's Mr. Benham's work product,  
8 because he started his own work-product objections as well.

9 THE COURT: Right. But I guess the log does  
10 identify -- hold on one second.

11 (Court confers with the clerk)

12 THE COURT: So, as I'm looking through my notes  
13 that I made on the Exhibit H to whosever affidavit this is,  
14 which is the 115-document log, under the basis for claim of  
15 privilege, it identifies both: "Hodges' work product  
16 related to Augustine role as non-testifying expert."

17 That's just your work product, correct?

18 MR. HODGES: If that's the only entry, I  
19 assume that --

20 THE COURT: It goes on to say: "Benham work  
21 product related to same." So for entries such as that  
22 you're asserting both your work product and Mr. Benham's  
23 work product. And I would assume then as I go through this,  
24 if there are any documents as to which only Mr. Benham's  
25 work product is being asserted, it would say that.

1 MR. HODGES: I assume that's correct, Your Honor.

2 THE COURT: And my recollection is -- and I guess  
3 don't anybody rely on my recollection, but as I look through  
4 all 84 documents, every one begins with "Hodges' work  
5 product."

6 MR. BLACKWELL: That is right, Your Honor.

7 THE COURT: Okay.

8 MR. HODGES: Your Honor, we were talking about  
9 relevancy and the fact 3M hasn't established that this is  
10 relevant, assuming it is producible.

11 THE COURT: You've got about a minute left.

12 MR. HODGES: Okay. They've asserted 51  
13 affirmative defenses. None of them apply to this.

14 3M's global marketing manager, Mark Scott,  
15 testified -- the affidavit that's also included in the  
16 briefing from one of the previous cases -- that if 3M  
17 confidential information was shared with Dr. Augustine, it  
18 would, you know, be catastrophic or whatever to 3M.  
19 However, they seek the same thing from Dr. Augustine and his  
20 attorney now. They subpoenaed Dr. Augustine's customer list  
21 and they received it. We've asked for the customer list in  
22 this litigation, have not received it.

23 I guess my point is, Judge, maybe a little bit of  
24 the goose/gander rule here. They've gotten a lot of  
25 documents out of Dr. Augustine is my understanding, all

1 right? There's a small subset that they haven't gotten, all  
2 right, that's my work product. And as we've indicated,  
3 under any of those six reasons, all right, if one of them  
4 applies, it is not producible. As Your Honor said yourself,  
5 the fact that it's work product by and between two attorneys  
6 adverse to 3M doesn't waive that privilege.

7 THE COURT: Okay. Thank you.

8 MR. HODGES: Thank you, Your Honor.

9 THE COURT: Just to be sure I'm clear, the cases  
10 you were reading back there that you say I wrote, they're in  
11 your memo so I can find them?

12 MR. HODGES: Yes, Your Honor.

13 THE COURT: Okay. Thank you.

14 MR. BLACKWELL: Two minutes.

15 THE COURT: You actually have five, I'm told.

16 MR. BLACKWELL: Thank you, Your Honor.

17 Your Honor, I think I'm going to start with the  
18 case from Your Honor that Mr. Hodges was referring to, the  
19 ***Transunion Intelligence, LLC vs. Search America, Inc.***  
20 Westlaw case, but I think what's important about the opinion  
21 from Your Honor is this quote from Your Honor:

22 "The common-interest doctrine protects already  
23 privileged information when it is shared among two or more  
24 parties who are represented by counsel and share a common  
25 legal, factual, or strategic interest."

1           So the question here is what is the privilege in  
2           the first place. And so before there's going to be a  
3           common-interest privilege that applies, it only applies to a  
4           pre-existing privilege. So to cite it as a reason that the  
5           documents can't be discovered because they've got this joint  
6           business interest begs the question of what is the  
7           privilege.

8           Mr. Hodges in his papers went on at some length  
9           about the work product protection, but in his papers he  
10          wasn't specific as to which documents he felt the  
11          work-product protection applied to. Mr. Benham slapped it  
12          on everything that we saw, but where does it apply? And  
13          more to the point, the critical question is for what party  
14          was this work product supposedly prepared?

15          THE COURT: He just told us it's the plaintiffs in  
16          this litigation. That was the question I had and --

17          MR. BLACKWELL: And here is the problem. This  
18          litigation, as it's known, did not exist in 2013. There was  
19          a case called *Walton*. There was a case called *Johnson*. We  
20          were focused on, for example, the 2013 to 2015 time period.  
21          This litigation, as it's known, didn't exist.

22          THE COURT: Right, but it doesn't have to exist  
23          for the work product to apply. It simply has to be the work  
24          has to have been done by the lawyer in anticipation of  
25          litigation. You don't deny that because there were two

1 cases pending and the lawyers are out there beating the  
2 bushes looking for more clients that they're anticipating  
3 suing you more than once?

4 MR. BLACKWELL: Your Honor, as relates to the  
5 specific communications, not just a memo that David Hodges  
6 and his office has done, Mr. Hodges has done, with his  
7 theories of the case, the communications specifically  
8 between Scott Augustine and his various entities, the  
9 lawyers, and Mr. Hodges' law firm. To the extent he's  
10 invoking work-product protection around those  
11 communications, it is then begging the question for what  
12 matter? It almost requires an *in camera* review to see what  
13 the nature of the discussions were.

14 The fundamental relevance of all of this to 3M  
15 since Mr. Hodges raised that issue is, if this is a case  
16 that at bottom is fueled by a competitor for 3M who fed,  
17 manufactured a fraudulent science hook, line and sinker to  
18 the plaintiffs' lawyers who simply repeated it to instigate  
19 this litigation, that goes to the credibility of the  
20 plaintiffs' case generally, Your Honor, and it's a fact that  
21 impugns the credibility of the case. And we're I think  
22 entitled to be able to show that to explore that, if this  
23 case ultimately was based upon either faulty science,  
24 miscited science, and is simply backfilled with paid experts  
25 later during the discovery period.

1 I wanted to point out one other thing to Your  
2 Honor also with the couple minutes that I have.

3 On the common-interest privilege, Your Honor, I  
4 wanted you to see, the Court to see, just how often we have  
5 been in front of various courts on this issue.

6 You can see the dates here on the left where this  
7 issue has been addressed by all kinds of courts, and this is  
8 the first time after one, two, three, four, five, six, seven  
9 junctures over the course of a year and a half there's been  
10 a common-interest privilege invoked.

11 So, they've never claimed there was a  
12 common-interest privilege until we got in here today. And  
13 it's like a kaleidoscope. It just keeps shifting and  
14 changing and moving. And so our interest in getting at this  
15 is what is the real nature of this relationship. If there  
16 are facts that would support this being manufactured  
17 litigation, we just simply want to know about it and see it,  
18 and it's hard to see through what we've gotten.

19 THE COURT: I guess I'm not sure why that is. So  
20 you do have documents, correct? Augustine has produced some  
21 documents to you; is that a correct statement?

22 MR. BLACKWELL: Your Honor, he's produced enough  
23 documents. We've got the 15 documents from Mr. Hodges last  
24 night and we've got some other documents from him as well,  
25 but it's not sufficient for us to see into what was the

1 nature of the business relationship. We don't have that.

2 THE COURT: Well, you've told me a number of times  
3 and you cited to various things about these documents that  
4 are being sent to the FDA it turns out weren't written by  
5 Dr. X, but in fact were written by Mr. Benham and  
6 Dr. Augustine. You got that information from somewhere, I  
7 assume.

8 MR. BLACKWELL: We got that information from  
9 deposing Dr. Gauthier himself, Your Honor. And there's  
10 more, we believe, where that comes from, and we can't get at  
11 it if we're getting stonewalled.

12 And so what we would invite Your Honor to do if  
13 need be -- and I have been advised by Ms. Ahmann that the  
14 two tranches of documents are not identical, that there are  
15 some documents in the 23 that are not in the 84. And if it  
16 matters to Your Honor to know or see which ones, we'd ask  
17 for leave to be able to identify those for Your Honor. I  
18 don't know that as I stand here.

19 THE COURT: Okay. All right. Anything else?

20 MR. BLACKWELL: No. So, Your Honor, that's all we  
21 have on this issue and we'll await the Court's decision.

22 THE COURT: So let me ask this question:

23 If there is -- I am told there is and indeed I  
24 have seen something that purports to be a retainer agreement  
25 between Dr. Augustine and Kennedy Hodges, and I understand

1 Mr. Hodges says he's going to disclose it to you. When you  
2 get that -- well, you haven't seen it, so it's an unfair  
3 question to say, "Okay. So tell me now what will it say?"

4 But I asked the question earlier and I guess your  
5 answer was -- and I just want to make sure it's clear now,  
6 that it's not just hypothetical and in the abstract, but a  
7 concrete question about a concrete fact:

8 Does the fact that there is a relationship between  
9 Dr. Augustine and Kennedy Hodges, and assuming it is as  
10 Mr. Hodges was describing in part related to this  
11 consultancy and in part perhaps to sue 3M over some Lanham  
12 Act or other kinds of competition matters, that doesn't  
13 change anything is what your answer was before. Is that  
14 still your answer?

15 MR. BLACKWELL: Your Honor, I think the answer is,  
16 in fairness to 3M, we'd have to understand exactly what is  
17 the nature of that relationship, what is the time period of  
18 the relationship, and what it did or didn't accomplish. And  
19 our concern is that it shouldn't be just the facile matter  
20 of Mr. Benham and Mr. Hodges picking the right words and we  
21 just simply give it a pass.

22 As you heard from Mr. Benham standing here, they  
23 purport to be wearing a great number of different hats in  
24 these various communications. And whether or not something  
25 will or will not be privileged depends on which hat is

1 predominant at a given point in time, and that requires I  
2 think a case-by-case assessment or document by document.

3 Thank you, Your Honor.

4 THE COURT: One more question for this side. I  
5 don't know if it's Mr. Benham or Mr. Hodges.

6 But as I look through the privilege log, at the  
7 very beginning of it there is a glossary or an index of  
8 who's who with initials or names and their title, but  
9 there's a name that recurs on the log that I don't see on  
10 the list, and that name is simply Green.

11 Anybody know who Green is? Is it a Mr. Green, a  
12 Ms. Green, Colonel Green --

13 MR. HODGES: That's my associate, Your Honor.  
14 He's an attorney.

15 THE COURT: Okay. So he's a Kennedy Hodges  
16 lawyer.

17 MR. HODGES: Yes, Your Honor.

18 THE COURT: Okay. All right. I --

19 MR. BENHAM: Could I have just a few seconds?

20 THE COURT: I think you exceeded your -- or you  
21 used up all -- oh, he didn't finish his time. All right.

22 MR. BENHAM: First, in response to your question  
23 of has Augustine produced documents, the answer is thousands  
24 and thousands and thousands of pages have been produced.  
25 Maybe that was not heard correctly.

1 I also want to make certain that I spoke clearly  
2 regarding the 23 items on the privilege log and the 87. My  
3 belief is that all of the 23 are within the whatever number  
4 there is, secondly. If I'm wrong, then it's inadvertence.  
5 And if we had actually had a meet-and-confer and they would  
6 have told me where the discrepancy is, I would have looked  
7 for them and tried to reconcile it.

8 But I do not intend to assert that all of the  
9 documents in the second privilege log were also in the first  
10 log, because you made clear to me that I didn't do a very  
11 good job on the first privilege log and I went back and  
12 looked much carefully and found some others. So I don't  
13 want to suggest that the two logs are identical, but the  
14 second has exploded because the second log has some  
15 additional documents in it.

16 THE COURT: Okay.

17 MR. BENHAM: Thank you.

18 THE COURT: So one thing for sure we're going to  
19 do here before I adjourn, Mr. Blackwell or Ms. Ahmann,  
20 whoever on this side of the table, get to me, say, by Friday  
21 any non-overlap documents. Just identify for me on what is  
22 Exhibit J, which is the 23 documents, I believe, that are  
23 not on Exhibit H, which is the 115 documents. And I don't  
24 want any argumentation. I don't want to hear from them that  
25 they argue or somehow need to argue. I just want you to

1 identify which entries on those two logs are not overlapping  
2 from your observation.

3 MR. BLACKWELL: We'll provide just the facts, Your  
4 Honor.

5 THE COURT: In the meantime, I'll take it all  
6 under advisement and issue a ruling shortly, and we are in  
7 recess. Thank you very much. We made it within precisely  
8 the hour and I'm very impressed.

9 (Laughter)

10 MR. BLACKWELL: Thank you, Your Honor.

11 (Proceedings concluded at 3:00 p.m.)

12 \* \* \* \*

13 **C E R T I F I C A T E**

14 **I, TIMOTHY J. WILLETTE**, Official Court Reporter  
15 for the United States District Court, do hereby  
16 certify that the foregoing pages are a true and  
17 accurate transcription of my shorthand notes,  
18 taken in the aforementioned matter, to the best  
19 of my skill and ability.

21 */s/ Timothy J. Willette*

22 **TIMOTHY J. WILLETTE, RDR, CRR, CRC**  
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