UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation	File No. 15-MD-2666 (JNE/FLN)
	March 27, 2017
	Minneapolis, Minnesota
	Courtroom 9W
	9:06 a.m.

BEFORE THE HONORABLE FRANKLIN L. NOEL
UNITED STATES MAGISTRATE JUDGE

(MOTIONS HEARING)

APPEARANCES

FOR THE PLAINTIFFS:

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

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

KENNEDY HODGES, LLP
Gabriel Assaad
4409 Montrose Blvd
Suite 200
Houston, TX 77006

(Appearances continued next page)

FOR THE PLAINTIFFS:

KENNEDY HODGES, LLP
David W. Hodges
711 W. Alabama Street
Houston, TX 77006

FARRAR & BALL, LLP
Kyle Farrar
1010 Lamar, Suite 1600
Houston, TX 77002

FOR THE DEFENDANT:

BLACKWELL BURKE P.A.
Ben Hulse
431 South Seventh Street
Suite 2500
Minneapolis, MN 55415

COURT REPORTER:

Maria V. Weinbeck, RMR, FCRR
Official Court Reporter
United States Courthouse
300 South Fourth Street
Suite 1005
Minneapolis, MN 55415

Proceedings recorded by mechanical stenography; transcript produced by computer.

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P R O C E E D I N G S

THE COURT: Okay. This is In Re Bair Hugger Forced Air Warming Devices Products Liability Litigation, and we have two motions. The first is the Defendant's motion to compel, and second is the Defendant's motion for a protective order. Let's get everybody's appearance on the record. For the plaintiffs?

MR. HODGES: David Hodges here from Kennedy Hodges.

MR. FARRAR: Kyle Farrar for the plaintiffs.

MS. ZIMMERMAN: Genevieve Zimmerman for the plaintiffs.

MR. ASSAAD: Gabriel Assaad for plaintiffs.

MR. SACCHET: Michael Sacchet, plaintiffs.

MR. HULSE: Good morning, Your Honor. Ben Hulse for the defendants.

THE COURT: Okay. Mr. Hulse, you're up.

MR. HULSE: All right. Thank you, Judge Noel. Good morning.

First, is the defendant's motion to compel against Kennedy Hodges. We're here on this motion, Your Honor, because we have learned through the production that was ordered by the Court from Augustine of the documents that were on Augustine's privilege log, that Augustine's privilege log was radically incomplete with respect to

communications with the Kennedy Hodges firm and was also deceptive.

And what do I mean by "deceptive?" What I mean is that the information that was contained on the log was in several instances false making it difficult for both us and the Court to assess the privilege. We have filed this motion against Kennedy Hodges because our viewpoint is that they had an obligation as both the other side of the correspondence as having been held out as counsel for Augustine, having been held out as being in a consulting relationship with Augustine, and having also intervened in these proceedings in the motion against Augustine to confirm that Augustine's privilege logs were in fact complete and accurate. Something they did not do.

How do we know that Augustine's privilege logs were incomplete and deceptive? Well, one thing that we've learned, Your Honor, and I'll use the Elmo here, is that Mr. Benham set up an e-mail address or used an email address, a Gmail address called kennedyhodgesllp@gmail.com, under the name David Hodges. And I've highlighted, this is one of the documents that was ordered produced to us. This purports to be from David Hodges to David Hodges, which is a little puzzling in itself, but then it is signed by Brandy. There are multiple instances in the documents --

THE COURT: Let me just interrupt for a second and

say I do that all the time. That's how I keep my to-do lists.

MR. HULSE: Is that right?

THE COURT: But go ahead.

MR. HULSE: You set up a Gmail address?

THE COURT: No, I send myself e-mails from the to me.

MR. HULSE: Well, the interesting thing though, Your Honor, is that this e-mail address, the name of the e-mail address is David Hodges, kennedyhodgesllp@gmail.com, but these are e-mails that are being sent by Randy Benham, so it's unclear to us why this was done. And there are multiple instances of this in the documents that were produced to us, Your Honor. So why Randy Benham from Augustine is using an e-mail address under the name of David Hodges to send e-mails to David Hodges. But those e-mails then appear, Your Honor, on Augustine's privilege log as e-mails from David Hodges to David Hodges rather than e-mails from Randy Benham to David Hodges, and this is a recurring issue.

THE COURT: So let me ask you this though, are there discovery requests that you have made to Kennedy Hodges?

MR. HULSE: Absolutely, Your Honor. In fact, we asked both an interrogatory and a document request to all

plaintiffs' counsel to produce communications with Augustine. The Plaintiffs' Executive Committee, which includes the Kennedy Hodges firm objected wholesale, based on privilege to that. Your Honor actually gave an advisory Order after a hearing that all plaintiffs' counsel needed to respond to these. And so there clearly is a document request that encompasses this. But this is just one of four reasons why we know that the Augustine privilege log was both inaccurate. And, again, putting aside this puzzle of why Augustine's counsel is using the e-mail address David Hodges, kennedyhodgesllp@gmail.com.

Second, as the Court knows, Augustine provided 12 documents to the Court for in camera review that were never on the logs that were provided to 3M, the 12 mystery documents.

Third, Kennedy Hodges, after we filed our motion has disclosed on a new privilege log another ten documents and produced one document that should have been on Augustine's privilege logs. Now, the only way we were able to get this after repeatedly trying to meet and confer was filing this motion, which is something that we should not have had to do.

And, fourth, the documents that the Court ordered produced by Augustine reference or reveal the existence of dozens of other documents, including e-mail attachments that

should have been produced or at least put on Augustine's privilege log. We notified Mr. Benham and Kennedy Hodges of these dozens of missing documents and to date we have no response from Kennedy Hodges.

THE COURT: I'm sorry, say that again? How did these documents come to light?

MR. HULSE: Sure, they're referenced in the documents that the Court ordered produced.

THE COURT: Okay.

MR. HULSE: And if Your Honor would like, I actually have a listing of these documents, but they range all over time. Many of the e-mails will say, for example, I sent you earlier my notes on this or I sent you a presentation or I sent you a draft or I sent you a video. None of that was logged. None of its been produced to us.

So our sense here is that the, more than our sense, what is clear to us from what's now come out is that there are probably double the number of communications between Kennedy Hodges and Augustine than have actually been revealed to us on a log or through the documents that were produced in camera.

So it's clear to us that either by production or privilege log that only a subset of the documents reflected in the communications between Augustine and Kennedy Hodges have been disclosed, and that what has been disclosed,

again, pointing to this instance of Mr. Benham puzzlingly using that Kennedy Hodges e-mail address is that the information that we've been receiving is not correct.

We shouldn't have to keep doing this. We shouldn't have to keep coming back to the Court to get a full disclosure of these communications that the Court has repeatedly determined to be relevant. We believe that we and the Court are entitled to a complete record of the communications between Kennedy Hodges and Augustine.

What we are asking for here is that the Court first take the ten documents that Kennedy Hodges has now put on a privilege log, and I'm not certain whether that privilege log has been provided to the Court; otherwise, I have it here and undertake an in camera review of those documents.

The second thing that we are asking for is that Kennedy Hodges undertake a full diligent search of its documents to identify any communications with Augustine and either produce them or put them on a log and provide them to the Court for in camera review.

We also ask that Kennedy Hodges be ordered to provide a sworn declaration that they have not -- that they have done so, that they have undertaken this comprehensive search, along the lines of what the Court ordered Mr. Benham to do.

Kennedy Hodges in its response says that it has conducted a review, apparently in response to our motion, but it's clear to us that that review was not thorough, and it was not comprehensive. It does not include the documents, the dozens of documents that we have identified to them and Mr. Benham that we know exist based on the documents the Court has ordered to be produced. And it by coincidence, 10 of the 11 documents that they additional documents that they have now disclosed to us are privilege, we know there are significant numbers of nonprivilege documents that exist.

Kennedy Hodges doesn't say whether this review they undertook was comprehensive. They don't explain what they did to conduct this review, and they certainly don't explain why the Court should have any faith that they have identified all communications with Augustine.

As I noted, all plaintiff's counsel, including Kennedy Hodges, also have an affirmative duty in light of the Court's March 7th Order on privilege to go back and look at their responses to interrogatories, our interrogatories and document requests, and to produce any communications with Augustine that are not subject to privilege under the terms of the Court's Order.

The Court's Order spells out several categories of communications that are not privileged. These include

documents that, "reflect Augustine's thoughts or suggested strategies about specific cases or potential cases." Another is, "the initiative to publicize the *Walton* cases and to solicit other lawyers to bring similar cases." The Court concluded that any work product privilege was waived.

The only way to know whether documents that are in Kennedy Hodges' possession fall into either of these categories is to either provide a detailed privilege log or for the Court to undertake an in camera review, and we suspect that in camera review is really going to be the only way to do this.

So just to round this out, Your Honor, the relief we're asking for here is that the Court undertake an in camera review of the ten newly listed documents on the Kennedy Hodges' privilege log. The Court order Kennedy Hodges to undertake a comprehensive search for communications with Augustine and produce those that are not privileged or disclose a privilege log of those it believes are privileged, and also to provide a sworn declaration explaining what it did to ensure that this search was complete.

Lastly, less the Court think that this is the end of the road, there will be more with Augustine to come. Mr. Benham has not produced to us all of the documents that the Court ordered him to produce. He has designated all or

most of the documents as confidential, despite the fact that the Court has found that that confidentiality was waived by disclosed to the public.

And, furthermore, of course, the documents that we are seeking from Kennedy Hodges, we are also seeking from Augustine. Thank you, Your Honor.

THE COURT: Okay. Mr. Hodges?

MR. HODGES: Your Honor, there's an old saying that pigs get fat and hogs get slaughtered, and I think that's applicable here. I want to be clear, Your Honor, they're asking for documents from opposing counsel concerning current litigation. My firm was under no duty to go compare what had been produced from Mr. Benham, which, by the way, I wasn't privy to many of these conversations that Mr. Hulse and Mr. Benham had regarding these documents. I was brought in later on towards the tail end and only by Mr. Benham when I was copied by e-mail, and I asked for a meet and confer so we can walk through this, and I was denied that opportunity, and here we are.

The Court held in its order, the March 7th Order, that there was an attorney-client privilege, and I respect that it didn't apply. So no duty attached to me as an attorney for Dr. Augustine to produce anything. There's been no subpoena that's been issued to Kennedy Hodges.

There was a request for production that we

responded to, we complied with, and it's asking for communications regarding the Bair Hugger Warming System or HotDog, and we have complied with that, and the Court's Protective Order that was entered in this case.

Mr. Hulse makes an assumption that there's this whole litany of documents that have not been produced, assuming that they even exist. These documents go back years. Your Honor, as you will recall, a lot of this goes back to 2008, I mean nine years. So documents don't exist.

There was a piece meal approach from what I could glean from Mr. Benham's attempts to comply with the request. And did he do a perfect job on that? Apparently not, but that doesn't mean he was being deceptive in producing his privilege log.

THE COURT: No, but clearly there are lots of documents that appear to be communications between Mr. Benham on behalf of Dr. Augustine and Kennedy Hodges over a significant period of time, correct?

MR. HODGES: There was from 2008 forward.

THE COURT: And my question to Mr. Hulse was is there a document request out there to either the plaintiffs in this action or to Kennedy Hodges generally for those documents? And your answer to that question is what?

MR. HODGES: I don't believe there's a request specifically asking for those documents, Your Honor. There

was never other than a general request that was sent out to all the plaintiffs and to all of the plaintiffs' law firms that we then did do our own search. We put together --

THE COURT: And that document request asked for what, documents?

MR. HODGES: It's documents, communications per you and your attorneys and any person including but not limited to current and former patients of any health care provider regarding the Bair Hugger Warming System, Forced Air Warming, the HotDog and/or SSIs. That's the request.

THE COURT: Okay. Is there a specific request for communications between Kennedy Hodges and Dr. Augustine?

MR. HODGES: No, Your Honor.

THE COURT: Okay. And these ten documents that you've put on a privilege log that Mr. Hulse was referencing, is this the first privilege log that Kennedy Hodges has produced?

MR. HODGES: It is.

THE COURT: Okay. Everything else that we've been grappling with are all Benham-produced or Augustine-produced logs, correct?

MR. HODGES: That's correct.

THE COURT: Okay. Go ahead. Anything else?

MR. HODGES: Your Honor, I'm going to point out, and I think there is a distinction to be made here, and I

know we have argued about other courts entertaining this, but these were requests that were specific to my law firm, and 3M was denied relief by Judge Stacy in May of 2015 and said you can go get these documents or go take a deposition of Dr. Augustine.

Again, in September of 2015, then Judge Hoyt also denied the very same motion to compel in this case. And then Judge James also in October of 2015 also ruled that in denying the relief that you can go get these documents directly from Dr. Augustine or take his deposition, and that's what they've done, Your Honor. I mean we are fully in compliance.

I've never been involved in a case where my opposing counsel wants me to go examine my e-mail server for communications related to the litigation that we're in, and I think it's highly inappropriate. And they've been denied relief three times. There should be a stop from seeking it once again a fourth time.

I've read the Order a couple of times, Your Honor, and I do want to once again state at least for the record there's again been absolutely no showing of relevancy whatsoever by 3M on this. They've made no showing of substantial need or undue hardship, that this was a rare or extraordinary circumstances.

The documents that we have are those that I think

that within the Court's Order of March 7th, about thoughts, legal analysis or strategy regarding the litigation or potential litigation.

So, Your Honor, I ask that the Court deny the motion to compel with respect to seeking documents or anything further from my law firm.

THE COURT: Okay. Anything else, Mr. Hulse?

MR. HULSE: Right to your point, Your Honor. As we pointed out in our submission, defendant's document request number 25 says, "produce all documents relating or referring to any communication between you or your attorneys and the following entities and/or their owners, officers, employees, agents, affiliates or representatives including but not limited to Dr. Scott Augustine." And then we list the various Augustine-affiliated entities.

We had also a copy cat interrogatory, so we asked for all communications between plaintiffs, plaintiffs' counsel, Dr. Augustine, and the Augustine entities both by document requests and by interrogatory. And the response came on behalf of the Plaintiffs' Executive Committee, which includes the Kennedy Hodges firm, and Plaintiffs objected and asserted the attorney-client and work product privilege and stated no nonprivilege responsive documents exist. That's what they said. They said there were no nonprivilege responsive documents that reflected communications between

them and Dr. Augustine. That was not accurate.

There is no question that we have requested these, and there is also no question that the Court on October 6th advised all plaintiffs' counsel, all plaintiffs' counsel, including the ones on the executive committee, but beyond that too, to respond to these specific document requests.

We are here pursuing these from Kennedy Hodges because every time we shake the tree with Mr. Benham, more documents fall out. We have no confidence that we will ever be getting a complete disclosure from Mr. Benham no matter how many times we return.

THE COURT: Wait a minute. The privilege analysis as it relates to Kennedy Hodges, who does represent plaintiffs in this MDL, unlike Mr. Benham and unlike Dr. Augustine, who is not a party to this litigation, the privilege analysis as to Kennedy Hodges is different than the privilege analysis as set forth in our Order from earlier this month, correct or incorrect?

MR. HULSE: Not necessarily, Your Honor. We're talking about the same communications here, the communications between Kennedy Hodges and Augustine were the subject of the Court's Order. So the problem is that there are additional communications that clearly exist here that we would have challenged and would have been subject to the Court's in camera review.

THE COURT: Except Rule 26 talks about documents and things prepared in anticipation for litigation by a party or the party's representative, and we concluded in our March Order, I believe -- there were many iterations of that Order -- we concluded that Dr. Augustine, neither Dr. Augustine nor Randy Benham were party representatives of parties in the multidistrict litigation.

MR. HULSE: Right.

THE COURT: So our analysis of work product as it related to them was one thing. Clearly, Mr. Hodges and his firm are party representatives. Their lawyers for plaintiffs in the MDL. So documents that they prepare in anticipation of litigation are going to be treated differently than documents that Dr. Augustine prepared, even if they're communicated between the two people, correct or incorrect?

MR. HULSE: That is absolutely what Your Honor said. The issue here is that there are additional documents that fall into the nonprivilege categories that the Court has identified that are in the possession of Kennedy Hodges. We just got produced one of them. We know those documents exist. We believe based on the documents that were produced that there are dozens of other documents. We presume that Kennedy Hodges has kept these communications with Augustine that are missing right now. And so the key is it's the

nonprivilege documents.

But we would also say that to the extent there are privilege documents, those ought to go on a log, so that we and the Court can assess the privilege too. The privilege analysis that the Court has set out is detailed and thorough, and it requires parsing of what the purpose was of the communication and also whether there was an expectation of disclosure as there was with the litigation guide that was prepared by Augustine and then edited by Kennedy Hodges. And the only way to know that is to get the documents on a log.

So as I said, these are documents that we should have gotten from Augustine, assuming Augustine has kept them. We did not get a complete privilege log. We did not get an accurate privilege log. We did not get a complete production, so we're going to the other side of the communications. Kennedy Hodges, which is the recipient or sender of communications, and saying, "can we please get these from you?" And the response has been "no, you can't have them."

And so we're asking for the Court today to order that these documents to the extent not privilege be produced, and to the extent they're asserting privilege be logged, so that we can ask the Court for an in camera review.

THE COURT: All right. Thank you.

MR. HODGES: Your Honor, may I have a couple more minutes?

THE COURT: You can have 30 seconds.

MR. HODGES: Thirty seconds, all right.

Your Honor, he's right. There was another request, I guess, that I didn't know. I do note that it was objected to, and that we responded that there were no nonprivilege responsive documents. That is accurate. We've given the log of what we have, Your Honor.

THE COURT: That's the ten documents we're talking about. The log that you've just produced.

MR. HODGES: He has it. He has it. Most of those documents, the vast majority of those documents that Mr. Benham have I did not have. His is the most complete set that exists, Your Honor.

THE COURT: What about this business of Benham having an e-mail account at Kennedy Hodges? Are those documents --

MR. HODGES: I don't have those documents.

THE COURT: Are you claiming those are Benham documents not Hodges' documents?

MR. HODGES: I don't have those documents, period. In fact, I didn't even recall that those documents existed until they were brought up in connection with this. Those,

as I recall, that was in connection with distributing the guide. It came from that address.

And I also want to point out, Your Honor, because reading the Order, I don't know that the Court had a full understanding of what happened. There was an e-mail that had gone out saying, hey, here's -- there's a litigation guide out here. Let us know if you want this guide or whatever. It went out kind of like, you know, to a list. However, it was only those people that affirmatively responded and said, yeah, I want to get this, and I believe that number was very, very low. I mean it could be counted on one, maybe two hands of people that got that, and that was only an abridged guide.

The full guide that was my understanding it never went out to anybody, and I don't have a copy of that either. And that e-mail address isn't on my server. It's not a document that I have.

The other thing I wanted to point out, Your Honor, that the Court did not have the benefit of and after going through these documents or looking, we were able to find is that we actually found the consulting agreement dated January 29, 2013, with Dr. Augustine's companies. And I think it's important because the Court held in the March 7th Order that there was no consulting privilege. That's been produced to the Court. That is the document that was

produced to 3M in connection with all of this.

So I would actually ask the Court to revisit this issue as far as any communications after January 29th of 2013 that Mr. Benham produced because they were clearly privileged under the consulting expert privilege as well.

I think that's all I have.

THE COURT: Okay.

MR. HULSE: Your Honor, if I may, just to speak to a factual assertion. I promise it will take 10 seconds.

THE COURT: Ten seconds, and if you want to hear your other motion, you better start talking.

MR. HULSE: I'll be quick. Mr. Hodges says he's not the recipient of e-mails sent from this Gmail account. Well, yes, he is. Here is an e-mail sent from this Gmail account that is used by Mr. Benham, and it's forwarded to dhodges@kennedyhodges.com. That's Mr. Hodges. There are clearly communications from the kennedyhodgesllp@gmail.com used by Mr. Benham --

THE COURT: What about this January 29th document? Does that change the Court's analysis of whether or not Benham is or is not a party representative under Rule 26?

MR. HULSE: No, no, Your Honor. First off, that document is only dribbled off after extensive motion practice on this. But Kennedy Hodges ended up telling us and the *Walton* Court that he was not a consultant, so

whatever that e-mail says, he didn't end up being a consultant.

And, again, this fact that we again having to shake the tree and shake the tree, and here's another new document after all this briefing and motion practice, we think the Court should take that with a grain of salt.

THE COURT: All right. Let's move on to the next motion.

MR. HULSE: All right. Thank you, Your Honor.

This is defendant's motion for a protective order regarding subpoenas sent to five third-party manufacturers of patient warming systems. I would just note today that counsel for Stryker, Mr. Griffin, is present in the courtroom. Stryker is one of the targets of the third-party subpoenas.

The basis for the motion was that despite us pushing, plaintiffs would not articulate the reason that they believed discovery from these five third-party manufacturers was relevant. We understand now that they are not contesting relevance as to several of the subpoenas:

One is the Cincinnati Sub-Zero Blanketrol III, the Medline PerfecTemp, the MTRE Allon, and the Medi-Therm System by Stryker and Gaymar. These are conductive systems. That is electric blanket-type systems, and thus, under the terms of the Court's decision on the VitaHEAT subpoena,

those aren't relevant.

We are troubled that the subpoena targets apparently were not notified of the VitaHEAT decision and nor have these subpoenas ever been withdrawn, despite their lack of relevance, but we have informed Stryker and Gaymar and CSC. We are not certain. We've had no contact with MTRE or Medline and don't even know what the status of those subpoenas are.

There are two devices that are the subject of plaintiff's subpoena: The Stryker Mistral-Air, and CSZ Warm Air that use convective technology. Convective is essentially forced air technology like the Bair Hugger. The problem that we still here, Your Honor, is that the plaintiffs' relevance showing is incredibly cursory. They fail to explain what they think the discovery will gain them beyond what they already know from public marketing materials.

THE COURT: Let me interrupt for a second and just make sure I've got the sort of outline correct. Unlike VitaHEAT, as you stand here, you're not representing these third-party --

MR. HULSE: No, Your Honor.

THE COURT: -- targets of the subpoena, correct?

MR. HULSE: That's correct.

THE COURT: You're here on behalf of 3M seeking a

Protective Order saying those subpoenas to these other folks that I don't represent are irrelevant?

MR. HULSE: Right. Exactly, Your Honor. And under some case law that we've cited as a party to the litigation that will be burdened with this discovery if it goes forward, we have standing to object to it.

Separately, Stryker, Gaymar, and Cincinnati Sub-Zero have objected to this discovery. They have objected based on relevance, but they also have additional burden and breadth objections which are there to assert, and they play out in some separate hearing whether in this courtroom or some other courtroom that's local to their operations.

THE COURT: And just to be clear, there's nothing in the papers before me other than a letter from Mr. Griffin.

MR. HULSE: That's correct, Your Honor.

THE COURT: Dated March 24th that -- strike that. A letter from Mr. Griffin and a letter from Stryker itself, it looks like, Ethan York. Is he in-house counsel at Stryker?

MR. HULSE: He is, Your Honor.

THE COURT: So I have those two letters.

MR. HULSE: I also have the honor -- the honor, apologies -- I have the letter that was sent by counsel for

CSZ to plaintiffs' counsel, if the Court would like a copy.

THE COURT: Okay. I don't.

MR. HULSE: Okay.

THE COURT: But just to be sure I'm clear though, and Mr. Griffin I see is sitting here in the courtroom but hasn't entered an appearance, and you don't intend to make any argument regarding this motion, correct, Mr. Griffin?

MR. GRIFFIN: Correct, Your Honor.

THE COURT: You're just observing?

MR. GRIFFIN: I'm here in case there's a question I can help.

THE COURT: Okay. I think I have the outline. Go ahead, Mr. Hulse.

MR. HULSE: Thank you, Your Honor.

So, as I said, where we're left here is that for four of the six third-party devices that are the subject of the plaintiffs' subpoenas, those are conductive devices, electric blanket-type devices like the VitaHEAT, doesn't appear to be contested here, that those fall within the same logic as the VitaHEAT ruling, and so we ask for the motion for Protective Order to be granted with respect to those.

We also on separate grounds ask for the motion to be granted with respect to the two convective devices, the Stryker Mistral Air, and the Cincinnati Subzero Warm Air, because the plaintiffs for two reasons, one is that the

plaintiffs' relevant showing is cursory and inadequate. And, two, is because what they have not explained is how, now that we are past the close of general causation discovery. This discovery can be taken consistent with the current case schedule. And that's really where I'd like to focus my argument, Your Honor.

The cut-off for general causation discovery was March 20th. That's last week. There are a handful of things that by agreement we're getting done by March 31st like Augustine's deposition, but the Court's Scheduling Order said that discovery must be issued in time to be completed by March 20th.

As of this date, there has been no discovery from Stryker or Cincinnati Subzero. The plaintiffs have not moved to compel against them. If the Court were to authorize discovery, it's fair to say that Cincinnati Sub-Zero and Stryker would also play out their other objections, which could take quite a while, and we would not be seeing production for likely several months to come.

Meanwhile, the plaintiffs' expert disclosures are due March 31. Ours are due a few months after that. And it is, and this discovery is clearly being sought under the auspices of general causation discovery. Plaintiffs haven't requested an extension of the discovery schedule, so it is impossible to see how extensive discovery of these third

parties can be done within the scope of the existing schedule. And we think that's something that ought to be taken into consideration here and is further grounds for granting the motion for a protective order.

Separately, what plaintiffs are pointing to here in articulating for the first time in their papers the relevance of this discovery of these two convective devices is, first and foremost, that the two devices employ, according their marketing materials, HEPA filters. Plaintiffs since May of last year at Science Day have been arguing that a HEPA filter should be used in the Bair Hugger Forced Air Warming System. The Court has heard this many times. It's been a refrain from the beginning.

Yet, they did not seek this discovery from Stryker and Cincinnati Sub-Zero apparently relating to the use of a HEPA filter until here at the very end of the fact discovery period. They've known about this. This has been their argument for nine months, and yet, and they had ample opportunity to seek this discovery, and they didn't until the end, and that also militates in favor of granting our motion for protective order.

The one other thing that I'd like to add, Your Honor, is that if the Court is going to let any of this discovery go forward, it needs to be narrowly tailored to the case -- in accordance with the case law about feasible

safer alternative designs. What plaintiffs have said is if we get this discovery, we shouldn't be limited in any way, shape, or form, and the discovery they served is similar in scope to the discovery that they served on 3M. That discovery must be narrowly tailored to deal with the specific components that they allege should be incorporated into the 3M Bair Hugger system.

And so we'd ask to the extent Your Honor allows that discovery to go forward, that it also direct that it be narrowly tailored on that basis. If so, that might allow for the discovery to be done sometime three or four months from now. Certainly, the blunder bust discovery that they sought right now can't be done any time soon.

But our baseline concern here with those remaining convective devices is it's just too late. This discovery cannot be done in a way that can -- it's certainly past the discovery deadline for general causation, and it can't be done consistent with the expert schedule.

THE COURT: But it is relevant, correct? You don't object?

MR. HULSE: Well, we don't think it's relevant, Your Honor, because our viewpoint of the case law is that a different device cannot be relevant, but we understand the Court's VitaHEAT Order to contemplate that another convective device, a component of another convective device

might meet the relevance standard for the purpose of discovery, at least. That's at least how we understood Your Honor's Order. And so that's, you know, while we preserve our general position that other devices can't be relevant. We recognize that's the lay of the land.

THE COURT: Okay. Thank you.

MR. FARRAR: Your Honor, excuse me, Kyle Farrar for the plaintiffs, and I don't believe I've had a chance to speak in front of you yet.

Additionally, I'm struck by the irony of the two motions 3M brought. They want discovery from plaintiff's counsel on a device that has conductive in a company that does conductive warming and prohibit discovery from the plaintiffs of a company that does convective warming. Obviously, companies that do convective warming are relevant. The case law is clear that safer alternative designs are always relevant. And I think Mr. Hulse conceded relevancy to some extent, but it's not limited as their papers say, and as I think as Mr. Hulse was trying to allude to a specific component. He wants to limit it to the HEPA filter, for instance.

But there's more because Mistral talks about in their marketing materials how the blanket has a diffusion so it doesn't disrupt the flow of the air in the operating room. The Warm Air talks about how it has two filters. The

blanket itself serves as a filter. So these are safer alternative designs. They're things that we pled in our master form on paragraph 81, and we're entitled to discovery of it.

The case I think that is probably the most on point for the issue is the *In Re: Mentor*. It's a Westlaw cite. It's out of the Middle District of Georgia regarding the transvaginal mesh. And it talks about what the threshold showing of relevance is.

And it says, "if plaintiff's request are reasonably calculated to lead to the discovery of evidence regarding a feasible design that is safer than the subject design, then those requests satisfy plaintiff's threshold burden of establishing relevance."

Clearly, the stuff that we're asking for is relevant. We're asking for the exact same things that were asked for in the *In Re: Mentor* case. It is the 510(k) submissions, the design documents, and the testing. And *In Re: Mentor* is directly on point. It says, look, you have to not only produce the outside testing, the literature that you're aware of that supports your safety condition, but also your internal, your 55 internal tests that were done. So I don't think there's a credible argument as to the relevance of the information we sought.

As to the timing, it's the first time I heard in

the argument it's not in their papers. But the subpoenas were served, and the answers were due before the end of the discovery period. It's the discovery period. We don't have to do all of the discovery in the front of it. We get the full-time of the discovery period. So the fact that the answers were due before the discovery period ended means they're timely subpoenas.

And I think the last argument, Your Honor, is getting back to the relevancy, but if the documents aren't relevant, I'm not positive why 3M is complaining about it. I mean we're going to review some documents. It's not significant. If they're not relevant, then don't review them at all if you don't want to, if you know they're not relevant.

Obviously, the issues go to the heart of our design defect claim and relevant, and we think we're entitled to them, Your Honor.

THE COURT: All right. Thank you. Anything else, Mr. Hulse?

MR. HULSE: No, Your Honor.

THE COURT: All right. Thank you all very much. I will take both motions under advisement and issue a ruling shortly, and we are in recess. Thank you.

(Proceedings concluded.)

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REPORTER'S CERTIFICATE

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

Certified by: *s/ Maria V. Weinbeck*

Maria V. Weinbeck, RMR-FCRR