

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA

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4 In Re: Bair Hugger Forced Air) File No. 15-MD-2666
5 Warming Devices Products) (JNE/FLN)
6 Liability Litigation)
7)
8) Minneapolis, Minnesota
9) March 12, 2018
10) 10:37 a.m.
11)
12) **DIGITAL RECORDING**
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15 BEFORE THE HONORABLE FRANKLIN L. NOEL
16 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
17 **(MOTION HEARING)**

18 APPEARANCES

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P R O C E E D I N G S

I N O P E N C O U R T

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3 THE COURT: Okay. This is In Re. Bair Hugger
4 Forced Air Warming Device Product Liability Litigation.
5 Let's get everybody's appearance on the record. For the
6 plaintiff.

7 MS. ZIMMERMAN: Good morning, Your Honor.
8 Genevieve Zimmerman for plaintiffs.

9 MS. YOUNG: Good morning, Your Honor. Mary Young
10 for defendants.

11 MR. GOSS: Good morning, Your Honor. Peter Goss
12 for defendants.

13 THE COURT: Okay. We are here for a hearing on
14 plaintiffs' motion to compel and the defendant's motion for
15 a protective order, correct?

16 MS. ZIMMERMAN: Yes, Your Honor.

17 THE COURT: Okay. Let's start with the
18 plaintiffs' motion to compel, Ms. Zimmerman.

19 MS. ZIMMERMAN: Thank you, Your Honor. May I
20 please the Court. We're here with respect to, as the Court
21 has indicated, plaintiffs' motion to compel additional
22 information necessary for completion of our duties under
23 Pretrial Order No. 24, which is repopulation of the
24 bellwether pool. We have been obligated to provide proof of
25 Bair Hugger use to defendants, and I believe that we

1 completed that on February 9th. In response, PTO No. 24
2 required 3M to essentially let us know if there were cases
3 where they were challenging the proof of product claims and
4 then also to produce relevant documents that the defendants
5 may have with respect to those challenges.

6 And we outlined in our papers some of the issues
7 that we have with respect to defendants many challenges.
8 The defendants have challenged more than half of the
9 100 cases randomly selected by the Court for potential
10 inclusion in the second bellwether pool.

11 And I would start by directing Your Honor to the
12 challenge that was made with respect to Carol Griffin, and
13 her case is 17-CV-1520. And so, for example, the challenge
14 made here, plaintiffs have produced records that show the
15 Bair Hugger was used during the surgery. And in connection
16 with their response to the PTO 24, defendants say that they
17 agree that they were selling blankets in the 12 months
18 leading up to the surgery but that there's no records that
19 they have that the warming devices themselves were ever
20 placed at that hospital, and that's at least in the
21 spreadsheet that they provided to us.

22 And I'm sure we could -- I haven't -- I have two
23 copies of the spreadsheets if the Court would like to look
24 at. We have one that we could e-mail the Court as well.
25 But these are defendant's spreadsheets kind of indicating as

1 to the 100, here's what we know. Here's if the actual
2 warming unit itself was placed and then also a separate
3 spreadsheet that says we show that we've sold Bair Hugger
4 blankets themselves in the 12 months ahead of time. So they
5 say yeah, we were selling Bair Hugger blankets but we don't
6 see that we ever supplied a warming unit.

7 To contrast with that, though, plaintiffs looked
8 through some of the documents that have been produced, and
9 in 2010 the FDA requested a customer list from 3M, and we
10 have that information in the documents that were produced to
11 plaintiffs. And at the Bates range BMBH572250, 3M indicated
12 to the FDA that, in fact, they had placed 27 Bair Hugger
13 warming units at the particular hospital in Alabama where
14 Ms. Griffin's surgery took place by the year 2010. Her
15 surgery was in 2015. So what they've told the FDA is not
16 consistent with what they've told the plaintiffs in
17 connection with this bellwether identification process. And
18 that is just one example that I can point the Court to
19 specifically with respect to Bates numbers where we see what
20 they're telling us now is inconsistent with what they've
21 told the FDA in the past.

22 Some of the other challenges that we see, Dale
23 Anderson, for example, he's case 17-CV-1928, the anesthesia
24 record clearly actually preprints Bair Hugger on the medical
25 record itself but they've misspelled Bair Hugger, it's

1 B-A-E-R, on the medical record, and the challenge is
2 essentially there's unspecific Bair Hugger confirmation. So
3 not that there isn't a check mark but it doesn't say Bair
4 Hugger, but from what we can see, it was misspelled.

5 THE COURT: But as I understand it, part of the
6 defendant's objections here are that the plaintiff is
7 supposed to do more than look to see that there's a check
8 mark that says Bair Hugger was used, that you're supposed to
9 have some evidence before they even have to go back and
10 produce evidence to show that the Bair Hugger was or wasn't
11 used in the particular case, and they're saying that you've
12 not done that, you've just come up with another check the
13 box thing.

14 MS. ZIMMERMAN: Well, respectfully, Your Honor, I
15 think that, from the plaintiffs' perspective, in vetting a
16 case prior to filing it for Rule 11 purposes, once a
17 plaintiff -- or the plaintiffs' attorney sees on the medical
18 record that a Bair Hugger box is checked, between that
19 medical record confirmation and also what we know about the
20 merit -- the Bair Hugger market share , we certainly think
21 that there has been a due diligence that supports that Bair
22 Hugger was used in the particular surgery.

23 So, for example, if Mr. Anderson were my client
24 and I saw Bair Hugger checked on his anesthesia record
25 B-A-E-R, I would think that was a Bair Hugger use. The fact

1 that it was misspelled on the anesthesia record would not
2 suggest to me that I needed, for example, an affidavit from
3 the anesthesiologist that performed the surgery that day. I
4 think that that is putting the plaintiffs to a burden beyond
5 what is required by the rules, and certainly whether or not
6 a Bair Hugger was used during that surgery, we think, given
7 the records that were involved, given the sales records that
8 the defendants have, we think would be an issue of fact that
9 should be properly decided by the trier of fact.

10 I -- I certainly understand that the Court has
11 directed that to the extent that there are some questions
12 about whether or not Bair Hugger was properly documented,
13 that plaintiff should attempt to get additional records.
14 Plaintiffs have produced records on the 100 bellwether
15 candidates randomly selected by the Court. I think that the
16 defendant's point that there was at least one letter that
17 confirmed that Bair Hugger was not used, and to my knowledge
18 that case was dismissed with prejudice by the firm that
19 represented that particular plaintiff, so I think that
20 that's not an issue at least before the Court today.

21 With respect to other cases where there is, in
22 fact, documents in the medical records, that sometimes the
23 challenges that defendants make seem to be that the -- that
24 the serial number that the plaintiffs have provided does not
25 comport with the serial number that the defendants show as

1 being placed in that particular hospital. So, for example,
2 Edna Washington, she's 17-CV-3763, the challenges made by 3M
3 about whether or not Bair Hugger was properly used,
4 underneath the entry on the medical record where it says
5 warming device dash Bair Hugger, they actually enter the
6 equipment 81005, but from what we can tell, that's actually
7 likely a number that's assigned by the hospital. It's not
8 necessarily the serial number that was provided by the
9 defendants on their particular product, but it's clear from
10 the records that Bair Hugger was used and that the hospital
11 was even tracking the type of machine that was used during
12 that particular surgery.

13 We have other examples like that, for Kent
14 Griffin, for example. He's 17-CV-1286. He's challenged by
15 3M, again, saying that the Bair Hugger system doesn't have
16 the same serial number that they reflected that they have
17 placed at that facility. Now, they agree that they put Bair
18 Huggers in that particular hospital. And the records on
19 page 26 show that a Bair Hugger model 505 was used, and this
20 one, again, provides a serial number, or a number anyways,
21 for the hospital 75853. It looks, to us, that that's an
22 internal hospital tracking number, not the serial number,
23 but certainly there's confirmation that Bair Hugger was used
24 and that the hospital was tracking it. And while 3M
25 certainly agrees that they placed these warming units there

1 and that they sold the disposable blankets themselves, they
2 are still challenging proof of product in that particular
3 case.

4 We know from the exchanges that happened in
5 Gareis, the case that we're getting ready to try before Your
6 Honors in May, in December they were able to provide a
7 number of non-Bates-labeled e-mail exchanges between
8 defendants and the hospital at issue there, Providence
9 Hospital, that was essentially a communication about whether
10 or not the hospital was going to continue to use Bair
11 Hugger. I think that we have now ultimately resolved any
12 question the parties had with respect to the use of Bair
13 Hugger in that particular hospital, but we know that there
14 were e-mails that were exchanged between the defendant and
15 the hospital in question and that they hadn't previously
16 been produced, and they related to this issue of product
17 placement.

18 So while we have outlined a number of different
19 challenges in the actual motion papers we have provided to
20 the Court and we have other examples of additional
21 information that we think are just inappropriate given that
22 we are on the verge of needing to recommend to the Court the
23 list of 16 cases that we think ought to be included in the
24 bellwether repopulation pool, we simply ask to be on an
25 equal footing, because at this point, the defendants are

1 essentially saying about half of the cases have to be
2 removed from potential consideration based on their proof of
3 product challenges, and we think many of those challenges
4 were not --

5 THE COURT: As I understand your argument, all
6 they've given you for their challenges are these
7 spreadsheets.

8 MS. ZIMMERMAN: That's exactly right, Your Honor.

9 THE COURT: There's no documentation underlying
10 them or backing them up?

11 MS. ZIMMERMAN: Correct. And to my knowledge, in
12 the interest of full disclosure, they have withdrawn a
13 single challenge to the 53 challenges that they made, but
14 only one. So what we have are the spreadsheets that
15 they've provided and their objections and that's it at this
16 point. And I'll reserve any additional time.

17 THE COURT: Okay.

18 MS. ZIMMERMAN: And I do have a copy of each of
19 the Bair Hugger, the blanket sales, and the warming unit
20 spreadsheet provided by defendants if the Court would like
21 them.

22 THE COURT: Sure.

23 MR. GOSS: Does that include all of the backup
24 dates that we've provided or just --

25 MS. ZIMMERMAN: I think it's just the cover page.

1 MR. GOSS: Not the full stack with the backup
2 data?

3 MS. ZIMMERMAN: It does not have each one of the
4 tabs. This is a summary page.

5 MR. GOSS: Okay. As long as that's clear on the
6 record.

7 THE COURT: Except now I'm confused again. I
8 thought there was just the spreadsheet. What is the backup
9 stuff that we're talking about?

10 MS. YOUNG: May I approach too, Your Honor?

11 THE COURT: I don't want a lot of stuff, but
12 what --

13 MS. ZIMMERMAN: So there's essentially, if you
14 have Excel spreadsheet, there are different tabs. So this
15 one is a summary sheet of their challenges, and as I
16 understand it, they have a additional tab for each one of
17 the hospitals in the 100 cases where they would say, you
18 know, we show that we shipped, you know --

19 MS. YOUNG: This is my --

20 MS. ZIMMERMAN: -- blankets to the hospital on
21 these different occasions. And if an electronic copy would
22 be useful to the Court or to the clerk, I'm happy to e-mail
23 that as well. We have it right here.

24 THE COURT: All right. Well, I'm still confused,
25 but I will wait to hear from the defendant when we get

1 there.

2 MS. ZIMMERMAN: That's right.

3 THE COURT: Are you done?

4 MS. ZIMMERMAN: For now, on this. I will wait and
5 address any additional questions the Court may have after
6 defense presents.

7 THE COURT: All right. Thank you. Ms. Young.

8 MS. YOUNG: Thank you, Your Honor. So to try to
9 clarify what you have in front of you, so 3M exported from
10 the sales system data for each of the hospitals at issue
11 where the plaintiffs in the 100 cases had their surgeries
12 performed. And the one sheet that I provided for you was
13 just an example of a facility address, and then if you look
14 across, you can see the serial number of the Bair Hugger
15 warming unit, the model type, and the manufacturing ship
16 date, the install date. And so we provided this. We
17 searched and in some cases we had to try to reconcile where
18 an address didn't match a facility name or vice versa, so 3M
19 searched the database, put together this information, and it
20 provides, for each facility at issue, our records with
21 respect to what warming units are placed there.

22 And then, in addition, we went through for those
23 same facilities and looked at the 12 months prior to the
24 surgery date at issue and provided blanket sale information.
25 So you have the two summary charts, I believe, from

1 Ms. Zimmerman, but wanted you to be aware that there is
2 backup for each of those.

3 THE COURT: But the backup is data that you've
4 extracted from a database, not -- and presumably there is --
5 is there a document that would correspond to, for example,
6 I'm looking at customer No. H0013219, Cartersville Medical
7 Center, are there -- is there a document that this database
8 would generate?

9 MS. YOUNG: Your Honor, I don't know that. I can
10 confer with Mr. Hulse who might know that, but I do know
11 that this is the exact information. In the prior bellwether
12 selection process the parties did some limited discovery on
13 31 cases before making our selections in response to those
14 interrogatories served by plaintiffs, and this is identical
15 to the information that we've provided for those 31 cases.

16 THE COURT: Okay.

17 MS. YOUNG: Thank you, Your Honor. At issue in
18 plaintiffs' motion is what is sufficient proof of product
19 use to get us over this threshold requirement, and that is
20 what plaintiffs now contend they need additional information
21 from 3M. And, Your Honor, it's our position that this is
22 simply an attempt to shift the burden to 3M in cases where
23 plaintiffs have not come forward with sufficient product
24 use. Pre-trial Order 24 requires the plaintiffs to submit
25 and, as the order says, to confirm use, and so at issue here

1 is what is sufficient to confirm use.

2 And as we know from the Skaar case, that's an
3 example where there appeared to be a notation to the Bair
4 Hugger circled on the plaintiffs' medical records and it
5 wasn't until the parties got to Idaho, were taking treating
6 physician depositions, that it became to light that the Bair
7 Hugger was not used in that procedure. And so the Court in
8 open court on December 21st at the status conference, the
9 Court said that that check the box just simply wasn't enough
10 based on the experience that the parties have had in
11 selecting bellwether cases. We also had the Kamke case
12 where it came to light that the Bair Hugger was turned off.
13 And so what we're trying to determine here is what is
14 sufficient proof?

15 Plaintiffs have pointed out a couple of instances.
16 And our chart on page 3 of our brief sets forward our
17 challenges fall into I think it's six or seven categories,
18 and we tried to do that so that the Court could see what it
19 is, is at issue here. As Ms. Zimmerman pointed out, there
20 was a case that there was actually a letter saying Bair
21 Hugger wasn't used. And when we got the 100 cases,
22 plaintiffs represented to us, they represented to the Court
23 at the next status conference that proof of product use had
24 been provided in every case. That's just simply not the
25 case. There's a number of cases where there's no reference

1 of warming of any kind, and plaintiffs continue to maintain
2 that it's our records that they need to further evaluate
3 these challenges. So what I think they're really saying,
4 Your Honor, is in those cases where there is a reference to
5 a Bair Hugger, that should be sufficient, the Court should
6 take that at face value and should require us to come
7 forward with additional information.

8 We believe there is no basis to shift the burden
9 to 3M to provide these unspecified types of documents when
10 what plaintiffs could do and what they should do is go to
11 the facility and provide proof of product use, and they have
12 done that in some cases, even cases where there's references
13 to a Bair Hugger in the documents, some of the plaintiffs
14 firms have gone ahead and gotten that letter from the
15 facility to confirm product use. And it's our position that
16 that is what the Court had envisioned here. The whole
17 purpose of this is to get to cases that can be prepared for
18 bellwether trials so that the parties and the Court aren't
19 expending resources trying to figure out if a case is, in
20 fact, an appropriate bellwether case.

21 So plaintiffs moved immediately to both strike all
22 of our challenges, which we submit there's no support, that
23 is not an issue that could possibly be before the Court on a
24 motion to compel in this context, nor would there be any
25 basis to strike it. The Court has said we just -- this is

1 Judge Ericksen, said we can't do this again, we can't be in
2 a position where we don't have proof of product use as the
3 parties move forward through the bellwether process.

4 So, Your Honor, if you looked at the records that
5 are submitted, if you looked at our charts, there is
6 probably 100 variations in how these come to pass. Again,
7 we've tried to organize them by category, but you have to
8 dig into the records. There are competing references at
9 times. There are what look to be serial numbers that don't
10 match our serial numbers. So in those cases where there's
11 ambiguity, that's where we take issue with plaintiffs'
12 product use. So you may have a reference to a Bair Hugger
13 on a form but then there also, there is nothing else to
14 establish product use. Some have references simply to
15 forced air forming, and as we know, there are other forced
16 air warming manufacturers, and a hospital or facility system
17 might have more than one. So it is plaintiffs burden to
18 come forward with the evidence required to satisfy product
19 use so that we can move forward and select cases.

20 And Ms. Zimmerman is right, the parties today have
21 to each submit 16 cases to the Court. It's our position if
22 cases have product use challenges that are on those lists,
23 we should come up with a mechanism to address that right
24 up-front should those make it to the list of eight that the
25 Court is going to have move forward to working up.

1 Defendant's -- or excuse me, plaintiffs' motion
2 also doesn't address what kind of information they purport
3 to be looking for. And I do know Your Honor's question
4 about what additional document might be generated from that
5 list, but I don't believe they're saying that there's any
6 problem with the product placement information that we've
7 provided. What I believe plaintiffs' position is, is that
8 they want us to go search for ESI to try to identify what
9 sales people at 3M may have spoken to salespersons at the
10 facilities at issue and that it's not that they're looking
11 for additional supporting documentation related to the
12 information we've provided. And at best --

13 THE COURT: Wait a minute. Say that again. I
14 guess my understanding was they were -- my understanding is
15 the plaintiffs' vision of this process is they produce
16 whatever they produce and then it -- the burden shifts to
17 you to show that there was no Bair Hugger used and that what
18 you have produced, these spreadsheets and apparently some
19 backup data, they say is insufficient to establish that.
20 And they give me the example of the misspelled Bair ,
21 B-A-E-R, and the internal control numbers that a hospital
22 might use for their devices as opposed to your serial
23 numbers and that those are not -- those two things, for
24 example, don't prove that a Bair Hugger was not used.
25 You're saying that they want discovery about sales people?

1 MS. YOUNG: Well, Your Honor, I think what there
2 may be a sort of two ships passing in the night in terms of
3 what we're talking about. I think what plaintiffs
4 are -- what we have said with respect to our challenges is
5 that we don't believe the evidence provided is sufficient to
6 prove product use and that it's plaintiffs' burden to do
7 that. So where there's ambiguity in the records, even if
8 there is a Bair Hugger form checked, we heard the Court to
9 be saying that simply is not enough. And so at the December
10 status conference, I think, Your Honor, it relates to the
11 fact, perhaps, that PTO24 is very broad and general and it
12 simply says that the plaintiffs have to confirm use and that
13 defendants may challenge --

14 THE COURT: Technically it says that plaintiffs
15 must ascertain that a Bair Hugger was used in the surgery at
16 issue to the best of their ability. Have I got that right?
17 I'm reading from PTO No. 24. I think. If plaintiffs have
18 evidence of Bair Hugger use, they must produce it to
19 defendants. Plaintiffs must serve a complete verified
20 plaintiff fact sheet. That's not at issue here, correct?
21 Then paragraph 3 is, by February 16th, defendants must
22 challenge plaintiff as to any disputes about Bair Hugger use
23 in the cases. These challenges must include any relevant
24 documents defendants have. And then by March 12th you need
25 to come up with your 16 cases. Go ahead.

1 MS. YOUNG: So with respect to the ascertaining
2 use, plaintiffs have represented that they submitted proof
3 of product use in all 100 cases. And it's our view that
4 where they have either cases with no indication of warming
5 at all, cases where they have reference to forced air
6 warming but not the Bair Hugger, and even cases where they
7 have just a form reference to Bair Hugger, that that alone
8 would not be sufficient to meet their threshold requirement
9 of proving product use. And so that's the basis for our
10 challenges. And when we looked at what evidence we have
11 that relates to those challenges, it is the product
12 placement information that we provided, as well as the
13 blanket sales information.

14 And so the specific cases that I believe
15 plaintiffs highlighted, all of them in their motion, and
16 I'm -- I wouldn't represent this here today, but are the
17 cases that fall into the category if there was a medical
18 records with a checkmark and but the plaintiffs have not
19 provided then any additional information from the facility
20 to show that that was a Bair Hugger unit.

21 And so, Your Honor, if we want to go through
22 product use challenges, I think that actually would be more
23 on a case-by-case basis. Our issue with this is that that
24 was not sufficient proof in the cases that we challenged
25 based on what we heard the Court to say in the December

1 status conference and then back in chambers and, again, with
2 the objective in mind that we are simply trying to get to a
3 set of cases where the resources are expended in working up
4 the bellwether case, not trying to figure out if the Bair
5 Hugger was used which is plaintiffs' initial and threshold
6 requirement to filing suit here.

7 And so I didn't understand plaintiffs to be asking
8 for more documentation related to the charts we've already
9 provided, but we had a very general discussion between our
10 meet and confer. And the motion also doesn't specify what
11 specific information they're seeking that would shed light
12 on what we believe is their burden to establish. And so we
13 ask that the Court deny the motion to strike. We don't
14 think that's a proper issue before the Court, and it
15 certainly doesn't take into account the broad range of proof
16 that we have in all of these cases. And then also that the
17 Court deny the motion to compel because there's no
18 specificity to it and it would be an improper attempt to
19 shift the burden to 3M on an issue that is plaintiffs.

20 If the parties, if, again, any of these cases make
21 their way into that group of -- final group of eight, I
22 think the parties can address how to deal with any
23 ambiguities that remain on proof of product use.

24 THE COURT: So how many -- so as I understand it,
25 I'm looking at the chart on page 3 of your memo, there are

1 53 cases where you challenge the adequacy of the plaintiffs'
2 evidence of Bair Hugger use. Is that a correct statement?

3 MS. YOUNG: There were, Your Honor, and then after
4 the lexicon waivers came in, that number is now 37. So
5 plaintiff submitted lexicon waivers in 70 cases and did not
6 waive lexicon in 30 cases and then 16 of our challenged
7 cases dropped out. And I know which categories they fall
8 into. They were the majority of those lexicon nonwaiver
9 cases were in the two categories where there was either a
10 reference to forced air warming generally or the Bair Hugger
11 what we call kind of the check the box form document. But
12 there were some cases that fell out of the other categories
13 as well.

14 THE COURT: So it's the two categories that are
15 both 15 cases? Do we know?

16 MS. YOUNG: Yes, Your Honor, by my math, nine
17 remain in the forced air warming and ten remain in the check
18 the box Bair Hugger category. And then a couple fell out of
19 the other categories.

20 THE COURT: And the bottom category of other,
21 there's four cases, what -- is there any --

22 MS. YOUNG: You know, Your Honor, I'd have to --

23 THE COURT: One by one because each one is
24 different?

25 MS. YOUNG: Yeah, they had just different

1 anomalies to them, and I could go back through my notes
2 and --

3 THE COURT: Okay.

4 MS. YOUNG: -- get them. And with respect to the
5 serial numbers, again, there was a reference to a number.
6 It didn't reflect a Bair Hugger serial number, and when we
7 have a number, we can make that -- we can check that.

8 THE COURT: Right. But that's not really -- I
9 guess how many of that are we talking about?

10 MS. YOUNG: There are three left in that category.

11 THE COURT: And that doesn't strike me as being a
12 particularly valid argument. I mean, it's clear there's a
13 Bair Hugger there, there's a number assigned to it, it might
14 not be your number, but the hospital has given it a number,
15 and apparently you don't have records like you do in on your
16 sheets to show that you never sold them a warming unit or
17 you never sold blankets in the year before the surgery. Why
18 are they even on this list?

19 MS. YOUNG: Well, Your Honor, I think, though,
20 there are records that show ambiguity, and that's what we
21 are trying to have some way of dealing with this. I mean,
22 they moved categorically --

23 THE COURT: What's ambiguous? What's ambiguity?
24 There's no ambiguity. You don't have records or you do have
25 records showing the sale of a warming unit or the placement

1 of a warming unit at that hospital. You've showed that in
2 the 12 months before the surgery you sold them blankets.
3 And the fact that they wrote down a number that's different
4 than the number that's on your device, how does that call
5 into question whether a Bair Hugger was used in that surgery
6 if the records the plaintiff has looked at has a check box
7 that says yes, Bair Hugger used?

8 MS. YOUNG: Well, Your Honor, that would be I
9 believe the exact situation we had in the Scar case where
10 you had the notations, you know, the units are there, but
11 what we have learned through the process is that isn't
12 necessarily sufficient. And we are certainly happy to meet
13 and confer on the very --

14 THE COURT: Which was the Skaar again? That's the
15 one where they said --

16 MS. YOUNG: Idaho.

17 THE COURT: -- turned off?

18 MS. YOUNG: No that's the one that looked to be a
19 circle on the box and it wasn't until the depositions of the
20 treating physicians in Idaho that I believe it was the CRNA
21 said I don't use this, this -- this wouldn't be how we'd
22 note it. And so we're just trying to figure out where there
23 is ambiguity in the records what will give us sufficient
24 proof, and that would be an affidavit, a verification from
25 the treating physician.

1 And, again, there are varying levels here of in
2 some of these if you look, Your Honor, and I'd have to look
3 at, again, there's a specific example for each case, some of
4 these show unit placement from the late 90s, from the early
5 2000s, and maybe those do or don't have blanket sales, but
6 there are tremendous variation in --

7 THE COURT: Do they still work? Do you have a
8 product that you placed in the 90s and the early 2000s that
9 they're still buying blankets?

10 MS. YOUNG: Yes, Your Honor.

11 THE COURT: So what difference does it make, so
12 what if they bought it in 1998 as opposed to 2017?

13 MS. YOUNG: Well, and, Your Honor, if that is
14 sufficient to move forward, and we can certainly get into
15 discovery and determine like we have done in the other cases
16 whether it was, in fact, there and turned on and used, but
17 we don't believe going back through 3M records to try to
18 figure out any more information about product use is an
19 efficient way. It would be unduly burdensome at this
20 juncture to require that type of discovery when what we're
21 trying to drive here towards are eight cases that can be
22 worked up for trial and that simply we're trying to take the
23 Court's guidance from the last go around and understand what
24 plaintiffs have submitted and whether it's sufficient to
25 resolve ambiguity about use. Our whole objective here is to

1 figure out if Bair Hugger was used so that we can make those
2 nominations.

3 THE COURT: Right. And I guess the point is that
4 you're introducing a new phrase, the ambiguity of use.
5 That's not what this is about. This is about Pretrial Order
6 No. 24. Plaintiffs have to come up -- have to ascertain
7 that a Bair Hugger was used. If you say that it wasn't,
8 you've got to produce evidence that shows that it wasn't.
9 Not that there's ambiguity. Your standard isn't whether
10 there's ambiguity. Your standard is it wasn't used. Once
11 they -- they have a prima facie case. They've got to show
12 that it was used. Once they've met their prima facie case,
13 if you want to kick this case out of the bellwether pool,
14 you've got to say and show it wasn't used, not just create
15 some ambiguity that it might not have been used. Am I
16 missing something?

17 MS. YOUNG: Well, but, Your Honor --

18 THE COURT: Am I missing something?

19 MS. YOUNG: Well, I think the issue is have they
20 met their prima facie case, where for example --

21 THE COURT: I get that. And I understand that's
22 the thing, but that's different than you saying all you've
23 got to do is show some ambiguity about whether it was used
24 because the serial numbers don't match.

25 MS. YOUNG: Well, Your Honor, I think our

1 challenges relate to what is required to meet a prima facie
2 case, and what we're doing is going off what we learned in
3 the Skaar case, the Kamke case and what the Court has said
4 about a simple checkmark on a box not being sufficient, and
5 that is where I think the discrepancy or the dispute is here
6 as to what is the prima facie case. And then whether we
7 should be talking about challenges on a case by case basis
8 and what could be done to resolve those disputes I think is
9 a different issue than moving to strike all of our
10 challenges or asking for additional discovery on cases where
11 there's not even a reference to waiving at all.

12 THE COURT: Okay. Do you agree or disagree,
13 Ms. Zimmerman, that the 53 number has now been reduced to 37
14 by reason of the failure to waive lexicon?

15 MS. ZIMMERMAN: I will take counsel at her
16 representation on that. I believe that there are, in fact,
17 30 cases that refused to waive lexicon, so it's still a
18 little over half.

19 THE COURT: So why don't -- what would be wrong
20 with just simply saying, okay, they challenged these 37,
21 kick them out, let's now from you've got 63 cases left?

22 MS. ZIMMERMAN: Because we've --

23 THE COURT: You started with a hundred, right?

24 MS. ZIMMERMAN: Sure. So we started with a
25 hundred. 30 don't waive lexicon so we're down to 70, and of

1 that 70, 37 they challenge at this time, so we're down to a
2 little less than half of the remaining 70. You know, I
3 think that we've got some real questions about whether
4 that's appropriate representative.

5 But kind of getting back to some of the questions
6 that were posed by Your Honor, another way of looking at
7 these spreadsheets is that, you know, if you look at the
8 gray kind of summary spreadsheet 3M prepared, out of the
9 100 cases randomly selected by the Court, all but four have
10 Bair Hugger heaters placed in those facilities. So and of
11 those four where there are challenges saying we don't see
12 that we ever placed a heater, one is this Carol Griffin case
13 that I mentioned at the beginning where they told -- they
14 told the FDA something different than what they're telling
15 the Court today.

16 So my question really gets to or the plaintiffs'
17 motion is really intended to drive to, look, if 3M has
18 evidence that nothing was ever sold to this particular
19 facility and it's not a case, there's no fact dispute for a
20 trier of fact to figure out, please tell me and I will get
21 on the phone to whomever the plaintiffs attorney is, as I
22 did last week when I saw this letter that said Bair Hugger
23 wasn't used in this facility, that's one case. That case
24 does not exist and is not pending before this Court anymore.
25 If there is additional evidence about cases like that where

1 their records show we didn't ever sell anything here, this
2 is not a real case, let's work on that.

3 But I think that Your Honor's question really
4 drives towards the kind of dispute between the parties, and
5 that is whether or not essentially what needs to happen here
6 is identifying ambiguities and what plaintiffs need to do to
7 respond to that. And I think, unfortunately, while we did
8 learn things in the Scar deposition -- the Skaar, by the
9 way, was a defendant nomination so it was presumably they
10 thought that was a Bair Hugger use as well or they would
11 have either moved to dismiss it or wouldn't have nominated
12 it as a potentially representative bellwether.

13 THE COURT: Sort of, except their whole point is,
14 as I understand, this is all your burden. You have to
15 establish that a Bair Hugger was used.

16 MS. ZIMMERMAN: Agreed.

17 THE COURT: And that checking a box on a form
18 isn't enough. You've got to do something more than that.

19 MS. ZIMMERMAN: That's their position.

20 THE COURT: And does that require a affidavit from
21 a doctor or anesthesiologist or something, I don't know, I'm
22 not -- I'm not going say right now, but that's their
23 position, that you've got to do more than just look at a
24 record and see if there's a box checked or a circle around a
25 box.

1 MS. ZIMMERMAN: Yes, Your Honor. I understand
2 that to be defendant's position. I think that that imposes
3 a burden on the plaintiffs that is not imposed by the
4 Federal Rules of Civil Procedure. The plaintiffs have a
5 good faith when they see that the record is indeed checked.
6 There's certainly people that are going above and beyond
7 that whenever they can to get an affidavit or declaration
8 either from the risk manager or a facilities manager or
9 sometimes the treating physicians, but these cases have been
10 going on, and the treatment, in many instances, are -- is
11 many years ago. Some of the hospitals just don't have the
12 time or the staff or the willingness to submit to legal, you
13 know, form filling out, at this point, and/or the people
14 just aren't there anymore. I mean, the case we're getting
15 ready to try, that surgery was, you know, almost eight years
16 ago now; it was in 2010. So the issue is that going back to
17 figure out what was actually used in the kind of way that I
18 think the defendants are contemplating or hearing the Court
19 to require to resolve any and all ambiguity is really
20 imposing a burden above and beyond the burden that the
21 plaintiffs accept.

22 THE COURT: But it's the burden that is
23 established by our experience with this case, right? I
24 mean, clearly you've -- you can't sue somebody and hold them
25 liable for something they had nothing to do with. So if it

1 was an ABC machine that was used, not a Bair Hugger.

2 MS. ZIMMERMAN: Absolutely.

3 THE COURT: 3M is not responsible for that.

4 MS. ZIMMERMAN: Absolutely.

5 THE COURT: And you can't sue them for it and you
6 can't haul them into court and make them go to trial.

7 MS. ZIMMERMAN: Absolutely, Your Honor.
8 Plaintiffs agree. But I think that the issue, though, is
9 that the way that the proof of product issue has been
10 painted in this court is different than what we believe the
11 facts really reflect of the six bellwether nominations that
12 we started to work up. There was only one where there was a
13 real proof of product issue and that was the Scar case that
14 nobody knew until we got to a deposition. So and given the
15 timeframe that's outlined in Pre-trial Order 24, we
16 can't -- we don't believe that the Court assumed that the
17 parties were going to go depose every one of the treating
18 facilities to figure out and resolve any and all ambiguity.
19 That just wouldn't have been feasible.

20 THE COURT: No, but I do think what the Court
21 anticipated that the plaintiffs' lawyers, and it's the whole
22 panoply of lawyers, not just and your committee but whoever
23 has got these cases, was going to do more than just look at
24 the record that you already got and see if there's a
25 checkbox, that you're going to do something to ascertain

1 that a Bair Hugger was actually used. Maybe it's just a
2 call to the hospital. Maybe it's looking at more records
3 than what's in your possession at the moment. I don't know
4 what it would be. But I think the Court anticipated it
5 would be more than what you did for the first go round
6 because the first go round resulted in one bellwether that
7 actually can go to trial.

8 MS. ZIMMERMAN: So, Your Honor, I think that from
9 the plaintiffs' perspective, Pretrial Order No. 24 outlines
10 what we're required to do, and what we heard the Court to
11 say was that plaintiffs had to say, are you -- are we
12 prepared to try this case? It -- do we have evidence that
13 confirms Bair Hugger use such that I will walk into this
14 courtroom and say, you know, Judge Noel and Judge Ericksen,
15 may I please the Court, I'm here to present my trial, my
16 case for trial.

17 THE COURT: Let me just make sure you're clear.
18 I'm not going to be there for the trial. That's Judge
19 Ericksen's problem. But go ahead. I appreciate the --

20 MS. ZIMMERMAN: So we heard the Court to instruct
21 that what the plaintiffs were required to do was get
22 evidence such that we felt confident that we were going to
23 be able to come in here and say to a court and to a jury, we
24 believe that the Bair Hugger was used in Mr. Anderson's
25 case, for example, and records we think support that, and to

1 the extent that defendants then think that we're wrong about
2 that, that is part of what happens in a adversarial process.

3 There is a mutual discovery obligation in these,
4 and when we come forward and we say, okay, Mr. Anderson,
5 head of surgery at this particular place, or, for example,
6 Ms. Griffin, you say that couldn't be possible, well, we say
7 that, you know, your records suggest otherwise and we say
8 that Ms. Griffin's medical records, she was exposed to this
9 and we know you were selling blankets.

10 So we think that there is, you know, to the extent
11 that there is ambiguity or a lack of meeting of the minds as
12 to what was sold when and who was exposed to it, we think
13 that it's inappropriate for the defendants to use this
14 process of challenging proof of product to unfairly filter
15 the potential bellwether pool. And we certainly see
16 examples that they have more information about what was
17 placed where, and we think that some of these challenges
18 were not made in good faith.

19 THE COURT: So let me make sure I'm following
20 because I'm still a little confused about what that there is
21 and what there isn't. So you've given me these
22 spreadsheets.

23 MS. ZIMMERMAN: Mm-hmm. Yes.

24 THE COURT: And then the defendant says, but,
25 wait, you also got to have the backup and the backup they

1 say this is the documentation that's the subject of your
2 motion to compel, as I understand it, this is their
3 database, whatever it is, that shows when they placed a
4 warming unit at a given hospital and how -- whether they
5 sold blankets in the 12 months before the surgery.

6 MS. ZIMMERMAN: Yes.

7 THE COURT: Is it your contention that there's
8 more than that that you want or that they just haven't given
9 you this for all of the items on the -- that they challenge?

10 MS. ZIMMERMAN: We think that we have -- we think
11 that we have a summary spreadsheet, so it's an Excel
12 spreadsheet. The documents I printed for Your Honor, there
13 are tabs on the bottom, if you're familiar with Excel where
14 you can flip from one tab to the next, so they have a
15 summary sheet which is in front of you presently and then
16 there are tabs for each of the different hospital, at least
17 for the warming unit. The heater, that is not printed
18 because it would be a voluminous production per hospital.
19 And the vast majority of those comport with the kind of all
20 gray spreadsheet that I've showed to Your Honor where all
21 but four of the 100 hospitals are shown to be Bair Hugger
22 warming unit customers.

23 So I think that at least with respect to, I mean,
24 if we can assume that 94 -- 96, I'm sorry, 96 of the hundred
25 we know have heaters, then we can look at the blue and white

1 sheet that's in front of you and that talks about whether or
2 not blankets were placed in the facility in the 12 months
3 prior to the plaintiffs' surgery. I think that Your Honor's
4 question was to opposing counsel was really kind of getting
5 at the issue which is if there is a case where defendants
6 are sure based on their own internal information that, you
7 know, maybe it's Carol Griffin, that we didn't sell
8 anything, I mean, they show blankets but they don't show a
9 heater, they don't show blanket sales, they don't show any
10 of that, then if they can tell us that, we can try and
11 figure out where the kind of -- where we're missing each
12 other. But what we're seeing in these challenges instead
13 are, well, your serial numbers don't match our serial
14 numbers so that can't be part of the pool. And that's
15 imposing a burden on the plaintiffs and, frankly, excluding
16 a number of cases that ought to be considered as potentially
17 representative bellwether nominations simply because they've
18 created an ambiguity in the record about proof of use.

19 THE COURT: Okay. Thank you.

20 MR. HULSE: Your Honor, Ben Hulse for --

21 THE COURT: Who are you? I don't believe you
22 entered an appearance .

23 MR. HULSE: I was just going to say, I do defer to
24 Ms. Young. As the discovery guy and the person --

25 THE COURT: Just for the record, this is Mr. Hulse

1 speaking. Go ahead.

2 MR. HULSE: Good morning, everybody. Ben Hulse
3 for defense. I can speak to the data, where it comes from,
4 what was provided to plaintiffs, if it would be helpful
5 to --

6 THE COURT: Well, that was my last question I was
7 going to ask Ms. Young, but if you want to answer it, I
8 suppose that would be fine. So this?

9 MR. HULSE: Yes.

10 THE COURT: And the court record should reflect
11 I'm holding up a single sheet which was given to me as an
12 example by Ms. Young of a backup piece, correct?

13 MR. HULSE: Yes, Your Honor.

14 THE COURT: Okay. Is this a printout from a
15 database kept in the ordinary course of business by 3M or is
16 this something that was created along with the databases
17 that what Ms. Zimmerman handed me as an attachment by that
18 some human was looking at information and then entered the
19 data anew into an Excel spreadsheet?

20 MR. HULSE: The item that you're holding right
21 now, Your Honor, is generated in the ordinary course of
22 business from 3M's sales systems. Basically the way it
23 comes to be is that there is a paper invoice. It is in a
24 box somewhere in the bowels of 3M. That was all keyed in at
25 the time of the sale or the placement into 3M's system or

1 Arizant's predecessor system. A report is then generated
2 which provides the information in the system about the
3 placement of the unit.

4 We also for simply explanatory purposes and for a
5 quicker reference created these additional cover sheets that
6 summarize all of the underlying data that we provide. For
7 example, sometimes we had cases where the -- we did not show
8 blanket sales to a hospital or facility at the particular
9 address that had been provided to us at the plaintiffs but
10 we had a -- blankets provided to a facility at a very
11 similar address and a facility with a similar name, and
12 we've provided that data. So that's the kind of thing
13 that's notated on these cover sheets that we prepared. But
14 there were close to, it wasn't 200 because we didn't show
15 sales and placement to all hospitals because we didn't have
16 any, but there's still somewhere around 185, 190 individual
17 spreadsheets that were provided to plaintiffs, individual
18 spreadsheets for both the blanket sales and for the warming
19 unit placement generated from 3M systems in their ordinary
20 course of business, business data.

21 THE COURT: Is Ms. Zimmerman correct that for 96
22 of the 100 there was warming units placed?

23 MR. HULSE: I think that is correct. At some
24 point in time there was, for 96 facilities, and again, this
25 also includes ones where we didn't have a perfect match but

1 we saw something that looked like a facility with a similar
2 address and we provided warming unit information for all of
3 those.

4 So maybe just to sort of clarify one point, our
5 challenges are overwhelmingly based on the medical records
6 that have been produced. We provided the warming unit and
7 sales information because it's -- it is, we concede,
8 relevant to all of this. And we would agree that if there
9 is a warming unit placed at the facility, it makes it more
10 likely that the Bair Hugger was used. If there were blanket
11 sales for the 12 months prior, it makes it more likely. But
12 as we know from our first round of bellwethers, it's still
13 not ultimately determinative. It's only --

14 THE COURT: Well, let's put aside which is which.
15 This one the -- the -- the spreadsheet that's all white and
16 gray is the placement of warming units?

17 MS. ZIMMERMAN: That's the warming unit. You can
18 see it.

19 MR. HULSE: Yeah, actually, it's hard for me to
20 see from there, Your Honor, but it sounds like it's the
21 warming unit.

22 MS. ZIMMERMAN: And when you say this one --

23 THE COURT: So I'm going to assume that 96 out of
24 100 is good enough for warming units.

25 MR. HULSE: For warming unit. But, again, all

1 this means is that we show that a warming unit was placed.
2 It doesn't mean that warming unit was still in use at the
3 time of the --

4 THE COURT: I understand all of that. And then so
5 the only, what I'm -- it appears to me the only evidence
6 that really relates to this issue of whether a case should
7 be in the bellwether because a Bair Hugger was or wasn't
8 used is the one showing when you sold them -- last sold them
9 blankets?

10 MR. HULSE: I think that -- that's probably more
11 helpful evidence.

12 THE COURT: And it's the defendant's contention
13 that in now 37 out of the 100 cases -- or 37 out of the
14 70 --

15 MS. YOUNG: 53. It was 37 out of the 53
16 challenges.

17 THE COURT: Okay. 37 out of the 53 challenges,
18 but still, it's -- there's now 37 challenges.

19 MS. YOUNG: Correct.

20 THE COURT: Out of the -- when you take the
21 lexicon waivers out of the 100, you're down to.

22 MS. YOUNG: 70, yes.

23 THE COURT: 70. So 57 -- or 37 out of the 70 are
24 now being challenged. By the way, is there anything in this
25 spreadsheet that will tell me who hasn't waived lexicon?

1 MR. HULSE: No, Your Honor. Unless that's
2 something that either side has created.

3 MS. ZIMMERMAN: I have a spreadsheet with that. I
4 could certainly provide it to the Court, but --

5 MR. HULSE: If that's useful information, I'm sure
6 the parties could collaborate on it and provide it.

7 THE COURT: Yes, let's do that. So before the day
8 is out, get together and submit to me a revised page 3 of
9 your memo so that will show which of the 53 are no longer
10 being challenged, so it shows the 37 that are being
11 challenged, and then a revised, this includes all 100 cases,
12 and then it's either you've produced stuff and everybody
13 agrees or you haven't. And have I got that right?

14 MR. HULSE: If we didn't produce, it's because we
15 couldn't find a matching or a similar address so we reached
16 the conclusion that they weren't a customer. And we
17 searched both for similar facility names and similar
18 addresses, recognizing that in the healthcare world, the
19 hospitals change names all the time.

20 THE COURT: Okay. I guess my question is, are
21 there a hundred things listed on this spreadsheet?

22 MS. ZIMMERMAN: Yes.

23 THE COURT: Okay. And so if it's just an X in the
24 box in the column called disposable sales found for
25 12 months before surgery, that means yes?

1 MR. HULSE: Yes.

2 THE COURT: Okay. So then just somebody tell me
3 which of these 100 are out for lexicon reasons as opposed to
4 Bair Hugger use reasons.

5 What about, Ms. Young, the argument that FDA was
6 told one thing and the response on this spreadsheet is
7 another with regard to blanket sales on one of the
8 hospitals?

9 MS. YOUNG: You know, we didn't have any
10 information about that before today. I will have to check
11 into it and get back to the Court.

12 THE COURT: Okay.

13 MS. YOUNG: I wasn't aware of that. But, Your
14 Honor, I think this is obviously coming to a head today
15 because the parties 16 nominations are due. 3M is certainly
16 willing to allow cases to be nominated with a notation as to
17 where there's product use challenges and then to move
18 forward with whatever seems to be the best way to address
19 those, and the parties -- the Court then is going to pick 12
20 and each party is going to strike two.

21 I'm wondering if we may be able to just agree that
22 parties can list cases and then note the nature of the
23 product use challenge. I think the Court certainly has an
24 understanding now of the different categories that we've
25 challenged. I would suggest perhaps that we could do it in

1 that manner and then this issue may actually not come to a
2 head in any way that applies across all of the 70 cases. So
3 I think we could likely resolve this.

4 THE COURT: So I can kick the can down the road.

5 MS. YOUNG: Pardon me?

6 THE COURT: That I can kick the can down the road.

7 MS. YOUNG: Yes, since by probably 5 o'clock today
8 we're submitting our lists, and that would be the approach
9 that we would think makes sense.

10 THE COURT: Ms. Zimmerman, any thoughts on that?

11 MS. ZIMMERMAN: Well, we're happy to work with
12 defense counsel on that. I mean, I'm a little worried that
13 the defendant's nominations of 16 are going to be from just
14 this, what's left, 37.

15 MS. YOUNG: They are not. They are not, Your
16 Honor. They would not be.

17 MS. ZIMMERMAN: Then we should just submit our
18 lists to the Court and not bother him with additional --

19 MS. YOUNG: There will be some, obviously, because
20 of, as Ms. Zimmerman has said, we whittle, whittle, whittle
21 and we're left with -- we -- we will have some likely that
22 have product use challenges, we would identify those for the
23 Court. We certainly aren't making an effort -- we want to
24 get through this process and have cases that can be worked
25 up. That's -- that is our objection in all of this. Our

1 objective.

2 THE COURT: Objective.

3 MS. YOUNG: Excuse me. Slip there.

4 THE COURT: Okay.

5 MS. ZIMMERMAN: And we'll be back before Your
6 Honor again on Thursday, I think, for the status conference.

7 THE COURT: Right.

8 MS. ZIMMERMAN: And I certainly, if it's something
9 we can work out, that's fantastic and I'd prefer not to
10 bother the Court with it. What we were worried about was
11 that these nominations, A, that we might be limited, and, B,
12 that defendants wouldn't be -- would be nominating a case
13 they thought didn't have Bair Hugger proof because that
14 doesn't seem to be appropriate.

15 THE COURT: Okay.

16 MS. ZIMMERMAN: Perhaps we can get past that.

17 THE COURT: So let's, as I understand it, keep
18 doing what I suggested so I got a full thing as to and have
19 this lexicon, because that seems, to me, to be as at least
20 as big an issue or bigger than this issue; in other words,
21 that you've now whittled the 100 down to 70 because 30 folks
22 want to try their cases at home, so get me that information.
23 And in the meantime go forth and select your cases without
24 regard to the product placement challenges, and we'll deal
25 with those, and it may be that nobody picks a case that has

1 a challenge. But we can deal with it. We'll have a fewer
2 number that we need to know that do need to be dealt with.

3 MS. YOUNG: Thank you, Your Honor.

4 THE COURT: Okay. All right. So then the next
5 thing is the defendant's motion for a protective order
6 Mr. Goss, is that you?

7 MR. GOSS: Yes, thank you, Your Honor.

8 THE COURT: Okay.

9 MR. GOSS: So the defendants are moving for a
10 protective order for a subpoena that was served on
11 Dr. Walter Minkowycz. And Dr. Minkowycz is a professor of
12 mechanical engineering at the University of Illinois-Chicago
13 and he's also the editor in chief of a journal called the
14 *Journal of Numerical Heat Transfer*. Defendants
15 computational fluid dynamics expert, Dr. John Abraham,
16 published an article in the *Journal of Numerical Heat*
17 *Transfer* back in August. And the subpoena appears to be
18 directed towards Dr. Minkowycz to get discovery into the
19 pre-publication processing of the article before it was
20 selected for publication. The subpoena was served on
21 February 15th.

22 During -- actually during Dr. Abraham's deposition
23 specific to the Gareis case, he was questioned about the
24 publication, about the article, and he actually produced an
25 acceptance letter which is Exhibit 5 to Ms. Zimmerman's

1 affidavit in support of her opposition. And the letter
2 says, from Dr. Minkowycz to Dr. Abraham, it says, I have
3 reviewed the paper carefully and find it to be of good
4 quality. Indeed, the quality standard of the paper merits
5 acceptance for publication without further review. And
6 Dr. Abraham was asked, did you ever get any comments from
7 any outside reviewers? And he said no, I didn't. As far as
8 I know, the paper was reviewed by Dr. Minkowycz only, and he
9 didn't have any information about whether Dr. Minkowycz had
10 sent the paper to outside reviewers.

11 Plaintiffs have said in their papers that and they
12 confronted Dr. Abraham at his deposition with the idea that,
13 look, this doesn't comply with the written procedures for
14 Taylor and Francis which is the publisher for many
15 scientific journals, including this one, and Dr. Abraham's
16 answer to that was that the editor in chief has the
17 prerogative to publish things without sending them out for
18 review.

19 So this subpoena was served, again, on
20 February 15th. Expert general cause discovery closed last
21 August. And, in fact, I think when plaintiffs moved for
22 leave to seek additional discovery from Dr. Augustine,
23 plaintiffs' counsel mentioned that they were interested in
24 perhaps pursuing some additional discovery surrounding
25 Dr. Abraham's article. So it's not a new issue. The Gareis

1 case specific discovery closed in December. So our position
2 is that this subpoena was served out of time and that
3 plaintiffs ought to have first moved for leave to seek --

4 THE COURT: Is it clear or is it my understanding,
5 then, that what you're telling me the state of the record is
6 that this article was described as being peer-reviewed when
7 it wasn't?

8 MR. GOSS: I think that's plaintiffs' position,
9 although --

10 THE COURT: What's your position?

11 MR. GOSS: Well, our position is that it was
12 reviewed by the editor in chief. So in that sense, it was
13 peer reviewed.

14 THE COURT: Okay. But everybody agrees -- I guess
15 that's the question.

16 MR. GOSS: Right.

17 THE COURT: All of it is spin or interpretation.
18 You're -- but it -- everybody agrees the facts are it was
19 submitted for publication, the editor in chief reviewed it,
20 the editor in chief accepted it, and there were no other
21 comments from other people skilled in the art?

22 MR. GOSS: That's right, Your Honor. That's
23 absolutely right.

24 THE COURT: There's no dispute about any of those
25 facts ?

1 MR. GOSS: There's no evidence in the record that
2 it was ever sent out for review or any reviewers provided
3 Dr. Abraham any comments, which raises the question, why do
4 we need to go to Chicago two months before trial and take
5 the deposition of Dr. Minkowycz when plaintiffs already have
6 in the record what they need to impeach Dr. Abraham if he
7 says on the stand, well, yes, this was peer reviewed?
8 Plaintiffs have said that there are 3M marketing materials
9 that describe the article as peer reviewed. They didn't
10 identify the -- I'm not saying that these statements haven't
11 been made. They didn't identify them. And I would submit
12 that there's no -- none of the witnesses at trial are going
13 to say that relied on a 3M statements about peer reviewed
14 status about Dr. Abraham's article. And Dr. Abraham himself
15 is going to rely on his report which is substantially the
16 same as the article.

17 So the question is why do we need this discovery,
18 and our position is that it's not only late, it's just not
19 needed. They have what they need to impeach Dr. Abraham on
20 this issue. Dr. Minkowycz is 81 years old and probably
21 wondering what all of this is about. And I -- defendants
22 just don't see the need to bother him, you know, in this
23 short window before trial. But if we're going to reopen
24 discovery to discuss issues surrounding publications,
25 plaintiffs have refused to provide the same type of

1 information on Dr. Elghobashi's article which wasn't
2 published until after the Gareis discovery period closed.
3 We're concerned, I asked Dr. Elghobashi about the conflict
4 of interest disclosure in his article which says the authors
5 have no conflicts to disclose. In his view, there was no
6 conflict. Our position is that, well, if we're going to
7 reopen discovery, we would like to know from the journal
8 whether they would consider funding from plaintiffs' counsel
9 to be a potential conflict given the litigation. So we
10 think all of this is too late, but if we're going to reopen
11 discovery, then defendants will likewise move for leave to
12 pursue discovery on Dr. Elghobashi's article.

13 THE COURT: Okay. Ms. Zimmerman.

14 MS. ZIMMERMAN: Yes, thank you, Your Honor. I
15 think that Your Honor has understood the salient facts at
16 issue here.

17 THE COURT: So I guess then my ultimate question
18 is, why do we need to go to Chicago to depose this guy?
19 Everybody agrees there -- nobody else reviewed this article
20 but the editor in chief, period, end of sentence. Why do we
21 need to -- - what more do you need? The record is clear,
22 that's what you want it to show, right?

23 MS. ZIMMERMAN: Your Honor, I think that's correct
24 . We did need to know because during his deposition,
25 Dr. Abraham testified under oath that this was a peer

1 reviewed publication. And once he testified that, given the
2 documents that he produced to us, we had some questions
3 about whether or not he was telling us the truth. That's
4 the reason that the subpoena wasn't timely prior to that.
5 It wasn't until he averred under oath that this was peer
6 reviewed that we served the subpoena. We do have additional
7 information now that -- that, I mean, from counsel even on
8 the record today saying, yeah, this wasn't peer reviewed
9 because Dr. Abraham didn't go quite that far.

10 THE COURT: Just to be clear, he didn't say it
11 wasn't peer reviewed; he said editor in chief alone
12 constitutes peer review and therefore it's peer reviewed.

13 MS. ZIMMERMAN: That's correct.

14 THE COURT: Go ahead.

15 MS. ZIMMERMAN: And the papers that we submitted
16 along with our motion, as I can tell Your Honor read,
17 detailed what the peer-reviewed process ought to be in this
18 particular journal. Dr. Minkowycz is, in fact, an
19 81-year-old former frequent colleague of Dr. Abraham's and
20 Dr. Sparrow's, both of whom have published a number of
21 different articles together, some of which relate to issues
22 here. We're not sure yet which articles different experts
23 are intending to rely upon when we get to trial and so we
24 want to get to the heart of what really was done here and
25 whether or not this was an appropriately submitted and

1 peer-reviewed publication.

2 Now, plaintiffs submitted subpoena to Dr. Abraham
3 that mirrored really the subpoenas defendants served on our
4 experts last spring in the general causation phase. It
5 would have contemplated production of these documents back
6 then, but these were not produced to us in advance of his
7 deposition in July. We did finally get them this February
8 just before his deposition, and that's where we said oh,
9 something doesn't seem quite right here, and that's the
10 reason that we asked the questions and we served the
11 subpoena.

12 We do think that there's a departure from the
13 peer-reviewed standards in the journal, and we do think that
14 that will be appropriate cross-examination. But we think
15 that we need more information about exactly what happened
16 here and what's been represented, because this paper is not
17 disclaimed by the journal, it is not being subjected to the
18 peer-review process that they typically hold themselves to.
19 And the person who is going to have the information about
20 that are essentially twofold, Dr. Abraham, the corresponding
21 author, and Dr. Minkowycz, the editor in chief who decided
22 on his own to publish this article.

23 Now, I can tell the Court Dr. Minkowycz called me
24 because he received the subpoena. He told me on the phone
25 that he doesn't have a lawyer on this, that he doesn't know

1 anything about this particular subject area, and he doesn't
2 want to be involved. I think that we need that information
3 under oath so that we can really properly investigate
4 whether or not this article ought to have been published and
5 what impact it has on the litigation here and on the
6 opinions that I don't know if the FDA was provided copies of
7 Dr. Abraham's published work. Counsel has represented here
8 that both the published work and the report disclosed in
9 this litigation are, you know, substantially similar, if not
10 nearly identical. So these things really do get to the
11 heart of what Dr. Abraham intends to testify about in this
12 Court before a jury, whether it's upstairs or where, about
13 matters that are really going to the key of this particular
14 case.

15 Now, I feel obligated to respond briefly that
16 counsel has noted Dr. Elghobashi did not disclose that the
17 plaintiffs had provided funding for the research that his
18 group did. What was not cited to the Court is the section
19 of his deposition where he was asked, why did you think that
20 it might not be a conflict? And Dr. Elghobashi said, I told
21 the plaintiffs at the beginning when they commissioned me to
22 do this work I was going to publish it no matter what the
23 results showed. And that's why, under his under oath
24 testimony, he felt it wasn't a conflict because he was going
25 to publish it whether it supported the plaintiffs or not.

1 And we can provide that deposition testimony if the Court
2 would like it.

3 So we think that the information that
4 Dr. Minkowycz has is relevant to a key witness that the
5 defendants intend to call. And the Court is certainly aware
6 of how important the CFD experts have been throughout the
7 heart of this litigation, and we ought to be entitled to
8 discover that information.

9 I will also say, it is my expectation that there
10 are going to be lawyers that look for this. There's a state
11 court litigation that's pending in Illinois right now, and
12 the lawyers that have not been particularly active thus far
13 are quite interested in these kinds of issues. So I think
14 that Dr. Minkowycz, whether in the Gareis case or in a
15 different case, is going to be providing discovery with
16 respect to these issues. So we would like to go forward
17 with the discovery because we think it's important for
18 Gareis and for other matters, and we appreciate the Court's
19 attention.

20 THE COURT: Okay. Anything else, Mr. Goss?

21 MR. GOSS: I would just say, Your Honor,
22 Dr. Abraham tends to rely on his report, which he was
23 cross-examined quite extensively about the peer review and
24 publication, is not really --

25 THE COURT: Is Dr. Abraham going to be testifying

1 at trial or his --

2 MR. GOSS: That's --

3 THE COURT: -- deposition going to be offered?

4 MR. GOSS: Well, if Dr. Elghobashi doesn't
5 testify, then maybe not, but if Dr. Elghobashi will be
6 present, then Dr. Abraham as a rebuttal witness will be
7 testifying in response.

8 THE COURT: Is Dr. Elghobashi going to be --

9 MS. ZIMMERMAN: Dr. Elghobashi will certainly be
10 here live.

11 THE COURT: Okay. Give me two seconds.

12 All right. So with regard to both of these
13 motions, here's what's going to happen. First, as I
14 understand it, the parties have agreed with respect to the
15 recalculation of the bellwether pool that irrespective of
16 challenges to the product placement or product use issue,
17 all of those cases are available to both sides to designate
18 as potential bellwethers, and if in fact, at the end of your
19 respective nominations cases remain which are subject to
20 product use challenges, the Court will address that at that
21 time.

22 With regard to this motion for a protective order,
23 as I understand it, the motion is for an order essentially
24 quashing the deposition subpoena for Dr. Minkowycz. And
25 that motion will be granted, and the basis for it is the

1 Court concludes that the time for the discovery has closed,
2 and the state of the record is clear regarding the facts,
3 although apparently the parties disagree about the meaning
4 of peer review. The facts are clear the article was
5 published at the direction of the editor in chief without
6 further review or comment by others in the field or others
7 skilled in the art of the field, and the field we're talking
8 about is computational fluid dynamics.

9 MR. GOSS: Yes, Your Honor.

10 THE COURT: I just had to say that out loud
11 because I've been working on the expression.

12 So anything else with regard to either of these
13 motions, Ms. Zimmerman?

14 MS. ZIMMERMAN: No, Your Honor.

15 THE COURT: Ms. Young.

16 MS. YOUNG: No, Your Honor. Thank you.

17 THE COURT: Mr. Goss.

18 MR. GOSS: No, Your Honor.

19 THE COURT: Mr. Hulse.

20 MR. HULSE: No, Your Honor. Any -- anything
21 that's on the Court's mind for Thursday that we should be
22 prepared to address?

23 THE COURT: I am chatting with both Patrick who is
24 here and Chad when we're done here, so the answer is not
25 right now.

1 MS. YOUNG: Okay. Then we'll be submitting a
2 agenda.

3 THE COURT: And just so the record is clear, just
4 to round things out, Ms. Ahmann, do you have anything?

5 MS. AHMANN: I have nothing further, Your Honor.
6 Thank you.

7 THE COURT: Thank you for being here. And we are
8 in recess.

9 MS. ZIMMERMAN: Thank you, Your Honor.

10 THE COURT: And we'll see you on Thursday but
11 we're going to be up in Judge Ericksen's courtroom even
12 though she's not here.

13 (Court adjourned.)

14 * * *

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17 I, Staci A. Heichert, certify that the foregoing is
18 a correct transcript to the best of my ability from the
19 digital recording in the above-entitled matter.

20

21 Certified by: s/ Staci A. Heichert

22 Staci A. Heichert,
23 RDR, CRR, CRC

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