

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/)  
6 Liability Litigation )  
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9 BEFORE THE HONORABLE FRANKLIN L. NOEL  
10 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
11 **(MOTION HEARING)**

12 APPEARANCES

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23 Proceedings recorded by mechanical stenography;  
24 transcript produced by computer.



1 Bair Hugger system that's at issue in this litigation. His  
2 involvement concerned conducting testing on the safety of  
3 the Bair Hugger system, as well as evaluating the increased  
4 risk of infection associated with the Bair Hugger system.  
5 These ten documents that are referenced in our motion all  
6 concern that topic because that was his only involvement in  
7 this litigation, and they consist of the underlying facts  
8 and data, apparently so based on the description, but the  
9 underlying facts and data that were, in fact, used by  
10 Mr. Chen and two of his colleagues to generate a report  
11 addressing their experimental assessment of the Bair Hugger  
12 model 750.

13           Because the documents on the privilege log that  
14 are at issue, these ten documents, involve underlying facts  
15 and scientific information, they are discoverable. And  
16 there is not a basis for the defendants to selectively  
17 produce the report that Mr. Chen and his colleagues prepared  
18 in October 2015, which, in fact, was disclosed and provided  
19 to their testifying expert, Dr. John Abraham, on the  
20 analysis, but yet not produce these other documents that  
21 apparently relate to the internal testing of work and  
22 evaluation of the increased risk of infection that Mr. Chen  
23 was asked to do.

24           These documents are discoverable for a multitude  
25 of reasons. Again, they involve factual information,

1 scientific-related work which, in fact, is the subject of  
2 one of your prior orders entered in this case which you  
3 addressed this issue that pertains to whether or not  
4 internal testing documents involving either material or data  
5 related to the Bair Hugger were, in fact, discoverable.  
6 And, in fact, you addressed both the application of the work  
7 product privileges and the attorney-client privilege, and  
8 I'll go through that in a moment, but neither privilege was  
9 determined to have applied.

10 Here, simply because 3M's lawyer asked Mr. Chen to  
11 become involved in this regard doesn't shield the documents  
12 from disclosure. Neither the attorney-client privilege or  
13 the work product doctrines apply to preclude production of  
14 underlying factual internal testing or related materials,  
15 particularly when those documents are related to a report  
16 that he prepared and, in fact, has been used by defendant's  
17 testifying expert and, in fact, relied upon in issuing his  
18 opinions in this case that will be rendered at trial.

19 Additionally, these materials are discoverable  
20 because none of the cases cited by 3M substantiate  
21 protecting these types of documents.

22 Even if Mr. Chen were categorized as an internal  
23 consulting expert in this case, that does not end the  
24 inquiry. Instead, the inquiry goes on to evaluate whether  
25 or not exceptional circumstances exist for the production of

1 these internal testing documents and related materials, and  
2 here, that same standard, an exception to the work product  
3 doctrine which has previously been determined to have been  
4 met by plaintiffs and therefore requiring production of  
5 other internal testing materials.

6 THE COURT: So compare that to -- refresh my  
7 recollection as to what the circumstances were. As I  
8 understand it, it related to something that either  
9 Mr. Benham or Mr. -- Dr. Augustine had done.

10 MS. KRAFT: The prior documents that you ordered  
11 to be disclosed were documents dated in the early 2000s that  
12 Dr. Augustine -- that Mr. Augustine and/or his counsel  
13 requested be done, and you determined that those documents  
14 fell within the ordinary work product doctrine but that the  
15 plaintiffs had met their burden of demonstrating substantial  
16 need for the documents as well as undue hardship associated  
17 with generating a substantial equivalence of those  
18 documents.

19 And for your -- and these documents are, in fact,  
20 similar and even more compelling for production here  
21 because, again, what we know is Mr. Chen's involvement was  
22 limited. It was limited to doing internal testing on the  
23 Bair Hugger products. And the -- we're only talking about  
24 ten documents. These documents, as described on the log,  
25 all relate to the forced air warming system, the safety of

1 the Bair Hugger system, and nine of the ten documents at  
2 issue were either authored by or sent by Mr. Chen or one of  
3 his colleagues who are authors of the very report dated  
4 October 15, 2015, that was supplied by 3M's counsel to  
5 Dr. Abraham and, in fact, used in his review and --

6 THE COURT: Hold on. Let me stop you there  
7 because I'm confused by the convoluted nature of that  
8 sentence. Are you saying that Dr. Abraham relied on  
9 Dr. Chen's report?

10 MS. KRAFT: He relied and used the information in  
11 the report in connection with rendering his opinions.

12 THE COURT: Is that different than relying on the  
13 report?

14 MS. KRAFT: It -- using the information and  
15 relying on the report are two different things, and --

16 THE COURT: By information, are you referring to  
17 just objective data that Dr. Chen generated or things he  
18 wrote down in a narrative report?

19 MS. KRAFT: Okay. I'll direct the Court's  
20 attention to some of the deposition testimony of Dr. Abraham  
21 in this regard and let you know what I'm referring to. So  
22 first of all, just by way of further background, at pages  
23 143 and 144 of Dr. Abraham's deposition, he testified that  
24 Andy Chen was one of three engineers who was with him at the  
25 time he did the modeling of the operating room, so he was

1 there from the outset.

2 Then at pages 43 and 44 of his deposition, we  
3 learned that Dr. Abraham had been provided with a copy of  
4 this very extensive report prepared by Mr. Chen and his two  
5 colleagues regarding the Bair Hugger system.

6 Then on pages 303 and 304 of his deposition,  
7 Dr. Abraham testified that he used the report in the  
8 following ways. At page 303, quote, he says, this is the  
9 document which confirmed my understanding of the boundary  
10 conditions of the Bair Hugger, so I would say it confirmed  
11 my boundary conditions.

12 He then goes on to testify that many of diagrams  
13 and photographs contained in Chen's report represented the  
14 same CFD model used by Dr. Abraham. He goes on at those  
15 pages in the range of 303 and 304 to talk about the geometry  
16 from Chen's report that's referenced on page 28 of his  
17 report and states that is the same one or similar to the one  
18 that 3M provided to Dr. Abraham to do his analysis.

19 And then, finally, he discusses diagrams and  
20 photographs of the OR contained in Chen's October 2015  
21 report that, in fact, represent the same CFD model used by  
22 Dr. Abraham.

23 So what seems to be the case here is we have ten  
24 documents on the privilege logs identified by 3M. These  
25 documents are, with the exception of one dated in 2016, but

1 none of the ten documents are all dated right at the time of  
2 the preparation of this report. And we know there's a short  
3 window. Mr. Chen was asked to get involved in August of  
4 2015. His report was prepared by October of 2015. Four of  
5 the documents were prepared -- excuse me, five of the  
6 documents were prepared the day before he issued the report,  
7 one after the date of the report. Again, most of these  
8 documents are authored by Mr. Chen or his colleagues. The  
9 defendants here have --

10 THE COURT: And this is right around the time of  
11 Walton and Johnson, correct, that we're --

12 MS. KRAFT: Yes.

13 THE COURT: And do you dispute that these are  
14 ordinary work product and are simply arguing that you've met  
15 your burden to get them or do you dispute that they're even  
16 work product at all?

17 MS. KRAFT: Well, I certainly dispute that they  
18 are ordinary work product and that we meet our exception. I  
19 don't think that they're work product at all. And the  
20 reason is because these logically appear to be the  
21 underlying facts or information pertaining to the October  
22 report that Mr. Chen prepared, and, again, that basis alone  
23 would require their production. He, Mr. Chen, is a fact  
24 witness here. He's not a consulting expert witness by which  
25 the defendants should be able to, you know, shield

1 production of these documents.

2 And certainly defendants have made arguments based  
3 on every front, one of which is opinion work product. They  
4 claim that these documents are opinion work product.  
5 However, in looking at the description of the documents on  
6 the log, we see that none of the documents are even authored  
7 by an attorney or sent by an attorney. None of the  
8 descriptions used on the log use terms such as strategy,  
9 impressions, legal conclusions, legal -- or internal  
10 thoughts of counsel. Instead, the log reveals that all the  
11 documents are sent by 3M employees and that relate to,  
12 again, internal testing which is very, very critical to the  
13 plaintiffs here to be able to have the effective right to  
14 cross-examine Dr. Abraham and others about internal testing  
15 done by 3M on the products at issue, regardless of the  
16 timeframe of whether this occurred during the pendency of  
17 the Walton Johnson litigation or not, because that  
18 information is exclusively within the control of the  
19 defendants.

20 And in your order issued on August 9th of 2017,  
21 document --

22 THE COURT: Do you have the docket number of that  
23 order, by the way?

24 MS. KRAFT: Yes, I do. It's document No. 645.

25 THE COURT: Okay.

1 MS. KRAFT: And in reference to -- referring to  
2 that order on page 4, you addressed sort of the timing of  
3 litigation versus the timing of the document, the testing  
4 documents at issue, and you indicated on page 4, quote,  
5 assuming, without deciding, that some litigation was pending  
6 at the time of the challenged documents requesting testing  
7 or performing testing were created, any testing performed on  
8 the Bair Hugger is material and relevant to the issue in  
9 this case and plaintiffs have the substantial need for these  
10 materials. Additionally, because these materials are  
11 exclusively in the possession of the defendants, the  
12 plaintiffs have no other way of obtaining this material  
13 other than through discovery.

14 And that same situation applies here. As  
15 discovery currently stands, we have a summary report  
16 prepared by Mr. Chen and, again, his two colleagues, whose  
17 names are referenced throughout the privilege log, but we  
18 have a summary document prepared by Mr. Chen but yet we are  
19 not in receipt of access of the underlying -- of what  
20 appears to be the underlying documents or other information  
21 related to his purpose in this litigation which is to do  
22 internal testing.

23 And for all of these reasons, Your Honor, we would  
24 request the Court to be the one to conduct the in-camera  
25 review to assess the validity of these claims. Again,

1 there's no basis to determine if the, based on the  
2 description that these documents involved, opinion work  
3 product, I -- they -- it's our position they do not involve  
4 ordinary work product for two reasons: One, not work  
5 product at all because Mr. Chen is a fact witness who has  
6 conducted internal testing on which their expert has relied.  
7 That's a real distinguishing factor here. Or at least  
8 considered or used. Whatever terminology, I do not believe  
9 that it's dispositive, whether he used it or relies on it or  
10 whatnot, but he was provided that information, and he  
11 testifies very clearly about that in his deposition.

12 And then, third, the application of the  
13 attorney-client privilege here in our position is not  
14 applicable, as you so found in your order at pages 6 and 7,  
15 because the context of the information is factual in nature.  
16 It does not involve providing or seeking legal advice. Each  
17 description is providing information in connection with the  
18 work that Mr. Chen has done on testing the Bair Hugger  
19 products.

20 THE COURT: Okay. Thank you.

21 MS. KRAFT: Thank you, Your Honor.

22 THE COURT: Who's up over here, Ms. Lewis?

23 MS. LEWIS: Good morning again, Your Honor,  
24 Deborah Lewis. It's defendant's position that no  
25 camera -- in camera review is necessary, Your Honor, for

1 several reasons. Number one, as is evident from our  
2 responsive motion and the log itself, the documents that  
3 plaintiffs challenge are protected by the attorney-client  
4 privilege. How do we know that? The log identifies clearly  
5 the attorneys' names on the log on all the entries. It  
6 shows the name of outside counsel, it shows the name of  
7 in-house attorney, it shows the name of those who were  
8 involved in the assignment by in-house attorneys. It is  
9 clear what the attorney-client privilege protects. It  
10 protects attorney-client privileged communications for the  
11 client.

12 As Your Honor pointed out, the timing of these  
13 communications is October 2015. According to the Walton and  
14 Johnson cases, they were set for trial in March of 2016. So  
15 these communications occurred five months before an actual  
16 trial setting. These communications reflect the attorney's  
17 opinions and defense strategy for those particular cases.  
18 Communications between an attorney and client are absolutely  
19 immune from disclosure. That should end the inquiry on that  
20 alone. These are attorney-client privileged communications.

21 For the second reason, these documents on the log  
22 are opinion product, meaning they are reflective of the  
23 attorney's opinion, strategy, again, prior to trial. They  
24 were asked, this team was asked at the direction of legal  
25 counsel to form and perform some work that was relevant to

1 the defense of the case, and that's -- and so the work that  
2 was done was done under the direction and control of legal  
3 counsel.

4 Plaintiffs do not argue that there are some  
5 extraordinary circumstances. And as we know, case law is  
6 pretty clear that opinion work product is more absolutely  
7 immune from discovery. There has to be some sort of  
8 extraordinary circumstance in order for that privilege to be  
9 passed aside.

10 Plaintiffs don't have any evidence if this were to  
11 be assumed to be opinion -- if this were assumed to be  
12 ordinary work product, which it is not, but let's assume for  
13 purposes of ordinary work product, if this were ordinary  
14 work product, plaintiffs don't have evidence that they can't  
15 do -- can't get substantially the same amount of information  
16 from their own testing.

17 As we have pointed out --

18 THE COURT: Except that's the point, we don't know  
19 what Chen did, right, or do we?

20 MS. LEWIS: Plaintiffs have that information.

21 THE COURT: Do they know what tests he performed?

22 MS. LEWIS: They have the data, and that's the  
23 point that you were making, do they have the data, which  
24 they have. They had more than 14 hours of deposition time  
25 with Dr. Abraham to question him about the data.

1 Dr. Abraham did not rely on the Chen Eaton memo. He said  
2 he -- the -- the data in the memo confirmed his  
3 understanding of the Bair Hugger flow rate and temperature,  
4 but that doesn't mean because that confirmed -- that memo  
5 confirmed what he understood that he relied on it. He did  
6 not rely on it. He tested --

7 THE COURT: Did he use it? What words, I guess,  
8 words do we use to get the ship confused? What word, if he  
9 relied on it, do you concede that it would then be  
10 discoverable?

11 MS. LEWIS: I don't know that I would concede if  
12 he relied on it, it would be discoverable. It -- my  
13 understanding from Dr. Abraham's testimony is he came up  
14 with figures on his own. When he saw the Chen report, he  
15 said the Chen report data confirmed what he already knew and  
16 understood.

17 THE COURT: And does that constitute using the  
18 data in some way?

19 MS. LEWIS: I think he used his own data. What  
20 was in the Chen data confirmed what he already knew.

21 THE COURT: And but the data you're telling me the  
22 plaintiffs have already anyway?

23 MS. LEWIS: The data that they have --

24 THE COURT: I'm sorry, the data that Chen  
25 generated, not Abraham's data. Do they have Chen's data?

1 MS. LEWIS: They have Chen's data.

2 THE COURT: Okay.

3 MS. LEWIS: And so they already have the data.

4 And so there's no substantial need for these documents on  
5 this log because they already have the data. I think -- I  
6 mean, their argument is simply we don't have your testing,  
7 and they're claiming that constitutes substantial need. And  
8 we have cited numerous cases have said just the opposite,  
9 that have given examples of when someone asked for someone  
10 else's testing, the courts have ruled that just because they  
11 have testing doesn't mean you're entitled to it, especially  
12 when you can do your own testing.

13 And the case from Northern District of Illinois is  
14 pretty instructive, which we cite, in which that Court ruled  
15 that it -- the Court can easily conclude that  
16 attorney-initiated tests were reflective of the attorneys  
17 opinions and strategy and thus protected as opinion work  
18 product. Even if the tests were non opinion work product,  
19 they were still protected because nothing prevented the  
20 plaintiff from running tests of its own. And although  
21 plaintiffs might not have the same tests as defendants, it  
22 would have tests nonetheless, reflecting the  
23 same -- relating to the same ultimate issue.

24 Plaintiffs' issue in this case is they -- their  
25 contention that the Bair Hugger is defective. Well, go get

1 your own testing to --

2 THE COURT: Which I'm sure they've done. And I  
3 remember sitting through three days of testimony.

4 MS. LEWIS: That's absolutely right.

5 THE COURT: Or argument.

6 MS. LEWIS: They've done their own testing, so  
7 they have, you know, the substantial equivalent of data that  
8 they're trying to get. So just saying we don't have it is  
9 not a showing a substantial need or that you can't get the  
10 substantial equivalent.

11 We've cited our cases as well. But the courts are  
12 coming to the conclusion that if you're wanting someone  
13 else's tests and if you already have that data, in some  
14 circumstances you don't need to go after someone else's  
15 privileged communications. And so these documents are  
16 different from your prior order.

17 THE COURT: In what way?

18 MS. LEWIS: These tests are, number one, these are  
19 tests done in during the pending litigation in Walton and  
20 Johnson. These tests are --

21 THE COURT: But I assumed in the other case, in  
22 the other order, assumed without deciding, that the stuff I  
23 was referring to was generated in connection with  
24 litigation.

25 MS. LEWIS: That's what we were trying to

1 establish in the prior priv log challenges. The evidence  
2 was not as clear-cut then as it is now. But in this case it  
3 is clear that these were done, again, during pending  
4 litigation, done at the direction of legal counsel, done in  
5 order to facilitate the defense of the case. They  
6 involved -- these involve opinion work product which means  
7 it's more than just facts.

8 THE COURT: But I guess so how does -- how is it  
9 opinion work product? So opinion work product, as I  
10 understand it, relates solely to the lawyer's opinion,  
11 right?

12 MS. LEWIS: That's correct.

13 THE COURT: What's relevant, what evidence should  
14 we look at, what evidence should we generate, what evidence  
15 should we discover, how do we analyze these claims.

16 MS. LEWIS: That's correct.

17 THE COURT: It's the lawyer's opinion, not some  
18 scientist's opinion, correct?

19 MS. LEWIS: That's correct. And plaintiffs are  
20 assuming that these particular documents at issue are not  
21 met and that's not the case.

22 THE COURT: But I guess that's my question, as I  
23 understand it, yeah, every one of these documents is an  
24 e-mail string, correct?

25 MS. LEWIS: That's correct.

1 THE COURT: And you're telling me that if I were  
2 to look at them in camera, what I would see is a lawyer  
3 saying something that is exposing her thought processes?

4 MS. LEWIS: Yes.

5 THE COURT: Not Dr. Chen's thought processes or  
6 analyses or interpretations of data?

7 MS. LEWIS: Correct on interpretation of data.  
8 And these e-mail strings, the way they are placed on the  
9 log, by necessity, because it is an e-mail string, the  
10 defendants only listed the names of those at the top of that  
11 chain, but within that e-mail chain are communications  
12 generated by outside counsel. So contrary to Ms. Kraft's  
13 thoughts, all e-mails were not generated by a nonlawyer.

14 THE COURT: Okay.

15 MS. LEWIS: That was her argument was these could  
16 not be either work product or communications because they  
17 were all generated by, again, a nonlawyer, but, again,  
18 that's because that may be top e-mail string, e-mail string,  
19 that was the last communication, but, again, within that  
20 string were communications generated by one of the lawyers.

21 So although, again, it's our position that these  
22 are opinion work product and, again, similar to the  
23 attorney-client privilege, there has to be some  
24 extraordinary circumstance why plaintiffs should be entitled  
25 to have those in which the work product would not apply.

1 These, again, are different from the other ones that you  
2 ordered produced because these more reflect thought  
3 processes of the lawyers getting ready for trial. It was  
4 not that clear on the previous orders and the documents that  
5 were at issue. So these documents are not similar to the  
6 documents in the other case.

7 And so, finally, I guess, Your Honor, our argument  
8 is, again, we don't believe an in camera review is even  
9 necessary because the attorney-client privilege attaches to  
10 each and every single document that is challenged today. In  
11 addition to the attorney-client privilege that applies,  
12 opinion work product also applies.

13 THE COURT: Okay. Thank you. Anything else,  
14 Ms. Kraft?

15 MS. KRAFT: Yes, Your Honor. If I may, please.

16 THE COURT: Before you go, let me ask, do you have  
17 the Chen data?

18 MS. KRAFT: Well, that's exactly one of the points  
19 that I was going to address. We do not have the underlying  
20 data. We have the report. We have Mr. Chen's October 15,  
21 2015, report. We do not have the underlying data. And, in  
22 fact, I can provide certain examples of information  
23 contained in this report, although --

24 THE COURT: But the data is not going to be  
25 found -- now I'm even more confused. The ten documents at

1 issue are e-mail strings, correct?

2 MS. KRAFT: Yes, that's how they are described out  
3 there. The attachments or additional information, I don't  
4 know, or they could be just discussions about the report and  
5 the testing that he did. And in either case, it's our  
6 position it would be discoverable.

7 THE COURT: But -- but you've got the report. So  
8 let's assume for a moment the strings are something like  
9 holy crap, look at this, we're going to lose this case, is  
10 that relevant -- is that discoverable if that's between a  
11 lawyer and Dr. Chen in response --

12 MS. KRAFT: Yes.

13 THE COURT: -- to the lawyer's request to do this  
14 testing stuff?

15 MS. KRAFT: Yes, that communication would not  
16 involve rendering legal advice or providing legal advice, it  
17 would be I guess a factual opinion by Mr. Chen in that  
18 scenario.

19 THE COURT: But the requests at issue aren't going  
20 to necessarily give you the data underlying Chen's report,  
21 will it?

22 MS. KRAFT: I don't know. And that's  
23 particularly -- and, frankly, we think that information is  
24 discoverable. We don't know where that -- where those  
25 documents may be. We did not find descriptions on the log

1 that would seem to, per se, state this is the underlying  
2 data.

3 THE COURT: Well, where did the report say the  
4 data is?

5 MS. KRAFT: It doesn't indicate. It makes -- this  
6 is a confidential document so I hesitate to make reference  
7 to certain aspects of it, but there are references in the  
8 report to certain types of testing being done. And we do  
9 not have the data. Certain CFD, computational fluid  
10 dynamic, analysis and experimental flow digitalization were  
11 used. We don't have that underlying data. There is  
12 information in the report describing a geometry for the CFD  
13 model, a 3D geometric model was created and generated by  
14 visiting site and certain dimensions were taken of the room  
15 and the equipment. We don't have that background  
16 information.

17 There's other underlying --

18 THE COURT: Okay. I got it.

19 MS. KRAFT: So I think counsel may be defining the  
20 term data differently than we do. We have the report, but  
21 the underlying data we do not have.

22 A couple of other issues that I didn't point out  
23 before that I think are important here after hearing  
24 counsel's argument is that the portion -- in the event there  
25 are opinions and legal conclusions or strategies of legal

1 counsel in these documents, which is not apparent at all  
2 from the descriptions, but let's assume that's the case,  
3 only that portion of the document would be protected, not  
4 the remainder of the e-mail string. And certainly based on  
5 the descriptions that have been provided, it seems very  
6 reasonable that the communications are from Mr. Chen or his  
7 colleagues and relate to providing information about the  
8 safety of the Bair Hugger system. So we would -- this  
9 is -- this only heightens the basis for our request to  
10 conduct an in-camera review of these documents to make the  
11 Court's own determination as to the applicability of the  
12 privilege here.

13           With respect to our substantial need for this  
14 information, whether it's e-mail communication commenting  
15 about the tests that were done or the underlying data, which  
16 we think is likewise discoverable, but we have a -- what  
17 we're talking about here are -- is the testing and comments  
18 of the testing or information related to the testing that is  
19 exclusively in the defendant's control. We're not talking  
20 about -- I mean, an inventory of Bair Hugger systems that we  
21 could conduct our own tests. You know, we've done that.  
22 That's not at issue here. It's the, similar to what you  
23 found before, it's the internal work of the -- of the  
24 defendants that is exclusively within their control is  
25 relevant here. We cannot be in a position to replicate it

1 or duplicate it in any way if we don't know -- if we don't  
2 have it, and we certainly are not -- or we would be placed  
3 in an unfair position of not being able to effectively use  
4 the information or cross-examine defendants' witnesses about  
5 the information, you know, if applicable.

6 I would also state that the attorney-client  
7 privilege is applied narrowly in order to ensure that the  
8 truth and information, you know, pertaining to a subject  
9 matter is disclosed and that the case citation I believe was  
10 referenced in your order.

11 And those are all the issues that I wanted to  
12 address, unless Your Honor has some questions.

13 THE COURT: Okay. Thank you.

14 I have a question for Ms. Lewis first. When you  
15 say the plaintiffs have the Chen data, are you referring to  
16 the narrative report that Ms. Kraft refers to? Or is there  
17 somewhere where there's actual objective data generated by  
18 Dr. Chen's testing?

19 MS. LEWIS: That's why Mr. Goss was standing up.  
20 He can probably better explain the data. But it's my  
21 understanding that plaintiffs do have and, in fact,  
22 questioned Dr. Abraham for, again, 14 hours, on the data.

23 THE COURT: That Chen generated?

24 MS. LEWIS: Yeah, it's called the geometry. I  
25 think that means the calculations --

1 THE COURT: Okay.

2 MS. LEWIS: -- of a particular --

3 THE COURT: Well, if your answer to my question is  
4 Mr. Goss knows, I'll let Mr. Goss speak.

5 MS. LEWIS: I believe I'm right, but I think he  
6 can define that better.

7 THE COURT: Okay. Thank you.

8 MR. GOSS: All right. Ms. Lewis brought me along  
9 because I have suffered through more of this than she has  
10 and I am probably more familiar with the documents than  
11 either counsel here. They do have the data. If Your Honor  
12 recalls from Mr. Assad's presentation, various  
13 presentations, regarding computational fluid dynamics, you  
14 basically need three inputs: you need the temperature, you  
15 need the flow rate, and then you need -- you do need some  
16 specifics about the room, including the geometry of the  
17 room, okay, and that is simply what we call a CAD file or  
18 computer-aided design.

19 And the CAD file that Dr. Abraham used in his CFD  
20 is the same one that Mr. Chen developed based on an  
21 operating room at Fairview Southdale Hospital. And that  
22 just tells you the configuration of the room and the patient  
23 and the draping. That CAD file was produced more than a  
24 year ago. So plaintiffs have that same CAD file. The only  
25 remaining questions are do they have the temperature of the

1 air coming out of the Bair Hugger and the flow rate of the  
2 air coming out of the Bair Hugger. Both of those are  
3 disclosed in Mr. Chen's memo. There's nothing else that you  
4 need to do a CFD, according to Dr. Elghobashi's own  
5 testimony. So and, in fact, they relied on similar  
6 documents to make their CFD to what's described in the Chen  
7 report. So that's what we mean we say they have the  
8 underlying data.

9 What they seem to be asking for is actual CFD  
10 files, after you plug the information into the computer,  
11 what does the computer produce, okay, that's a different  
12 thing. Now, they've spent a lot of time and money with  
13 Dr. Elghobashi using those same inputs to develop their own  
14 CFDs.

15 THE COURT: All right. I get that. But I guess  
16 my question is, so does Dr. Chen run those things? Does he  
17 run the CAD file, the temperature, and the flow rate through  
18 the computer and get something back from the computer saying  
19 here's what happens at this temperature with this flow rate  
20 in this room?

21 MR. GOSS: Yeah, so it would be the same as  
22 Dr. Elghobashi's CFD and Dr. Abraham's CFD.

23 THE COURT: Well, if they were all the same, we  
24 wouldn't be here, I'm guessing.

25 MR. GOSS: No, that's right. But you put it into

1 the computer and you get a output. Now, Dr. Abraham is not  
2 relying on -- he's never seen the internal 3M CFD. He's  
3 seen the memo that Chen prepared that gave certain input.

4 THE COURT: But do the plaintiffs have Dr. -- is  
5 it Dr. Chen or Mr. Chen? I've heard both. Is he a doctor?

6 MR. GOSS: You know, I think he is a Ph.D. so.

7 THE COURT: Okay.

8 MR. GOSS: He's a very humble guy, though, so.

9 THE COURT: Does -- do the plaintiffs have  
10 whatever he generated with his CAD file, his flow rate, his  
11 temperature?

12 MR. GOSS: No, they only have the inputs, and the  
13 reason for that is this was done under direction of counsel  
14 to assess whether the CFD project would be worth pursuing at  
15 all with an outside lawyer -- with an outside expert, okay,  
16 and that's why Dr. Abraham has never seen any of these  
17 results. And at trial in May he is not going to testify  
18 about them, he's not going to rely on them, he's only going  
19 to rely on his own work.

20 THE COURT: So what does he mean when he  
21 testifies, as I understand it, that Dr. Chen's data is  
22 consistent with his own data?

23 MR. GOSS: Right. So counsel is trying to get him  
24 to admit that he relied on the memo, and he said, no, I have  
25 my own experience with these blankets from doing my own

1 research before I was retained for this litigation. When I  
2 saw the Chen memo, it was consistent with the inputs that I  
3 used for air temperature and flow rate out of the Bair  
4 Hugger. I didn't rely on it. It confirmed that the inputs  
5 I used were correct.

6 And so by plaintiffs' argument, they're saying we  
7 need the CFD files. They haven't produced Elghobashi's CFD  
8 files. All we have is videos from it. They've said the CFD  
9 files are locked up in a super computer down in Austin,  
10 Texas. So it's hardly fair for them to say we need 3M's  
11 internal CFD file which are not going to be shown in trial  
12 which our expert has never seen when their expert has not  
13 even produced the software he used to generate his CFD.

14 THE COURT: All right. All right. I'll take the  
15 matter under advisement.

16 There's also then an issue regarding substitute of  
17 parties, correct? Who's got that issue?

18 MS. HARRIS: Good morning, Your Honor. Charmaine  
19 Harris for defendant.

20 THE COURT: Ms. Harris.

21 MS. HARRIS: As a preliminary matter, I should  
22 mention that defendants noticed both hearings and so I'm not  
23 sure even if plaintiffs are going to call in or what they're  
24 going to do. I don't know.

25 Are you representing plaintiffs in this matter?

1 MS. KRAFT: Your Honor, for on behalf of the  
2 plaintiffs, I would ask the Court to consider the briefing  
3 solely in connection with this issue and would rely on  
4 the --

5 THE COURT: We haven't heard from anybody?

6 THE CLERK: We have not.

7 THE COURT: These all -- there's three of them.  
8 Is that right?

9 MS. HARRIS: Two.

10 THE COURT: Two. I'm sorry, what are the two?  
11 I've got three things in front of me to so I'm confused.  
12 This is Summers Price -- I'm sorry.

13 MS. HARRIS: Yeah, she -- Ms. Price is connected  
14 with the Andrews case.

15 MS. KRAFT: Oh, okay.

16 MS. HARRIS: And then we have.

17 THE COURT: Sandra Vann.

18 MS. HARRIS: Sandra Vann, correct.

19 THE COURT: Okay.

20 MS. KRAFT: Yes, Your Honor, I would say I do not  
21 represent any of those plaintiffs so I guess I would retract  
22 my statement and say I -- I'm not here appearing in those  
23 cases and so I do not know, frankly, if they have submitted  
24 a brief in this regard.

25 THE COURT: Okay. Let me --

1 MS. KRAFT: So I'm sorry.

2 THE COURT: -- start all over again. So I've got  
3 before me two matters, civil No. 17-3276 which relates to  
4 Summer Price individually and on behalf of the estate of  
5 Larry Andrews, and in that matter plaintiff  
6 seeks -- plaintiff Summer Price seeks to be substituted for  
7 the deceased, Larry Andrews, and defendant objects, correct,  
8 correct, Ms. Harris?

9 MS. HARRIS: Correct, Your Honor.

10 THE COURT: And then it appears to me based on the  
11 documents I have that Ms. -- or Summers Price and Larry  
12 Andrews estate are represented by Seth Webb of Seth Sharrock  
13 Webb -- I'm sorry, Seth Sharrock Webb of Brown & Crouppen in  
14 St. Louis, Missouri.

15 MS. HARRIS: Correct.

16 THE COURT: And the next matter then is the case  
17 involving Sandra Vann which is civil No. 16-841. And,  
18 again, that's a situation of substitution the defendants  
19 oppose, correct?

20 MS. HARRIS: Correct, Your Honor.

21 THE COURT: And it appears, to me, that Ms. Vann  
22 and her estate are represented by Kirk Goza, G-O-Z-A, of  
23 Goza and Honnold in Leawood, Kansas.

24 MS. HARRIS: Correct, Your Honor.

25 THE COURT: Okay. So let me just confer with my

1 clerk for one moment.

2 (The Court conferred with his clerk.)

3 THE COURT: Counsel, it's my understanding, then,  
4 though, Ms. Harris, that the notice of this motion and this  
5 hearing were served on those through ECF.

6 MS. HARRIS: Correct.

7 THE COURT: Were served on the individual  
8 plaintiff's lawyers.

9 MS. HARRIS: Correct, Your Honor.

10 THE COURT: Okay. And you have no other  
11 information?

12 MS. KRAFT: I do not, Your Honor.

13 THE COURT: All right. Then I have the papers.  
14 Ms. Harris, go.

15 MS. HARRIS: Do you -- do you want --

16 THE COURT: If there's any argument you want to  
17 make in addition to what's in the papers.

18 MS. HARRIS: I'll make it quick then. For the  
19 Larry Andrews case, Summer Price has asked to be the proper  
20 party to be subsisted, but under Georgia law, a substituted  
21 party requires legal appointment and she has not produced  
22 any documentation evidencing that she is the administrator  
23 or executor of the estate of Larry Andrews. Additionally,  
24 no PFS sheet has been submitted. And so therefore, we ask  
25 that the motion be denied.

1 THE COURT: Okay.

2 MS. HARRIS: For Sandra Vann, again, we ask that  
3 his motion be denied as well. Under Colorado law, the  
4 personal representative stands in place of the decedent's  
5 shoes in a survival action. However, by counsel's own  
6 admission, Jesse Cooper has initiated proceedings to be the  
7 legal representative but, again, has not produced any papers  
8 actually evidencing that he is the legal representative. So  
9 while he might be the heir, he is not the legal  
10 representative. And so we ask that his motion as well be  
11 denied.

12 THE COURT: Okay. Thank you. I will take those  
13 under advisement and issue an order shortly.

14 Anything else for anybody on any of these issues?  
15 Plaintiff?

16 MS. KRAFT: If I may just one point, to  
17 the -- our -- our argument with respect to these documents  
18 and why we believe they do not fall within the scope of  
19 either privilege, I just want to emphasize is not  
20 dispositive or does not hinge on whether or not these same  
21 documents were provided to Dr. Abraham. We need to look at  
22 the documents based on the description of the log which is  
23 why an in-camera review is so important here to evaluate  
24 whether or not any of these privilege claims we discussed  
25 earlier apply.

1           And then secondly, on the underlying data issue,  
2           if I may ask leave of court for five days to provide any  
3           other information responding to Mr. Goss's argument, I will  
4           acknowledge that I do not have the details associated with  
5           that type of information to be able to address the Court in  
6           that regard.

7           The reason we discussed underlying data was, you  
8           know, in part because if these -- these documents do involve  
9           underlying data, that, again, I think heightens the  
10          reasoning that we have for producing these documents and  
11          that they're not privileged because, again, as the status  
12          would be, we have the expert report that was provided and  
13          not underlying data. But even if this information does not  
14          involve underlying data in our terminology and as I  
15          understand it when I appeared here, the information, to the  
16          extent it's not involving attorney impressions and  
17          strategies fall outside of the privilege because of the  
18          internal testing that Mr. Chen's sole role was here. So  
19          thank you, Your Honor.

20          THE COURT: Okay. Thank you. Ms. Lewis, anything  
21          else? You're thinking of something to say. Don't feel  
22          compelled. But I just want to give you the opportunity.

23          MS. LEWIS: I only want to say this, Your Honor,  
24          and that is, as we said in our papers, there are ten  
25          documents they challenge, nine of them, their focus seems to

1 be on the CFD. None of the documents have anything to do  
2 with the CFD.

3 THE COURT: Okay.

4 MS. LEWIS: And that's what we've told plaintiffs.

5 THE COURT: Okay. Ms. Harris, anything else you  
6 want to say?

7 MS. HARRIS: No, Your Honor.

8 THE COURT: Mr. Goss.

9 MR. GOSS: No, sir.

10 THE COURT: Okay. Thank you all, very much. I  
11 will take these advisement. I'll issue an order shortly,  
12 and we are in recess.

13 (Proceedings concluded at 10:51 a.m.)

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18 I, Staci A. Heichert, certify that the foregoing is  
19 a correct transcript from the record of proceedings in the  
20 above-entitled matter.

21

22 Certified by: s/ Staci A. Heichert

23

Staci A. Heichert,  
RDR, CRR, CRC

24

25