IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MEDICALGORITHMICS S.A., Plaintiff,

v

AMI MONITORING, INC. D/B/A SPECTOCOR AND SPECTOCOR LLC, Defendants.

Civil Action No. 10948-CB

AMI MONITORING, INC., Counterclaim Plaintiff,

v

MEDICALGORITHMICS S.A., Counterclaim Defendant.

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Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, July 15, 2015
2:00 p.m.

BEFORE: HON. ANDRE G. BOUCHARD, Chancellor.

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ORAL ARGUMENT ON DEFENDANTS' MOTION REGARDING PLAINTIFF'S IMPROPER DOCUMENT PRODUCTION, PLAINTIFF'S CROSS-MOTION FOR DEFENDANTS TO SUPPLEMENT THEIR DEFICIENT DOCUMENT PRODUCTION, DISCOVERY ISSUE REGARDING LOCATION OF DEPOSITIONS and RULINGS OF THE COURT

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APPEARANCES:

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-and-
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for Plaintiff

BLAKE K. ROHRBACHER, ESQ.
KELLY E. FARNAN, ESQ.
ROBERT L. BURNS, ESQ.
THOMAS R. NUCUM, ESQ.
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THE COURT: Good afternoon. Mr. Trainer.

MR. TRAINER: Good afternoon, Your Honor. Lee Trainer from Ashby & Geddes for plaintiff, Medicalgorithmics.

If I could just hop up and make some introductions, I will turn the podium over to Mr. Rohrbacher.

From our office, we have Marie Degnan. From Kaye Scholer, we have three people: Madlyn Primoff, Michael Lynn, and Lindsay Moilanen.

THE COURT: Good afternoon.

MR. TRAINER: Thank you, Your Honor. With the Court's permission, Ms. Primoff will address the issues today.

THE COURT: All right. Thank you.

Mr. Rohrbacher

MR. ROHRBACHER: Your Honor, Blake Rohrbacher, Richards, Layton & Finger, for defendants, AMI Monitoring and Spectocor LLC.

From my office, Your Honor, Kelly Farnan, Rob Burns, and Tom Nucum.

THE COURT: Good afternoon.

MR. ROHRBACHER: Your Honor,

unfortunately, we have a number of issues for the Court this afternoon. And it is unfortunate because each one of plaintiff's discovery violations is itself a big deal, and I fear that by piling them up into a single argument, we may -- I hope we don't unintentionally minimize the seriousness of each issue.

I will be addressing the document production issues and Ms. Farnan will be addressing the plaintiff's refusal to come to Delaware for depositions and its one-page, it used to be 5,000-document privilege log, but now it's a one-page, about 10,000-document privilege log.

Before I start, I concede that our papers unavoidably made a number of harsh accusations, and I want to make clear that none of those are directed at Mr. Trainer. I have the utmost respect for Mr. Trainer. I have no reason to believe that he was involved in making any improper decisions we challenge. And further, once I was allowed to speak with Mr. Trainer, we were able to make some progress. Unfortunately, the problems had occurred by that time.

THE COURT: Does that moot any of today's issues or not?

MR. ROHRBACHER: It does not, unfortunately --

THE COURT: All right.

MR. ROHRBACHER: -- fix any of today's issues.

The issues today are fairly straightforward, and I don't plan to add a whole lot to our papers. But the context is important, so I'm going to touch on a bit of background. Please feel free to move me along at any point.

Defendant, AMI Monitoring, has been plaintiff's exclusive sales agent since 2011. Over the years, we have been very successful, and we are responsible for about 65 percent of the plaintiff's revenue. But we've increasingly had problems with plaintiff's performance. We sent plaintiff a notice of material breach in November of 2014, and those breaches still have not been cured. The principal issue, from our standpoint, was that plaintiff could not keep us supplied with new devices or spare parts to fix the broken devices and had switched us to a purportedly improved product with about a 30-some percent failure rate. We ordered devices for delivery in the spring of 2014, and we are still waiting for

about 1200 of those.

Admittedly, we were delayed on payment of some of our invoices, which we eventually did pay. But plaintiff refused to address any of the open business issues until -- saying, "You have to pay everything before we talk." And a good example of that can be found in Exhibit 1 to the Moilanen affidavit. So Joseph Bogdan of AMI sent his counterpart at Medicalgorithmics some correspondence in late April, essentially saying, "I can't keep growing unless you comply, and I'm branching out internationally since you refuse to partner with me to go internationally." The plaintiff flipped out, decided not to address any of the issues, purported to terminate the agreement, and filed this suit.

Plaintiff's claims are essentially about our alleged failure to grow and our alleged development of a competing product. Our counterclaims are essentially about their failure to deliver product, their flawed invoices, and their unlawful termination.

The issues are fairly circumscribed, although plaintiff misuses the phrase "course of performance," which is normally an interpretative

canon to suggest everything defendants have ever done under the contract is at issue, which is simply not true.

Plaintiff sought expedition and we agreed to a very tight schedule. Trial is set for September 2, 3, and 4, and the dates follow hard on each other. Likely because plaintiff is a public company in Poland and defendants are small private companies owned by one man, it appears that plaintiff has tried to win by wearing us down through discovery. As the Chief Justice is fond of saying, "It's a lot easier to throw a pizza than to clean one up." So plaintiff has thrown a lot of pizzas. Thus far, they have filed nine motions for commission, served 127 interrogatories on defendants. In plaintiff's brief and in accompanying affidavit, they complain that we caused the broad discovery by serving 54 document requests. And they list 11 requests where we sought "all documents."

By comparison, plaintiff served 99 document requests on defendants, at least 85 of which sought "all documents" or "all documents and communications." And a number of those requests were very broad. For example, one sought "all documents

and communications relating to AMI's efforts to commercialize PocketECG," which is essentially our entire business. Another one requested the following: "All documents and communications relating to AMI," which is one of the defendants, "including, without limitation, formation, present businesses, any subsidiary." So that's the starting point for why we are here today.

But the fundamental issue that I will address is that we spent weeks and many hours conferring with the other side to reach agreement on a reasonable number of documents for each side to review, by which we meant actually review, and we believed that they did as well. We were never told that the other side had an unreasonable number of documents to review. Instead, after the deadline for substantial completion, we received a mountain of documents that plaintiff admits that it never reviewed. And we are told -- we were told last week that we should be getting another mountain of documents, about 60 to 70,000 -- I am aware we have not received any of those -- and they have not been reviewed either.

Now, this is a very expedited case.

We only had a few weeks to review and produce documents. So the parties agreed on custodians and started negotiating search terms. From the beginning, I made clear that we don't have a lot of time. We need to come up with some sort of limit. The other side disputes this, but it's right there in our Exhibit 5. In one of the early conversations I said, "Listen, we should come to a number. You know, we're not going to review more than 100,000 documents." We ultimately did review about 140-some thousand. But I said --

THE COURT: Is that something -- you make a big point of the fact that the other side, when it was running search terms, never talked to you about what kind of hits, the volume of the hits they were getting from different search terms, and so forth.

Tell me about the flip side of that. Were you telling them what you were getting? I understand, I guess it was a little under 135,000 documents went through your first-level responsiveness review. Did you tell them that? What was going on there?

MR. ROHRBACHER: We did not, Your Honor. We had some initial discussions with search

terms when we -- they sent us some drafts. There were about three times as many terms in our set as theirs, so we cut a bunch from ours, added a few to theirs to try to make them equal. They came back and said, "That's not the way we want to do it."

We essentially -- the approach we took was, "We're going to take most of their search terms unless they're crazy." I came back to them specifically with two. One was "know-how," which doesn't really have anything to do with any direct relevance, and I said, "That one hits more than 100,000 documents. We're not going to run it because that's just not a real term that should mean anything." And the other one was, as to one single custodian, the term "@Medicalgorithmics.com" --

THE COURT: I saw that in the papers.

MR. ROHRBACHER: -- hit about 100,000 or so, because he seemed to get an automated feed from the other side.

So it is true we did not tell them our total hit count because we were just going to swallow it. We did not -- we weren't coming back and saying, "oh, we can't do this. We can't do this." We swallowed all of the search terms after we came to --

I think it was June 12 they sent us a draft of search terms, and we accepted all of them except for "know-how" and that one term against the one custodian.

THE COURT: All right. So from their side, they knew what search terms you are running; and where you disagreed with them, you told them. That's what you are telling me?

MR. ROHRBACHER: Correct.

THE COURT: And from the papers, I am understanding that both sides knew each other's custodians. Is that right?

MR. ROHRBACHER: Correct. We agreed to those fairly early on.

THE COURT: Okay.

MR. ROHRBACHER: And there were a couple additional search terms that we added on our end that were not part of the negotiated set, but we added them ourselves and put them into our group. So we did not, it is true, give them a full hit count, because we were just going to run them and review them. Had it been more than we could reasonably have reviewed, we would have mentioned it.

And so our process was very different

than what it turns out theirs was. We knew we didn't have time to waste, so we started almost immediately. As soon as we collected Joseph Bogdan's e-mails -- Mr. Bogdan is essentially the head of both defendants -- we said, "Rather than negotiate search terms, this guy is the most important guy in the litigation, we are going to review every one of his e-mails." And we did.

We actually asked them to do the same with their counterpart, but they refused continually. And the irony is, had they done that, they could have actually reviewed some documents before this point.

So we started reviewing documents immediately without regard to search terms, because we did not run search terms on his, we reviewed every single one. Then, while the search term negotiations were going on, we knew that the schedule was tight, so what we did was as soon as we would agree to some terms, we dumped those into a review platform, started reviewing them, and left out only the ones that we were still negotiating. So we were reviewing continuously while we were still negotiating.

Looking at the affidavits from the other side, they apparently did nothing. They didn't

take steps to review any documents until after June 19, when we reached final agreement. That's in the Moilanen affidavit, paragraph 12. Then, after sitting on its hands for weeks, they took five days to load their documents into a review platform.

So, one, we have been reviewing continuously for weeks. They didn't bother to have their documents ready to review until six days before document production was due. That's paragraph 14 of the Moilanen affidavit.

Two, they didn't bother to say anything to us at this point about the potential size of their production, even though it took them five days to load it and even though we had been asking them for a long time about their document review protocol. Eventually they dumped 273,724 documents on us, with apparently another 60 to 70,000 to come. So so far --

THE COURT: That's documents. Pages is 2 million or so?

MR. ROHRBACHER: Documents. 2,129,000, or so, not including native Excel spreadsheets and whatnot. But with paginated documents, it's 2 million some. And then we have

another 60 or 70,000 documents, not pages. We haven't gotten them, but that's what we've been told.

And I'm sure the Court has heard about the boy who killed his parents and then pled for mercy on the basis he was an orphan. Plaintiff certainly has. So after waiting until there were only six days left to review a massive search term yield, and after hiding the size of that yield from us for nearly a month, they claim they had no time to review documents so they were forced to dump it on us.

But they should not be saved from their own decisions. First, they put themselves in this position by seeking expedition and then doing nothing to review documents until near the very end of June.

And second, Your Honor, we discussed a little bit that in the negotiations, they omitted key information about their document review, while saying, "Oh, we have to cut this term. This is unreasonably burdensome; it's 37,000. This one is 47,000. This one is 27,000." So we thought we were both in the same place. We were doing similar things, although our threshold was much higher. We basically swallowed everything unless it was 100,000 or so.

At no time did they mention that they were planning to dump this amount of documents, and at no time did they say that they actually weren't planning to review documents at all. We had been talking about documents to review, this is an unduly burdensome number to review, but they weren't reviewing any documents.

THE COURT: Some level of review must have occurred, because they pulled out privileged stuff. Right?

MR. ROHRBACHER: Pulled the privileged stuff?

THE COURT: Well, they pulled out 5 or 6,000 documents that they say are privileged. I know you didn't get much of a log, but they did pull them out.

MR. ROHRBACHER: We believe --

MS. FARNAN: Your Honor, if I could just interject, that was based on search terms as well. So they used attorney names and other -- words like "privileged" and just pulled them.

So the 60 to 70,000 Mr. Rohrbacher is talking about are ones they have now determined -- were originally marked privileged and, in fact, are

not privileged.

THE COURT: So, obviously, you will speak for yourself in a minute. But your understanding is that the other side's privilege review was just based on search terms, not document-by-document attorney review?

MS. FARNAN: Initially. And I understand there was some -- when they went to do the log, that there were some subsequent review. It's not clear, based on the affidavit, that there has been an attorney review of all of those documents. But the initial call-back was all based on the search terms.

THE COURT: All right.

MR. ROHRBACHER: So we have been suspicious, just because of things we had heard, and we have made clear throughout, we are not going to accept a quick-peek production. That's not what we agreed to. We are not doing it. We asked repeatedly, "Are you doing this?" And we were told almost as repeatedly our suspicions were wrong.

For example, in our Exhibit 16, I was told that they reject all the contentions and insinuations in our letter regarding their approach to discovery. So they never told us what they were

doing, not until the day after the documents were due. And I won't go into the problems we had in getting the documents after the deadline, but it took us about a week to download and get them ready to review. And that's just the first 270-some-odd thousand.

Meanwhile, already one deposition has taken place in this case. We had noticed our first offensive deposition for this morning, and we're seeking an additional two to three, not including a 30(b)(6), which would have to be completed in 16 days. Our opening expert reports are clearly due on July 31. And there is, Your Honor, no way that we would be able to or should have to take the deposition and draft an expert report with 2 million pages to review and 60,000-plus documents yet to be produced.

Indeed, paragraph 15 of the Moilanen affidavit concedes that a document dump of less than this size "... could not be reviewed on a document-by-document basis in 11 days." That we agree with. The math in Footnote 8 of that same affidavit suggests that we would need to hire 20 reviewers for at least 36 days to finish reviewing, even after we get it and load it, to finishing reviewing their massive production.

So it took us a while, but when we finally cracked it open, we quickly saw what they had done. The documents which were marked confidential or highly confidential, apparently without regard to content, were mostly junk. They basically ran the search terms and gave us the results. And that's not going to -- that's not a method guaranteed to give us responsive documents.

THE COURT: Can you tell me again what has happened in terms of depositions. Is it just one?

MR. ROHRBACHER: It is just one. It is a third-party deposition. We have been discussing schedule. We suggested giving our folks up on essentially the dates they were noticed. I guess we are still in flux. We have said -- they said, "No, we will do those on some other date." We have been offered their CEO next week, or next Friday, I guess, next Thursday, whatever the 23rd is, and then a couple other folks in Poland the week after. But that's obviously -- the location is an issue yet to be determined.

So nothing has been taken besides this one third-party deposition. But, like I said, we had -- we planned to start now, because July 31st the

fact discovery closes. August 10th, rebuttal expert reports. August 14th is expert close. August 21st is pretrial briefs. So there's not a lot of time now that we are in this situation.

We attached to our opening brief some of the more egregious examples of what they produced, but those are fairly representative of, at least what I saw, thousands of irrelevant documents. And those are just the English ones we could read. The Polish ones, I ran a few through Google Translate, and they were not, frankly, much better. One was about apartments, apparently, in the local neighborhoods.

Just to give a sense of the magnitude of the differences between our production -- now, they complain about our production -- we produced around 6,000 documents by this point. They have said they produced around 350,000. That's a 60- -- or so -- to-1 ratio.

THE COURT: Who did your second level of review?

MR. ROHRBACHER: Some of the gentlemen who are sitting at the table.

THE COURT: So was it Richards attorneys?

MR. ROHRBACHER: All Richards attorneys. In short, Your Honor, we produced the needles and they produced the haystack. And that's essentially what we believe is the difference.

Now, when we first complained to plaintiff's counsel when we found out what they had done at our July 2nd meet and confer, we were told two things. First, we were told we should be happy because we get to run search terms on all those documents. And second, we were told that nobody actually reviews documents these days.

So first, getting to run our own search terms is not a solution. If we had been interested in that, we would have negotiated and agreed to a quick peek. That is a -- people do that these days. We never would have done it in this case, because it's expedited, and that would have dumped all the burden on us to review. And if we had done it, we certainly would not have given them until July 1. If they are not going to review anything, they should have done it weeks before so that we could have reviewed.

And we cited a transcript ruling from Vice Chancellor Laster where he made clear that even

with a quick peek you don't have a license just to dump documents and even an agreed-to quick-peek production could be unreasonably large. And, again, he was looking at a production, at least gigabytewise, at least two and a half times smaller than their first load, not including what we are going to get. And here, we expressly did not agree to a quick-peek production.

Plaintiff didn't cite any contrary cases. Their attempts to distinguish that ruling fail. First, one would expect an appraisal case to have more discovery than a circumscribed contract dispute. In an appraisal case, you get discovery five years back and three years forward, and they are notorious for requiring tons more discovery than are proportional for the amount at issue. So that distinction actually goes in our favor, I would believe.

Second, it was not expedited. So the other side had actual time to review the documents. Here, we have no time, and it took us 20 percent of our available time just to load the documents. So I believe that distinction also goes in our favor.

And the amount at issue, plaintiff has

conceded that we paid the 600,000 in unpaid invoices, but claims we are on the hook for the late payment charges, which under the contract are limited to no more than 1 1/2 percent per month. So we are talking about essentially a pittance, particularly in relation to the amount that we have already spent reviewing our documents and now theirs.

Now, again, the second thing we were told is that nobody actually reviews documents these days. But that's certainly not my experience in this Court. We cited a Delaware Supreme Court opinion, obviously back in the hard-copy days, but I don't think that Delaware law has changed, unless, of course, the parties agree to a quick peek. But the very existence of the quick-peek protocol shows that the normal course is to review; otherwise, quick peek would be normal discovery.

Another way we can tell that attorneys are supposed to review the documents is because Delaware law requires a document-specific privilege log. And I will let Ms. Farnan discuss that. But yet another way we know is that our confidentiality order in this Court says that if you designate documents as confidential or highly confidential that "... shall

constitute a representation that such Discovery Material has been reviewed by an attorney representing the Party ...."

Now, plaintiff concedes that it "overdesignated" confidentiality, but that wasn't our issue. It's not about overdesignation; it's about the Court's order requiring an attorney to actually review a document. To that they have no response. And further, plaintiffs are doubling down on their plan to deprive us of meaningful discovery by making Rule 33(d) responses and then saying, "We're not going to tell you. You can find it. Run some search terms."

Now, the normal way, Your Honor, that parties do this is you supplement or amend your responses after you've done your document production and you give the Bates numbers. That's what all the cases say. That's what the cases we cited say. 33(d) itself says you specify the documents.

Now, they didn't cite a single case in favor of their position, probably because they couldn't find one. Instead, they said our interrogatories were stupid. They also said that "... the Defendants' pot should not be heard to call Plaintiff's kettle black," whatever that means. They

should be compelled to amend and actually provide the 33(d) responses that Delaware law requires. And this is, Your Honor, just one more reason that the case schedule needs to be vacated.

We have asked for a number of different aspects of relief. First, we have asked to vacate the remaining dates in the scheduling order. Frankly, that hurts us as well, because we wanted to get this nonsense over with and get back to business. But given their actions with the document dump, it would be unfair if we had to start taking depositions tomorrow with this production, with tens of thousands of documents still yet to be produced. It would also be unfair if we had to submit an opening expert report within two weeks.

So the plaintiff should have to go back and do what they should have done the first time under Delaware law. That will, I assume, take at least a month or so. And, frankly, whether they have to review them and certify that they have done so or whether Your Honor tells us to review them and we send the bill to them, that I will leave up to the Court, I suppose. But, in any event, we should not have to bear the cost for reviewing them, as we have done so

far. We are entitled to our fees for bringing the motion and for dealing with the document dump.

Further, the plaintiff should not be allowed to violate the confidentiality order on this next round. It should have to comply with the representations set out in the order, which is to have an attorney actually review the document. They should unredact all the improperly redacted documents. We have a two-tier order. I'm not sure why there were redactions. That was never explained. They should have to produce any English translations. They should supplement their 33(d) responses. Once all that is done, Your Honor, we can discuss putting the case back on schedule.

I am happy to sit down now, unless Your Honor has any questions. I can talk about our document production after the other side has gone or now, whatever.

THE COURT: That's fine. Ms. Farnan, were you going to go next, or were you going to -- Ms. Primoff, are you handling all the issues?

MS. PRIMOFF: Yes.

THE COURT: All right. So, Ms. Farnan, why don't you go now.

MS. FARNAN: Thank you, Your Honor. As Mr. Rohrbacher indicated, I'm going to be handling the privilege log issues and the issue about location of depositions.

And I will start with the privilege log. About a half hour before this hearing, Your Honor, we did get an updated privilege log. So I would like to pass up a copy to the Court, just so that you have it.

So Your Honor has attached as Exhibit A to our reply on Friday the log that was served on us on July 8th, which was the deadline in the scheduling order for privilege logs. Now Your Honor has what we got today. I think what we got today, in fact, raises more questions than it answers and the serious deficiencies with the plaintiff's privilege log remain.

Prior to receiving the log that we received on July 8th, we had not heard anything from the other side with respect to logging documents, no request to deviate from a standard document-by-document privilege log. So, instead, receiving this log, which was four categories of documents, was certainly a surprise to us. And we cited in our

papers the requirements for a privilege log, which are well known, which require, you know, specific information that would allow us to assess the privilege.

Now, I want to highlight, really, for the Court a few ways in which both logs are deficient -- now, we only had about a half hour to review the second log, but the deficiencies are fairly clear -- and, in fact, why those deficiencies matter.

THE COURT: Just the font size alone is challenging.

MS. FARNAN: Actually, to print it -- it's better on the screen. So I actually have a bigger copy of the first log.

THE COURT: If the content matters. I can bumble through. Just let me know what you want me to read.

MS. FARNAN: We did bring a larger copy of the earlier log. That might just help a little bit in reading through the categories. So I will pass those up.

THE COURT: All right.

MS. FARNAN: So if you look at the first category of the log that I just handed up, which

was the July 8th log, it's 1400 documents, all about the agreement that's at issue here.

Now, in that category, they identify two attorneys, Robert Cohen and -- I don't know how to pronounce this gentleman's name, but I'm going to go with Maciej Stankius. And he is apparently in-house counsel at Medicalgorithmics. Now, we knew who Robert Cohen was based on our own review of our documents, but we didn't know who the in-house counsel was until we asked them after we received the log.

Now, we have gone subsequently and, based on a Google search, we have learned, in fact, that Mr. Stankius didn't join the company until 2014. Mr. Cohen, on the other hand, was involved in the negotiation of the agreement, the original agreement at issue between the companies, from approximately October of 2011 to December of 2011.

Now, we know Mr. Stankius comes along sometime in April of 2014, but they have got a range here of four years, from 2011 to 2015. We don't know if there are any documents in that four-year gap where there was no attorney involved. But more importantly, if you search for Cohen in the 280,000 documents that you have, you come up with -- from the plaintiff, you

come up with precisely one document. And it's a draft agreement. There are no e-mails.

In our production, however, there are 15 to 25 -- I forget the exact number of e-mails exchanged between Mr. Cohen and our -- and Mr. Bennett concerning the negotiation of the agreement. So we have a serious concern that there are documents that have been improperly withheld here. And because we don't have document-by-document descriptions, we have no way to test that. But we do know that, in fact --

THE COURT: Assuming the names in the box that says recipients/copyees is comprehensive of who is on the other side of the communication with Cohen, big assumption, but assuming it is, you presumably would have an ability to test whether or not there were communications with your own client that they were withholding. Right?

MS. FARNAN: So, for example -- we should be able to test that, Your Honor. But, for example, we don't see Mark Bennett in there; we don't see Joseph Bogdan. But we know that, based on even our production, that these gentlemen had communications. So what we don't know, and maybe what we will hear is that they were part of the 60,000

documents that were initially culled based on search terms that we are going to get at some point in time that we don't have yet.

But what I'm trying to convey to Your Honor is that there is a real issue here in terms of us litigating the case on an important issue in terms of what is the agreement at issue. Or, you know -- in fact, there is a legitimate issue of contract interpretation here. The parties --

THE COURT: Well, that was going to be my next question. Is there an argument of ambiguity on a provision?

MS. FARNAN: There is. So, as Mr. Rohrbacher said, they have accused our client of competing with them as he was not permitted to. And the language that they are relying on appears in Section 3.3 of the agreement. And, in fact, what we know from review of our documents is that Section 3.3 was inserted by Mr. Cohen. So it's a very important and key issue that's fundamental to this case. The parties dispute, in fact, what that provision means and what it means our client was precluded from doing.

So this isn't a situation where we just want to make them go through the exercise of

doing a log because privilege logs are not fun. It's a situation where we have a legitimate concern about a central issue in the case, and the way in which they have logged the documents is preventing us from discovering that.

Now, after we received this log, I had a meet and confer with the plaintiff, and they told us that their view of the scheduling order was that they didn't need to log communications with outside counsel at all. Now, that comes from paragraph 19 of the scheduling order, which specifically said that communications between Kaye Scholer and Ashby & Geddes and Medicalgorithmics did not need to be logged and that communications between Richards, Layton & Finger and Mark Bennett, who was outside counsel to our client, did not need to be logged. Somehow the plaintiff has -- and I don't know how, because, in fact, in reading the scheduling order and the protective order, but they say if you --

THE COURT: Is the scheduling order attached as an exhibit I can take a look at?

MS. FARNAN: It was not, Your Honor, because we didn't know this until --

THE COURT: Do you have an extra copy?

Actually, I have it here, because I printed it out myself. What's the paragraph number?

MS. FARNAN: Paragraph 19. So subparagraph (i) there says, "... documents evidencing communications between outside counsel (Kaye Scholer or Ashby & Geddes) and Medicalgorithmics ...."

THE COURT: Do you know who the lawyers were that negotiated the underlying agreement that's at issue?

MS. FARNAN: Well, the negotiation history of this agreement lasts about 18 months, from 2010 until the agreement was signed in 2011.

THE COURT: There are two, right, one from 2011 and one from 2014?

MS. FARNAN: There are, Your Honor. So I'm talking primarily -- because the 2014 agreement doesn't change -- they look nearly identical. So there are differences. There is a 2011 agreement; there is a 2013 amendment; and there is a 2014 agreement. The 2014 agreement was prompted primarily by the fact that AMI was jointly run by Joseph Bogdan and his brother, Andy Bogdan. They split up into two separate companies. So that's really what prompted the 2014 agreement.

So when you are looking at how this agreement came to be, you have to really go back to 2011. And that negotiation occurred really from early 2010, as I recall, through December 2011. Initially, neither side had an attorney involved. Eventually, our clients had Mark Bennett, who he was with Strasburger at the time. He was involved in some of the negotiations. And then the plaintiff got Robert Cohen of Greenberg Traurig involved in October of 2011. But there were -- and as I mentioned, the provision at issue that really is key and central to this dispute was inserted by Mr. Cohen, and the negotiations that are going to be most important occurred between October and December of 2011.

So just going back to my point about paragraph 19, so the plaintiff now interprets that to mean that any outside counsel they had does not need to -- those communications do not need to be logged. So if Your Honor looks at the --

THE COURT: Can we just stop for a second on 19.

All right. So (i) is just -- it's documents on each side, as I am reading it, unless somebody tells me I'm reading it incorrectly here.

It's the first time I'm really looking at this. So it's like Kaye Scholer and Ashby talking to their own client.

MS. FARNAN: Correct.

THE COURT: And Richards Layton or Mark Bennett talking to your own client.

MS. FARNAN: Correct.

THE COURT: And (ii) is just a time parameter?

MS. FARNAN: Correct.

THE COURT: All right. So it's not intended to encompass, for example, any communication between lawyers for opposing sides?

MS. FARNAN: Correct. And it wasn't intended to encompass, for example, Mr. Cohen, who was one of the negotiators.

So if Your Honor looks at the log that we received today, they have removed any outside counsel -- so the log we received today, the first overarching issue is the log we received on July 8th had 5,000 documents. Today's log has 25,000 documents. So we don't know how it expanded fivefold. But I would point Your Honor to the Mechel Bluestone case we cited in our papers, where Vice Chancellor

Laster held that a party did exactly that, they served a log that didn't have documents on it, they served a second log that had more. The ones that weren't on the first log the privilege is waived with respect to.

But what they did here is they took all of the outside counsel communications and they put them on the second page and just gave us broad categories. So now Mr. Cohen just has his own category that says "Legal advice and drafting re SAAs," if you look on page 2 of today's log. He is the fifth person down. So now we've gone from at least knowing there were 1400 documents in that category to not knowing anything other than it appears the total number of documents is 15,000.

Now, I guess I will admit, Your Honor, it's hard to tell exactly how many documents have been withheld. If you see, on the second page it says 15,000. On the first page, it says 9,000 in the top right-hand corner, the very first column on the top right. So I added those together. If they have already done it and the total number is 15,000, then the log is threefold instead of fivefold. I'm not trying to misrepresent that, but it's a little bit unclear.

THE COURT: Well, are these boxes purporting to be mutually exclusive?

MS. FARNAN: Well, they said documents may appear in more than one category.

THE COURT: They did. All right.

MS. FARNAN: For example, I guess, Your Honor, we know, for example, if you look at categories 3 and 4 on their log, which now assert attorney work product, those were not on the prior log at all. So we know there are some additions. How many additions, I am not sure I can say with certainty. And perhaps they can shed some light on that.

But that's the first category of documents I wanted to address, and that's the negotiation of the agreement at issue. We have very little discovery from them on the other side on this, and yet we have a massive withholding of privilege documents and we are not able to assess in any meaningful way the assertion of the privilege.

And, again, if we can just go -- if I go back to the first log, the second and third categories of documents they withheld almost -- over 2300 documents where the only attorney was their

in-house counsel, who, as we indicated, based on our public search, arrived at the company in 2014. He is the only person that's listed, but communications predate 2014. Not only do the communications predate 2014, so we are not even certain there is a valid claim of privilege there, but the only description is their business plans and operations.

And so there is a legitimate concern there. As Mr. Rohrbacher mentioned, one of the issues we have is with respect to some product defects, the inability to provide product. So to the extent any of those documents have been withheld, we think they would be within those categories of documents. And so having a document-by-document log is crucial to assessing whether or not the privilege has been properly asserted.

THE COURT: All right. So just so I have the facts here, this Stankius person, is this an in-house counsel or outside; do you know?

MS. FARNAN: We were told he was in-house counsel.

THE COURT: What's the date you say he joined?

MS. FARNAN: I looked at his LinkedIn

profile on-line, and it said April 2014. Prior to that, he was with, I believe, Deloitte Poland. So we never got -- so the only information we got that he was in-house counsel, I told them that we had discovered this on LinkedIn. They said they would investigate it. We haven't heard anything further.

But this category of documents was 2300 documents. If you look at today's log, roughly, if you look at categories 5, 6, and 7, it's now been expanded to three categories, with apparently over 8,000 documents. So, you know, I'm looking really here at categories 2 and 3 of the old log and then categories 5, 6, and 7 of the new log. Again, the in-house counsel, Mr. Stankius, whose name I am sure I am not pronouncing correctly, he is the only attorney listed there. And the date range in category 7 is still worrisome because it goes back to October of 2011.

THE COURT: Have you had any discussions with the other side about that, your concern on the time frame?

MS. FARNAN: We did mention it to them. They said they would take it under advisement and then it would perhaps be reflected if they sent us

a revised log. So this is the revised log, which doesn't seem to correct the issue. But, again, you know, just saying "business plans/operations and contract obligations" is extraordinarily broad. And, again, we have no way of assessing whether or not the privilege was properly asserted with respect to any of those documents.

And I already mentioned, Your Honor, categories 3 and 4, which are work product communications apparently related to a third-party consultant that they hired, which we never saw until today about a half hour before the hearing. So our position with respect to those is that the privilege was waived because they were never even listed previously.

The last category of documents, Your Honor -- it's really categories -- it was category 4 on the prior log and categories 8 and 9 of today's log, and it relates to IP. One of the claims in this case is that we have misused the plaintiff's confidential information.

Now, we have had, I think, some productive back and forth on understanding that claim and, in fact, what the confidential information is

that they are claiming. And if they are limited to what they have told us at this point in time, I am not sure that all of these IP e-mails become incredibly relevant. But back in -- we put this in our papers. Back in 2011, the CEO of Medicalgorithmics provided our client -- I don't know why, but he provided our client with the "freedom to operate" opinion he had received, which contained his attorney-client privileged information. And so to the extent that these -- that their IP -- they are going to make their IP a central focus of this case, we would argue that there was a waiver.

So just to really -- I want to crystallize for Your Honor where the areas of dispute are. I think we put this as a lowest priority. If they change their theory of the case, if they don't stick with what they have said their confidential information is, these could become highly relevant, and we would have a very legitimate waiver argument based on what has happened in the past. But based on the shape of the case today, again, I don't think -- they haven't been properly logged, so we argue that they are waived. But they aren't the most crucial category of documents. The other categories of

documents do cause us a serious concern on key issues in the case.

I think, Your Honor, as you can see, this log raises serious concerns for us. It doesn't comply in any respect with Delaware law. And I think the precedent from both the Klig vs. Deloitte case and the Bluestone case that I mentioned is that a failure to properly assert a claim of privilege is no claim of privilege at all and that it's been waived. And so our request is that Your Honor order the plaintiff to produce all of the documents that have been withheld as privileged or, in the alternative, require them to provide us with a document-by-document log so that we can figure out on the key issues that I mentioned, specifically Mr. Cohen, their business plans and operations, where the proper claims of privilege have been made and where the improper -- and where we may need to test some potentially improper claims of privilege.

Unless Your Honor has any further questions on the privilege log, I wanted to turn briefly to the location of depositions.

THE COURT: I don't believe it's on my list of items for today, but tell me a little bit

about what you guys did by way of your privilege log.

MS. FARNAN: So I think this is perhaps something they may raise today. They didn't file a motion on it. We produced a log for Mr. Tamil, or Dr. Tamil, who is a third party. We did withhold documents as privileged. When we went through -- in fact, Richards, Layton & Finger was preparing the privilege log -- they all were communications with Mark Bennett. And based on paragraph 19 of the scheduling order, we were not required to log any communications with Mark Bennett. I mean, when we began the privilege review, I didn't know, for example, that Mark Bennett was the only lawyer that Mr. Bogdan had consulted. So we did not provide a log. When we provided our log for Dr. Tamil, we told them the reason why we weren't was based on paragraph 19 of the scheduling order.

They made a request last week that we log communications with Mark Bennett during the time period that he served as in-house counsel. And we explained to them that Mr. Bennett has never been in-house counsel at AMI or Spectocor. Mr. Bennett was an attorney at Strasburger. He eventually left Strasburger, and he now still does outside legal work

for AMI and Spectocor, but he is not employed as an in-house attorney. He has never been on the payroll.

The way that the plaintiff gets to asserting that Mr. Bennett is in-house counsel is based on our confidentiality order. And there was -- when we were negotiating the confidentiality stipulation, the plaintiff was trying to tweak the definition of who was outside counsel to basically exclude Mr. Bennett so he couldn't have access to highly confidential information. And these were conversations between Mr. Rohrbacher and Ms. Primoff, and I was privy to them as well. And what we said to them was, "Look, he's not in-house counsel, but he doesn't need to see highly confidential information. We will agree to that." So Mr. Rohrbacher sent an e-mail, "We will treat him as in-house counsel for purposes of paragraph 7(A) of the protective order." We never conceded that he is in-house counsel. He is not in-house counsel. But we didn't see any need -- Mr. Bennett doesn't need access to highly confidential information -- Richards, Layton & Finger is litigating this case -- and so we agreed to that.

THE COURT: You have given them a log for Mr. Tamil. Right?

MS. FARNAN: We have.

THE COURT: Again, give me a sense of how much is on it. Is it document by document?

MS. FARNAN: It is document by document. I think there were 15 documents on it. Mr. Burns had prepared the log. But I think there were 15 documents. It was document by document. It was broken out by e-mail and by attachment. So if we -- if we had communications to log, we logged them appropriately under Delaware law. And I just don't think that the plaintiff did the same.

With that, Your Honor, I would just turn briefly to the deposition issue.

THE COURT: All right.

MS. FARNAN: We originally noticed depositions for five officers and directors of the plaintiff, and we noticed them in Wilmington, Delaware. They came back to us and said that they wanted to have those depositions go forward in Poland. In response to that, we said that we would agree to have only three of their senior officers and directors deposed, but that they should bring them to Delaware.

As Your Honor knows, and we cited in our papers, the general rule is that a plaintiff's

officers and directors who file suit in Delaware should come to Delaware for deposition. There is no basis here for the Court to deviate from that standard rule. We have selected a narrow set of deponents. As I mentioned, we selected five. We narrowed it to three.

In the letter to Your Honor, they informed us, in fact, that their CFO had left the company, which is -- that's actually -- that's not insignificant, Your Honor, because he was a very key person, both in terms of the original negotiation of the agreement that's at issue here, as well as all -- based on our review so far of their documents, all of the agreements that Medicalgorithmics has outside of the United States, which they claim we are not allowed to do anything outside of the United States. So their activities outside of the United States are important. He was a key player in that. And they didn't tell us until eight days after he resigned that he actually left the company. So until sometime last week, we thought we were going to be able to depose who was a key figure. In any event, he is no longer at the company, so we dropped him.

But we are looking to depose the CEO,

the chief technical officer, and the deputy chief finance officer, who replaced the now-departed chief financial officer. These are all three deponents with personal knowledge who have been involved in the facts that are going to be at issue here. And because we have selected a narrow set of dependents, each of whom have personal knowledge, none of the exclusions that they have pointed to in their papers apply. This is not like the Conoco case, where they tried to depose 11 people. This is not like UniSuper, where the deponents had no personal knowledge. These are three key figures who all had personal knowledge.

And it's our position that, in fact, equity -- in this situation, given all the issues we are dealing with today, equity would weigh in favor of these depositions proceeding in Delaware. We are still trying to deal with their large document production. We would have to deal with issues of getting a court reporter over there. We would have to deal with our own counsel schedules, travel, all while trying to meet the expedited schedule and with all of the burdens that have been placed on us.

And, in addition, Your Honor, the failure to inform us. Now, I understand, Mr. Trainer

told me that they did not know until they told us that the CFO had left the company. But the client should have communicated that to them. I mean, I do think that's important to consider here, that a key figure has now apparently left the company and we won't be able to get his deposition. And yet now they seek to have us go to Poland to depose three other people.

THE COURT: So the slate currently is CEO, deputy CFO. Who is the third?

MS. FARNAN: The chief technical officer.

THE COURT: The CTO. Okay.

MS. FARNAN: Yes. So unless Your Honor has any questions, I don't have anything further at this time.

THE COURT: I don't.

MS. FARNAN: Thank you, Your Honor.

THE COURT: Ms. Primoff.

Maybe Mr. Trainer.

MR. TRAINER: If I might just interrupt. I appreciate Mr. Rohrbacher's comments, but if I was Your Honor, I would be wondering where Ashby & Geddes was in all of this.

THE COURT: That thought crossed my

mind, especially given what we say in our guidelines.

MR. TRAINER: Yes. And, Your Honor, I can tell you this: Ashby & Geddes -- most of the communications were between or actually among Ms. Farnan, Mr. Rohrbacher, Ms. Primoff, and Mr. Lynn. Mr. Rohrbacher and I did have conversations about location of depositions. Ashby & Geddes did not deal directly with the document review. We did not deal with the vendors who were doing it.

But that aside, Ms. Primoff and I were in regular communications, so I was aware of how the documents were going to be produced. Given the practical realities, I thought that was the best thing to do. But if Your Honor is concerned about that, I just -- we are on the hook, too. So we were involved.

THE COURT: I appreciate the candor. And I think you will have to be more active in this going forward. But why don't I hear from Ms. Primoff.

MS. PRIMOFF: Thank you, Your Honor. Madlyn Primoff for the plaintiff, Medicalgorithmics.

Your Honor, this is an expedited proceeding.

THE COURT: Only because you guys made it so. And you didn't even really ask me for

permission other than to enter a schedule. So I accommodated you and you, both sides.

MS. PRIMOFF: Yes. Yes. And the defendants agreed. And what I wanted to address -- and we will get to the document issues very promptly, Your Honor, but what I wanted to address is why it's important that this be an expedited proceeding.

THE COURT: It's going to be less expedited after today, just to preview what's going to happen here.

MS. PRIMOFF: The plaintiff manufactures and operates a device and software known as the PocketECG. And the system is a heart-monitoring system that transmits interpretive results to patients in realtime. Going back to 2011, the plaintiff entered into a strategic alliance agreement with the defendants. This SAA, strategic alliance agreement, is essentially a license agreement, and the defendants, together with one other entity, have the exclusive right to market and develop and use the PocketECG in the United States.

You have heard the defendants make reference to Section 3.3 of the SAA, which lies at the core of this dispute. In fact, it's the principal

claim in this dispute. Section 3.3 says that without first providing notice of the termination of the SAA, the defendants agree that they will not seek or develop any technology to replace plaintiff's products or services, period. Full stop. Plain. It says nothing about international markets.

Shortly before filing the complaint, the plaintiff learned information and developed the belief that the defendants were, in fact, seeking to develop technology in breach of Section 3.3. The plaintiff's belief was confirmed by the defendants' principal, Joe Bogdan, himself in writing just days before we filed the complaint.

What we've now learned through discovery, Your Honor, is that defendant Spectocor has purchased a two-thirds interest in a company called HTel for $300,000, and they have entered into a development agreement with another company called imedLogix that provides for imedLogix to develop an ECG monitoring product that is as good, or at least as good as Spectocor's existing product, which is our product.

THE COURT: One second. Is there a confidentiality issue or something?

MR. ROHRBACHER: I believe Ms. Primoff is talking about highly confidential documents. And although I love Mr. Compton, he is not --

THE COURT: Have these things been designated confidential in this case?

MR. ROHRBACHER: I believe they have been marked highly confidential, these particular agreements that Ms. Primoff is talking about.

THE COURT: All right. So are the names confidential or the terms?

MR. ROHRBACHER: The names are fine. The terms of the agreements are highly confidential, as are any developments that -- it sounds like she is about to start talking about what happened in a highly confidential deposition.

THE COURT: I guess, Ms. Primoff, if you need to refer to these things, then I need to excuse Mr. Compton from the courtroom. If you don't need to refer to the items that are of concern, it would be better to just sort of talk around it. So I guess what I'm hearing --

MS. PRIMOFF: I will do the best I can. If you think that I am saying something sensitive, then feel free to stop -- if you have a

better suggestion --

MR. TRAINER: Excuse me, Your Honor.

THE COURT: That's fine.

MS. PRIMOFF: I will try, Your Honor, not to talk about it.

THE COURT: All right.

MS. PRIMOFF: So there's a development agreement with imedLogix. It provides for them to be paid a pile of money if they successfully develop an ECG monitoring product.

THE COURT: Okay.

MS. PRIMOFF: Both of these companies, HTel and imedLogix, which were identified by the defendants in their interrogatory responses, are controlled by Dr. Lakshman Tamil. We took Dr. Tamil's deposition last Thursday, July 9th, and that deposition confirmed our worst fears. Dr. Tamil testified that through HTel and imedLogix --

THE COURT: Do we have a problem here with this, too?

MR. ROHRBACHER: This is exactly what I'm concerned about, is she's going to tell you what Dr. Tamil's deposition said.

THE COURT: All right. So I'm going

to ask Mr. Compton and the other person in the courtroom --

MR. ROHRBACHER: She is a summer associate at our firm.

THE COURT: So you may remain. Sorry, Mr. Compton. We will call you back.

(This portion of the record was deemed confidential and the courtroom was cleared.)

Go ahead.

MS. PRIMOFF: I apologize, Your Honor. So Dr. Tamil testified that, through HTel and imedLogix, he is developing a telehealth or telemedicine platform. The technology being developed is, in part, a cardiac monitoring system worn by the patient over an extended period of time using ECG to permit monitoring by a doctor or monitoring site. So what we learned from Dr. -- and what we learned from Dr. Tamil, moreover, is that these efforts to develop date back to at least September of 2014. So we are coming up on a year.

The reason that this is meaningful is that the SAA very plainly prohibits the defendants from seeking to develop unless they give us notice of termination. They didn't do that. They have just

gone ahead and developed for almost a year. In the meantime, plaintiff's hands are tied. Because they refuse to acknowledge that we've properly terminated the agreement, we cannot, as a practical matter, go out and do anything with the technology with somebody else here in the U.S. So we are sitting here in limbo, while they've gotten nearly a one-year head start in developing technology. That's not fair. It's just not fair.

THE COURT: That may be. And these are the ultimate merits of this case. But today, I've got to sort out a rational way to deal with discovery to get you to a prompt resolution. It's not going to be in the early part of September. And I want to get a prompt resolution because -- a little preview -- I am not very happy with how this has gone down so far. So let's go through the discovery issues.

MS. PRIMOFF: Understood, Your Honor. And I just wanted to give you some background.

THE COURT: I have got it. You have a very significant issue for your client. I get it.

You can tell Mr. Compton he can come back in.

(The courtroom was reopened to the

public.)

MS. PRIMOFF: Again, the principal issue in this case, Your Honor, is the Section 3.3 issue. The other issues are largely a smoke screen. And there's nothing in plaintiff's documents that speak to the 3.3 issue. We are not the ones out there developing the competing --

THE COURT: But even by your chronology, other than the interpretive questions, I guess, that may be raised about the meaning of 3.3 -- there will presumably be some fight about that, which may go back in time, I guess, all the way to 2011, possibly. I don't know. But the time frame you are talking about would seem to make the period that's really relevant to discovery much narrower than this five-year relationship that you people have identified as the scope of these productions. Am I missing something?

MS. PRIMOFF: Well, that would have been the case, but defendants' counterclaims put into issue course of performance and course of dealing in terms of how payments were made, what the repair history was, what the product performance history was, and all that sort of thing.

THE COURT: Okay.

MS. PRIMOFF: As we show throughout our papers, there are problems with defendants' production, a fairly poultry production, if I may, Your Honor, of less than 6,000 documents. They finally admit in page 3 of their reply that their production is not perfect. I'm not telling you ours is perfect, either. It's not. But we do believe that it was reasonable and appropriate.

THE COURT: Well, that's where you've got to convince me otherwise, because the problem I have right now is the picture of your production is you really didn't try. You dumped. Their production, they had contract attorneys review a pretty significant universe, a second-level review by attorneys with the firm that's in front of me now taking accountability for it. The output number might look relatively modest compared to the output number you laid at their doorstep, but your production looks like the classic dump.

MS. PRIMOFF: And it really wasn't, Your Honor. So let me try and address that.

Again, it was a four-year relationship, 54 document requests. They sought all

documents. If you look at my colleague Mr. Lynn's affidavit, we fought very, very, very hard over search terms. The search term fight went on on basically a daily basis from June 3rd to June 19th, with us resisting the addition of lots and lots and lots of search terms. So if we had intended to do a document dump, we would have just said yes to all of the search terms and produced all of the documents.

THE COURT: The breakdown that I see, though, and you tell me otherwise, is -- and this is not a finger-pointing exercise. But there was no communication after you started doing hits on your search terms. There's no dialogue going on with the other side about what it would yield. And, obviously, you knew, as they did, the schedule both of you asked me to impose in this case. So why did that happen like that?

MS. PRIMOFF: Right. So we did not hide the ball and we were not trying to hide the ball. Let me try and explain what happened.

THE COURT: Okay.

MS. PRIMOFF: So, as Your Honor knows from our papers, we hired PWC in Poland. We really and truly do believe that -- this is not an

advertisement for PWC; it just is what it is. We interviewed a number of firms. We really and truly do believe that PWC was the only firm that had the capability to do this. There were some complicated collection exercises that needed to be done because of the way company personnel maintained their e-mails and screen shots and whatnot. So PWC had people on the ground in Warsaw to collect. They had a team in Warsaw to process. They brought in their uber-team from the Netherlands, as well as folks in Chicago.

So the collection process itself was very difficult. Our main focus was on making sure we found all potentially responsive documents. And we are very confident that we have.

While PWC was running and assembling the collection process, they couldn't feasibly tell us how many search terms the documents were hitting because they were restoring the Dropbox, for example, while all this was going on. So it really wasn't until right around that June 19th time frame, when, coincidentally, we reached agreement on the final list of 150 Polish and English search terms, that PWC had collected all the documents so that they could run the searches. And the number came out to be a million

hits, and we said, "Okay. What are we going to do?" And we did what we thought was -- there were only 11 days left to meet the Court's scheduling order.

THE COURT: Well, again, your scheduling order.

MS. PRIMOFF: Yes, okay. To meet our scheduling order.

THE COURT: I'm not going to take the fall for your scheduling order.

MS. PRIMOFF: Okay. We knew that we couldn't, nor could anybody have reviewed the documents by hand. So we employed what we think were credible, responsible, routine, customary sampling and filtering techniques to review the document set. And we brought in, in addition to PWC, UnitedLex in both New York and Kansas.

THE COURT: Who are they?

MS. PRIMOFF: They were a document firm that has technical people as well as lawyers.

THE COURT: Did any attorneys actually do a substantive review?

MS. PRIMOFF: Of every privilege log, whether it is in Polish -- I'm sorry. Every document that's captured by our privilege log, whether the

document is in English or in Polish, has been reviewed by an attorney.

THE COURT: Right. But how about the ones that aren't, that aren't on a privilege log?

MS. PRIMOFF: If it's not captured by the privilege log, then we did sampling and we did filtering, and we did multiple rounds of sampling and filtering, but we did not hand review each and every document, and nor could we have.

THE COURT: Well, again, based on the timelines you imposed on yourself. But people can come back to me and ask to change schedules when they realize these problems. But put that aside.

I am inferring, from what you are saying, that the privilege log must have gone down this way, though, which is: Through this automated process, you identified when a lawyer is involved, and then a lawyer looked at it. Is that right? Because it wouldn't make sense the other way, if nobody was reviewing the nonprivileged stuff that was a lawyer.

MS. PRIMOFF: We developed a list of terms that -- in conjunction with the client, a list of terms that were likely to hit on privileged documents.

THE COURT: Okay. And somebody looked at those to do the log?

MS. PRIMOFF: Somebody has looked at every document that's encompassed by the log.

THE COURT: All right.

MS. PRIMOFF: So we did sampling of the document set, both on terms -- so you see in our papers, for example, there is an example of the word "PO," which in this case we used to refer to purchase order, but in Poland it means "at." So we removed that from the production. And we advised the defendants of any terms that we were removing from the production for any reason. So -- and in addition to sampling certain terms that were producing an illogical number of hits, we also reviewed the -- sampled the production as a whole to see whether any particular problems were jumping out. So, for example, there were 150 or 200,000 just fax cover sheets that we were able to identify.

So we did far, far, far more than a quick peek. There was never any agreement -- Mr. Rohrbacher did introduce the concept of a cap on documents. We rejected that concept. There was never any concept of a quick peek. So if it's 300,000

documents, then that is what it is. It's not perfect.

THE COURT: There is also no agreement, though, on no lawyer review. Right?

MS. PRIMOFF: No, there was no agreement on no review.

THE COURT: Which is pretty customary here.

MS. PRIMOFF: Understood. I mean, I remain surprised that their production only has 6,000 documents.

THE COURT: I got that. Look, maybe there are some issues there. I'm not sure yet.

MS. PRIMOFF: Our goal certainly was to give them everything, not withhold anything. I am confident that they have everything. They can --

THE COURT: I don't think they are complaining about that.

MS. PRIMOFF: Well, they can run their own search terms. The difference is, I am not confident that we have everything. I mean, there is examples in our papers of documents that were not produced by the defendants that were produced by third-party witnesses, and that raises a real question.

But I do think it's important, Your Honor, for the reasons I said at the outset, that we keep as closely to the original scheduling order as Your Honor believes is appropriate.

I just want to address some of the comments that defendants' counsel made. I will try to be brief, Your Honor. Defendants' business, as best we understand it, is, except to the extent that they are wrongfully developing a product, their business is their business with us. Our business, however, is much broader than these folks. We operate all over the world: China, India, Brazil, England, Europe. Our CEO is going to Japan on the 27th. So we operate all over the world. To say that we should have reviewed all of his documents or reviewed documents of his before conducting search terms is completely impractical and not feasible.

On the highly confidential issue, we originally designated 234,000 documents as highly confidential. We are a technology company. The technology is obviously the lifeblood of their business. We have since reviewed those designations, and we have reduced them by 204,000 documents. So we have taken 204 of the original 234, and we have

reduced the confidential -- the highly confidential.

THE COURT: The key issue there, though, is your confidentiality order, which I think is pretty standard -- it's probably patterned after our guidelines -- requires attorney review to make those designations. That did not happen.

MS. PRIMOFF: Well, in conjunction -- I will be perfectly candid with Your Honor about what we did, of course. A lot of these documents are technical stuff that lawyers couldn't feasibly make that determination over, in any event. So what we did with our client was we developed a list of custodians, so a subset of custodians whom our client understands are the people who possess the highly confidential information. And then a list of fields that would pick up the highly confidential documents that are of particular concern. And we did that in conjunction with our client, so that the number has been -- there's about 30,000 highly confidential documents. And, frankly, we have with us today a binderful of documents that the defendants, in their very small production, have designated highly confidential that we don't believe are highly confidential. And we will ask them to lift the designations, and hopefully they

will do that. But our view is, for anything that they want us to consider whether to lift the designation, we are happy to consider it.

On the Rule 33(d) issue, I really don't think that's an issue at all. I've looked at every place we've made a Rule 33 designation, which is about a dozen interrogatory responses. Half of them are documents that defendants have. So all notices sent to defendants under the SAA. They are just as capable of identifying those documents as we are, because they should be in their files.

The other half a dozen items are all things that we can either provide them the Bates numbers for or they could be readily addressed. All communications with Mark Patterson, for example. The only communications we have ever had with Mark Patterson is at his Spectocor or AMI address.

THE COURT: I don't even know who he is.

MS. PRIMOFF: He was the former CFO of the defendants.

THE COURT: Oh, all right.

MS. PRIMOFF: You know, all communications with the board members. Well, they had

asked us for the names of the board members, and they have the names of the board members and they can run a search.

THE COURT: The problem with all this is it's not the way Rule 33(d) works. I mean, you can either answer an interrogatory with a narrative or you can specifically identify the documents to which you are referring somebody to get the information. I don't know of any precedent in this Court that "go search yourself" is an answer to that.

MS. PRIMOFF: Okay. On the privilege log, Your Honor, again, they didn't even submit a privilege log. So that raises some questions for us. You know, we are told that Mr. Bennett was first at the Strasburger firm. Now we are told that he's not at a law firm, but he's not inside counsel. So what is he? I suppose he's a consultant. Maybe he's a legal consultant. But is he providing exclusively legal advice? Is he providing business advice? We have some questions about that.

THE COURT: Are you contending that what they did with Bennett isn't in accordance with paragraph 19 of the scheduling order? I mean, I have read that for the first time here. Maybe I read it

too quickly. But it sounds like he is listed -- if there were communications between the defendants and Bennett, it sounds like you agreed they didn't have to log them.

MS. PRIMOFF: We did agree that they didn't have to log them. And with respect to Bennett, we agree that they have complied with the terms of the order. We are just surprised that they don't have any logs at all. That's all.

THE COURT: Okay.

MS. PRIMOFF: To the deficiencies that they observed, they are in the 60,000 documents, and the 60,000 documents have been produced. And if there is any issue with your vendor -- with the defendants' vendor, they can let us know, and we'll address it. But they have -- so, for example, documents with Robert Cohen, who I believe was at Greenberg when the SAAs were negotiated on behalf of the plaintiff, those documents should be in the 60,000 documents.

I think Ms. Farnan made a misstatement. The new log has 9,000 documents on it. Each document that's encompassed by the log, whether it's in English or in Polish, has been reviewed by a U.S. attorney. Mr. Stankius is in-house counsel, and

the discussions with vendors encompass things like Verizon and telecommunications vendors.

THE COURT: When did he become in-house counsel?

MS. PRIMOFF: A year ago. There is a typo on the log, and I apologize, Your Honor. There is one Stankius entry that begins with 2014, and there is another one that refers to an earlier period. I think it's No. 7 on the new log. And instead of saying "inside counsel," that should say "outside counsel."

THE COURT: Okay.

MS. PRIMOFF: So, in short, Your Honor, yes, I recognize that this did not comply with the jot and tittle of Delaware practice, but the parties were very focused on meeting the July 1 deadline. Everything we did was done in good faith, with a view to making sure that the full pool of documents was made available to defendants on a timely fashion.

THE COURT: All right. Did you want to say anything about the deposition location?

MS. PRIMOFF: Yes. Thank you.

So as early as this morning, Your

Honor, we reached out again to defendants' counsel and have offered to produce the CEO in New York on July 23rd, and then have the chief technology officer and the finance person's deposition proceed in Warsaw on July 29 or 30, and have the product manager -- that's Mr. Kulesza -- his deposition in either New York or Delaware on August 6th or 7th.

THE COURT: Is that the CTO person?

MS. PRIMOFF: The CTO person is Tomasz Mularczyk. So we've got CEO is Dziubinski, CTO is Medicalgorithmics, Sztandera is the finance, and Kulesza is the product.

THE COURT: So you are agreeing to one in New York, one in New York or Delaware, and the third you want in Warsaw?

MS. PRIMOFF: The remaining two. We understood that they wanted the CTO and the finance person. And on each of those -- let us address it. Frankly, these are all key operational people. They are all the very, very senior management of the company. The CEO and the CTO are the only members of the company's management board. Mr. Zolkiewicz, the former CFO -- I should mention, he resigned on July 1. It was a surprise to the company. The company did not

alert us to it until days later, when I was reaching out to them about the deposition schedule, and they said, "Oh, by the way, he is not here anymore." And I probably said, "Thanks for telling me," or something like that.

THE COURT: I'm sure.

MS. PRIMOFF: And so we apologize for that. This is all happening in real --

THE COURT: I don't think they are suggesting anything untoward about the CFO leaving.

MS. PRIMOFF: Right. We do not intend to call him as a witness in this proceeding. He has left. He has left of his own accord. He has no affiliation with the company. But these are all very, very senior officers and managers of the company. For the chief technology officer to be away from the company is a problem. For him to be away at a time when Mr. Dziubinski is traveling for business reasons is a super-duper problem, because they are the only two members of the management board. And we think that we have proposed a fair and reasonable compromise.

And then, on the other side, you know, whereas they noticed up all of these persons'

depositions for Delaware, we have noticed up their persons' depositions for Texas. And they will say, "Well, that's because we chose to file here." And, yes, we chose to file here, but we chose to file here because it's the exclusive venue provision under the agreement. So I don't think we should be penalized for that. And I just think this is goose versus gander. What's fair is fair. And we think that it's fair to have two out of four depositions in Poland. And, likewise, it's fair to have -- there's four depositions of their officers as well. It's fair to have two of those be in Dallas and two of those be here in Delaware. And that's all we're asking for, Your Honor, is that it be fair.

THE COURT: All right. Thank you.

MR. ROHRBACHER: Your Honor, I will maybe skip a little out of order here.

I first want to address a couple of the points Ms. Primoff made about their production. And I believe I can do this without requiring the Chancery Daily to leave.

I was at Dr. Tamil's deposition. Ms. Primoff was not. I wholeheartedly dispute everything she said about it. And the reason for

expedition, Ms. Primoff pointed Your Honor to Section 3.3. And the first clause says, "Without first providing notice of termination of this Agreement to Supplier, Buyer agrees ...," so on and so on.

We dispute that there was any breach before then, and there will be plenty of contention on our side, A, that the agreement doesn't say what they said; B, that even if it does, it was not breached; and, C, even if it was breached, it was not material because we are talking about two weeks of time from when one agreement was signed and the termination.

That all being said, notice of termination has been provided. It was provided in May. So under the express terms of the agreement, AMI/Spectocor is allowed to do those things. So the fact that -- and I am not conceding at all that these terms are being -- are implicated. But even if they are, they are okay, because the agreement says once you provide notice of termination, you can do this development. Notice of termination was filed in May. So the fact that development is ongoing is not a present harm. The only harm could have been between mid-April and the date of termination, which is mid-May.

So anything that's happening now is happening expressly under the terms. So there's no reason for expedition on that head, because any "harm" was done and final as of May 18th or thereabouts.

THE COURT: Why is any of this case expedited, then? You are saying it's all historical in nature?

MR. ROHRBACHER: Your Honor, there really is no need for it to be expedited now that we have a status quo order in place. And just, if it's helpful to the Court, when this action was first filed -- we service heart patients. These folks are being monitored for a reason. And when the complaint was first filed, they said, "Hey, we're terminating. We're yanking the plug. You have got 90 days to find somebody else to monitor these folks." We said, "Hold on. That's not okay. Let's get this going." And then we --

THE COURT: Might be a little distressing to the people using the monitors.

MR. ROHRBACHER: Yes, Your Honor. So we negotiated a status quo order that I believe is very helpful. And it says so long as this case is going on, you can't pull the plug. We will agree to

pay whatever the prices are. And so once that --

THE COURT: They probably signed it expecting a trial in September. But okay.

MR. ROHRBACHER: Fair enough, Your Honor. But having that in place allows the patients who are being monitored and both entities to continue operating to protect these folks. And so other than that, there is really no reason for expedition.

And one other point. We heard that all the deficiencies are cured in the 60,000 documents. We are not aware that those have been provided.

We heard a couple things, pretty much all of which actually served to, I guess, confirm our suspicions. It is not true, though, that the other side took until June 19 to run any search. On Exhibit 11 of our affidavit, Mr. Lynn said on June 15 that they had run the search terms and maintained their objections as to specific terms. So we believe that by the middle of June they had already been running the terms and had results.

I heard about Rule 33(d) and how the burden is substantially the same for both parties. That's what the rule actually says, is when the burden

is substantially the same for both parties, that's when you use 33(d). That's when you disclose the documents. We are entitled to their contentions as to which of those documents are the ones that they are referring to.

I don't think I need to touch on their -- issues with their production. I think Ms. Primoff pretty much confirmed what we were going to say.

We did hear a complaint about the search term "PO," as that was a bad term in Polish. That was their proposed term. I think that's Mr. Lynn's affidavit, Exhibit 1. That was a term that they proposed, as well as "AB" and "JB," which are other terms that they complained about.

So I want to turn briefly to our production, because there are a number of contentions made about it. And I am happy to take any questions that Your Honor might have. Delaware lawyers -- and mostly the folks involved are sitting at this table, one of them standing up, but we were involved at every stage of planning, supervising, and reviewing. We were -- we had folks in person -- Mr. Burns, Mr. Nucum were in person -- when our document reviewers started

reviewing. They were there for several days, and they have been here the entire time. Second level of review. We have done a third level of review.

We asked questions of every one of the custodians. "Where do you keep your documents?" Once we learned that, we gathered all of those sources. We have disclosed those sources in our reply brief, so to the extent that portion of plaintiff's cross motion is still alive, it is moot. We disclosed them. We reviewed each one of Joe Bogdan's e-mails. We agreed to search terms as to everybody else.

THE COURT: So tell me the nuts and bolts of how the attorney review works. You have agreed-upon custodians. You run the search terms. When the lawyer gets involved, what are they doing?

MR. ROHRBACHER: So the lawyers at our firm or the contract lawyers?

THE COURT: Tell me the contract attorneys first and then the lawyers at your firm.

MR. ROHRBACHER: So we sent a total of about 140-or-so thousand, 130-or-so thousand documents to contract reviewers.

THE COURT: Just based on what came out of the search terms?

MR. ROHRBACHER: Based on the search terms. Plus all of Joe Bogdan's e-mails without regard to search terms. And we supplied them with pleadings. Delaware RLF attorneys discussed the case with them and sat there for days as they started reviewing. And at every juncture, other than two categories -- one were financial statements that we had already told the other side we weren't giving up, and another one was another category we told them we weren't giving up -- every time someone came to us with a question, "Should we produce? Should we not produce?" "Yes, produce." We did not make -- if there was anything on the line, we fell on the side of producing. So we --

THE COURT: Or at least put it in the bucket for the second review?

MR. ROHRBACHER: Correct.

THE COURT: Maybe not.

MR. ROHRBACHER: Correct. And I don't believe that we took -- we may have taken some out of the second-level review. But our goal was to produce every document that we thought touched on any of the issues at all.

THE COURT: So the basic methodology

was: Search terms gives you a big bucket. And then, based on the actual requests themselves, an attorney, whether it is contract or your firm, based on understanding the categories, then further narrows things. That's the essence of it?

MR. ROHRBACHER: And, in fact, Your Honor, that's partly correct, but I would say we actually did more than that.

So it is correct that we used search terms to collect the -- besides Mr. Bogdan, to collect the universe of reviewable documents. That much is true. The requests were a guideline. But there were a number of requests that we objected to, and then on meet and confers we said, "Listen, we don't think this is relevant. But you know what we're going to do? If we come across it, we will produce it."

So we actually did even more than that. We produced everything that we thought was responsive, whether we agreed to produce it or not, other than the two categories, one being the financial statements and one being that they had asked for every communication with any potential investor. And we said, "We are not going to give you that; but if we gave something to a potential investor that's

otherwise responsive, we will give you that. But we're not going to give you any specific investor material."

THE COURT: What explains -- I mean, this is oversimplifying things grossly, but how do you end up with, like, 5 or 6,000 documents out of 140,000? That seems to be the fundamental problem the other side is raising.

MR. ROHRBACHER: The difference, Your Honor, is that we seem to have a general agreement, I suppose, about what is responsive. The other side believes that every single e-mail between one party and the other was responsive and must be produced. We did not produce every single e-mail, because some were junk, some were about things that had nothing to do with what's at issue in the litigation. So what we did was everything that was potentially at issue in the litigation, any of the subject matters, any of the allegations, we produced that. If it was about "Do you want to go bowling on Saturday night?" we did not produce it, even if it went between the parties. And I think that's probably the principal difference.

And I want to touch on a few of the specifics. So Ms. Primoff challenged our document

production. But even though they theoretically have every document that ever existed, they only found a few things. They assert, with no basis whatsoever, that we, quote, chose to omit older documents copying Professor Gupta from our production. We did not. Those e-mails we checked. They were not in Joe Bogdan's e-mails when we did the collection. They had obviously been deleted sometime before the litigation. And we produced documents on similar topics. So we were not trying to hide anything; they just didn't exist.

And they also assert on pages 32 and 33 of their brief that we have omitted "many documents" regarding confidential information and suggested that we excluded them. The Moilanen affidavit, in paragraph 33, tries to make us look bad by listing nine different Bates numbers, to make it look like a big healthy stack, hoping the Court didn't notice that those refer to two e-mails, but every single page was specifically listed.

First of all, one of the documents we did produce. It is AMI 3149. So there are two documents, essentially, in Ms. Moilanen's affidavit Exhibit 3, two e-mails, one that had some exhibits.

The first e-mail we did produce. They said we didn't, but we did. Second, the other one, we didn't produce because we don't believe that it is responsive or relevant to any of the issues in this litigation. So, yes, it was a document. We did collect it. The other side says it's now the transmission of some purportedly confidential information, which came from a third party, by the way. So I'm not sure how that flies. But when we reviewed it, we didn't believe that it had anything to do with this case. I still do not believe that it has anything to do with this case. So they found one example of a document that we had in our production that we did not produce, and I do not believe that that is sufficient to result in the relief that they are requesting.

And just for safety's sake, Your Honor had asked a question: Did I ever disclose our hit numbers? That's Exhibit 12 to our affidavit, where I told Mr. Lynn about the two terms, "know-how" and "@Medicalgorithmics" for Juan Velez's documents. And in my e-mail, on Exhibit 12, I told him roughly the 100,000 hits.

THE COURT: All right. Ms. Farnan, it looks like you want to rise, but we are going to take

a break for a little bit and come back in about 10 or 15 minutes.

(Recess taken from 3:33 p.m. to 3:48 p.m.)

THE COURT: Ms. Farnan.

MS. FARNAN: Thank you, Your Honor. I just want to address a few brief points. First, I'm going to overlap with Mr. Rohrbacher a little bit. I just wanted to address a little bit further the document review, because somehow, unlike Mr. Rohrbacher, I had the pleasure of going through thousands of documents.

THE COURT: You thought partner was going to be soft duty.

MS. FARNAN: Right. So I did what I thought I would never have to do when I was a partner. So I do think our process was robust. In addition to Mr. Burns and Mr. Nucum reviewing them, I personally reviewed thousands of documents. And we did have conversations. Initially, before we made our production, we had conversations where we thought, you know, 5,000 documents isn't that many. So we went back and we double-checked ourselves. The thousands of documents I reviewed, there were, I think, one or

two where I had disagreed with the calls. And this was in mid-June. So we communicated that to our team, to the document review team, made these kinds of documents either -- one was a confidentiality designation, one was a response to them. So it was a very robust effort to really get them all of the documents that were responsive.

Our client spends a lot of its time selling and talking to customers, and they talk to customers about issues that are nowhere near this litigation. They talk to customers about signing them up, about what doctors want to see out of reports. They don't talk to them about the devices, which are the core of what's at issue, and the work that they allege that we are doing in violation of Section 3.3.

So in our collection -- I saw it myself -- there are a large number of documents that just aren't responsive. So there was no attempt to hide anything, and we really did do our best. Again, like we said in our papers, I don't think anybody can profess to be perfect on document review, especially when you are working on an expedited schedule. So if there are issues, we are happy to look at them, address them, correct them, but there was no attempt

to do anything but the best that we could do. And because somehow partner seems to be better for Mr. Rohrbacher, I thought I would just address that myself.

THE COURT: He is senior to you.

MS. FARNAN: Maybe not. He is actually older than me, but I am senior to him at the firm. In any event, I just wanted to address that.

THE COURT: Sorry about that. My mistake.

MS. FARNAN: That's okay. He is smarter than me. I will give him that, too.

On the privilege log, I think we did hear now, it's just hard to make heads or tails of the privilege log. And we have a new privilege log today that has -- if it's 9,000 documents, I will accept that it's 9,000 documents. We got a log last week that had 5,000 documents. Where the other 4,000 came, we're not sure.

But if you look -- they have now agreed with us that their in-house counsel wasn't hired until 2014. If you look at categories 2 and 3 of the old log, where he was the only attorney listed, that date range far exceeds his time with the company.

It appears to now correspond to categories 5 and 6 on the new log, with now an appropriate date range, but the number of documents has ballooned from 2300 to 6,000. So, again, what we have here just doesn't make any sense of the privilege calls, it doesn't give us any sense of, in fact, what they are withholding, why they are withholding it. So, again, it's our position that all of their privilege assertions have been waived or, at a minimum, we have got to have a document-by-document log so that we can take a look.

Finally, the issue of depositions, which I think is fairly simple. I think there is a big difference between Texas and Poland. They did notice our depositions in Texas. This was after we noticed theirs in Delaware. We have only asked -- I think the confusion was we did ask for five people. Only four remain at the company. And so Ms. Primoff did address the four that remain at the company. But when Mr. Trainer and Mr. Rohrbacher spoke to try to resolve this dispute, we narrowed it to three.

THE COURT: So it's three right now?

MS. FARNAN: Yes. And of the three we have asked for, they have only offered to bring the CEO to New York. They have offered the other two

people, the CTO and the CFO, still in Poland. They never said to us, "If you come to Delaware, we'll come to Delaware." That's something we could talk about. But I think the first step is that their witnesses, these three witnesses need to come to Delaware for their deposition.

So unless Your Honor has any other questions, that's all I have.

THE COURT: I don't.

MS. FARNAN: Thank you, Your Honor.

THE COURT: Ms. Primoff, I will give you the final word if there is something that you want to add.

MS. PRIMOFF: Just a few brief points, Your Honor. Thank you.

The first is that -- to address the status quo order and what the product is, the product is not an emergent technology. It's a monitoring diagnostic device that a patient wears over a series of days or weeks to help a doctor make a diagnosis. So it's not for emergency-care purposes.

THE COURT: All right. Anyway, you have worked out an arrangement so people aren't cut off of the service, I guess.

MS. PRIMOFF: We have worked out that arrangement, but it was predicated on an early September trial date. And the fact of the matter is that if the defendants would acknowledge the termination so that we are not in limbo, that would be a very different situation than what we presently face, which is that they have had a one-year start, one-year head start on developing technology that they were not permitted to have under the agreement, and we are still held in limbo because they refuse to acknowledge our valid termination on April 27. And that's the need for expedition.

As to their production, there were terms "Medicalgorithmics" and "@Medicalgorithmics.com" which showed up in Juan Velez's, their employee Juan Velez's e-mails. And they said, "Oh, that turned up 100,000 documents. We're not going to review it." But our view is they refused to review documents that may be potentially responsive sources of information. And that may be part of the story as to why they only have 6,000 documents, when they are admitting that Mr. Bogdan seems to have willy-nilly deleted e-mails from the system.

Mr. Bogdan's conversations with

doctors and hospitals and his correspondence may very well be relevant to this dispute. They have challenged the efficacy of our product. And to the extent that they were making statements to hospitals and doctors about how great our product is, we are entitled to know that.

And then, lastly, just to clear up on the privileged documents, when Ms. Moilanen and Ms. Farnan had a conversation last week about the privilege log, we said that there were 67,000 Polish documents still to be reviewed. So the reason for the increase in -- so each of those Polish documents has been reviewed by a U.S. attorney since that conversation took place, and that's the reason for the increase on the privilege log on Mr. Stankius' communications, because his primary language is Polish.

And that's all I have, Your Honor. Thank you.

THE COURT: Thank you.

All right. I'm going to tell you what I'm going to do with this now. I'm going to do the best I can to articulate this as clearly as possible. Discovery disputes are one of my least favorite things

to deal with. This seems to have been discovery dispute week. But let me back up first.

Number one, when I was contacted to have what was described to me as a short call to address some issues and it was put on my schedule, I was, frankly, rather -- and it could be miscommunication on our end, so I'm not going to point fingers. But I was rather surprised, to say the least, when I started seeing your papers and the magnitude of the issues that were involved here, which is the reason I delayed this, so I would have time to actually study those papers. And I thought it was important to have people here, because I was very concerned when I read the papers.

That's a little background by way of next time you call me for a conference call, I want a better idea of what's really going on when you guys schedule something. I think I had another hearing that day. It was just not going to be possible to devote the kind of time needed to these issues. But, in any event, that's a heads up.

Number two, as I have already adumbrated in my earlier comments, the trial is not going to occur in September. I have learned enough to

know in this job -- I knew it from private practice as well -- that if you don't have your ducks in a row on the front end with getting the production issues sorted out correctly from the beginning, it is just going to be a mess later on. And we need to get this production sorted out correctly, in my view, at the beginning. And when it is sorted out is when you can come back to me jointly and ask for new trial dates, when the document production issues are resolved.

Now, to resolve them, I am going to just go through these in the order that I see them and tell you how I'm coming out.

On the issues concerning the defendants' challenges to Medicalgorithmics' production, I'm going to order that the following occur: I do want an attorney review of documents. It is, I think, the presumed way to do it. And if it wasn't going to be done that way, it should have been communicated that it wasn't going to be done that way. There was no agreement on a quick-peek production. It sounds like to the contrary, there was an agreement not to do a quick-peek production. But whether there was or wasn't, there wasn't an agreement to do one, and the default should be that attorneys are involved

in document reviews. The time pressures to rationalize a dump of documents were of the parties' own making and could have been fixed and addressed. And there was a lack of communication, unfortunately, between the parties here, as far as I can see, when the magnitude of what was going to be dumped may have been realized.

How do I want this done? The way I want it done is I want each of you to confer as Medicalgorithmics, or MDG, should run searches and identify subsets, numbers that are manageable. I don't mean to be arbitrary, but maybe something like 100,000 documents or less, or 150,000 documents or less, whatever you two can hopefully agree on, and keep tinkering with those search terms until you get to a manageable universe, and then attorney review should kick in.

So step one of what I'm ordering is the two of you confer. You massage these search terms to get to a universe, similar to what Richards Layton did in the AMI review, get it to a manageable point, and then attorney review process has to occur to parallel the review that was done on the other side. That's issue number one.

Is there any lack of clarity in what I'm saying from either side on that issue?

MR. TRAINER: No, Your Honor.

THE COURT: Okay.

Issue number two. For better or worse, your confidentiality order requires attorney review. I expect attorney review. I appreciate, Ms. Primoff, your explanation that a lot of this is technical information, and it may well make a lot of sense to run cuts by looking at custodians to identify who would likely have the highly confidential information. But the attorneys can't be totally out of the loop. So I want you to go back and get the attorneys in the loop. You may come out in the same place, but it is an order of the Court, and I want it complied with in that respect. And both of you sound like you are going to have some discussions going back and forth about dedesignating and getting things in the right classifications. But, unfortunately, it should have had attorney review before; it's going to have it now.

Third issue, Rule 33(d). My working understanding of the rule -- and nobody has disabused me of it today -- is that you have a choice. You can

provide a narrative response with information, or if, indeed, the burden is equal to each side, you can tell the other side, "Here are the documents in which the information is contained. Go look at them." Those are your two choices. Unfortunately, MDG did not avail itself of either of the two permissible choices, and it is not an answer to tell the other side to just go search, we gave you everything. Therefore, I am going to order you, to the extent you are relying on references to documents as a response to an interrogatory under Rule 33(d), that you identify by Bates numbers the specific documents that you are relying on. If you want to provide a narrative response in lieu of that, that's your prerogative that you will still have open to you.

Issue number four, the privilege log. The context of the motion was a four-category, one-page privilege log which has ballooned -- that was sarcasm -- to ten categories. It's not compliant. It's just manifestly not compliant with how we do things in Delaware. Again, I understand people may have had a full heart, empty head here, thinking we have got a deadline, we have got to comply with it. Again, that deadline was of your own making. It's

just not a compliant privilege log. And the order is that you give a normal, Delaware-compliant privilege log.

Now, the other side is not totally unreasonable, usually. They may think they have one up on you, because they apparently don't have many privileged documents, and that may give them some leverage. But I think you can fairly try, and I would expect AMI's counsel in good faith to work with you to find if there are ways you can legitimately cut this down. But I can't tell from your privilege log who is on any particular communication, whether or not a particular document is genuinely privileged, et cetera. It's just not a compliant privilege log.

I favor parties working out and eliminating privilege logs because they are burdensome. But the default is a normal privilege log. You didn't have an agreement to the contrary, you can't self-impose new rules, so you are going to have to provide a Delaware-compliant privilege log.

I'm not going to make you waive privilege. Other members of this Court might have. They very well might have. I'm not going to do that. But you are only going to get one more shot to get it

right. And I do want AMI to work in good faith. Don't put them over the barrel just because you have the advantage here. Work with them in good faith to be practical to try to get things done.

Number five on my issues, AMI's production. Well, you know, there might be, at a gut level, some skepticism about the number of documents produced, but I saw the process as outlined in the Neipert and Miller affidavits. It's under oath, and I accept the representations in those affidavits that there was a thorough effort here, with a significant universe of approximately 135,000 documents, that contract attorneys were brought in to review. There was a second level of review involving members of the Bar of this Court, and it yielded the results. I have no basis factually, other than maybe a gut suspicion that it just looks like a small number, to question the bona fides of those representations, and I'm not going to do it for today's purposes.

If you find specific problems, I will address them. And this will be goose and gander. That's the way it will roll. But I don't have a basis to suspect anything improper in the production based on what I know at this point.

Location of the depositions. That's issue number six. The default rule when you file suit in this jurisdiction is that you are going to be available for a deposition in this jurisdiction. There was reference to the Wolfe and Pittinger treatise and the Activision case. You can certainly work out different arrangements, but the default that I'm going to set right now is that each of your clients are going to be in Delaware unless you agree otherwise. You want New York and you want Texas, or vice versa. You can agree to those things, or if you want to agree to Warsaw, you can. But the default rule is all your officers come to Delaware for the depositions unless you reach agreements otherwise.

The three people, it's not an unreasonable number. You are going to have more time to stagger them if one person can't be away. You told me today this is an international company, and I think you mentioned your CEO traveling to Tokyo. They are going to have to travel to Delaware. I presume, I don't know for a fact, they will probably have to be here for a trial. Maybe they don't. But, in any event, I'm going to go with the default rule on this. They are all going to come to Delaware unless you guys

work out something and agree to something different.

There was some mention, I don't know if it was formally in the papers, that there were a number of redactions. You guys should talk about that. But you have a confidentiality order, and I really have little tolerance for sorting through redaction problems when there are confidentiality orders. I mean, what's the basis for doing that? We take our confidentiality orders seriously. I don't know why something that's being produced -- there could be circumstances, and I think there is enormous abuse that goes on in this Court with people redacting things like board minutes. But the full document should be produced as the presumptive rule unless you have a very good reason otherwise. And all of you need to talk before you bring that to my attention. I really have no appetite for that minutia.

Have I missed any issues? I have one left, but have I missed any of the discovery-related issues?

(No response)

All right. The only issue I have left is the request for fees. So Rule 37(a)(4), which I'm going to read into the record to frame this, says:

"If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the Court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including the attorney's fees, unless the Court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

I have been a judge now for about a year. I can't remember imposing sanctions. I may have and just forgotten. I can't remember doing it. But I think it's appropriate here. And I'm sorry to say that, because it gives me no pleasure in doing it. But, basically, on six or seven issues, MDG has gone 0 for 6, 0 for 7, whatever the number is. I don't think this was justified. This deadline was one of your own creation. These problems were so acute, they should have been brought to somebody's attention. They should have been worked out earlier.

And, therefore, I'm going to award to AMI the cost, including attorneys' fees, associated

with pressing this motion. I want an order of that number submitted to me by the end of the week, after conferring with the other side and showing it to them. As I said, it gives me no pleasure in doing it. But you know what? You've got to do things the right way, by the rules, and this was not done by the rules, in my judgment.

Does anybody have any questions for me?

MS. FARNAN: Your Honor, I do. You asked for that order by the end of this week. Actually, Mr. Rohrbacher flew in today from vacation, and I have a trial ongoing in the District Court. Could we have until mid next week to get that in?

THE COURT: You certainly may. And I apologize for bringing you off your vacation, Mr. Rohrbacher. Unfortunately, I wanted to see you all before I did things with this, especially when we are talking about potential sanctions.

All right. Thank you.

(Court adjourned at 4:09 p.m.)

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CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 99 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 88 through 99, which were revised by the 19th.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 20th day of July 2015.

/s/ Debra A. Donnelly

Debra A. Donnelly
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
Delaware Notary Public