
From: Oliver Richards <orichards@fr.com>
Sent: Tuesday, February 28, 2023 6:12 PM
To: Austin Ginnings; Timothy Grochocinski; Service on FR/DTNA
Cc: DG-EPS; Jon Rastegar; Ryan Griffin
Subject: RE: EPS v. DTNA - Motion to Compel

Austin,

Thank you for the productive discussion this morning. I just wanted to follow up by email on a few items.

First, regarding the few Mahle radiators we have yet been able to source, we are expecting a proposal, in writing, for a stipulation regarding these radiators. As indicated on the call, now that the list of radiators has been significantly narrowed, and now that both parties are in possession of the facts, we are open to considering a proposal regarding the similarity of these radiators.

Second, regarding the Spectra declaration, we both agreed that declarations from Spectra would be acceptable in lieu of a deposition. To facilitate this agreement, we further agreed that neither party would object to a declaration from Spectra on hearsay grounds, and the parties would treat the declaration testimony as though it were testimony given in a deposition. To the end, I would propose the parties enter a stipulation similar to the following:

“The parties agree to waive any hearsay or foundation objections to any declarations provided by a Spectra representative relating to subpoenas served EPS and DTNA. The parties reserve the right to object to any testimony provided by declaration on relevance or any other ground.”

We can memorialize this agreement now via email for later insertion in a pre-trial order. Let me know if you have any edits.

Third, we discussed a deposition of a Mahle representative. I informed you that I had proposed March 16 or March 17 to Mahle, and that DTNA intends to proceed with the deposition in person in South Carolina. I have not yet heard back confirmation on either of those dates. You all stated you would continue to discuss a possible declaration with Mahle to streamline an eventual declaration.

Finally, you raised the issue of whether DTNA would provide logs of common-interest privileged communications with DTNA’s suppliers. I informed you that DTNA had already produced any non-privileged communications, and that the remaining unproduced communications were protected by the common interest privileged. With respect to logging, I informed you that DTNA

will not log every single privileged communication, especially as all of these communications occurred after the initiation of litigation. I further informed you, though, that DTNA would be willing to provide a bulk log for the communications being withheld as privileged. I additionally expressed confusion as to why EPS was asking for such logs as, in my view, the communications between outside counsel for DTNA and outside counsel for DTNA suppliers, relating to EPS's allegations, would clearly be privileged under the common interest privilege.

In my (and I'm sure yours as well) experience in patent litigation, it is commonplace for parties to waive privilege logs regarding clearly-privileged communications created after the initiation of litigation—except as to clawed-back materials. Indeed, Circuit courts have explained that “a rule requiring creation of an ongoing log of all post-complaint privileged communications would have a chilling effect on the attorney-client relationship,” and thus should not be required as a matter of course. *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 140 (3d Cir. 2009); *see also U.S. v. Bouchard Transp.*, 2010 WL 1529248, at 2 (E.D.N.Y. 2010) (noting that “privilege logs are commonly limited to documents created before the date litigation was initiated”); *Ryan Inv. Corp. v. Pedregal de Cabo San Lucas*, 2009 WL 5114077, at 3 (N.D. Cal. 2009) (stating that “counsel's communications with the client and work product developed once the litigation commences are presumptively privileged and need not be included on any privilege log”). This same logic applies to the policies underlying the common-interest privilege, which fosters open and honest communication between parties with a common interest.

It is my strong preference that we follow this practice and not require logging of post-complaint privileged communications. However, should you all persist in perusing detailed privilege logs regarding clearly-privileged communications, we will have no choice but to reciprocate by requesting logs of any documents and/or communications that your firm exchanged with third-parties (including third-party witnesses and Chisum) that you are withholding under a claim of privilege. As such, please let us know whether you still wish to proceed down this path.

Please let me know if you have any edits to the above summary. We also look forward to your proposal regarding the Mahle radiators, any edits you have to our proposed language concerning the Spectra declarations, and any response you all might have concerning privilege logs.

Very Best,
Oliver

From: Austin Ginnings <austin@nelbum.com>
Sent: Monday, February 27, 2023 2:15 PM
To: Oliver Richards <orichards@fr.com>; Timothy Grochocinski <Timothy@nelbum.com>; Service on FR/DTNA <ServiceonFR/DTNA@fr.com>
Cc: DG-EPS <eps@nelbum.com>; Jon Rastegar <jon@nelbum.com>; Ryan Griffin <ryan@nelbum.com>
Subject: RE: EPS v. DTNA - Motion to Compel

Oliver,

Please let us know if discussing this at 10am PT tomorrow works for you. In addition, we'd like to discuss where things are with scheduling (or obviating) depositions of Behr and Spectra.

Thanks,
Austin

From: Oliver Richards <orichards@fr.com>
Sent: Monday, February 27, 2023 12:05 PM
To: Timothy Grochocinski <Timothy@nelbum.com>; Service on FR/DTNA <ServiceonFR/DTNA@fr.com>
Cc: DG-EPS <eps@nelbum.com>; Jon Rastegar <jon@nelbum.com>; Ryan Griffin <ryan@nelbum.com>
Subject: RE: EPS v. DTNA - Motion to Compel

Tim,

To my understanding, we have been able to source CU077001. I have asked for an invoice and will forward once I receive. I am available tomorrow morning PST or Friday to discuss.

Very Best,
Oliver

From: Timothy Grochocinski <Timothy@nelbum.com>
Sent: Saturday, February 25, 2023 7:03 AM
To: Oliver Richards <orichards@fr.com>; Service on FR/DTNA <ServiceonFR/DTNA@fr.com>
Cc: DG-EPS <eps@nelbum.com>; Jon Rastegar <jon@nelbum.com>; Ryan Griffin <ryan@nelbum.com>
Subject: RE: EPS v. DTNA - Motion to Compel

Oliver –

Please let us know what models you have sourced and send me an invoice for review.

Please also let me know your availability for a call next week to discuss the status on the other radiators model numbers.

Thank you,

Tim

From: Oliver Richards <orichards@fr.com>
Sent: Friday, February 24, 2023 12:17 PM
To: Timothy Grochocinski <Timothy@nelbum.com>; Service on FR/DTNA <ServiceonFR/DTNA@fr.com>
Cc: DG-EPS <eps@nelbum.com>; Jon Rastegar <jon@nelbum.com>; Ryan Griffin <ryan@nelbum.com>
Subject: Re: EPS v. DTNA - Motion to Compel

Tim,

Following up on one of the below items -- we have been able to source some of the radiators on your list. We likely can have an invoice generated for them and then have them shipped directly to you. Please let me know how you would like to proceed. If you would like to discuss, let me know.

Very Best,

Oliver

From: Oliver Richards
Sent: Tuesday, February 14, 2023 10:31:32 AM
To: Timothy Grochocinski; Service on FR/DTNA
Cc: DG-EPS; Jon Rastegar; Ryan Griffin
Subject: RE: EPS v. DTNA - Motion to Compel

Tim,

We are in agreement. We will continue to work to get you all the models of radiators listed below and are open to further discussion should we not be able to acquire them.

Very Best,
Oliver

From: Timothy Grochocinski <Timothy@nelbum.com>
Sent: Tuesday, February 14, 2023 10:24 AM
To: Service on FR/DTNA <ServiceonFR/DTNA@fr.com>
Cc: DG-EPS <eps@nelbum.com>; Jon Rastegar <jon@nelbum.com>; Ryan Griffin <ryan@nelbum.com>
Subject: EPS v. DTNA - Motion to Compel

[This email originated outside of F&R.]

Oliver –

This confirms that we will agree to withdraw the motion to compel. This is based on our understanding that DTNA will continue to help us acquire samples of the five Behr radiators we have not been able to acquire (listed below) and, if we are not able to acquire those, that DTNA will work with us on reaching an agreement with respect to these products.

BHT CU078001
BHT CU077001
BHT CU080001
BHT CU079001
BHT U3692002

Please confirm the same and we will get a Notice of Withdrawal on file.

Thanks,

Tim

Timothy E. Grochocinski | Attorney | P. 708.675.1974

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