

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
TRIAL COURT DEPARTMENT

JANE DOE 1 and JANE DOE 2, on behalf of
themselves and others similarly situated,

Plaintiffs,

v.

John Hancock Life Insurance Company
(U.S.A.), First Fitness Management, LLC,
and Commonwealth Flats Development Corp.
d/b/a Second Wave Health & Fitness,

Defendants.

2284CV00831

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION TO COMPEL DEFENDANT JOHN HANCOCK LIFE
INSURANCE CO. (U.S.A.) TO PRODUCE DOCUMENTS**

Plaintiffs Jane Doe 1 and Jane Doe 2 hereby move, pursuant to Mass. R. Civ. P. 37, to compel Defendant John Hancock Life Insurance Company (U.S.A.) (“John Hancock”) to produce documents in response to the Plaintiff’s First Request for Production of Documents. John Hancock claims it can further delay producing documents (other than external emails) until after this Court enters a protective order and until after this Court decides John Hancock’s recent Motion to Strike Class Allegations. But John Hancock already requested and received a temporary stay of discovery in this case while John Hancock’s initial motion to dismiss was pending. That stay expired on July 21, 2023, when this Court denied John Hancock’s Motion to Dismiss. John Hancock cannot forever delay production through the serial filing of motions, or based on its suggestion

that it *might request* a protective order at some unknown time in the future. A year and 5 months into this case, John Hancock has failed to move for a protective order under Rule 26(c). Nor is there any protection under the law for materials related to John Hancock's dismantling of the hidden camera and destruction of other evidence of these crimes. John Hancock must produce the documents, now.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs' Efforts to Obtain Documents and Communications

More than a year and five months ago, on June 21, 2022, the Plaintiffs served their First Request for Production of Documents on John Hancock. Duran Affidavit, Ex. A. pgs., 1-17. The Plaintiffs requested, without limitation: all internal and external communications and documents relating to the "Hidden Camera," the "Internal Investigation," and the "Hidden Camera Incident" (Request No. 3);¹ all lists or other documents identifying the women who used or had access to the women's locker room between January 1, 2014 and December 31, 2019 (Request No. 9); all documents and logs which show or reflect the identity of any agent or employee of John Hancock who had access to the locked or restricted-access area where a monitor linked to the Hidden Camera was discovered (Requests Nos. 16 & 17); all documents relating to the disappearance of, misuse of, or problems locating any covert or pinhole cameras (Request No. 41); all documents relating to the termination or discipline of any employees in connection with the Hidden Camera Incident or as a result of the Internal Investigation (Request No. 44); all documents relating to the theft of any electronic and/or surveillance equipment from a locked or restricted-access area between January

¹ These terms are defined in the request for production of documents.

1, 2014 and December 31, 2019 (Request No. 22); and all documents which show or reflect the names of all persons interviewed as part of John Hancock's internal investigation (Request No. 23).

Roughly a year ago, on December 14, 2022, John Hancock filed a Motion to Dismiss the original complaint. (Dkt. 23.) A week later, on December 21, 2022, John Hancock responded to Plaintiffs' document request stating that "party discovery is premature given John Hancock's pending Motion to Dismiss, filed on December 14, 2022," and that "[s]taying discovery until the resolution of John Hancock's pending Motion to Dismiss would conserve party and Court resources and Plaintiffs would suffer no prejudice from the delay." John Hancock's Objections to Plaintiffs' Request for Production of Documents, dated December 21, 2022, Duran Aff., Ex. B, ¶ 1, pg. 19.

On May 17, 2023, the Plaintiffs moved to compel John Hancock's production of documents. On May 30, 2023, John Hancock responded with a Cross Motion for Temporary Stay of Discovery, requesting a temporary stay of discovery until the Court ruled on John Hancock's then-pending motion to dismiss. (Dkt. 35.)

On June 16, 2023, this Court ruled as follows: "The court reserves on the motion to compel and allows so much of the cross motion to stay discovery until the Motion to Dismiss hearing on July 10, 2023. Further action on this motion will be taken on July 10th, 2023." (Dkt. Entry on June 21, 2023.) At the hearing on July 10, 2023, this Court continued the temporary stay of discovery against John Hancock until its ruling on John Hancock's motion to dismiss.

Shortly thereafter, on July 21, 2023, this Court denied John Hancock's motion to dismiss. (Dkt. 39.)

Since the denial of its motion to dismiss and the termination of any stay imposed by this Court, John Hancock continues to withhold relevant materials requested by the Plaintiffs.

On September 29, 2023, John Hancock made a limited production of *only external emails* with the State Police, various media outlets, and other third parties. John Hancock is otherwise withholding *responsive materials*, stating as follows:

To the extent the Requests call for the production of confidential information, John Hancock will produce any non-privileged, nonobjectionable documents responsive to such Requests *only after the entry of an appropriate Protective Order* between the parties by the Court.

To the extent the Requests call for the production of documents relating to Plaintiffs' class allegations, John Hancock will produce any non-privileged, non-objectionable documents responsive to such Requests *after the Court rules on Defendants' Joint Consolidated Motion to Strike Plaintiffs' Class Allegations*, which was served on Plaintiffs on August 25, 2023.

John Hancock's Supplemental Response to Plaintiff's First Set of Document Requests, dated September 29, 2023, ¶¶ 8, 14, Duran Aff. Ex. C. pgs., 42, 44 (emphasis added.)

Since receiving the Plaintiffs' Document Requests more than a year and five months ago (on June 21, 2022), John Hancock has not moved for any protective order pursuant to Mass. R. Civ. P. 26(c).

ARGUMENT

John Hancock should be compelled to produce documents that are indisputably relevant, that contain information that has been withheld from victims for more than

four years, and that any further delay in their production would only inflict greater harm and prejudice.

A. The Documents Sought Are Relevant

Rule 26 states that a party “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, . . . [and which] appears reasonably calculated to lead to the discovery of admissible evidence.” Mass. R. Civ. P. 26(b)(1).

This case involves illegal surveillance by an employer. Distilling the Amended Complaint (the “Complaint”) (Paper No. 38) to its core, Plaintiffs allege the following:

- a. Unbeknownst to scores of women that used the employee gym that John Hancock provided for its employees, a covert camera was secretly installed in the women’s locker room, viewing the area where women removed their clothes either to work out or shower. Compl. ¶¶ 1-5, 66-82, 80-82.
- b. The covert surveillance program occurred in John Hancock’s building, using John Hancock’s pinhole camera, connected by John Hancock’s cables, leading through John Hancock’s crawlspace, to John Hancock’s mobile monitor, which was sitting in view behind John Hancock’s access-restricted doors. Compl. ¶¶ 1-5, 66-82, 80-82.
- c. John Hancock waited 48 days to report this crime to the Police while John Hancock moved, tampered with, and destroyed evidence that interfered with the State Police investigation in violation of G.L. c. 268, § 13E, and thereby harmed the Plaintiffs who, as victims are the intended beneficiaries of G.L. c. 268, § 13E. Compl. ¶¶ 106-110, 363, 403-406.
- d. John Hancock withheld the fact that John Hancock was the owner of the hidden camera, mobile monitor, and other surveillance equipment in an effort to thwart and hinder the State Police investigation. Compl. ¶ 12.
- e. John Hancock then touted its “internal investigation” to support John Hancock’s claim that it had acted promptly and properly, while in reality

John Hancock's incredible delay and destruction of evidence hindered the investigation. Compl. ¶¶ 132, 138.

- f. John Hancock touted its "internal investigation" to support John Hancock's claim that as it was working "to ensure whomever is responsible will be held accountable for this action," while in reality John Hancock had actively concealed these crimes from the State Police for many days. Compl. ¶¶ 132, 4, 11, 15, 110, 149, 225.
- g. John Hancock committed to the Plaintiffs that, "when we know the results of the investigation, we will share it as soon as law enforcement permits." Compl. ¶¶ 132.
- h. John Hancock told the Plaintiffs not to speak about the incident outside of John Hancock and attempted to silence the victims and thereby protect its own reputation, which prevented the victims from healing. Comp. ¶¶ 152-153.
- i. After the discovery of the hidden camera, John Hancock quietly terminated or urged retirement of certain employees that were likely involved in, or knew about, the hidden camera. Compl. ¶227. These former employees included:
 - i. John Gailius - (Control Room Operator - Corporate Real Estate), date unknown.² Compl. ¶227.
 - ii. Thomas Ballard (Senior Technology Supporter - Information Technology), fired May 23, 2019. Compl. ¶227.
 - iii. Bruce Pearson (Managing Director of U.S. Corporate Real Estate), retired suddenly in 2020. Compl. ¶227.
 - iv. Philip Warren (Lead Building Engineer - Corporate Real Estate), fired (on information and belief) in December 2020 and joined Able Services. Compl. ¶227.
 - v. Christopher Vargas (Building Maintenance - Corporate Real Estate), fired (on information and belief) in December 2020 and joined Able Services. Compl. ¶227.
 - vi. Timothy Gallagher (Project Manager - Corporate Real Estate), fired August 14, 2019. Compl. ¶227.

² The Plaintiffs have learned that John Gailius left John Hancock in December 2018, and that he subsequently began working at the Museum of Science.

The documents requested by the Plaintiffs, including John Hancock's internal documents and communications related to the investigation, would tend to prove, disprove, or at least shed light on these claims or any defenses to these claims. The information is relevant and discoverable.

B. John Hancock's Internal Investigation and Communications Are Not Confidential Trade Secrets

John Hancock's basis for withholding documents rests on vague generalizations that all documents within its possession that have not been shared with third parties, including all documents relating to its internal investigation of the hidden camera, are confidential. John Hancock has not established that *any* of these documents are confidential. Rather, all John Hancock is able to offer is the tautological argument that its "internal investigation" is confidential because it has hidden results from the outside world. Such arguments fail. *See West v. Bell Helicopter Textron, Inc.*, No. 10-CV-214-JL, 2013 WL 758346, at *2 (D.N.H. Feb. 27, 2013) (helicopter manufacturer's claim of confidentiality through a series of generalizations concerning its "confidential investigation files" relating to the subject accident insufficient to establish confidentiality). Where, as here, a defendant takes a position suggesting "that every aspect of [its] business is confidential and proprietary," such a position is "by its nature is simply implausible." *Id.*, at *2. *See also Takata v. Hartford Comprehensive Emp. Ben. Serv. Co.*, 283 F.R.D. 617, 622 (E.D. Wash. 2012) (modifying protective order submitted by defendant which "lacks a definition for 'Confidential Information,' and seemingly allows Defendants to mark anything as 'confidential' without requiring a relationship to

the material that the Court has found good cause for protecting.”). The mere fact that information is “not publicly known” is insufficient to support a designation of confidentiality. *See Ductmate Indus., Inc. v. Famous Distribution, Inc.*, No. 12CV1440, 2014 WL 122886, at *6 (W.D. Pa. Jan. 10, 2014); *Clark v. Medtech Coll.*, No. 1:12-CV-356, 2012 WL 5985622, at *1 (N.D. Ind. Nov. 29, 2012) (denying motion for protective order where the proposed order's definition of “confidential” was “impermissibly broad” and motion lacked basis for protection “other than simply that the information is not otherwise publicly available.”).

John Hancock claims that it has grounds for a stay or a protective order, but no motion has been filed by John Hancock. John Hancock has had since June 21, 2022, when the document request was served. The burden is squarely on John Hancock to show that it requires protection from the document production. Mass. R. Civ. P. 26 (c) provides that “[u]pon *motion* by a party or by the person *from whom discovery is sought*, and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Mass. R. Civ. P. 26 (c) (emphasis added). Thus, even if John Hancock filed a motion for a protective order, John Hancock cannot meet its burden of demonstrating annoyance, embarrassment, oppression, or undue burden or expense that would necessitate a protective order. John Hancock’s interest in resisting the discovery simply does not outweigh **the interests of hundreds of women** (and the public’s interest) in discovering what happened at John Hancock. *See Del Valle v. Bechtel Corp.*, No. 06-3654, 2008 WL 4107325, at *1 (Mass. Super.

Ct. Jul. 30, 2008) (weighing the following factors when deciding a motion for protective order to stay discovery: (1) The interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) The burden which any particular aspect of the proceedings may impose on defendants; (3) The convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) The interests of persons not parties to the civil litigation; and (5) The interest of the public in pending civil and criminal litigation.)

John Hancock also cannot leverage its indefinite failure to obtain a protective order to forever suspend its obligation to produce relevant documents.

John Hancock already shared the details and the results of its investigation with John Hancock's Senior Management Team and the State Police. Duran Aff. Ex. D., pgs. 73-74. This negates any possible claim of confidentiality. John Hancock even created a "Talking Points Memo" for the State Police to use in their interview with a John Hancock employee, who mysteriously left John Hancock to go work at the Museum of Science in December of 2018. Duran Aff. Ex. E, pgs. 76-87, 77. This interview was apparently conducted by Trooper David Walsh on August 20, 2019, at the Museum of Science. Duran Aff. Ex. F, pg. 89 ("on our way to museum. I will update you when done.") There is simply no protection available for materials related to John Hancock's investigation of itself.

Further, John Hancock specifically touted its internal investigation to support the propriety of its actions with respect to both the State Police and the Plaintiffs.³ John

³ John Hancock is also not entitled to any privilege-based protection for its investigation because the investigation was not done in anticipation of any litigation. *Rhodes v. AIG Domestic Claims, Inc*, No. 05-1360-BLS2, 2006 WL 6848126, at *4 (Mass. Super. Jan. 23,

Hancock promised to “ensure whomever is responsible will be held accountable for this action” and to “share [the investigation] as soon as law enforcement permits.” Compl., ¶ 132, Answer, ¶ 132. The time has come for John Hancock to make good on its promise to the Plaintiffs. John Hancock must produce the documents.

C. John Hancock Cannot Further Delay Production With its Late-Filed Motion to Strike

John Hancock also refuses to produce “documents relating to Plaintiffs’ class allegations” until “*after* the Court rules on Defendants’ Joint Consolidated Motion to Strike Plaintiffs’ Class Allegations, which was served on Plaintiffs on August 25, 2023.” John Hancock’s Supplemental Response to Plaintiff’s First Set of Document Requests, dated September 29, 2023, ¶¶ 8, 14, Duran Aff. Ex. C. pgs., 42, 44 (emphasis added.) John Hancock may not use its untimely motion to strike as a pretext to delay or defeat discovery.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court order John Hancock to immediately produce responsive materials in their possession, custody, or control.

2006) (Gants, J.). John Hancock itself claimed that the internal investigation was done to “ensure whomever is responsible will be held accountable for this action.” Compl. ¶ 132. Further, to the extent that John Hancock attempts to claim some special privilege for their investigation, Massachusetts does not recognize any internal investigation privilege apart from the statutory privilege granted to hospitals to conduct internal peer investigations of alleged medical errors. *Id.*; *McGuire v. Acuflex Microsurgical, Inc.*, 175 F.R.D. 149, 155-156 n. 8 (D. Mass. 1997) (Gertner, J.) (employers’ internal investigations into allegations of sexual harassment “are not privileged”).

Respectfully submitted,

JANE DOE 1 AND JANE DOE 2
By their attorneys,

Dated: November 28, 2023

/s/ *Michael J. Duran*

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CERTIFICATE OF SERVICE

I, Michael J. Duran, hereby certify that on November 28, 2023, a true copy of the above document was served upon on the attorney of record for each party by email as follows:

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