BEFORE THE
UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: BAIR HUGGER FORCED AIR WARMING PRODUCTS LIABILITY LITIGATION

MDL No. _____

BRIEF IN SUPPORT OF MOTION TO TRANSFER OF ACTIONS TO THE DISTRICT OF MINNESOTA PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

ORAL ARGUMENT REQUESTED

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff William Lichlyter ("Moving Party") brings this motion to transfer all cases that arise out of the use of Bair Hugger® forced air warming units or blankets ("Bair Hugger®") to the District of Minnesota.

Defendants 3M Company[1] and Arizant Healthcare, Inc.[2] ("Defendants") have designed, manufactured and sold Bair Hugger® devices across the United States for well over 15 years. There are currently tens of thousands of patients in hospitals all across the United States who undergo surgery each month which involves intraoperative use of the Bair Hugger® forced air warming blankets. Many of these patients now find themselves at significantly increased risk of infection and severe medical complications as a result of the use of Bair Hugger®.

[1] Defendant 3M is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Maplewood, Minnesota. 3M is engaged in the business of researching, developing, designing, licensing, manufacturing, distributing, supplying, selling, marketing and introducing into interstate commerce, either directly or indirectly through third parties or related entities, its products, including the Bair Hugger.

[2] Defendant Arizant Healthcare, Inc. is a corporation organized and existing under the laws of the State of Delaware, Arizant conducts business throughout the United States, including the State of Minnesota, and is a wholly owned subsidiary of Defendant 3M.

Moving Party is aware of fourteen such cases that have been filed in six different federal district courts at this time. With potentially more than tens of thousands of Bair Hugger® systems in use across the country, it is inevitable that many patients who believe they were harmed through the use of these products will turn to the federal court system to seek some redress. The Moving Party respectfully submits that the Bair Hugger® cases will most efficiently be managed through a multi-district litigation.

To promote judicial efficiency and ensure that the Bair Hugger® cases benefit from cost savings accomplished by coordinated and centralized pretrial proceedings, Moving Party respectfully submits this Brief in Support of the Motion to Transfer of Actions to the District of Minnesota Pursuant to 28 U.S.C. § 1407 for Coordinated and centralized Pretrial Proceedings

II. FACTUAL BACKGROUND

By way of very high level, general background, the defect with the Bair Hugger®, forced air warming devices and blankets involves interruption of normal air flow around the surgical field in a surgical operation room. By disrupting the calculated and purposeful air ventilation/circulation system – both by introducing additional air currents and through the introduction of heat – the Bair Hugger® causes bacteria to enter the surgical site, resulting in a dramatic increase in the rate of peri-prosthetic joint infections. These infections result in additional surgical debridement, premature prosthetic replacement, significant hospital stays, and/or even amputations.

Upon information and belief, more than 50,000 Bair Hugger® forced-air warming units are currently in use across the United States.

The Bair Hugger® consists of a portable heater/blower connected by a flexible hose to a disposable blanket that is positioned over (or in some cases under) surgical patients. The Bair

Hugger® warms patients during surgery by blowing hot air through the blanket and on a patient's exposed skin.

The hot air produced by Bair Hugger® accumulates under the surgical drape covering the patient and escapes from under the surgical drape below the level of the surgical table or at the head end of the surgical table. This escaped air creates air flow currents that push against, and disrupt, the downward air flow of the operating room. As studies have shown, as this warmed air rises, it potentially deposits bacteria from the floor of the surgical room into the surgical site.

In June of 1997, in sworn filings submitted to the FDA in connection with Section 510k of the Food and Drug Act, the Defendants admitted that "air blown intra-operatively across the surgical wound may result in airborne contamination."[3] The Defendants addressed this flaw in their products by making further misrepresentations to the FDA when they stated that the risk of contamination by air flow is obviated because all "Bair Hugger Blankets designed for use in the operating room feature a tape barrier which prevent [sic] air from migrating toward the surgical site."[4] That statement by the Defendants was false and misleading, and it remains uncorrected to this day. A number of Bair Hugger® blankets marketed as safe for use in surgeries do not utilize a taped edge at all. Instead, these forced air warming systems cause contaminated air to enter the surgical field.[5] Also, representing that a taped barrier would contain the contaminated air is false; it ignores the fact that cooler downward airflow in the operating room causes the heated air

[3] http://www.accessdata.fda.gov/cdrh_docs/pdf/K964673.pdf
[4] *Id.*
[5] See, e.g., Leaper, Albrecht, Gauthier. "*Forced air warming: a source of airborne contamination in the operating room?"* ORTHOPEDIC REVIEW, October 17, 2009 (finding Bair Hugger is blowing large number of particles into the sterile field) available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3143984/; Legg, Cannon, Hamer. *Do forced air patient warming devices disrupt unidirectional downward airflow?* THE JOURNAL OF BONE AND JOINT SURGERY, September 2011 (finding significantly increased particle count over the surgical site compared when radiant warming), available at http://www.ncbi.nlm.nih.gov/pubmed/22323696.

from the Bair Hugger® to rise up. The presence of a tape edge does not prevent the Bair Hugger® from facilitating the movement of pathogens from the floor of the operating room to the surgical site.

In a communication to the Food and Drug Administration ("FDA") in July 2000, Defendants represented that the Bair Hugger's filtration system meets HEPA ("High Efficiency Particulate Air") Standards.[6] This statement was false and misleading at the time Defendants made it, and it remains false today. To meet HEPA standards, an air filter must be capable of removing 99.97% of all particles 0.3 microns or larger.[7] The filter of the Bair Hugger, which is marketed as HEPA compliant, is only capable of removing 63.8% of all such particles.[8]

Upon information and belief, at some point between 2002 and 2009 the Defendants reduced the efficiency of the air filtration of Bair Hugger® blowers. This action reduced the safety of such blowers.

As a result of Defendants' actions, the internal airflow paths of Bair Hugger® blowers become contaminated with dangerous pathogens, which dramatically increase the risk of infection for patients undergoing lengthy surgeries, especially total hip and knee device surgeries.[9]

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[6] *See* BH Model 750 510k Summary, available at https://510k.directory/clearances/K001149

[7] "Aerosol penetration for any HEPA filter shall not exceed 0.03% (0.0003) at 0.3 micrometer particle size." *See* DOE Technical Standard: Specifications for HEPA Filters, available at http://energy.gov/sites/prod/files/2013/06/f1/doe-std-3020-2005.pdf.

[8] *See* Reed, Kimsberger, McGovern, Albrecht, *Forced-air warming design: evaluation of intake filtration, internal microbial buildup, and airborne contamination emissions,* AANA JOURNAL (August 2013).

[9] See, e.g., Wood, Moss, Keenan, Reed, Leaper. *Infection control hazards associated with the use of forced air warming in operating theatres.* JOURNAL OF HOSPITAL INFECTION (July 2014)available at http://www.ncbi.nlm.nih.gov/pubmed/25237035; McGovern, Albrecht, Belani, Nachtsheim, Partington, Carluke, Reed. *"Forced-air warming and ultra clean ventilation do not mix."* THE JOURNAL OF BONE AND JOINT SURGERY, July 2011. ("A significant increase in deep joint infection…was identified during a period when forced air warming was used compared to conductive fabric warming.") available at http://www.ncbi.nlm.nih.gov/pubmed/22058308.

Upon information and belief, the pathogens contaminating the internal airflow paths of Bair Hugger® blowers incubate and proliferate therein.

These pathogens are then expelled from the interior of the Bair Hugger® blower by the outward airflow, travel through the hose into the disposable blanket and escape into the operating room.

Upon information and belief, the Defendants have been aware of the pathogenic contamination of the airflow paths of Bair Hugger® blowers since at least 2009. Despite that knowledge, Defendants have actively and aggressively marketed the Bair Hugger® as safe in both general and orthopedic surgeries.

In an advertisement that appeared in multiple medical publications as early as 2010, the Defendants made the following false and deliberately misleading claims:

> "While simple logic makes it clear that forced air warming has no impact on laminar conditions, science also supports this. A forced air warming blanket delivers less than one percent of the airflow of a laminar flow system and therefore is unable to affect laminar flow ventilation systems."[10]

Published scientific research, before and after this statement, has demonstrated this statement is untrue. The exhaust generated by the Bair Hugger® creates convective airflow patterns which disrupt the laminar flow of the operating theater. In addition, many if not most hospitals do not have true laminar air flow, but rather simply positive downward air pressure, which is easily disrupted by the Bair Hugger forced air warming system.

In a communication that appeared in *Healthcare Purchasing News* in July of 2012, the Defendants' public relations and communications specialist Greta Deutsch stated "some conductive-warming manufacturers have alleged that forced-air warming increases bacterial

[10] http://www.fawfacts.com/_asset/zn062p/AJIC.pdf (last visited July 17, 2015).

contamination of operating rooms or interrupts laminar airflow. These accusations have no factual basis."[11] Again, this statement ignores numerous published studies documenting the adverse effects the Bair Hugger® has on laminar and other forms of unidirectional airflow.

The publication of numerous peer-reviewed studies identifying and documenting critical safety shortcomings of the Bair Hugger® should have prompted the Defendants to redesign or discontinue their product.[12] Instead, those criticisms only caused the Defendants to amplify their efforts to champion the Bair Hugger® and silence critics.

The effect of these misrepresentations was to mislead healthcare providers about the safety of the Bair Hugger for use in surgical procedures. The Defendants were aware of the falsity of their misrepresentations. Rather than alter the design of their product or warn physicians of the dangers associated with the Bair Hugger, as numerous studies confirm, the Defendants have chosen to "double down" on their efforts to promote their defective product.

The Moving Party's health care providers relied upon the above representations and advertisements to Plaintiff's detriment. Any reasonable and competent physician would not use a Bair Hugger® in an orthopedic implant surgery if they were fully apprised of the dangers and risks associated with doing so. However, through misrepresentations to the public, the medical community, and the FDA, the Defendants actively and knowingly concealed the propensity of these devices to cause infection in orthopedic implant surgeries.

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[11] Available at http://www.hpnonline.com/inside/2012-07/1207-OR-TempMgmt.html

[12] See, e.g., Albrecht M, et. al. *Forced-air warming blowers: An evaluation of filtration adequacy and airborne contamination emissions in the operating room*. AM J INFECT CONTROL 2010; 39:321-8; Leaper D, et. al. *Forced-air warming: a source of airborne contamination in the operating room?* ORTHOPEDIC REV. 2009;1(2):e28; McGovern, P.D., et. al. *Forced-air warming and ultra-clean ventilation do not mix.* J BONE AND JOINT SURG-BR. 2011;93-B(11):1537-1544; Legg, A. et. al. *Do forced air patient-warming devices disrupt unidirectional downward airflow?* J BONE AND JOINT SURG-BR. 2012; 94-B:254-6; Belani, K., et. al. *Patient warming excess heat: The effects on orthopedic operating room ventilation performance*. ANESTHESIA & ANALGESIA 2012 (prepublication on-line) 2013;117(2):406-411; Dasari, K.B., et. al. *Effect of forced air warming on the performance of operating theatre laminar flow ventilation.* ANAESTHESIA 2012;67:244-249.

As a result of the Defendants' failure to maintain the sterility of the surgical area and the Defendants' wrongful conduct in designing, manufacturing, and marketing the Bair Hugger®, Moving Party and Moving Party's physician were unaware, and could not have reasonably known or have learned through reasonable diligence, of the significantly increased risk of infection associated with use of the Bair Hugger forced air warming blankets.

Not surprisingly, patients who suffered from a peri-prosthetic joint infection following orthopedic surgery where a Bair Hugger® product was used intra-operatively have begun to file lawsuits in federal court, including Moving Party. As of the filing of this Motion, Moving Party is aware of fourteen cases filed in federal courts across the nation. In their complaints, Plaintiffs allege causes of action for negligence, breach of express and implied warranties, strict product liability (failure to warn; design defect; manufacturing defect), and consumer fraud claims.

Moving Party alleges in his Complaint, among other things, that the Bair Hugger® products are defective because they were improperly designed and manufactured and Defendants failed to include an appropriate warning with the devices. Furthermore, Moving Party also alleges that Defendants had knowledge of the alleged defects and dangers, citing to medical reports and journals dating back to the 1990s. As a result, Moving Party alleges he has suffered from physical injuries, pain, suffering, emotional distress, and economic damages as a result of Defendants' Bair Hugger® products, which required plaintiffs to undergo additional surgeries because of the Bair Hugger-induced infection. Plaintiffs across the country have alleged similar causes of action, factual support, and resulting damages.

Moving Party anticipates that a large number of additional Bair Hugger® cases will be filed in federal courts across the country. In spite of Defendants' aggressive efforts, the information described in this petition has recently found a wider audience. The gradual

accumulation of published scientific evidence has reached a tipping point, causing the issue to become increasingly publicized. Knowledge of the hazards created by the Bair Hugger® has expanded beyond the laboratory, and has become an issue discussed by industry associations, trade journals, and patient advocacy groups. The increased exposure of this information, combined with the staggering market share enjoyed by the Bair Hugger®, suggests that numerous cases will continue to be filed in federal districts across the nation moving forward. Like the other MDLs involving defective medical devices, the Bair Hugger® cases will benefit from coordinated or centralized pre-trial proceedings. As analyzed in detail below, these cases involve several common issues of fact that should be resolved by one judge in order to minimize the number of potentially inconsistent rulings around the country. Accordingly, Moving Party requests that the Panel transfer the Bair Hugger® cases to the District of Minnesota, and specifically to the Honorable Donovan Frank, who is an experienced MDL judge with a unique knowledge and understanding of cases involving implantable medical devices, and orthopedic implants specifically.

III. ARGUMENT

A. TRANSFER AND COORDINATION OF THE BAIR HUGGER FORCED AIR WARMING CASES IS APPROPRIATE AND NECESSARY

28 U.S.C. § 1407 directs the Panel to transfer federal civil actions for pretrial coordination or consolidation where: (1) the cases involve "common questions of fact" (2) the transfer is convenient for the parties and witnesses; and (3) the transfer "promote[s] the just and efficient conduct" of the cases. 28 U.S.C. § 1407(a). Generally speaking, the purpose of Section 1407 is "to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation costs, and save the time and effort of the parties, the attorneys, the witnesses, and the

courts." Manual for Complex Litigation (Fourth) § 20.131 (2004) (citing *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (J.P.M.L. 1968)); *see also* David F. Herr, Multidistrict Litigation Manual § 5:16 (2010).

The Bair Hugger® cases are well suited for centralization under Section 1407. Though scattered across the country, these cases are all closely related: in most cases, they share exactly the same Defendants, the same basic theories of liability, and the same general factual allegations. All of the cases will involve the same core of lay and expert witness and document discovery. Moreover, only two of these cases have made any progress towards resolution, but neither is even set for docket call until 2016. Further, one of these two cases was reassigned to a new judge on July 27, 2015, making this the optimal time to order transfer. More specifically, because neither of these cases has progressed to the point of trial, or even full production of documents or discovery of experts and other key witnesses, the goals of efficiency and coordination can best be met by transferring all filed cases, including the two first-filed cases, to the MDL judge who may be assigned to this case. Transferring these cases pursuant to 28 U.S.C. § 1407 would enhance the convenience and efficiency of this litigation. Failing to transfer would force all the parties to take repetitive and/or redundant depositions and other pre-trial discovery, as well as leading to inconsistent and conflicting rulings – particularly with respect to discovery and other pretrial matters, which have not reached maturity in the first filed cases. As set forth in detail below, the Bair Hugger® cases are suitable for transfer and centralization before a single district court.

i. The Bair Hugger® cases involve common questions of fact and involve common issues for discovery.

Federal civil actions are eligible for transfer pursuant to 28 U.S.C. § 1407 if they involve "common questions of fact" subject to discovery. *See* 28 U.S.C. § 1407(a); *In re Kugel Mesh Hernia Patch Products Liability Litigation*, 493 F. Supp. 2d 1371, 1372-73 (J.P.M.L. 2007). That requirement is plainly met here. The Bair Hugger® cases filed, and, ultimately future filings, share countless issues of fact, including:

(1) Whether and to what extent the Bair Hugger® products have caused, or will cause, harmful effects in patients including, but not limited to, physical injury, pain and suffering, swelling, severe inflammation of surrounding tissue and bone, infection, an inability to walk and other lack of mobility, and the need for revision surgery to remove an orthopedic implant, and/or surgical amputation, together with the attendant risks of complications from surgery;

(2) When Defendants first learned of the connection between the Bair Hugger® and the foregoing harmful effects caused by use of the products;

(3) Whether, and for how long, Defendants concealed any such knowledge from physicians who purchased the devices for use with their patients and the public;

(4) Whether Defendants defectively designed and/or manufactured the Bair Hugger®;

(5) Whether Defendants failed to provide adequate warnings and instruction concerning the Bair Hugger® products;

(6) Whether Defendants were negligent in their design and/or manufacture of the Bair Hugger®;

(7) Whether Defendants engaged in fraudulent and illegal marketing practices including, but not limited to, making unsubstantiated claims regarding the superiority and effectiveness of the Bair Hugger®; and

(8) The nature and extent of damages suffered by Plaintiffs as a result of the Bair Hugger®.

Accordingly, the fourteen cases currently filed before federal district courts across the nation, as well as anticipated future cases, share numerous common questions of fact subject to discovery. Furthermore, ordering coordination or centralization and transferring pending and future Bair Hugger® cases to a single district court will result in efficient discovery practices for plaintiffs and for defendants. As in past MDL cases, the defendants will likely not want their 30(b)(6) designees, retained experts, and other key witnesses to be subjected to repeated depositions around the country in hundreds if not thousands of cases that will, in all likelihood, be filed over the coming weeks and months.

Transferring the Bair Hugger® cases will permit the transferee court to manage discovery justly and efficiently; eliminate costly and timely duplicative discovery; and avoid conflicting rulings on issues like the scope, timing, and form of discovery. *See, e.g.*, *In re M3Power Razor System Marketing & Sales Practices Litigation*, 398 F. Supp. 2d 1363, 1364-65 (J.P.M.L. 2005) ("Transfer under Section 1407 will offer the benefit of placing all actions in this docket before a single judge who can structure pretrial proceedings to accommodate all parties' legitimate discovery needs while ensuring that the common party and witnesses are not subjected to discovery demands that duplicate activity that will or has occurred in other actions."). Coordination of discovery will be beneficial not only for Plaintiffs, but also Defendants. If consolidated, depositions of key witnesses will only be required once rather than several separate

occasions. Documents can be produced once to a central location with access to all Plaintiffs and their counsel, therefore limiting duplicative discovery efforts as to the common factual issues between the cases. Thus, centralization is necessary to prevent duplicative discovery, lower the Defendant's overall costs of discovery and avoid unnecessary burdens on witnesses and plaintiffs.

ii. Pretrial centralization of the Bair Hugger® cases will enhance the convenience of the litigation as a whole.

Transfer is appropriate when it enhances the convenience of the litigation as a whole. *See, e.g.*, *In re Library Editions of Children's Books*, 297 F. Supp. 385, 386 (J.P.M.L. 1968) ("[T]he Panel must weigh the interests of all the plaintiffs and all the defendants, and must consider multiple litigation as a whole in the light of the purposes of the law."). Here, pretrial transfer would undoubtedly ease the burdens on all parties involved.

Defendants and Plaintiffs stand to benefit from pretrial centralization. As previously mentioned, pretrial centralization would reduce discovery requests and costs significantly for Defendants. It also permits Plaintiffs' counsel to coordinate their efforts and share the pretrial workload, thereby reducing each individual counsel and plaintiff's costs and allowing Defendant to work with one consolidated plaintiffs' requests and filings rather than various counsel and courts across the country. *See, e.g.*, *In re Baldwin-United Corp. Litigation*, 581 F. Supp. 739, 741 (J.P.M.L. 1984) ("[P]rudent counsel will combine their forces and apportion the workload in order to streamline the efforts of the parties and witnesses, their counsel and the judiciary, thereby effectuating an overall savings of cost and a minimum of inconvenience to all concerned.").

Pretrial centralization will also allow Defendants to concentrate its attention and energy on one forum, rather than numerous locations all over the country. As a result, Plaintiff anticipates that Defendants will be able to respond more quickly and effectively to Plaintiffs and the transferee court, enhancing the overall efficiency of the litigation and compensation of plaintiffs' harms. *See In re: Apple iPhone 3G Products Liability Litigation*, 630 F. Supp. 2d 1382, 1383 (J.P.M.L. 2009) (concluding that transfer to the Northern District of California would "conserve the resources of the parties, their counsel and the judiciary," in part because "[t]he headquarters of the common defendant . . . are located within this district").

In short, transferring the Bair Hugger® cases for pretrial coordination or centralization will make this litigation far more efficient and convenient for all involved.

iii. Pretrial centralization of the Bair Hugger® cases will promote the just and efficient conduct of these cases.

Centralization of the Bair Hugger® cases will also promote the just and efficient conduct of this litigation. In evaluating whether proposed pretrial transfers serve this goal, the Panel often asks whether centralization will prevent inconsistent or repetitive pretrial rulings. *See, e.g.*, *In re Baycol Products Liability Litigation*, 180 F. Supp. 2d 1378, 1380 (J.P.M.L. 2001) (centralization would promote justice and efficiency because it would "eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel and the judiciary"). For litigation of this potential magnitude and scope, centralization before a single court eliminates the possibility of inconsistent rulings amongst the Bair Hugger® cases; therefore, preventing different treatment of plaintiffs under similar legal theories. While the JPML has sometimes indicated that inconsistent

rulings may be unavoidable, movant maintains that centralization will assist the parties and the judiciary to keep the number of such potential conflicts to a bare minimum.

Centralization will ensure just application of law for all Plaintiffs. All Plaintiffs will proceed under the same rulings and avoid conflicting decisions that may benefit one Plaintiff in one court over another. Because every Bair Hugger® case sets forth the same basic liability allegations, such defenses go to the heart of each and every case. With over a dozen Bair Hugger® cases currently filed, and many hundreds more expected to surface in the near future, it is important for the parties and the court to try to minimize the risk of conflicting rulings from various courts around the country. Indeed, a single transferee court will be in the best position to determine the appropriate staging and resolution of such threshold issues that affect all actions and that could dramatically simplify the litigation. *See In re Suess Patent Infringement Litigation*, 331 F. Supp. 549, 550 (J.P.M.L. 1971).

Thus, under the authority granted to it by 28 U.S.C. § 1407, the Panel should grant the Motion for transfer and consolidation of the Bair Hugger® cases. Therefore, the remaining issue presented to the Panel is to determine the proper venue for the transferred actions.

B. THE DISTRICT OF MINNESOTA IS THE PREEMINENT TRANSFEREE FORUM TO EFFICIENTLY MANAGE THE BAIR HUGGER® CASES

Moving Party respectfully urges the Panel to transfer the Bair Hugger® actions to the District of Minnesota where they can be efficiently, justly and capably managed by a court with extensive Multidistrict Litigation experience. The District of Minnesota is the optimal court to effectively manage a complex products liability case like this one, in part because of that court's familiarity and experience with damages associated with defective orthopedic implants.

In determining an appropriate transferee forum, the Panel balances a number of factors, including: the experience, skill and caseloads of the available judges; number of cases pending in the jurisdiction; convenience of the parties; location of the witnesses and evidence; and the minimization of cost and inconvenience to the parties. *See, e.g., In re Regents of University of California*, 964 F.2d 1128, 1136 (Fed. Cir. 1992); *In re Wheat Farmers Antitrust Class Action Litig.*, 366 F.Supp. 1087, 1088 (J.P.M.L. 1973); *In re Preferential Drugs Prods. Pricing Antitrust Litig.*, 429 F.Supp. 1027, 1029 (J.P.M.L. 1977); *In re Tri-State Crematory Litig.*, 206 F.Supp. 1376, 1378 (J.P.M.L. 2002); Annotated Manual of Complex Litigation (Fourth) (2004), §20.131, at 303-304. Of the factors the Panel considers when determining the transferee forum, experience, number of pending cases, and available resources weigh heavily in favor of transferring all related cases to the District of Minnesota.

The District of Minnesota is well-versed in handling multidistrict litigations and specifically, handling medical device products liability cases. Judges in the District of Minnesota have presided over and brought about successful partial or complete resolution in several medical device multidistrict litigations including: *In Re: Stryker Rejuvenate and ABGII Hip Implant Products Liability Litigation*, MDL No. 2441; *In Re: Guidant Corp. Implantable Defibrillators Products Liability Litigation*, MDL No. 1708, *In Re: Medtronic Inc., Sprint Fidelis Leads Products Liability Litigation*, MDL No. 1905, *In Re: St. Jude Medical Inc., Silzone Heart Valves Products Liability Litigation*, MDL. No. 1396, and *In Re: Medtronic, Inc. Implantable Defibrillators Products Liability Litigation*, MDL No. 1726. Furthermore, the District of Minnesota's bench and staff have extensive experience in overseeing multiple complex MDL proceedings involving complicated medical issues, including, *In Re: Levaquin Products Liability Litigation*, MDL No. 1943, *In Re: Baycol Products Liability Litigation*, MDL

No. 1431, and *In Re: Mirapex Products Liability Litigation*, MDL No. 1836. The District of Minnesota's copious knowledge, background, and experience will undoubtedly ensure that this litigation will proceed in a timely and efficient manner.

Defendants 3M and Arizant Healthcare, Inc. conduct significant business in the District of Minnesota. Indeed, Minnesota is the principal place of business for both Defendants. Additionally, the Bair Hugger® was invented in Minnesota. Nearly every document and witness critical to the Bair Hugger® litigation is located in Minnesota. Currently, nine of the fourteen Bair Hugger® cases are filed in the District of Minnesota.[13] The remaining cases not before the District of Minnesota are spread across at least five different District Courts with no Court presiding over more than one Bair Hugger® case. *See* David F. Hen, Multidistrict Litigation Manual § 6:8 (2010) ("[T]he Panel will not normally transfer actions to a district in which no action is then pending and the panel clearly considers the number of actions pending in various districts to determine the selection.").

Finally, in addition to the Defendants' connection to Minnesota, the Minneapolis/St. Paul area offers a convenient and affordable location for both the Defendants and Plaintiffs. The Minneapolis-St. Paul International Airport is a central hub for multiple airlines, providing direct flights throughout the day to destinations across the U.S. In addition, the District of Minnesota is a geographically centralized location for the Defendants, Plaintiffs, and a comprehensive group of surgeons and experts that will be involved in this complicated litigation.

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[13] *William Lichlyter v. 3M Company and Arizant Healthcare, Inc.*, No. 15-cv-3139; *Brenda Naylor v. 3M Company and Arizant Healthcare, Inc.*, No. 15-cv-3140; *Gerald Nottingham v. 3M Company and Arizant Healthcare, Inc.*, No. 15-cv-3141; *Renny Schackmann v. 3M Company and Arizant Healthcare, Inc.*, No. 15-cv-3142; *Tawas Reed v. 3M Company and Arizant Healthcare, Inc.*, No. 15-cv-3143add cases?

The Panel in the past has recognized that the District of Minnesota is an appropriate MDL transferee court because the district "enjoys general caseload conditions' and resources allowing it to handle complex litigations. *In re St. Jude Medical, Inc., Silzone Heart Valves Prods. Liab. Litig.*, 2001 U.S. Dist. LEXIS 5226, at *4-5 (J.P.M.L. 2001). Furthermore, in transferring the *Baycol* MDL to the District of Minnesota, the Panel found that the District is "a major metropolitan court that i) is centrally located, ii) is not currently overtaxed with other multidistrict dockets, and iii) possesses the necessary resources, facilities, and technology to sure-handedly devote the substantial time and effort to pretrial matters that this complex docket is likely to require." *In re Baycol*, 180 F. Supp. 2d 1378, 1380 (J.P.M.L. 2001).

While there are a number of eminently qualified judges serving in the District of Minnesota, if transferred to the District of Minnesota, Moving Party respectfully requests that the litigation be assigned to the Honorable Donovan W. Frank. Judge Frank has more than twenty-five years of experience as a jurist, including nearly fifteen years of experience as a federal judge and multiple MDLs. Before his appointment to the District of Minnesota in 1998, Judge Frank served on the Minnesota state district court bench, including, serving as the Chief Judge of the sixteen-judge Sixth Judicial District form 1991 to 1996. Prior to his judicial appointments, Judge Frank served as an Assistant County Attorney in Minnesota.

Judge Frank's comprehensive and unique experience, including presiding over complex implantable device products liability cases, makes him a superior choice to oversee the Bair Hugger® cases MDL. Specifically, Judge Frank's experience includes presiding over the *In Re: Guidant Corp. Implantable Defibrillators Products Liability Litigation*, MDL No. 1708, which involved many complex disputes concern science and discovery. Judge Frank's guidance led to a global resolution of thousands of *Guidant* cases. In addition, Judge Frank has presided over the

Stryker Rejuvenate and ABG II Hip Implant MDL for more than two years, bringing that litigation to substantial resolution during that span. The Guidant MDL is closed, and a significant portion of the Stryker MDL has settled, clearing room on Judge Frank's docket for another complex MDL involving medical devices. Judge Franks' experience, and that of his staff, in managing large and complicated medical device litigation will undoubtedly result in an efficient litigation here.

Judge Frank is continually recognized, both locally and nationally, for his commitment to the right to a fair legal process. Most recently, the American Bar Association ("ABA") Commission on Disability Rights selected Judge Frank to receive the 2012 Paul G. Hearne Award for Disability Rights. The ABA selected Judge Frank citing his focus on "advocating for the rights of persons with developmental disabilities – 'the forgotten minority'- to equal opportunities, equal justice under the law, and equal access, and to be treated with dignity and respect."[14],[15]

Accordingly, Moving Party recommends the District of Minnesota and the Honorable Donovan W. Frank to preside over the Bair Hugger® cases.

III. CONCLUSION

For the aforementioned reasons, Moving Party respectfully requests that the Panel order coordinated or centralized pretrial proceedings for the Bair Hugger® cases and transfer all pending and future cases to the District of Minnesota with the Honorable Donovan W. Frank

[14] http://www.fedbar.org/Chapters/Minnesota-Chapter/Minnesota-Federal-Judge-Receives-Paul-G-Hearn-Award-from-ABA.aspx

[15] Other distinguished honors and awards include: Federal Bar Association - Elaine R. "Boots" Fisher Award (2006), in recognition of outstanding public service and dedication to diversity in the legal community; Hamline University School of Law Distinguished Alumnus Award (2000); Minnesota Trial Judge of the Year, Conference of Chief Judges (1996); Range Women's Advocates Annual Recognition Award (1995), in recognition of contributions toward ending domestic violence; Alumni Association Distinguished Achievement Award, Hamline University School of Law (1986).

presiding. Furthermore, given the ongoing discovery taking place in the first two districts with filed cases, (cite to Walton and Johnson), movants urge this Honorable Panel to add this Bair Hugger motion to the October 1 docket set to be argued on October 1 in New York City.

Respectfully submitted,

Dated: August 21, 2015

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