BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: BAIR HUGGER FORCED AIR WARMING PRODUCTS LIABILITY LITIGATION

MDL No. 2666

ORAL ARGUMENT REQUESTED

DEFENDANTS 3M COMPANY'S, ARIZANT HEALTHCARE, INC.'S AND ROBERT PRESTERA'S JOINT RESPONSE IN OPPOSITION TO MOTION OF PLAINTIFF FOR TRANSFER OF ACTIONS TO THE DISTRICT OF MINNESOTA PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

Plaintiff seeks to transfer and consolidate fourteen cases (collectively the "Plaintiffs") against 3M Company, Arizant Healthcare, Inc. and Robert Prestera ("Defendants") arising from infections diagnosed following knee or hip implant or replacement surgeries in which the Bair Hugger Forced Air Warming system ("Bair Hugger FAW") was used to maintain patients' normal body temperature before and during surgery. In contrast to the typical medical device mass tort litigation initiated by outside events—such as FDA action or the discovery of new risks published in independent, peer-reviewed studies—these cases present the unprecedented circumstance of product liability litigation concocted by lawyers and based on the false and misleading claims of the inventor of the device and now competitor, Dr. Scott Augustine motivated by financial gain. The Bair Hugger FAW is an FDA-cleared medical device, demonstrated and determined by the FDA to be safe and effective before marketing, and further proven to be safe and effective through decades of clinical research and widespread use in hundreds of millions of surgeries. Maintaining normal body temperature, or normothermia, is clinically proven to help reduce the risk of infections and improve surgical outcomes.

Plaintiffs' claims, conversely, have no basis in fact or legitimate science, and should not

be endorsed by this Panel through the creation of an MDL. The Motion of Plaintiff for Transfer of Actions to the District of Minnesota ("Plaintiff's Motion") recites a litany of false claims and conjecture, supported by deeply flawed and competitor-sponsored "studies," and draws conclusions that the studies themselves do not suggest. Indeed, these same allegations and alleged "studies" have been reviewed and rejected by multiple independent organizations. Sanctioning this litigation through the creation of an MDL could put countless patients in danger of serious surgical complications by needlessly intimidating medical providers into discontinuing the use of proven and important surgical care. There have been no studies establishing that the use of Bair Hugger FAW causes infections.

Plaintiff's Motion should be denied because individual issues predominate, and transfer would not promote the just and efficient conduct of these actions or serve the convenience of the parties and witnesses. Two earlier-filed actions[1] have been pending for 1.5 and 2.5 years, respectively, during which time substantial discovery has taken place, including production of tens of thousands of pages of documents, the depositions of numerous treating physicians and other fact witnesses, and depositions of numerous of the Defendants' current and former employees. Discovery in the other twelve recently filed cases will primarily relate to the surgery conducted, the hospital protocols utilized, and patient-specific risk factors. Given the mature stage and substantial completion of discovery in these longstanding cases, both of which are already scheduled for trial in 2016, transfer is improper.

I. BACKGROUND

A. The Bair Hugger FAW Has Been Proven Safe and Effective by Decades of Use, a Substantial Body of Scientific Literature, and Independent Review

Forced-air warming is widely considered the optimal method of maintaining patient

[1] *See Walton v. 3M Company, et al.*, No. 4:13-cv-01164 (S.D. Tex.); *Johnson v. 3M Company, et al.*, No. 2:14-cv-02044 (D. Kan.).

normothermia, one of the important patient benefits of which is reducing the risk of infection. Preventing hypothermia in anesthetized patients during surgeries is recognized as important by virtually all relevant anesthesia and patient care organizations, including the American Society of Anesthesiologists (ASA). Several of these organizations specifically call for the use of forced-air warming devices to maintain normothermia. More than 50,000 patients are warmed daily with the Bair Hugger therapy.

The vast majority of research showing the benefits of normothermia comes from studies where the Bair Hugger FAW or other forced-air warming devices were used. The technology is supported by more than 170 clinical studies, including 60 randomized controlled trials. The Bair Hugger FAW has been cleared by the FDA for more than 25 years. In all that time, there has been no FDA recall of the device related to infection, nor any FDA Safety Communication, Warning Letter, or other enforcement action related to infection. Nor have Defendants received a single report of infection connected with a Bair Hugger FAW device from a patient's healthcare provider. There is also no credible scientific literature to support Plaintiffs' far-fetched claims that there is an increased risk of infection associated with the Bair Hugger FAW. To the contrary, multiple randomized, controlled clinical trials, including studies published in the New England Journal of Medicine and The Lancet, have found that the use of Bair Hugger FAW kept patients normothermic and thereby significantly ***reduced*** the risk of infection. The consequence of creating an MDL could thus be to put patients' lives at risk by prompting litigation-averse hospitals to stop use of the Bair Hugger FAW—an outcome which no independent medical organization or regulatory agency has advocated, and which several have specifically rejected.

B. A Deceitful Misinformation Campaign by Defendants' Competitor Is the Source of Plaintiffs' False Allegations Against the Bair Hugger FAW

Plaintiffs' claims trace their origins to a smear campaign launched by Dr. Augustine,

CEO of Augustine Biomedical & Design, a competitor in the patient-warming market. Since 2007, Dr. Augustine has engaged in an aggressive and unorthodox effort to drive sales of his own device by improperly attempting to undermine the Bair Hugger FAW. Dr. Augustine falsely claims that the use of forced-air warming may increase airborne contamination in operating rooms, and that this contamination presents an increased risk of infection. These allegations are knowingly deceptive and driven by a personal agenda. Dr. Augustine was the original inventor and developer of the Bair Hugger FAW.[2] After being forced to leave the company he founded[3] in 2003, while he was being investigated for Medicare fraud, Dr. Augustine developed a new patient warming device with a different design. His new device (the "HotDog") works much like an electric blanket by providing warmth to the patient through direct contact between the patient and the device, as opposed to the Bair Hugger's forced-air method of warming. (*Id*. ¶¶ 10-11.) The HotDog does not enjoy widespread acceptance or use, and Dr. Augustine has descended into dishonesty and junk science in an effort to change the competitive landscape.

Dr. Augustine has combined public dissemination of false information and threats of litigation with private offers to "sell [to the Defendants] the solution" to his fictional "contamination problem."[4] He has attempted numerous times to extort financial gain from Defendants with his baseless campaign. For example, he has sought to acquire patents on unnecessary "hose-end filter" technology on which, based on the false information he has contrived to spread among the medical community, he claims "the short-term survival of Bair Hugger is dependent," and has threatened "litigation when our patents issue" if Defendants do

[2] Declaration of Mark Scott ¶ 8. (attached as **Exhibit A**.)
[3] The original name of Arizant was "Augustine Medical"; following Dr. Augustine's departure, the name was changed to Arizant Healthcare.
[4] *See* April 19, 2010 letter from Scott Augustine to Gary Maharaj, CEO, Arizant Healthcare, Inc., at 2 (attached as **Exhibit B**).

not accede to his demands.[5] Dr. Augustine has also advertised his investor strategy of "attacking [forced-air warming] competitors" by claiming that forced-air warming "contaminates the sterile field and increases the risk of implant infections."[6]

Of particular importance to the present Motion, Dr. Augustine has repeatedly consulted with Plaintiffs' counsel to incite baseless product liability litigation against Defendants, for his own financial gain. As he has written to Defendants' employees: "Many plaintiffs' lawyers have contacted us for technical and scientific information regarding FAW and wound contamination. Some law firms are blogging about FAW, and at least one has launched a website advertising for SSI cases that might have been caused by FAW."[7] Indeed, it has recently been revealed that Dr. Augustine has been represented by Kennedy Hodges, the plaintiffs' law firm who brought the two longest-standing cases, as his personal attorneys since July of 2009.[8] Despite these extortion attempts, Defendants have repeatedly refused to engage in any negotiations with Dr. Augustine.

As noted in the attached article, "Dr. Augustine's campaign against the Bair Hugger has taken various forms. He has spoken out against the device at professional meetings and has underwritten studies intended to show that it may pose a bacterial threat."[9] Indeed, one anesthesiologist at the Cleveland Clinic described Dr. Augustine's efforts this way:

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[5] *See* April 2, 2010 Letter from Scott Augustine to Gary Maharaj, CEO, Arizant Healthcare, Inc., at 2 (attached as **Exhibit C**).

[6] *See* Augustine Temperature Management, *Investment Opportunity: Surgical Patient Warming via Conductive Fabric* (July 2014) (attached as **Exhibit D**).

[7] June 1, 2010 Email from Scott Augustine to Arizant employees (attached as **Exhibit E**). One of the first law firms to blog or advertise about potential lawsuits alleging that infections were caused by FAW is Kennedy Hodges, LLP in Houston. Kennedy Hodges was also the firm who filed the *Walton* and *Johnson* lawsuits – the first two such lawsuits.

[8] Dr. Augustine and Kennedy Hodges disclosed this relationship in an effort to block Defendants' efforts to discover communications between Dr. Augustine and plaintiffs' counsel in *Walton* and *Johnson*, which would further disclose Dr. Augustine's role in spurring and shaping the present litigation.

[9] *Doctor Says a Device He Invented Poses Risks,* New York Times (Dec. 24, 2010) (attached as **Exhibit F**).

> "He simply has a new device now and wants to promote it," said Dr. Andrea Kurz, an anesthesiologist at the Cleveland Clinic, who has studied the HotDog. "And when you promote a new device by making something old look bad, it doesn't work well in our community."

Id. Dr. Augustine himself has given interviews in which he has candidly admitted the ulterior motives behind his campaign: "[Augustine] says he offered to sell the [HotDog] technology to Arizant, but they declined. 'They chose to fight over this,' he says. 'I just want the fight to be interesting. This is the way I compete. If you want to play this game, fine.'"[10]

Dr. Augustine's efforts to undermine the Bair Hugger FAW in the marketplace have also drawn the FDA's attention. (Ex. A, Scott Decl. ¶ 3). After a review of the Augustine Biomedical & Design website in 2012, the FDA sent Dr. Augustine a Warning Letter informing him that his device was "being marketed without the required clearance or approval in violation of the Federal Food Drug and Cosmetic Act" because of his advertised claims of lower infection rates for the HotDog as compared to the Bair Hugger FAW. [11] As such, the FDA declared the HotDog "misbranded" and "adulterated."[12] This may be the first time in the history of medical device product liability litigation that the very allegations on which Plaintiffs premise their claims (increased risk of infection vis-à-vis a competitor product) have in fact been the subject of a warning letter not directed to the Defendants, but to the competitor manufacturer of the proposed alternative design advocated by Plaintiffs.

C. Plaintiff's Complaints Repeat the False Claims of Dr. Augustine's Misinformation Campaign, Endangering Patient Safety

Dr. Augustine's theories have now caught the attention of entrepreneurial plaintiffs'

[10] Andrew Tellijohn, *Just Invented It* (available online at http://www.upsizemag.com/cover-story/just-invent-it) (last accessed September 3, 2015) (attached as **Exhibit G**).
[11] *See* July 24, 2012 Warning Letter from Damia Jackson, Food and Drug Administration, Center for Devices and Radiological Health, Office of Compliance to Scott Augustine, M.D., a copy of which is attached as **Exhibit H**.
[12] *Id.*

attorneys, apparently eager to improperly manufacture new litigation from existing inventories of recent hip and knee implant claimants, despite the total absence of evidence to support their claims. For example, six of the fourteen Plaintiffs identified in Plaintiff's Schedule of Actions previously filed separate actions still pending against hip or knee implant manufacturers arising out of the same surgery in *In re: Stryker Rejuvenate and ABG II Hip Implants Prods. Liab. Litig.,* MDL No. 2441.[13]

Plaintiffs allege that the Bair Hugger FAW caused their infections, parroting Dr. Augustine's false assertions and citing flawed, competitor-sponsored "studies" in support.[14] Yet Plaintiffs go even further, drawing conclusions the studies themselves do not suggest. None of the Augustine-sponsored or Plaintiff-cited "studies" conclude that the Bair Hugger FAW can cause any infections, yet Plaintiffs cite them for this conclusion. Plaintiffs assert a variety of claims sounding in product liability, breach of warranty, fraud, and tort, all of which are based upon allegations that the Bair Hugger FAW was defectively designed and manufactured, that 3M and Arizant failed to warn of its known risks, and that 3M and Arizant negligently or intentionally misrepresented the safety and efficacy of the Bair Hugger FAW. Plaintiffs assert the Bair Hugger FAW used in their surgeries caused "interruption of normal air flow" in the operating room during one of their surgeries, and allegedly caused bacteria to enter the surgical site. These baseless claims have no merit, and similar claims made by Dr. Augustine's company drew an FDA warning letter. Defendants deny these allegations.

Plaintiffs' claims also baselessly contradict decades of research and clinical experience—including clinical studies where the Bair Hugger FAW was used—demonstrating that

[13] *See* **Exhibit I**.
[14] Five of the six articles cited were supported in some way by Augustine and include Mark Albrecht, an Augustine employee, as an author.

maintaining normothermia reduces the risk of infection. In 2010, the FDA specifically investigated claims of alleged contamination in connection with the Bair Hugger FAW and—based on a review of Defendants' complaint database, an inspection of Defendants' files, and consideration of multiple, independently-conducted studies concluding that forced-air warming systems do not increase bacterial contamination in the operating room—found no evidence to support contamination concerns. Similarly, multiple independent organizations have examined the allegations that forced-air warming systems could create an increased risk of infection in orthopedic surgeries, and have found that no change in practice was warranted.[15]

D. Post-Operative Infections Are a Known Surgical Complication with Multifactorial Causes Individual to Each Patient

Plaintiffs' claims also rely on speculation and conjecture, as no reliable data or study supports their position, and Plaintiffs' assertions are made without regard to the known, multi-faceted causes of post-operative infection. Generally, there is a risk of infection in all surgeries. Post-operative surgical site infections and perioperative joint infections of the types Plaintiffs allege are well-recognized complications of any surgery, including those related to orthopedic implants. Such post-operative infections are known to be caused by a variety of independent patient, procedure, physician, and environmental factors; however, the vast majority of surgical site infections come from the patient's own microflora.[16]

APIC advises that "[c]ontamination of the surgical wound is almost unavoidable despite the best efforts of the surgical team."[17] For example, while preparation of the skin can "reduce

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[15] *See* ECRI Institute, *Forced-air Warming and Surgical Site Infections,* Health Devices (April 2013) (attached as **Exhibit J**); Proceedings of the International Consensus Meeting on Periprosthetic Joint Infection (August 2013) (discussion regarding forced-air warming attached as **Exhibit K**; full report available at http://www.msis-na.org/international-consensus/).

[16] Greene, LR, et al, Guide to the elimination of orthopedic surgical site infections, An APIC Guide. 2010 (attached as **Exhibit L**).

[17] APIC, *Guide to the Elimination of Orthopedic Surgical Site Infection* (attached as **Exhibit L**).

bacterial contamination," since "as much as 20% of the skin's bacteria are resident (living beneath the epidermal layer of skin, in appendages such as hair follicles and sebaceous glands), any incision made through the skin has the potential of carrying some of this bacterial load directly to the operative site." *Id*. Orthopedic surgery carries particular risks, because "placement of a foreign body, either a prosthetic joint, joint components, or hardware used to stabilize bony structures or repair fractures" can "facilitate infection by either locally introduced contamination or by hematogenous spread of microorganism." *Id*. Indeed, the source of infection alleged by ten Plaintiffs, Methicillin-resistant Staphylococcus aureus (MRSA), is a staph bacterium most commonly transferred by the patient's tissue, blood or inanimate objects in the environment and less commonly via "airborne contamination" as Plaintiffs allege.[18]

Because contamination of the surgical wound is almost unavoidable, one of the most important factors in the development or prevention of post-operative infection is the patient's own host defenses, which of course can vary greatly from patient to patient. "Neither operating rooms nor patients are perfectly sterile. Thus, all surgical wounds become contaminated. Although the type and degree of contamination clearly matter, progression from contamination to clinical infection is largely determined by the adequacy of host defense."[19] Multiple randomized controlled trials have found that patients who are kept normothermic by the Bair Hugger FAW have a significantly reduced risk of developing infection.

In short, Plaintiffs' claims are nothing more than the latest iteration of a competitor's bad-faith attempts to undermine the established safety of the Bair Hugger FAW, and have no legitimate scientific basis. However, the creation of an MDL could have the unintended

[18] Oie S, Kamiya ,. Survival of methicillin-resistant Staphylococcus aureus (MRSA) on naturally contaminated dry mops. Journal of Hospital Infection. 1996 (attached as **Exhibit M**).
[19] Sessler DI, *Neuraxial anesthesia and surgical site infection*, Anesthesiology (2010) (attached as **Exhibit N**).

consequence of lending credibility to these claims, potentially leading to intimidation of medical providers, reduced use of patient warming devices, and ultimately undermining patient safety.

E. The Two Original Bair Hugger Cases Are Mature and Nearing Completion, Whereas the Other Twelve Cases Are in Their Inception

Discovery in two of fourteen actions is mature and nearing completion. The *Walton v. 3M Company* case in the U.S. District Court for the Southern District of Texas has been pending since March 5, 2013. Discovery will close November 30, 2015, prior to the December JPML hearing, dispositive motions are due by December 21, 2015, a joint pretrial order is due on February 22, 2016, and the case is set for trial March 7, 2016. The *Johnson v. 3M Company* case in the U.S. District Court for the District of Kansas has been pending since January 31, 2014. Discovery (including expert discovery) will close on February 19, 2016, a proposed pretrial order is due by March 9, 2016, a final pretrial conference is set for March 16, 2016, dispositive motions are due by March 31, 2016, and a jury trial is set for October 17, 2016. Fact discovery is substantially complete in both cases. There have been eighteen depositions of ten current or former employees taken or scheduled to be taken. Defendants have produced nearly 84,000 pages of documents in each case. Defendants have answered 64 interrogatories and 183 requests for production. In contrast, the remaining twelve cases were filed in July and August of 2015, nine of them in the U.S. District Court for the District of Minnesota. Separate motions to dismiss have been filed in eleven of the twelve cases, with the twelfth to follow shortly.

II. ARGUMENT

Plaintiff has not met his burden under 28 U.S.C § 1407, and his Motion should therefore be denied. Transfer and centralization are not appropriate under Section 1407 unless: (1) the civil actions involved "common questions of fact"; (2) transfer will be "for the convenience of the parties and witnesses"; and (3) transfer will "promote the just and efficient conduct of such

actions." 28 U.S.C. § 1407(a). The party moving for transfer bears the burden of showing that transfer "will further the purposes of Section 1407." *In re: Cable Tie Pat. Litig*, 487 F. Supp. 1351, 1354 (J.P.M.L. 1980). Here, any potential benefits of an MDL would be significantly outweighed by the resulting inconvenience and inefficiency. Because the purposes of Section 1407 would not be furthered by transfer and centralization of these disparate actions, Defendants request the Panel deny Plaintiff's Motion and instead allow the currently-presiding courts to manage the factual and legal intricacies of each individual action. Finally, granting Plaintiff's Motion would give credence to an unprecedented competitor driven litigation that has no basis in fact or science. As discussed above, Plaintiff is improperly attempting to create a new MDL leveraging existing hip and knee implant MDL cases, in the hopes of building an inventory of cases based on unsupportable scientific claims that threaten a widely accepted and established medical device. "[T]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it." *Rosen v. Ciba-Ceigy Corp.,* 78 F.3d 316, 319 (7th Cir. 1996). Make no mistake, if Plaintiff's Motion is granted, patients will suffer. Plaintiff's efforts are an abuse of the MDL process, and should not be countenanced by this Court.

A. Common Issues of Fact Do Not Predominate and Are Dwarfed by Substantial Case-Specific Inquiries Required for Each Case

Post-surgical infections are a well-recognized risk associated with any orthopedic surgery, and the circumstances under which they can arise are highly individualized and depend on the unique facts and circumstances of each patient, hospital, and surgical procedure. *See* § I.D, *supra*. For example, the rate of infection with an orthopedic implant is approximately 1-2%, but individual risk factors such as obesity and diabetes significantly increase a patient's chance of developing an infection. When calculating an individual's potential for development of surgical site infections, some considerations can include, among others: individual medical

history and host defense; the amount of bacteria and virulence of the infecting organism; the details of each surgery, including length, procedure, and complications; the layout, ventilation system, and contents of each operating room; the personnel present in each surgery; the specific anti-infective measures taken before, during, and after each procedure; the hospital's infection history; and the patient's pre- and post-surgical actions to reduce risk of infection.[20] When studies accurately calculate infection rates in orthopedic surgeries with the use of Bair Hugger FAW by correcting for comorbidities and confounding factors, a decrease in infection rates for total hip and knee arthroplasties has been documented.

In short, because the circumstances under which a post-surgical infection can arise are as varied as the individual patients and particular surgeries performed, adjudication of individual cases will require a case-specific inquiry into the unique medical facts of each case. This inquiry requires discovery of the multifaceted potential causes of infection for each individual plaintiff. The only commonality between the cases at issue here is that a Bair Hugger FAW was used during each surgical procedure and each plaintiff alleges his or her individual procedure led to an infection. The patient-specific individual issues particular to each case predominate over this one commonality, and will drive the outcome of each case. There is no common method to pinpoint the cause of infection to the Bair Hugger FAW, as opposed to the numerous other potential causes of infection specific to each patient, hospital, medical provider, and surgery.

Conversely, any common discovery can be conducted (and has already been conducted) through voluntary cooperation and legacy discovery materials rather than a centralized MDL. To the extent there is commonality in conducting discovery as to the Bair Hugger FAW, this has

[20] Greene, LR, et al, Guide to the elimination of orthopedic surgical site infections, An APIC Guide. 2010 (attached as **Exhibit L**).

largely been completed in the more than 83,000 documents produced in both *Walton* and *Johnson* and the eighteen corporate depositions taken thus far.

Where, as here, individual factual questions predominate over the common factual ones alleged by Plaintiffs, MDL centralization is not warranted. *See, e.g., In re: Electrolux Dryer Prods. Liab. Litig*., 978 F. Supp. 2d 1376, 1377 (J.P.M.L 2013) ("On the present record, it appears that individualized facts . . . will predominate over the common factual issues alleged by plaintiffs."); *In re: Ocala Funding, LLC, Commercial Litig.,* 867 F. Supp. 2d 1332 (J.P.M.L. 2012) ("Individualized issues concerning each party's rights and duties under separate sets of contracts, and with different contracting parties, appear to predominate among the actions."); *In re: American Manufactured Drywall Prods., Liab. Litig.,* 716 F. Supp. 2d 1367, 1368 (J.P.M.L. 2010) ("The proponents of centralization have not convinced us that any efficiencies from centralization would outweigh the multiple individualized issues, including ones of liability and causation, that these actions appear to present.").

Not only do individualized factors predominate in these cases, but the eight purported "common" questions of fact proffered by Plaintiffs fail to present a unified set of discoverable facts common to all Plaintiffs. Plaintiffs reference to "harmful effects" in multiple of their alleged issues of "common" fact is so broad and lacking in specificity Plaintiffs could not possibly form justiciable issues common to all Plaintiffs. *See* Plaintiff's Motion at 1. Typically product liability MDL claims revolve around a central general causation theory, where all plaintiffs allege the same type of injury caused by the product. But here, Plaintiffs do not identify a common core of alleged "harmful effects" that could provide a colorable nexus between Plaintiffs. Nor can they, as they seem to rely on two different baseless theories of general causation put forth by Dr. Augustine. Further, they gloss over significant differences in

the highly individualized specific causes of Plaintiffs' infections (as even reflected in the complaints that Plaintiffs seek to transfer), including the hospital, type of surgery, and the organisms responsible for the infections. Similarly, Plaintiffs allege common issues of 1) defective design and manufacture; 2) failure to warn; 3) negligent design and manufacture; and 4) "fraudulent and illegal marketing practices," without reference to any unifying theory of general causation common to all Plaintiffs and provable on common evidence rather than a Plaintiff-specific multi-factorial analysis. Given the breadth of these "common" questions, consolidation in an MDL would be improper, particularly when balanced against the overwhelmingly individualized, case-specific factual inquiry necessary to adjudicate causation and liability in each case.

The motions to dismiss filed (or soon to be filed) by Defendants in each of Plaintiffs' twelve most recently filed Complaints further illustrate the individual nature of the cases presented. Plaintiffs present claims governed by the laws of, among other states, Alabama, Arkansas, California, Illinois, Louisiana, Michigan, Minnesota, Montana, Ohio, and Texas. Plaintiffs have asserted infections based on surgeries occurring as early as 2009 or as late as 2014, and whether each plaintiff's claims are time-barred under the applicable laws of their respective states is thus a case-specific question, as is the sufficiency of each plaintiff's allegations in light of the causes of action recognized in each applicable state and the elements of each cause of action. These individual, potentially case-dispositive issues cannot be decided on a common basis; they must be resolved based on a case-specific analysis of the applicable choice of law, the substantive law of each state, and the success or failure of each Complaint to meet the substantive elements of each claim alleged under each state's applicable law.

B. Centralization Is Unnecessary Because the Common Discovery Plaintiffs Seek Is Largely Complete, and Centralization Would Delay Efficient and Timely Resolution of Earlier Filed Actions Close to Completion.

Centralization here is further inappropriate because discovery in the two legacy cases is procedurally advanced and almost complete. *See In re: Electrolux Dryer Prods. Liab. Litig.*, 978 F. Supp. 2d 1376, 1377 (J.P.M.L. 2013) (denying transfer where "many of the actions [were] procedurally advanced" and "[d]iscovery [was] complete in nine actions, and scheduled to close in the next two months in another ten actions"). Two cases, *Walton* and *Johnson*, were filed on March 5, 2013 and January 31, 2014, respectively, with discovery closing in *Walton* on November 30, 2015 and in *Johnson* on February 19, 2016, dispositive motions due by December 21, 2015 in *Walton* and March 31, 2016 in *Johnson*, and trials set for March 7, 2016 and October 17, 2016, respectively. Any benefits in efficiency and coordination that might have been achieved several years ago through transfer to the MDL are largely moot or could be accomplished through coordination of counsel.[21] MDL centralization is appropriate where cases are in their infancy, not here, where two cases are mature, fact discovery is substantially complete, and both cases are nearing readiness for dispositive motions and/or trial.

In contrast, the remaining twelve cases were filed in July and August of 2015, nine of them in the U.S. District Court for the District of Minnesota, and seven of those are already reassigned to one judge. Document and deposition discovery in *Walton* and *Johnson* can be made available in the recently filed cases through agreement of counsel as appropriate. Thus, the

[21] Plaintiffs in *Walton* and *Johnson* argue in their Response that, because these cases were separately filed, some witnesses were deposed twice and there have been separate document productions. First, Defendants offered to cross-notice depositions to avoid duplicative discovery, but Plaintiffs refused. However, at a deposition, the parties did agree to cross-notice part of the deposition. Second, the documents produced in the two cases overlap almost entirely. There are separate protective orders and different years at issue in each case, but Defendants gave meta data to the Plaintiffs to determine the corresponding document produced in each case once it was confirmed both cases involved the same Bair Hugger Model. Finally, Plaintiffs' concerns are moot because depositions discovery against Defendants will be complete as of tomorrow.

coordinated discovery of any purportedly "common" issues of fact has largely been completed, and any further discovery of such "common" issues against Defendants can be coordinated with Plaintiffs' counsel in the fourteen cases as needed. These cases closely resemble the Panel's decision denying transfer in *In re: Cymbalta (Duloxetine) Prods. Liab. Litig.*, where discovery was close to completion in three earlier filed cases, and another set of twenty-two cases were filed a year later. *In re: Cymbalta (Duloxetine) Prods. Liab. Litig.,* 65 F. Supp. 3d 1393, 1394 (J.P.M.L. 2014) (finding that "most, if not all, of the common discovery has already taken place in those earlier-filed actions"). *See also In re: General Electric Capital Corporation Thomas Peters Investment Litig.,* MDL No. 2603, 2015 WL 506433, at *1 (J.P.M.L. Feb. 4, 2015) ("Discovery in the Florida action is well underway, in contrast to the other actions. The parties already have exchanged more than one million pages of documents, and several depositions have taken place. The fact discovery cutoff is [in two months]."); *In re: Bailey Financing Litig.,* MDL No. 2609, 2015 WL 1518582, at *1 (J.P.M.L. Apr. 3, 2015) ("In the earlier filed . . . action, which was commenced in Texas state court in November 2013, a significant amount of discovery has already taken place. . . . [F]act discovery cutoff . . . already has passed. In contrast, the actions in the Northern District of Illinoi and the District of Nevada were filed in November and December 2014, respectively.").

As this Panel has indicated, voluntary cooperation is a preferable "[a]lternative[] to transfer … that may minimize whatever possibilities could arise of duplicative discovery." *In re: Table Saw Prods. Liab. Litig.,* 641 F. Supp. 2d 1384, 1384-85 (J.P.M.L. 2009); *In re: Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.*, 38 F. Supp. 3d 1380, 1381 (J.P.M.L. 2014) ("Given the few involved counsel and limited number of actions, informal cooperation among the involved attorneys is both practicable and preferable to centralization."). Voluntary

cooperation is especially practicable where the actions "are filed by a single plaintiffs' counsel, and name the same defendant, which has national counsel coordinating its response to [the] litigation." *Mirena,* 38 F. Supp. 3d at 1381. *See also In re: Rite Aid Corp. Wage & Hour Empl. Practices Litig.*, 655 F. Supp. 2d 1376, 1377 (J.P.M.L. 2009) (voluntary coordination is "particularly appropriate" where many or all plaintiffs share counsel). Here, the same Plaintiffs' attorneys, Genevieve Zimmerman and Ben Gordon, represent Plaintiffs in six of the cases, and the firms of Kennedy Hodges and Farrar & Ball represent two other Plaintiffs. Ben Gordon has also recently filed his appearance in the two earlier-filed cases in which Kennedy Hodges and Farrar & Ball had previously been lead counsel. Defendants are represented by undersigned counsel and have worked cooperatively in scheduling and taking numerous depositions of Plaintiffs, company witnesses, treating physicians, and key third party witnesses. Thus, discovery common to the fourteen cases can be coordinated efficiently without the need for an MDL.

Moreover, the small number of cases weighs against creation of an MDL. Bair Hugger FAW cases have been pending since 2013, and two years later there are only 14 total cases in federal court. *See Mirena*, 38 F. Supp. 3d at 1381 (holding that the "limited number of actions" counseled against centralization). Plaintiffs' claims of additional cases coming forward should be viewed skeptically. *See In re: Lipitor Mktg., Sales Practices & Prods. Liab. Litig.*, 959 F. Supp. 2d 1375, 1376 (J.P.M.L. 2011) (stating that the Panel is "disinclined to take into account the mere possibility of future filings in our centralization calculus"). Even if more cases are filed, it will be a low number of cases and discovery can be voluntarily coordinated in those cases too.

Finally, given the impending completion of fact and expert discovery, dispositive motion deadlines in the next three to five months, and trial dates for *Walton* and *Johnson*, centralization of cases would needlessly delay remaining discovery and adjudication of these two earlier filed

actions. See *In re: Dietgoal Innovations, LLC (%2C561) Patent Litig.*, 999 F. Supp. 2d 1380, 1381 (J.P.M.L. 2014) (denying centralization where it "will hinder the progress of the more advanced … actions that involve the majority of the defendants" and "threatens to slow the progress" of another action "which involves over a third of the remaining defendants"). Plaintiffs have already caused far too many delays in the *Walton* and *Johnson* cases. Fact discovery was originally scheduled to be completed in Walton in January 2015. In October 2014, Plaintiff in *Walton* unilaterally cancelled depositions of six 3M company witnesses that were scheduled for December 2014, and moved for an extension of all deadlines for a third time. The court extended the discovery deadline to June 2015. Plaintiff again moved for a nine month extension of all deadlines in *Walton* and *Johnson* based on belatedly raised discovery disputes, which the courts denied in *Walton* and *Johnson* and extended deadlines by only 4-5 months. At the very least, if these cases are consolidated, Defendants ask that *Walton* and *Johnson* not be transferred so that the dispositive motions and, if necessary, trials can proceed as scheduled.

C. If Transfer Is Ordered, It Should Be to the District of Minnesota

This Panel has previously considered various factors when determining where to transfer consolidated actions, including: (1) the geographical centrality and convenience of the district; (2) the likelihood of additional actions being filed in the district; (3) the docket of the proposed transferee court; (4) the location of the parties and witnesses; and (5) the preference of the parties. *See., e.g., In re Nat'l Hockey League Players' Concussion Injury Litig.*, 49 F. Supp. 3d 1350, 1350 (J.P.M.L. 2014); *In re: Upjohn Co. Antibiotic "Cleocin" Prods. Liab. Litig.*, 450 F. Supp. 1168, 1169-71 (J.P.M.L. 1978). Although Defendants do not support consolidation, if the Panel consolidates these cases, Defendants agree with Plaintiff that the District of Minnesota would be the most appropriate forum. The Panel has repeatedly recognized that the location of

defendants in a jurisdiction renders it an ideal forum of transfer. *See, e.g., In re: Navistar 6.0 L Diesel Engine Prods. Liab. Litig.,* 777 F. Supp. 2d 1347, 1348 (J.P.M.L. 2011) (transferring to a district in part because, "[d]efendants' headquarters, and therefore relevant documents and witnesses, are located in or relatively near this district."). Minnesota is the principal place of business for Defendants. Most of the witnesses and documents to be produced in this litigation are in Minnesota, as are ten of the filed cases. There are ten MDLs pending in the District of Minnesota, and several others that have closed. Counsel for Plaintiffs Michael Kent, Tommy Walton, and Timothy Johnson argue that the cases should be transferred to the Northern District of Ohio. There is only one case pending in the Northern District of Ohio, in contrast to the nine pending in the District of Minnesota. Given that the vast majority of witnesses and documents are in Minnesota, the Northern District of Ohio would not be convenient.

Plaintiffs' single-minded focus in their Motion on just one judge from the District of Minnesota, Judge Donovan W. Frank, is unusual, particularly where none of the pending cases have been assigned to him and he already has more than 2,000 other cases assigned to him under other MDLs. *See In re: Am. Gen. Life & Acc. Ins. Co. Retiree Benefits "ERISA'" Litig.*, 387 F. Supp. 2d 1361, 1363 (J.P.M.L. 2005) (assigning MDL "to a judge with a caseload burden favorable to accepting this assignment and before whom two actions are currently pending"). It is improper to focus on a single judge in this manner; any judge in the District of Minnesota would be well-suited to preside over the proposed MDL. Defendants would note that, whereas Judge Frank has not had any involvement in this litigation to date, seven of the fourteen cases listed in Plaintiffs' Motion have already been assigned to Judge Joan Ericksen and Defendants have already filed Motions to Dismiss in those cases, providing her with prior familiarity with

the claims and legal issues of the cases.[22] As a previous chair of this panel has remarked, the "ideal transferee judge is one with some existing knowledge of one of the cases to be centralized and who may already have some experience with complex cases," and "a judge already assigned many of the transferee cases would be a likely choice[.]" Judge John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tulane L. Rev. 2225, 2240 (2008) (citing *In re: RC2 Corp. Toy Lead Paint Prods. Liab. Litig.*, 528 F. Supp. 2d 1374, 1375-76 (J.P.M.L. 2007)).

D. Plaintiffs' Request to Place This Motion on the October 1, 2015 Docket Should Be Disregarded as Procedurally Improper

In the conclusion to his brief, Plaintiff urges the Panel to add his Motion to the October 1, 2015 docket. The Notice of Hearing Session for October 1, 2015 was issued on August 14, 2015, prior to the filing of Plaintiff's Motion. Plaintiff has failed to file a separate motion requesting expedited review of Plaintiff's Motion, as required by JPML Rule 6.3. As such, Plaintiff's request is procedurally improper and should be disregarded by this Panel. Moreover, given the September 21, 2015 deadline for Plaintiff's Reply, setting this Motion for the October 1, 2015 hearing would give insufficient time to the Panel and the parties to prepare for the hearing. Defendants support placing Plaintiff's Motion on the December 2015 docket.

III. CONCLUSION

Defendants respectfully request this Panel: (1) deny all requests to consolidate and transfer Bair Hugger FAW cases that have been brought, or may be brought; or (2) in the alternative, transfer these cases, except the two long-standing cases, *Walton* and *Johnson*, to the District of Minnesota.

[22] Motions to Compel in two cases have also been re-assigned to Judge Ericksen.

Respectfully submitted,

By ___/s/ Lori G. Cohen

Lori G. Cohen
GREENBERG TRAURIG LLP
Terminus 200
3333 Piedmont Road, NE
Suite 2500
Atlanta, GA 30305
(678) 553-2386
Facsimile (678) 553-2386
cohenl@gtlaw.com

Attorneys for 3M Company, Arizant Healthcare, Inc., and Robert Prestera

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: BAIR HUGGER FORCED AIR WARMING PRODUCTS LIABILITY LITIGATION

MDL No. 2666

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September 2015, I electronically filed Defendants 3M Company's, Arizant Healthcare, Inc.'s, and Robert Prestera's Joint Response in Opposition to Motion of Plaintiff For Transfer of Actions to the District of Minnesota Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings, the Schedule of Actions in Which 3M Company and Arizant Healthcare, Inc. Have Been Named, and this Certificate of Service by using CM/ECF, which will effectuate service on all counsel of record.

By ___/s/ Lori G. Cohen

Lori G. Cohen
GREENBERG TRAURIG LLP
Terminus 200
3333 Piedmont Road, NE
Suite 2500
Atlanta, GA 30305
(678) 553-2386
cohenl@gtlaw.com

Attorneys for 3M Company, Arizant Healthcare, Inc., and Robert Prestera