

**BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

IN RE: BAIR HUGGER FORCED AIR) MDL Docket No. 2666
WARMING DEVICES PRODUCT)
LIABILITY LITIGATION)
)

**INTERESTED PARTY RESPONSE 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**

ORAL ARGUMENT REQUESTED

NOW INTO COURT, through undersigned counsel, comes Interested Party, ROY E. TEMPLET (“Plaintiff”), *Templet v. 3M Company, et al.*, United States District Court for the Eastern District of Louisiana, Civil Docket Number: 2:15-CV-04995, to file this Interested Party Response 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 agrees with Plaintiff William Lichlyter (“Plaintiff Lichlyter”) that transfer of civil actions involving the use of Bair Hugger Forced Air Warming Devices for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 is proper, but respectfully submits that the Eastern District of Louisiana, given its central location and experience handling medical MDL litigation, would be the most appropriate transferee court for this litigation that will involve thousands (if not tens of thousands) of plaintiffs spread all across the United States.

I. INTRODUCTION

On August 21, 2015, Plaintiff Lichlyter filed a Motion for Transfer of Actions pursuant to 28 U.S.C. § 1407, seeking to consolidate and transfer actions related to Bair Hugger Forced Air Warming Devices (“Bair Hugger”) to the District of Minnesota. Subsequently, several Plaintiffs filed motions seeking to transfer Bair Hugger proceedings to other jurisdictions. Plaintiff

Templet supports transfer of actions related to the use of Bair Hugger to the Eastern District of Louisiana.

II. BACKGROUND

The Bair Hugger consists of a disposable blanket that is connected to a portable heater/blower by a flexible hose. The Bair Hugger system is positioned over (or in some cases under) surgical patients during surgery, and keeps patients warm by blowing hot air on the patient's exposed skin. The hot air accumulates under the surgical blanket and escapes the blanket either below the surgical table or at the head end of the surgical table. The escaped hot air creates airflow currents that flow against the downward air flow of the operating room. As this warmed air rises, it deposits bacteria from the floor of the operating room onto the surgical site.

Between 2002 and 2009, Defendants reduced the efficiency of the Bair Hugger air filtration blowers, which drastically reduced the safety of such blowers. As a result of Defendants' actions, the internal airflow pathways of the Bair Hugger blowers became contaminated with pathogens. The pathogens incubate and proliferate within the internal airflow paths of the Bair Hugger blowers. The 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.

Plaintiffs allege that Defendants have been aware of the pathogenic contamination of the airflow paths of the Bair Hugger since at least 2009. Moreover, despite their knowledge to the contrary, Defendants have actively and aggressively marketed the Bair Hugger as safe in both general and orthopedic surgeries. Indeed, due to that marketing effort, the device at issue is used in the vast majority of such procedures *nationwide*.

Plaintiffs allege that as a result of Defendants' conduct in designing, manufacturing, and marketing this defective product, Plaintiffs and Plaintiffs' healthcare providers were unaware, and could not have reasonably known or have learned through reasonable diligence of the risks caused by Bair Hugger, and that those risks were a direct and proximate result of Defendants' acts, omissions, and misrepresentations.

III. LAW AND ARGUMENT

A. Transfer Pursuant to 28 U.S.C. § 1407 is Proper

28 U.S.C. § 1407 provides that civil actions pending in different districts may be transferred for coordinated or consolidated pretrial proceedings when these actions involve one or more common questions of fact. 28 U.S.C. § 1407. Transfers are authorized where the Panel determines that such transfers will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. *Id.*

The purpose of multidistrict litigation is to promote economy and avoid duplication in discovery. *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 700 (E.D.N.Y. 9/25/1984). Coordinating or consolidating pretrial proceedings in civil actions involving common questions of fact will also, "eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 491-492 (J.P.M.L. 12/27/1968).

The Bair Hugger products liability cases are well-suited for centralization pursuant to 28 U.S.C. § 1407. These cases are closely related because they involve the same basic factual allegations, same basic theories of liability, and the same defendants. Moreover, these cases will all likely involve the same lay and expert witnesses and document discovery. As of date, sixteen individual cases have been filed in various jurisdictions, and there is a high probability that

hundreds of cases will be filed in the future. Transfer under these circumstances will conserve the resources of the judiciary and parties because common factual and legal questions will be litigated in only one forum, duplicative discovery will be eliminated, and there will be no risk of inconsistent pretrial rulings. Therefore, transfer of civil actions involving the use of Bair Hugger will promote the just and efficient conduct of these actions and be convenient for the parties and witnesses.

B. The Most Appropriate Transferee Court is the Eastern District of Louisiana.

The Panel generally considers numerous factors when determining the most appropriate transferee forum. Those factors include the number of cases pending in the jurisdiction, convenience of the parties, location of witnesses and other evidence, whether the district is an accessible metropolitan area, the caseload of the transferee district, and experience in managing class actions and complex litigation.

Assuming the Court finds transfer proper, the Eastern District of Louisiana is the most appropriate transferee court for civil actions involving the use of Bair Hugger Forced Air Warming Devices.

While one can understand the interest in consolidating these cases in Minnesota – the Defendant is there, and, it is conceivable (though not known for certain) that many of the fact witnesses will be located there.¹ However, if that were the only factor this Panel considered, all cases would go to the home state of a defendant. While that might be convenient for the defendant and plaintiffs residing in the state at issue, it would prove inconvenient for the plaintiffs, attorneys, and witnesses residing in the other 49 states. Indeed, whenever a case

¹ Thanks to advancements in technology, the location of the documents is becoming less and less of an issue and should not be given much, if any, weight in the convenience analysis. Documents are almost exclusively reviewed remotely, in electronic form, in these cases. This can be (and is) done from anywhere someone has access to a computer terminal.

involves plaintiffs *throughout the 50 states*, any jurisdiction the Panel chooses will prove inconvenient to many. Moreover, as this case will involve plaintiffs from all over the country, it is unlikely that any one court will have the majority of the filings. In fact, the filings to date already demonstrate a nationwide spread.² For the above reasons, the undersigned respectfully suggests that other factors should be given much more weight in this instance.

It will be critically important for this Honorable Panel to select a court with both experience handling cases of this nature *and* with a light enough docket to give this highly complex matter the attention it deserves. The Judges and staff of the Eastern District of Louisiana possess the experience and available judicial resources to preside over the Bair Hugger Litigation. Indeed, as this Panel is well aware, the Eastern District of Louisiana is no stranger to medical MDLs or MDLs in general. It has a great deal of experience handling (and resolving) countless MDL actions, such as: *In Re: Vioxx Marketing, Sales Practices and Products Liability Litigation*; *In Re: Xarelto (Rivaroxaban) Products Liability Litigation*; *In Re: Propulsid Products Liability Litigation*; *In Re: Franck's Lab, Inc., Products Liability Litigation*; *In Re: Apple iPhone 3G and 3GS "MMS" Marketing and Sales Practices Litigation*; *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*; *In Re: FEMA Trailer Formaldehyde Products Liability Litigation*; *In Re: Pool Products Distribution Market Antitrust Litigation*; and *In Re: Chinese-Manufactured Drywall Products Liability Litigation*.

While the undersigned is not advocating for any one judge in the Eastern District of Louisiana over another (all are well qualified), it should be noted that the judge assigned to this suit (the first filed in that jurisdiction) is the Honorable Judge Jay C. Zainey. Judge Zainey does not presently have an MDL before him. Moreover, an analysis of Court statistics demonstrates

² Complaints have been filed in Alabama, Arkansas, California, Kansas, Louisiana, Minnesota, Ohio, and Texas.

that the Eastern District of Louisiana has a relatively light MDL docket.³ By comparison, the District of Minnesota has a relatively heavy MDL docket.⁴ While the latter court certainly has the experience to handle a case of this nature, the former appears as though it would be more available to the parties in this case. Again, this litigation will involve thousands upon thousands of plaintiffs and will be very complex and time consuming for whichever court is chosen to oversee its pre-trial proceedings.

The final factor – accessibility – also weighs in favor of the Eastern District of Louisiana. The Eastern District of Louisiana is centrally located for the parties and witnesses who will be involved in this nationwide litigation. Looking at it another way, to the extent it is an inconvenient venue for certain parties (an unavoidable consequence in nationwide MDLs), it is *equally* inconvenient for them. The Courthouse for the Eastern District of Louisiana is situated in New Orleans, Louisiana. As this Panel is well aware, New Orleans is a tourist destination and, for that reason, it is readily able to handle the demands of MDL participants. New Orleans has a major airport that is highly accessible (with direct flights to and from virtually every major city). There are plenty of hotels and meeting rooms. Transportation is not an issue. And, as the undersigned has noted to this Panel on previous occasions, there is no shortage of excellent dining options. Respectfully, if there is a place parties do not seem to mind being “inconvenienced”, it is New Orleans, a city that prides itself on taking good care of its guests.

³ There are six MDLs pending in the Eastern District of Louisiana: (1) *In Re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*; (2) *In Re: Franck’s Lab, Inc., Products Liability Litigation*; (3) *In Re: Vioxx Marketing, Sales Practices and Products Liability Litigation*; (4) *In Re: Chinese-Manufactured Drywall Products Liability Litigation*; (5) *In Re: Xarelto (Rivaroxaban) Products Liability Litigation*; and (6) *In Re: Pool Products Distribution Market Antitrust Litigation*.

⁴ There are eleven MDLs pending in the District of Minnesota: (1) *In Re: Baycol Product Liability Litigation*; (2) *In Re: Mirapex Products Liability Litigation*; (3) *In Re: HardiePlank Fiber Cement Siding Litigation*; (4) *In Re: Life Time Fitness, Inc., Telephone Consumer Protection Act (TCPA) Litigation*; (5) *In Re: Stryker Rejuvenate and ABG II Hip Implant Products Liability Litigation*; (6) *In Re: Target Corporation Customer Data Security Breach Litigation*; (7) *In Re: Wholesale Grocery Products Antitrust Litigation*; (8) *In Re: Supervalu, Inc., Customer Data Security Breach Litigation*; (9) *In Re: National Hockey League Players’ Concussion Injury Litigation*; (10) *In Re: Levaquin Products Liability Litigation*; and (11) *In Re: Fluoroquinolone Products Liability Litigation*.

IV. CONCLUSION

WHEREFORE, Interested Party, ROY E. TEMPLET, respectfully requests that civil actions involving the use of Bair Hugger be transferred to the Eastern District of Louisiana pursuant to 28 U.S.C. § 1407.

DATED: OCTOBER __, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2015, I electronically filed the foregoing Interested Party Response with the Clerk of the Panel by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Respectfully submitted,

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