

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

IN RE: BAIR HUGGER FORCED AIR
WARMING DEVICES PRODUCT
LIABILITY LITIGATION

MDL Docket No. 2666

**INTERESTED PARTIES', GEORGE ELIC WAINNER AND SALLIE E CAGLE,
MEMORANDUM IN SUPPORT OF COORDINATION AND CONSOLIDATION, AND
FOR TRANSFER OF ACTIONS TO THE EASTERN DISTRICT OF LOUISIANA
PURSUANT TO 28 U.S.C. § 1407**

INTRODUCTION

NOW INTO COURT, through undersigned counsel, come Plaintiffs, George Elic Wainner¹ and Sallie E. Cagle ("Plaintiffs"),² who respectfully submit this Interested Party Response in Support of Transfer of Related Actions to the Eastern District of Louisiana Pursuant to 28 U.S.C. § 1407. Plaintiffs support the arguments for coordination and consolidation contained in Plaintiff William Lichlyter's ("Plaintiff Lichlyter") Motion for Transfer and agree that there are ample grounds for coordination and consolidation of these Bair Hugger cases. As suggested by Plaintiff Lichlyter, the District of Minnesota is also an appropriate venue for these actions and is home to jurists who are extremely well qualified to handle a complex MDL litigation of this nature. Plaintiffs, however, respectfully submit, for the reasons stated herein, that the more appropriate forum for coordination and consolidation is the United States District Court for the Eastern District of Louisiana, before the Honorable Jay C. Zainey.

BACKGROUND

As discussed in previous responses in support of consolidation, the Bair Hugger system has been used nationwide in connection with surgeries of likely tens of thousands of individuals

¹ See *George Elic Wainner v. 3M Company, et al.*, No. 2:15-cv-00752 (D. Utah).

² See *Sallie E. Cagle v. 3M Company, et al.*, No. 3:15-cv-765 (M.D. La.).

since its invention and widespread use over the past ten years. Consequently, many individuals across the country have been subjected to the harmful pathogens deposited by the devices during joint surgeries where the Bair Hugger device was used.

Despite the increased risk of catastrophic joint infections caused by the Bair Hugger device, Defendants engaged in an aggressive marketing campaign touting the device as safe in orthopedic surgeries. As a result of Defendants' marketing, the Bair Hugger system has been adopted by hospitals and other medical centers and has gained widespread use nationwide in the vast majority of such procedures. Consequently, consolidation of these actions due to the sheer number of individuals who have likely been exposed and suffered infections due to the defective Bair Hugger system is necessary to efficiently and effectively manage this litigation.

There are likely to be thousands of additional cases filed as a result of the widespread use of the Bair Hugger product nationwide. The current number of civil actions regarding Bair Hugger is "the tip of the iceberg" based on conversations with many clients who have been subjected to the risks of Bair Hugger and suffered injuries, by a review of those clients' medical records, and conversations with other plaintiff's attorneys representing similarly situated plaintiffs. Undersigned counsel is currently reviewing hundreds of potential cases related to injuries caused by Bair Hugger products.

There are multiple reasons why the Eastern District of Louisiana is the most appropriate venue for transfer and consolidation of the actions, not the least of which is that there is already a case involving a Bair Hugger system pending before the Honorable Jay C. Zainey in the Eastern District of Louisiana, *Templet v. 3M Company, et al.*, Case No. 2:15-cv-04995. The judges of the Eastern District of Louisiana are well-suited to handle this multidistrict litigation. Many of them have successfully presided over several complex, multidistrict litigation cases, including,

but not limited to, the following: *In re Vioxx Products Liability Litigation*, MDL 1657 (Judge Fallon); *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, MDL 2179 (Judge Barbier); *In re: Chinese Manufactured Drywall Products Liability Litigation*, MDL 2047 (Judge Fallon); and *In re: Pool Products Distribution Market Antitrust Litigation*, MDL 2328 (Judge Vance); *In Re: Xarelto (Rivaroxaban) Products Liability Litigation*, MDL 2592 (Judge Fallon). Consequently, the jurists and the clerk’s office of the Eastern District of Louisiana are well equipped to handle a litigation of this magnitude.

ARGUMENT

A. The Panel Should Centralize These Cases.

This Panel consolidates “civil actions involving one or more common questions of fact” pending in different judicial districts when doing so “will be for the convenience of parties and witnesses and will promote the just and efficient conduct” of the actions. 28 U.S.C. § 1407(a). These cases easily meet the standard for consolidation.³

1. Transfer and consolidation are appropriate because the cases involve common questions of fact and issues for discovery.

There are currently more than fifty (50) cases pending in federal courts involving the use of Bair Hugger products. These cases raise common questions of fact and involve common issues for discovery because they involve the same basic factual allegations, same basic theories of liability, and the same defendants.

Moreover, due to the widespread use of Bair Hugger products, Plaintiffs’ counsel anticipates that litigation raising common questions of fact and involving common issues for discovery will continue to spread across the country. Given these facts, additional filings will be

³ Plaintiff Lichlyter’s Motion for Transfer contains a more-detailed analysis of the standard for transfer and consolidation under Section 1407, which Plaintiffs incorporate into their argument, but do not repeat for the sake of brevity and efficiency.

made, numerous of which will certainly be filed in or removed to federal court. *See In re Camp Lejeune, N.C. Water Contamination Litig.*, 763 F. Supp. 2d 1381, 1382 (J.P.M.L. 2011) (considering the potential for “a large number of additional related actions to be filed”); *In re Foot Locker, Inc., Fair Labor Standards Act (FLSA) & Wage & Hour Litig.*, 787 F. Supp. 1364 (J.P.M.L. 2011) (stating that “[t]hough a large number of actions are not presently before the Panel, also weighing in favor of centralization is that additional related actions alleging similar class claims in other states could well be filed.”). The current number of cases, and potential for many more, meet the requirement to establish an MDL so that discovery in the current cases and in the new filings can be coordinated from the beginning.

2. The currently-pending cases will benefit from centralization.

Product liability cases are particularly well-suited for coordination because they involve common questions of fact concerning the “development, testing, manufacturing and marketing” of the products. *See In re Accutane Prods. Liab. Litig.*, 343 F. Supp. 2d 1382, 1383 (J.P.M.L. 2004); *see also In re Trasylol Prods. Liab. Litig.*, 545 F. Supp. 2d 1357, 1358 (J.P.M.L. 2008) (common questions regarding the safety profile of a drug and the manufacturer’s warnings); *In re Vytarin/Zeta Mktg., Sales Practices & Prods. Liab. Litig.*, 543 F. Supp. 2d 1378, 1380 (J.P.M.L. 2008) (common questions regarding the use and/or marketing of two pharmaceutical drugs). These considerations fully apply here.

Because the Bair Hugger cases involve common factual and discovery issues relating to the risks the systems have caused to Plaintiffs, Defendants’ knowledge of the connection between the products and their related risks, whether any such knowledge was concealed, whether the Bair Hugger products were defectively designed or manufactured, whether Defendant failed to properly warn about the usage and risks of the products, and the nature and

extent of past and future damages, centralization is “necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.” *In re Accutane*, 343 F. Supp. 2d at 1383. *See also In re Trasylol*, 545 F. Supp. 2d at 1358 (same); *In re Celexa & Lexapro Prods. Liab. Litig.*, 416 F. Supp. 2d 1361, 1363 (J.P.M.L. 2006) (same). MDL coordination will thus permit the parties to coordinate written discovery and avoid multiple, unnecessary depositions of Defendants’ key witnesses.

Having a single court with a broad perspective over the litigation as a whole will not only circumvent inconsistent rulings, it will also help achieve fair and just results. A single judge can better assess common patterns of this type and resolve the resulting disputes in a uniform way. *See In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 2003 WL 22341307, at *4 (E.D. Pa. 2003) (transferor court noting that it “developed a broader perspective than is usually available to individual transferor courts in dealing with widespread efforts [of fraudulent joinder].”); *In re Wilson*, 451 F.3d 161, 167 (3rd Cir. 2006) (same).

Here, the currently pending Bair Hugger cases involve common questions of fact, including core issues concerning the design, manufacture, testing, and marketing of the Bair Hugger products. Therefore, it is inevitable that pretrial proceedings will overlap to a significant degree, making transfer desirable and appropriate in the instant matter.

B. The Panel Should Centralize the Cases in the Eastern District of Louisiana.

Currently, there is no center of gravity for Bair Hugger actions as more than fifty (50) cases span across at least thirteen (13) federal districts. In fact, cases have been filed in a wide array of districts ranging from the Northern District of Ohio to the Eastern District of California. However, the Eastern District of Louisiana is the best choice of transferor forum based on the

case already pending there, convenience and accessibility of the forum, experience of the District, and the relatively light MDL case load currently assigned to the District.

Many of the judges of the Eastern District of Louisiana are experienced and skilled at handling MDL cases. Additionally, the Eastern District of Louisiana and New Orleans are easily accessible and convenient for counsel, witnesses, and the parties involved. The federal courthouse in New Orleans is in close proximity to the Louis Armstrong New Orleans International Airport which hosts 13 airlines and serves 44 nonstop destinations with 135 daily departures. Moreover, there is already a case involving a Bair Hugger product pending before the Honorable Jay C. Zainey in the Eastern District of Louisiana, *Templet v. 3M Company, et al.*, Case No. 2:15-cv-04995.

Because of the large number of Bair Hugger cases that will be filed, it is anticipated that the litigation will require a substantial amount of judicial time and energy. As such, the judicial efficiency and just resolution of these actions is best served by transferring these actions to Judge Jay C. Zainey or another skilled jurist in the Eastern District of Louisiana. Plaintiffs are confident that the judges of the Eastern District of Louisiana will promote the goal of a just resolution in this MDL as speedily, inexpensively, and fairly as possible.

As an alternative to the Eastern District of Louisiana, Plaintiffs are also confident that the judges in the District of Minnesota, including the Honorable Donovan Frank, are extremely well-qualified to handle this litigation. Consequently, Plaintiffs do not oppose transfer to the District of Minnesota.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully move for an Order transferring all existing and future Bair Hugger product liability suits to Judge Jay C. Zainey or another skilled jurist in the Eastern District of Louisiana, for consolidated or coordinated pretrial proceedings, or, alternatively, a judge within the District of Minnesota.

Dated: November 20, 2015

Respectfully submitted,

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