

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAIR HUGGER FORCED AIR
WARMING DEVICES PRODUCTS
LIABILITY LITIGATION

MDL No. 15-2666 (JNE/FLN)

This Document Relates To:
All Actions

**PRETRIAL ORDER NO. 17:
Amended Scheduling Order**

The Court issued an initial pretrial scheduling order in this Consolidated Action in March 2016 (Pretrial Order No. 4) and amended the schedule in November 2016 (Pretrial Order No. 13). The Court also issued Pretrial Order No. 15: Bellwether Trial Selection Process, which sets deadlines relating to the selection of bellwether cases for trial. The parties have proposed further amendments to the pretrial schedule and jointly requested to push back much of the timeline, including the date for completing fact discovery on the issue of general causation, expert discovery deadlines, filing deadlines for dispositive motions, and the start date of the first bellwether trial. After considering the parties' submissions on the matter and relevant discussion at the December 15, 2016 status conference, and for good cause shown, the Court **HEREBY ORDERS** that the following schedule shall govern this Consolidated Action, superseding Pretrial Order Nos. 13 and 15. The schedule may be modified only upon formal motion and a showing of good cause as required by Local Rule 16.3. Unless otherwise specified herein, the parties also must comply with the Federal Rules of Civil Procedure and the Local Rules of this Court.

1. The parties submitted a proposed protective order and ESI protocol. *See* Pretrial Order Nos. 7 & 10.
2. Initial disclosures required by Rule 26(a)(1) that pertain to the issue of general causation were to have been completed on or before April 29, 2016.
3. A "Science Day" educational tutorial was held off the record on May 19, 2016.

4. Master Long Form and Master Short Form Complaints were to have been filed and served on or before April 29, 2016. Motion(s) to dismiss claims or parties in the Master Long Form Complaint could be filed no later than July 8, 2016. Plaintiffs could amend the Master Long Form and Master Short Form Complaints without leave of Court on or before July 29, 2016.
5. Plaintiffs filed a First Amended Master Short Form Complaint [Dkt. No. 96] and an amended Master Long Form Complaint [Dkt. No. 97] on August 24, 2016.
6. Defendants filed an Answer to the Amended Master Long Form Complaint [Dkt. No. 105] on August 31, 2016.
7. The parties proposed a form Plaintiff Fact Sheet and a service protocol in August 2016. Plaintiff Fact Sheets shall be served as directed in Pretrial Order Nos. 14 and 16.
8. The parties each proposed a plan for the selection of bellwether cases on October 18, 2016. The Court set the bellwether trial selection process in Pretrial Order No. 15.
9. As to the pending requests for production that were the subject of discussion at the December 15, 2016 status conference, Defendants will complete document production by January 20, 2017.
10. Fact discovery on the issue of general causation shall be commenced in time to be completed by March 20, 2017.
11. Motions to amend the Amended Master Short Form and Master Long Form Complaints to include punitive damages claims may be filed no later than April 21, 2017.
12. **Bellwether Trial Selection Process:**
 - a. The Court randomly selected 150 cases from the bellwether pool, which consisted of cases filed in, removed to, or transferred to this Consolidated Action on or before December 19, 2016.
 - b. On or before January 9, 2017, the parties shall jointly submit to the Court an overview of relevant characteristics or categories to be considered in assessing whether a case is representative of the range of cases in this Consolidated Action.
 - c. Plaintiffs and Defendants shall each select 16 cases for consideration as bellwether trial cases, choosing exclusively from among the 150 cases randomly selected by the Court. In addition, consistent with the parties' agreement to include Ramsey County, Minnesota, cases in the potential bellwether case pool, Plaintiffs and Defendants shall each select 1-2 cases from among the related Bair Hugger cases filed in Ramsey County, Minnesota, on or before December 19, 2016.

- d. On January 20, 2017, Plaintiffs and Defendants shall each inform the Court of their respective 16-18 nominations (“Nominated Cases”), providing a brief (3-5 sentence) description of each case and why it is an appropriate candidate. Counsel should also identify, for each nominated case, whether it is anticipated that the case might be excluded from the bellwether pool pursuant to Pretrial Order No. 14 and whether any *Lexecon*¹ issues are foreseen. If there is overlap between the parties’ Nominated Cases, there will be no substitutions.
- e. Between January 21 and May 1, 2017, for the Nominated Cases, the parties may conduct limited case-specific discovery, including collecting some case-specific records from third parties. The parties may, for example, issue limited subpoenas to hospitals regarding product identification, infection rates, and medical records. Plaintiffs may also serve limited interrogatories regarding any specific details Defendants have regarding the Bair Hugger system used in the plaintiff’s procedure that allegedly resulted in a surgical site infection caused by the Bair Hugger patient warming system, or if specific details are not known, Plaintiffs may request details about the placement of Bair Hugger warming systems, model number(s), and dates of placement at the facility where the plaintiff’s procedure at issue was performed.
- f. The parties will meet and confer to seek agreement on the 8 most representative cases among the Nominated Cases, taking into account and aiming to appropriately reflect the various characteristics or categories that the parties identified in the January 9, 2017 submission. The parties shall jointly submit the list of 8 cases to the Court by May 10, 2017. To the extent that the parties cannot agree on the full list of 8, Plaintiffs and Defendants shall file separate lists on that date. The parties’ submissions should include for each case: the names of the parties, the case number, the law firm representing the plaintiff(s), a brief description of the case, and a paragraph explaining why the case is representative. The parties should also explain why the 8 cases they propose are representative of the range of cases in this Consolidated Action. Responsive letter-briefs may be filed no later than May 18, 2017. The Court strongly encourages the parties to agree on the list of 8 cases, keeping in mind that a primary goal of bellwether trials is to provide useful information to both sides.
- g. On or before June 1, 2017, the Court will consider the parties’ joint or separate proposal(s) and will determine which of the proposed cases, up to 8, will be included in the Final Bellwether Trial Pool.
- h. Within one week of the Court’s determination of the cases in the Final Bellwether Trial Pool, Plaintiffs and Defendants may each exercise one

¹ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

strike. The parties shall notify the Court of their strikes no later than June 8, 2017.

- i. A protocol for selecting the order of the bellwether trials will be determined at a later date.

13. **Experts on General Causation:**

- a. Initial expert reports and disclosures of the identity of expert witnesses under Rule 26(a)(2) shall be exchanged on or before March 31, 2017.
 - b. Rebuttal expert reports and disclosures of the identity of rebuttal expert witnesses shall be exchanged on or before June 3, 2017.
 - c. Depositions of expert witnesses must be completed on or before August 2, 2017.
14. Initial disclosures required by Rule 26(a)(1) that pertain to the bellwether-case-specific issues shall be completed on or before June 15, 2017.
15. *Daubert* motions and other dispositive motions (as defined under the Local Rules of this Court) on general causation and issues not specific to bellwether cases may be filed no later than August 15, 2017.
16. Bellwether-case-specific discovery shall be commenced no earlier than June 2, 2017, and shall be completed no later than October 2, 2017.
17. Bellwether-case-specific dispositive motions shall be filed no later than November 1, 2017.
18. The first bellwether trial shall commence February 5, 2018.

The Court DIRECTS the Clerk to send a copy of this Order to the Clerk of the Judicial Panel on Multidistrict Litigation, and counsel of record. IT IS SO ORDERED.

Dated: January 5, 2017

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge