

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air)	File No. 15-MD-2666
Warming Devices Products)	(JNE/FLN)
Liability Litigation)	
)	October 13, 2016
)	Minneapolis, Minnesota
)	Courtroom 12W
)	9:35 a.m.
)	
)	

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

And THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

And THE HONORABLE WILLIAM H. LEARY
RAMSEY COUNTY DISTRICT COURT JUDGE

(STATUS CONFERENCE)

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1 thought with people dialing in, we would let you know about
2 that.

3 We are working with defense counsel to finalize
4 agreement with respect to service of the protocol or, pardon
5 me, the fact sheets, and we'll keep the Court updated on
6 that as well.

7 THE COURT: In mentioning the folks on the phone,
8 we should also make clear that Judge Leary is here from
9 Ramsey County. Judge Leary, good morning again.

10 JUDGE LEARY: Good morning.

11 MS. ZIMMERMAN: Thank you.

12 THE COURT: The bellwether selection plan?
13 Mr. Gordon?

14 MR. GORDON: Your Honor, may we both approach?

15 THE COURT: Mr. Blackwell, Mr. Gordon.

16 MR. GORDON: Good morning, Your Honor. Ben Gordon
17 for the plaintiffs.

18 MR. BLACKWELL: Good morning, Your Honors. Jerry
19 Blackwell for 3M. Judge Leary.

20 JUDGE LEARY: Good morning.

21 MR. GORDON: Your Honors, we have had, I think,
22 fruitful discussions including up to yesterday concerning
23 the bellwether proposals that the respective sides think
24 would be appropriate for the Court to consider. We've not
25 reached agreement. I'm not sure we will on everything. We

1 may on some points, and we can certainly outline those.
2 They've given us their proposal. We provided them ours.
3 And while there are some common features, there's a
4 fundamental disagreement about whether the process in terms
5 of the selection from a global standpoint should be a random
6 process versus a more what we view as the plaintiffs a
7 deliberative process with the parties and the Court,
8 involved much in the way that we did in the Stryker MDL
9 litigation that Judge Noel was involved in. We, the
10 plaintiffs, I think prefer that it not be a truly random
11 process. And one of the reasons for that is that there are
12 only 780 cases as of today, and with any sampling of any
13 cases that is lower than several thousand, to select
14 randomly from among those cases and expect to get truly
15 representative plaintiffs I think is completely fallacious.

16 In fact, the mathematicians in our group have done
17 the numbers on this, and I think it stands to common sense
18 that the likelihood of getting a truly representative
19 plaintiff or group of plaintiffs from a population or a
20 universe of plaintiffs would require so many thousands of
21 plaintiffs to be statistically representative, if you
22 selected them randomly, that it would be difficult if not
23 impossible to do here.

24 But, more importantly, it is anathema to the
25 process of trying to select plaintiffs that truly represent

1 the overall population on things like the types of injuries,
2 the damages they've sustained, the exposure to the product,
3 their ages, a number of objective criteria that we could
4 look to, and the Court can look to to compare the plaintiffs
5 to each other, and come up with a subset of the universe
6 that is truly characteristic.

7 I mean after all, the bellwether process is
8 calculated to lead us in a certain direction if it's to have
9 any meaning ultimately toward global resolution of an MDL.
10 So I think generally that fundamental disagreement, and I'll
11 let Mr. Blackwell speak to it, may cause us to submit
12 countervailing proposals to the Court for consideration.

13 MR. BLACKWELL: And, Your Honor, I'm --

14 MAGISTRATE JUDGE NOEL: Actually, before you
15 start, I was wondering if Mr. Gordon could identify the
16 mathematicians among you because every lawyer I've ever met
17 said they went to law school to avoid having to do math.

18 MR. GORDON: Fair point, Your Honor. Maybe not
19 true mathematicians, but Mr. Parekh I'll put on the podium
20 as the most gifted arithmetician among us and to ask him
21 about that if you wish, Your Honor.

22 MR. BLACKWELL: Which is a relative statement,
23 Your Honor.

24 THE COURT: So I recently learned that many of the
25 writers for "The Simpsons" are mathematicians, so if

1 mathematicians are funny, then that's more proof that
2 lawyers aren't good at math.

3 MR. GORDON: Fair enough, Your Honor.

4 MR. BLACKWELL: So, Your Honors, this may not be
5 the best time to take up this issue, and we probably will
6 need to be heard on it more fully. The concern that we have
7 with respect to our proposal that there be a random
8 selection of cases, and these lawyers have all been in MDLs
9 where cases have in fact been selected randomly out of
10 Court, so this isn't just some fangled thing that we came up
11 with.

12 Our time is short, first of all. We've got a very
13 tight schedule, had to be very efficient at what we do.
14 What the plaintiffs have at this point that we don't is a
15 great deal of information about every one of the plaintiffs.
16 As of today, we stand at one thousand pieces of paper that
17 we got for discovery. We're supposed to get more today, but
18 we haven't gotten very much, And we don't know the specifics
19 of the plaintiffs.

20 What would be an unfair dynamic is for the
21 plaintiffs to have their list of top ten based on kind of
22 their greatest hits for plaintiffs. We don't know enough
23 about the facts to either dispute, contest, modify, edit
24 that list.

25 And in addition, the way that we're discussing

1 bellwether cases now, if there's a plaintiff that does not
2 have a complete plaintiff fact sheet, then that particular
3 plaintiff falls out as a bellwether prospect, which then the
4 plaintiffs can then gain that if they choose to, to simply
5 just not complete the fact sheet with respect to ones they
6 don't want selected.

7 But the upshot is that we will spend a lot of
8 time, I think, going back and forth, if not footsie-ing
9 around. Their greatest hits cases versus our greatest hits
10 cases, once we figure those out, and if the Court were to
11 simply randomly select the cases, which the Court can do, it
12 will save us roughly -- it will save us weeks in our
13 schedule to just randomly select the cases. All of them
14 should be good cases to begin with or they shouldn't be in
15 suit anyhow. And so why not just randomly pick them, and
16 we'll see what we do. But we'd like to be able to more
17 fully set this out for the Court what the reasons are for
18 our different perspectives, how they save the Court time and
19 energy between the different perspectives.

20 We had a discussion yesterday, the teams did, to
21 Mr. Gordon's point about choosing a representative case. We
22 said, "fair enough, what do you think is a representative
23 case?" Crickets. Yeah, this is protected. Can't tell you.
24 And so if we're here to talk about statisticians,
25 representative, picking the case that is a fair

1 representation of the universe, we have to be able to talk
2 about what's representative of the universe. You can't do
3 that if the response and allegation is it's work product.

4 And so we're simply, at this point, teeing this up
5 for Your Honors, and today we were to update the Court on
6 what the status is of our discussions. And this is where we
7 are by way of status, and we have discussions yet to do, but
8 I do agree with Mr. Gordon that the problems is going to be
9 a fork in the road as to whether we have some process where
10 we do this sort of battling between the top ten list, the
11 plaintiffs versus top ten list of defendants once we knew
12 enough to pick our top ten list, versus the Court being
13 perfectly free to use a random process that will save the
14 Court lots of time and be far more efficient.

15 THE COURT: October 17th is the date, right?

16 MR. BLACKWELL: Yes, Your Honor.

17 MR. GORDON: Next week, Your Honor. Monday. And
18 Your Honor, if I might just say -- I'm sorry, Judge Noel.

19 MAGISTRATE JUDGE NOEL: I was going to say so
20 following up on Judge Ericksen's point that the date in the
21 schedule is Monday, what are the parties asking us to do
22 about that? And what do you plan for the future having
23 reached this point of potential impasse but not complete
24 impasse?

25 MR. GORDON: Well, two things, Your Honor. First,

1 with respect to Mr. Blackwell, he wasn't on the call
2 yesterday. I don't remember anything about crickets. I
3 don't remember anything about not being prepared to discuss
4 the merits --

5 MR. BLACKWELL: Well, nobody used the word
6 "crickets." I meant silence.

7 MR. GORDON: Well, but it didn't happen. My
8 recollection is it didn't happen. We can talk to others who
9 were on the call. They asked a question, and the point is
10 we are perfectly willing, ready and able to talk about the
11 substance and the merits of the cases if they want to have
12 that deliberative objectively based discussion about the
13 kinds of cases that we think are representative. We haven't
14 gotten there yet. We're happy to do that tomorrow in
15 advance of trying to come up with something that is as close
16 to an agreement as we can get for the Court.

17 THE COURT: Were you able to identify the factors
18 that would make a case representative or not?

19 MR. GORDON: Yes, Your Honor, and part of the
20 point I made to them yesterday was we as a group would have
21 to have that discussion among ourselves before we could
22 convey it to the defendants effectively. It wasn't
23 crickets. It was that we would need to get back to them.

24 THE COURT: Not the actual cases, but an aspect.
25 What aspect of the case?

1 MR. GORDON: Yes, Your Honor, things like type of
2 injury, level of damages, age of the plaintiffs, absolutely,
3 Your Honor.

4 MR. BLACKWELL: In response to Your Honor's
5 question, what we would ask that the Court do probably at
6 the end of this if we haven't reached agreement, we would
7 expect that Your Honors would hear the different points of
8 view, and maybe Your Honors will choose a road that maybe
9 one or the other or something in the middle and send us
10 back. With the Court's guidance, then to kind of do what
11 the Court asked with the given perspective in mind that's
12 been given to us by the Court based upon what the parties
13 have proposed.

14 THE COURT: But you don't think you're going to
15 make much progress between now and Monday I don't think.

16 MR. GORDON: I think with the directive of the
17 Court that it's not going to be a random selection the whole
18 universe and that we are to meet and confer and come up with
19 a more deliberative objectively based system, absolutely we
20 can do that and make progress tomorrow, Your Honor.

21 THE COURT: Let us talk about this a little bit
22 and then we'll hear back from you.

23 JUDGE LEARY: Judge Ericksen?

24 THE COURT: Yes.

25 JUDGE LEARY: If I could make a comment, what I'm

1 concerned about is if these are bellwether cases, I assume
2 they're for the purpose of instructing the lawyers --

3 MAGISTRATE JUDGE NOEL: Can I interrupt for a
4 second? I'm pretty sure the people on the phone are not
5 hearing you.

6 JUDGE LEARY: Judge Leary --

7 MAGISTRATE JUDGE NOEL: Sorry, you need to be at
8 the microphone. I'm sorry.

9 JUDGE LEARY: Thank you. My concern is if you're
10 going to designate these cases as bellwether cases, they do
11 have to be representative in some way because they're going
12 to provide no advantage to anybody if the parties can't
13 agree that they are representative of a larger number of
14 cases. So that's where I'm concerned.

15 And I suppose mathematically it could be
16 determined, a process could be determined by which you could
17 arrive at a fairly representative sampling if you have
18 enough information to do the math on, but if you can't do it
19 that way then each party has got to know, you know, as has
20 been suggested what the universe of cases are to know
21 whether or not they're representative because if you don't
22 know that they're not representative, then there's no reason
23 to go through the bellwether process.

24 MR. BLACKWELL: Right. And, Judge Leary, if I
25 may, what's kind of missing from this discussion with Your

1 Honors is any treatment of the thinking from any number of
2 courts that have dealt with MDLs in this process around the
3 country, a number of which have come down, and correct me if
4 I'm wrong, Ms. Ahmann, with the conclusion that there are
5 some distinct benefits to a random process even with that.
6 We'd like to be able to provide that information to Your
7 Honors so you have the benefit of it to know what some of
8 the other courts have said and why they have said it. And
9 also kind of at the root of this is the fact that we up to
10 this point haven't had a discussion with anything
11 substantive about even what representative means even if we
12 were going that route. And so both and what we'd like to do
13 is to be able to bring all of the law to bear, the thinking
14 to bear around whether we have a random process or whether
15 we have a process that's based upon, well, nothing anyone
16 has said has been a matter of simply the plaintiffs picking
17 their best cases. That's not what random means either. I
18 mean, I'm sorry, that's not what picking distinct cases
19 means, representative cases, not plaintiff's best cases
20 either. It's cases that are representative of the whole.

21 THE COURT: Okay. All right. So we're going to
22 come back and talk about this, but Judge Leary and Judge
23 Noel and I will discuss and then we might talk in chambers
24 with you. I, at least, am not prepared to rule on any of
25 this right now, so I need at least a few minutes to digest

1 what you both have said so far. And then we will jointly,
2 at least the Judges will agree on what might be helpful at
3 this point because we have you here, and what it sounds like
4 to me is that there's maybe not much point in just sending
5 you back without direction, and then letting Monday come and
6 go and setting up another time for you to come back. But
7 let us put our heads together on that and --

8 MR. BLACKWELL: And at what point --

9 MR. GORDON: Your Honor --

10 THE COURT: That's all I'm going to hear about
11 that right now. We're going to move on to the next issue
12 now.

13 MR. BLACKWELL: All right, Your Honor.

14 MR. GORDON: Thank you, Your Honor.

15 MR. BLACKWELL: It's like a political debate.

16 MR. GORDON: It was my turn.

17 THE COURT: People on the phone, were you able to
18 hear Judge Leary? Were you able to hear that discussion?
19 Would somebody unmute their mic and just let me know if you
20 heard all that.

21 UNIDENTIFIED VOICE: Yes, Your Honor.

22 THE COURT: Okay, thank you very much. All right,
23 now the foreign discovery, I know that you've chewed that
24 over some with Judge Noel. Is there anything that need be
25 done with respect to the foreign discovery?

1 MS. CONLIN: No, Your Honor.

2 MR. BLACKWELL: No, Your Honor.

3 THE COURT: All right. And then the number and
4 status of cases. I heard Ben Gordon talk about 780. That's
5 the number that's in --

6 MS. ZIMMERMAN: We believe that's accurate, Your
7 Honor.

8 THE COURT: And the Ramsey County cases now number
9 47 or so. Is that correct?

10 MS. ZIMMERMAN: I believe that's correct.

11 THE COURT: And then the two state cases outside
12 of Ramsey County, we've got the Illinois case and the Texas
13 case. And nothing much is happening there, is that right,
14 that we have to worry about?

15 MR. HULSE: I can speak to that, Your Honor. The
16 Illinois case is sort of finally moving forward, and there's
17 going to be a scheduling conference. Obviously, given that
18 it's only now just having a scheduling conference, we don't
19 anticipate that there's going to be any issue about it
20 getting ahead of the MDL.

21 The Texas case, the plaintiffs there are
22 struggling with product ID. The surgical records don't show
23 Bair Hugger use, and so that's an issue that the parties are
24 working through with additional discovery right now, but we
25 think that's going to be an issue that's going to be a

1 recurring issue through these cases.

2 THE COURT: Canada?

3 MS. YOUNG: Your Honor, no case activity in
4 Canada.

5 THE COURT: Judge Noel, do you want to talk about
6 discovery? I don't know that anything was due by today.

7 MAGISTRATE JUDGE NOEL: Well, we had a discovery
8 conference, which I think the parties agreed was useful.
9 Essentially, we went through about seven issues that the
10 parties had identified, and a couple of them I said we could
11 not decide involving whether a privilege did or didn't
12 apply. But as to the other matters, I think we told the
13 parties what my thoughts on it were, and my sense is that
14 the parties were going to use that information to figure it
15 out. Have I overstated that or understated that,
16 Ms. Conlin?

17 MS. CONLIN: No, you haven't, Your Honor, and I
18 thought I would just give the Court an update on that.

19 At the informal conference last Thursday, which
20 everybody agrees has been very helpful in resolving some of
21 these issues, you had indicated that you felt that we should
22 update interrogatories that dealt with the scientific
23 methodology. Now, we disagree with the fundamental premise
24 of the interrogatory, which is that we are required to prove
25 our case to rule out all other causes of the infection. And

1 I think as we indicated, our burden is to show it's a
2 substantial contributing factor.

3 That said, we are in the process and should have
4 something to them barring unforeseen circumstances next week
5 that identifies, you know, CFD analysis, some of which you
6 saw during science day, as well as the Bradford Hill
7 criteria and the other scientific methodology by which we're
8 building our case.

9 The second issue dealt with information basically
10 in the possession of plaintiff's executive committee. And
11 Your Honor will recall that issue dealt with whether we were
12 responsible or whether the broader set is. And I can tell
13 the Court that I had some reluctance to vouch for the
14 completeness or the veracity of, for example, some lawyer
15 sitting in Tennessee, but what we've done is we've sent out
16 interrogatories that individual firms will basically vouch
17 for the accuracy.

18 I mean one of the -- I mean so the two primary
19 issues were Med Watch and communications with Dr. Augustine.
20 And 3M has been somewhat fixated with any communications
21 with Dr. Augustine. I think as this Court is aware in the
22 Walton and Johnson cases, the Kennedy Hodges firm did have
23 communications with him, but, and I don't know whether some
24 to use an example I gave some lawyer in Tennessee has either
25 filed a Med Watch report or talked to Dr. Augustine, but

1 that is not where we are at in terms of building our case.
2 So we're going to send those out, we're going to have people
3 verify them, we'll get that information to 3M.

4 The third issue was --

5 MS. ZIMMERMAN: If I could just supplement my
6 co-counsel's representation to the Court, they did actually
7 go out. And we have at this point heard back from 15 firms
8 about their answers. And when we get back complete
9 responses from all 89 firms, we will make sure to update
10 defense counsel on that.

11 MR. HULSE: I don't mean to interrupt but just on
12 that point, we'd, of course, be happy to accept them on a
13 rolling basis too.

14 MR. GORDON: And that's fine. We can do that.

15 THE COURT: That was big of you.

16 MR. HULSE: I thought I'd be generous, Your Honor.

17 MS. CONLIN: But it really was, and I'll stand
18 here as an officer of the court and say I was the one
19 reluctant on this issue not because there's anything to
20 hide, but I just didn't want to be vouching for lawyers whom
21 I've never met, and so that's the way we're handling that.

22 The third issue dealt with information equally
23 available to both sides, and I heard Mr. Blackwell allude to
24 the thousand pages. We are gathering everything, and we are
25 gathering everything from publicly available sources that we

1 have looked at or whatever, and we're going to produce it to
2 them. We've already started that process. I think we're
3 going to have it to them in the next I would say no later
4 than two weeks, and we can do that on a rolling basis as
5 well.

6 Some of the information -- may I approach, Your
7 Honor?

8 THE COURT: What is it?

9 MS. CONLIN: I just want to show you an example of
10 one of the publicly available information that kind of goes
11 to this issue. It will take 30 seconds.

12 THE COURT: All right. Thank you.

13 MS. CONLIN: And this issue on the publicly
14 available information, and this is an excerpt, but this is
15 information that the type of information that we've
16 gathered. We know 3M is familiar with, but this is an
17 excerpt from proceedings before the CDC and the Department
18 of Health, and you can see it was in November of 2015.

19 If I can direct the Court's attention to excerpt
20 page 27, you'll recall at science day we raised the issue of
21 the heater-cooler unit, and this issue of myobacterium
22 infections that were being created as a result of it. If
23 you can look at the last paragraph on page 27 where they're
24 discussing in the proceedings, it's written "the heater
25 cooler unit appears to be harmless from an infection

1 perspective, but the water overflow bottle is likely rarely
2 if any ever sanitized and is situated in front of a fan.
3 Nothing that blows air should be in an operating theater if
4 possible."

5 And, of course, as we demonstrated at science day,
6 the insides of the Bair Hugger units are never, you know,
7 decontaminized. And the air that is blowing out of that is
8 going through a filter, which is not cleaned between use.
9 So this is an example of the type of publicly available
10 information that we'll be producing to 3M in the next couple
11 of weeks.

12 And then there were some issues on the other side
13 with 3M, and we're working through them on the CAR protocol
14 and things like that. If you'd like an update, I can have
15 one of the other lawyers come up. But we're in the process
16 of fully complying with what you've asked us to do, and I
17 apologize if I was the one who got us going down the road of
18 not wanting to vouch for people that we hadn't met.

19 MAGISTRATE JUDGE NOEL: Thank you.

20 MR. BLACKWELL: Your Honors, if I may. We'll wait
21 to see what we get with respect to their discovery
22 responses. As I alluded to at several hearings where the
23 plaintiffs were complaining about the adequacy of 3M's
24 responses, multiple times to the Court that we had not
25 gotten anything from plaintiffs. And we have been asking

1 since day one what evidence of facts they have to establish
2 that the Bair Hugger causes surgical site infections, and
3 what evidence of facts do they have that would rule out
4 other well-known causes of surgical site infections, based
5 upon reliable scientific methodology. So we're just looking
6 for what facts they have.

7 And to the extent that reports have been made to
8 the FDA by anyone in the plaintiffs' group, we asked them to
9 find out in the plaintiffs' groups who submitted those
10 reports, so that we can investigate and examine that. And
11 it wasn't until we met with Judge Noel last week that they
12 were willing to reach out to the rest of the plaintiffs'
13 group at all with respect to that. So we are waiting to see
14 that.

15 And, Your Honor, I do take some issue with this
16 document that counsel just showed the Court relating to the
17 heater cooler units devices. To be very clear, the Bair
18 Hugger is not a heater-cooler device. This has nothing to
19 do with the Bair Hugger. It doesn't contain water bottles
20 or any of that.

21 And to the extent we're going to have any
22 revisiting of the science day per the last paragraph that
23 was referenced on I think it was page 27, I forget which
24 page she cited, but there are absolutely studies done of the
25 Bair Hugger unit, and I will just cite this for the record,

1 the Avidan study done in 1997 where the goal was to see if
2 when they turned the Bair Hugger unit on equipped with the
3 blanket, whether they could derive colony forming units from
4 the Bair Hugger, not with the hose pulled off, not using
5 water bottles or anything else, and they weren't able to
6 establish any colony forming units with the Bair Hugger unit
7 being used as it's supposed to be used.

8 And we've further heard even from one of the study
9 authors this past week that there were other experiments
10 done also with the Bair Hugger where the goal was to see if
11 they could colonize bacteria from the Bair Hugger hose
12 system with the blanket attached, and they weren't able to
13 do so.

14 So I don't want to go down the road of the
15 science. I would rather wait to get the discovery, but I
16 think this particular piece submitted this morning to the
17 Court has nothing to do with the Bair Hugger and to me
18 doesn't really bear on the issue at all of whether or not it
19 tends to cause surgical site infections. But we'll
20 otherwise wait, Your Honor, just to see what we receive in
21 discovery from them.

22 MAGISTRATE JUDGE NOEL: Could I just ask a
23 question of Ms. Conlin?

24 MS. CONLIN: Sure.

25 MAGISTRATE JUDGE NOEL: Make sure I'm

1 understanding what you just directed our attention to. The
2 paragraph begins with the clause, "The heater-cooler unit
3 appears to be harmless from an infection perspective."

4 MS. CONLIN: Yes.

5 MAGISTRATE JUDGE NOEL: Does that mean that
6 whatever we're looking at here, the minutes of the committee
7 on this infectious disease, that whatever they've looked at
8 showed that there was no increase in infection from the
9 heater-cooler units?

10 MS. CONLIN: No. What they were talking about
11 was, and it was if I remind the Court of what Dr. Jarvis
12 talked about at science day, but they didn't until these
13 water cooler units came out, nobody assumed that having that
14 machine in the OR that had exhaust could create infections.
15 And what has happened because multiple people have died,
16 they've started looking and saying, wow, things that we
17 thought were harmless can actually cause deadly infections.
18 And my point simply is like the water or the warming cooling
19 unit, the Bair Hugger is not only in the OR and not cleaned
20 internally, and we have internal documents showing that
21 these machines were filthy, that there were instances in
22 which a customer would call in and say we've got a MRSA
23 issue at the hospital, and the response would be tell them
24 to very carefully change the filter, and make sure you don't
25 blow the dust out of the machine.

1 And my point simply is is unlike the water cooler
2 unit, which just had an exhaust that ended up killing
3 patients, the Bair Hugger, its intended purpose is to blow
4 air in the operating room. So when they're talking about
5 that, they're talking about it from a historical standpoint
6 in saying, we didn't know it was a problem until this rare
7 bug started killing people. Now they're going back and
8 looking at it, and that's the context of that.

9 MAGISTRATE JUDGE NOEL: Thank you.

10 MR. BLACKWELL: Just one small -- I think there is
11 one other very important point of clarification with respect
12 to this heater cooling device, which the Bair Hugger isn't.
13 This was a study of a fairly rare bacterium to begin with,
14 if you will, a designer bacteria, that was found in surgical
15 wounds, and then also found in the heater-cooler units. It
16 wasn't some ubiquitous type of bacterium like MRSA that's
17 found all over the hospital, and the most common source is
18 the patient's own body. And so we're going to have no doubt
19 our own battles over this, and I don't doubt for a second
20 that this would be the subject of some Daubert motions too
21 if this is the best they have for science.

22 But I do think it's an important distinction here
23 that were they able to come up with some signature bacterium
24 only found in the Bair Hugger and then only found in the
25 surgical wound, then probably the only other open question

1 would be is whether it's a common source for both. But at
2 least it's moving down the road towards causation. But I do
3 think it's not proper in a context to discuss this
4 heater-cooler device without understanding exactly what the
5 device is and how it isn't a Bair Hugger, and then
6 understanding what was in fact found here.

7 And to point out to the Court, there has been more
8 than one study, the Bair Hugger really is the most studied
9 form of forced air warming in the history of the earth. It
10 really is. And it's been studied with a view in mind to
11 whether we can find even with used ones, there are colony
12 forming units that come out of the blanket given the heat
13 involved, etc., and it just hasn't happened.

14 MAGISTRATE JUDGE NOEL: Okay. Thank you.

15 THE COURT: All right.

16 MS. CONLIN: And I'll just add that the reason why
17 I was pointing that out is that it actually goes to the
18 biological plausibility, which is one of the Bradford Hill
19 criteria.

20 MAGISTRATE JUDGE NOEL: Thank you. I got lost in
21 terms of the back and forth and who was interrupting whom.
22 Did you finish responding to Ms. Conlin's summary of --

23 THE COURT: It's like a debate.

24 MAGISTRATE JUDGE NOEL: Except we don't have a
25 time limit. Thank you.

1 THE COURT: Well, then let me ask if there's
2 anything else to be discussed before the Judges go into
3 confab and decide what we're going to do about --

4 MS. CONLIN: Not from our perspective, Your Honor.

5 THE COURT: What, if anything, we're going to do
6 about the bellwether issue.

7 MR. GORDON: Your Honor, on that bellwether point,
8 I might just say so it's clear because apparently I did not,
9 we did give them our proposal last Sunday. We just got
10 their's yesterday, but we do support, as Judge Leary said,
11 representative cases, however you come up with that.

12 THE COURT: Just not ready. I don't want to hear
13 about it right now. But we'll be back and then --

14 MR. GORDON: Understood, Your Honor.

15 MAGISTRATE JUDGE NOEL: The last thing I have, you
16 have an additional item on the joint agenda about coming up
17 with another list of discovery disputes. Are there
18 discovery disputes or would you be ginning them up just to
19 have another meeting?

20 MR. BLACKWELL: To our knowledge, Your Honor, it's
21 the latter. To our knowledge, there aren't disputes, and I
22 think if we pick the date and the forum, we would simply
23 find the issues to meet and conform. But we're not aware of
24 any issues currently, are we?

25 MS. CONLIN: I mean we do have some issues on the

1 privilege log, but in my view, it's not ripe for Your Honor,
2 and we can continue to work. We've had a good working
3 relationship with them, and we'll continue to do that.

4 MR. HULSE: And the privilege log protocol
5 provides for its own process -- that was kind of
6 alliterative -- there to resolve those disputes.

7 MAGISTRATE JUDGE NOEL: Okay.

8 MR. BLACKWELL: And, Judge Ericksen, at the risk
9 of what may befall me, Bridget Ahmann did do the research on
10 what courts have done around the random selection process.
11 Is it helpful for the Court to hear what the rationale is
12 there?

13 THE COURT: Not right now.

14 MR. BLACKWELL: Okay. All right.

15 MS. CONLIN: Thank you.

16 THE COURT: For the benefit of those on the
17 telephone, if you want to know what's going to happen now.
18 Let's say that we'll come back or somebody will come back
19 and at least announce in 15 minutes what the next step will
20 be. So nothing is going to happen. There will be nothing
21 for you to hear for the next 15 minutes. I wonder if --
22 should we set a specific time? I've got 10:08.

23 MAGISTRATE JUDGE NOEL: We could say twenty
24 minutes and say we'll be back at 10:30.

25 THE COURT: We'll be back at 10:30, so there's

1 nothing of interest that will happen in this courtroom for
2 20 minutes.

3 MAGISTRATE JUDGE NOEL: Unless some of the lawyers
4 want to entertain the people on the phone with a stand-up
5 comedy routine.

6 THE COURT: Nothing from the Judges will be
7 forthcoming.

8 (Laughter.)

9 THE COURT: All right. We're in recess.

10 (Short recess at 10:08 a.m.)

11 (In open court at 10:33 a.m.)

12 MAGISTRATE JUDGE NOEL: Good morning. Please be
13 seated. I'm the designated person to address this one issue
14 that we wanted on the record, which is at our discovery
15 conference last week, there was an issue regarding tapes and
16 the vendor was determining what's on them. And you were
17 going to report back the status of preparing an index.

18 Mr. Hulse, do you want to address that?

19 MR. GORDON: And we have our mathematician, Your
20 Honor.

21 MR. HULSE: Would you like to step up, Behram?

22 MR. PAREKH: No.

23 MR. HULSE: Okay. So yesterday we provided a
24 listing of the contents of the tapes after our vendor
25 completed it. Plaintiffs got it yesterday, so I understand

1 they're evaluating it and deciding whether they think
2 anything more needs to be done. It turned out that there
3 was a single e-mail account spread out over the four tapes.
4 It's for someone that we can't even confirm was ever an
5 Arizant employee.

6 MAGISTRATE JUDGE NOEL: Were there 33,000 e-mails
7 in that account?

8 MR. HULSE: It's a lovely french name from a
9 database of European e-mail. And like I said, we can't
10 verify that she was ever actually an employee this person.
11 But anyway the plaintiffs are evaluating it, and if they
12 think there is anything more that needs to be done, we will,
13 of course, meet and confer on that.

14 MAGISTRATE JUDGE NOEL: Okay. Mr. Parekh?

15 MR. PAREKH: That's essentially correct. We're
16 looking at the index to see if there's anything on there
17 that we think really needs to be vetted. At first blush,
18 there doesn't seem to be.

19 MAGISTRATE JUDGE NOEL: Okay. And so nothing else
20 you need -- neither side needs anything from the Court on
21 that issue?

22 MR. PAREKH: Not at this time.

23 MR. HULSE: No, Your Honor.

24 MAGISTRATE JUDGE NOEL: Okay, thank you very much.
25 And now I understand Judge Ericksen wants three lawyers from

1 each side to meet in chambers. So if you selected your
2 selective three, let's go back.

3 And by the way, and then we're going to end the
4 this as to the telephone, folks, so once we finish meeting
5 in chambers, we'll be done. Thank you.

6 (Court adjourned at 10:36 a.m.)

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12 I, Maria V. Weinbeck, certify that the foregoing is
13 a correct transcript from the record of proceedings in the
14 above-entitled matter.

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16 Certified by: s/ Maria V. Weinbeck

17 Maria V. Weinbeck, RMR-FCRR
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