

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	)	
	)	December 21, 2017
	)	Minneapolis, Minnesota
	)	Courtroom 12W
	)	9:52 a.m.
	)	
	)	

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

THE HONORABLE FRANKLIN L. NOEL  
UNITED STATES MAGISTRATE JUDGE

**(STATUS CONFERENCE)**

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## P R O C E E D I N G S

(9:52 a.m.)

1 THE COURT: Thank you, good morning.

2 MAGISTRATE JUDGE NOEL: Good morning.

3 THE COURT: Let me just check before -- you can  
4 please be seated. And I was going to check here and see if  
5 the phone is working before we get started. Could someone  
6 on the phone say something?  
7

8 (Unidentified voice heard.)

9 MAGISTRATE JUDGE NOEL: Maybe the phone is all set  
10 up and nobody bothered to call.  
11

12 THE COURT: Can you hear us all right?

13 MR. GORDON: Ben Gordon (inaudible) I'm here, Your  
14 Honor.

15 THE COURT: Okay, I'm going to mute you now. I  
16 was just checking to see if you were there.

17 All right. I say we just get started on the joint  
18 agenda. The pretrial orders and case schedule, does anybody  
19 want to say anything about that?

20 MR. BLACKWELL: Your Honor, if I may.

21 Good morning, Your Honors. Jerry Blackwell for  
22 3M. As Your Honors know, the Skaar case is now gone. The  
23 CNRA testified that the Bair Hugger was not in fact used in  
24 the surgeries at issue. So we're down to the Gareis cases  
25 remaining for bellwether.

1           The parties have had some exchanges for proposal  
2           to the Court for a new schedule. We've sent our proposal to  
3           the plaintiffs. I think they still have some conferring to  
4           do on their side. And maybe the most productive thing, if  
5           Your Honors would give us a sort of return date to get a  
6           proposal back to the Court, I think together we can work to  
7           do that.

8           MS. ZIMMERMAN: With respect to the bellwether  
9           repopulation issue?

10          MR. BLACKWELL: Yes.

11          MS. ZIMMERMAN: Yes, we're happy to do that.

12          MR. BLACKWELL: So nothing further to say.

13          MS. ZIMMERMAN: And, Your Honor, if I may?

14          THE COURT: Yes, Ms. Zimmerman.

15          MS. ZIMMERMAN: I suspect that may be a few  
16          issues, and I suspect that Mr. Hulse and some of his  
17          colleagues may chime in as well.

18                 With respect to this first issue, the pretrial  
19                 orders and case schedule, we're in agreement with  
20                 Mr. Blackwell in terms of how we would like some input from  
21                 the Court as to how best to address this issue of  
22                 repopulating the bellwether pool. I think that that's a  
23                 separate issue in the agenda.

24                 But with respect to number one, pretrial orders  
25                 and case schedule for the Gareis matter, I do think that we

1 are in a situation where we may need a little bit of extra  
2 time to complete the expert depositions in that matter.

3 We just received the case specific expert reports  
4 from defense counsel this Monday. We've been advised that  
5 there are only two available dates where the relevant  
6 counsel for defendants is able to take the deposition of  
7 Dr. Elgobashi in January. And, unfortunately, the two dates  
8 that are available for Mr. Goss don't work for  
9 Dr. Elgobashi.

10 I know that Dr. Borak, who is one of defendant's  
11 disclosed experts on case specific causation, likewise is  
12 not available for deposition on any day in January. And so  
13 I've had some conversations in the last few days with  
14 Ms. Lewis for 3M, and we've discussed whether or not we  
15 might try to push the deadline for expert depositions maybe  
16 a couple weeks into February to accommodate these kind of  
17 schedule things. It does seem at this point we are going to  
18 have at least nine experts subject to deposition in the  
19 course of January and perhaps these first two couple weeks  
20 of February.

21 We have two set so far. Dr. Jarvis is set to be  
22 done, as is Dr. Stonnington. Those are both plaintiffs'  
23 experts, and we're waiting to finalize Dr. Elgobashi's  
24 deposition date.

25 We are waiting on dates for the defendant's

1 experts when they will be available. I know that Dr. Borak  
2 is not available in January, and we were told we'd be  
3 getting those dates from them when they got their reports,  
4 but to my knowledge we don't have those just yet. So, I  
5 think --

6 THE COURT: What would that do to the trial date?

7 MS. ZIMMERMAN: So that's a great question, Your  
8 Honor. One of the things that we talked about on the phone  
9 this week was the parties' mutual desire for a date certain,  
10 and we wanted to check with the Court to see if the -- so  
11 the present scheduling order says the case should be ready,  
12 trial ready on April 30th. We're not certain if that is a  
13 trial date certain on Your Honor's calendar.

14 And if so, certainly both parties would like to  
15 have a trial date certain, given the numbers of experts and  
16 the complexity of arranging those schedules. So we're not  
17 sure if that's a trial date certain on Your Honor's calendar  
18 or if the trial date would potentially be pushed by a couple  
19 of weeks or so.

20 THE COURT: I'm planning on trying the case then.

21 MS. ZIMMERMAN: Excellent.

22 THE COURT: That's what I'm looking at. It says,  
23 "tentative" on my calendar, but there's nothing else there,  
24 and it's as good a time as any.

25 MS. ZIMMERMAN: Perfect.

1 THE COURT: So I am planning on trying it then.

2 MS. ZIMMERMAN: Well, that's welcome news, and I  
3 think that both parties wanted to just get an idea about  
4 whether that was a date certain so that we could communicate  
5 with our experts about that.

6 And in terms of what it means if we push the -- if  
7 we give the parties a couple of extra weeks to complete  
8 these expert depositions through the first part of February,  
9 the plaintiffs have proposed that we push presently under  
10 the Court's scheduling order dispositive motions on case  
11 specific issues would be due on February 6th, which was  
12 seven days after the close of expert discovery or expert  
13 depositions.

14 We would say that if perhaps we pushed the expert  
15 deposition date back to say February 16th, we could follow  
16 the same time path that Your Honors had laid out, and seven  
17 days later have dispositive motions be due.

18 And the question that we had or the discussion we  
19 had was how much that might jam up Your Honor's calendar in  
20 terms of hearing those.

21 I think the other thing that we discussed, to the  
22 extent it works for Your Honors, it may be helpful for the  
23 parties and the Court to sit down perhaps informally after  
24 this status conference to discuss just housekeeping matters  
25 in anticipation of the trial, when motions in limine might

1 be due, jury instructions, the kind of different  
2 housekeeping things that might be helpful to keeping this  
3 trial on track.

4 So I think that those were some additional  
5 thoughts from the plaintiffs' perspective, certainly on  
6 agenda Item Number 1.

7 MAGISTRATE JUDGE NOEL: I just had a question on  
8 the case specific dispositive motions. What -- and I guess  
9 it's more for the defendants than you because I guess you're  
10 not going to have any or you will.

11 MS. ZIMMERMAN: Well, I think we're going to see a  
12 lot of the same experts. There are no new experts that have  
13 been disclosed by either side. There is some potentially  
14 duplicative, I mean we have a 95 page report from Dr. Wenzel  
15 that we'll be doing a deposition on.

16 I think that the parties will probably have to  
17 read the Court's Order on the general causation, Daubert  
18 issues, and keep that in mind as we anticipate case specific  
19 motions as well. I hope it's not as big of a list this time  
20 around, but I suspect there will be some motions that are  
21 submitted.

22 MAGISTRATE JUDGE NOEL: I guess that's my  
23 question. So are the case specific dispositive motions  
24 similar? Are they going to be a rehash of Daubert things or  
25 something different.

1 MS. ZIMMERMAN: I would certainly hope that we're  
2 not going to rehash everything that we've already presented  
3 to the Court, but I can only speak for the plaintiffs.

4 MAGISTRATE JUDGE NOEL: Okay.

5 THE COURT: Mr. Hulse?

6 MR. HULSE: Thank you, Your Honors. Good morning.  
7 Ben Hulse for the defendants.

8 There certainly won't be a rehash of the general  
9 causation motions. I think we know better than that. But  
10 this is where the rubber hits the road in a specific case.  
11 What plaintiffs have to show here and the experts have to  
12 show is that the Bair Hugger system actually caused  
13 Mr. Gareis's infection.

14 So we have a host of other issues, alternative  
15 causes and so forth that are going to be at issue on  
16 specific cause. And it is absolutely our anticipation that  
17 we will file motions to exclude each of the plaintiffs'  
18 experts and that we will file a summary judgment motion.

19 Our concern with the April 30th date certain, if  
20 we're then moving the Daubert deadline is that we're not  
21 actually getting to a hearing on Daubert and summary  
22 judgment until into April. And, obviously, the Court will  
23 take the time it will take, but it only allows potentially a  
24 few weeks for consideration and decision on motions that  
25 will be involved motions.

1           So while we do have the single availability issue  
2 with Dr. Borak who has got some significant medical  
3 treatment in January, we do think it's possible to get this  
4 all done within the present schedule. But if we are going  
5 to move the Daubert schedule, our suggestion would be that  
6 we just, that if it works with the Court schedule, that we  
7 push that trial date out accordingly, whether it's one week  
8 or two weeks, just because we're already pretty compressed  
9 on the time between Daubert and trial.

10           THE COURT: Let's talk about the dates in our  
11 informal meeting when we get done here. I hate to do  
12 anything with the calendar without all the relevant people  
13 involved.

14           MR. HULSE: Makes sense to us, Your Honor.

15           THE COURT: All right. I'd like to get this  
16 bellwether pool repopulated as soon as possible. Is that  
17 something else that you want to talk about informally? I  
18 think, Mr. Blackwell, that's what you said you thought that  
19 you and the plaintiffs could work on something?

20           MR. BLACKWELL: Your Honors, we could talk about  
21 it informally with the Court. As I say, we had sent our  
22 proposal to plaintiffs. I don't know that they've had a  
23 chance to meet and confer on their side.

24           THE COURT: Okay.

25           MS. ZIMMERMAN: And, Your Honors, so Ms. Conlin

1 sends her regrets for not being here. She's wrapping up a  
2 trial out of state, and Mr. Ciresi is also out of town. And  
3 I know Mr. Gordon sent a note to you. He's stuck I think in  
4 the Atlanta airport right now.

5 So we've had some difficulty getting our side a  
6 chance to kind of review the entire proposal. We thought  
7 that it made a lot of sense to get some input from Your  
8 Honor in terms of what you'd like to see. Certainly from  
9 the plaintiffs' perspective, one key part that we think that  
10 needs to be added is some mutual discovery on case specific  
11 issues. And we can talk at length about the issues that we  
12 run into with the respect to the Skaar case and the Gareis  
13 matter, where some of the things that we sought along the  
14 course of this case, customer lists, other case specific  
15 communications between defendant and the hospitals for these  
16 plaintiffs have not been produced, despite our requests. We  
17 don't have a defendant fact sheet. And normally in a case  
18 like this where we had a defendant fact sheet, we would have  
19 some of this information.

20 Discovery about detailed people. It's what they  
21 call the sales folks that go out to the hospitals. Sales  
22 information that confirms in fact that certain blankets were  
23 provided. And the reason that that's come up, and,  
24 unfortunately, to trouble Judge Noel about this just about  
25 two weeks ago, we ended up with an emergency telephone

1 conference before Your Honor, and then actually the next day  
2 an emergency motion to quash by the third party hospital  
3 with respect to some of the discovery that we're seeking.

4 I think given the discovery response that we got  
5 from Smith's Medical, which is another third party we  
6 received just yesterday, I assume that that has put to bed  
7 any questions about products with respect to Mr. Gareis.

8 We have testimony from the anesthesiologist and  
9 from the CRNA that in fact it was used in Mr. Gareis' case.  
10 The hospital records that we've been provided confirmed that  
11 as well. But we have been provided a lot of e-mails now  
12 just over the last few weeks between the defendants and the  
13 hospital for Mr. Gareis. So it would have been responsive  
14 discovery that we had served but hadn't been produced until  
15 now. And they thought perhaps there might be a product ID  
16 issue, and they can say that, well, it wasn't Bair Hugger,  
17 which is Smith Medical instead. So some of these things we  
18 think could have been avoided if we had product information,  
19 customer lists.

20 MAGISTRATE JUDGE NOEL: Let me interrupt for a  
21 quick second because it occurs to me that people on the  
22 telephone probably are not hearing either of you from where  
23 you're standing.

24 MS. ZIMMERMAN: I apologize. That's a good point,  
25 Your Honor.

1           Genevieve Zimmerman for plaintiffs. I won't  
2           restate everything, but one of the issues that the  
3           plaintiffs have with respect to the proposal the defendants  
4           have put together on repopulating the bellwether pool really  
5           has to do with mutual discovery obligations on case specific  
6           issues from defendants. Typically, what we see in MDLs like  
7           this is a defendant fact sheet or something like that.  
8           Certainly, when it comes to the bellwether plaintiffs that  
9           have been nominated, we would suspect that relevant to that  
10          would be customer lists, information about what blankets,  
11          what machines have been placed at these hospitals.

12                   MAGISTRATE JUDGE NOEL: But what goes into the  
13          plaintiffs front end work to determine that a Bair Hugger  
14          was used in the first place because you don't get to sue  
15          them unless --

16                   MS. ZIMMERMAN: Certainly, Your Honor.

17                   And so what's happened in all six of the  
18          bellwether cases that made it to the kind of final  
19          nomination from the plaintiffs' perspective is there in the  
20          medical record, generally speaking, an anesthesiology  
21          record, where there's a box sometimes that actually has a  
22          little Bair Hugger logo on it. Sometimes it says, "Bair  
23          Hugger." Sometimes it says, "forced air warming."  
24          Sometimes there's a line through it. Sometimes it's  
25          circled. Sometimes it's checked. And so we have that.

1 Sometimes it's reflected in the billing records from the  
2 hospital as well.

3 But, again, it's certainly on the plaintiffs to  
4 begin that process before they start a lawsuit to make sure  
5 that they have some objective evidence that Bair Hugger was  
6 in fact used in the surgery at issue.

7 But what we've run into now is that despite --  
8 I'll take the Gareis case, for example, where there is in  
9 fact a check mark on the relevant surgery note. We have  
10 deposition testimony from the anesthesiologist and from the  
11 CRNA that says, yes, this was used. After those depositions  
12 happened, the defendants served third party subpoenas and  
13 produced some e-mails to us between defendants and hospital  
14 representatives back in the time of the subject surgery 2009  
15 and 2010, that they believed indicated that perhaps the  
16 hospital was moving to use Smith's Medical, which is another  
17 forced air warming product.

18 Given what we now know, based on the third party  
19 subpoena response received yesterday, Smith's Medical never  
20 sold any products to this particular hospital. And we do  
21 know that 3M did in fact sell Bair Huggers and placed this  
22 machine at these hospitals. So I think we're past that, but  
23 that wasn't until we had been out to South Carolina on three  
24 separate trips for multiple depositions and hospital  
25 inspections.

1           So to the extent that the defendants have proposed  
2           in their bellwether repopulation proposed order that there  
3           be some affirmative obligations on the plaintiffs, we  
4           certainly welcome that, and we think it's appropriate.

5           But we think that that responsibility should be a  
6           mutual obligation as is generally done in many other cases,  
7           such that as they have obtained, you know, customer lists  
8           from a competitor in this case, but we haven't obtained  
9           those here.

10           We can see based on some of their documents, hey,  
11           you sent this many blankets, and this many machines to the  
12           hospital in question on these dates. And here are the  
13           e-mails that you had with that particular facility that  
14           would be relevant in this case. So it's not that we think  
15           we shouldn't have to produce some information, we just think  
16           that it should be a mutual observation, so we can avoid some  
17           of these issues.

18           MR. BLACKWELL: Your Honor's, if I could be heard  
19           on our position since you heard a response to our position  
20           not having heard our position. Mr. Hulse, perhaps, you  
21           could speak to it.

22           MR. HULSE: Good morning again, Your Honors. The  
23           fundamental issue here is that what has become clear from  
24           this set of bellwethers that we've been working up is the  
25           fact that there is a medical record, which sometimes is an

1       ambiguous medical record, doesn't in fact tell you in many  
2       cases that the Bair Hugger was in fact used.

3               And the way that you find that out is, for  
4       example, as we saw in the Skaar case, you talk to the CRNA,  
5       the registered nurse anesthetist who said in the deposition  
6       oh, yeah, I would have marked this differently if I used it.  
7       Our view point is that's the kind of diligence that needs to  
8       happen at the front end. It ought to happen before the case  
9       is filed. If it doesn't happen, it ought to happen before  
10      the case goes into the Bair Hugger -- into the bellwether  
11      pool.

12              So what our proposal does is it just modifies the  
13      old process to put in a requirement that there either be a  
14      medical record that's clear or a statement reflecting a  
15      discussion between plaintiffs' counsel and the CRNA or the  
16      anesthesiologist that confirms the Bair Hugger was in fact  
17      used.

18              We, for our part, this premise that we haven't  
19      produced documents on Bair Huggers at hospitals is just not  
20      right. For the pool, the initial, the last pool of  
21      32 cases, we produced the information about all the Bair  
22      Huggers that had been placed at those hospitals.

23              Gareis had a special case where we found through  
24      deposition testimony that they had apparently piloted the  
25      HotDog system, so we went back and did some additional

1 discovery there. But we have provided that Bair Hugger  
2 placement information for the cases in the prior bellwether  
3 pool, and we would do that for this one too.

4 But, ultimately, just because a Bair Hugger is  
5 there doesn't mean that it was used in this particular  
6 surgery. And I think we knew at the front end, but the  
7 discovery has certainly confirmed that we're going to find  
8 in lots of cases that the Bair Hugger wasn't used, and  
9 neither side should be wasting time on those cases when that  
10 could have been found out at the front end.

11 THE COURT: So the purpose of bellwethers is to  
12 find out whether there are some conclusions that can be  
13 drawn that are generalizable. So far the bellwether process  
14 has been useful it seems in identifying a problem, which is  
15 that the medical record with the check is an insufficient  
16 indicator of whether the case does or does not belong in a  
17 lawsuit against the Bair Hugger.

18 What, if any, suggestion do you have for how  
19 further, you know, fair enough the plaintiffs would not have  
20 known before we went into this bellwether process that that  
21 was not, that that's not enough to show that you've actually  
22 got a case against a particular product. And they say, you  
23 know what they say.

24 MR. HULSE: Yes.

25 THE COURT: So what's your suggestion on how we

1 get over that hump?

2 MR. HULSE: Our suggestion is that there ought to  
3 be a -- unless you really have an absolutely clear record --  
4 there ought to be a final communication between plaintiffs'  
5 counsel and in most cases it will be the CRNA. You know, we  
6 went through a discussion earlier in the case about  
7 contacts, they have unfettered access to treaters and that  
8 communication ought to happen.

9 And then what we're suggesting is part of the  
10 process that we've proposed is that there be a statement,  
11 that before the case can go into the bellwether pool, the  
12 plaintiffs' counsel provide a statement that says we talked  
13 to the CRNA on this date, and they confirmed based on  
14 medical record or whatever other evidence that the Bair  
15 Hugger was in fact used in this surgery.

16 THE COURT: Okay. Ms. Zimmerman, what would be  
17 the problem with now that you know that what you were  
18 relying on isn't good enough, what's the problem with  
19 something along the lines that Mr. Hulse was just talking  
20 about where there has to be at least a --

21 MS. ZIMMERMAN: A statement --

22 THE COURT: -- a communication, talk to somebody.

23 MS. ZIMMERMAN: Sure. So, Your Honor, I think,  
24 first of all, we do have objective evidence that it was  
25 used. And what the deposition testimony has shown so far is

1 that the CRNA or the anesthesiologist from a case like  
2 Gareis where the surgery was in 2010, they don't have an  
3 independent memory of these patients. And so what they do  
4 is they go back and they look at the record, and they say,  
5 oh, was there a check mark there? And that's really what  
6 ended up being the issue in Skaar, which incidentally was a  
7 defense pick, and there was an indication on the sheet.

8 THE COURT: Okay. I know you're saying that you  
9 want us to revisit the ruling about you getting all the  
10 defendant's sales records and everything, and let's just  
11 assume for the moment that's not going to happen. So what  
12 else do you -- I mean in the absence of some other  
13 suggestion, the defendant's suggestion seems pretty  
14 reasonable to me.

15 Of course, it's not going to be iron clad but we  
16 now know from the bellwether process is what you have been  
17 relying on is insufficient, so we can't do that again. So  
18 what else can we do?

19 MS. ZIMMERMAN: Well, I think that the burden in  
20 terms of repopulating the bellwether pool, if what we're  
21 going to do is get an affirmative statement from a CRNA or  
22 the treating physician on 4200 cases prior to selecting 150  
23 for potential bellwether considerations, it just seems from  
24 a logistical standpoint not to be likely to be very easily  
25 done.

1           MAGISTRATE JUDGE NOEL: I don't think that's what  
2 they're suggesting. I think they're suggesting we come up  
3 this 150 case randomly selected pool and then you folks go  
4 through these steps, but one of the new steps would be  
5 before a case gets into the bellwether actual pool, you need  
6 to -- not you personally.

7           THE COURT: Y'all.

8           MAGISTRATE JUDGE NOEL: The lawyer for the client  
9 whose case is proposed to be in the bellwether pool needs to  
10 have some affirmative evidence that there was a Bair Hugger  
11 used in the surgery. And that doesn't strike me as being an  
12 overly burdensome or unreasonable request in light of what  
13 we have observed about the cases that were in the initial  
14 bellwether.

15           MS. ZIMMERMAN: Okay. Recognizing where the Court  
16 is going on this, I think that it seems to be kind of a  
17 hybrid or headed towards a lone pine of sorts, which is  
18 typically not done at this stage. But certainly if we had  
19 150 cases that are randomly selected by the Court to be  
20 considered for the bellwether pool, and the Court directs  
21 that we need to have, you know, the 134 law firms that are  
22 presently involved in persecuting or prosecuting cases here  
23 get -- "persecuting" mind slip -- get statements from the  
24 CRNA, we will certainly do what the Court indicates.

25           I think that what we have learned from the

1 depositions is what they do is they go back to the records  
2 that we're producing, and so you end up in kind of a circle.  
3 Now, if it's an affidavit testimony and that gives the Court  
4 and the defendant some additional comfort in terms of this  
5 is certainly a case where the plaintiff was exposed, we'll  
6 certainly comply with the Court's Orders in that regard.

7 We certainly are interested in avoiding this as  
8 well. I mean multiple trips to Idaho and to South Carolina  
9 to try and get these things sorted out, you know, is not in  
10 our interest or anyone's interest, and we don't want to  
11 burden the Court unnecessarily either.

12 THE COURT: Okay. All right. Well, this is not  
13 on the order of a lone pine and that reflects a complete  
14 misunderstanding of what we're saying. You now know because  
15 of the bellwether process that's gone through so far that  
16 there are a number of cases that are being brought by  
17 plaintiffs who do not have sufficient reason to know that  
18 they actually have a product that was involved in their  
19 surgery. That's just a very basic fact.

20 And we have allowed all of these cases to go  
21 forward on the simple check mark, and we now know that's not  
22 enough. And to say that 4500 cases should be allowed to  
23 proceed now based on a check mark when everybody knows that  
24 in reality that doesn't tell you anything is inconsistent  
25 with the fundamental requirement that there be some good

1 faith belief on the part of a plaintiff that they've got a  
2 case before they bring it. It has nothing to do with a lone  
3 pine order that has all this scientific business. It's not  
4 that at all.

5 And the bellwether process in order to keep  
6 identifying issues that are going to be meaningful for  
7 generalized use has to overcome that problem at least with  
8 respect to the 150. So --

9 MS. ZIMMERMAN: We agree with that, Your Honor.

10 THE COURT: Okay. So when you talk amongst  
11 yourselves, hopefully, there won't be so many areas of  
12 disagreement now. And when you do that, you might be able  
13 to talk, I don't know, you can talk today some, I suppose,  
14 but the sooner the better.

15 MS. ZIMMERMAN: Absolutely, Your Honor. With  
16 respect to the six bellwethers that have been considered, we  
17 know that there's one now, Skaar, where it was not in use.  
18 The other ones to our knowledge are all cases that were  
19 used. There was one case where it was turned off early.  
20 Well, we did certainly learn that from the CRNA.

21 But I think, respectfully, that the facts at least  
22 with these six are not suggestive that there's a lot of  
23 cases that have made it this far without any kind of  
24 objective proof it's been used in their surgeries.

25 MR. BLACKWELL: Kamke was another case, Your

1 Honor.

2 THE COURT: We're not going to argue about all  
3 these cases. Well, you say it.

4 MAGISTRATE JUDGE NOEL: I was going to say clearly  
5 the initial bellwether process when it got down to actually  
6 identifying cases was problematic because more than one case  
7 it turns out either it wasn't used, it was turned off or  
8 whatever the facts are. And I think all we're saying is  
9 that in coming up with a process to repopulate the  
10 bellwether pool, the parties should focus on that.

11 And I think what Judge Ericksen is saying is that  
12 that burden is more on the plaintiffs than on the  
13 defendants, and it's not really about the defendant's sales  
14 records or who they sell Bair Huggers to. It's about  
15 whether or not this plaintiff was exposed to the device that  
16 is alleged to have caused his damages. And I guess maybe  
17 I'm not understanding what the burden is or why that's a  
18 difficult thing for a plaintiff's lawyer to ascertain at the  
19 front end of a lawsuit.

20 Now, having said that, I'm looking now at defense  
21 counsel, and if you've got evidence or you know for sure you  
22 never sold Bair Huggers to hospital X where this guy's  
23 surgery is, you can't play in the weeds and wait for them to  
24 put it on the list and then say, oh, by the way, guess what,  
25 yep, not a Bair Hugger, 'cuz we never sold them a Bair

1 Hugger.

2 So if you've got evidence like that, that should  
3 be part of the give and take in putting together the process  
4 for repopulating the Bair Hugger bellwether list would be my  
5 thought.

6 THE COURT: That's exactly right.

7 MS. ZIMMERMAN: We're in agreement with that.

8 Thank you.

9 THE COURT: Okay. We've got some plaintiff fact  
10 sheet issues to discuss. Mr. Hulse, is this you again?

11 MR. HULSE: I believe so. Mr. Parekh, do you want  
12 to join me?

13 MAGISTRATE JUDGE NOEL: It occurs to me, I don't  
14 know if this is on the record, but we should probably tell  
15 everybody Judge Leary is not here. He's under the weather  
16 and sent us a note to that effect yesterday, and I just want  
17 to make sure the record is clear on that.

18 THE COURT: Thank you.

19 MR. HULSE: Yes, thank you, Your Honor.

20 So the Court has disposed of the pending motion  
21 that we had. This was just a small motion with respect to  
22 three cases, though Mr. Parekh who represents the plaintiff  
23 in one of those cases notes that almost immediately after we  
24 filed our motion, he served a PFS for this case. And we  
25 don't, you know, while our overall principle is the

1 deadlines have to be met that, you know, a lot of time  
2 passed before the PFS came in. In this case, we don't  
3 oppose the setting aside the dismissal.

4 THE COURT: All right. And that is 17CV2395,  
5 docket, right?

6 MR. PAREKH: Yes, Your Honor. The Hecht case.

7 THE COURT: All right. Your motion is granted.

8 MR. PAREKH: Thank you, Your Honor.

9 MR. HULSE: The related issues, Your Honor, the  
10 defendants have proposed a process to deal with the  
11 plaintiffs who pass away after the filing of their lawsuits.  
12 The plaintiffs, I think their position is they don't think  
13 an order like this is necessary. And let me tell you given  
14 the background of rules that we have why we have proposed  
15 this, and it's something that's been done in other MDLs, if  
16 this is an okay time to talk about this issue.

17 So the issue is that Rule 25A, which provides the  
18 process for suggestion of death, it doesn't actually provide  
19 a date by which a suggestion of death needs to be filed. So  
20 what we've learned over the last several months is that we  
21 have dozens and maybe perhaps a hundred plaintiffs who have  
22 passed away since filing lawsuits, and they're just  
23 lingering out there.

24 Many already had compliant PFSs, so there is no  
25 way we would know through the PFS process that somebody has

1 passed away. And if we weren't in an MDL, this would have  
2 been addressed. But because we are in an MDL without a  
3 focus on these cases, these just sort of linger out there.  
4 And if the plaintiffs don't tell us or file a suggestion of  
5 death, we don't know about it.

6 So what we've been doing, the defendants, is when  
7 we find out about one of these cases, we file a suggestion  
8 of death. So what we're proposing here is an Order that is  
9 just copied from the *Aredia and Zometa MDL* from a few years  
10 back, which would put in a requirement that plaintiffs file  
11 a suggestion of death within 30 days of the death of their  
12 client. We think that's a reasonable requirement. And  
13 after that, we basically follow the process set by the rule.

14 The other thing that we've incorporated is the  
15 Court's prior ruling. This is on July 24th having to do  
16 with the *Harkleroad* case. That with the substitution, there  
17 has to be a completed, verified PFS served on the defendants  
18 too. So we don't -- so the expectations are clear, and that  
19 would just be taking that ruling from the *Harkleroad* case  
20 and extending it across the MDL.

21 So I do have, if the Court is interested, copies  
22 of the Order from the *Aredia and Zometa MDL* that this is  
23 copied from. The plaintiffs have indicated in meet and  
24 confer correspondence that they are concerned that this  
25 impinges on State Court rules and laws for appointment of

1 representatives and special administrators. We don't see  
2 that at all. That is something that comes up when a motion  
3 for substitution has been filed, then we have to be in  
4 compliance with whatever the state rule is for being a  
5 proper party to be substituted. But there's nothing  
6 contrary to state law in requiring plaintiffs to file a  
7 suggestion of death within 30 days of their client's death.

8 MAGISTRATE JUDGE NOEL: And that's the only  
9 constraint in your proposal is the 30 days to file the  
10 suggestion, then there's no other time limit or requirement  
11 that things happen in any given time frame.

12 MR. HULSE: The only other requirement that really  
13 goes beyond the rules is this PFS requirement that we've  
14 picked up from the Court's July 24th ruling in Harkel Road  
15 case.

16 THE COURT: Okay. So it's Rule 25 straight up  
17 with the insertion of the 30-day.

18 MR. HULSE: Right.

19 THE COURT: Okay.

20 MR. HULSE: Which is a gap that maybe the rules  
21 should fill at some point.

22 THE COURT: I'll get right on it. We meet in -- I  
23 guess we don't meet until next year.

24 MR. HULSE: It's a funny rule.

25 THE COURT: Have you had this problem in other

1 case s?

2 MR. HULSE: There is a bit of an ambiguity in it  
3 too in the Court's interpretation of what the word "service"  
4 means in this rule too. I know Judge Noel is familiar with  
5 this issue. He's confronted it before with some courts  
6 taking the viewpoint that filing the suggestion of death and  
7 service through ECF meets the service requirement.

8 Other courts have said you actually need to go and  
9 find out anybody, find anybody who is a potential heir or  
10 substitute plaintiff and actually serve them according to  
11 state law rules, so there's a split of opinion on that.

12 THE COURT: Okay. Is there any objection to this?

13 MS. ZIMMERMAN: Your Honor, the plaintiffs'  
14 primary objection is with respect to the 30 days. I mean,  
15 unfortunately, the reality is a lot of times these people  
16 will die and their family members may or may not have any  
17 idea that they have a lawsuit pending.

18 So a lot of times the lawyers aren't going to be  
19 advised within 30 days of the actual death. They've got a  
20 lot to attend to during that time. So we would suggest that  
21 it should be 30 days from the time that the lawyers are  
22 provided notice about the death because it's just, it's an  
23 onerous burden when lawyers don't necessarily know for many  
24 months whether their next of kin are sorting through their  
25 effects and trying to figure out what other paperwork needs

1 to be tended to.

2 So with that caveat, we recognize there is a duty  
3 to provide a notice of suggestion of death upon the record  
4 and whether it's service, as Mr. Hulse indicated, I don't  
5 think that we're particularly concerned. The concern is  
6 more it takes a while sometimes for the next of kin to  
7 notify the lawyers. They may not know that they have a case  
8 pending. So within 30 days of the lawyers knowing about it,  
9 would be our request.

10 THE COURT: What's the longest State Court time  
11 frame that's allowed? Because State Court, there is a  
12 requirement that somebody take over the lawsuit in a  
13 reasonable period of time. And it sounds like you've had  
14 occasion to become familiar with the various state laws so  
15 what's the --

16 MS. ZIMMERMAN: I wish I could tell you what the  
17 longest is across the country. Usually, what I run into is  
18 this reasonable time kind of language so that lawyers can't  
19 just sit back and not do anything about it. And the same  
20 thing goes for the next of kin, they do need to be  
21 diligently working on handling the affairs and the effects  
22 afterwards.

23 THE COURT: There's not even a reasonable time  
24 requirement in Rule 25, is there?

25 MS. ZIMMERMAN: Not that I'm aware of.

1                   MAGISTRATE JUDGE NOEL: I think where Judge  
2                   Ericksen is going -- maybe I'm wrong.

3                   THE COURT: No, you're right.

4                   MAGISTRATE JUDGE NOEL: Instead of 30 days from  
5                   when the lawyer learns, what if we just extended the 30 days  
6                   to some longer period of time? Would that be another way to  
7                   fix your concern?

8                   MS. ZIMMERMAN: That's a good question, Your  
9                   Honor. I'd have to check and see if there was some kind of  
10                  outside back stop. If there is some state that says you get  
11                  a year or something like that. I'm not aware of that. As I  
12                  stand here, I think a year seems like a long time. I would  
13                  hope that people would be able to get lawyers notice within  
14                  a couple of months. Perhaps we can research to see if  
15                  there's some sort of state statute we would be running afoul  
16                  of and otherwise propose something to Your Honors.

17                  THE COURT: Couldn't we do the 30 days, and then  
18                  if it turns -- so that triggers something, so then the  
19                  family gets notice. And if it turns out that they want to  
20                  take action, then you can come back and try to get it  
21                  re-upped, just like we did with this --

22                  (Court conferring off the record.)

23                  MR. HULSE: I think I could add something to this  
24                  sort of. All, of course, a suggestion of death is just the  
25                  statement on the record that the plaintiff has died. It

1 triggers the 90 day period for substitution. The advisory  
2 committee notes make clear that the Court can grant for good  
3 cause an extension of that 90-day period. So if basically  
4 things are dragging out in State Court with the appointment  
5 of the personal representative, counsel can come in and ask  
6 for an extension.

7 MAGISTRATE JUDGE NOEL: That's not the concern.  
8 And I understand the concern that Ms. Zimmerman raises is  
9 that the lawyer who represents the plaintiff who is now dead  
10 may not know that guy is dead for many more than 30 days  
11 after he or she has died, and that that's the piece of your  
12 proposal that's being attacked is that if I were to die and  
13 I have a lawsuit pending, my wife may not even know I have a  
14 lawsuit pending. And --

15 THE COURT: She wouldn't even know you're dead.  
16 Get a different example.

17 MAGISTRATE JUDGE NOEL: I'm just going to let that  
18 one go. The point is that the 30 days is too short a  
19 window, 30 days from the date of death is too short of a  
20 window for a lawyer to get that suggestion of death on the  
21 record.

22 MR. HULSE: Here's a thought about that, and I'm  
23 sympathetic to that. My suggestion would be to make it  
24 60 days instead of 30. And here's the reason why I still  
25 think it should be based on the death and not the notice.

1           If we weren't in an MDL, then the plaintiffs'  
2           counsel would be in more regular contact with their clients.  
3           Here, because we're in an MDL, if we don't require  
4           plaintiffs' counsel to be checking in from time to time,  
5           we're just going to end up in the same situation where  
6           they're not in contact for a year with their clients, and we  
7           really haven't fixed the problem. So we'd be fine with  
8           60 days instead of 30. That gives a window for plaintiffs'  
9           counsel to check in bimonthly with their clients, which  
10          seems like a reasonable expectation to us.

11           THE COURT: There are ways to monitor.

12           MS. ZIMMERMAN: Yes, I mean there are a number of  
13          those --

14           THE COURT: We can put a mirror over there or you  
15          can take their blood pressure.

16           MR. HULSE: We'll check 80 percent of the cases.

17           MS. ZIMMERMAN: Mr. Assaad offers a good point,  
18          who do we call because we don't, if the plaintiff is dead,  
19          but.

20           MR. HULSE: In the PFS, of course, if you can't  
21          reach your plaintiff for a period of time, then it probably  
22          is time to call any of those other people who are listed in  
23          the PFS, the family, or spouses. Many of these spouses, of  
24          course, have a loss of consortium claim. So it doesn't  
25          seem, again, it doesn't seem like anything other than the

1 regular expectation of diligent representation of your  
2 clients.

3 MS. ZIMMERMAN: Well, I think the plaintiffs  
4 respect that, and I think that we should afford these  
5 families the opportunity to get with their lawyers and make  
6 sure that we can go through the procedural requirements.  
7 But I don't think that there's any prejudice to the  
8 defendants, particularly if it's not a case that's presently  
9 being worked up for trial, if they get a little bit of extra  
10 time to gather paperwork.

11 THE COURT: Hold on, let's just think.

12 (Court conferring.)

13 THE COURT: All right. It will be 90 days from  
14 the date of death. Plaintiffs' counsel files a suggestion  
15 of death following which the Rule 25 procedures kick in.

16 MS. ZIMMERMAN: Thank you, Your Honor.

17 MR. HULSE: And, Your Honor, as far as our  
18 Proposed Order?

19 THE COURT: It will be just like that only it will  
20 be 90 days.

21 MR. HULSE: And should we submit one that makes  
22 that revision?

23 THE COURT: No, we can do it.

24 MR. HULSE: Okay, we can do it.

25 MAGISTRATE JUDGE NOEL: Sorry for the next mixed

1 signal. I was saying yes.

2 THE COURT: I misspoke. I misspoke.

3 MAGISTRATE JUDGE NOEL: No, no, no, you spoke and  
4 your word is the Order. So we can substitute 30 for 90 or  
5 90 for 30.

6 THE COURT: I was just showing off that we were  
7 able to do that.

8 MR. HULSE: The language is we'd like the PTO that  
9 goes up on the website and everything, so everybody could  
10 see it and so --

11 THE COURT: Could you just hold on for a second?

12 MR. HULSE: Of course.

13 (Court conferring.)

14 THE COURT: If you're willing to do it, would you  
15 do it?

16 MR. HULSE: Of course.

17 THE COURT: Thank you. Okay. Done. All right.  
18 What about these other ones?

19 MR. HULSE: I assume you're referring to PFSs,  
20 Your Honor.

21 THE COURT: Yes.

22 MR. HULSE: There's nothing else to be decided  
23 today. We'll have a motion for the next status conference  
24 as the procedure goes that probably involves quite a few  
25 more cases, but no other items for decision today, at least

1 not from our perspective.

2 THE COURT: Okay. And Ms. Zimmerman, I don't know  
3 who the people are behind you but they seem very unhappy  
4 about something, so maybe you want to consult with them.

5 MS. ZIMMERMAN: The folks at the counsel table?

6 THE COURT: No, the people behind you. Did they  
7 want to be heard or something?

8 MS. ZIMMERMAN: Does anybody have any PFS issues  
9 that they need to have addressed? No.

10 MR. HULSE: Your Honor, my apologies, it slipped  
11 my mind. We do have the Houseman case motion to dismiss.  
12 We'd be willing to just have that taken on the papers. I  
13 have nothing to add beyond what's in our brief.

14 THE COURT: Okay. Dead person.

15 MS. ZIMMERMAN: I don't know if Mr. Webb is on the  
16 phone and wants to be heard. I have not been told that.

17 THE COURT: Mr. Webb, are you on the phone?  
18 Mr. Web?

19 MS. CORDRAY: This is Abby Cordray. I'm his  
20 paralegal. Seth is not on the phone, but I am representing  
21 for him.

22 THE COURT: Could we have your name and spelling,  
23 please?

24 MS. CORDRAY: It's A-B-B-Y. And the last name is  
25 C-O-R-D-R-A-Y.

1 THE COURT: And you're an attorney representing?

2 MS. CORDRAY: No, I'm actually his paralegal.

3 THE COURT: Okay.

4 MAGISTRATE JUDGE NOEL: But you work with the  
5 lawyer that represents Ms. Houseman and/or her estate?

6 MS. CORDRAY: Correct, yes.

7 MAGISTRATE JUDGE NOEL: Okay. And Mr. Hulse for  
8 the defendant has suggested that we can just decide the  
9 motion to dismiss that case on the papers without any  
10 further oral argument. Do you think the lawyer you work  
11 with would be agreeable to that?

12 MS. CORDRAY: Yes, I believe so.

13 THE COURT: All right. Thank you very much.  
14 We'll do that.

15 MS. CORDRAY: You're welcome.

16 THE COURT: So the update on the number, nothing  
17 to be added there, I don't believe.

18 MS. ZIMMERMAN: Nothing to add, Your Honor. We  
19 did have Dave Szerlag's office did a census, and it does  
20 include not just 4,116 plaintiffs but also represented by  
21 134 law firms, and I thought the Court might be interested  
22 to know that.

23 THE COURT: Thank you.

24 Okay. There's the Ramsey County cases. Somewhere  
25 there's an -- let me just go through these in order. The

1 Rodriguez in Illinois. The trial is set for next summer.

2 MS. LEWIS: Yes, Your Honor. Deborah Lewis for  
3 3M.

4 THE COURT: And you've got a trial on the  
5 Rodriguez matter scheduled for July 30th?

6 MS. LEWIS: Yes.

7 MAGISTRATE JUDGE NOEL: You need a microphone.

8 MS. LEWIS: Good morning, Your Honors. Deborah  
9 Lewis for 3M. Yes, the Rodriguez matter is set in Lake  
10 County, Illinois, this summer. There is no other scheduled  
11 dates beyond the trial setting at this point.

12 THE COURT: Well, you've got a status conference  
13 for January, right? It says, "next status conference  
14 scheduled for January 23rd."

15 MS. LEWIS: I, unfortunately, don't have those  
16 full dates in front of me but --

17 MR. HULSE: That's correct.

18 MS. LEWIS: -- yes.

19 THE COURT: All right. Interesting. Do you think  
20 that's a date certain for trial?

21 MS. LEWIS: I don't know that it's not. We've not  
22 had a court hearing beyond the motion to dismiss.

23 THE COURT: Okay. Thank you, Ms. Lewis.

24 MS. LEWIS: Thank you.

25 MR. HULSE: I can add one maybe more thing on

1 Rodriguez. So Your Honors, while that is a date certain  
2 right now on the Court's calendar, based on my discussion  
3 with plaintiff's counsel, it's not his desire to be out in  
4 front of the MDL. So nothing binding, no agreement, but I  
5 think there is a good probability that the case will  
6 ultimately, the trial date will fall farther back.

7 THE COURT: Okay. All right. Canada, no  
8 additional activity since we last spoke.

9 Discovery, nothing to do about that right now I  
10 don't believe.

11 Is there anything else to discuss before we go  
12 back and talk about the Gareis fact specific dates?

13 MR. BLACKWELL: Only, Your Honors, if I might be  
14 excused from the informal discussion. Mr. Hulse and  
15 Ms. Ahmann will go. I've been parachuted in to try a case  
16 in LA the first week in January, and I've got a lot to  
17 learn, and so I'm anxious.

18 THE COURT: Well.

19 MAGISTRATE JUDGE NOEL: How did you arrange that  
20 LA thing in January?

21 MR. BLACKWELL: The Honolulu thing in November was  
22 even better.

23 THE COURT: Maybe you just want to come back for a  
24 moment.

25 MR. BLACKWELL: All right, I will, Your Honor.

1 THE COURT: Anybody on the phone have anything  
2 that they want to be heard on at this point?

3 MR. BURKE: Your Honor, this is Daniel Burke from  
4 Bernstein Liebhard. May I be heard?

5 THE COURT: Yes.

6 MR. BURKE: Hi. So your Order, the Court's Order  
7 dated December 18th concerning fact sheets with respect to  
8 my client Rhonda Morgan notes that there was no opposition  
9 filed to that motion. And I think what happened was the  
10 Court confused or mistakenly substituted our opposition for  
11 Morgan with the Order with respect to Kimberly Charles. And  
12 I just wanted to clarify the record that we did in fact  
13 serve and file an opposition to the motion.

14 And I understand that the Court is going to  
15 dismiss it with prejudice, but I just wanted for purposes of  
16 my client to note on the record that we did in fact oppose  
17 the motion.

18 THE COURT: I apologize for that. We'll get that  
19 fixed.

20 MR. BURKE: Thank you, Your Honor.

21 THE COURT: Anybody else? All right. Thank you.  
22 We're in recess.

23 (Court adjourned at 10:45 a.m.)

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REPORTER'S CERTIFICATE

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

Certified by: s/ Maria V. Weinbeck

Maria V. Weinbeck, RMR-FCRR