

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	)	
	)	January 18, 2018
	)	Minneapolis, Minnesota
	)	Courtroom 12W
	)	9:30 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

(9:55 a.m.)

1 THE COURT: Good morning. Please be seated.

2 Judge Leary is unable to join us today because of  
3 a legal problem. He no longer has any business here.

4 Do we have our people on the phone? Let's see.  
5 Would someone on the phone say something?

6 UNIDENTIFIED SPEAKER: Good morning, Your Honor.

7 THE COURT: Thank you very much. We've been  
8 discussing the bellwether back and forth, and it struck us  
9 that it might be best to go through the non-bellwether  
10 matters that are on the agenda for today. And then,  
11 counsel, if you would come back and then we can have an  
12 informal discussion about what's the best way to proceed on  
13 the bellwether process. So that's what we've been doing and  
14 that's how we will proceed.

15 So let's just turn right to the joint agenda. And  
16 skipping over the bellwethers, we come to the motions to  
17 dismiss. Mr. Hulse, do you want to take the lead on that?

18 MR. HULSE: I will, Your Honor. Thank you.

19 THE COURT: I'll tell you what I've got drafted up  
20 here. And then maybe you can let me know how that...

21 MR. HULSE: Very good. And good morning.

22 THE COURT: And good morning to you. We're  
23 missing some people. Okay, where is your colleague?  
24  
25

1 MR. HULSE: Mr. Blackwell is in trial.

2 THE COURT: Is he up with that Starkey thing I've  
3 about reading about?

4 MR. HULSE: No, it's a California trial. L.A.  
5 Superior Court.

6 THE COURT: Is this the one where he got called in  
7 at the last minute?

8 MR. HULSE: They all fit that bill.

9 MAGISTRATE JUDGE NOEL: I think this is one where  
10 it's warmer in California than it is in Minnesota, and so  
11 should I go to the status conference in Minnesota or the  
12 trial in California?

13 MR. HULSE: He does have impeccable timing in his  
14 trial assignments when it comes to the weather. This one  
15 Your Honors may know that with L.A. Superior Court, you  
16 don't know what courthouse you're going to be in until  
17 you're actually called for trial. So you just have to sort  
18 of book a centrally located hotel and hope it's close.

19 THE COURT: Sounds like a good idea if you want to  
20 torture the jury. Okay. So that's him. Ms. Zimmerman?

21 MS. ZIMMERMAN: Thank you, Your Honors. You may  
22 notice we have fewer people here as well. Mr. Gordon is a  
23 victim of the snowstorm through Atlanta, which has basically  
24 shut down that airport. And Ms. Conlin is covering a  
25 deposition for one of here partners whose wife unexpectedly

1 had their baby early, so she sends her regrets her as well,  
2 but she's taking a deposition that she is hopefully now  
3 prepared for in New York.

4 MAGISTRATE JUDGE NOEL: Okay, thank you.

5 THE COURT: All right. So I have a draft order  
6 here with respect to Grooms, Johnson, Gilbert Garcia,  
7 Gruetzmacher, Maria Garcia, Petrakis, Sellers, Allen Graves,  
8 Morris, Maxheimer, Saylor, and Schapansky. That excludes  
9 Prince, so my thought was we find out whether the issue with  
10 the lawyer switch, whether they ever heard -- whether Prince  
11 is going to go forward separately.

12 But on the others, I have a plan here to deny the  
13 motions to dismiss as moot with respect to Morris and  
14 Schapansky on the grounds that I think those are taken care  
15 of without court intervention.

16 MR. HULSE: That's correct, Your Honor.

17 THE COURT: And then denying without prejudice to  
18 renew on Gruetzmacher and Maria Garcia and that has to do  
19 with the identification. Maria Garcia is identified as  
20 Guzman, and Gruetzmacher's case is listed as 17CV00988, even  
21 though it's 998.

22 MR. HULSE: Right, that is a typo.

23 THE COURT: So I just thought we would deny it for  
24 now and give you a chance to fix it up and make sure that we  
25 still want to do that. And then dismiss with prejudice

1 Grooms, Johnson. That's 17CV640. Grooms was 343. Gilbert  
2 Garcia, that's 711. Petrakis is 1082. Sellers is 17CV1879.  
3 Allen, 2738. Graves, 2747. Maxheimer, 2763. And Saylor,  
4 2892. That's my proposal. I don't know if that saves you  
5 any time.

6 MR. HULSE: You've left me with nothing to say,  
7 Your Honor.

8 THE COURT: Okay. So, Ms. Zimmerman, I guess I'm  
9 to you. This is my draft here. Do you have any problems  
10 with that?

11 MS. ZIMMERMAN: I think that given Your Honor has  
12 clarified that the motions are denied on Morris and  
13 Schapansky and that they have the opportunity to fix the  
14 typos on Maria Garcia, and is it Gruetzmacher? I think that  
15 that is the remainder of consistent with what we've heard.

16 I know that the responses that were filed in  
17 response to the Defendant's motion to dismiss were only by  
18 three firms. One was the Prince matter. I don't know if  
19 Bernstein Liebhard is on the phone. It's my understanding  
20 anyways though that a PFS has been served now and that that  
21 issue I think is off the table.

22 THE COURT: Okay. So I've unmuted the phone. Can  
23 we hear from counsel representing the plaintiff in the  
24 Prince matter? Okay, somebody, even if you don't represent  
25 them, can you say something so that I'm sure the reason I'm

1 not hearing anything is that the lawyer is not there as  
2 opposed to there being some technological issue.

3 MS. THOMAS: Yes, Your Honor. Lisa Thomas from  
4 Colling Gilbert Wright & Carter. Can you hear me?

5 THE COURT: Okay, I hear something so thank you.

6 MS. ZIMMERMAN: And my understanding, Your Honor,  
7 then is that the Bernstein Liebhard firm did respond to the  
8 motion to dismiss and indicated that the fact sheet was  
9 served on January 12 of this year. I think that there was  
10 at least some issue with respect to the client retaining two  
11 firms, and my understanding anyways is that the Bernstein  
12 Liebhard firm response asks that the case not be dismissed.

13 If the other responses that were filed all  
14 indicated that the plaintiffs, despite the plaintiffs' firms  
15 best efforts were nonresponsive, and I know that there was  
16 one firm or one case that the Kennedy Hodges firm represents  
17 the plaintiffs is Sellers, and they have requested in their  
18 response a 60-day extension to get the plaintiff fact sheet  
19 completed, and to the extent that they have anything to add  
20 to that I'm sure that they will.

21 THE COURT: Okay, and is that 1879?

22 MS. ZIMMERMAN: Yes, that's 1879, Your Honor.

23 MR. ASSAAD: Your Honor, we have nothing to add.  
24 We have been unable to reach the client. We would ask for  
25 60 days.

1 THE COURT: Very well. Well, then this morning I  
2 will sign this order that we've got.

3 MR. HULSE: Thank you, Your Honor.

4 THE COURT: Okay. Thank you, Mr. Hulse.

5 Okay, now, update on the number and status of  
6 cases?

7 MS. YOUNG: Nothing to add there from the  
8 defendants.

9 MS. ZIMMERMAN: And, Your Honor, from the  
10 plaintiffs' perspective, I was provided this updated number  
11 from the David Szerlag at the Pritzker firm. As of  
12 yesterday, there are 4,466 active federal Bair Hugger cases  
13 pending in this MDL. So about another 260 or so odd cases  
14 since this report went in.

15 THE COURT: All right. And overview of related  
16 state proceedings other than the Minnesota one? We do miss  
17 Judge Leary I must say.

18 MS. AHMANN: Your Honor, I don't think we have  
19 anything to add other than what is in the papers. The  
20 Rodriguez case is still on for trial, but we're going to be  
21 working with the parties and the Court to get that moved.

22 THE COURT: Let me know if you need any help.

23 MS. AHMANN: We'll keep that in mind.

24 MS. ZIMMERMAN: And, Your Honor, the plaintiffs  
25 have nothing to add other than we intend to appeal but.

1 THE COURT: And nothing to add on the other state  
2 cases?

3 MS. ZIMMERMAN: Correct.

4 THE COURT: Is that true of Canada as well?

5 MS. YOUNG: Yes, Your Honor, nothing to add.

6 MS. ZIMMERMAN: Yes, Your Honor.

7 THE COURT: Item Number 6, pretrial orders, I  
8 don't have anything.

9 MS. ZIMMERMAN: The only proposals, Your Honor,  
10 with the competing proposals on the bellwether repopulation,  
11 and we'll discuss that with Your Honors.

12 THE COURT: Yes. Is there anything else that we  
13 should discuss while we're all here together?

14 MR. GOSS: Hello, Your Honor. Peter Goss here.  
15 We have an issue with respect to Dr. Elgobashi.

16 MAGISTRATE JUDGE NOEL: Can I just interrupt for a  
17 second? Either speak into the microphone on the table or  
18 come up to the podium because the folks on the phone I think  
19 are not hearing you.

20 MR. GOSS: Thank you. So the parties have worked  
21 out the deposition date with respect to Dr. Elgobashi. It  
22 looks like we're going to forward on Saturday, February  
23 10th. And then Dr. Abraham, who is the defense fluid  
24 dynamic expert, he can go on the 15th. So we've got the  
25 deposition dates set.

1           The bigger issue is that Dr. Elgobashi is working  
2           on a new CFD, and this one will be tailored to the Model  
3           505. His first CFD that we reviewed in the Daubert hearings  
4           involve the Model 750. The Model 505 has appreciably lower  
5           air flow. So we've been informed that he's working on a new  
6           CFD, that there is going to be a supplemental report. We  
7           don't know when we're going to get it.

8           THE COURT: If I remember, Dr. Elgobashi's report  
9           from before, it takes a long time to put these together.

10          MR. GOSS: Right, it does, and knowing that it was  
11          going to take a long time, it's our position that while they  
12          knew that they ere going to have some 505 cases, and they  
13          should have done this earlier, the reports were due on  
14          November 27th, we put in our rebuttal reports on  
15          December 16th. If we get a new CFD, we're going to need  
16          some time for our expert to look at it, rebut it, and we're  
17          very concerned that we're just not going to be able to hold  
18          to the May 14th trial date if that happens. So our position  
19          is that new CFD is untimely and ought not to be supplemented  
20          for the Gareis case.

21          THE COURT: Is Gareis a 505?

22          MR. GOSS: Yes, Your Honor.

23          THE COURT: Oh, no. All right, we'll talk more  
24          about that when we're talking about the bellwethers, shall  
25          we?

1 MR. GOSS: That sounds great, Your Honor. Thank  
2 you.

3 MS. ZIMMERMAN: Your Honor, may we respond at  
4 least briefly?

5 THE COURT: Yes.

6 MS. ZIMMERMAN: So with respect to Dr. Elgobashi's  
7 CFD, Your Honors have heard much evidence and argument about  
8 the admissibility and reliability and relevance of his  
9 reports. I will say that Dr. Elgobashi's report initially  
10 on general causation addressed generally and principally the  
11 750, but his report also addressed the 505. What was  
12 actually put through the super computer was the 750.

13 And I will also update the Court that as of  
14 January 9th, his paper was accepted for peer review  
15 publication in the International Journal On Numerical  
16 Methods in Biomedical Engineering, so his report is now a  
17 peer reviewed publication as of last week.

18 THE COURT: Well, we'll deny summary judgment  
19 then.

20 MS. ZIMMERMAN: Thank you. So at any rate, he did  
21 serve his original general causation report. And just to  
22 kind of recite the basic schedule or time frame to remind  
23 the Court, the Gareis scheduling order came out on the 20th  
24 of October. We then had a three-day hearing the next week,  
25 and there was some argument about whether we might be able

1 to put additional numbers into this super computer. And so  
2 given the argument and the questions from the Court,  
3 Dr. Elgobashi started in early November putting all of the  
4 same kind of numbers into the super computer to do the same  
5 calculations for this LES CFD modelling.

6 As the Court is aware, it certainly takes a great  
7 deal of time and the super computer, as I understand it, you  
8 have to petition for time on these big machines. And from  
9 the scientific community standpoint, you also have to  
10 explain why your project merits use on these super  
11 computers. His project is considered to have already been  
12 solved because of the initial project on the 750. But so he  
13 now is using a different super computer. It's slightly  
14 slower. He has some preliminary reports back, and we expect  
15 that the final modelling with the videos will be available  
16 sometime in February, and he will supplement his report as  
17 soon as he's able.

18 But the report that he did serve on November 27th  
19 timely under the Court's scheduling order addressed the  
20 calculations that he made and his opinion with respect to  
21 the 505.

22 MAGISTRATE JUDGE NOEL: Is there any difference in  
23 methodology or anything that he's doing in this report or is  
24 it just different numbers.

25 MS. ZIMMERMAN: It's just different inputs, that's

1 it. That's the only thing that's different. And he has  
2 provided a six-page report, I believe, with respect -- that  
3 includes calculations. I'm sorry, it's a four-page report  
4 with a cover page, so five pages, detailing the calculations  
5 and essentially the boundary conditions and the inputs for  
6 the 505, and what his professional opinion is with respect  
7 to the 505 for Mr. Gareis' case. So that was provided in a  
8 timely manner. The defendants certainly will be able to  
9 depose him on that when it comes up. And if and when they  
10 decide to bring a motion when he has a supplemental report  
11 where they need to take an additional deposition, I presume  
12 that that will be before the Court if and when they decide  
13 to bring that motion. But we don't have a motion before us  
14 right now.

15 I will add that they have submitted supplemental  
16 expert reports on at least four or five of their experts as  
17 well, particularly with respect to this FDA letter that Your  
18 Honor has heard quite a bit about at the hearing in October.

19 THE COURT: It's a different super computer  
20 though, so it's not just different numbers. It's different  
21 numbers arrived at by a different --

22 MS. ZIMMERMAN: Technically, Your Honor, you're  
23 right. But it would be kind of like if I used my Mac or if  
24 I, you know, went and used one of your law clerk's computers  
25 right now, it's still really accessing essentially Microsoft

1 Word.

2 THE COURT: Right, except that the information  
3 we've had from him before talked a lot about that particular  
4 super computer, and so what you're telling me now is that  
5 that's not the one that he's using -- did you want to say  
6 something?

7 MR. ASSAAD: Your Honor, I'm going to --

8 MS. ZIMMERMAN: So he was using the new numbers  
9 but the same exact equations that have been provided and  
10 disclosed in that they were run on a different computer, but  
11 the calculations are still being done in the same exact  
12 fashion, just by a different computer.

13 THE COURT: Okay.

14 MAGISTRATE JUDGE NOEL: Is it the plaintiffs'  
15 intent to call Dr. Elgobashi live at the Gareis trial or to  
16 offer deposition or video or something?

17 MS. ZIMMERMAN: We intend to call him live, Your  
18 Honor.

19 THE COURT: Mr. Assaad, did you want to say  
20 something about that? You seem very exercised about it, so  
21 I want to be able to give you a chance to --

22 MR. ASSAAD: Well, just from a technical  
23 standpoint, Your Honor, the super computer only solves the  
24 problems. It's not different equations. It's not different  
25 algorithms. The only thing that's changing to the 750 and

1 the 505 is one number, just one number, which is the flow  
2 rate. It's a slower flow rate. Everything else is  
3 identical, and the preliminary results so far are identical.  
4 The only difference is instead of taking 26 seconds, it's at  
5 40 seconds. The only change.

6 MS. ZIMMERMAN: We did bring copies of  
7 Dr. Elgobashi's published peer review article, if the Court  
8 would like to receive one. I have one for defense counsel  
9 as well. I don't know if they've seen it yet, I'd be happy  
10 to offer those to them.

11 THE COURT: I don't need it right now.

12 MR. GOSS: Could I have just one response?

13 THE COURT: Yes.

14 MR. GOSS: So just to be clear on what  
15 Dr. Elgobashi said in his November 27th report, he expressed  
16 that the result with the 505 will be the same, that it will  
17 just take more time. And I understand that that's what he  
18 expects. People, odds makers expect the Vikings to win in  
19 Philadelphia on Sunday, I hope, but that's why we play the  
20 game, and so we don't know what's going to happen until we  
21 see it happen and that's what we want to see.

22 And the basis for our motion is not going to be a  
23 rehash of what's wrong with the inputs with respect to the  
24 temperature, velocity, it's actually going to be specific to  
25 the Gareis OR, which had some very unique air flow features,

1 and we're hearing for the first time that those aren't  
2 accounted for in this model. We're going to need time to  
3 explore this with him in order to bring our case specific  
4 Daubert motion. And, again, I'm concerned that if we get a  
5 report in mid-February, then we bring a Daubert motion, you  
6 know, as soon as we can after that, it's still going to  
7 effect our trial date of May 14th.

8 THE COURT: Nothing else for us to say about that  
9 right now, I don't think.

10 All right. We will then conclude the hearing and  
11 that frees up the folks who are on the phone. And, counsel,  
12 please come back to chambers so that we can make a plan for  
13 the bellwether repopulation. We're in recess.

14 (Court adjourned at 10:16 a.m.)

15  
16 \* \* \*

17  
18 I, Maria V. Weinbeck, certify that the foregoing is  
19 a correct transcript from the record of proceedings in the  
20 above-entitled matter.

21  
22 Certified by: s/ Maria V. Weinbeck

23 Maria V. Weinbeck, RMR-FCRR  
24  
25