

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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4 )  
5 In Re: Bair Hugger Forced Air ) File No. 15-MD-2666  
6 Warming Devices Products ) (JNE/FLN)  
7 Liability Litigation )  
8 ) December 20, 2018  
9 ) Minneapolis, Minnesota  
) Courtroom 12W  
) 9:44 a.m.  
) -----

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

12 And THE HONORABLE DAVID T. SCHULTZ  
13 UNITED STATES MAGISTRATE JUDGE

14 **(STATUS CONFERENCE)**

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31 Proceedings recorded by mechanical stenography;  
32 transcript produced by computer.

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

2 (9:44 a.m.)

3 THE COURT: Good morning. Please be seated.

4 Welcome.

5 Would someone on the phone please say something so  
6 we know that you can hear us?

7 UNIDENTIFIED SPEAKER: Good morning, Your Honor.

8 THE COURT: Good, thanks. All right. Now they're  
9 muted. I suggest that we start right in marching through  
10 the joint agenda.

11 On the bellwethers, might there be some benefit in  
12 adding some cases? I think we're getting down to kind of a  
13 skimpy number again, so I suggest that you add at least a  
14 couple more.

15 How about a review of the state cases? Anybody  
16 want to do that?

17 MS. ZIMMERMAN: Good morning, Your Honor.

18 Genevieve Zimmerman. There are, I think, two, well, so  
19 Ramsey County cases are -- have been argued to the Court of  
20 Appeals. I think we'll have a decision by statute sometime  
21 before I think like the ninth of February.

22 And then the other two State Court cases, there's  
23 one in Hidalgo County, Texas. That's the Petitta v.  
24 Dr. Trey Fulp. They had an interlocutory appeal about  
25 whether or not the orthopedic surgeon could continue to be

1 in the case. The hospital has actually settled out. The  
2 orthopedic surgeon took the case up to the Court of Appeals,  
3 tried to reverse the motion to dismiss, lost, and that case  
4 is now I think they had a hearing yesterday and they are  
5 beginning to proceed with discovery. So we've been in  
6 contact with those attorneys.

7 And then there is this other case in Montana where  
8 I don't believe there's much action happening at this point.

9 THE COURT: And nothing to report from Canada?

10 MS. ZIMMERMAN: We still haven't heard anything  
11 new in Canada.

12 THE COURT: Okay.

13 MS. ZIMMERMAN: With respect to the discovery on  
14 the two bellwethers that remain.

15 THE COURT: Right.

16 MS. ZIMMERMAN: There are two cases, Partlow and  
17 Trombley. Trombley, I believe we have a number of  
18 depositions set in the first week of January, and there is a  
19 motion pending before Your Honors with respect to a motion  
20 for leave to amend, and this is the Ohio issue that has come  
21 up on a couple of cases.

22 Partlow is another case, and I believe that that's  
23 set for an argument later today on a motion for judgment on  
24 the pleadings. We did have a couple of depositions and a  
25 hospital inspection on Monday this week. Those went

1 forward, and the discovery deadlines are outlined in the  
2 joint status report.

3 Fact discovery is set to close on January 11th.  
4 Initial expert reports would be January 18th. Rebuttal  
5 reports on February 8th, and then the parties are to inform  
6 the Court as to which case should be tried in May by  
7 February 15th. And I think that that is really --

8 THE COURT: Other than our Rule 23 and Rule 14  
9 march through. Let's do that.

10 MS. ZIMMERMAN: Okay.

11 MR. HULSE: Your Honor, if we start with PTO-14,  
12 I'd like to introduce our colleague Ted Hartman, who will be  
13 taking over that argument today.

14 MR. HARTMAN: Good morning, Your Honor. Ted  
15 Hartman on behalf of defendants.

16 THE COURT: So you are.

17 MR. HARTMAN: So there was a letter submitted on  
18 behalf of the defendant yesterday regarding the cases that  
19 have been withdrawn from the motion. That's 19 cases and  
20 then there was a case dismissed as well.

21 THE COURT: Hold on. Is that McClain?

22 MR. HARTMAN: McClain was dismissed. That's  
23 correct.

24 THE COURT: Okay. And then the 19 that you're no  
25 longer moving on are:

1 Bond, Henderson, Spry, Picuri, Reed, Gilmore,  
2 Falcetta, Darwick, Wolf, Hauser, Farrell, Wolfe, Rodliff,  
3 Turnage, Yost, Johnson, Carter, Cerbins and Mitchell.

4 MR. HARTMAN: That's correct, Your Honor.

5 THE COURT: All right. So that's 19 in that  
6 category and then the 19 remaining, correct?

7 MR. HARTMAN: That's correct. And then the next  
8 category is the cases which no response has been filed.  
9 There are 13 cases there from Levin Papantonio we've been in  
10 communications with their counsel, and we understand that  
11 those are unopposed.

12 And then there is also one case, Robinson from  
13 Travis Walker, and there was a late PFS filed late last  
14 night which we have reviewed and remains deficient, and so  
15 we are still seeking dismissal of that matter, and that  
16 should be all 14 of the cases where no response was filed.

17 THE COURT: All right. So is that Barnes, Ussery,  
18 Welch, Conrad, that list?

19 MR. HARTMAN: Yes, that is correct.

20 THE COURT: So Barnes, Ussery, Robinson. That's  
21 the one who said "NA" to height and weight?

22 MR. HARTMAN: Yes, as well as not providing the  
23 dates or addresses for the medical providers, and also we  
24 don't have medical records either.

25 THE COURT: Okay, that has to qualify as a no

1 response, so Robinson is dismissed.

2 Welch, Conrad, Snow, Branch, Ramondo, Reid,  
3 Roshell, Shade, Scott, Twichell and Custer are the ones you  
4 are talking about?

5 MR. HARTMAN: That's correct, Your Honor.

6 THE COURT: Okay, Ms. Zimmerman, anything you want  
7 to say about those cases?

8 MS. ZIMMERMAN: No, Your Honor.

9 THE COURT: All right. So they're dismissed.

10 MR. HARTMAN: Then, Your Honor, we have the five  
11 cases remaining where there have been responses filed. I  
12 have two of those cases where the response didn't contest  
13 the motion on the merits. It just recited an inability to  
14 communicate with the client.

15 THE COURT: And would that be Pimentel and Adams?

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

17 THE COURT: So the Pimentel, he's the one who is  
18 80, right?

19 MR. HARTMAN: That's my understanding from the  
20 response.

21 THE COURT: We'll give you another 90 days. It,  
22 looked like he's 80 years old, and the deficiencies were  
23 things that should be easily cured, so I know there already  
24 was a 90-day extension, but we'll give them another 90 days.

25 MR. HARTMAN: All right.

1 THE COURT: Adams is dismissed.

2 MR. HARTMAN: And then we have the last three  
3 cases are all from the Bernstein Liebhard cases. These were  
4 carried over from two months ago when Your Honor gave them  
5 30 days to respond to defense's contention that they had  
6 whited out dates on prior verifications, and that's the same  
7 issue for all three of those cases. And in response, I  
8 believe the -- well, there wasn't a response filed within  
9 the 30 days after the motion was brought --

10 THE COURT: I'm sorry, there was or wasn't?

11 MR. HARTMAN: There was no response filed within  
12 that 30 day period to the contention that these were  
13 re-dated. In responding to the motion to dismiss,  
14 plaintiffs said that they had a policy of not re-dating  
15 verifications which is at least not a consistent policy  
16 based on Your Honor's rulings last two months ago, and said  
17 that they were unable to find evidence in the file that  
18 would give them knowledge or information as to whether these  
19 were whited out.

20 And we had previously after the October status  
21 conference, defendants had submitted copies for the Court by  
22 a letter of those verifications that we contend are whited  
23 out and re-dated. But if Your Honor would like, we brought  
24 copies as well today.

25 THE COURT: Let's just see, Ms. Zimmerman, did you

1 have any response on this one?

2 MS. ZIMMERMAN: I don't on these cases, Your  
3 Honor, but I have received a message that there is someone  
4 on the telephone that is wanting to address at least one of  
5 the cases. I'm not sure which.

6 THE COURT: And they're unmuted, so whoever that  
7 is should have the opportunity to speak up.

8 MS. ZIMMERMAN: Thank you.

9 MR. WALKER: Your Honor?

10 THE COURT: Yes.

11 MR. WALKER: Hi. Good morning, Your Honor. I  
12 tried to interject previously. This is Travis Walker here  
13 on behalf of a previously called case Robinson. I don't  
14 know if we would like to address that now or if Your Honor  
15 would prefer to finish what you're currently working on and  
16 re-address Robinson, but I would like to be heard on  
17 Robinson.

18 THE COURT: Robinson, if I'm remembering, I don't  
19 have it in front of me. Robinson is the one who said "NA"  
20 on the height and weight and everything?

21 MR. WALKER: Yes, Your Honor. And we just filed a  
22 new PFS last night as well as before this hearing this  
23 morning with correcting the deficiencies, Your Honor. So  
24 we're respectfully requesting a review of that the newly,  
25 both the one filed last night as well as this morning.

1 THE COURT: Did you file two? One last night and  
2 one this morning? Or is it just the one?

3 MR. WALKER: We filed two because the first one  
4 that was filed last night did not include dates with it.  
5 And we realized that this morning and then we completed it  
6 accurately this morning.

7 THE COURT: All right. I'll not dismiss that.  
8 We'll give the defendants another status conference to take  
9 a look at what you just submitted.

10 MR. WALKER: Thank you, Your Honor.

11 THE COURT: Thanks -- was it Walker? Thanks, Mr.  
12 Walker.

13 MR. WALKER: Yes, Your Honor.

14 MR. DWECK: Your Honor?

15 THE COURT: Yes?

16 MR. DWECK: Attorney for plaintiffs Billings,  
17 Edwards and --

18 THE COURT: Johnston.

19 MR. DWECK: I'm not sure if you wanted me to  
20 interdict at this moment, Your Honor, or if there was more  
21 to be said in the courtroom?

22 THE COURT: Just a second. We really can't hear  
23 anything you said. So would you start again with your name?

24 MR. DWECK: Sure, Your Honor. My name is Morris,  
25 M-O-R-R-I-S, last name is Dweck, D as in David, W-E-C-K.

1 THE COURT: Okay. And you represent?

2 MR. DWECK: Plaintiffs Billings, Edwards and  
3 Johnston.

4 THE COURT: Okay. And were you on the line last  
5 time when we discussed these cases?

6 MR. DWECK: I was not, Your Honor. I believe  
7 Mr. Lee was on the line. He's no longer with the firm, but  
8 I mean he did brief me on the issue before he left. It was  
9 my understanding from the conversation with Mr. Lee that,  
10 you know, that we should respond to defendants and speak to  
11 them about the issue, not that I guess a formal response in  
12 the form of a motion should be filed, but we did file a  
13 response in response to the defense motion to dismiss.

14 THE COURT: Mr. Hartman?

15 MR. HARTMAN: Well, Your Honor, there was a  
16 written order issued that clearly stated that there was a  
17 response to be filed within 30 days if they contended that  
18 these were not reused copies. And during the hearing, the  
19 Court also made clear in October that that was the  
20 expectation.

21 And in fact in response to Ms. Zimmerman's  
22 suggestion that they could just file new verifications to  
23 resolve this, the Court did reject that at the time. The  
24 only reason these cases weren't addressed at that hearing is  
25 because the Court didn't have an opportunity to review the

1 verification.

2 So the question about whether or not to cure that,  
3 that ship had sailed in October, and the real question here  
4 is just whether these were copies. There's been no  
5 substantive response to that contention.

6 THE COURT: Mr. Dweck, anything?

7 MR. DWECK: Yes, Your Honor. So Mr. Lee was in  
8 charge of the cases at the time. So, unfortunately, I don't  
9 have, you know, intimate knowledge. But I did take a look  
10 at the letters submitted by defense with all the copies and,  
11 you know, while if I look at each one individually, you  
12 know, I cannot tell that it's whited out. And the 397, the  
13 three dates on them do appear different. It doesn't look  
14 like one person filled in the dates.

15 You know, I can't say that -- I don't have any,  
16 you know, knowledge whether or not someone in the office or  
17 plaintiffs did do something to the verifications, but I do  
18 know that these three cases multiple verifications were  
19 submitted, you know, to cure the PFSs. And I mean we didn't  
20 submit new verifications in order to, you know, try to just  
21 say that this issue doesn't matter, but just out of an  
22 abundance of caution we thought it would be, you know, wise  
23 to submit a new verification to Your Honor showing that the  
24 clients were still involved in the case and were still  
25 updating their PFSs to cure whatever deficiencies they

1       could.

2                   THE COURT:   So there were fresh verifications  
3       done?

4                   MR. HARTMAN:   You could check with him, but I  
5       believe he's referring to the whited out verifications as  
6       being submitted.

7                   MR. DWECK:   No, that's incorrect.   I'm stating  
8       that within the past 30 days there were new verifications  
9       submitted on all three of these cases.

10                  MR. HARTMAN:   So in the last week or two weeks for  
11       one of the cases, Your Honor, they obtained new  
12       verifications from their client and said that they cured  
13       these instead of responding directly to the allegation that  
14       they were whited out.   Defendant's position consistent with  
15       the Court's prior ruling and statements in Court was that  
16       that was not sufficient, that these were supposed to be  
17       cured in October, and that the only question was whether  
18       they were cured at that time.

19                  THE COURT:   Well, the problem is that that whiting  
20       out might have been done by the lawyers not with the firm  
21       anymore.   And now if there are actual verifications, I don't  
22       want the plaintiffs to suffer as a result of whatever that  
23       lawyer might have done.   I doubt very much that the clients  
24       did the whiting out.

25                  MR. HARTMAN:   And I think that's the probably the

1 case, Your Honor, if we had to guess why that occurred.

2 THE COURT: Right.

3 MR. HARTMAN: The concern that the defense has is  
4 because they've made this misrepresentation or been  
5 nontransparent with the Court about this, they've been put  
6 in a better position than other attorneys and plaintiffs who  
7 came to the Court candidly and acknowledged that they hadn't  
8 complied, and their cases were dismissed because they didn't  
9 comply with the order and, you know, this has been --

10 THE COURT: Right, okay, but I'm going to hold off  
11 because of the lawyer problem. It was one thing when we had  
12 the lawyer who -- it was one thing when we had that lawyer,  
13 but now we have a fresh lawyer, and we're going to give this  
14 fellow, Mr. Dweck, a chance.

15 MR. HARTMAN: Thank you, Your Honor.

16 THE COURT: Okay. So take a look at what was  
17 submitted and take whatever action is required.

18 MR. HARTMAN: Thank you, Your Honor. And I think  
19 that's it for PFSS then.

20 THE COURT: Mr. Dweck, anything else?

21 MR. DWECK: No, that's all, Your Honor. Thank you  
22 very much.

23 THE COURT: Yep. Okay, I'm putting the mute back  
24 on now.

25 MR. HULSE: PTO23, Your Honor.

1 THE COURT: I looked down and then when I looked  
2 up again, Mr. Hartman was gone, and Mr. Hulse had  
3 miraculously taken his place.

4 MR. HULSE: Quick change.

5 THE COURT: All right. I'm ready.

6 MR. HULSE: This is our fourth PTO23 motion, Your  
7 Honor. It covers nine cases. One of those cases Ducote,  
8 16CV3940, was dismissed by stipulation. That leaves eight.  
9 No opposition was filed as to six of the remaining cases,  
10 which I can list if Your Honor would like.

11 THE COURT: So that would be Cole?

12 MR. HULSE: Correct.

13 THE COURT: Dismiss Ashby.

14 MR. HULSE: Correct.

15 THE COURT: Dismiss Jennings.

16 MR. HULSE: Correct.

17 THE COURT: Dismissed. Spear?

18 MR. HULSE: Yes, Your Honor.

19 THE COURT: Dismissed. Trewhella dismissed?

20 MR. HULSE: Yes, Your Honor.

21 THE COURT: And Ward?

22 MR. HULSE: That covers it.

23 THE COURT: Dismissed, okay. Now Chapman?

24 MR. HULSE: Yes, Chapman there's an opposition.

25 As we mentioned in our brief, we've been, due to doubts on

1 our part about some firm's compliance with PTO23, we've been  
2 conducting our own review of obituaries for the plaintiffs,  
3 and this is a case where we found an obituary for the  
4 plaintiff, notified plaintiffs' counsel. Plaintiffs'  
5 counsel opposes on the basis that the obituary that we sent  
6 is, they say they've been unable to confirm that the client  
7 is dead with the client's next of kin.

8 In our reply, we cited yet another obituary that  
9 matches on full name, including middle name, date of birth,  
10 residence. Daughter's got a rather unusual name too. All  
11 of this matches the PFS and still no suggestion of death has  
12 been filed. So this case, from our point of view, is  
13 clearly far out of compliance with PTO23 and should be  
14 dismissed with prejudice.

15 THE COURT: Ms. Zimmerman?

16 MR. HODGES: Your Honor, if I may be heard.

17 David Hodges here on behalf of Kenneth Chapman.  
18 Your Honor, the only evidence in the record at this point is  
19 unauthentic hearsay that the defendant has submitted. It's  
20 true we have not gotten confirmation. This particular  
21 individual has a twin. It has a somewhat similar first  
22 name. I'm not saying that the twin is dead, but we don't  
23 know for sure. And so in our exercise of due diligence, we  
24 have not filed the suggestion of death because we don't have  
25 confirmation with the family.

1           There's been no death certificate that's been  
2           filed by the defendants.  It's nothing but in their reply  
3           they --

4           THE COURT:  All right.  Within 30 days get  
5           something from your client saying he's alive or else it will  
6           be dismissed.

7           MR. HODGES:  Okay.

8           MR. HULSE:  Your Honor, I would say one more word  
9           on that case, but I'll move on if --

10          THE COURT:  No, he's got 30 days to prove he's  
11          alive.

12          MR. HULSE:  All right, Your Honor.  Thank you.

13          THE COURT:  What about Ciccone?

14          MR. HULSE:  I'm assuming that it's Ciccone, like  
15          Madonna, Your Honor, so.  The one that plaintiffs --

16          THE COURT:  Is that her last name?  Madonna, is  
17          that her last name?

18          MR. HULSE:  Madonna Veronica Louise Ciccone.

19          THE COURT:  If you say so.

20          MR. HULSE:  And so, Your Honor, this is a case  
21          suggestion of death was filed July 2nd.  The motion to  
22          substitute was due September 30th.  The Court granted an  
23          extension.  Judge Schultz granted an extension until  
24          October 31st to file a motion to substitute.  No motion to  
25          substitute has been filed, and plaintiffs' counsel indicates

1 that efforts to contact the next of kin have been  
2 unsuccessful. This case is just like the Lister case, which  
3 the Court dismissed with prejudice in its October 26th  
4 order.

5 THE COURT: Anybody want to say anything on the  
6 Ciccone case?

7 MR. HODGES: Your Honor, I'll just rest on my  
8 papers.

9 THE COURT: Okay. Ciccone is dismissed.

10 MR. HULSE: Thank you, Your Honor.

11 THE COURT: Thank you. Is there anything else  
12 before we move to the Partlow motions?

13 MR. BLACKWELL: Good morning.

14 THE COURT: Good morning.

15 MR. BLACKWELL: There is an Axline motion also.

16 THE COURT: Right, Partlow and Axline. Do you  
17 want to do our Axline first?

18 MR. BLACKWELL: Certainly, Your Honor.

19 THE COURT: Sure.

20 MS. ZIMMERMAN: Your Honor, we're happy to rest on  
21 the papers on Axline as well.

22 THE COURT: Okay. Axline is going to be dismissed  
23 with prejudice. I do want to get to Partlow. Mr. Hulse?

24 MR. HULSE: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. HULSE: May I proceed?

2 THE COURT: Please.

3 MR. HULSE: So, Your Honor, the big issues in this  
4 12C motion are statute of limitations, which applies to the  
5 products liability counts and then the Minnesota Consumer  
6 Protection claims.

7 So there's no dispute here that the products  
8 liability and unjust enrichment claims in this Complaint are  
9 subject to a two-year statute of limitations and that the  
10 warranty claim under Alabama law is subject to a four year  
11 statute of limitations. There's also no dispute that  
12 there's no discovery rule in Alabama. So the only exception  
13 that conceivably could then apply is fraudulent concealment  
14 to toll the statute of limitations.

15 There was a series of decisions from the Alabama  
16 Supreme Court in the early 1980's that have very, very  
17 narrowly defined what constitutes fraudulent concealment,  
18 And the interesting thing is they are pleading cases. They  
19 are cases where dismissal was based on the pleadings. And  
20 those cases are *Cazalas v. Johns-Manville*, 435 So. 2d.

21 THE COURT: Just a second. I just want to make  
22 sure that's the case I read. I think that's a familiar  
23 sounding --

24 MR. HULSE: This is the big case.

25 THE COURT: Yes, I'm sure it is. Is that the one

1 where they said that it wasn't concealment of the right to  
2 bring a lawsuit?

3 MR. HULSE: Right. Exactly, Your Honor.

4 THE COURT: Yes.

5 MR. HULSE: Yep. So it's basically the rule that  
6 comes out of *Cazalas*, and then the other case is *Miller v.*  
7 *Mobile County Board of Health*, which is actually a medical  
8 device case, it's a Dalkon Shield case, is that the  
9 plaintiffs do establish fraudulent concealment have to plead  
10 and then prove "that the defendants concealed the cause of  
11 action or injury and what prevented the plaintiff from  
12 discovering the facts surrounding the injury."

13 What they have to show is that the defendant  
14 affirmatively prevented the discovery of facts or  
15 affirmatively prevented the discovery of the injury.

16 If I could just sort of talk about *Cazalas* for a  
17 moment. So in that case you've got the plaintiffs were a  
18 group of shipyard workers, and they've alleged that the  
19 manufacturers of asbestos products fraudulently concealed  
20 their product liability causes of action because the  
21 manufacturers knew about the risks of asbestos but failed to  
22 put warnings on the packages, failed to disseminate the  
23 warnings, and interestingly also breached a duty to tell the  
24 local unions about the dangers of asbestos. The idea of the  
25 local unions would then have disseminated it to the workers.

1           And what the Supreme Court of Alabama said there  
2           is those allegations could support a failure to warn theory,  
3           but there is simply not fraudulent concealment. What these  
4           allegations don't give rise to is a conclusion that the  
5           manufacturers of asbestos actually affirmatively prevented  
6           the workers from discovering the dangers of asbestos or  
7           somehow duped them into not bringing claims. So, you know,  
8           and I'd say that that's about as tight a restriction as  
9           you'll find in case law anywhere on fraudulent concealment.

10           The twin case to that that came out right around  
11           the same time is the *Miller v. Mobile County Board of Health*  
12           case, 409 So.2d, page 420. In that case the plaintiff  
13           alleged both that her clinic and that the manufacturer of  
14           Dalkon Shield had failed to warn her of the risks resulting  
15           in a miscarriage. And that claim was dismissed as time  
16           barred and then affirmed by the Supreme Court of Alabama.

17           And in particular, the Supreme Court of Alabama  
18           said that the Complaint had failed to allege what prevented  
19           Mrs. Miller, that's the plaintiff, from discovering the  
20           facts surrounding the injury. Notably about that case is  
21           there's no discussion of there being a special relationship  
22           between a medical device manufacturer and a patient, a  
23           person who uses the device.

24           One of the things that plaintiffs has contended is  
25           that there's a fact issue as to whether there's a sort of a

1 fiduciary relationship between 3M, Arizant and Ms. Partlow.  
2 And that's contrary to the *Miller* case. It also finds no  
3 support in Alabama law.

4 The one case they cite to support that special  
5 relationship is a case that's based on an Alabama statute  
6 that creates a fiduciary-type relationship between a  
7 pharmacist and a client. And they don't cite, and there  
8 isn't any kind of statute like that for medical device  
9 manufacturers.

10 So really our view here is that the allegations  
11 that are in the Master Complaint, which is what the  
12 plaintiff is relying on here can support, subject to other  
13 arguments we may have, a failure-to-warn type theory, but  
14 they simply do not meet the Alabama standard for fraudulent  
15 concealment.

16 Another thing that plaintiffs have contends is  
17 they say, well, this is an MDL. We have short form  
18 Complaints. We used a short form Complaint here. But case  
19 law including some very recent case law that we've cited in  
20 our reply brief makes very clear that just because you're in  
21 an MDL doesn't mean that the requirements of Rule 8 or  
22 Rule 9B drop away. That if you need to for your claim to go  
23 forward, you need to plead fraudulent concealment with  
24 specificity. You can't simply say, well, that's not part of  
25 the template. There are extra lines that are left on the

1 short form Complaint. You can attach a page, but if you're  
2 going to plead fraudulent concealment, you have to plead it  
3 with specificity under 9B.

4 I'd add too that the plaintiffs here haven't asked  
5 for leave to amend. They haven't sought any amendment, and  
6 we know from their PFS that Ms. Partlow had no  
7 communications with 3M. She didn't go to the 3M's website.  
8 There's nothing that could possibly factually constitute a  
9 fraudulent concealment that could be alleged in an Amended  
10 Complaint.

11 So just a word on the Minnesota Unfairness  
12 Statute. The plaintiffs object to the application of  
13 Alabama statute of limitations citing Minnesota's unfairness  
14 statute, which, in undefined extreme circumstances would  
15 allow the substitution of Minnesota's statute of  
16 limitations.

17 In *Whitney v. Guys*, the Eighth Circuit case from  
18 2012, the Eighth Circuit indicated that the statute should  
19 rarely be employed and only except rather in extreme cases.  
20 And the Court in that case, the Eighth Circuit in that case  
21 found nothing unreasonable about a three-year statute of  
22 limitations, and there's nothing in the logic of that  
23 decision that would give a basis to conclude that a two or  
24 four year statute of limitation as we have here would fall  
25 into those extreme cases.

1           The plaintiffs also cite the decision in *Burks*  
2           from Judge Tunheim, but in that case, Judge Tunheim  
3           ultimately concluded that a one year statute of limitations  
4           did not fall within the unfairness statute. So we think  
5           that argument fails as well.

6           That brings us briefly to the Tennessee claims,  
7           which are Counts 4 and 9. Plaintiffs in our meet and confer  
8           had agreed to dismiss these claims. They then changed  
9           course in their opposition and asked the Court to construe  
10          these claims as claims brought under Alabama's Implied  
11          Warranty Law and Alabama's Deceptive Trade Practices Act.  
12          That's the way to amend a claim is by a Motion to Amend. If  
13          we are construing Tennessee claims as Alabama claims, then  
14          it would really eliminate Rule 15's requirements.

15          We also mentioned that, in any event, these claims  
16          would still be time barred under Alabama law and also that  
17          Partlow didn't satisfy the pre-suit notice requirement of an  
18          Alabama Deceptive Trade Practices Act claim.

19          Finally, onto the Minnesota Consumer Protection  
20          claims, the first problem here that we've highlighted is the  
21          lack of public benefit. It's well-established that claims  
22          under the MCFA and UTPA and MFSAA must be brought to the  
23          private attorney general statute. They must be for private  
24          benefit, and there is an ever growing amount of case law in  
25          this district that finds that in cases like this where you

1 have individual claims brought for private damages, personal  
2 injury and private damages that that doesn't satisfy the  
3 public benefit exception.

4 The MFSAA, the false advertising statute,  
5 according to case law in this district, doesn't apply to  
6 advertising, that is heard by a non-Minnesota plaintiff or a  
7 non-Minnesotan outside Minnesota. The most recent case  
8 standing for that is the *McAteer* decision from July 26,  
9 2018, discussed in the briefs.

10 The MDTPA claim, Count 6, is a claim for damages.  
11 The MDTPA well-established only allows injunctive relief.  
12 No injunctive relief sought in this case. That claim should  
13 be dismissed as well.

14 And, finally, this brings us to the issue of the  
15 application of Minnesota's Consumer Protection Statutes to a  
16 non-Minnesota plaintiff injured outside Minnesota. This is  
17 an issue that we raised in the *Axline* case. The Court noted  
18 in denying it that the defendants had not cited case law on  
19 this topic. We were remiss in that, and now we've cited  
20 case law.

21 So here there are a series and also ever growing  
22 number of cases in this district that have concluded that  
23 Minnesota's Consumer Protection Statutes do not apply to  
24 non-Minnesotans injured outside Minnesota. Again, the most  
25 recent decision there is is the *McAteer* decision. There the

1 plaintiff was not a Minnesota resident. She bought these  
2 wipes that she was suing on in California, and the Court  
3 found that she lacked standing to bring a claim under  
4 Minnesota's Consumer Protection Statutes, even though the  
5 defendant was Target, a Minnesota company.

6 And so before that were the *Ferrari v. Best Buy*  
7 case, the *Super Valu* data breach MDL, and the *Insulate SB v.*  
8 *Advanced Finishing* case, all cited in our briefs, which all  
9 stand for this same principle that we've articulated here.  
10 Also, there is recognized in the case law including the  
11 *Capitol Records* case from this district, quote, "there is a  
12 general presumption that Minnesota statutes do not apply  
13 extra territorially."

14 So the plaintiff cites two putative class actions  
15 that sought certification of nationwide classes. These  
16 cases were *Khoday* and *Kinetic*. And as we pointed out in the  
17 reply brief, in *Khoday*, the defendant didn't even raise the  
18 argument over whether the Minnesota statutes apply to  
19 non-Minnesotans injured outside Minnesota. And in *Kinetic*,  
20 the Court expressly deferred consideration of that issue to  
21 the class certification stage and then there was a  
22 settlement before class cert. And neither one of those  
23 cases involve claims for personal injuries. So I think I've  
24 got through it all, Your Honor, and I'll stop there.

25 THE COURT: All right. Mr. Assaad.

1 MR. ASSAAD: Good morning, Your Honor.

2 I'm going to be very brief, Your Honor. I will  
3 address the Minnesota Consumer Protection Statutes. Defense  
4 counsel is correct that many of the courts in this district  
5 indicate that in federal court the Minnesota Consumer  
6 Protection Statutes do not apply because of Article III  
7 standing. And if the Court does dismiss this case on  
8 standing, I'd ask that it dismisses it because it would be  
9 considered a 12(b)(1) motion that dismisses this case  
10 without prejudice because it's not on the merits.

11 THE COURT: What about the statute of limitations?

12 MR. ASSAAD: Statute of limitations. First, we do  
13 dispute, as you saw in my briefing, the choice of law in  
14 this case. We believe that Minnesota law applies. I went  
15 through a -- I detailed the factors, and I could go through  
16 them again if the Court would like me to, but the key thing  
17 is unlike all of those other cases, every single act that  
18 occurred in all of these cases occurred in Minnesota. And  
19 not only that, currently, the actual Bair Hugger machine is  
20 not sold. It is still owned by 3M and Arizant. It is their  
21 machine in Alabama. They own it. Everything, every single  
22 negligent act all the marketing, all the design, all the  
23 packaging, everything is done in Minnesota.

24 So if you look at the predictability issue first,  
25 it's predictable that if you own a product, actually own it,

1 that Minnesota law will apply. And 3M, a Minnesota company,  
2 should predict that they would be brought into a Minnesota  
3 court and that they be bound by the Minnesota laws for  
4 product liability, and Minnesota law for statute of  
5 limitations.

6 And there's a case right on point, which is the  
7 *Mooney* case which I cited, in which it was an action where  
8 it was a case that the Court -- sorry, that the Court  
9 concluded that a Minnesota corporation under the choice of  
10 law analysis said a Minnesota corporation that sells  
11 products and every single act is done in Minnesota, that the  
12 Minnesota choice of law would rule that the Minnesota law  
13 applies.

14 THE COURT: Would the case have been timely filed  
15 under Minnesota statute of limitations?

16 MR. ASSAAD: Yes, it would, Your Honor. Yes, it  
17 would, and that's another issue. We'll get to the  
18 fraudulent concealment, but this is not an issue that would  
19 need to be decided because either through the Minnesota six  
20 year statute of limitations or the fraudulent concealment,  
21 the case will survive.

22 And if you look at all of the factors, the  
23 maintenance of interstate and international order. It's  
24 neutral simplification of the judicial task is mutual, but  
25 the advancement of a forum's governmental interest, Alabama

1 has absolutely no interest in 3M's products, 3M's  
2 manufacturing, design or anything. The interest here is for  
3 Minnesota. Minnesota law should be applied because they  
4 have the greatest interest in this case. This factor  
5 definitely favors Minnesota law. Not only is 3M a Minnesota  
6 company, but it also effects its economy, its citizens, 3M's  
7 employees. Alabama has no interest.

8 And if you look at the *Fluck v. Jacobson Machine*  
9 *Works* case, which is out of this district in 1999, this was  
10 a Colorado resident that was injured by defective seed mixer  
11 in Colorado, and this Court held that the Minnesota law  
12 applied and the statute of repose in Colorado should not bar  
13 plaintiff's private liability claims.

14 It is almost a similar issue, the statute of  
15 repose and the statute of limitations. And this Court said  
16 basically that the advancement of the forum governmental's  
17 interest, the courts of Minnesota, and the law of Minnesota  
18 should apply to a Minnesota company that not only  
19 manufactures and designs but in this case actually still  
20 owns the product. If this Court decides that Alabama law  
21 applies and the two-year statute of limitations apply,  
22 there's fraudulent concealment.

23 And I'm not going to go through all the facts.  
24 However, if you look at the *Cazalas* case, I agree with  
25 *Cazalas* says if there's a failure to warn, that is not

1 enough for fraudulent concealment. We have more here. This  
2 is not a case of a failure to warn such as the *Cazalas* case  
3 or the other case with asbestos, that we have asbestos. 3M  
4 actively went out and made fraudulent representations of  
5 their product:

6           Number one, they said the Bair Hugger does not  
7 disrupt laminar flow. That's an issue of fact.

8           Number two, they said that the Bair Hugger doesn't  
9 put enough air compared to the air that's coming out of the  
10 operating room and has no effect. That's an issue of fact  
11 in this case. They say that this is safe for orthopedic  
12 surgeries. It's been tested for orthopedic surgeries. They  
13 went out across the country on a marketing campaign, which  
14 this Court has seen documents, two million documents which,  
15 by the way, all came out of the state of Minnesota. No  
16 documents were produced from the state of Alabama. All  
17 about the war games, you know, all of the marketing they did  
18 to doctors, the Dear Doctor letters, their interaction with  
19 the FDA.

20           They did something more. They did not fail to  
21 warn. They went out and said this is not only not  
22 dangerous, but it's safe. And these allegations and these  
23 were made to doctors and to hospitals. That is more in this  
24 case. It's not just a failure to warn. It is they actually  
25 actively went out and promoted the product and said not only

1 is it not dangerous and these things don't happen, but it's  
2 actually safe and that is the more.

3 And when it comes to, yes, Ms. Partlow did not  
4 have any communications with 3M, but the Alabama Supreme  
5 Court has made it very clear that the case law is very clear  
6 that an allegation alleging suppression of a material fact,  
7 a duty to disclose may be owed to a person with whom one has  
8 not had a contractual relationship or other dealings. And  
9 this is the *Wyeth v. Weeks* case, 159 So.3d 649.

10 As defense counsel said, there is a statutory duty  
11 for the pharmacy to have a fiduciary duty to the public or  
12 to a person by statute. We have the same thing here, Your  
13 Honor. 3M has a federal statutory duty to notify the FDA  
14 about any new issues or any warnings or anything that might  
15 be relevant to the public.

16 We know back in 2005 that an internal document  
17 said that orthopedics, that the Bair Hugger is  
18 contraindicated for orthopedic surgery. They never informed  
19 the FDA or the public. We also know that that same document  
20 said increases airborne contamination. They did not inform  
21 the public. There was a statutory duty. There's a duty to  
22 the doctors and to the health care community for 3M to  
23 disclose this material fact. I'm not saying whether or not  
24 it's true or not. That's an issue of fact for a jury to  
25 decide, but it's a fact that's an issue that in light

1 looking at the facts most favorable to the plaintiff, the  
2 Court has to take those facts as true. And as a result,  
3 fraudulent concealment is an issue in this case and should  
4 be able to toll the statute of limitations.

5 Also, Your Honor, I mean I have other issues with  
6 a learned intermediary and how it applies. I'll rest on my  
7 papers, and I'll also rest on my papers on the other issues  
8 with respect to the public benefit and the damages.

9 THE COURT: Okay. Thank you, Mr. Assaad. Any  
10 response?

11 MR. HULSE: Unless Your Honor has any questions,  
12 no.

13 THE COURT: I think we've got it. We'll take it  
14 under advisement and issue an order in due course.

15 Ms. Zimmerman, anything else we need to discuss?  
16 I understand that you'll be going down and having a party on  
17 the ninth floor.

18 MS. ZIMMERMAN: I was just re-reviewing the  
19 agenda. I think we've completed everything, Your Honor.

20 THE COURT: Seemed like it. Thanks very much.  
21 Mr. Blackwell?

22 MR. BLACKWELL: Your Honor, perhaps the only other  
23 outstanding thing is simply to scheduling a motion for  
24 reconsideration.

25 THE COURT: Oh, right, right, thank you. Here's

1 the schedule:

2 3M, January 24th. Plaintiffs, February 21st.

3 Defendants reply March 14th.

4 MR. BLACKWELL: Thank you, Your Honor.

5 THE COURT: There's the schedule.

6 MS. ZIMMERMAN: Thank you, Your Honor. And from  
7 the plaintiffs' perspective, we've asked I guess to know if  
8 the motion is intended to be based on new evidence, and we  
9 don't have an answer to that question yet. But to the  
10 extent that it is new evidence, we'd like to know what the  
11 new evidence is so that we can address it properly, and I  
12 expect that there will likely be a motion to conduct  
13 discovery such that plaintiffs can respond to new evidence.

14 THE COURT: We'll see what happens. We'll see  
15 what they submit.

16 All right. Thank you very much. We are in  
17 recess.

18 (Court adjourned at 10:34 a.m.)

19 \* \* \*

20 REPORTER'S CERTIFICATE

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

24 Certified by: s/ Maria V. Weinbeck

25 Maria V. Weinbeck, RMR-FCRR