

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE: ATRIUM MEDICAL CORP. \*  
C-QUR MESH PRODUCTS LIABILITY \* 16-md-2753-LM  
LITIGATION \* July 13, 2017  
\* 2:00 p.m.  
\* \* \* \* \*

TRANSCRIPT OF TELEPHONE CONFERENCE  
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

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TELEPHONE CONFERENCE

THE COURT: Good afternoon, counsel. This is Judge McCafferty. I am going to, because we have a court reporter here I am going to start by stating the case name and docket number, and then I will ask for counsels' names and identification for the record.

This is In Re: Atrium Medical Corp. C-Qur Mesh Products Liability Litigation. It is docket number 16-md-2753-LM. This is the MDL case and this is our monthly conference. And I understand there are numerous attorneys appearing via telephone, so what I'd like to do is just have the attorneys introduce themselves, state your name, spell your last name for our court reporter, and then I would just, as I always do at these conferences, anybody for plaintiffs who are not part of the executive committee may listen, but if they would please mute their telephones, that would be great. And any time you speak during the conference, if you would just simply identify who you are, and then begin speaking. That way the record will make some sense. So, let's begin by having plaintiffs' counsel introduce themselves. Go ahead, Mr. Orent.

MR. ORENT: Hi, good afternoon, your Honor. Jonathan Orent for the plaintiffs.

THE COURT: Who else is here for the

1 plaintiffs?

2 MR. SELBY: Yes, your Honor, this is David  
3 Selby for the plaintiffs.

4 MS. SCHIAVONE: Anne Schiavone for the  
5 plaintiffs, S-C-H-I-A-V-O-N-E.

6 MS. LOWRY: Susan Lowry for the plaintiffs,  
7 L-O-W-R-Y.

8 MR. MATTHEWS: Jim Matthews for the  
9 plaintiffs' state court liaison counsel. I'm the one  
10 with the two T's. M-A-T-T-H-E-W-S.

11 THE COURT: All right, the one with one T,  
12 Todd Mathews, is actually not with us today is my  
13 understanding. Any other counsel for plaintiffs? All  
14 right. Counsel for defendants.

15 MS. AYTCH: Good afternoon, your Honor. This  
16 is Enjolique Aytch, last name A-Y-T-C-H, counsel for  
17 defendants.

18 MR. HERSH: Good afternoon, everyone. Elan  
19 Hersh, H-E-R-S-H, on behalf of the defendants.

20 MR. CHABOT: And your Honor, this is attorney  
21 Pierre Chabot, C-H-A-B-O-T, for the defendants.

22 THE COURT: Excellent. All right. Let's get  
23 right to it. Did I forget someone? Nope.

24 MR. CHABOT: Not from the defendant's end,  
25 your Honor, this is Pierre Chabot.

1           THE COURT: Okay. All right, let's get into  
2 the agenda. This should be, I hope, and it sounds as  
3 though this might be a shorter status conference than  
4 we've had in the past and this is an agenda that looks  
5 rather bright. So, let me just check in and we'll go  
6 through one-by-one in order of the agenda. Number one  
7 is the ESI Protocol. So, let me hear from counsel on  
8 that protocol. Obviously I've read paragraph one of the  
9 agenda and it sounds as though you're close to  
10 finalizing that.

11           MR. ORENT: Yes, your Honor, Jonathan Orent  
12 for the plaintiffs. We've, over the last week or two,  
13 we've exchanged drafts. As your Honor may recall, we  
14 had identified and closed the gap on a number of the  
15 issues and come up with a term sheet that we had  
16 presented your Honor at the last hearing. Since that  
17 time we've attempted to incorporate that language into  
18 the framework of the overall agreement and we are  
19 largely done with that. There are two to three  
20 modifications that we need to tweak in terms of  
21 language. I had another call with Mr. Hersh and Mr.  
22 Chabot this afternoon and we are conceptually on the  
23 same page, and so it's a simple matter of tweaking the  
24 language on those, like I said, two or three different  
25 areas, but subsequently we're done. We I think expect

1 to have a final draft of that document ready for court  
2 submission no later than early next week.

3 THE COURT: Excellent.

4 MR. ORENT: I think that accurately states it,  
5 and I'll turn it over to Mr. Hersh or Mr. Chabot if they  
6 want to add anything.

7 MR. HERSH: This is Mr. Hersh. I would agree  
8 with that assessment. We had a call earlier today in  
9 which we were able to point out the few remaining  
10 issues, whether they are linguistic or stylistic, but  
11 nothing substantive, so I think we're on the path to  
12 resolution of the ESI issues and hopefully filing if not  
13 early next week, by the end of next week.

14 THE COURT: Excellent. All right, anything  
15 more we need to say about number one?

16 MR. ORENT: Not on behalf of the plaintiffs,  
17 your Honor.

18 MR. HERSH: Neither for the defendant.

19 THE COURT: Okay, let's move to number two.  
20 And these are just various documents that you are  
21 finalizing, and it sounds as though you're optimistic  
22 that you'll be able to finalize these profile forms,  
23 fact sheets, and the joint collection order as well as  
24 the enabling orders for those documents, along the same  
25 basic timeframe that you just laid out for the ESI

1 protocol, some time next week? I know I recently ran it  
2 today, in fact I think it was this morning, an extension  
3 that you sought, an assented to extension with respect  
4 to various documents and that may have included some of  
5 these as well. So, that deadline definitely works. Is  
6 that where you're at with respect to number two?

7 MR. ORENT: Your Honor, Jonathan Orent again  
8 for the plaintiffs. And Mr. Evans from the Hollis law  
9 firm who's on the plaintiffs' executive committee has  
10 been handling the last round with defendants and can  
11 provide more detail, but my understanding is that we're  
12 close on a number of the items and that we anticipate  
13 being able to finalize everything by the modest  
14 extension, and that if there are any outstanding issues  
15 they will be narrow in scope at a later time, but that  
16 we are confident at this point that we've overcome the  
17 largest number of obstacles in just making our way  
18 through, due to the number of documents involved in item  
19 number two, various iterations of the drafts, and that  
20 is obviously something that takes a lot of time when  
21 you're dealing with multiple iterations and multiple  
22 different documents.

23 THE COURT: Excellent. Okay, Attorney Aytch.

24 MS. AYTCH: I would agree with Mr. Orent's  
25 assessment on those documents. And to answer, your

1 Honor, that the extension that you provided us, thank  
2 you, to the 24th should be sufficient to get everything  
3 done and get over with regards to these documents.

4 THE COURT: Okay, good. All right. Well,  
5 that sounds good. Anything else on number two? Okay.

6 MR. ORENT: Not for plaintiffs, your Honor.

7 THE COURT: Let's move to number three.

8 Update of the New Hampshire state court litigation. Mr.  
9 Matthews with two T's. Go ahead.

10 MR. MATTHEWS: Thank you, your Honor. Well,  
11 things are starting to move slightly. We have chosen  
12 our four bellwether picks. Two chosen by the plaintiff,  
13 two chosen by the defense. So that's a good start.  
14 Because of the judge, Judge Temple admittedly was late  
15 in giving us some orders because of the backlog that  
16 they have in state court on various things and so the  
17 deadlines, we agreed to extend the deadlines in the  
18 state court bellwether litigation by three months, so we  
19 pushed our trial date back from July or August, I can't  
20 remember which, of 2018, into October I believe of 2018.

21 THE COURT: Okay.

22 MR. MATTHEWS: The plaintiffs had sought to  
23 amend complaints to allege that the Getinge and Maquet  
24 defendants are liable for Atrium's misconduct under the  
25 corporate veil alterego theory and the assumption of

1 liabilities theory, and the defendants oppose that  
2 motion. That was some time ago. Judge Temple issued an  
3 order on that this week where he granted the plaintiffs'  
4 motion, so we will be amending our complaints to make  
5 those allegations and should be able to conduct  
6 discovery on those issues as well. There are still,  
7 there is still an outstanding discovery motion that  
8 involves the extent of the ESI and production of  
9 documents that I believe is due to be ruled on, but that  
10 should be done shortly. We have, we're ready, the  
11 plaintiffs are ready to take corporate depositions. We  
12 would like to get more documents before we do that, but  
13 given our deadlines we feel like we need to get going.  
14 We've been waiting for documents but also because we've  
15 been waiting on our MDL colleagues so that all of these  
16 depositions can be coordinated because we realize that  
17 we're under an obligation to coordinate to the fullest  
18 extent possible and we intend to try to do that. And  
19 that's pretty much the state court report unless  
20 Enjolique, Pierre or Elan need to add anything. One  
21 last thing I would reiterate, we brought this up before,  
22 but I do think that at some point, hopefully in the  
23 relatively near future, that it would be good for both  
24 state court and your Honor to have a science day because  
25 it really helps to understand what the issues are in



1 these cases and understand why certain parties are  
2 pushing for certain documents or objecting to certain  
3 documents. So that's my report.

4 THE COURT: Okay. Excellent. Attorney Aytch,  
5 you want to add anything --

6 MS. AYTCH: I'm going --

7 MR. CHABOT: This is attorney Pierre Chabot. I  
8 apologize, your Honor, I didn't mean to steal  
9 Enjolique's thunder, but I am state court liaison  
10 counsel for the defendants in this one and I had  
11 prepared to do this one. I, you know, Attorney  
12 Matthews' assessment is generally correct in my view.  
13 The only thing I would -- just a couple of things to  
14 clarify or amplify. One is that Judge Temple has  
15 extended the bellwether schedule in the Downey group of  
16 cases. The Downey group of cases is sort of a separate  
17 group from the Gorham, Brown and Hayward cases where  
18 motions to amend were recently granted. The Downey  
19 group of cases is heading towards a trial in November of  
20 2018 if you project the prior schedule out 90 days.  
21 With respect to the Gorham, Brown and Hayward cases in  
22 which Attorney Matthews correctly notes that a motion to  
23 amend was just allowed, I'm not sure that we have the  
24 same assessment of what was allowed and the defendants  
25 are considering their options. Judge Temple did

1 potentially invite some further motion practice at least  
2 with respect to a portion of the claims that plaintiffs  
3 sought to add, but the defendants have not determined  
4 yet exactly how they're going to handle that.

5 THE COURT: Okay.

6 MR. CHABOT: And again, it was simply, we took  
7 it as adding claims to pierce the corporate veil. We  
8 did not see it as adding successor liability claims.  
9 But that's something obviously we're going to work out  
10 in the state court.

11 THE COURT: Okay.

12 MR. CHABOT: And beyond that, your Honor, I  
13 believe that's an accurate assessment of the state of  
14 the state court litigation. I'll let Attorney Aytch  
15 speak to anything else that Attorney Matthews alluded  
16 to.

17 THE COURT: Let me just ask you a quick  
18 question. The Gorham, Brown and Hayward line of cases,  
19 when are those scheduled for trial now? Are they  
20 scheduled still for July 2018 or are they also in --

21 MR. CHABOT: No, your Honor. The way that I  
22 understand Judge Temple's bellwether order is that after  
23 bellwether cases in Downey, nothing is stayed, the cases  
24 are moving forward in Gorham, Brown and Hayward and  
25 they've all been consolidated for discovery purposes

1 only under the Gorham caption. As part of the order  
2 setting the bellwether deadlines in Downey, my  
3 understanding is that Judge Temple's intention is to  
4 have those cases ready to go, and if we are not able to  
5 come to some kind of global resolution of all the cases  
6 following bellwether trials in Downey, that we would  
7 have a further bellwether proceeding with respect to  
8 Gorham, Brown and Hayward directly on the heels of the  
9 Downey bellwether proceedings.

10 THE COURT: Okay, gotcha, all right. So some  
11 time after the Downey group are done. And you suspect  
12 that right now is November 2018?

13 MR. CHABOT: That is the date you come up with  
14 when you project the existing deadlines that were just  
15 modified by 90.

16 THE COURT: Okay. All right. And how do you  
17 feel, and obviously Attorney Aytch can weigh in as well,  
18 how do the defendants feel about having an early science  
19 day or having an early half science day, a kind of  
20 introductory science day I think is what Attorney  
21 Matthews was describing, but how do the defendants feel  
22 about that?

23 MR. CHABOT: Your Honor, I'm going to defer to  
24 Attorney Aytch on that point.

25 THE COURT: Okay.

1 MS. AYTCH: Your Honor, I know that we  
2 contemplated a science day before and we were not  
3 adverse to it. With regard to the timing, I believe at  
4 a status conference, maybe a couple of status  
5 conferences ago the Court expressed the need to get  
6 beyond the pleading stage, so we would still want to  
7 discuss the timing, and unfortunately without Attorney  
8 Turner I'm not at liberty to completely speak as to what  
9 timeframe the defendants would be comfortable with, as  
10 he would play a major role if it.

11 THE COURT: Sure. Well, and what I would say  
12 with regard to science day is I'm very open to that and  
13 I'm open to scheduling it here and just scheduling it  
14 jointly with Judge Temple. And what I would suggest is  
15 that once you give me your discovery plans and your ESI  
16 Protocol is filed and these other fact sheets and  
17 profile forms that you've reached agreement on those and  
18 the stay is lifted, perhaps you could assign one  
19 individual within your plaintiffs' group and one within  
20 your defendants' group to put together, you know, a  
21 science day jointly with perhaps Mr. Matthews being part  
22 of that subcommittee or group because obviously he could  
23 bring in the state folks as well, and just make some  
24 sort of proposal with regard to a science day by our  
25 next month's status conference. Would that work?

1 MR. ORENT: Jonathan Orent for the plaintiffs,  
2 your Honor. I believe that would work for us, and I  
3 just want to note that, you know, we strongly believe  
4 that a science day or even a preliminary science day  
5 with the goal of having one more in-depth later on I  
6 think is essential sooner rather than later, and the  
7 reason for that is we're now in a period where we're  
8 going to start discovery and we're going to start having  
9 inevitably issues come up, whether they be issues over  
10 how to choose bellwethers or issues over discovery  
11 documents or issues over science. And I think that the  
12 sooner the Court can learn some of the key terminology  
13 and some of the key biological concepts and  
14 technological concepts that are in issue here, the  
15 better, because I think that the Court will need that  
16 information in order to make decisions once we get into  
17 any of the next set of issues that are moving forward.  
18 So, as your Honor has recognized, we've done a lot of  
19 the logistical work up until now and we're getting to  
20 the point where the remainder of those orders are going  
21 to be entered. And I do think that the next hearing is  
22 a logical time to set up and hopefully have shortly  
23 thereafter a science day so that the Court has the level  
24 of familiarity that perhaps the parties do and can  
25 import on to it.

1 THE COURT: All right. You agree with that in  
2 concept, Attorney Aytch?

3 MS. AYTCH: I agree with that in terms of the  
4 parties can at the Court's request, have a proposal at  
5 the next hearing.

6 THE COURT: Perfect. All right, that's what  
7 I'd like to see. I'd like to see some sort of  
8 agreement. And I am very amenable to a September  
9 timeframe for a science day and hopefully counsel for  
10 both sides can come together and agree on an agenda for  
11 even the science day and then you can present it to me.  
12 I would hope to see something at our next status  
13 conference, something somewhat specific so that I can  
14 then perhaps consult with Judge Temple, we could perhaps  
15 get him on the phone as well, perhaps, to come up with  
16 an agreement about what makes sense for that science  
17 day. But if plaintiffs and defendants and Mr. Matthews  
18 are all in agreement about it and we get Judge Temple to  
19 agree as well, then it seems to me that especially for a  
20 preliminary science day, I would very much defer to  
21 plaintiffs and defendants' counsel as to what you think  
22 makes the most sense by way of teaching me early on the  
23 concepts that both sides think I need to understand and  
24 that Judge Temple needs to understand. So, I will hope  
25 to see something somewhat detailed then by way of a

1 proposal in our next agenda. And that sounds like a  
2 topic that I'm guessing the parties can come together on  
3 and negotiate. It's far less contentious a topic than  
4 some of the other you have successfully navigated, so I  
5 have a lot of faith. Anything else we need to discuss  
6 today?

7 MS. AYTCH: Not from the defendants, your  
8 Honor.

9 MR. ORENT: And not from the plaintiffs  
10 either, your Honor.

11 THE COURT: Excellent. Well, thank you very  
12 much all of you for the work that you have put into  
13 this. It's been impressive. All the documents that you  
14 have proposed, as you can see I have approved them, I  
15 have read them with great interest and they are very  
16 well done, I'm impressed, and I appreciate your ability  
17 to negotiate these contentious matters, and I am very  
18 hopeful that we're going to move this litigation along  
19 and I find that thus far, at least what I've seen by way  
20 of litigation, has been very impressive to me. So, I  
21 appreciate it and I want to let you know that. And  
22 seeing as there is no further business to cover today, I  
23 will look forward to receiving your agenda for our next  
24 status conference. Enjoy the month. Thank you all.  
25 Court is adjourned.

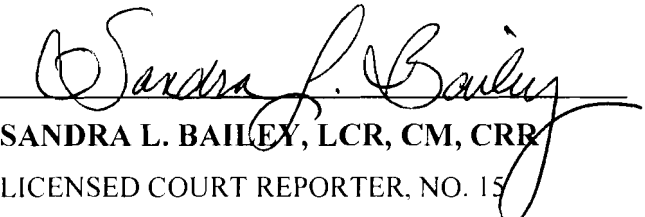
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(Telephone conference concluded at 2:26.)

C E R T I F I C A T E

I, Sandra L. Bailey, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 7/24/2017

  
SANDRA L. BAILEY, LCR, CM, CRR  
LICENSED COURT REPORTER, NO. 15  
STATE OF NEW HAMPSHIRE