

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE**

**In Re: Atrium Medical Corp. C-Qur Mesh  
Products Liability Litigation (MDL No. 2753)**

**MDL Docket No. 16-md-2753-LM  
ALL CASES**

**ORDER**

Getinge AB (“Getinge”), one of the three defendants in this multi-district litigation, moves pursuant to [Federal Rule of Civil Procedure 12\(b\)\(2\)](#) to dismiss all claims against it for lack of personal jurisdiction.<sup>1</sup> See doc. no. [975](#). In support of its motion, Getinge relies almost entirely on the opinions of two of its designated experts, John Orcutt and Alex Fernandez, and the affidavit of Chad Carlton, the President of Atrium Medical Corporation, another defendant in this case. Plaintiffs move to exclude Orcutt’s and Fernandez’s expert reports (and request that the court not consider their opinions in ruling on Getinge’s motion to dismiss), see doc. no. [1009](#), and move to strike Carlton’s affidavit, see doc. no. [1013](#). Getinge objects to both motions.

I. Motion to Exclude Expert Reports

In support of their motion to exclude Orcutt’s and Fernandez’s expert reports, plaintiffs make four arguments: (1) Getinge is not authorized to designate experts or produce expert reports on the issue of personal jurisdiction; (2) even if Getinge could offer the expert reports, the reports were needlessly delayed, are unnecessary, and would cause additional, substantial

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<sup>1</sup> Getinge had previously moved to dismiss the claims against it for lack of personal jurisdiction. The court denied that motion without prejudice to renewal and granted plaintiffs’ motion for jurisdictional discovery. See doc. no. [300](#).

delays and costs; (3) the use of the expert reports would constitute a waiver of the lack of personal jurisdiction defense; and (4) the expert reports are unhelpful and improper.

The court does not agree that Getinge's use of the expert reports constitutes a waiver of its lack of personal jurisdiction defense. Nor does it appear that Getinge has violated any discovery rule or that it is precluded from offering expert opinion evidence in support of its motion to dismiss. Although the late timing of the disclosure suggests gamesmanship on Getinge's part, that is not at this time a sufficient basis to exclude the expert reports.

But several of plaintiffs' points in their motion are well-taken. For example, the court agrees that both experts' opinions are of minimal, if any, use to the court in determining whether the court may exercise personal jurisdiction over Getinge. And, to the extent the opinions contradict the sworn testimony of Getinge's Rule 30(b)(6) deponent, the value of the opinions is even further diminished.

Such deficiencies, however, do not require exclusion of the expert reports. The court is more than capable of deciding for itself what evidence is and is not helpful in determining whether plaintiffs have shown a likelihood of the existence of each fact necessary to support personal jurisdiction over Getinge. Therefore, the court denies plaintiffs' motion to exclude Orcutt's and Fernandez's expert reports.

If plaintiffs believe it necessary to depose Orcutt and/or Fernandez prior to the evidentiary hearing on Getinge's motion to dismiss, counsel shall confer to arrange depositions. Getinge shall make all reasonable efforts to accommodate plaintiffs and produce the witnesses

for depositions in an expedited fashion.<sup>2</sup> Plaintiffs may seek leave to file a supplemental objection to Getinge's motion to dismiss after the depositions if they believe it is warranted.

II. Motion to Strike

Plaintiffs raise similar grounds in support of their motion to strike Carlton's affidavit. Specifically, they argue that the court should strike the affidavit because: (1) it was offered late and the court's consideration of the affidavit would prejudice plaintiffs; (2) it contradicts the testimony of Getinge's Rule 30(b)(6) deponent; and (3) it is substantively improper because it is not based on Carlton's personal knowledge and contains Carlton's personal opinions.

As with plaintiffs' motion to exclude the expert reports, their motion to strike Carlton's affidavit raises several legitimate concerns, though none of which warrants striking the affidavit. The court is capable of determining Carlton's affidavit's value in light of plaintiffs' criticisms, and striking the affidavit would only further delay resolution of Getinge's pending motion to dismiss.

As with Orcutt and Fernandez, if plaintiffs believe it necessary to depose Carlton prior to the evidentiary hearing on Getinge's motion to dismiss, counsel shall confer. Getinge shall make all reasonable efforts to accommodate plaintiffs and make Carlton available for a deposition in an expedited fashion. The court, however, denies plaintiffs' motion to strike Carlton's affidavit.

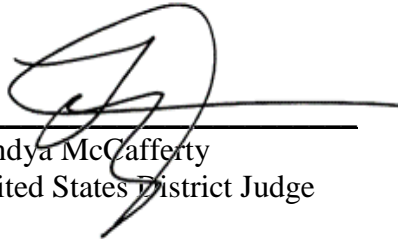
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<sup>2</sup> The court notes that although plaintiffs worry about the additional delay caused by the admission of the expert reports, exclusion of the reports at this stage would only cause additional delay. If the court excluded the reports, it would allow Getinge to re-file its renewed motion to dismiss without relying on the reports, which would only further delay the swift resolution of Getinge's personal jurisdiction arguments.

**Conclusion**

For the foregoing reasons, plaintiffs' motion to exclude expert reports (doc. no. 1009) and motion to strike Chad Carlton's affidavit (doc. no. 1013) are denied in accordance with this order.

SO ORDERED.



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Landya McCafferty  
United States District Judge

December 19, 2018

cc: All counsel of Record