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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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IN RE: ATRIUM MEDICAL CORP. *
C-QUR MESH PRODUCTS LIABILITY *
LITIGATION *
* * * * *

16-md-2753-LM
August 16, 2018
2:00 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances:

For the Plaintiffs: Jonathan D. Orent, Esq.
Motley Rice, LLC

Susan A. Lowry, Esq.
Upton & Hatfield, LLP

Anne W. Schiavone, Esq.
Holman Schiavone, LLC

David Selby, II, Esq.
Bailey & Glasser, LLP

For the Defendants: Enjolique D. Aytch, Esq.
Akerman, LLP

Pierre A. Chabot, Esq.
Jack Friberg, Esq.
Wadleigh Starr & Peters, PLLC

Court Reporter: Sandra L. Bailey, LCR, CRR
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P R O C E E D I N G S

THE COURT: Good afternoon, counsel. This is Judge McCafferty.

MS. AYTCH: Good afternoon.

MR. ORENT: Good afternoon.

THE COURT: Let me just -- we have a court reporter here of course -- let me just state the case name and docket number and have everybody introduce themselves per usual.

The case name is In Re: Atrium Medical Corp. C-Qur Mesh Liability litigation, MDL Docket No. 16-md-02753-LM.

And let me now have counsel introduce themselves. And let me just reiterate what I always say at the beginning, which is that typically one counsel is lead speaking counsel for this conference, but there can be other attorneys who are lead counsel who might want to say something. Just make sure to introduce your last name before you speak so that our court reporter knows who is talking, and as you introduce yourself if you could just spell your last name for the court reporter.

And also, everybody who's not speaking, if you could mute, in fact everybody should mute unless they are speaking, their phones, and do not put your phones on hold, use moot instead.

1 All right, let's start with counsel for the
2 plaintiffs. Go ahead.

3 MR. ORENT: Good afternoon. Jonathan Orent
4 for the plaintiffs.

5 MR. SELBY: David Selby for the plaintiffs.

6 MS. LOWRY: Susan Lowry for the plaintiffs.

7 MS. SCHIAVONE: Anne Schiavone for the
8 plaintiffs.

9 THE COURT: Okay. It sounds like we can go to
10 the defendants. You have their names (speaking to the
11 court reporter), so you're familiar with them.

12 Okay, go ahead. Attorney Aytch.

13 MS. AYTCH: Good afternoon. Enjolique Aytch.
14 Last name A-Y-T-C-H for the defendants.

15 MR. CHABOT: Good afternoon, your Honor.
16 Pierre Chabot, C-H-A-B-O-T, for the defendants.

17 MR. FRIBERG: Good afternoon. Jack Friberg
18 for the defendants. F-R-I-B-E-R-G.

19 MS. AYTCH: Your Honor, that's all that we
20 have for the defendants today.

21 THE COURT: Okay. All right. And I have the
22 agenda in front of me, Document No. 842, and I have gone
23 through the agenda. Let's just go through it item by
24 item.

25 Item number one is regards the Notice of

1 Initial Discovery Pool Selections. There appears to be
2 a, I'm going to call it a minor dispute, a dispute about
3 one of the pool selections. There's no dispute that
4 this case should be in the Discovery Pool. It looks as
5 though there is a dispute about whether or not they
6 should be in the Trial Pool case selections. And it
7 looks as though defendants see no reason that this Moore
8 matter should not be on the list of triable cases, but
9 plaintiffs have an issue with that or want to at least
10 reserve their rights to object.

11 So perhaps you could just explain your
12 position on that, Attorney Orent.

13 MR. ORENT: Thank you, your Honor. I want to
14 also just briefly state, I was looking at this last
15 night and I believe there may be a typographical error
16 as far as the case caption of the Ethicon case related
17 to this particular matter.

18 But in short, your Honor, the purpose of the
19 Bellwether is to put to trial issues that can be
20 extrapolated and give us information to resolve all of
21 these cases. And when we have cases with multiple
22 products, the issues become not about the product at
23 issue, that is, is the Atrium C-Qur device defective and
24 did it cause injury, but it then becomes about some
25 other item.

1 So in this particular case this individual
2 also had a hernia mesh put in by another manufacturer,
3 Ethicon, that is also subject to litigation, and with
4 that come additional complications including making sure
5 that Ethicon's counsel is involved at the discovery
6 phase, the depositions, things of that nature.

7 And parenthetically I would also add in past
8 mesh litigations, both vaginal mesh and hernia mesh
9 litigations, including the ongoing Ethicon Physiomesh
10 MDL, we have excluded from the Bellwether Pool cases
11 that are dual products with situations like this.

12 So, we don't feel that that would be a good
13 use of the Court's time and resources as one of our
14 first cases to bring in the complexity of multiple
15 products and how a jury should decide between those
16 multiple products. We feel that the first round of
17 trials should be reserved for single product, single
18 injury type cases.

19 THE COURT: All right. Attorney Aytch.

20 MS. AYTCH: Your Honor, I agree with Attorney
21 Orent in so far as the Bellwether Pools are supposed to
22 do that, just give both parties an understanding of how
23 a jury would view certain like cases, and we try to be
24 extremely representative in our selection. And there
25 are a number of plaintiffs kind of in the inventory of

1 the MDL before us that have multiple manufacturers'
2 hernia mesh implanted, and so selecting one,
3 notwithstanding what happens going forward, I think at
4 this point it is premature for us to decide whether or
5 not she would actually be in Trial Pool, although
6 definitely in the Discovery Pool, that we should move
7 forward because that actually does inform the parties as
8 to the value of these cases.

9 THE COURT: Okay. So you're basically saying
10 you agree that she should be in the Discovery Pool.
11 Neither of you have a disagreement about that. But it's
12 premature to strike her at this early stage from the
13 Trial Pool?

14 MR. ORENT: Your Honor, for the plaintiffs
15 what we believe is that quite frankly we don't believe
16 it's suitable for the Trial Pool, and that if the
17 defendants want to investigate as part of the larger
18 pool, the preliminary pool, because they believe that
19 there's value to be had, we don't have an objection to
20 that.

21 It certainly narrows by one case the number of
22 options that they would have to a trial, but that's
23 their decision, and so we don't have any objection to
24 that and we can more fully vet this issue down the road
25 if this is one of the ones that they wish to pursue.

1 We wanted to make sure that our position was
2 known and that there was no surprise in the matter when
3 we did object should this issue come before your Honor
4 later on.

5 THE COURT: Okay, so you're just putting the
6 issue out there so that I'm aware of it but it doesn't
7 have to be resolved right now.

8 MR. ORENT: As far as plaintiffs are
9 concerned, that's correct.

10 MS. AYTCH: As far as defendants are
11 concerned, that is correct insofar as the parties have
12 not yet chosen which will be the Trial Pool cases. So
13 we do not agree that Ms. Moore's case would not be
14 appropriate for the Trial Pool as well.

15 But at this point, your Honor, you're correct,
16 that I don't think that this is an issue that needs to
17 be resolved.

18 THE COURT: Okay. All right, then let's move
19 on to agenda item number two, which is actually we can
20 dispatch with that because I granted Document No. 841,
21 which was your joint motion to extend the deadlines. So
22 I have done that.

23 So, anything more on agenda item number two?

24 MR. ORENT: With regard to the -- I'm sorry.

25 MS. AYTCH: No, go ahead. I was just going to

1 say not from the defendants.

2 MR. ORENT: So with regard to number two, the
3 -- I'm sorry, I just shut my calendar. This is the
4 briefing schedule, your Honor, or are we doing the PFF?

5 THE COURT: Yes, yes, item number two.

6 MR. ORENT: With regard to the briefing
7 schedule, your Honor, the one thing I would note is the
8 potential issue coming down the road as to whether or
9 not defendants are going to disclose an expert or
10 experts with regard to the jurisdictional discovery.

11 As we indicated in the agenda on August 7th,
12 about ten days ago, defendants advised us that they may
13 produce experts throughout this process prior to
14 completing the discovery on jurisdiction.

15 We are now about a week and a half, two weeks
16 from discovery close having been through this process
17 for over a year. We don't think that it's appropriate
18 to disclose an expert or necessary, nor do we think that
19 the timing of this is proper, that we feel that we
20 should have been notified a lot sooner, and with the
21 days closing down, certainly at a minimum we would need
22 to respond in some meaningful way.

23 So, if defendants do ultimately intend on
24 serving an extra report and we've not received further
25 indication that they in fact will or when they will or

1 who these individuals might be pursuant to our request,
2 we would certainly want to take that matter up with the
3 Court when we have some more information on it, but
4 given the lack of information on our side at this point
5 we just want to place this issue out there for the Court
6 and there may be a need to address this further down the
7 road.

8 THE COURT: Okay. All right. So that issue
9 is flagged.

10 Anything you want to say anymore on that,
11 Attorney Aytch?

12 MS. AYTCH: No, your Honor.

13 THE COURT: Okay.

14 MS. AYTCH: Unless you have any questions on
15 it. I guess we can just deal with it down the road.

16 THE COURT: Number three is the amendment of
17 the fact sheet, and I'm going to take care of that on
18 this end. I'll issue an endorsed order that really
19 clarifies what's happening by way of amendments and
20 we'll take care of that issue.

21 Agenda item number four looks like a matter
22 that the parties are optimistic that meet and confer
23 will lead to agreement on the issue. So again, that
24 issue is flagged per agenda item number four.

25 Is there anything more that needs to be said

1 on that?

2 MR. ORENT: Your Honor --

3 THE COURT: Yes.

4 MR. ORENT: If I could just interject. I
5 think we're probably close to an agreement, if not
6 there. Plaintiffs have agreed to two out of the three
7 requests without conditions. We made a narrow
8 modification to the second of three requests and we are
9 optimistic that that will accomplish what the defendants
10 are looking for.

11 So, I spoke to Ms. Aytch prior to the call
12 today and understand that they are reviewing our
13 proposal to them to see if that resolves their concerns,
14 so I think we're close.

15 THE COURT: Okay. Anything further on that,
16 Attorney Aytch?

17 MS. AYTCH: No, your Honor.

18 THE COURT: That ends the agenda items. Is
19 there anything further anybody needs to talk about
20 today? (Pause.) That's a comforting silence.

21 MS. AYTCH: Nothing from the defendants.

22 MR. ORENT: Nothing from the plaintiffs, your
23 Honor.

24 THE COURT: All right. And I could hear
25 Attorney Aytch, I spoke over you, I apologize, say there

1 was nothing from the defendants, and so we can close
2 this hearing and I will talk to counsel next month.

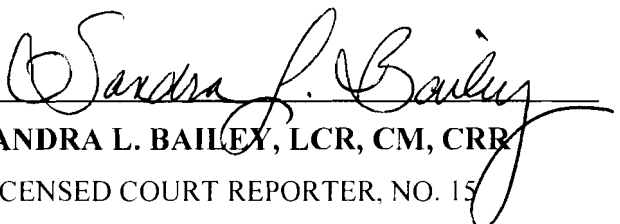
3 Thank you all. Court is adjourned.

4 (Telephone conference concluded at 2:15 p.m.)
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11 C E R T I F I C A T E
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13 I, Sandra L. Bailey, do hereby certify that
14 the foregoing transcript is a true and accurate
15 transcription of the within proceedings, to the best of
16 my knowledge, skill, ability and belief.
17

18
19 Submitted: 8/20/2018


SANDRA L. BAILEY, LCR, CM, CRB
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