

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Martha Luna

v.

Civil No. 16-cv-372-LM

Atrium Medical Corp., et al.

Carrie L. Barron, et al.

v.

Civil No. 17-cv-742-LM

Atrium Medical Corp.

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

MDL No. 16-MD-2753-LM

AMENDED ORDER

This Amended Order replaces the February 25, 2021 order (Luna, doc. no. 257; Barron, doc. no. 215; and MDL No. 2753, doc. no. 1246).

With leave of court to do so, the parties jointly filed via email a proposed order that disposes of pending and overlapping matters in two of the bellwether cases in this MDL (Barron v. Atrium Medical Corp., 17-cv-742-LM, and Luna v. Atrium Medical Corp., et al., 16-cv-372-LM). The court has largely adopted that proposed order herein. However, the court added two sections to address matters that the parties neglected to mention in their proposed order. See infra Sections I(4) and IV. This order begins with a summary of the procedural history and then breaks down the individual motions and overlapping rulings.

BACKGROUND

MDL member action Barron has been selected as the first bellwether trial in In re Atrium Medical Corporation C-QUR Mesh Products Liability Litigation, MDL No. 2753, and MDL member action Luna has been selected as the second. In both actions, the parties have submitted Daubert motions and motions in limine and defendants have moved for summary judgment. At the December 10, 2020 hearing in Barron, the parties agreed to meet and confer and advise the court as to their stipulations regarding the parties' regulatory Daubert motions (Barron doc. nos. 131, 132) in light of the court's resolution of plaintiffs' motion in limine regarding evidence relating to FDA processes and decisionmaking (Barron doc. no. 147). The court directed the parties to follow through on that commitment by endorsed order on December 11, 2020, and again on January 29, 2021. In the parties' Notice of Joint Agenda of February 4, 2021 (doc. no. 1244), the parties indicated that they would provide the court with their stipulations regarding the regulatory Daubert motions in Barron and their substantially similar counterpart motions in Luna (Luna doc. nos. 214, 225).

Several of the parties' other motions in Luna also substantively overlap with motions previously filed in Barron. During the January 5, 2021 hearing in Barron, the court requested that the parties identify the instances where the motions filed in Luna substantively overlap with the motions that the court previously addressed in Barron. The parties have accordingly conferred and reported to the court.

On November 13, 2020 and November 20, 2020, the court issued two orders regarding or resolving several Daubert motions filed in Barron (Barron doc. nos. 161, 163). On December 11, 2020, the court ruled on a motion in limine (Barron doc. no. 147) filed by the plaintiff. And on January 6, 2021, the court issued an order denying a motion for summary judgment filed by

defendants (Barron doc. no. 209). In addition to entering orders on the docket, the court issued rulings on the record relating to those motions during hearings held on November 12, 2020, November 19, 2020, December 10, 2020, and January 5, 2021 (hereinafter, the “Motion Hearings”).

In order to minimize re-argument in Luna of motions that have already been substantively addressed in Barron, and to otherwise conserve judicial and party resources, the court resolves the below pending motions in Luna based on the argument, authorities, and rulings set forth in the Motion Hearings and corresponding orders in Barron. For the motions that are adjudicated herein, the parties fully preserve for any appeal all the issues presented in the corresponding motion papers and the arguments and authorities made in the Motions Hearings.¹

I. Plaintiff’s Medical Daubert Motions

1. Plaintiff’s Motion to Exclude Certain Opinions and Testimony of Dr. Richard Jacobs (Luna Doc. No. 211)

Plaintiff in Barron stipulated to withdraw her Motion to Exclude Opinions and Testimony of Defendants Expert Dr. Richard Jacobs (Barron doc. no. 103). Plaintiff has similarly stipulated to withdraw her Luna Motion to Exclude Opinions and Testimony of Defendants Expert Dr. Richard Jacobs (Luna doc. no. 211). Plaintiff’s motion is therefore withdrawn and denied as moot.

¹ Nothing herein precludes any party from otherwise seeking reconsideration or revisiting of the rulings herein in light of supplemental authority or other developments after the time this order is entered.

2. Plaintiff's Motion to Exclude Opinions and Testimony of Steven R. Little, Ph.D. (Luna Doc. No. 212)

Plaintiff in Barron stipulated to withdraw her Motion to Exclude Opinions and Testimony of Dr. Steven R. Little (Barron doc. no. 89), other than as to plaintiff's challenges to his "testimony and opinions on the reasons, motive and intent behind LyondellBasell's medical implant prohibition." Plaintiff has similarly stipulated to withdraw her Luna Motion to Exclude Opinions and Testimony of Dr. Steven R. Little (Luna doc. no. 212), except as to plaintiff's challenges to his testimony and opinions on the reasons, motive, and intent behind LyondellBasell's medical implant prohibition.

Plaintiff's remaining argument substantively overlaps with the plaintiff's Motion to Exclude Opinions and Testimony of Dr. Steven Little, Ph.D. in Barron (Barron doc. no. 89). The court therefore grants plaintiff's motion to exclude opinions and testimony of Dr. Little (doc. no. 212) to the extent not voluntarily withdrawn as set forth above, for the reasons stated on the record during the Barron November 19, 2020 hearing and in this court's November 20, 2020 Order (Barron doc. no. 163). Accordingly, opinion testimony of Dr. Little regarding any polypropylene manufacturer's purported reasons or motives for warning against use of polypropylene in medical devices is excluded.

3. Plaintiff's Motion to Exclude Opinions and Testimony of Stephen Spiegelberg, Ph.D. (Luna Doc. No. 213)

Plaintiff in Barron stipulated to withdraw her Motion to Exclude Opinions and Testimony of Dr. Stephen Spiegelberg (Barron doc. no. 88), other than as to plaintiff's challenges to his "testimony and opinions on the reasons, motive and intent behind LyondellBasell's medical implant prohibition." Plaintiff has similarly stipulated to withdraw her Luna Motion to Exclude Opinions and Testimony of Dr. Stephen Spiegelberg (Luna doc. no. 213), other than as to

plaintiff's challenges to his testimony and opinions on the reasons, motive, and intent behind LyondellBasell's medical implant prohibition.

Plaintiff's remaining argument substantively overlaps with plaintiff's Motion to Exclude Opinions and Testimony of Stephen Spiegelberg, Ph.D. in Barron (Barron doc. no. 88). The court therefore grants plaintiff's motion to exclude opinions and testimony of Dr. Spiegelberg (doc. no. 213) to the extent not voluntarily withdrawn as set forth above, for the reasons stated on the record during the Barron November 19, 2020 hearing and in this court's November 20, 2020 Order (Barron doc. no. 163). Accordingly, opinion testimony of Dr. Spiegelberg regarding any polypropylene manufacturer's purported reasons or motives for warning against use of polypropylene in medical devices is excluded.

4. Plaintiff's Motion to Exclude Opinions and Testimony of David Brooks, M.D. (Luna Doc. No. 210)

In the parties' Notice of Joint Agenda of February 4, 2021 (doc. no. 1244), the parties indicated that they would offer stipulations regarding resolution of plaintiff Luna's Motion to Exclude Opinions and Testimony of David Brooks, M.D. (Luna doc. no. 210). The parties have not done so. The parties are directed either to provide the court with their stipulations regarding plaintiff's motion or to indicate that they have been unable to reach an agreement as to such stipulations by not later than March 4, 2021.

II. Defendants' Medical Daubert Motions

1. Defendants' Motion to Exclude Certain Opinions and Testimony of Russell F. Dunn, Ph.D. (Luna Doc. No. 219)

The Parties in Barron agreed to the following stipulation regarding the opinions and testimony of Dr. Dunn:

The parties agree and stipulate that Dr. Dunn shall not testify about any hazards associated with the C-QUR V-Patch device after it has been implanted into the body, medical concerns about implanting the device, performance of the device inside the body, or that the device was defectively designed. Dr. Dunn may testify about other opinions in his report, including oxidation of polypropylene generally or outside the body in failure mode effects analysis.

The stipulation is not an admission of fact by any party.

This stipulation was entered into the record during the November 19, 2020 hearing in the Barron litigation. The parties have since agreed to this same stipulation with regard to defendant's Luna Motion to Exclude Opinions and Testimony of Russell F. Dunn, PhD (Luna doc. no. 219). In light of this stipulation, the motion (Luna doc. no. 219) is denied as moot.

2. Defendants' Motion to Exclude Certain Opinions and Testimony of Scott Guelcher, Ph.D. (Luna Doc. No. 221)

Defendants' motion substantively overlaps with defendant's Motion to Exclude Certain Opinions and Testimony of Scott Guelcher, Ph.D. in Barron (Barron doc. no. 96). Defendants' motion is therefore denied based on the argument, authorities, and rulings set forth in the Barron November 12, 2020 hearing and in this court's November 13, 2020 Order (Barron doc. no. 161).

3. Defendants' Motion to Exclude Certain Opinions and Testimony of Prof. Dr. Med. Uwe Klinge (Luna Doc. No. 223)

Defendants' motion substantively overlaps with defendants' Motion to Exclude Certain Opinions and Testimony of Prof. Dr. Med. Uwe Klinge in the Barron litigation (Barron doc. no. 98). Defendants' motion is therefore denied based on the argument, authorities, and rulings set forth in the Barron November 12, 2020 hearing and in this court's November 13, 2020 Order (Barron doc. no. 161).

4. Defendants' Motion to Exclude Certain Opinions and Testimony of Howard Langstein, M.D. (Luna Doc. No. 215)

The first ground of defendants' motion (Luna doc. no. 216 at 4-6) substantively overlaps with the first ground of defendants' Motion to Exclude Certain Opinions and Testimony of Howard Langstein, M.D. in Barron (Barron doc. no. 93 at 4-6). The first ground of defendants' motion is therefore denied based on the argument, authorities, and rulings set forth in the Barron November 12, 2020 hearing and in this court's November 13, 2020 Order (Barron doc. no. 161).

The second ground of defendants' motion (Luna doc. no. 216 at 6-11) substantively overlaps with the second ground of defendants' Motion to Exclude Certain Opinions and Testimony of Howard Langstein, M.D. in the Barron litigation (Barron doc. no. 93 at 6-11). The second ground of defendants' motion is therefore denied based on the argument, authorities, and rulings set forth in the Barron November 12, 2020 hearing and in this court's November 13, 2020 Order (Barron doc. no. 161).

The legal rationale for the third ground of defendants' motion (Luna doc. no. 216 at 11-14) substantively overlaps with the legal arguments made in support of the third ground of defendants' Motion to Exclude Certain Opinions and Testimony of Howard Langstein, M.D. in the Barron litigation (Barron doc. no. 93 at 11-14). Although the facts of the cases are different, the differences are not sufficient to command a different outcome. The third ground of defendants' motion is therefore denied based on the argument, authorities, and rulings set forth in the Barron November 12, 2020 hearing and in this court's November 13, 2020 Order (Barron doc. no. 161).

The fourth ground of defendants' motion (Luna doc. no. 216 at 14-15) substantively overlaps with the fourth ground of defendants' Motion to Exclude Certain Opinions and Testimony of Howard Langstein, M.D. in the Barron litigation (Barron doc. no. 93 at 14). As

this court explained at the November 12, 2020, hearing, through his report, Dr. Langstein offers opinions as to the instructions for use only to the very limited extent that he opines that plaintiff's hernia repair surgery using Atrium's surgical mesh was performed in accordance with accepted guidelines and instructions for use. To the extent Dr. Langstein goes far beyond that limited statement defendants can object at trial and ask the court to exclude it. Otherwise, the fourth ground of defendants' motion is denied based on the argument, authorities, and rulings set forth in the Barron November 12, 2020 hearing and in this court's November 13, 2020 Order (Barron doc. no. 161).

III. Plaintiff's Motion in Limine to Exclude Evidence Relating to the United States Food and Drug Administration ("FDA") 510(k) Clearance Process. (Luna Doc. No. 202)

Plaintiff's motion in limine substantively overlaps with plaintiff's Motion in Limine to Exclude Evidence Relating to the United States Food and Drug Administration ("FDA") 510(k) Clearance Process in the Barron litigation (Barron doc. no. 147). Plaintiff's motion in limine is therefore granted based on the argument, authorities, and rulings set forth in the December 10, 2020 hearing in Barron.

IV. The Parties' Regulatory Daubert Motions (Barron Doc. Nos. 131, 132; Luna Doc. Nos. 214, 225)

As noted, at the December 10, 2020 hearing in Barron, the parties agreed to meet and confer and advise the court as to their stipulations regarding the parties' regulatory Daubert motions (Barron doc. nos. 131, 132) in light of the court's resolution of plaintiffs' motion in limine regarding evidence relating to FDA processes and decisionmaking (Barron doc. no. 147). The court directed the parties to follow through on that commitment by endorsed order on

December 11, 2020, and again on January 29, 2021. In the parties' Notice of Joint Agenda of February 4, 2021 (doc. no. 1244), the parties indicated that they would provide the court with their stipulations regarding the regulatory Daubert motions in Barron and their substantially similar counterpart motions in Luna (Luna doc. nos. 214, 225). The parties have not done so. The parties are directed either to provide the court with their stipulations regarding their regulatory Daubert motions or to indicate that they have been unable to reach an agreement as to such stipulations by not later than March 4, 2021.

V. Defendants' Motion for Summary Judgment (Luna Doc. No. 217)

The first ground of defendants' motion (Luna doc. no. 218 at 8) substantively overlaps with the first ground of defendants' Motion for Summary Judgment in Barron (Barron doc. no. 95 at 6-8). The first ground of defendants' motion is therefore denied based on the argument, authorities, and rulings set forth in the Barron January 5, 2021 hearing and in this court's January 6, 2021 Order (Barron doc. no. 209).

The second ground of defendants' motion (Luna doc. no. 218 at 8-10) substantively overlaps with the second ground of defendants' Motion for Summary Judgment in Barron (Barron doc. no. 95 at 8-9). At the hearing on defendants' Barron motion for summary judgment, Plaintiff indicated that she intended to withdraw her claim for manufacturing defect. On February 3, 2021, the parties in Barron filed a Stipulation of Voluntary Dismissal dismissing Count III, Strict Liability – Manufacturing Defect, with prejudice (Barron doc. no. 212). Plaintiff has likewise indicated that she intends to withdraw Count III (Manufacturing Defect) of her complaint in this action also. Upon dismissal of Count III of the complaint, the second ground of defendants' motion will be denied as moot.

The legal rationale for the third ground of defendants' motion (Luna doc. no. 218 at 10) substantively overlaps with the legal arguments made in support of the third ground of defendants' Motion for Summary Judgment in the Barron litigation (Barron doc. no. 95 at 9-10). Although the facts of the cases are different, the differences are not sufficient to command a different outcome. The third ground of defendants' motion is therefore denied based on the argument, authorities, and rulings set forth in the Barron January 5, 2021 hearing and in this court's January 6, 2021 Order (Barron doc. no. 209).

The fourth ground of defendants' motion (Luna doc. no. 218 at 11) substantively overlaps with the fourth ground of defendants' Motion for Summary Judgment in the Barron litigation (Barron doc. no. 95 at 10-11). As the hearing on defendants' Barron motion for summary judgment, plaintiff indicated that she intended to withdraw her claim for breach of express warranty. On February 3, 2021, the parties in Barron filed a Stipulation of Voluntary Dismissal dismissing Count V, Breach of Express Warranty, with prejudice (Barron doc. no. 212). Plaintiff has likewise indicated that she intends to withdraw Count V (Express Warranty) of her Complaint in this action also. Upon dismissal of Count V of the Complaint, the second ground of defendants' motion will be denied as moot.

The sixth ground of defendants' motion (Luna doc. no. 218 at 13-23) substantively overlaps with the fifth ground in defendants' Motion for Summary Judgment in the Barron litigation (Barron doc. no. 95 at 11-22). The sixth ground of defendants' motion is therefore denied based on the argument, authorities, and rulings set forth in the Barron January 5, 2021 hearing and in this court's January 6, 2021 Order (Barron doc. no. 209).

The seventh ground of defendants' motion (Luna doc. no. 218 at 23-25) addresses plaintiff's implied warranty claims (Count VI). Plaintiff has indicated that she intends to

withdraw Count VI. Upon dismissal of Count VI of the Complaint, the seventh ground of defendants' motion will be denied as moot.

CONCLUSION

For the reasons discussed above, the court orders as follows.

In both Barron, 17-cv-742-LM, and Luna, 16-cv-372-LM, the parties are directed either to provide the court with their contemplated stipulations regarding their regulatory Daubert motions (Barron doc. nos. 131, 132; Luna doc. nos. 214, 225) or to indicate that they have been unable to reach an agreement as to such stipulations by not later than **March 4, 2021**.

In Luna, 16-cv-372-LM:

(1) defendants' Motion to Exclude Opinions and Testimony of Scott Guelcher, Ph.D. (Luna doc. no. 221), defendants' Motion to Exclude Opinions and Testimony of Prof. Dr. Med. Uwe Klinge (Luna doc. no. 223) are denied;

(2) plaintiff's Motion to Exclude Opinions and Testimony of Defendants' Expert Dr. Richard Jacobs (Luna doc. no. 211) and defendants' Motion to Exclude Opinions and Testimony of Russell F. Dunn, Ph.D. (Luna doc. no. 219) are denied as moot;

(3) defendants' Motion to Exclude Opinions and Testimony of Howard Langstein, Ph.D. (Luna doc. no. 215) is granted as to opinion testimony regarding the Instructions For Use associated with defendants' surgical mesh products that goes beyond the testimony offered in Langstein's expert report and at his deposition, and is otherwise denied;

(4) plaintiff's Motion to Exclude Opinions and Testimony of Defendants' Expert Dr. Steven R. Little (Luna doc. no. 212) and Motion to Exclude Testimony and Opinions of Dr. Stephen Spiegelberg, Ph.D. (Luna doc. no. 213) are both granted as to opinion testimony


regarding any polypropylene manufacturer's purported reasons or motives for warning against use of polypropylene in medical devices, and otherwise denied as moot;

(5) plaintiff's Motion in Limine to Exclude Evidence Relating to the United States Food and Drug Administration 510(k) Clearance Process (Luna doc. no. 202) is granted;

(6) defendants' Motion for Summary Judgment (Luna doc. no. 217) is denied to the extent it addresses Counts I, II, and IV of plaintiff's Amended Complaint, will be denied as moot to the extent it addresses Counts III, V and VI effective upon plaintiff's contemplated voluntary withdrawal of those Counts, and is taken under advisement to the extent it addresses Count VII; and

(7) the parties are directed either to provide the court with their contemplated stipulations regarding plaintiff's Motion to Exclude Opinions and Testimony of Defendants' Expert David Brooks, M.D. (Luna doc. no. 210) or to indicate that they have been unable to reach an agreement as to such stipulations by not later than **March 4, 2021**.

SO ORDERED.



Landya McCafferty
United States District Judge

March 1, 2021

cc: Counsel of Record.