

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., et al.

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

MDL No. 16-MD-2753-LM

ORDER ON MOTIONS

The court directed the parties in MDL member actions Barron et al. v. Atrium Medical Corp., 17-cv-742, and Luna v. Atrium Medical Corp. et al., 16-cv-372, either to provide the court by not later than March 4, 2021, with their stipulations in connection with the following motions or to advise the court that they were unable to reach agreement as to these stipulations:

- (1) the Barron plaintiffs' Motion to Exclude Testimony and Opinions of Timothy Ulatowski (Barron doc. no. [131](#));
- (2) defendant Atrium's Motion to Exclude Opinions and Testimony of Peggy Pence, Ph.D. (Barron doc. no. [132](#));
- (3) plaintiff Luna's Motion to Exclude Opinions and Testimony of David Brooks, M.D. (Luna doc. no. [210](#));

(4) Luna's Motion to Exclude Testimony and Opinions of Timothy Ulatowski (Luna doc. no. 214); and

(5) the Luna defendants' Motion to Exclude Opinions and Testimony of Peggy Pence, Ph.D. (Luna doc. no. 225).

On March 4, 2021, the parties filed as an attachment to their Notice of Joint Agenda (doc. no. 1248-1) their stipulations as to Barron doc. nos. 131 and 132 and as to Luna doc. no. 210. The parties have neither provided the court with stipulations regarding Luna doc. nos. 214 and 225 nor advised the court that they have been unable to reach agreement as to stipulations regarding those motions.

In addition to their stipulations regarding Barron doc. nos. 131 and 132 and Luna doc. no. 210, the parties filed as a second attachment to their Notice of Joint Agenda (doc. no. 1248-2) a proposed Second Amended Order intended to replace and supersede the court's Amended Order dated March 1, 2021 (doc. no. 1247; Barron doc. no. 214; Luna doc. no. 258). The parties proposed Second Amended Order addresses the parties' stipulations regarding Luna doc. no. 210, but not their stipulations regarding Barron doc. nos. 131 and 132. The court declines the parties' invitation to amend its order a second time. Rather than issue a second amended order, the court finds and rules as follows.

I. Motion to Exclude Opinions and Testimony of David Brooks, M.D. (Luna doc. no. 210)

The parties have stipulated that plaintiff Luna shall withdraw her Motion to Exclude Opinions and Testimony of David Brooks, M.D. (Luna doc. no. 210). Accordingly, Luna doc. no. 210 is denied as moot.

II. Barron Motion to Exclude Testimony and Opinions of Timothy Ulatowski (Barron doc. no. 131); Motion to Exclude Opinions and Testimony of Peggy Pence, Ph.D. (Barron doc. no. 132); Motion in Limine No. 5 to Exclude or Limit Evidence Concerning FDA Observations and Letters and Consent Decree (Barron doc. no. 167)

The parties have conditionally stipulated that the Barron plaintiffs will not rely on the testimony, opinions, or report of their designated regulatory expert Pence and that the Barron defendant will not rely on the testimony, opinions, or report of its designated regulatory expert Ulatowski, “thereby rendering moot” (doc. no. [1248-1](#) at 2) Barron doc. nos. 131 and 132. The parties have further conditionally stipulated that the Barron plaintiffs will not offer trial argument, testimony, or evidence regarding United States v. Atrium Corporation, Case No. 1:15-cv-41 (D.N.H.), or regarding the FDA Form 483 Observations or FDA Warning Letter, thereby rendering moot the Barron defendant’s Motion in Limine No. 5 to Exclude or Limit Evidence Concerning FDA Observations and Letters and Consent Decree (Barron doc. no. [167](#)). The condition for these stipulations is that the parties will “agree upon the content of the Factual Summary” that the parties intend to present at trial in lieu of the evidence the parties have agreed not to present. Doc. no. [1248-1](#) at 2.

The court has concerns regarding the conditional nature of the parties’ stipulations. In particular, the court is concerned about the possibility that the parties’ agreement could unexpectedly become void on the eve of trial, necessitating resolution of the complex issues raised by the conditionally mooted motions. Accordingly, the court denies Barron doc. nos. 131, 132, and 167 as moot, but directs the parties by not later than March 22, 2021, either to file their proposed jointly drafted Factual Statement or to advise the court that they have been unable to reach agreement as to the Factual Statement’s content.

III. Motion to Exclude Testimony and Opinions of Timothy Ulatowski (Luna doc. no. 214); Motion to Exclude Opinions and Testimony of Peggy Pence, Ph.D. (Luna doc. no. 225).

As noted, the parties have not provided the court with stipulations regarding the pending regulatory Daubert motions in Luna. The parties have advised the court on multiple occasions that they intend to provide the court with such stipulations, and the court has directed them to do so on multiple occasions, most recently on March 1, 2021. See doc. no. [1247](#); Barron doc. no. [214](#); Luna doc. no. [258](#). The parties are directed either to provide the court with those stipulations or to advise the court that they are unable to do so by not later than March 15, 2021.

CONCLUSION

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

In Luna, 16-cv-372:

(1) plaintiff's Motion to Exclude Opinions and Testimony of Defendants' Expert David Brooks, M.D. (Luna doc. no. [210](#)) is denied as moot; and

(2) the Luna parties are directed by not later than March 15, 2021, either to file their contemplated stipulations regarding the Motion to Exclude Testimony and Opinions of Timothy Ulatowski (Luna doc. no. [214](#)) and the Motion to Exclude Opinions and Testimony of Peggy Pence, Ph.D. (Luna doc. no. [225](#)) or to advise the court that they have been unable to reach agreement as to as to such stipulations.

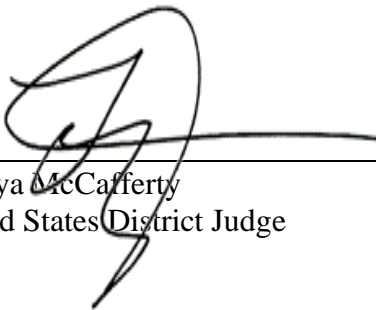
In Barron, 17-cv-742:

(1) plaintiffs' Motion to Exclude Testimony and Opinions of Timothy Ulatowski (Barron doc. no. [131](#)), defendant's Motion to Exclude Opinions and Testimony of Peggy Pence, Ph.D. (Barron doc. no. [132](#)), and defendant's Motion in Limine No. 5 to Exclude or Limit Evidence

Concerning FDA Observations and Letters and Consent Decree (Barron doc. no. 167) are denied as moot; and

(2) the Barron parties are directed either to file their contemplated jointly drafted Factual Statement or to advise the court that they have been unable to reach agreement as to the Factual Statement's content by not later than March 22, 2021.

SO ORDERED.



Landya McCafferty
United States District Judge

March 8, 2021

cc: Counsel of Record.