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 No. 16-MD-2753-LM** **ALL CASES**

ORDER

Before the court is plaintiffs' motion (doc. no. 1206) to strike all of defendants' affirmative defenses pled in the bellwether member cases of the Atrium Medical Corp. C-Qur Mesh Products Liability Multi-District Litigation, and in the alternative for partial summary judgment as to those defenses. The bellwether member cases are Barron v. Atrium Medical Corp., 17-cv-742, and Luna v. Atrium Medical Corp. et al., 16-cv-372. For the reasons discussed below, plaintiffs' motion is denied in its entirety.

BACKGROUND

In both Barron and Luna, defendant Atrium Medical Corporation ("Atrium") pled twenty-six defenses styled as affirmative defenses. In Luna, defendant Maquet Cardiovascular USA Sales, LLC ("Maquet") pled the same twenty-six defenses together with a twenty-seventh defense premised on lack of personal jurisdiction over it in this district.[1] (Barron doc. no. 81; Luna doc nos. 195, 196). The twenty-six defenses[2] pled in both bellwether cases are: (1) failure

[1] Maquet has been dismissed as a defendant in the Barron action.

[2] The court's enumeration of the twenty-six defenses, employed throughout this order, corresponds to their enumeration in Atrium's answers to the long-form complaint in both bellwether actions. Because Maquet pleads lack of personal jurisdiction as its first affirmative defense, the enumeration of the defenses in Maquet's answer (in Luna) differs slightly from their enumeration in Atrium's pleadings.

to state a claim upon which relief can be granted, (2) plaintiffs' claims are time-barred, (3) assumption of the risk and failure to mitigate damages, (4) plaintiffs' damages were unforeseeable to defendants, (5) plaintiffs' claims are barred by the doctrines of laches, waiver, or estoppel, (6) plaintiffs' damages were not caused by Atrium's product, (7) plaintiffs' damages were caused by plaintiffs' own negligence, (8) plaintiffs are barred from recovering damages or their prayer for damages is subject to reduction pursuant to the doctrine of comparative fault, (9) plaintiffs' damages had a superseding cause, (10) plaintiffs' failure to warn claims are barred under the learned intermediary doctrine, (11) Atrium's product was not unreasonably dangerous, (12) plaintiffs' claims are barred because defendants complied with applicable regulations in manufacturing and marketing its product, (13) plaintiffs' claims are barred because defendants complied with applicable regulations at all relevant times, (14) plaintiffs' claims are barred by "any applicable" safe harbor doctrine, (15) plaintiffs' claims are barred by the doctrines of informed consent and release or assumption of risk, (16) plaintiffs' damages were caused by the negligent or otherwise wrongful conduct of third parties, (17) defendants complied with applicable regulations and conformed to available scientific knowledge in designing, manufacturing, and marketing its product, (18) no practical and technically feasible alternative design for Atrium's product was available at the time it was designed, manufactured, and marketed, (19) any claim for breach of warranty[3] is barred by applicable law, (20) defendants are entitled to unspecified applicable defenses or presumptions arising as a matter of law, (21) plaintiffs' claims are barred as a matter of law to the extent premised on defendants' misrepresentations to the FDA, (22) plaintiffs have failed to allege fraud with the requisite

[3] Plaintiff Barron has voluntarily withdrawn her warranty claims. Plaintiff Luna has indicated that she intends to withdraw her breach of express warranty claim, but has not yet done so.

particularity,[4] (23) plaintiffs' claims are barred due to failure to join necessary parties, (24) plaintiffs' claimed damages may be barred or offset by plaintiffs' receipt of reimbursement from an insurer or health plan, (25) plaintiffs are not entitled to seek punitive or enhanced compensatory damages, and (26) defendants reserve the right to assert applicable defenses to the extent plaintiffs seek award of punitive or exemplary damages.

In Barron, Atrium has voluntarily withdrawn defenses 4-7, 9, 13-16, 18-25, to the extent pled as affirmative defenses (while expressly preserving them as legal theories to be argued at trial). Defendants have not withdrawn any of their defenses in Luna. Accordingly, in this order the court addresses all of the defenses pled in the two actions.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(f) provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." However, Rule 12(f) "motions are narrow in scope, disfavored in practice, and not calculated readily to invoke the court's discretion." Manning v. Bos. Med. Ctr. Corp., 725 F.3d 34, 59 (1st Cir. 2013) (quoting Boreri v. Fiat S.p.A., 763 F.2d 17, 23 (1st Cir. 1985)). This is so in part because striking any portion of a pleading is considered a "drastic remedy." Id. (quoting 5C Charles Alan Wright, et al., Federal Practice & Procedure § 1380 (3d ed. 2011)).

Because motions to strike are not favored, challenged matter in a pleading will not be stricken "unless it is clear that it can have no possible bearing upon the subject matter of the litigation." Berke v. Presstek, Inc., 188 F.R.D. 179, 180 (D.N.H. 1998) (citation and internal quotation marks omitted). "Pleadings will not be stricken absent clear immateriality or prejudice

[4] There is no fraud claim at issue in either of the bellwether cases.

to the moving party." Id. Moreover, motions to strike affirmative defenses "should be granted only when it is beyond cavil that the defendant could not prevail on them." Honeywell Consumer Prods. v. Windmere Corp., 993 F. Supp. 22, 24 (D. Mass. 1998) (citation, internal quotation marks, and internal modification omitted).

DISCUSSION

I. Defendants' Negative Defenses Inaccurately Styled as Affirmative Defenses

As a preliminary matter, the court notes that defendants improperly characterized nineteen of the twenty-six defenses (plus Maquet's jurisdictional defense) as "affirmative defenses." An affirmative defense concerns "the pleading of a matter not within the plaintiff's prima facie case, that is, pleading matter to avoid plaintiff's cause of action," Gilbert v. Eli Lilly & Co., 56 F.R.D. 116, 123 (D.P.R. 1972), and must be pled or it is deemed waived, see Fed. R. Civ. P. 8(c). By contrast, a negative defense "controverts the plaintiff's claim in h[er] prima facie case," Gilbert, 56 F.R.D. at 123, and need not be affirmatively pled in a responsive pleading. Here, each of the following is a negative defense inaccurately styled in defendants' responsive pleadings as an affirmative defense: the First Defense (failure to state a claim); Fourth Defense (plaintiff's damages were not foreseeable); Sixth Defense (causation); Ninth Defense (superseding cause); Tenth Defense (learned intermediary doctrine)[5]; Eleventh Defense (not unreasonably dangerous); Twelfth Defense (conformity to state of scientific knowledge in

[5] In their opposition memorandum, defendants request that the court enter partial summary judgment in their favor as to their learned intermediary defense. See doc. no. 1208 at 11. The court summarily rejects defendants' request because the Local Rules prohibit combination of objections to pending motions with affirmative requests for relief, see Loc. R. 7.1(a), because the dispositive motion deadline passed in Barron before defendants made their request, see doc. no. 1203, and because the request is not supported by a statement of undisputed facts as required by the Local Rules, see Loc. R. 56.1(a).

manufacturing and marketing); Thirteenth Defense (Atrium's compliance with applicable law); Fourteenth Defense (safe harbors); Seventeenth Defense (conformity to state of scientific knowledge in design, manufacturing and marketing); Eighteenth Defense (no alternative design); Nineteenth Defense (warranty defenses); Twentieth Defense (unspecified applicable defenses); Twenty-First Defense (misrepresentation to the FDA); Twenty-Second Defense (failure to plead fraud with particularity); Twenty-Third Defense (failure to join necessary parties); Twenty-Fifth Defense (no entitlement to punitive damages); and Twenty-Sixth Defense (reservation of right to assert defenses to punitive or exemplary damages). The same is true of Maquet's personal jurisdiction defense.

Generally, where a defendant styles an assertion that plaintiff cannot prove a necessary element of a claim as an affirmative defense, "the proper remedy is not to strike the defense, but instead to treat it as a denial." Adams v. Jumpstart Wireless Corp., 294 F.R.D. 668, 671 (S.D. Fla. 2013) (citing 5 Charles Alan Wright, et al., Federal Practice & Procedure § 1269 (3d ed. 2011)). Accordingly, the court construes defendants' nineteen pled negative defenses as denials of plaintiffs' allegations in support of their claims. Because the constructive denials are relevant to issues raised in the bellwether cases and will not prejudice plaintiffs' ability to litigate their claims, the court declines plaintiffs' invitation to strike them. The court similarly declines plaintiffs' invitation to adjudicate defendants' constructive denials at summary judgment. To the extent any party wishes to litigate any specific element of one or more of plaintiffs' claims or defendants' defenses, that party is directed to file a motion as to that element in the particular case in which it arises.

II. Defendants' Affirmative Defenses

The court turns next to defendants' eight pled affirmative defenses. The affirmative defenses are: the Second Defense (statutes of limitations and repose); Third Defense (assumption of the risk); Fifth Defense (laches, waiver, and estoppel); Seventh Defense (plaintiffs' negligence); Eighth Defense (comparative fault); Fifteenth Defense (consent and release); Sixteenth Defense (fault of third parties); and Twenty-Fourth Defense (offset for recovery from insurers). Of these defenses, all have been withdrawn in Barron other than those premised on statutes of limitations and repose, plaintiffs' assumption of the risk, and plaintiffs' comparative fault. All eight affirmative defenses remain at issue in Luna.

The parties' willingness and ability to reach agreement as to defendants' withdrawal of inapposite or cumulative affirmative defenses in Barron indicates that defendants' assertion of such defenses in pleadings will not cause prejudice to plaintiffs. The court is confident that the parties and their counsel will continue their pattern of negotiating in good faith to reach cooperative stipulations in litigating the member cases of this MDL.

Moreover, on this record, the court cannot find that it is "beyond cavil" that plaintiffs will prevail as to the affirmative defenses pled in Luna or those remaining at issue in Barron. Although some of the defenses raise close calls—and the court acknowledges that plaintiffs' arguments as to some of the defenses may ultimately prevail—the limited record now before the court does not mandate the conclusion that any of the affirmative defenses is necessarily without merit, or that any of them is entirely irrelevant to legal issues raised in the bellwether cases. The court similarly declines on the current record to adjudicate the affirmative defenses at summary judgment. Again, the court directs the parties to file motions as to any issue they believe merits further litigation in the particular case in which any such issue arises.

CONCLUSION

For the reasons discussed above, plaintiffs' motion (doc. no. 1206) to strike is denied in its entirety.

SO ORDERED.

Landya McCafferty
United States District Judge

April 8, 2021

cc: Counsel of Record.