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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 * 16-md-02753-LM
LITIGATION * August 13, 2020
* 2:00 p.m.
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TRANSCRIPT OF SCHEDULING CONFERENCE
BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

APPEARANCES:

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1 P R O C E E D I N G S

2 THE CLERK: For the record, this is a status
3 conference in the Atrium MDL C-Qur Mesh Litigation,
4 16-md-2753-LM.

5 THE COURT: All right. And I'm looking at
6 document No. 1222, if that gives you any sense of what
7 kind of case this is, and this is the joint agenda for
8 this conference. And so I'm looking through it, and I
9 want to give counsel an opportunity to address any
10 issues that they want.

11 A lot of it deals with issues that are really
12 not in dispute. They're just I think nicely summarizing
13 where we are in the case in terms of discovery
14 depositions, pending motions.

15 The issue of trial and whether or not this
16 occurs via video or whether ultimately I wait until say
17 January to see where things are is still a question that
18 obviously I'm considering.

19 I've read -- I know the defendants were able
20 to file objections to the video procedure, so I've read
21 those. I read them before plaintiffs had an opportunity
22 to weigh in in writing, but my sense from the agenda was
23 that perhaps plaintiffs would weigh in orally today.

24 But if you wanted time to file something in
25 writing, I'm perfectly willing to see your arguments in

1 writing on that, Attorney Orent, but I was thinking
2 maybe we could talk through some of that.

3 And then ultimately I think what I would do is
4 I would probably take this issue under advisement and
5 think a little bit more about it, but I would love to
6 hear, you know, hear some of your thoughts about it
7 today.

8 And then there's also a request from
9 plaintiffs, and there's no response here from
10 defendants, about a special master to mediate the MDL,
11 and that's something I'm obviously open to. So I'll
12 give defense counsel and plaintiffs an opportunity to
13 meet and confer on that and then propose something more
14 specific to me.

15 So let me turn the floor over to Attorney
16 Orent, and then Attorney Cheffo and Armstrong, and you
17 can bring my attention to whatever you would like during
18 this hearing.

19 MR. ORENT: Thank you, your Honor.

20 Actually, about an hour ago, and I doubt the
21 ink is even dry on it, plaintiffs were able to get an
22 opposition in to the Court principally addressing the
23 constitutional concerns and the legal concerns raised by
24 defendants in their papers.

25 Just to give a quick rundown for your Honor, I

1 think that you'll see that the argument is pretty well
2 addressed in our papers, but where the defendants rely
3 on specifically the Seventh Amendment and then some
4 procedural issues under Rule 43, we're pointing the
5 Court to Rules 1, 43 and 77, as well as a series of
6 published cases, particularly Gould Electronics versus
7 Livingston County Road Commission, which is -- it does
8 not yet have an F.Supp cite, I only have the Westlaw
9 cite, but that is in our brief, as well as Vitamins
10 Online, Inc. versus HeartWise.

11 Both of those cases in fact ordered Zoom
12 trials to go forward. They were albeit under -- they
13 were bench trials, but the Court specifically addressed
14 the Rule 43 concerns, and Rule 77 was addressed. Rule
15 77 actually provides rule-based justification for doing
16 it. And in fact Rule 77 says, "Every trial on the
17 merits must be conducted in open court and, so far as
18 convenient, in a regular courtroom."

19 And so the courts that have evaluated these
20 cases under Rule 77 have found that this passes muster
21 as further support for the Rule 43 analysis.

22 There's also a variety of cases that order
23 oral depositions to be done by video conference, and
24 those cases, while done under the Rule 30 auspices, they
25 actually are decided under the higher standard of good

1 cause of Rule 43. And we have outlined all of that in
2 our papers, your Honor, so I'm just quickly pointing
3 some of that out to the Court.

4 And then finally, your Honor, we don't believe
5 that there are any Seventh Amendment concerns. We
6 believe that if your Honor looks to the criminal cases,
7 there is a clear distinction between the Sixth Amendment
8 right to confront and how the Seventh Amendment applies,
9 and we feel that there's lots of language in those
10 cases, particularly addressing the issue of Zoom trials,
11 that provides further support that there is no
12 prohibition under the Seventh Amendment.

13 Going beyond that, your Honor, just to -- we
14 feel that there's -- really the objections for the most
15 part are logistical and that we have a number of
16 proposals.

17 I know that we all talked -- the defendants
18 and plaintiffs talked and exchanged ideas, and I quite
19 frankly don't think that if we need to, we would -- we
20 are very far apart on many issues. So we can get more
21 specific into the logistical issues, but I think that
22 there are answers to every problem that can be pointed
23 out, and those answers all push for trial in the first
24 instance.

25 And I would just finally leave the Court with

1 a case which is perhaps the most cited case of the
2 recent cases on COVID-19. It is the In Re: Broiler
3 Chicken Antitrust Litigation, and there the Court
4 recognized the underlying principal that the right to
5 proceed in court should not be denied except under the
6 most extreme circumstances, and the Court further
7 discusses how putting the cases in a prolonged holding
8 pattern would essentially cause the litigation to tread
9 water throughout the length of the pandemic.

10 So I think that our papers more fully set out
11 the arguments, but that is just the Cliff Note
12 highlights, your Honor.

13 THE COURT: Okay. And I won't make any
14 decision on that obviously until I have a chance to read
15 through that. I think, you know, it would be far better
16 if I had everybody's consent. That would be my
17 preference just as a trial judge. I much prefer
18 defendants who are consenting to this procedure in this
19 really rather remarkable set of circumstances that we
20 find ourselves in. That's my preference.

21 But short of that I was going to try to
22 propose some logistical solutions, and I'll give you an
23 example of one. And again, this would be proposed in
24 the event that maybe defense counsel would be more
25 willing to agree to a remote trial under these

1 circumstances.

2 One of the major concerns at least in your
3 brief was the issue of the judge's obligation to oversee
4 the jury, to protect the jury, to protect the jury's
5 secrecy and deliberations and those issues.

6 So it did occur to me that I could probably
7 because it would be a smaller jury -- a civil trial is a
8 smaller jury than a criminal trial. Right now we have
9 16 jurors in our courtroom in a criminal trial. So this
10 would be a smaller number.

11 We would obviously probably agree on maybe
12 perhaps a couple of extra alternates just in case
13 because of the length of the trial and the situation
14 we're in.

15 But ultimately we could pick the jury and I
16 could allow one lawyer from each side to come to New
17 Hampshire to pick the jury and be part of that jury
18 selection process, and then ultimately I could stay in
19 the courtroom with the jurors each day thereby
20 alleviating all of the issues with respect to access to
21 the Internet, access to a computer, and then judicial
22 oversight of the jury.

23 And I've already talked to my courtroom staff
24 about the possibility of this and all of the big screens
25 that we could bring into that courtroom and allow the

1 jury trial to proceed remotely, but in the courtroom I
2 would be present with the jurors.

3 The jury selection process would be done more
4 traditionally, and I could describe that to you as well.
5 We obviously have to stagger our jurors in terms of
6 numbers and the voir dire process, but it would be
7 familiar to you basically. It would not be this
8 completely remote virtual experience that none of us are
9 familiar with yet.

10 So those were going to be some of my
11 logistical solutions to some of the issues the defendant
12 raised with respect to a virtual trial. I think that
13 addresses I think many of the concerns that defendants
14 had raised. And it would be my effort, obviously my
15 attempt to try to get defendants to agree and consent to
16 go ahead and do this and do it under circumstances as I
17 just described, which would involve me in a courtroom
18 with the jurors, and then we would go through exactly
19 how the case would be tried digitally with witnesses and
20 lawyers.

21 You could probably talk me into, although I'm
22 not sure it's necessary, having one lawyer from each
23 side in the courtroom through the whole thing, but I
24 just don't think that's -- I don't think that's
25 necessary, but again, I'm open to creative solutions to

1 this. I will let counsel think about this and continue
2 to meet and confer. Rather than thrust my, you know,
3 decision onto litigants, I would rather have you come to
4 me with a procedure that both of you can stomach.

5 And I appreciate that plaintiffs are ready to
6 go whatever the procedure is, including a full-on, you
7 know, video trial, but I would like to see if I can't
8 pull defendants perhaps a little closer to some sort of
9 agreement to a remote procedure. It would keep the case
10 on track and it would allow for I think a safe, very
11 safe trial. It would allow all of you to stay remote.

12 Obviously you would have to figure out the
13 logistics of running your trial remotely, I would leave
14 that obviously to you, but it would keep everybody,
15 witnesses, lawyers, safe during the trial, and I think
16 the small amount of jurors and myself in a courtroom.

17 Based on all the research I've done and the
18 consulting I've done with an infectious disease expert
19 about our courthouse and about mitigation during COVID,
20 I'm very confident I could pull that off.

21 That was an idea that I had in response to
22 reading the defendant's objection. I have not heard of
23 that being done. That's simply something that I thought
24 of as a response for the hearing today. So I want to
25 throw that out and ask counsel to consider that.

1 I know that defense counsel would like me to
2 give more time and give counsel till January, let
3 counsel continue to, you know, do discovery, prepare
4 their bellwethers, but to move Barron to January, and I
5 just want you to think about this. I'm not saying no.

6 I also note that you've asked for a special
7 master, and I'm certainly willing to entertain
8 conversations along those lines.

9 So what I think I'll do is I think everything
10 in the agenda speaks for itself. I want to give you an
11 opportunity to say anything if you want to about the
12 agenda, something I haven't spoken to, and then perhaps
13 I'll let you meet and confer. I'll think further. I
14 need to read the briefing that Attorney Orent has filed
15 on behalf of the plaintiffs and see if counsel can't
16 come up with a proposal that meets both sides' approval
17 and then you bring it to me and I'll consider it.

18 So right now we were going to talk about the
19 Barron trial, perhaps talk about scheduling it, and I
20 think I'm going to put that off again, kick the can down
21 the road not for long, we can reconvene in a couple of
22 weeks, but I want to give counsel an opportunity to work
23 out some of these issues and perhaps reach agreement.

24 And to the extent -- I do want you to continue
25 talking about mediation and settlement, and so I want --

1 obviously I've asked for you to give me information on
2 that.

3 And defendants didn't have a chance to respond
4 to Attorney Orent's proposal. I don't know if you want
5 to speak to that today or if it would be better if I let
6 you just meet and confer and then let me know where
7 you've, you know, what your new date is and if you both
8 agree on a special master/mediator so we can at least
9 get that started so that it's going along the same track
10 of whatever trial schedule we come up with.

11 MR. CHEFFO: So very briefly, your Honor.

12 You've given us some food for thought, and we
13 do appreciate your kind of comments both on the logistic
14 and constitutional issues, and we appreciate Mr. Orent
15 and his team suggesting something.

16 If it is okay, I would like to just maybe muse
17 it over a little bit, talk to our client, and then very
18 quickly, you know, talk to Mr. Orent about it.

19 So we're not opposed to the concept of a
20 mediator, but maybe we can just talk about what that
21 might look like, and whether it's stage 1 or stage 2, if
22 we talk to each other informally.

23 THE COURT: Okay. All right. Well, I'm going
24 to just give you more time. But before I get off, I
25 want to make sure we cover whatever issues in the agenda

1 need to be addressed.

2 Anybody want to put something on the table for
3 discussion or are you guys ready to go meet and confer
4 about Barron and the possibility of a remote trial, a
5 mediator, possibility of a mediator, and getting into
6 settlement discussions as we talk also about a trial?

7 MR. ORENT: Nothing further for the
8 plaintiffs, your Honor. I believe you have given us a
9 lot to think about, and we will reach out to the
10 defendants and attempt to resolve some of these issues.

11 THE COURT: Okay.

12 MR. CHEFFO: We can agree, your Honor. I
13 agree with Mr. Orent completely on that.

14 THE COURT: Okay. You both agree that we
15 should adjourn.

16 I'll meet with you again at some time that
17 works for the parties probably in the next two weeks,
18 something like that, and we can finalize these
19 outstanding issues.

20 Thank you all very much.

21 Court is adjourned.

22 MR. ORENT: Thank you, your Honor.

23 MR. CHEFFO: Thank you, your Honor.

24 (Conclusion of hearing at 2:24 p.m.)

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C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 8-26-20 /s/ Susan M. Bateman
SUSAN M. BATEMAN, RPR, CRR