

UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE:

ATRIUM MEDICAL CORP. C-QUR MESH
PRODUCTS LIABILITY LITIGATION

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) MDL NO. 2753
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)

**DEFENDANTS' RESPONSE IN SUPPORT OF MOTION OF PLAINTIFFS
DANIEL HICKS, NICOLE YOUNG, MARTHA LUNA, FELICIA BLACKWOOD,
JEFFERY CROUCHER, ANN ACKLEY, AND ANDJA BADRY FOR
TRANSFER AND CONSOLIDATION OF RELATED ACTIONS
TO THE DISTRICT OF NEW HAMPSHIRE PURSUANT TO 28 U.S.C. § 1407**

COME NOW, Defendants Atrium Medical Corporation (“Atrium”) and Maquet Cardiovascular, LLC (“Maquet CV”)¹, Getinge USA, Inc.², and Getinge AB³ (collectively “Defendants”), by and through undersigned counsel, and respond in support of the Motion for Transfer and Consolidation of Thirteen Related Actions to the District of New Hampshire Pursuant to 28 U.S.C. § 1407 (“MDL Motion”), stating as follows:

¹ Maquet Cardiovascular, LLC is named in only two of the cases at issue: *Julie Ann Bryant, et al. v. Atrium Medical Corporation, et al.*, Civil Action No. 3:16-cv-00123, Middle District of Georgia, in which it has been served; and *Richard Heinz v. Atrium Medical Co., et al.*, Civil Action 4:16-cv-1587, Eastern District of Missouri, in which it has not been served. Maquet Cardiovascular, LLC is therefore specially appearing to submit this Response in Support of the Motion for Transfer and Consolidation of Related Actions to the District of New Hampshire Pursuant to 28 U.S.C. § 1407, and does not waive, and in fact expressly reserves, all available defenses based upon insufficient service of process, lack of personal jurisdiction, lack of subject-matter jurisdiction, or improper venue.

² Getinge USA, Inc. is named in only one of the cases at issue, *Richard Heinz v. Atrium Medical Co., et al.*, Civil Action 4:16-cv-1587, Eastern District of Missouri, and has not yet been served. Getinge USA, Inc. is therefore specially appearing to submit this Response in Support of the Motion for Transfer and Consolidation of Thirteen Related Actions to the District of New Hampshire Pursuant to 28 U.S.C. § 1407, and does not waive, and in fact expressly reserves, all available defenses based upon insufficient service of process, lack of personal jurisdiction, lack of subject-matter jurisdiction, or improper venue

³ Getinge AB is named in only two of the cases at issue: *Julie Ann Bryant, et al. v. Atrium Medical Corporation, et al.*, Civil Action No. 3:16-cv-00123, Middle District of Georgia; and *Richard Heinz v. Atrium Medical Co., et al.*, Civil Action 4:16-cv-1587, Eastern District of Missouri, and has not yet been served in either. Getinge AB is therefore specially appearing to submit this Response in Support of the Motion for Transfer and Consolidation of Thirteen Related Actions to the District of New Hampshire Pursuant to 28 U.S.C. § 1407, and does not waive, and in fact expressly reserves, all available defenses based upon insufficient service of process, lack of personal jurisdiction, lack of subject-matter jurisdiction, or improper venue.

I. INTRODUCTION

Plaintiffs Nicole Young, Daniel Hicks, Martha Luna, Felicia Blackwood, Jeffery Croucher, Ann Ackley and Andja Badry (“MDL Movants”) have sought consolidation and transfer of their matters to the District of New Hampshire for treatment of their, and similarly-situated, cases as a multidistrict litigation. Similar to their counterparts who have filed in other Districts, the MDL Movants have pursued various causes of actions against Defendants arising out of alleged injuries sustained following the implantation of C-QUR surgical mesh manufactured by Atrium (“C-QUR Actions”). To date, fourteen⁴ cases currently pending in seven different federal districts have been identified for potential transfer and consolidation. A fifteenth case, *Joseph A. Godwin v. Maquet Cardiovascular US Sales LLC formerly Atrium Medical Corporation*, No. 2016 11402, pending in the Seventeenth Judicial Circuit in and for Volusia County, Florida, will be eligible for transfer once served and removed to the Middle District of Florida. Many of the C-QUR Actions, are in their infancy and no responsive pleading has been filed.⁵ Discovery has only begun in two actions: *Zissa* and *Ferguson*.

⁴ The fourteen cases consist of: *Ann Ackley v. Atrium Medical Co.*, Civil Action 1:16-cv-00358, District of New Hampshire; *Andja Badry v. Atrium Medical Co.*, Civil Action 1:16-cv-00360, District of New Hampshire; *Felicia Blackwood v. Atrium Medical Co.*, Civil Action 1:16-cv-00379, District of New Hampshire; *Julie Ann Bryant, et al. v. Atrium Medical Corporation, et al.*, Civil Action No. 3:16-cv-00123, Middle District of Georgia; *Jeffrey Croucher v. Atrium Medical Corporation*, Civil Action No. 1:16-cv-00371, District of New Hampshire; *Doris Dallas v. Atrium Medical Corporation*, Civil Action No. 4:16-cv-00295, Northern District of Florida; *Daniel Hicks v. Atrium Medical Co.*, Civil Action 1:16-cv-00357, District of New Hampshire; *Ferguson v. Atrium Medical Corporation*, Civil Action No. 2:16-cv-02058, District of Kansas; *Iris Guzman v. Atrium Medical Corporation*, Civil Action No. 2:16-cv-12179, Eastern District of Louisiana; *Daniel Hicks v. Atrium Medical Co.*, Civil Action 1:16-cv-00357, District of New Hampshire; *Richard Heinz v. Atrium Medical Co., et al.*, Civil Action 4:16-cv-1587, Eastern District of Missouri; *Martha Luna v. Atrium Medical Corporation*, Civil Action No. 1:16-cv-00372, District of New Hampshire; *Young v. Atrium Medical Corporation*, Civil Action No. 1:16-cv-00195, District of New Hampshire; and *Zissa v. Atrium Medical Corporation*, Civil Action No. 5:15-CV-00718 DAE, Western District of Texas. Following the filing of the MDL Motion on October 10, 2016, *Jennifer Dowell, et al. v. Atrium Medical Corporation and Does 1-20*, Civil Action No. 1:16-cv-00454, District of New Hampshire, was filed on October 12, 2016.

⁵ Responsive pleadings have not yet been filed in the following C-QUR Actions: *Ann Ackley v. Atrium Medical Co.*, Civil Action 1:16-cv-00358, District of New Hampshire; *Andja Badry v. Atrium Medical Co.*, Civil Action 1:16-cv-00360, District of New Hampshire; *Felicia Blackwood v. Atrium Medical Co.*, Civil Action 1:16-cv-00379, District of New Hampshire; *Julie Ann Bryant, et al. v. Atrium Medical Corporation, et al.*, Civil Action No. 3:16-cv-00123, {39891804;2}

Because the principal aims of multidistrict litigation – preserving resources of the courts and litigants, preventing the submission of duplicative filings, and avoiding inconsistent decisions on the same pretrial issues by allowing a single transferee court to consider the common legal and factual pretrial issues together and issue consistent rulings on such issues – will be achieved by centralization of the C-QUR Actions, Defendants request that the MDL Motion be granted.

II. ARGUMENT

The authority to transfer cases to an MDL is found in 28 U.S.C. § 1407(a), which provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(Emphasis in original). The following three criteria must be satisfied in order to transfer cases to a transferee court for consolidated pretrial proceedings:

1. The cases must share more than one question of common fact. The issues must be material, contested and factual. Legal issues are not sufficient.
2. Transfer must advance just and efficient conduct of the actions.
3. Transfer must serve the convenience of the parties and witnesses.

Each criterion is considered in turn.

A. The C-QUR Actions Share Common Questions of Fact and Law.

Middle District of Georgia; *Jennifer Dowell, et al. v. Atrium Medical Corporation and Does 1-20*, Civil Action No. 1:16-cv-00454, District of New Hampshire; *Daniel Hicks. v. Atrium Medical Co.*, Civil Action 1:16-cv-00357, District of New Hampshire; and *Richard Heinz v. Atrium Medical Co., et al.*, Civil Action 4:16-cv-1587, Eastern District of Missouri.
{39891804;2}

The requirement that the cases share more than one question of common fact and law is satisfied for the C-QUR Actions. All of the Plaintiffs were allegedly implanted with C-QUR™ Mesh, C-QUR TacShield™, or C-QUR V-Patch™ (collectively referred to as “C-QUR Mesh”). The C-QUR Mesh is unique in that it combines Atrium’s polypropylene mesh with an all-natural Omega 3 gel coating derived from highly purified pharmaceutical grade fish oil consisting of a unique blend of triglycerides and Omega 3 fatty acids.

Plaintiffs generally allege design defect, manufacturing defect, failure to warn, misrepresentation, fraud, and breach of warranty claims. Their claims therefore pose similar legal and factual allegations, including but not limited to whether Atrium breached its duty of care by failing to design and manufacture a reasonably safe product, whether the design and manufacture of the C-QUR Mesh was unreasonably dangerous, whether Atrium warranted its product and breached any such warranties, and whether Atrium intentionally, recklessly, or negligently concealed and/or misrepresented information regarding the efficacy of its C-QUR Mesh.

Although each plaintiff's case may present some individual factual issues concerning his/her care, treatment, prognosis and injuries, complete identity of factual issues is not a prerequisite to centralization, especially in a medical device context. *See In re Mirena IUD Prods. Liab. Litig.*, 938 F. Supp. 2d 1355, 1357 (U.S. Jud. Pan. Mult. Lit. 2013); *In re: Zimmer Durom Hip Cup Prods. Liab. Litig.*, 717 F. Supp. 2d 1376, 1377-78 (U.S. Jud. Pan. Mult. Lit. 2010).

B. Transfer Pursuant to 28 U.S.C. § 1407(a) Will Advance the Just and Efficient Litigation of the Actions.

Centralization in this instance promotes efficiency and judicial economy, and avoids inconsistency and redundancy. *See, e.g., In re: Darvocet, Darvon & Propoxyphene Prod. Liab.* {39891804;2}

Litig., 780 F. Supp. 2d 1379 (U.S. Jud. Pan. Mult. Lit. 2011) (finding that pretrial proceedings was warranted for actions in multidistrict litigation concerning the safety and marketing of certain medications; actions shared factual issues, and centralization would help limit duplicative discovery, prevent inconsistent pretrial rulings on discovery and other issues, and conserve the resources of the parties, their counsel and particularly the judiciary).

Where “a single judge [can] formulate a pretrial program that prevents duplicative proceedings on common issues and allows pretrial procedures on case specific issues” centralization favored. *Id.* at 1381. As noted above, responsive pleadings have yet to be filed in several of the C-QUR Actions. If these actions are transferred and consolidated before a single district court, it would be common for the transferee court to direct that a single consolidated complaint be prepared, allowing the Defendants to answer or otherwise respond once, rather than multiple times, and streamlining the motion practice concerning the properly named defendants and viable claims against them. *See* 8 Moore’s Federal Practice, § 42.13[5][a] at 42-30.1 (noting advantages of consolidated complaints as management tool for complex litigation). Moreover, because many of the cases are in their infancy, a pretrial program can effectively be established.

Centralization, as opposed to coordination under 28 U.S.C. § 1404(a), which states “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented,” is more advantageous given the number of pending actions over multiple districts, and the potential of additional tag along cases. *See, e.g., In re: UBS Fin. Servs., Inc., Wage & Hour Employment Practices Litig.*, 818 F. Supp. 2d 1380, 1381 (U.S. Jud. Pan. Mult. Lit. 2011) (denying centralization where there were only two cases before the Panel, the cases here were not particularly complex, and informal cooperation to avoid duplicative proceedings was more appropriate where plaintiffs shared counsel).

{39891804;2}

Here, the common issues of fact and law are sufficiently complex as has been previously determined in the medical device arena. *In re American Medical Systems, Inc., et al., Pelvic Repair Systems Prods. Liab. Litig.*, 844 F. Supp. 2d 1359, (U.S. Jud. Pan. Mult. Lit.. 2012); *In re Coloplast Corp. Pelvic Repair Support Sys. Prods. Liab. Litig.*, 883 F. Supp. 2d 1348 (U.S. Jud. Pan. Mult. Lit. 2012). There are multiple districts affected in that there are fourteen cases pending across seven different federal districts that have been identified for potential transfer and consolidation. There is association of counsel by plaintiffs' counsel in eleven of the fourteen cases. Robert Bonsignore, Aaron Broussard, and Adam Evans are all counsel of record in *Young*. In addition to *Young*, Robert Bonsignore is also counsel of record in *Ackley*, *Badry*, *Blackwood*, *Croucher*, *Hicks*, and *Luna*. In addition to *Young*, Aaron Broussard is counsel of record *Zissa* and *Guzman*. In addition to *Young*, Adam Evans is counsel of record in *Heinz* and heavily involved in *Dallas*. Nevertheless, all counsel are not presently associated and counsel for possible future tag along cases may also be independent, further complicating efficient and effective cooperation across all actions.

C. Centralization Pursuant to 28 U.S.C. § 1407 Will Serve the Convenience of the Parties and Witnesses.

Transfer and consolidation will undoubtedly serve the convenience of parties and witnesses, because in their absence, extensive, costly, and duplicative discovery will be required in multiple jurisdictions across the United States. *See In re: Bear Creek Techs., Inc.*, ('722) *Patent Litig.*, 858 F. Supp. 2d 1375, 1380 (U.S. Jud. Pan. Mult. Lit. 2012) (centralizing fourteen actions pending in three districts involving common questions of fact where centralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary). In this manner, the goal of protecting the parties and witnesses from inconvenience, added expense and loss of forum choice is achieved.

1. New Hampshire is the Proper Venue and Judge Landya B. McCafferty Is a Suitable Presiding Judge.

Numerous factors militate toward centralization in the District of New Hampshire, and thus Defendants agree with the MDL Movants' preference of this venue. Half of the pending cases are in the District of New Hampshire and no other district currently has more than one C-QUR Action. New Hampshire is Defendant Atrium's home venue, and therefore the majority of the relevant documents and witnesses as to the common questions of fact and law are located there. While this would not eliminate any discovery objection based upon inconvenience or undue and overly burdensome, it would facilitates discovery more than any other venue in which a C-QUR action is presently pending.

Additionally, twenty-six (26) cases against Defendants involving plaintiffs with alleged injuries sustained following the implantation of a C-QUR™ surgical mesh product are pending in the Superior Court for Hillsborough County Southern Judicial District before the Honorable Charles S. Temple. Counsel of record in the state court actions against the Defendants and counsel of record in at least one of the C-QUR Actions at issue here is the same. Defendants are represented by undersigned counsel in the state court actions as well. Aside from two other cases, one of which is the earlier-mentioned *Joseph A. Godwin v. Maquet Cardiovascular US Sales LLC formerly Atrium Medical Corporation*, No. 2016 11402, pending in the Seventeenth Judicial Circuit in and for Volusia County, Florida, there are no other cases against the Defendants related to the C-QUR Mesh in the state courts. While general discovery, including ESI, is further along in the New Hampshire state court actions, coordination of discovery and other pretrial proceedings among the state and federal matters is most optimal in the District of New Hampshire.

Likewise, Defendants agree with MDL Movants that the Honorable Landya B. McCafferty in the District of New Hampshire, if willing, would be capable of handling the matters and preferable as the *Young* matter, which is currently pending before Judge McCafferty, is also the case furthest along in the District of New Hampshire. In the *Young* case, Judge McCafferty or Magistrate Judge Johnstone have presided over a number of pre-trial matters including Rule 16 Initial Conference, Rule 26 Initial Disclosures, the issuance of a proposed discovery plan and trial notice, and the initial briefing of a proposed ESI Protocol. Yet, general discovery has not begun in the *Young* matter, so coordination at this stage would be practicable given that no other activity has occurred in any of the other District of New Hampshire C-QUR Actions aside from the filing of responsive pleadings in *Luna* and *Croucher*.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that transfer and consolidation of the C-QUR Actions and any subsequently filed tag along action be ordered in the District of New Hampshire before the Honorable Landya B. McCafferty pursuant to 28 U.S.C. § 1407.

Date: November 1, 2016

Respectfully submitted,

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**UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

IN RE: ATRIUM MEDICAL CORP.) **MDL No. 2753**
C-QUR MESH PRODUCTS LIABILITY)
LITIGATION)

AMENDED PROOF OF SERVICE

In accordance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that a true and correct copy of The Notice of Appearance, the Corporate Disclosure Statement on behalf of Atrium Medical Corporation and the Corporate Disclosure Statement on behalf of Maquet Cardiovascular, LLC have this date been filed electronically with the Clerk of Court using the CM/ECF system. Notice of these filings will be sent to all counsel of record and parties by operation of the Court's electronic filing system, and via U.S. Mail to all counsel of record and parties where electronic service is unavailable.

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