

**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 Docket No. 1:16-md-02753-LM ALL CASES |
|---|---------------------------------|---|

**PLAINTIFFS’ AND DEFENDANTS’ JOINT AGENDA
FOR FEBRUARY 11, 2021 STATUS CONFERENCE**

Now come the parties in the above-entitled multidistrict litigation and jointly submit the below report on the status of the litigation, in advance of the Status Conference to be held on February 11, 2021.

I. First Two Cases

At the conference with the Court on July 28, 2020, Plaintiffs proposed that the first case to be tried should be *Barron*, No. 1:17-cv-00742-LM, and Defendants proposed *Luna*, No. 1:16-cv-00372-LM. Although neither side objected to *Barron* and *Luna* being the first two cases to be tried, they disagreed on which should be first. After hearing arguments from both sides, the Court indicated that *Barron* would be the first case to be tried.

During the last hearing, the parties discussed with the Court the possibility of beginning the *Barron* trial in May or June 2021. During a recent meet and confer, the Defendants advised Plaintiffs that trial conflicts had since developed during the initially proposed time frame and proposed beginning trial on June 28, 2021 or July 6, 2021. Plaintiffs suggested beginning trial on June 7, 2021 but are willing to accommodate Defendants’ schedule. To avoid a holiday in the midst of the presentation of evidence, the parties thus propose July 6, 2021 as the trial date for *Barron*.

II. Trial Logistics and Procedures

On December 1, 2020, the parties submitted an agreed upon, proposed juror questionnaire for the Court's consideration, which the Court has taken under advisement. (*See Barron* Dkt. 181; Endorsed Order dated December 1, 2020.) The parties have also exchanged exhibit lists, witness lists, and deposition designations. In light of the revised trial date, the parties agreed to adjourn the filing of pretrial statements (*Barron* Dkt. 208), and the Court so-ordered that proposal on January 8, 2021.

The Court and the parties are optimistic that the *Barron* trial will proceed in-person. The parties will revisit discussions regarding remote trial logistics if it becomes necessary.

III. Pending *Barron* Motions

Since the Court's ruling on Plaintiffs' motion *in limine* on the FDA 510(k) process, the parties have continued to meet and confer about the effects of that ruling on the regulatory experts and other regulatory evidence. The parties are negotiating and drafting a joint stipulation that, if finalized, would obviate the need for the Court to rule on the balance of parties' *Daubert* motions directed at regulatory experts.

The parties have filed motions *in limine* and reached agreement on others pre-filing. The parties continue to meet and confer on the filed motions *in limine* to attempt to narrow or resolve the issues where possible. The parties have thus far reached agreements that moot the following filed motions *in limine*:

| Docket | Motion |
|--------|---|
| 172 | Plaintiffs' Motion <i>in Limine</i> No. 6: Marijuana Use |
| 178 | Defendants' Motion <i>in Limine</i> No. 1: Inflammatory Communications |
| 168 | Defendants' Motion <i>in Limine</i> No. 6: Italian Criminal Proceedings |

| | |
|-----|--|
| 174 | Defendants' Motion <i>in Limine</i> No. 12: C-QUR Is No Longer Sold Defendants' Motion <i>in Liminie</i> No. 13: Presence or Absence of any Corporate Representative Defendants' Motion <i>in Liminie</i> No. 14: Altered Deposition Exhibits |
|-----|--|

In addition, the parties' framework for resolving their regulatory *Daubert* motions may, if entered into, resolve Defendants' Motion *in Limine* No. 5: FDA Observations and Letters and Consent Decree (Dkt. 167). The parties anticipate finalizing stipulations on outstanding motions *in limine* in advance of the next status conference.

IV. Pending *Luna* Motions

The parties have agreed on a framework and are conferring over a proposed order to submit to the Court that would adjudicate the below motions pending in *Luna* that substantively overlap with the motions that the Court ruled on in *Barron*, while also preserving the parties' respective positions. The parties anticipate finalizing their submission in advance of the next status conference.

A. Plaintiffs' Motions to Exclude or Limit Defendants' Non-Regulatory Experts in *Luna*

The following *Daubert* motions seeking to exclude or limit Defendants' non-regulatory experts were filed by Plaintiffs and have been fully briefed.

1. Plaintiffs' Motion to Exclude the Testimony and Opinions of Stephen Spiegelberg, Ph.D. (*Luna* Dkt. 213);
2. Plaintiffs' Motion to Exclude the Opinions and Testimony of Defendant's Expert Steven R. Little, Ph.D. (*Luna* Dkt. 212);
3. Plaintiffs' Motion to Exclude the Opinions, Testimony and Report of Defense Expert David Brooks, M.D. (*Luna* Dkt. 210); and
4. Plaintiffs' Motion to Exclude the Testimony and Opinions of Richard Jacobs, M.D., Ph.D. (*Luna* Dkt. 211).

B. Defendants' Motions to Exclude or Limit Plaintiffs' Non-Regulatory Experts in *Luna*

The following *Daubert* motions seeking to exclude or limit Plaintiffs' non-regulatory experts were filed by Defendants and have been fully briefed.

1. Defendants' Motion to Exclude Certain Opinions and Testimony of Howard Langstein, M.D. (*Luna* Dkts. 215, 216);
2. Defendants' Motion to Exclude Certain Opinions and Testimony of Scott Guelcher, Ph.D. (*Luna* Dkts. 221, 222);
3. Defendants' Motion to Exclude Certain Opinions and Testimony of Prof. Dr. Med. Uwe Klinge (*Luna* Dkts. 223, 224); and
4. Defendants' Motion to Exclude Certain Opinions and Testimony of Russell F. Dunn, Ph.D. (*Luna* Dkts. 218, 220).

C. Motions to Exclude or Limit Regulatory Experts in *Luna*; Plaintiffs' Motion in *Limine* to Exclude Evidence Relating to the 510(k) Process

The following *Daubert* motions were filed by both sides against the other side's regulatory expert and have been fully briefed. In addition, on August 14, 2020, Plaintiffs filed a Motion in *Limine* to Exclude Evidence Relating to the United States Food and Drug Administration ("FDA") 510(k) Clearance Process. That motion has also been fully briefed.

1. Plaintiffs' Motion to Exclude Testimony, Opinions, and Report of Defendant's Expert Timothy Ulatowski (*Luna* Dkt. 214);
2. Defendants' Motion to Exclude Certain Opinions and Testimony of Peggy Pence, Ph.D. (*Luna* Dkt. 225, 226); and
3. Plaintiffs' Motion in *Limine* to Exclude Evidence Relating to the United States Food and Drug Administration ("FDA") 510(K) Clearance Process. (*Luna* Dkt. 202.)

V. Pending Dispositive Motions

1. Plaintiffs' Motion to Strike Affirmative Defenses to Long Form Complaints of Bellwether Plaintiffs, or Alternately, for Partial Summary Judgment (MDL Dkt. 1206). This motion has been fully briefed.
2. Defendants' Motion for Summary Judgment in *Luna* (*Luna* Dkts. 217, 218). This motion has been fully briefed. The parties are conferring over a proposed order to

submit to the Court that would adjudicate the portions of this motion in *Luna* that substantively overlap with the summary judgment rulings the Court made in *Barron*.

VI. Trial After *Barron* and *Luna*

The parties are conferring about the case to be tried after *Luna* and anticipate submitting either agreed or competing proposals for the March status conference.

VII. Other Pending Matters for Resolution

1. *Tremaine Hawkins v. Atrium Medical Corporation*, 1:19-cv-00364

By order dated November 25, 2019 (*Hawkins* Dkt. 6), this Court ordered the Plaintiff to have his new attorney file an appearance or to file a *pro se* appearance by December 30, 2019. The Court's order stated: "If no appearance is filed by an attorney or you do not file an appearance to proceed *pro se* by Monday, December 30, 2019, the cause may be dismissed for failure to prosecute your claims." (*Hawkins* Dkt. 6 at 1.) Plaintiff has not filed either an attorney or a *pro se* appearance, and therefore, this case can be dismissed.

2. *Gager v. Atrium Medical Corporation*, 1:18-cv-01174

On November 9, 2020, Plaintiff's counsel moved to withdraw from this matter on the grounds that Plaintiff has not responded to counsel's communications so that the Plaintiff's Profile Form can be completed. (*Gager* Dkt. 7.) Judgment was entered dismissing the case on February 1, 2021. (*Gager* Dkt. 13.)

VIII. Outstanding Depositions

The parties agreed to reserve depositions of family members (other than spouses who are making claims) until such time as they are designated as trial witnesses.

Plaintiffs and Defendants have been conferring on a rolling basis regarding the dates for depositions of sales representatives in *Barron* and *Luna*. The sales representative in *Barron* was

deposed on January 28, 2020. In the event that those discussions reach an impasse, the parties may seek guidance from the Court.

IX. Alternative Dispute Resolution

The parties have continued to engage in good faith and productive dialogue.

X. Administrative Update to Case Management Order No. 2

Case Management Order No. 2 (Doc. 1196, Mar. 5, 2020) should be updated in Section III to revise two email addresses, as underscored below:

III. SERVICE OF PROCESS

In order to eliminate disputes over service of process, Defendants agree that they will waive formal service of process in cases in this MDL.

To effectuate service, plaintiffs shall send a conformed or stamped copy of the filed complaint and a request for waiver of service pursuant to the provisions of Fed. R. Civ. P. 4(d) by jointly emailing EACH of the two following individuals: Pierre Chabot at pchabot@devinemillimet.com; and mesh@dechert.com

XI. Outstanding Meet and Confer Issues

The parties continue to meet and confer regarding various other matters, but none has reached an impasse requiring court intervention.

Dated: February 4, 2020

Respectfully submitted,

/s/ Paul LaFata

Mark S. Cheffo

Katherine Armstrong

Paul LaFata

DECHERT LLP

Three Bryant Park

1095 Sixth Avenue

New York, New York 10036

Tel: (212) 698-3500

Fax: (212) 698-3599

mark.cheffo@dechert.com

katherine.armstrong@dechert.com

paul.lafata@dechert.com

Pierre A. Chabot – NHBA # 17606

DEVINE MILLIMET

111 Amherst Street

Manchester, NH 03101

Tel: (603) 695-8780

pchabot@devinemillimet.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2021, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of Notice of Electronic Filing to all counsel of record.

/s/ Paul LaFata

Paul LaFata