BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE:

MDL DOCKET NO. 3024

ATRIUM MEDICAL CORPORATION
PROLITE AND PROLOOP
HERNIA MESH LITIGATION

RESPONSE OF ATRIUM MEDICAL CORPORATION AND MAQUET CARDIOVASCULAR, LLC TO MOTION TO TRANSFER

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PRELIMINARY STATEMENT

Plaintiffs seek to formally consolidate cases against Atrium Medical Corporation ("Atrium") and Maquet Cardiovascular, LLC ("MCV LLC," and with Atrium, "Defendants") relating to two of Atrium's surgical mesh products, ProLite Mesh ("ProLite") and ProLoop Mesh ("ProLoop"). ProLite and ProLoop are polypropylene surgical mesh products that surgeons use to repair hernias. Hernia repair is one of the most common surgeries performed in the United States. The FDA cleared ProLite and ProLoop in 1993 and 2000, respectively, for surgeons to repair hernias, and they have been widely used for years. Plaintiffs allege various product liability claims for these two products, including that they were improperly manufactured, designed, and labeled. Defendants dispute these allegations and, consistent with the FDA's longstanding view, maintain that ProLite and ProLoop mesh are properly made, designed, and labeled.

In the over two decades that the products have been on the market, the federal courts have managed the few federal lawsuits against Atrium and MCV LLC without any need for formal coordination. *See* App'x A (Status of Pending ProLite and ProLoop Mesh Litigation).[1] Plaintiffs do not meet their burden to show that formal coordination in a multi-district litigation is necessary; to the contrary, the informal coordination that has occurred for years has proven to be working well. One case (*Africano*) has gone through a jury trial and is undergoing post-trial briefing; a second (*Mills*) has completed fact discovery and is close to finishing expert discovery; and a third (*Aguirre*) is in the middle of fact discovery. The most recently filed case (*Kolbeck*) is under a court order that the plaintiff must file an amended complaint properly alleging subject-matter

[1] Getinge AB has not been served in any pending case relating to ProLite or ProLoop. Although the plaintiffs in *Mills v. Ethicon,* attempted service, the court held that service was ineffective and dismissed Getinge AB. 406 F. Supp. 3d 363, 395 (D.N.J. 2019). Getinge AB was not subsequently served in *Mills*, and the case is finishing expert discovery.

jurisdiction, or face dismissal.[2] The procedural history of the federal ProLite and ProLoop cases shows that formal coordination is unnecessary. Indeed, most of the moving Plaintiffs are already in coordinated proceedings and represented by the same counsel.

If, however, the Panel is nevertheless inclined to formally coordinate the ProLite and ProLoop cases, then Defendants respectfully suggest that the proceedings be assigned to the Honorable Mary M. Rowland in the Northern District of Illinois, who is the only judge to guide a ProLite case through trial and is located in a central and convenient jurisdiction.

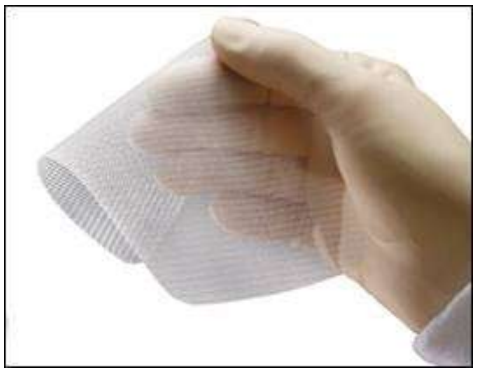
FACTUAL AND PROCEDURAL BACKGROUND

Surgeons use polypropylene mesh routinely to repair hernia in patients and have done so for decades. Unlike pelvic mesh—which the FDA no longer permits to be sold—polypropylene hernia mesh remains to this day the gold standard of medical care for hernia repair.[3] Atrium began selling ProLite in 1993 and ProLoop in 2000, after the FDA cleared the products for sale and use. MCV LLC has provided logistical support to Atrium since January 2014.

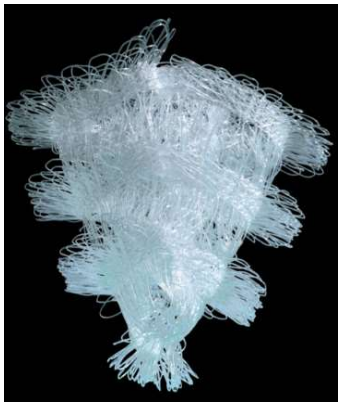
ProLite and ProLoop, depicted on the following page, are indicated for use in hernia repair, including ventral hernias and inguinal hernias:

[2] *See* Ex. 2, *Kolbeck v. Atrium Medical Corp.*, Docket (W.D. Wis. Jan. 3, 2022). None of the defendants named in *Kolbeck* has been served.

[3] ProLite and ProLoop Mesh were never designed or marketed for use in pelvic repair. Pelvic or transvaginal mesh repair is a different treatment with different products from that used to repair hernias. Pelvic mesh products are designed for use in elective surgeries with woman to address pelvic organ prolapse or stress urinary incontinence. Since the mid-2000s, the FDA has issued a series of warnings and recalls due to serious pelvic-mesh repair complications occurring in patients. However, hernia mesh, unlike pelvic mesh, was designed for use in non-elective surgeries in men and women to repair muscle wall when organs or fatty tissue push through a weak spot. Unlike pelvic mesh, hernia mesh remains cleared by the FDA and viewed by the medical field as the standard of surgical care for hernias.



ProLite example



ProLoop example

To date, ProLite and ProLoop have been successfully used in thousands of hernia repair procedures. The FDA has never withdrawn its clearance of these two products.

ProLite cases have been proceeding against Atrium and MCV LLC in federal courts since 2017. The first, *Africano v. Atrium Medical Corp.*, 1:17-cv-07238 (N.D. Ill. 2017), alleged strict liability and negligence product liability claims stemming from Atrium's manufacturing and labeling of ProLite. The parties spent years conducting extensive document and deposition discovery, and the resulting materials were shared with the plaintiffs in other ProLite cases to minimize duplication and expense. Expert discovery, too, was completed in *Africano* and used again in other litigation. Last fall, *Africano* proceeded to a jury trial before Judge Rowland. The jury found for Atrium on all issues and claims, final judgment was entered for Atrium, and post-trial briefing is *sub judice*.

Counsel for the plaintiff in *Africano* is also counsel in another ProLite case that has been pending since 2017: *Mills v. Atrium Medical Corp.*, 2:17-cv-12624-KM-MF (D.N.J. 2017). The parties have shared common fact and expert discovery between *Africano* and *Mills*. Fact discovery is closed, and the parties are finishing expert discovery, after which the parties must exchange settlement position statements by April 13, 2022, for a settlement conference with the court. Notably, in light of the substantial time and judicial and party resources spent from years of

litigation in *Mills*, the court last summer denied a request by the plaintiff to transfer the case to the Eastern District of Pennsylvania (where no other ProLite cases are pending). *See* 2:17-cv-12624-KM-MF, Dkt. 82, 83 (D.N.J. 2017).

Another ProLite case was filed against Atrium in 2018: *Aguirre v. Atrium Medical Corp.*, 2:18-cv-00153-WJ-GBW (D.N.M. 2018). As with the other ProLite cases, deposition and document discovery have been shared to minimize expense, inefficiency, and duplication. The parties in *Aguirre* will end fact discovery with case-specific depositions on or before April 19, 2022 and then hold a settlement conference on April 29, 2022.

With trial complete in *Africano* and discovery nearing completion in *Mills* and *Aguirre*, the remaining cases are *Avila* (2:21-cv-05223-CAS-MRW, C.D. Cal.) and *Kolbeck* (3:21-cv-00776-wmc, W.D. Wis.). Plaintiffs in *Avila* filed a consolidated action against Atrium involving ProLite and ProLoop in California state court. Fact discovery started in state court with jurisdictional discovery. Thereafter, based in part on facts learned from that discovery, the court held that it lacked personal jurisdiction over Atrium for claims by eleven of the plaintiffs. *See* Ex. 1, *Avila v. Atrium Medical Corp.*, Minute Entry (Sup. Ct. of Cal. May 28, 2021). With the lack of non-diverse plaintiffs, the case was removed. The parties proposed a discovery schedule, but Plaintiffs later sought a stay after filing the underlying motion to transfer. The three remaining Plaintiffs filed the underlying motion to formally coordinate proceedings.

Kolbeck (W.D. Wis.), a ProLite case, was filed on December 8, 2021, only two days before joining the instant motion to transfer. None of the defendants has been served. Shortly after Plaintiff filed his complaint, the court held that the jurisdictional allegations were insufficient and ordered Plaintiff to amend his allegations asserting subject-matter jurisdiction. Ex. 3, *Kolbeck*, 3:21-cv-00776-wmc, Dkt. 3 (W.D. Wis. Dec. 10, 2021). Plaintiff failed to do so by the court's

deadline. (*See* Ex. 3.) On January 3, 2022, the court extended the deadline briefly to January 10, 2022, stating: "In case there was some confusion as to this requirement, the court will provide plaintiff until January 10, 2022, to submit an amended complaint alleging the names and citizenship of each member of the defendant LLC. **Failure to do so, will result in dismissal of this action.**" Ex. 2 (emphasis original).[4]

In sum, the underlying motion is brought by four Plaintiffs represented by two law firms, and all but one Plaintiff is already in a coordinated proceeding.

ARGUMENT

This Panel, in setting Plaintiffs' motion to transfer for consideration, instructed the parties to "address what steps they have taken to pursue alternatives to centralization," such as "informal coordination" and "seeking Section 1404 transfers of one or more of the subject cases." (Dkt. 4.) Defendants are represented by the same national counsel in the ProLite and ProLoop cases, and there are overlapping counsel for the plaintiffs in most of the cases. As shown above, Defendants have successfully coordinated these cases using informal means, have litigated these cases for years, and even brought one case through trial to final judgment. In contrast, Plaintiffs here have not attempted any alternatives to centralization. Indeed, Plaintiffs in *Avila* told the court that they planned to move to transfer cases under Section 1404 to the court in *Mills* (D.N.J. filed 2017), but rather than first try alternatives to centralization, Plaintiffs instead filed their underlying motion. It should be denied.

[4] A single-plaintiff ProLoop case was also filed yesterday against Defendants in the District of Massachusetts, *Paye v. Atrium Med. Corp.*, No. 1:22-CV-10005-NMG (D. Mass. Jan. 3, 2022). Plaintiff's counsel are the same as in *Kolbeck*.

I. INFORMAL COORDINATION IS WORKING, AND PLAINTIFFS HAVE NOT TRIED ALTERNATIVES TO FORMAL COORDINATION

Plaintiffs in their motion rely on a false dichotomy: either formally consolidate the ProLite and ProLoop cases, or else courts and parties will face duplicative discovery, conflicting rulings, and other inefficiencies. History refutes Plaintiffs' view.

ProLite cases have been pending against Defendants in federal courts for years, and the record shows that informal coordination has actually avoided duplicative discovery, realized efficiencies for courts and parties, and prevented conflicting rulings. "[W]here, as here, 'only a minimal number of actions are involved, the proponent of centralization bears a heavier burden to demonstrate that centralization is appropriate.'" *In re Covidien Hernia Mesh Prods. Liab. Litig.*, 481 F. Supp. 3d 1348 (J.P.M.L. 2020) (denying motion for centralization, quoting *In re Hyundai and Kia GDI Engine Mktg., Sales Practices, & Prods. Liab. Litig.*, 412 F. Supp. 3d 1341, 1343 (J.P.M.L. 2019)); *accord In re: Lifewatch, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 140 F. Supp. 3d 1342, 1343 (J.P.M.L. 2015). Here, Plaintiffs fail to meet their heavy burden of demonstrating that centralization is appropriate, especially without taking any "steps … to pursue alternatives to centralization (including, but not limited to, engaging in informal coordination of discovery and scheduling, and seeking Section 1404 transfer of one or more of the subject cases)." (Dkt. 4.)

Moving Plaintiffs' cases are already largely consolidated. All but one of the moving Plaintiffs are represented by the same law firm, Keller, Fishback & Jackson LLP, in a coordinated proceeding, *Avila*, pending before the same judge in the same court. The other remaining case, *Kolbeck*, will be dismissed unless plaintiff timely cures his subject-matter jurisdiction allegations. Nothing more needs to be done to coordinate these actions, and Defendants will continue to coordinate discovery with Plaintiffs' counsel.

The other ProLite cases are at different and advanced stages of litigation. *Africano* has been tried to verdict with post-trial motions pending. *Mills* is done with fact discovery and finishing expert discovery. And *Aguirre* is finishing fact discovery. The parties in all of these actions have already benefitted from informal coordination of document and deposition discovery, both fact and expert discovery.

This Panel has repeatedly denied motions to centralize where parties can efficiently manage cases through cooperation of counsel, coordination, and other alternatives. For example, in *In re First American Financial Corp. Customer Data Security Breach Litigation*, the Panel "held that 'centralization under Section 1407 should be the ***last*** solution ***after*** considered review of all other options.'" 396 F. Supp. 3d 1372, 1373 (J.P.M.L. 2019) (emphasis added; quoting *In re Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011).) Because the parties had not yet considered other options, the Panel "encourage[d] the parties to employ the various alternatives to transfer that exist to minimize any potential for duplicative discovery and inconsistent pretrial rulings in this litigation." *First American*, 396 F. Supp. 3d at 1373. Here, Plaintiffs made filing the underlying motion their first option, before attempting any alternatives.

In their moving papers, Plaintiffs point to only four pending ProLite cases, each of which is proceeding at its own pace, and two of which are scheduled for settlement conferences this spring. All but one of the moving Plaintiffs are represented by the same law firm in a consolidated proceeding. Under similar circumstances, this Panel has declined requests to create a multidistrict docket. In *In re Covidien Hernia Mesh Products Liability Litigation*, the Panel found that the movants failed to meet the "high burden" required for centralization where "[t]he presence of common counsel … should facilitate informal coordination of this relatively small number

[twelve] of actions …. Plaintiffs in five of the twelve actions before the Panel are represented by the same law firm, and plaintiffs in another two actions also share counsel. Defendants are represented by the same law firm in nine of the actions." 481 F. Supp. 3d at 1349. Similarly, in *In re Lifewatch, Inc., Telephone Consumer Protection Act (TCPA) Litigation*, the movants failed to meet their "high burden" of showing that centralization was required where the defendant was represented by the same counsel in each matter, and "[t]hese cases already are being managed in an orderly and efficient manner, and the issues presented are not particularly complex." 140 F. Supp. 3d at 1343.[5]

Although the cases Plaintiffs seek to consolidate do involve some common factual issues, those common issues have aided, not impaired, informal coordination. As the Panel has recognized, "[t]he small number of actions suggests that cooperation and informal coordination by the involved courts and counsel should be feasible." *In re Prevagen Prods. Mktg. & Sales Practices Litig.*, 283 F. Supp. 3d 1379, 1380 (J.P.M.L. 2017) (citation omitted). Defendants have shown their willingness to cooperate with the plaintiffs' counsel, coordinating discovery with different counsel in several ProLite cases. Such informal coordination among counsel is "preferable to formal centralization." *In re Crest Sensitivity Treatment & Prot. Toothpaste Mktg. & Sales Practices Litig.*, 867 F. Supp. 2d 1348 (J.P.M.L. 2012). "Even if the pending transfer motion does not eliminate the multidistrict character of this litigation, voluntary cooperation and coordination among the small number of involved courts appears eminently feasible." *In re First Am. Fin. Corp. Customer Data Sec. Breach Litig.*, 396 F. Supp. 3d at 1373.

[5] Nor is it persuasive for Plaintiffs to point to other MDL proceedings involving hernia mesh. "A grant of centralization though does not guarantee that we will find centralization appropriate in another litigation alleging similar claims, and the Panel makes each of its decisions based on the circumstances presented by a particular litigation at the time." *In re Covidien Hernia Mesh Prods. Liab. Litig.*, 481 F. Supp. 3d at 1349.

Plaintiffs do not meet their "high burden" of explaining how formal coordination of ProLite and ProLoop cases is necessary. Plaintiffs cannot show that "the benefits of centralization outweigh the disruption to the pending actions, some of which have been pending in federal court for two or three years." *In re Covidien Hernia Mesh Prods. Liab. Litig.*, 481 F. Supp. 3d at 1348. Defendants will continue cooperating and informally coordinating the ProLite and ProLoop cases, and Plaintiffs offer no compelling reason to short circuit the years of work already done on these matters.

II. CONSOLIDATION IS IMPROPER FOR ELEVEN INDIVIDUALS WHO ARE NOT PARTIES TO ANY ACTION AND ONE INDIVIDUAL WHOSE CLAIMS WILL BE DISMISSED IF NOT AMENDED

Other procedural defects in Plaintiffs' cases make them particularly inappropriate for formal coordination in multi-district litigation proceedings. In *Avila,* the underlying state court held that it lacked personal jurisdiction over claims by eleven of the named individuals. Shortly after the complaint was filed on September 10, 2020, Atrium moved to quash service of the complaint for lack of jurisdiction for claims asserted by plaintiffs outside of California: Rachel Bates, Brian Benhardt, Herman Curley, Claude Daniels, Raymond Ferrell, John Langley, Betty Lewis, Raymond Maki, James Nakashian, Alan Roseman, and Randy Walker (the "Nonresident Plaintiffs"). On May 28, 2021, the California Superior Court granted Atrium's motion and held that the Nonresident Plaintiffs did not establish personal jurisdiction over Atrium. (*See* Ex. 1.) As a result, Nonresident Plaintiffs are not parties to *Avila, id.,* and they have not filed other claims against Defendants. These Plaintiffs have made no attempt to re-file their claims against Atrium in a court that could assert personal jurisdiction. Thus, Plaintiffs' motion is brought on behalf of only three individuals in *Avila* who have active claims against Atrium—Avila, Benhamed-Masri, and Vega—all of whom are already in a consolidated action and share the same counsel.

In *Kolbeck,* the court held shortly after the complaint was filed that Plaintiff failed to allege sufficient facts to establish subject-matter jurisdiction. *Kolbeck*, 3:21-cv-00776-wmc, Dkt. 3 (W.D. Wis. Dec. 10, 2021) (docket attached as Ex. 2). The court gave Plaintiff until December 24 to amend his complaint to cure the jurisdictional defects, but Plaintiff failed to do so. (*See* Ex. 3.) In granting Plaintiff a short extension to its deadline, the court stated "In case there was some confusion as to this requirement, the court will provide plaintiff until January 10, 2022, to submit an amended complaint alleging the names and citizenship of each member of the defendant LLC. **Failure to do so, will result in dismissal of this action.**" Ex. 2 (emphasis original).

III. IF THE PANEL GRANTS PLAINTIFFS' MOTION, THEN IT SHOULD COORDINATE THE CASES BEFORE THE HONORABLE JUDGE ROWLAND

While Defendants maintain that Plaintiffs' motion should be denied, if the Panel disagrees and decides to formally coordinate the ProLite and ProLoop cases in multi-district litigation proceedings, then Defendants submit that the Panel should do so before the Honorable Mary M. Rowland in the Northern District of Illinois.

Judge Rowland is the only judge who has guided a ProLite or ProLoop case through trial. Judge Rowland is intimately familiar with the key factual and expert issues at play after adjudicating a panoply of substantive motions, including on summary judgment, expert admissibility, pretrial evidentiary disputes, choice of law, jury instructions, and the verdict form. Judge Rowland is presently considering a post-trial motion that revisits some of these issues. Moreover, Judge Rowland partnered with an experienced magistrate judge, Hon. Young B. Kim, to efficiently lead the parties through pretrial discovery, issue rulings on discovery matters, and preside over mediations. The substantive experience that these judges have amassed contrasts with the option that Plaintiffs suggest, Hon. Christina A. Snyder (C.D. Cal.), who has not yet developed experience with the substantive issues in ProLite and ProLoop litigation.

In addition, Judge Rowland is a "skilled jurist who has not yet had the opportunity to preside over an MDL"—a factor this Panel considers when assigning multidistrict litigations. *See In re Rail Freight Fuel Surcharge Antitrust Litig. (No. II)*, 437 F. Supp. 3d 1365, 1366 (J.P.M.L. 2020); *see also*, *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 437 F. Supp. 3d 1368, 1370 (J.P.M.L. 2020); *In re Ermi LLC (289) Patent Litig.*, 396 F. Supp. 3d 1358, 1360 (J.P.M.L. 2019). Judge Rowland sits in Chicago, which is a central, readily-accessible location with numerous direct flights available each day to virtually every major city in the United States. Judge Rowland's central location makes her court well situated, if necessary, to serve as transferee judge, especially with cases proceeding in the north (*Kolbeck*), south (*Aguirre*), east (*Mills*), and west (*Avila*).

CONCLUSION

This Panel should deny Plaintiffs' motion because informal coordination is working, and Plaintiffs have not met their burden to show otherwise.

Dated: January 4, 2022

Respectfully submitted,

/s/ Mark Cheffo

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Counsel for Defendants
Atrium Medical Corporation and
Maquet Cardiovascular, LLC

APPENDIX A

STATUS OF PENDING PROLITE AND PROLOOP LITIGATION

(Ordered from most to least procedurally advanced)

Plaintiff	Court	Case Status
Randy Africano	N.D. Illinois	Jury verdict for Atrium, October 19, 2021. Plaintiff's motion for a new trial is pending.
Latiese Mills	D. New Jersey	Fact discovery is complete. Expert discovery started on June 8, 2021 and is scheduled to end by April 8, 2022. Settlement statements to be exchanged on April 13, followed by a settlement conference.
Jesusita Aguirre	D. New Mexico	Fact discovery commenced on December 9, 2020 and is scheduled to end on April 19, 2022. Settlement conference set for April 29.
Jose Avila, Hazel Benhamed-Masri, and Alfredo Vega	C.D. California	Atrium responded to jurisdictional requests for admission in state court. Initial disclosures has been exchanged in federal court.
Clark Kolbeck	W.D. Wisconsin	None of the named defendants has been served. Unless amended by January 10, 2022, Plaintiff's complaint subject to dismissal by court order for failure to allege facts supporting jurisdiction.
Joseph Paye	D. Massachusetts	Plaintiff filed yesterday, January 3, 2022. None of the named defendants has been served.

Exhibit 1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 54

20STCV34604 May 28, 2021
JOSE AVILA, et al. vs ATRIUM MEDICAL CORPORATION 9:00 AM

Judge: Honorable Maurice A. Leiter
Judicial Assistant: Robert R. Alva
Courtroom Assistant: Ray Manzo

CSR: Linda Lee #13568
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Dan Charles Bolton

For Defendant(s): Allison Ozurovich by Hong Lee

NATURE OF PROCEEDINGS: Hearing on Defendant's Motion to Quash Service of Summons as to Non-Resident Plaintiffs

Pursuant to Government Code sections 68086, 70044, and California Rules of Court Rule 2.956, Linda Lee CSR# 13568, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

Motions is called for hearing, argued and submitted.

LATER:

In the matter heretofore submitted earlier this date, the court announces its ruling as follows: The Court considers the moving papers, opposition and replies along with arguments of counsel.

BACKGROUND

On September 10, 2020, Plaintiffs Jose Avila, Rachel Bates, Hazel Benhamed-Masri, Brian Benhardt, Nury Bernal, John Coco, Herman Curley, Claude Daniels, Raymond Ferrell, John Langley, Betty Lewis, Raymond Mair, James Nakashian, Alan Roseman, Alfredo Vega and Randy Walker sued Defendant Atrium Medical Corporation. Plaintiffs, some of whom are residents of California and some of whom are not, allege Defendant’s synthetic monofilament polypropylene mesh medical device caused them injury.

ANALYSIS

“A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes: (1) To quash service of summons on the ground of lack of jurisdiction of the

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court over him or her." (CCP § 418.10(a)(1).) "When a motion to quash is properly brought, the burden of proof is placed upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence." (Aquila, Inc. v. Sup. Ct. (2007) 148 Cal.App.4th 556, 568.)

Defendant contends the Court does not have personal jurisdiction over Defendant for the claims of the nonresident Plaintiffs. Defendant is an entity organized under the laws of Delaware, with a principal place of business in New Hampshire. The parties agree the Court does not have general personal jurisdiction over Defendant. (See Daimler AG v. Bauman, 571 U.S. 117, 134 (2014) ["…for a corporation, ... the place of incorporation and principal place of business [are the] 'paradig[m] ... bases for general jurisdiction."])

"Where general jurisdiction cannot be established, a court may assume specific jurisdiction over a defendant in a particular case if the plaintiff shows the defendant has purposefully availed himself or herself of forum benefits; [that is,] the nonresident purposefully directed its activities at forum residents or purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of local law. (Hanson v. Denckla (1958) 357 U.S. 235.) California courts adopt the three-part test used in Boschetto v. Hansing (9th Cir. Cal. 2008) 539 F.3d 1011,1016: (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable." Panavision International, L.P. v. Toeppen (9th Cir. 1998) 141 F.3d 1316, 1320 [applying California law].)." (Jewish Defense Organization, Inc. v. Sup. Ct. of Los Angeles County (Rambam) (1999) 72 Cal.App.4th 1045, 1054.)

Although the Complaint generally alleges that Defendant conducts business in California, the nonresident Plaintiffs do not provide evidence of such activities, nor do they assert this creates specific jurisdiction over their claims. See Bristol-Myers Squibb Co. v. Superior Court (2017) 582 U.S.___, 137 S. Ct. 1773. Instead, the nonresident Plaintiffs argue the Court has specific jurisdiction because they entered into agreements with Defendant to toll the statute of limitations, and those agreements state they are governed by California law. The tolling agreements contain this language: "Choice of Law. This Agreement shall be construed in accordance with and be governed by the laws of the State of California, without regard to choice of law rules thereof that might apply the laws of any other jurisdiction." The tolling agreements were extended repeatedly.

Agreeing to a choice of law provision does not in itself constitute purposeful availment giving

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rise to personal jurisdiction, though it is a relevant factor. (See Burger King Corp. v. Rudzewicz (1965) 471 U.S. 462, 482 ["[a]lthough such a [choice of law] provision standing alone would be insufficient to confer jurisdiction, we believe that, when combined with the 20-year interdependent relationship Rudzewicz established with Burger King's Miami headquarters, it reinforced his deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there"].) In Halyard Health, Inc. v. Kimberly-Clark Corp. (2019) 43 Cal. App. 5th 1062 the California Court of Appeal rejected the plaintiff's argument that the defendant had purposefully availed itself of California as a forum "by executing the Distribution Agreement, which [the plaintiff] characterize[d] as a 'California-directed contract.'" Id. at 1069. And in T.A.W. Performance, LLC v. Brembo, S.p.A. (2020) 53 Cal.App.5th 632, the Court of Appeal discussed the issue of governing law and personal jurisdiction as follows:

In Shaffer, supra, 433 U.S. 186, 97 S.Ct. 2569, the high court specifically rejected the plaintiff's assertion that "if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute." (Id. at p. 215, 97 S.Ct. 2569.) In other words, even if a forum state's law governs the obligations of a defendant, such a finding "does not demonstrate that [the defendant has] 'purposefully avail[ed itself] of the privilege of conducting activities within the forum State,' ... in a way that would justify bringing [it] before" the forum state. (Id. at p. 216, 97 S.Ct. 2569.) Whether or not the enforceability of the parties' 2014 agreement is governed by California law "has nothing to do with whether enforceability may be determined by a California court. The required relationship among [Brembo, California, and this lawsuit] cannot be based on what [TAW's] argument assumes, i.e. that California substantive law applies." (Halyard Health, supra, 43 Cal.App.5th at p. 1072, fn. 7, 256 Cal.Rptr.3d 915 [Halyard Health court found that plaintiff's assumption that California law would apply "is not one that leaps off the pages" of the contract in which the parties agreed that the contract " 'shall be governed by and construed and enforced in accordance with the substantive laws of the State of Delaware and the federal laws of the United States of America applicable therein, as though all acts and omissions related hereto occurred in Delaware' "].)

(T.A.W. Performance, LLC v. Brembo, S.p.A., supra, 53 Cal.App.5th at 647-8.)

Here, the nonresident Plaintiffs' argument for specific jurisdiction rests entirely on Defendant's agreeing to the choice of law provision in the tolling agreements. That is insufficient to establish purposeful availment. As discussed, a choice of law provision governing the law to be applied to the dispute is not dispositive on the issue of specific jurisdiction. And here the choice of law provision is a step further removed. It merely governs the law to be applied to the tolling agreements. It does not otherwise govern what law applies to the relationship between Plaintiffs and Defendant, nor does it state what law would apply to any dispute between the parties, other

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Deputy Sheriff: None

than a dispute concerning the tolling agreements. Neither the choice of law provision nor the number of tolling agreements entered into by Defendant establishes purposeful availment.

That the agreements involve the narrow issue of tolling the statute of limitations also is relevant under the second prong of the analysis: whether the claim arises out of or results from the forum-related activities. The causes of action in this lawsuit, which include product liability, fraud and warranty claims, predate the tolling agreements and do not arise out of or result from the tolling agreements. The tolling agreements concern only the deadline by which lawsuits must be filed. And while the tolling agreements are "related to" this litigation, in that they concern this litigation, for the purpose of establishing specific jurisdiction their relation to the facts giving rise to the causes of action is tangential at best. (See Ford Motor Co. v. Mont. Eighth Judicial Dist. Court, (2021) 141 S. Ct. 1017, 1026 ["In the sphere of specific jurisdiction, the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum;" relationship is sufficient where claim arises from allegedly defective car causing injury to a resident of the forum state].) Plaintiffs have not satisfied the second prong.

At argument, Plaintiffs for the first time asked the Court to continue the hearing so Plaintiffs could conduct jurisdictional discovery. Plaintiffs did not request this in their opposition or surreply to the motion. In fact, Plaintiffs already conducted jurisdictional discovery: they propounded to Defendant requests for admission relating to the tolling agreements. Defendant responded in January 2021. When the Court asked what Plaintiffs are looking for in additional jurisdictional discovery, Plaintiffs' counsel stated generally that they seek more evidence of purposeful availment.

The Court declines to continue the motion. As noted, Plaintiffs did not ask for a continuance prior to the hearing, Plaintiffs already have propounded jurisdictional discovery, and Plaintiffs did not show that additional jurisdictional discovery was likely to produce additional evidence relevant to this motion. (See Beckman v. Thompson (1992) 4 Cal.App.4th 481, 486-7 [Trial court did not abuse discretion in denying plaintiff's request for continuance for jurisdictional discovery where plaintiff did not suggest discovery likely would produce evidence of relevant California contacts.])

The nonresident Plaintiffs have failed to establish specific jurisdiction over Defendant.
The Motion to Quash Service of Summons filed by Atrium Medical Corporation on 10/14/2020 is Granted.

Certificate of Mailing is attached.

Exhibit 2

U.S. District Court
Western District of Wisconsin (Madison)
CIVIL DOCKET FOR CASE #: 3:21-cv-00776-wmc

Kolbeck, Clark v. Atrium Medical Corporation et al
Assigned to: District Judge William M. Conley
Referred to: Magistrate Judge Stephen L. Crocker
Cause: 28:1332 Diversity-Product Liability

Date Filed: 12/08/2021
Jury Demand: Plaintiff
Nature of Suit: 367 Personal Injury: Health Care/Pharmaceutical Personal Injury Product Liability
Jurisdiction: Diversity

Date Filed	#	Docket Text
12/08/2021	1	COMPLAINT against All Defendants. (Filing fee $ 402 receipt number 0758-2976487.), filed by Clark Kolbeck. (Attachments: # 1 JS-44 Civil Cover Sheet, # 2 Summons - Atrium Medical Corp. (with a complaint from the Southern District of Ohio attached), # 3 Summons - Getinge AB, # 4 Summons - Maquet Cardiovascular US Sales, LLC) (Brenes, Troy) Modified on 12/9/2021. (lak) (Entered: 12/08/2021)
12/09/2021		Case randomly assigned to District Judge William M. Conley and Magistrate Judge Stephen L. Crocker. (rks) (Entered: 12/09/2021)
12/09/2021		Standard attachments for Judge William M. Conley required to be served on all parties with summons or waiver of service: NORTC, Corporate Disclosure Statement. (rks) (Entered: 12/09/2021)
12/09/2021	2	Summons Issued as to Atrium Medical Corporation, et al. (Attachments: # 1 Summons Issued - Getinge AB, # 2 Summons Issued - Maquet Cardiovascular US Sales, LLC) (rks) (Entered: 12/09/2021)
12/10/2021	3	ORDER Regarding Jurisdiction. Proof of Diversity of Citizenship due 12/24/2021. Signed by District Judge William M. Conley on 12/10/2021. (arw) (Entered: 12/10/2021)
01/03/2022	4	** TEXT ONLY ORDER ** On December 10, 2021, the court issued an order that required plaintiff to file an amended complaint containing allegations about the citizenship of defendant Maquet Cardiovascular US Sales, LLC, for purposes of determining whether this court has subject matter jurisdiction over this case under 28 U.S.C. § 1332(a). (Dkt. 3 .) The court set December 24, 2021, as the deadline for plaintiff to satisfy that order and warned plaintiff that "failure to amend timely shall result in prompt dismissal of this matter for lack of subject matter jurisdiction." (Id. at 3.) Instead, on December 16, 2021, plaintiff submitted documents relating to an MDL action, but then failed to file timely an amended complaint or otherwise submit information concerning the citizenship of the LLC defendant. Whether or not this case may be transferable to an MDL action, plaintiff still must provide sufficient allegations from which a federal court can determine whether it has subject matter jurisdiction over this action. In case there was some confusion as to this requirement, the court will provide plaintiff until January 10, 2022, to submit an amended complaint alleging the names and citizenship of each member of the defendant LLC. **Failure to do so, will result in dismissal of this action.** Signed by District Judge William M. Conley on 1/3/2022. (rks) (Entered: 01/03/2022)

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CLARK KOLBECK,

Plaintiff,

OPINION AND ORDER

v.

21-cv-776-wmc

ATRIUM MEDICAL CORPORATION, GETINGE AB and MAQUET CARDIOVASCULAR US SALES, LLC,

Defendants.

In this civil action, plaintiff Clark Kolbeck asserts various state law claims against defendants Atrium Medical Corporation, Getinge AB and Maquet Cardiovascular US Sales, LLC, based on defendants' manufacture and sale of a synthetic mesh device used in hernia repairs. (Compl. (dkt. #1).) Plaintiff alleges that this court may exercise its diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). (*Id.* at ¶ 14.) Because the allegations in the complaint are insufficient to determine if this is so, plaintiff will be given an opportunity to file an amended complaint containing the necessary factual allegations to establish diversity jurisdiction.

OPINION

"Federal courts are courts of limited jurisdiction." *Int'l Union of Operating Eng'r, Local 150, AFL-CIO v. Ward*, 563 F.3d 276, 280 (7th Cir. 2009) (citation omitted). Unless a complaint alleges complete diversity of citizenship among the parties and an amount in controversy exceeding $75,000, or raises a federal question, the case must be dismissed for

want of jurisdiction. *Smart v. Local 702 Int'l Bhd. of Elec. Workers*, 562 F.3d 798, 802 (7th Cir. 2009). Because jurisdiction is limited, federal courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Further, the party seeking to invoke federal jurisdiction bears the burden of establishing that jurisdiction is present. *Smart*, 562 F.3d at 802-03.

Here, plaintiff contends that diversity jurisdiction exists because (1) the amount in controversy exceeds $75,000 and (2) the parties are diverse. (Compl. (dkt. #1) ¶ 14.) For the latter to be true, however, there must be *complete* diversity, meaning plaintiff cannot be a citizen of the same state as *any* defendant. *Smart*, 562 F.3d at 803. Unfortunately, plaintiff's allegations as to defendant Maquet Cardiovascular US Sales, LLC prevent this court from determining its citizenship.

"The citizenship of an LLC is the citizenship of each of its members," yet plaintiff has not alleged the citizenship of this defendant's members, making it impossible to determine whether complete diversity exists here. *Camico Mut. Ins. Co. v. Citizens Bank*, 474 F.3d 989, 992 (7th Cir. 2007). Instead, plaintiff alleges defendant is "a Delaware corporation headquartered [in] New Jersey." (Compl. (dkt. #1) ¶ 9.) As the Seventh Circuit has instructed, however, this information is wholly irrelevant in deciding the citizenship of a limited liability company. *Hukic v. Aurora Loan Serv.*, 588 F.3d 420, 429 (7th Cir. 2009).

Before dismissing this action for lack of subject matter jurisdiction, plaintiff will be given leave to file within 14 days an amended complaint that establishes subject matter

jurisdiction by alleging the names and citizenship of each member of the defendant LLC. In alleging the LLC's citizenship, plaintiff should be aware that if the member or members of the LLCs are themselves a limited liability company, partnership, or other similar entity, then the citizenship of those members and partners must also be alleged as well. *See Meyerson v. Harrah's E. Chi. Casino*, 299 F.3d 616, 617 (7th Cir. 2002) ("[T]he citizenship of unincorporated associations must be traced through however many layers of partners or members there may be.").

ORDER

IT IS ORDERED that:

1) plaintiff shall have until December 24, 2021, to file and serve an amended complaint containing good faith allegations sufficient to establish complete diversity of citizenship for purposes of determining subject matter jurisdiction under 28 U.S.C. § 1332; and

2) failure to amend timely shall result in prompt dismissal of this matter for lack of subject matter jurisdiction.

Entered this 10th day of December, 2021.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE:

MDL DOCKET NO. 3024

ATRIUM MEDICAL CORPORATION
PROLITE AND PROLOOP
HERNIA MESH LITIGATION

PROOF OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that on January 4, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of the Panel using the Judicial Panel on Multidistrict Litigation's CM/ECF system and was served on the parties listed below via CM/ECF and email:

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Dated: January 4, 2022

Respectfully submitted,

By: */s/ Mark Cheffo*

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