

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

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IN RE:) MDL NO. 2753
)
ATRIUM MEDICAL CORP. C-QUR MESH) MDL Docket No.
PRODUCTS LIABILITY LITIGATION) 1:16-md-02753-LM
)
) ALL CASES
)
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**DEFENDANTS’ MOTION TO EXTEND DEADLINES
AND TRIAL DATE AND FOR EXPEDITED CONSIDERATION**

Defendants Atrium Medical Corporation (“Atrium”) and Maquet Cardiovascular US Sales, LLC (“MCV”) (collectively, “Defendants”) hereby move this Court on an expedited basis for an order moving the first trial in this matter to January 2021 and extending all other pre-trial deadlines by approximately 90 days. Defendants bring this motion in light of the extraordinary circumstances created by the COVID-19 crisis, as well as other delays encountered in the completion of expert discovery.¹ Because of the approaching deadlines, Defendants ask for expedited consideration of this motion and that the Court order Plaintiffs to respond within seven days.²

¹ Since this Court invited the parties to discuss revising pre-trial deadlines in its order denying Defendants’ motion to strike Dr. Knabe on March 19 (Order, Dkt. 189 at 6), Defendants have attempted to meet and confer with Plaintiffs regarding the schedule four times: in telephone calls on March 26 and 30, a letter on April 1, and a telephone call on April 7. However, Plaintiffs have refused to entertain any proposed extension of all deadlines. Thus, in light of the rapidly changing circumstances resulting from the COVID-19 pandemic, Defendants bring this motion.

² As the Memorandum of Law is incorporated into this document, below, no further memorandum of law will be forthcoming. See L.R. 7.1(a)(2).

MEMORANDUM OF LAW

The first trial in this matter is currently set for September 11, 2020. The parties are scheduled to select the first two cases to be tried by next Wednesday, April 15. Motions for summary judgment and to exclude expert witnesses are due in a little over a month, on May 13, 2020. However, despite the parties' efforts, expert depositions have not been completed and completion of those depositions has been made impracticable by the COVID-19 pandemic.

As of this date, Defendants have not deposed Plaintiffs' regulatory expert, Dr. Peggy Pence, or Plaintiffs' expert pathologist, Dr. Christine Knabe, in the *Hicks* case. Both these experts were designated after the deadline for doing so. In the case of Dr. Pence, Defendants agreed to the late designation after Plaintiffs' first regulatory expert withdrew for health reasons. Even after the initial agreement regarding a late designation, Defendants agreed to additional extensions of time for Plaintiffs to designate a regulatory expert. In the case of Dr. Knabe, this Court recently denied Atrium's Motion to Strike Plaintiff's Expert Report and Exclude the Opinions of Christine Knabe, Ph.D. (Order, Dkt. 189.)

The following defense experts remain to be deposed:

- (1) Stephen Badylak, M.D., biomaterials expert;
- (2) Stephen Spiegelberg, Ph.D., biomaterials expert;
- (3) Howard Beaton, M.D., case-specific hernia surgery expert in the *Barron* case;
- (4) Defendants' still-to-be-disclosed regulatory expert, in response to Plaintiffs' late-disclosed regulatory expert; and
- (5) Defendants' still-to-be-disclosed pathology expert in *Hicks*, in response to Plaintiffs' late disclosed pathology expert.

As the Court is well aware, travel is restricted throughout the country, much of the country is under government lock-down orders, and Defendants' experts and attorneys are located in parts of the country especially hard hit by COVID-19 and under severe restrictions on movement outside of the home, including for work. Defendants' attorneys are located in New York, Pennsylvania, New Jersey, and California, all of which are under mandatory government stay-at-home orders. Defense expert Badylak is located in Pennsylvania, Dr. Beaton is located in New York, and Dr. Spiegelberg is located in Massachusetts.

Attempting to prepare Defendants' experts for depositions and to defend those depositions under these circumstances will be extremely challenging. Expert depositions are document intensive and involve complex subjects. Preparing for and conducting depositions remotely presents challenges even when all parties are in an office setting. When all parties are working from home, these challenges are magnified. The parties and witness may not have access to high speed printers or high powered internet. Defendants have no ability to control how Plaintiffs will organize and present exhibits, a factor that will affect how the depositions proceed. Because defense counsel will not be in the same room as the witness, the ability to interpose an objection before the witness begins answering may be compromised, as will the witness's ability to review documents presented for questioning.³ All of these factors will contribute to very confusing depositions, which Plaintiffs may nonetheless attempt to use for impeachment despite such confusion.

Significantly, except for the two witnesses who were designated late by Plaintiffs, Plaintiffs were able to prepare and present their expert witnesses without similar difficulties. The following

³ In other litigation, the law firm representing Plaintiffs in this litigation has acknowledged the difficulty of conducting remote depositions, and adjourned depositions for this reason. (*See* Ex. A.)

Plaintiff experts were deposed well before the deadline for completion of expert discovery and in person:

- (1) Russell F. Dunn, Ph.D., biomaterials expert;
- (2) Scott Guelcher, Ph.D., biomaterials expert;
- (3) Uwe Klinge, M.D., hernia surgery;
- (4) Joseph T. Dodd, M.D., hernia surgery;
- (5) Stephen Ferzoco, M.D., general surgery; and
- (6) Howard N. Langstein, M.D., hernia surgery.

Plaintiffs' counsel had the ability to meet with these experts in person to prepare for their depositions and to be in the same room with them as they defended their depositions. Plaintiffs' counsel did not have to deal with any of the challenges of remote depositions when defending these experts. Defendants should not be disadvantaged by having to present their experts for depositions under significantly more difficult circumstances.

In addition, Defendants' expert Dr. Beaton is a practicing physician in New York City, still treating patients. Given the healthcare crisis in New York, his time is better spent on patient care, rather than preparing for and sitting for a deposition.⁴

Further, in its order denying Defendants' motion to strike Dr. Knabe, the Court stated that it "will permit defendants to designate their own pathology expert to opine on Mr. Hicks's pathology slides" and "will also allow defendants to amend and/or supplement their other expert reports as they deem necessary." (Order, Dkt. 189 at 6.) Time needs to be built into the schedule

⁴ Due to the shortage of healthcare professionals in New York, retired physicians are returning to practice, and medical schools have accelerated graduation. See J. De Avilla & T. Chen, *To Fight Coronavirus, States Call on Retired Medical Staff & New Graduates*, Wall Street J. (Mar. 31, 2020), at <https://www.wsj.com/articles/to-fight-coronavirus-states-call-on-retired-medical-staff-and-new-graduates-11585647003>.

for these steps to take place. Importantly, Defendants have not yet received pathology slides from Dr. Knabe or the hospital where Mr. Hicks was treated. And remote depositions of pathology experts present special difficulties, since the witness may refer to a physical specimen, which the opposing side may wish to examine and photograph. Plaintiffs also may wish to depose Defendants' experts on any supplemental reports, which will require additional time. The Court also stated in its order: "If, due to the need to conduct additional expert discovery, the parties find that the current deadlines and trial selection schedule are no longer feasible, the court will favorably entertain another joint motion to extend deadlines." (*Id.*) Defendants' counsel has conferred with Plaintiffs' counsel in an attempt to reach agreement on the schedule but have been unable to do so, necessitating this motion.

Recognizing the extraordinary circumstances presented by the COVID-19 crisis, on March 20, 2020, this Court also issued a standing order continuing all civil trials that were scheduled to begin before May 1, 2020. (Standing Order 20-5.) Continuing the trial date of the above-captioned matter will create room on the Court's docket to re-schedule cases that had been scheduled for trial earlier than the instant matter but were continued pursuant to Order 20-5.

For the reasons set forth above, Defendants propose that all current deadlines be extended by approximately 90 days and that trial be re-set for January 2021 (after the December holidays).

More specifically, Defendants propose that the schedule be modified as follows:

Event	Current Deadline	Proposed New Deadline
Rebuttal expert reports due in trial pool cases	March 10, 2020	June 9, 2020
Defendants' expert disclosure of regulatory and pathology expert and supplemental/amended reports of Defendants' previously disclosed experts	May 9, 2020	July 10, 2020
Each side is permitted to strike one case from among the trial pool cases by notifying Lead Counsel for the other side	April 14, 2020	July 14, 2020

Event	Current Deadline	Proposed New Deadline
Each side is permitted to select one case from among the trial pool cases by notifying Lead Counsel for the other side	April 15, 2020	July 15, 2020
Expert discovery deadline in trial pool cases	Per Agreement	July 24, 2020
Dispositive or Daubert motions due re: trial picks	May 13, 2020	August 11, 2020
Responses to dispositive or Daubert motions due re: trial pick cases	May 27, 2010	August 25, 2020
Replies to dispositive or Daubert motions due re: trial pick cases	June 3, 2020	September 1, 2020
After conferring regarding the first case to be tried, the manner of trial, and the timing of the second case to be tried, the parties shall submit a report to the Court indicating those matters as to which agreement has been reached and setting forth their positions as to all matters where agreement was not reached	June 4, 2020	September 2, 2020
If agreement cannot be reached on 1 st case to be tried, the Court will select a case from the 2 case selected by the parties	June 24, 2020	September 22, 2020
Deadline for Settlement conference for first trial pool case	August 3, 2020	November 3, 2020
First trial	September 16, 2020	January 11, 2021

CONCLUSION

For the reasons set forth above, Defendants respectfully ask that the Court give expedited consideration to this motion and order Plaintiffs to respond in seven days. Defendants further request that the Court grant relief from the current deadlines and enter an order extending the deadlines and trial date as set forth above.

Dated: April 8, 2020

Respectfully submitted,

/s/ Katherine Armstrong

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Attorneys for Defendants

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with Plaintiffs' counsel regarding this motion, but was unable to reach agreement.

/s/ Katherine Armstrong
Katherine Armstrong

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2020, 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/ Katherine Armstrong
Katherine Armstrong

EXHIBIT A

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
 Plaintiff,)
 vs.)
 MCKESSON CORPORATION,)
 CARDINAL HEALTH, INC., and)
 AMERISOURCEBERGEN DRUG)
 COMPANY,)
 Defendants.)

Case No. 3AN-18-10023 CI
(CONSOLIDATED)

vs.)
 MALLINCKRODT, PLC,)
 MALLINCKRODT, LLC and)
 SPECGX, LLC,)
 Defendants.)

Case No. 3AN-19-04861 CI

NOTICE OF SUSPENSION OF RECORDS DEPOSITION
ULMER'S DRUG & HARDWARE

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that, due to the COVID-19 pandemic, and the inherent need during a records deposition to review documents while in the same room, the records deposition of Ulmer's Drug & Hardware has been suspended and will be rescheduled at a later date. This deposition was previously noticed for April 7, 2020.

DATED this 30th day of March, 2020.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Plaintiff

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Elizabeth S. Smith (pro hac vice)
Michael J. Pendell (pro hac vice)
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Lisa M. Saltzburg (pro hac vice)
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of March, 2020, a true and correct copy of the foregoing was served via electronic mail, on the following:

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BIRCH HORTON BITTNER & CHEROT

By: /s/ Martha K. Marshall

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

IN RE:)	
)	MDL NO. 2753
)	
ATRIUM MEDICAL CORP. C-QUR MESH)	MDL Docket No.
PRODUCTS LIABILITY LITIGATION)	1:16-md-02753-LM
)	
)	ALL CASES
)	

**[PROPOSED] ORDER GRANTING DEFENDANTS' REQUEST FOR EXPEDITED
CONSIDERATION OF MOTION TO EXTEND DEADLINES AND TRIAL DATE**

The Court hereby grants the request by Defendants Atrium Medical Corporation and Maquet Cardiovascular US Sales, LLC for expedited consideration of their Motion to Extend Deadlines and Trial Date. Plaintiffs shall file their response to Defendants' motion within seven days from the date Defendants' motion was filed.

IT IS SO ORDERED.

Landya McCafferty
United States District Judge

April __, 2020

cc: All counsel of record

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

IN RE:

)
) **MDL NO. 2753**

**ATRIUM MEDICAL CORP. C-QUR MESH
PRODUCTS LIABILITY LITIGATION**

)
) **MDL Docket No.
1:16-md-02753-LM**

)
) **ALL CASES**
)
)

**[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION
TO EXTEND DEADLINES AND TRIAL DATE**

Upon consideration of the motion by Defendants Atrium Medical Corporation (“Atrium”) and Maquet Cardiovascular US Sales, LLC (“MCV”) (collectively, “Defendants”) for an order moving the first trial in this matter to January 2021 and extending all other pre-trial deadlines by approximately 90 days, and Plaintiffs’ response to Defendants’ motion, the Court finds that good cause for the requested extension has been shown. IT IS HEREBY ORDERED that Defendant’s motion is granted and all deadlines and the trial date are extended as follows:

Event	Prior Deadline	New Deadline
Rebuttal expert reports due in trial pool cases	March 10, 2020	June 9, 2020
Defendants’ expert disclosure of regulatory and pathology expert and supplemental/amended reports of Defendants’ previously disclosed experts	May 9, 2020	July 10, 2020
Each side is permitted to strike one case from among the trial pool cases by notifying Lead Counsel for the other side	April 14, 2020	July 14, 2020
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Deadline for Settlement conference for first trial pool case	August 3, 2020	November 3, 2020
First trial	September 16, 2020	January 11, 2021

IT IS SO ORDERED.

Landya McCafferty
United States District Judge

April __, 2020

cc: All counsel of record