

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

**IN RE: AVAULTA PELVIC SUPPORT SYSTEM
PRODUCTS LIABILITY LITIGATION**

CIVIL ACTION NO. 2:10-md-02187

**PRETRIAL ORDER #2
(Initial Conference)**

An initial case management conference was held on December 8, 2010, by Judges Joseph R. Goodwin and Mary E. Stanley. Substantive matters that were addressed are summarized below.

A. Designation of Liaison Counsel

In accordance with PTO #1, counsel for the defendants met and conferred and offered one nomination for Defendants' Liaison Counsel, Mr. Marc E. Williams. The court approved the nomination and accordingly **APPOINTED** as Defendants' Liaison Counsel:

Marc E. Williams
Nelson Mullins Riley & Scarborough, LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
Telephone 304-526-3501
Fax 304-526-3541
Email: marc.williams@nelsonmullins.com

The responsibilities of Defendants' Liaison Counsel shall be the following:

1. to serve as the recipient for all court orders for and on behalf of all defendants;

2. to coordinate service and filings for all defendants whether presently included or subsequently added;
3. to periodically review the attorney service list on the court's website, promptly communicate necessary revisions to the Clerk and effectuate required revisions in accordance with direction from the Clerk;
4. to receive and distribute pleadings, orders, and motions by overnight courier service and telecopier within two days after receipt, unless such service has been waived, in writing, by a receiving counsel **or is otherwise achieved through CM/ECF**; and
5. to carry out such other duties as the court may order.

Plaintiffs' counsel advised the court that they had reached agreement on a joint recommendation for appointment of three co-liaison counsel. The court approved the nominations and accordingly **APPOINTED** as Plaintiffs' Liaison Counsel:

Henry G. Garrard, III
Blasingame, Burch, Garrard & Ashley, P.C.
Street Address: 440 College Avenue, Suite 320, Athens, Georgia 30601
Mailing Address: P.O. Box 832, Athens, Georgia 30603
Phone: 706-354-4000
Fax: 706-353-0673
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Fred Thompson, III
Motley Rice LLC
28 Bridgeside Blvd.
Mt. Pleasant, South Carolina 29464
Phone: 843-216-9118
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Lawrence J. Tweel
Greene, Ketchum, Bailey, Walker, Farrell & Tweel
419 Eleventh Street
Huntington, WV 25701
Phone: 304-525-9115
Fax: 304-529-3284
Email: larry@greeneketchum.com

The responsibilities of Plaintiffs' Co-Liaison Counsel shall be the following:

1. to receive and distribute pleadings, orders and motions for pro se parties;
2. to coordinate service and filings;
3. to periodically review the attorney service list on the court's website, promptly communicate necessary revisions to the Clerk and effectuate required revisions in accordance with direction from the Clerk;
4. to receive and distribute pleadings, orders, and motions by overnight courier service and telecopier within two days after receipt, unless such service has been waived, in writing, by a receiving counsel **or is otherwise achieved through CM/ECF** ;
5. to establish and maintain a document depository, real or virtual, to be available to all plaintiffs counsel;
6. to maintain and make available to all plaintiffs counsel of record at reasonable hours a complete file of all documents served by or upon each party (except such documents as may be available at a document depository); and
7. to carry out such other duties as the court may order.

B. Appointment of Plaintiffs' Steering Committee and Lead Counsel

It is the court's intention to appoint a Plaintiffs' Steering Committee ("PSC") to conduct and coordinate the discovery stage of this litigation with the defendants' representatives or committee. Lead Counsel will be appointed by the court from among the members of the PSC. Applications or nominations for the PSC positions must be electronically filed with the Southern District of West Virginia's Clerk's Office using the event "*Application or Nomination for Plaintiffs' Steering Committee*" found under *Civil>Other Filings>Other Documents* in CM/ECF, **on or before January 21, 2011**. The main criteria for PSC membership will be: (a) willingness and availability to commit to a time-consuming project; (b) ability to work cooperatively with others; and (c) professional experience in this type of litigation. Applications/nominations should succinctly address each of the above criteria as well as any other relevant considerations. No submissions longer than three (3) pages will be considered. Only those attorneys who have instituted a civil action in this litigation will be considered for PSC service.

Written objections may be made to the appointment of a proposed applicant or nominee. Objections must be electronically filed with the Clerk using the event "*Objections to Application or Nomination*" found under *Civil>Other Filings>Other Documents* in CM/ECF, **on or before January 28, 2011**. Any objections should be concise yet thorough and have any necessary documentation attached.

The PSC will have the following responsibilities:

Discovery

- (1) Initiate, coordinate and conduct all pretrial discovery on behalf of plaintiffs in all actions which are consolidated with the instant multidistrict litigation.

- (2) Develop and propose to the court schedules for the commencement, execution, and completion of all discovery on behalf of all plaintiffs.
- (3) Cause to be issued in the name of all plaintiffs the necessary discovery requests, motions, and subpoenas pertaining to any witnesses and documents needed to properly prepare for the pretrial of relevant issues found in the pleadings of this litigation. Similar requests, notices, and subpoenas may be caused to be issued by the PSC upon written request by an individual attorney in order to assist him/her in the preparation of the pretrial stages of his/her client's particular claims.
- (4) Conduct all discovery in a coordinated and consolidated manner on behalf and for the benefit of all plaintiffs. With regard to depositions, only two members of the PSC or counsel duly authorized by them may question each deponent, provided that the second questioner avoids repetitiveness. No attorney for a plaintiff may be excluded from attending the examination of witnesses or other proceedings. Plaintiff attorneys may also suggest questions to be posed to deponents through the designated PSC members provided that the questions are not repetitious.

Hearings and Meetings

- (1) Call meetings of counsel for plaintiffs for any appropriate purpose, including coordinating responses to questions of other parties or to the court.
- (2) Initiate proposals, suggestions, schedules, or joint briefs, and any other appropriate matter(s) pertaining to pretrial proceedings.
- (3) Examine witnesses and introduce evidence at hearings on behalf of plaintiffs.

- (4) Act as spokesperson for all plaintiffs at pretrial proceedings and in response to any inquiries by the court, subject of course to the right of any plaintiff's counsel to present non-repetitive individual or different positions.

Miscellaneous

- (1) Submit and argue any verbal or written motions presented to the court or Magistrate Judge on behalf of the PSC as well as oppose when necessary any motions submitted by the defendants or other parties that involve matters within the sphere of the responsibilities of the PSC.
- (2) Negotiate and enter into stipulations with defendants regarding this litigation. All stipulations entered into by the PSC, except for strictly administrative details such as scheduling, must be submitted for court approval and will not be binding until the court has ratified the stipulation. Any attorney not in agreement with a non-administrative stipulation shall file with the court a written objection within ten (10) business days, without further time for mailing, after he/she knows or should have reasonably become aware of the stipulation. Failure to object within the time allotted shall be deemed a waiver, and the stipulation will bind the dilatory party.
- (3) Explore, develop, and pursue all settlement options pertaining to any claim or portion thereof of any case instituted in this litigation.
- (4) Maintain adequate files of all pretrial matters and have them available, under reasonable terms and conditions, for examination by plaintiffs or their attorneys.

- (5) Prepare periodic status reports summarizing the PSC's work and progress. These reports shall be submitted to the Plaintiff's Liaison Counsel who will promptly distribute copies to the other plaintiffs' attorneys.
- (6) Perform any task necessary and proper for the PSC to accomplish its responsibilities as defined by the court's orders.
- (7) Perform such other functions as may be expressly authorized by further orders of this court.

Co-Liaison Counsel and PSC members shall be entitled to seek reimbursement for fees and costs expended at the time and in a manner approved by the court.

Nominations for defendants' Lead Counsel were presented to the court. Defendants' Lead Counsel will be appointed simultaneously with plaintiffs' Lead Counsel after the PSC nomination process.

C. Coordination with State Avaulta Cases

The court advised counsel of its intention to coordinate heavily with the judges and counsel involved in the state Avaulta cases, especially in West Virginia and New Jersey where a majority of the state cases have been filed to date.

D. Procedural Issues

A number of procedural issues were presented to the court as part of the proposed agenda including: master complaint and answer; development of a scheduling order; issues as to proper party defendants and issues as to acknowledgment of service. The court advised the parties to continue to meet and confer on these issues. Issues that remain will be addressed at the first case management conference scheduled after the PSC and lead counsel are appointed. Counsel were

advised that lead counsel will be required to attend case management conferences and hearings in person. Counsel may not appear by phone. Videoconferencing may be used for case management conferences at the discretion of the court.

E. Discovery

Judge Stanley advised counsel of her general expectations during the discovery process. A number of suggestions and resources were provided to counsel to address Electronically Stored Information (“ESI”) protocols, issues with sealed and confidential documents and documents produced in a foreign language. The court urged the parties to begin now to identify those corporations and individuals who are potential parties and/or may possess potentially relevant ESI. The parties should begin now to negotiate agreed orders for the preservation of documents and ESI and the search, review and production of documents and ESI, including privilege logs, so that such agreed orders may be presented at the next status conference.

The court advised the parties to continue to meet and confer on all other discovery issues. Defense counsel advised the court that discovery had been offered to the plaintiffs on the issue of additional party defendants. The court agreed that motions concerning joining additional defendant parties may be filed as necessary prior to the next status conference. All other discovery issues that remain will be addressed at the first case management conference scheduled after the PSC and lead counsel are appointed.

The court **DIRECTS** the Clerk to file a copy of this order in 2-10-md-2187 and it shall apply to each member Avaulta-related case previously transferred to, removed to, or filed in this district which includes counsel in all member cases up to and including civil action number 2-10-cv-1362. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided

by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at www.wvsd.uscourts.gov.

ENTER: December 9, 2010



Joseph R. Goodwin, Chief Judge