

ABIOMED, INC., )  
)  
Plaintiff )  
)  
-VS- ) CA No. 16-10914-FDS  
) Pages 1 - 15  
MAQUET CARDIOVASCULAR LLC, )  
)  
Defendant )

BEFORE THE HONORABLE F. DENNIS SAYLOR, IV  
UNITED STATES DISTRICT JUDGE

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 7200  
Boston, MA 02210  
(617)345-6787

A P P E A R A N C E S:

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for the Defendant.

P R O C E E D I N G S

THE CLERK: Court is now in session on the matter of Abiomed v. Maquet Cardiovascular LLC, Civil Action No. 16-10914. Will counsel please identify themselves for the record.

MR. KENDALL: Yes, good afternoon, your Honor. White & Case for Abiomed. I'm Mike Kendall.

MR. PADRO: I'm John Padro.

MR. WEINGAERTNER: Good afternoon, your Honor. Scott Weingaertner for Abiomed.

THE COURT: All right, good afternoon.

MR. CONNOR: Good afternoon, your Honor. Mike Connor for defendant, Maquet Cardiovascular.

MR. IAMS: Travis Iams, also representing Maquet Cardiovascular.

MR. DERDERIAN: And Michael Derderian representing Maquet.

THE COURT: All right, good afternoon. All right, this is a status conference in this case. The parties submitted what I guess is a form of joint statement of issues that they say I ought to be thinking about. Why don't I start, I'll give you the floor, Mr. Weingaertner.

MR. WEINGAERTNER: Yes, your Honor. So, your Honor, one of the issues that we had discussed when we first met in January had to do with the expansion of the case by

1 Maquet, Maquet being the patentee and we're the DJ  
2 plaintiff. And they had patents that were pending that had  
3 not been added to the case; they had been issuing. We had  
4 understood they would possibly be added by March. They  
5 haven't been yet. And we understand, although relatively  
6 recently, that Maquet does intend to add them, but we have  
7 no schedule right now, your Honor, for amending them and our  
8 response. And that timing also affects some ongoing  
9 procedures that we have now; namely, invalidity contentions  
10 and noninfringement contentions which we're kind of in the  
11 middle of having to deal with on the first three patents.  
12 So Maquet has added to those contentions three patents that  
13 are not yet in the case.

14 THE COURT: These are all continuation patents?

15 MR. WEINGAERTNER: Yes, your Honor, although they  
16 have many claims. There's hundred claims, or well over a  
17 hundred claims. So what we were hoping was that we could  
18 invoke your Honor's assistance in trying to get a schedule  
19 for the amendment, and then our answer and any counterclaims  
20 or any defenses that we have, and then rethink the schedule,  
21 because a couple of months have gone by based upon what we  
22 thought was going to be the schedule originally, so that we  
23 have time, adequate time to prepare what is in essence a  
24 case that's going to be twice as large as the existing case.

25 THE COURT: All right, why don't we take this one

1 issue at a time. Who's going to take the lead, Mr. Connor?

2 MR. CONNOR: Your Honor, this is Mike Connor.

3 Your Honor, our position is that there is no surprise to  
4 Abiomed about the nature of the case or the inclusion of  
5 these additional patents. So prior to the CMC, the parties  
6 submitted a joint statement. The joint statement recognized  
7 that there were three patents already in the case, there are  
8 three continuation applications that would issue, and that  
9 all were agreed by both parties should be included in this  
10 case. The schedule that was proposed to the Court and  
11 entered by the Court acknowledges, had that in mind, your  
12 Honor, that all six patents would be included in the case.  
13 According to that schedule, Maquet served its preliminary  
14 infringement contentions on May the 25th for all six of the  
15 patents, regardless of the pleading issue. So, your Honor,  
16 all of the disclosures that had been provided are the same  
17 that would otherwise be, regardless of the pleading issue.  
18 So this is really a matter of form over substance, your  
19 Honor. Abiomed has known of these continuation applications  
20 since at least December of last year. Within a day or two  
21 of issuance, we --

22 THE COURT: I mean -- I'm sorry -- have you  
23 already served your infringement contentions?

24 MR. CONNOR: Yes, as to all six.

25 THE COURT: As to all six, okay, the three

1 existing and the three to be added?

2 MR. CONNOR: Yes, that's correct, your Honor, and  
3 so they know the claims that are at issue. They know the  
4 basis for the infringement positions. They are in full  
5 possession of information that they would be entitled to for  
6 purposes of their invalidity and noninfringement  
7 contentions, which are due July the 28th under the schedule  
8 the Court entered when the parties contemplated all six as  
9 being in the case.

10 I should say, so I think that the pleading issue  
11 is really a matter of form over substance as to the three  
12 additional patents.

13 THE COURT: If that's true, is there any reason we  
14 can't get this done? In other words, you move to amend the  
15 complaint to add the three new complaints, they can respond,  
16 and then --

17 MR. CONNOR: There's absolutely no reason, your  
18 Honor. I will tell you that we will do it within the next  
19 three weeks. The reason it hasn't been done already is the  
20 reason that we discussed at the CMC, which was to avoid  
21 duplicative or multiple amendments to the complaint. That  
22 was discussed at the CMC. At the time we knew that some  
23 patents were issuing sooner than others, and the question  
24 was, well, should we file multiple amendments or just file  
25 one? And the discussion was, well, let's just do one

1 amendment for efficiency.

2 Our client has been investigating whether to  
3 assert some nonpatent counterclaims in this case, and we  
4 would propose to do it all in one filing. We have now  
5 essentially completed that investigation and intend to file  
6 the amended pleading within the next two weeks.

7 The schedule that your Honor has entered does not  
8 address any nonpatent issues, your Honor. It's limited  
9 really to the *Markman* -- I guess the invalidity contentions  
10 and the *Markman* process.

11 THE COURT: All right, I guess what I would  
12 propose is, I set a deadline for a filing of a motion to  
13 amend, and if you can say you can do it in two weeks, how  
14 about if I set it for two weeks out? You'll have a chance  
15 to respond. We'll see, you know, whether there are  
16 counterclaims, you know, different contentions; and if the  
17 schedule needs to be changed, I'll try to be reasonable  
18 about it. I would like to try to hold this *Markman* hearing  
19 in November, just because my schedule may quickly go  
20 downhill shortly thereafter, but let's see where we are, or  
21 October, whenever I set it but the fall.

22 MR. WEINGAERTNER: Your Honor, we disagree with  
23 Mr. Connor's characterization of what's happened so far.  
24 There was no reason that the complaint couldn't have been  
25 amended earlier. In calls that we've had about other

1 issues, the issue was raised, and we were told that they  
2 can't respond about whether or when they're going to add  
3 them. And so it put us in a really unusual position about  
4 whether we will need to litigate patents, really complex  
5 patents that aren't in the case. And now we're in a  
6 position, your Honor, where if the schedule doesn't change,  
7 we're going to basically be forced to respond to a doubled  
8 case while we're responding and not knowing whether or not  
9 the schedule will be --

10 THE COURT: All right, and, again, to me, it's  
11 kind of abstract because I don't know. You may be right;  
12 you may not be right. This may double the size of the case;  
13 it may not. I can't tell. So let's take it a step at a  
14 time. Let's get this amended complaint on file, assuming I  
15 grant it. Let's circle back in some appropriate amount of  
16 time, probably in about 30 days, and see where we are.

17 MR. WEINGAERTNER: Okay, just, your Honor, just to  
18 note that I believe the contentions that we have to respond  
19 to are due at the end of July.

20 THE COURT: Okay. Well, I think he just said that  
21 this is not going to add any new contentions. Now, that may  
22 or may not be true, but if I see you in 30 days, that will  
23 give you another 30 days. In other words, I'm not going to  
24 be doing this at the last second. We'll have a chance to  
25 talk about this. And if you think it's not fair, you know,



1 we'll talk about that.

2 MR. WEINGAERTNER: Thank you.

3 THE COURT: Again, as I see my role here, it's to  
4 try to keep this case moving along without being unfair or  
5 unreasonable, and sometimes I have to tweak the schedule and  
6 sometimes not, but I can't tell. So let's handle it that  
7 way. I'm going to set a deadline. Today is June the 1st.  
8 Filing of motions to amend by June the 15th. And just so  
9 that I don't forget it, why don't we have a further  
10 status -- is July 5 a problem, the day after the 4th of  
11 July? You can appear by telephone. I don't require you to  
12 be here in person.

13 MR. WEINGAERTNER: No problem.

14 MR. CONNOR: That's fine, your Honor.

15 THE COURT: All right, I don't want anybody on a  
16 plane on the 4th if you don't need to be. How about  
17 11:00 a.m., Wednesday, July 5? And that's just a status to  
18 see where we are, and if there's an issue, I'll deal with  
19 it.

20 Okay, next issue. Mr. Weingaertner?

21 MR. WEINGAERTNER: Yes, your Honor. When we had  
22 prepared this, there were some open issues, and we were  
23 awaiting to hear a response from Maquet. We heard from them  
24 yesterday on an issue. We're hoping that we'll be able to  
25 resolve these without the Court's intervention, but we did

1     feel --

2                 THE COURT:  Is this discovery or supplementation?

3                 MR. WEINGAERTNER:  Yes, your Honor, we believe  
4     that there are some discovery issues.  One of them actually  
5     is sort of related to the following point, which if I might  
6     mention it.  So Maquet is the patent owner.  As far as we  
7     know, it doesn't practice the patents, although we haven't  
8     gotten a straight answer on that one, but we believe that  
9     its parent company, which appears to have some offices in  
10    the U.S., is a potential real party-in-interest, and we  
11    spoke about that with your Honor in January.  So we're  
12    trying to get some discovery on that.

13                We have other discovery about value.  They have  
14    actually acquired the patents in the first instance, and we  
15    believe there is discoverable information probably  
16    relatively targeted, and so we have been trying to work with  
17    Maquet to find kind of an efficient way to get that, and we  
18    haven't been able to arrive at that yet.  And we're --

19                THE COURT:  Is the issue because the -- is it a  
20    foreign company?  Is it overseas evidence?

21                MR. WEINGAERTNER:  Yes, your Honor.  It's in  
22    Sweden.

23                THE COURT:  Sweden, all right.

24                MR. WEINGAERTNER:  Although we believe that there  
25    are offices in the U.S. that also operate on behalf of

1 Maquet.

2 THE COURT: Okay. My strong recommendation is, if  
3 you need to go to Sweden, do it in the next few months and  
4 not next winner. Okay?

5 MR. CONNOR: Your Honor, there are a number of  
6 discovery matters that are pending in dispute between the  
7 parties. Our part of the letter had a Paragraph 2.  
8 Similarly, we have issues with them. We have offered to  
9 meet and confer on all of that essentially. We proposed,  
10 your Honor, that both parties do need to -- I think both  
11 parties need to be producing documents, need to be  
12 supplementing interrogatory answers. We would propose that  
13 the parties attempt to work that out in the next 30 days,  
14 and then at the status conference, your Honor, we could seek  
15 your Honor's guidance, if it's needed at that time.

16 THE COURT: All right, let's handle it that way.  
17 And, you know, to state the obvious, I want you to meet and  
18 confer. I want you to try to work it out. Sometimes you  
19 can't work it out. That's the way it is. Sometimes it  
20 depends on legal rulings I need to make, sometimes not, but  
21 I'd like to just get the process rolling; you know, if you  
22 have a dispute, get it teed up. If we're going to have to  
23 do, you know, Hague Conventions, you know, if we're going to  
24 have to do this sort of stuff, let's get that going because  
25 that's going to take a long time, and I just want to make

1 headway on this to try to crystallize this as best we can.  
2 So we'll start with a meet-and-confer, work out what you can  
3 work out, and report back to me in early July where we are.  
4 If you need to file a motion to compel or a protective  
5 order, file it; let's get it on file and take it from there,  
6 okay?

7 MR. CONNOR: Yes, your Honor.

8 MR. WEINGAERTNER: Yes, your Honor.

9 MR. CONNOR: Thank you.

10 THE COURT: All right. And what about IPR, or  
11 there may be other issues as well? Mr. Weingaertner?

12 MR. WEINGAERTNER: Yes, your Honor, we just wanted  
13 to keep the Court apprised of the status of the patents.  
14 Abiomed filed fourteen petitions. The number is in part  
15 dictated by the word limits that the Patent Office's Patent  
16 and Trial Appeal Board imposes. Those were filed --

17 THE COURT: So you're deliberately attempting to  
18 evade the word limits? Are you saying that on the record  
19 here?

20 (Laughter.)

21 MR. WEINGAERTNER: It's impermissible to do that,  
22 but -- it's tempting, but, no, it's really dictated by the  
23 numerosity of the claims. There's very many claims and  
24 they're very long, and you have to pay a fee each time, so  
25 we hope that from their perspective, it comes out in the

1 wash. But we filed those some weeks ago. Those are in. We  
2 expect -- Maquet must respond within three months of the  
3 filing of each of those, and then within six months the  
4 Patent and Trademark Office decides whether or not to  
5 initiate a proceeding, and so we simply wanted to keep the  
6 Court apprised of that.

7 THE COURT: And my view on that again, maybe  
8 simplistically, is, until they do it, this case is alive.  
9 If they do grant inter partes review, you know, whether I  
10 stay it or not or whatever, we'll just see. And I  
11 understand there is mixed -- in other words, this wouldn't  
12 take into account all the claims anyway. At least that's  
13 Maquet's position, I think, right?

14 MR. CONNOR: Correct, your Honor.

15 MR. WEINGAERTNER: That's right, your Honor. And  
16 we absolutely understand your Honor's position and simply  
17 wanted to be sure that we're being clear about it. If and  
18 when the time comes that they're instituted, we'll bring it  
19 up in a status conference.

20 THE COURT: Okay, and, again, that's one more  
21 bridge or set of bridges we'll cross when the time comes.

22 MR. CONNOR: I think that's fine, your Honor. I  
23 just wanted to note, I mean, it's interesting that they've  
24 come in and said that they need time to develop invalidity  
25 positions, when in fact with the IPR petitions, they filed

1     about five feet high full of petitions and so on, so --

2             MR. WEINGAERTNER: Well, your Honor, just to  
3     respond to that, the positions that can be taken before the  
4     Patent Office are entirely different from the ones --  
5     they're overlapping but they're much different from the  
6     defenses we can pursue in court, so I don't agree that's a  
7     fair characterization of the case.

8             THE COURT: All right, well, we'll see. Just  
9     don't try to evade my word limits, okay?

10            MR. WEINGAERTNER: No, your Honor.

11            THE COURT: Or page limits I guess is how I do it.  
12     In all seriousness, if we get to -- as long as I raised the  
13     topic, I'll finish the thought. My view is, if you need 30  
14     or 40 or 50 pages to do something, I'll give it to you, but  
15     don't waste my time or waste paper. You know, I understand  
16     sometimes these things are complicated. All I ask is,  
17     picture me reading your material, that's all, and then  
18     reading your opposition and the reply and the surreply and  
19     the cross-motions. You know, I have to read this stuff,  
20     so --

21            MR. WEINGAERTNER: I have nothing, your Honor.

22            THE COURT: Okay.

23            MR. CONNOR: Nothing further, your Honor.

24            THE COURT: All right, so we'll regroup in about a  
25     month. Again, you can appear by telephone. Again, there's

1 no need for you to fly over a holiday weekend. I just want  
2 to check in, see where we are, whether I need to tweak  
3 deadlines, set motion hearings and so forth. I probably  
4 told you at the scheduling conference, I do like status  
5 conferences in the sense that I think they tend to help move  
6 things along; and if there's a lot of moving parts, as there  
7 may well be here, at least for a little, you know, we'll  
8 just keep conferring and try to steer it the right  
9 direction, okay?

10 All right, unless there's anything else, thank  
11 you.

12 MR. CONNOR: Thank you, your Honor.

13 MR. WEINGAERTNER: Thank you, your Honor.

14 (Adjourned, 3:15 p.m.)  
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I, Lee A. Marzilli, Official Federal Court  
Reporter, do hereby certify that the foregoing transcript,  
Pages 1 through 15 inclusive, was recorded by me  
stenographically at the time and place aforesaid in Civil  
Action No. 16-10914-FDS, Abiomed, Inc. V. Maquet  
Cardiovascular LLC, and thereafter by me reduced to  
typewriting and is a true and accurate record of the  
proceedings.

Dated this 11th day of June, 2017.

/s/ Lee A. Marzilli

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LEE A. MARZILLI, CRR  
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