

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE: PHILIPS RECALLED CPAP,
BI-LEVEL PAP, AND MECHANICAL
VENTILATOR PRODUCTS
LITIGATION,

Master Docket: Misc. No. 21-1230

MDL No. 3014

This Document Relates to: All Actions

**PRETRIAL ORDER #17
RE: PROCEDURE FOR *IN EXTREMIS* DEPOSITIONS**

The following procedure will be followed with respect to case-specific discovery for *in extremis* cases. Testimony of *in extremis* plaintiffs may be preserved using the procedures set forth in this Order.

A. SCOPE OF THIS ORDER

This Order shall apply to all cases in which Plaintiffs allege personal injury that are currently pending in MDL No. 3014 and to all such related actions that have been or will be originally filed in, transferred to, or removed to this Court and assigned hereto as “MDL” cases (collectively, “the MDL proceedings”). This Order is not intended to interfere with, undermine, or contradict the procedures established in Rule 27(a) of the Federal Rules of Civil Procedure.

B. *IN EXTREMIS*

This Court intends to ensure that all parties are given a fair opportunity to take perpetuation or preservation deposition testimony where it is reasonably practicable to do so. For purposes of this Order, a Plaintiff will be considered “*in extremis*” when, based on medical evidence and a writing signed by a medical professional or a declaration executed pursuant to 28 U.S.C. § 1746 by the Plaintiff, he/she:

- Has reached, or is expected to reach within the next six (6) months, the state or condition of being no longer capable of testifying competently in a deposition; or

- Reasonably does not expect and/or is not expected to survive beyond the next twelve months.

C. NOTICE

Counsel shall give notice in writing to opposing counsel as soon as possible upon learning of a Plaintiff's *in extremis* condition, per section B above. The notice shall be accompanied by a declaration signed by the treating physician or by the Plaintiff pursuant to 28 U.S.C. § 1746 briefly describing the condition and the medical circumstances necessitating an expedited preservation deposition. The notice also shall contain a suggested date, time, and location for the Plaintiff's *in extremis* deposition, which will serve as the starting point for negotiations between counsel for the parties.

D. SCHEDULING

Upon receiving notice of a Plaintiff's *in extremis* condition and competency to testify, within seven days, the parties shall meet and confer in good faith to confirm the date, time, location, and means of conducting the deposition. Counsel who elects to take the deposition shall be responsible for securing and providing a court reporter and, if desired, a videographer for the deposition.

E. OBJECTIONS

1. If Plaintiff's counsel follows the procedures set forth in this Order, Plaintiff's counsel need not notice an emergency hearing in order to proceed with a Plaintiff's *in extremis* deposition. Should the non-noticing party have a good faith objection to the deposition, however, counsel shall notify opposing counsel in writing of their objection within seven (7) days of receipt of the notice and shall promptly meet and confer in good faith in an attempt to resolve the dispute.

2. If the parties are unable to resolve the dispute after meeting and conferring, any objection(s) shall be brought to the Court's attention as soon as practicable, but, in any event, no

more than fourteen (14) days following receipt of the notice. If the objection(s) are overruled, the deposition shall proceed as soon as practicable as agreed by the parties or ordered by the Court.

F. PROCEDURES

1. The following must be provided to defense counsel at least forty-five (45) days¹ before the *in extremis* deposition:

- a. Any available medical records related to Plaintiff's *in extremis* condition and the injuries alleged in this litigation that are in Plaintiff's or their counsel's possession not already produced to Defendants;
- b. Any available records within Plaintiff's possession relating to damages claims;
- c. All available records, to the extent they exist, supporting the request for a preservation deposition;
- d. To the extent ordered or agreed on by the time the request for the deposition is tendered, a substantially completed version of any Court-approved Plaintiff Fact Sheet, standard interrogatories, or other written discovery that plaintiffs are required to produce in this litigation, including any documents required to be produced therewith, if not already provided to Defendants; and
- e. Executed records authorizations including HIPAA-compliant medical authorizations required for the release of records related to Plaintiff's *in extremis* condition and the injuries alleged in this litigation from Plaintiff's

¹ The parties recognize that there are circumstances where a Plaintiff's medical condition may warrant a more expedited schedule than is contemplated herein. In these instances, the parties shall in good faith agree on a mutually convenient date as soon as possible after such notice. To the extent the parties are unable to reach agreement about how to proceed, the matter can be submitted to the discovery master for resolution.

healthcare providers, surgeons, facilities, and pharmacies (whether or not Plaintiff has provided such records to Defendants).

2. In addition, Defendants shall provide to Plaintiff any records obtained from such HIPAA-compliant medical authorizations or any subpoenas for plaintiffs' records as soon as practicable and in any event no later than five days prior to the discovery deposition.

3. Should Defendants' counsel encounter difficulty in timely securing medical and pharmacy records before a plaintiff's deposition, plaintiff and plaintiff's counsel will, upon request, provide reasonable assistance to defendants' counsel in securing such records.

4. Upon Defendants' request, a discovery deposition may be conducted at the time that a trial preservation deposition is taken. If a discovery deposition is noticed, it shall occur prior to the *in extremis* deposition at a time to which the parties mutually agree. The discovery deposition is limited to five hours on the record but may be extended up to seven hours on the record by agreement of counsel for the deponent and the parties. The *in extremis* deposition is limited to five hours on the record, during which each side is allotted 2.5 hours of questioning, regardless of whether the opposing party uses its full allotment of time, but may be extended up to seven hours (3.5 hours per side) on the record by agreement of counsel for the deponent and the parties. If a Plaintiff is unable to physically sit for the full duration of the allotted time for the deposition, the parties will meet and confer in advance of the deposition and agree to split the time 50/50, with each party allotted half of the agreed-upon time regardless of whether the opposing party uses its full allotment of time.

5. Subject to reasonable accommodations, including a remote deposition if warranted, the deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at trial. Unless the deponent's medical condition causes the deponent to be physically

unable, the deponent shall be seated at a table except when reviewing or presenting demonstrative materials for which a change in position is needed.

6. *In extremis* depositions may be taken remotely via a videoconferencing service agreed to by the parties. The procedures for conducting remote depositions will be addressed in a separate remote deposition protocol. However, nothing in this or any other deposition protocol will preclude a deponent from having counsel physically present during the deposition; however, if a deponent has counsel physically present during a deposition, Defendants shall have the right (but not the obligation) to have counsel physically present as well.

7. If a Plaintiff terminates an *in extremis* deposition before Defendants have completed the cross-examination, the parties will meet and confer regarding the continuation of the cross-examination at a later date. If the deposition terminates due to a Plaintiff's inability to physically continue and/or deteriorating medical condition, and the Plaintiff is unable to complete the deposition at a later date, the parties will meet and confer regarding the use of the deposition at trial.

8. Nothing in this Order is intended to limit either party's ability to present any portion of the discovery or *in extremis* deposition in its case-in-chief, or to preclude either party from requesting that any portion of either deposition be presented during the other party's case-in-chief, consistent with the applicable Rules of Civil Procedure.

9. If Defendants seek to take a subsequent update deposition of a Plaintiff prior to trial in the event that a Plaintiff's condition or prognosis improves subsequent to an *in extremis* deposition, the parties shall meet and confer on the necessity and scope of any additional deposition testimony and any objections thereto.

G. DEPOSITIONS OF NON-PARTY WITNESSES WHO ARE *IN EXTREMIS*

With regard to any case where a party reasonably believes that a non-party who is *in*

extremis may provide testimony that is necessary for the party's case, the parties will meet and confer in good faith, utilizing this protocol as a guide, to accommodate the scheduling of the non-party witness deposition.

Dated: May 19, 2022

Respectfully submitted,

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DONE and ORDERED this 8th day of June 2022.

/s/ JOY FLOWERS CONTI _____
JOY FLOWERS CONTI
SENIOR UNITED STATES DISTRICT JUDGE