

P R O C E E D I N G S

(Wednesday, June 15, 2022, 2:20 p.m.)

(In open court.)

THE COURT: This is the status conference in In Re: Philips Recalled CPAP, Bi-Level Pap, and Mechanical Ventilator Products Litigation, Master Docket Miscellaneous Number 21-1230, and it's MDL 3014.

The parties have filed a notice of who the speakers are going to be today and those who wish to formally have their appearance noted, and that will be incorporated into this hearing today.

So is there anyone who is listed that is not present?

(No response.)

THE COURT: Hearing none, so all of those names will come in.

Now, at this stage, we have also an opportunity for anyone else who wants to have their appearance noted of record. There will be a signup sheet. If you could sign that, we'll also include your names and the notice of those who have appeared today.

Looking at the agenda for today, it's not that lengthy. We do have the discovery plan update. So if somebody would like to provide that update?

MS. IVERSON: Kelly Iverson, Your Honor. I'm pleased to say that the parties have reached an agreement on a proposed

1 discovery plan. That would be filed --

2 THE COURT: Is it a plan to plan the discovery as
3 opposed to having --

4 MS. IVERSON: Yes.

5 THE COURT: Sort of like what we saw in the SoClean
6 case?

7 MS. IVERSON: Yes. I don't think you'll be surprised
8 that it looks very similar. It should be filed within the next
9 couple of hours. Hopefully, Aaron is letting his team know to
10 make a motion to include with that and --

11 THE COURT: Does it set forth the date when the fact
12 discovery will start?

13 MS. IVERSON: It does. We have a July 1st date for
14 fact discovery to start. We have dates for the ESI protocol to
15 be -- disputes to be submitted to the special master if we don't
16 have an agreement, dates for the amended protective order to,
17 you know, go through all of the different pretrial dates for us
18 to provide you with kind of a structure and plan for the next
19 phase, which I believe is sometime in late November, to talk
20 about kind of what we're going to do with class motions,
21 Dauberts, and things of this sort.

22 If you have questions on it, we're happy to jump on a
23 call at some time since it hasn't been submitted prior to this,
24 or whatever works for you.

25 THE COURT: One of the things I neglected to raise in

1 the SoClean case was how are things going with the mediator. So
2 how is that working?

3 MS. IVERSON: The mediator has been appointed, and we
4 are working to kind of schedule an initial conference, I
5 believe, so that everybody can talk about the plan to go through
6 sequenced or what have you mediation with Judge Welsh, which is
7 set forth in her order and in her directives.

8 THE COURT: I would expect that to be on every agenda
9 going forward, okay, so we have a sense of what's happening.
10 I'm also going to require that in the SoClean case. I'll do a
11 note on the docket that the agenda should include updates on the
12 status of the mediation plan.

13 MS. IVERSON: It sounds good to me, Your Honor.

14 THE COURT: Okay.

15 MS. IVERSON: Anything further on the discovery plan?

16 THE COURT: No. Anything from Philips?

17 MS. DYKSTRA: Lisa Dykstra, Your Honor. No, we're in
18 agreement. We have been working hard with plaintiffs --

19 THE COURT: State your name again before you speak.

20 MS. DYKSTRA: Sure. It's Lisa Dykstra. Thank you.

21 THE COURT: Thank you.

22 Okay. Ms. Katz, is there anything you want to add on
23 to that? Is she still here?

24 MS. KATZ: No. I moved seats. But no.

25 THE COURT: The census registry, this is a significant

1 issue. So where does that stand?

2 MR. STEINBERG: Your Honor, we have had -- Michael
3 Steinberg on behalf of Philips.

4 We've had plenty of conversations about it. Actually,
5 I think we are getting closer to creating both the registry and
6 sort of related fact sheets.

7 The important part from our perspective --

8 THE COURT: The fact sheets won't be too long, will
9 they?

10 MR. STEINBERG: Not for the census registry, no, Your
11 Honor.

12 THE COURT: Okay.

13 MR. STEINBERG: For the census registry, we want to
14 make sure we get pretty key information that we can use in
15 helping to identify bellwethers and early bellwether mediation.
16 That's fundamentally the information source that we're looking
17 at. And so I think we're coming closer to resolution with
18 plaintiffs about how to make this work.

19 The important part from our perspective is twofold;
20 it's getting good information that we can all use to help
21 stratify the issues in the case and identify -- you know, help
22 us select sort of representative bellwether mediations and
23 bellwether trials. So that's an important aspect.

24 Further, we want to make sure we have the tolling, but
25 we also understand that one --

1 THE COURT: We do have tolling.

2 MR. STEINBERG: We do have tolling right now. But the
3 point is, is that we are going to have to figure out how to
4 sunset that tolling in connection with the census registry.

5 THE COURT: And the registry will take the place of
6 the tolling?

7 MR. STEINBERG: The registry will take the place of
8 the tolling, exactly. And then, how do you then exit from the
9 registry to either push cases towards being asserted or not
10 being asserted? Because at the end of the day, having a big
11 list of a lot of people that have -- that are -- the claims are
12 just sitting out there in the ether is not good for anyone.
13 It's not good for the Court. It's not good for parties. And so
14 we need to make sure that at the end of the registry we have an
15 exit, and that's part of the discussions.

16 THE COURT: Will the fact sheets identify enough
17 information so that you can know that the plaintiff was using
18 the specific machine?

19 MR. STEINBERG: That's part of the ongoing
20 discussions. But that's -- from Philips' perspective, that's a
21 must on that, exactly.

22 THE COURT: I also thought -- my understanding -- that
23 these fact sheets can be very helpful in sorting out people who
24 really, you know, are not genuine plaintiffs in the sense that
25 they don't know that they were using the Philips machine, and

1 they can't identify the machine. If they got rid of it two
2 years ago, you know, they may not remember the manufacturer. So
3 it would make it very difficult for them to proceed as a
4 plaintiff if they can't identify that they were an actual user
5 of the machine.

6 MR. STEINBERG: We actually have something even
7 better, Your Honor. You know, we are living in the electronic
8 age -- I know; it reminds me, too -- and these devices actually
9 keep track of usage. And that is actually one of the subjects
10 that we're going to -- that we've been in discussions with the
11 plaintiffs about because it's in everybody's interest to
12 identify those people who stopped using the products.

13 My understanding is that roughly -- from when the
14 product is prescribed to a year out, roughly 60 percent of the
15 people drop off usage of the product. So we're going to want to
16 make sure that we look at and identify people who are actually
17 users of the product versus people who, you know, it just didn't
18 agree with them, and they didn't like it very much. I mean
19 that's one way of looking at the data and to make sure that we
20 know that they were, in fact, using the machines.

21 THE COURT: Well, I'm sure the plaintiffs will have
22 some thoughts on what should be included and how it should be
23 raised. But I think the ultimate goal is if somebody was never
24 a user, or they can't show that they were ever a user, that
25 would be important.

1 MR. STEINBERG: Exactly.

2 THE COURT: The dates and the timing, and were they
3 affected or not, that may be a different issue, and maybe those
4 facts would be relevant for bellwethers and that type of thing.
5 But I don't know if it would be case dispositive.

6 MR. STEINBERG: No, we're not looking for case -- I'm
7 not making motions for summary judgment off the registry, Your
8 Honor.

9 THE COURT: But I think part of this is to sort out
10 people that can't, you know -- really can't present a claim.

11 MR. STEINBERG: Right, and that's part of what we're
12 looking at and what we want to do. Before we came here to
13 court, Your Honor, we had another productive meeting over at
14 Morgan Lewis's office to chat about this.

15 THE COURT: Let's set a time frame for when we're
16 going to see the registry.

17 MR. STEINBERG: The registry, I believe it's in our
18 plan with Carol Katz, and I think we're due to have that -- I
19 think it's July 8th.

20 THE COURT: Okay.

21 MR. STEINBERG: July 8th.

22 THE COURT: You're working on it.

23 MR. STEINBERG: We're working on it. There have been
24 more meetings than you can shake a stick at. And so -- but
25 we're moving fast.

1 THE COURT: Thank you.

2 MR. STEINBERG: Thank you.

3 MR. SEEGER: Your Honor, Chris Seeger for the
4 plaintiffs.

5 A lot of what my friend, Mr. Steinberg, said is true.
6 We have an interest also in making sure that legitimate cases
7 make their way from the census program onto the file docket.
8 That would include some explanation of what kind of an injury
9 you have as well as whether you used the machine. I think that
10 is basic.

11 I think where we're held up is that Philips is looking
12 for a lot more information than that, and they are looking for
13 ways to eliminate cases before they ever make it onto the file
14 docket. So that's the tension. I don't want to preview too
15 much of it. I think we are working cooperatively.

16 What we would love to deliver to the Court that I
17 think would be effective is a program that prevents the filing
18 of cases that shouldn't even be here.

19 THE COURT: Right.

20 MR. SEEGER: We went through this in 3M, and we did an
21 analysis and found that, even though there were a lot of cases
22 in there, we prevented the filing of about 70,000 cases that
23 would have been filed if we didn't have the program. I expect
24 to be successful -- to have a successful program like that here
25 for this Court.

1 But it is important that we keep in mind that these
2 are unfiled cases that are just being vetted. And if we're
3 going to ask people to sign HIPAA forms and enter a lot of
4 information on fact sheets or census forms, they're just going
5 to file their case, and we're going to wind up with cases here
6 that we probably don't want or shouldn't be here. That's the
7 tension.

8 On the plaintiffs' fact sheet side, which is cases
9 once they're filed, of course, they're entitled to all the
10 discovery they're entitled to: medical records, information
11 about the injury. We're not -- I don't think we're going to
12 have a problem --

13 THE COURT: Shouldn't the registry be the kind of
14 thing that -- everybody doesn't have to file the first day. You
15 know, as long as they're within some kind of a tolling period or
16 whatever is mutually agreeable --

17 MR. SEEGER: Yes.

18 THE COURT: -- that there's going to be a period in
19 which they have to file them.

20 MR. SEEGER: Right. That is exactly right. That's
21 the way, I think, we see it going. I'm not sure Philips would
22 disagree.

23 Again, one of the sticking points -- just so Your
24 Honor is aware, I don't expect these issues to get to you
25 because I think we're going to resolve them -- but there is a

1 tolling agreement right now with very few conditions. Philips
2 wants to terminate that. So we've lured now 35-, 40,000 people
3 onto a tolling agreement, and we want to change the rules of the
4 game. So that's going to be a problem, and we have to really
5 think through how to do that in a way that encourages
6 participation into a census. And that's all just in terms of
7 framing it.

8 Other than that, I do want to say that Mr. Steinberg,
9 Mr. Monahan, all the people sitting here are working with us
10 cooperatively. We've spent a lot of time together. I think
11 we're going to get this done.

12 And the guidance you gave us today, whether it was
13 intended or not, I think was very helpful. So thank you.

14 THE COURT: Thank you.

15 Common benefit assessment order. I've reviewed the
16 order and I just have two things. Okay? One, it sets a ten
17 percent rate, but it doesn't break it down between the fees and
18 the costs, which I see almost every other case does that, and I
19 was wondering why. And if it should, why wouldn't we do
20 something like 7 and 3 or 8 and 2, you know, like some of the
21 other orders that I -- it was very helpful that you attached
22 those as exhibits.

23 And the second thing is, I need to have a pretrial
24 order on the docket requiring objections, if any, to be filed by
25 a date certain, so we can have a hearing on that if there are

1 objections because there are people that are going to be
2 affected by this that are beyond this room.

3 MS. DUGGAN: Thank you, Your Honor. Sandra Duggan for
4 the plaintiffs.

5 With regard to the allocation of the assessment
6 between common benefit fees and expenses, you are correct. In
7 most cases, they set aside two percent for expenses and the
8 remaining amount for fees. Because we're so early in this case,
9 it seemed to make sense to us to leave that open for a later
10 discussion, depending on how the case plays out. For example,
11 in GranuFlow, they needed more money for costs. So that was
12 increased to four percent down the road. And we may not need as
13 much for expenses. We just don't know right now. So we thought
14 it would allow flexibility if the Court could just set a total
15 amount aside and make that decision later.

16 THE COURT: It's important to get that fund up and
17 running if settlements start to come in.

18 MS. DUGGAN: Yes.

19 THE COURT: So you have it clear. And it seemed that
20 that is within the range of most of the other fees that were in
21 the other orders, but I need to have an opportunity for people
22 to object.

23 MS. DUGGAN: I agree, Your Honor. And I will let you
24 know that we filed a motion on behalf of all of the appointed
25 counsel in this case. I also circulated our motion to as many

1 potential common benefit counsel as I could to allow them an
2 opportunity to preview it before it was filed and to hear if
3 they had any objections, edits, or comments that they wanted to
4 give to us. But I agree. I don't know what time frame you're
5 thinking of for a proposed order in terms of allowing people to
6 object if they want to.

7 THE COURT: I would think if they had 30 days to
8 object from the date of the filing, you know, and then we'll see
9 if there are objections. Then I'll set a hearing date on it,
10 and it would -- if there are objections, you'll have to have an
11 opportunity to respond in writing.

12 So I don't want to prejudge the date for it, but I
13 would say the objections will have to be filed within 30 days of
14 the date of the entry of the motion. So get that exact date and
15 I'll put an entry on -- a notice on the objections must be filed
16 by that date.

17 MS. DUGGAN: Within 30 days of the filing?

18 THE COURT: Right.

19 Ms. DUGGAN: Okay.

20 THE COURT: Pick out the date by -- so people aren't
21 confused.

22 MS. DUGGAN: And I know this is set forth in our
23 papers, but since there's a transcript, I just want to make it
24 clear that this is just a set-aside. It is not an award of
25 fees. We will have to prove that down the road.

1 THE COURT: Exactly.

2 MS. DUGGAN: And the amount that's been set aside can
3 be increased or decreased depending on how the case unfolds.

4 THE COURT: It's very clear, I thought, in the
5 proposed order, that made it clear that this is just to have
6 some reserve, so to speak, so that at the end of the case
7 there's an ability to pay for the fees that might be necessary
8 for counsel who have provided that common benefit.

9 And then because most of those -- this is mainly for
10 the personal injury cases; it doesn't really affect the class
11 actions so much. It's really in the personal injury cases that
12 people know that when they're settling, that amount is going to
13 be set aside and can be utilized at the end of the case, and
14 maybe it's increased or decreased. But it's always harder to
15 get money from people who have already pocketed it than to have
16 it set aside at the very beginning. So I think it's good for
17 everyone to know upfront what's happening and what the
18 anticipation could be. And as soon as you think it's not
19 enough, you better be here very quickly so that we can address
20 that as soon as possible.

21 And we can't forget about the allocation between costs
22 and fees, and there should be some sense of timing that you'll
23 have to be attuned to so that it comes back up. And so it
24 should be something that maybe every three months you should
25 give me an update on whether you think that's still a good

1 number.

2 MS. DUGGAN: I most certainly will, Your Honor. At
3 the point in time when there is a settlement or a verdict and we
4 need to set up the fund itself, we will then also provide
5 reports to Your Honor as to how much has been set aside and the
6 status of that.

7 THE COURT: Okay. That would be good.

8 MS. DUGGAN: Thank you very much.

9 THE COURT: Anything else on that matter?

10 (No response.)

11 THE COURT: Okay. The Leadership Development
12 Committee.

13 MS. KREIDER: Good afternoon, Your Honor. Claire
14 Kreider with Gainsburgh Benjamin on behalf of the Leadership
15 Development Committee.

16 I haven't been before Your Honor since my appointment,
17 so I'd like to thank you for my appointment and the creation of
18 our committee.

19 I'm here to provide Your Honor with an update on my
20 committee members' work thus far in the MDL.

21 As Your Honor's aware, each member of the LDC has been
22 paired with a mentor from the plaintiffs' Steering Committee.
23 We continue to engage and collaborate with our mentors. In
24 addition, we have each been assigned to a substantive work
25 committee focusing on areas in the litigation such as bellwether

1 processes, discovery, law briefing.

2 I want to highlight some of our members' work product
3 that we have done thus far, including researching, drafting, and
4 editing various pleadings like the economic loss class complaint
5 to be filed with Your Honor shortly. And some of our members
6 have provided input on potential discovery forms, like census
7 forms that may be used in an MDL.

8 In advance of my attendance here today, I was able to
9 attend various meet and confers with the defendants' SoClean
10 counsel and the discovery special master. Those conversations
11 revolved mainly around the discovery plan that will be filed
12 with Your Honor shortly.

13 Lastly, the LDC intends to continue its monthly
14 videoconferences to discuss legal issues and projects that we're
15 each working on.

16 And with that, Your Honor, we just hope to be able to
17 continue our meaningful contributions to the MDL as it
18 progresses.

19 THE COURT: Thank you. As I've said before, please
20 keep good notes because, at the end, I think it would be nice to
21 have a report with things that worked, things that didn't work,
22 and any recommendations for future leadership development
23 committees.

24 MS. KREIDER: Yes, Your Honor. Our committee has
25 noted Your Honor's preferences for notes and assigned our

1 co-leads to take notes so that we can report at the end of the
2 litigation how our committee progressed and what we were able to
3 do.

4 THE COURT: Thank you.

5 MS. KREIDER: Thank you, Your Honor.

6 THE COURT: Now, is the liaison counsel present? Is
7 there anything that you need to bring to the Court's attention,
8 how that's going?

9 MR. RIHN: May I, Your Honor?

10 THE COURT: Yes.

11 MR. RIHN: Aaron Rihn, Your Honor.

12 THE COURT: We keep getting calls, and we refer them
13 to the appropriate liaison counsel.

14 MR. RIHN: We appreciate that.

15 The only thing that I would bring to the Court's
16 attention, because I know it's an issue of importance to you, is
17 that the website will be up and running probably by the end of
18 this week, they are telling me.

19 THE COURT: Oh, good.

20 MR. RIHN: I don't know if Your Honor would like a
21 call to chambers just to let you know when it is up and running,
22 but it's almost ready to go.

23 THE COURT: Thank you.

24 MR. RIHN: Thank you.

25 THE COURT: Now, again, the proposed order, if it's

1 filed, it has to be -- have a motion that precedes it. So you
2 have to have a motion attaching the proposed order. And then
3 that way -- and that would also work for stipulations if you
4 wanted them to be approved for whatever the appropriate purpose
5 would be. So if you could follow that practice, it will be in
6 compliance with how our ECF operates. And it's a way to -- it
7 triggers it to get to my attention immediately. Okay?

8 Now, is there anything else that we need to address?

9 MS. IVERSON: Nothing from the plaintiffs, Your Honor.

10 MS. DYKSTRA: Nothing from the defendants, Your Honor.

11 THE COURT: Okay. Hopefully, the real work -- not
12 that you haven't been really working, but in terms of the
13 substantive work of getting into the discovery, that will be
14 starting very soon.

15 Thank you, all.

16 (Proceedings concluded at 2:42 p.m.)

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18
19 C E R T I F I C A T E

20
21 I, SHARON SIATKOWSKI, certify that the foregoing is a
22 correct transcript from the record of proceedings in the
above-entitled matter.

23 s/Sharon Siatkowski
24 SHARON SIATKOWSKI, RMR, CRR, CBC, CRI
25 Official Court Reporter