

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

IN RE: PHILIPS RECALLED CPAP,
BI-LEVEL PAP, AND MECHANICAL No. 21-mc-1230
VENTILATOR PRODUCTS LIABILITY
LITIGATION.

Transcript of Status Conference held on Wednesday,
January 25, 2023, in the United States District Court,
700 Grant Street, Pittsburgh, PA 15219, before Honorable
Joy Flowers Conti, Senior United States District Judge.

APPEARANCES:

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P R O C E E D I N G S

1
2 THE COURT: This is now the status conference In Re:
3 Philips Recalled CPAP, Bi-level Pap and Mechanical Ventilator
4 Products Litigation. It's at Master Docket Miscellaneous
5 No. 21-1230. The Court has received notice of those who will
6 be speaking on behalf of the plaintiffs.

7 If there is anyone else that would want to enter
8 their appearance, we have a paper at the front by the court
9 reporter. You can come in and sign in, if you would like to
10 enter your appearance that way. And anyone who is here for
11 the SoClean MDL, they can also come up and enter their
12 appearance in the SoClean MDL, if they haven't done so
13 already.

14 Okay. I first want to take up one item that's not on
15 the agenda so I don't neglect to raise this. There have been
16 at least 47 cases in which Philips RS North America LLC filed
17 motions to dismiss pursuant to Federal Rule of Civil
18 Procedure 41(b). Following those filings, some of the
19 plaintiffs filed motions for leave to file short form
20 complaints, which the Court granted.

21 Philips RS North America LLC also filed notice of
22 withdrawal of some of their Rule 41(b) motions to dismiss. So
23 there is some administrative efficiency issues that have come
24 up with that, because you've got the master docket and then
25 the individual dockets.

1 So, first, Philips RS North America LLC must file or
2 ensure that they have filed the notices of withdrawal at each
3 of the individual dockets to which the notices apply. This
4 has been done in some, I've been advised by the clerk's
5 office, but not all the individual cases.

6 So somebody has got to go through very carefully and
7 see which notice -- where the notices of withdrawal are going,
8 to which cases they will apply and make sure they're filed at
9 the individual docket as well.

10 Secondly, Philips RS North America LLC should file a
11 chart at the master docket noting which Rule 41(b) motions to
12 dismiss were resolved via notice of withdrawal and which 41(b)
13 motions to dismiss remain active and pending. So that I will
14 then focus on the active and pending and see what needs to be
15 done to bring that motion to resolution. Okay. That will be
16 most helpful to the Court.

17 MS. FEINSTEIN: Thank you very much, Your Honor.
18 Wendy West Feinstein for Philips RS with Morgan-Lewis. I
19 spoke with plaintiffs' counsel this morning about that very
20 thing, and I actually have a chart with me today.

21 What we would propose to Your Honor, in addition to
22 what you've requested, is that the parties meet and confer
23 about a process going forward so that the docket is -- the
24 parties can work together and present any remaining open
25 issues in a little more of a concise and less cumbersome way

1 to the Court, understanding that we've got to address both the
2 individual dockets and the master MDL docket.

3 So if that's all right with Your Honor, we will
4 discuss and then report back at the next conference about a
5 procedure going forward with respect to those other issues.

6 THE COURT: Miss Duggan?

7 MS. DUGGAN: Good morning, Judge Conti. Sandra
8 Duggan for the plaintiffs. We're interested, Your Honor, in
9 making sure the process is efficient. And we certainly don't
10 want to waste judicial resources. I think there was a little
11 bit of confusion sometimes on behalf of plaintiffs' counsel
12 when PTO 28 was entered. Some of the counsel have one case on
13 file. They're not part of the leadership structure. Some of
14 the short form complaints were filed in the original docket as
15 opposed to the docket -- individual docket that was
16 transferred to the MDL.

17 So we're in the process of talking to defendants to
18 try to make sure at least that our charts are the same and
19 that way motions are only filed where there is a legitimate
20 reason to do so.

21 THE COURT: While you're taking this up, if there has
22 been a motion to file the short form complaint out of time, if
23 it's granted -- and I've essentially granted all of them to
24 date -- then the motion to withdraw will be -- excuse me, the
25 motion to dismiss with respect to that case would be mooted,

1 even if there hasn't been a motion to withdraw filed. So
2 we've got to work through all of those things and make sure
3 we've got the docket straight. So dangling cases out there
4 and then somebody could be prejudiced.

5 MS. FEINSTEIN: Exactly. Thank you, Your Honor. We
6 will work together to ensure that both of our charts match
7 before we submit them to the Court. And plaintiffs'
8 leadership has assured us that they'll communicate with folks
9 to determine those who wish to proceed with their claims and
10 those who wish to dismiss them.

11 MS. DUGGAN: Counsel have been reaching out to all of
12 the individual counsel first to try and get an idea of where
13 the cases stand, and we will work together to present
14 something unified.

15 THE COURT: Thank you. Okay. Update on the
16 jurisdictional discovery.

17 MR. MONAHAN: Hello again, Your Honor. Bill Monahan
18 for the Philips Dutch parent company, Koninklijke Philips. We
19 heard you loud and clear at the last conference, Your Honor.
20 You wanted jurisdictional discovery to get started on the
21 Dutch parent company and plaintiffs' alter-ego theory and to
22 get it done and to get it done fast. And that's exactly what
23 we've been doing.

24 We received plaintiffs' discovery requests,
25 jurisdictional discovery requests, on December 19th. And

1 since then we've been working around the clock to respond to
2 them, to answer their interrogatories, produce documents,
3 etcetera, etcetera.

4 My colleague, Miss Olsen, actually cancelled her
5 plans on New Year's Eve in order to get a production out that
6 night. So we've been taking this very seriously, Your Honor,
7 to make sure we get this done quickly. The requests have been
8 quite broad.

9 We don't think a lot of it really has to do with
10 jurisdictional discovery or to the ten factors from your
11 In Re: Enterprise decision, but we have tried really hard --
12 and I think Special Master Katz can probably attest to this.
13 We tried really hard not to have disputes with plaintiffs
14 about whether something is or isn't relevant to jurisdiction
15 and jurisdictional discovery. So we've been giving it to them
16 even when we don't think it's relevant, but where it's not
17 terribly burdensome.

18 We have, I think, 22 rounds of interrogatories from
19 the other side, 34 document requests. The topics are broad.
20 Various financial topics; accounting, budgeting, taxes,
21 employee compensation, marketing, IP licensing, just to name a
22 few things, Your Honor.

23 We've been doing rolling productions. So far we've
24 reviewed about 120,000 pages of documents for responsiveness.
25 There really isn't all that much responsive from our

1 perspective, Your Honor, not much there--there to this
2 alter-ego theory. But we've had to review a whole bunch of
3 documents just to make sure we're not missing something that
4 might be there. We made six productions over the last month
5 or so, responded to 20 of the 22 interrogatories. The
6 remaining two are going to be answered this week.

7 This has been an all-hands process, Your Honor. My
8 colleague on our Leadership Development Committee,
9 Miss Labrinos, who will speak at the end of today, Your Honor,
10 will talk a little bit more about the process and her
11 involvement in it.

12 But before I sit down, just one sort of favor, Your
13 Honor. There is going to be a 30(b)(6) deposition of KP NV,
14 the Dutch parent company. We're hoping on February 1st of
15 next week. It's on 11 topics. We're all flying to Amsterdam.
16 So hopefully that will be fun.

17 But both sides are contemplating that this will be
18 the end of the jurisdictional discovery process, this
19 deposition on February 1st. I know Your Honor at the last
20 conference said you wanted everything done by the end of
21 January, but I would just respectfully ask that one additional
22 day, which would make things --

23 THE COURT: I'll extend the date for the
24 jurisdictional discovery until February 2nd.

25 MR. MONAHAN: Thank you, Your Honor. That's the

1 entirety of my report.

2 THE COURT: Thank you.

3 MR. SEELEY: Your Honor, Caleb Seeley on behalf of
4 the Philips plaintiffs. Just to report, I don't agree that
5 there is not a lot of there-there with plaintiffs'
6 jurisdictional arguments. But, otherwise, I would agree that
7 the parties have been able to work through their disputes with
8 great help from Special Master Katz. We've had continuous
9 meet-and-confers over the last few weeks.

10 Unfortunately, we do have to state some reservations,
11 which is, as Mr. Monahan just stated, we're still waiting on
12 some documents. We're still waiting on some answers. And the
13 deposition itself, which while we would hope would be the end
14 of discovery, has not happened yet. And so we hope that the
15 witness will be prepared and answer our questions on all
16 11 topics. But, unfortunately, we just can't promise that's
17 going to be the absolute end.

18 We've made these reservations clearly from the
19 beginning to defendants and asked them, if they could, to see
20 if their witness was available with a week to spare in the
21 deadline. I guess the witness was only available on
22 February 1st.

23 So with those few caveats and reservations, we
24 otherwise generally agree that we've gotten the discovery that
25 we've sought, broadly speaking. And we continue to review

1 what we've gotten. And we'll continue to work through any
2 upcoming disputes with the help of Special Master Katz. And
3 if that doesn't solve it, we'll come to you.

4 THE COURT: Okay. Thank you. We have some -- the
5 disputed items re discovery in the case management docket,
6 No. 1436.

7 MR. BUCHANAN: Your Honor, Dave Buchanan for the
8 plaintiffs. There are a number of items in here. So they may
9 be handed off to one of my colleagues. So I'm not sure where
10 you would like to begin. I'm happy to give an overall.

11 THE COURT: Can the other side come up to the podium
12 who is going to be addressing this?

13 MR. LAVELLE: Good morning, Your Honor. John Lavelle
14 from Morgan-Lewis for Philips RS. As with the plaintiffs, we
15 have several people who will be speaking, depending on which
16 issue Your Honor wants to hear on.

17 MR. STEINBERG: Michael Steinberg on behalf of the
18 Dutch parent and the non RS LLC. Yes. I'm talking on one
19 topic today and so can address that at Your Honor's
20 convenience.

21 THE COURT: Well, what I want to say is there is such
22 a wide difference. And I'm a little confused, actually, about
23 what the parties' perception is going -- each side's
24 perception is going to be about how the case is going to
25 proceed. And the plaintiffs have approached it one way.

1 Then when I read the defendants' approach, it was
2 very different. And they raised a number of issues that
3 weren't really encompassed within the plaintiffs'
4 presentation. But I want to set some ground rules so it's
5 clear and there's no misunderstandings. I mentioned this
6 during the SoClean status conference. Mediation is meant to
7 be early. It's not meant to be after trials have taken place.

8 That defeats the whole purpose of having an early
9 mediation. I understand in class actions often at the end of
10 the case, after you've had the bellwether trials, if
11 necessary, there will be further mediation, because by that
12 time things may be that the parties were widely apart at one
13 point, you know, and they weren't able to come to resolution,
14 that final mediation can be helpful.

15 We have that in other civil cases, complex cases.
16 You have an early mediation. Everybody is hopeful. Sometimes
17 they do work out, and those are the ones that we want to
18 encourage. That's why we encourage it, because sometimes the
19 early ones can really save a lot of time and effort, the
20 parties' time and effort. Because it's expensive. This is
21 very expensive litigation.

22 So if you can solve things early, everyone's better
23 off. Particularly the clients and the plaintiffs who may be
24 receiving funds earlier. They'll have to wait years.

25 So those are the goals of early mediation. But it

1 has to be meaningful. So if there is discovery needed so that
2 you can address it, then let's do that. Let's meet with the
3 special master, Special Master Katz, and the mediator, Special
4 Master Welsh, and try to figure out what discovery is really
5 needed that's going to be helpful.

6 It can't be an excuse to try to overburden one side
7 so it delays the process. No. Figure out what is going to be
8 helpful to you, to the mediator, so that you can have a
9 meaningful mediation.

10 So mediation doesn't happen after trial. It happens
11 before trial. Otherwise, we'll have done all the summary
12 judgment motions, I have had all the Daubert hearings and then
13 we'll have gone through the expense of trial -- and not just
14 one trial. You'll have maybe several trials. So it's really
15 expensive.

16 So let's try to use our best efforts to have an early
17 mediation that can be meaningful. If it doesn't work out -- I
18 mean, that does happen. Most of the times you would be
19 surprised how many cases will settle early. I'm not saying
20 that will happen in this case. At least it helps frame
21 everybody's framework so when you're working, if there is a
22 misconception, you can try to clear it up with maybe some
23 other discovery or some tailored motions or something like
24 that. That's early.

25 Then there is this question, what's the role of --

1 when trials take place -- I'm not quite sure exactly what the
2 trials are going to be all about. Is it just on the personal
3 injury cases that we're going to have the trials? Are the
4 personal injury cases part of a class action?

5 It's going to be a class action on some point of
6 liability issues or some targeted issues that might be
7 appropriate for class certification that will affect the
8 personal injury cases? If that's the case, class
9 certification comes first. You don't do trials and then do
10 class certification.

11 There is a Third Circuit case, In Re: Citizens Bank
12 NA, 15 F.4th 607, Third Circuit, 2021. It's interpreting
13 Rule 23's concept that you have to have practical -- that the
14 certification be in an early practical time. The Court on
15 page 617 says, "True enough, practicable means feasible, so a
16 district court has discretion in its choice of timing. But
17 the district court's plan to conduct a full trial cannot
18 satisfy any definition of early.

19 "The district court's planned FLSA trial on whether
20 Citizens Bank had a policy or practice that caused MLOs to not
21 report all of the hours they worked would resolve many, if not
22 all, of the factual issues pertaining to the Rule 23 class.
23 Yet under the district court's approach, Rule 23 class
24 certification vel non would remain unresolved until after
25 trial. The period after a trial on the parties' core factual

1 dispute hardly comprises a case's first part or stage."

2 So barring something that you can raise with the
3 special master about the timing issues, from my point of view
4 -- and I've had many class actions, complex and some not so
5 complex. We always do class certification first. You do
6 class certification discovery.

7 You have a period for class certification discovery.
8 That would require you to identify sort of what the issues are
9 going to be for the class and focus on those, get that
10 discovery done. Then I understand that means you pick out a
11 couple of the plaintiffs, and you have robust discovery about
12 some of those plaintiffs and that kind of thing so you can
13 team up that plaintiff for the plaintiff's own individual
14 case, if it comes to that.

15 And you may have expert issues that come up. We may
16 need to have an expert component to the class discovery
17 period. But you have to sit down and talk about it. And you
18 have to have an approach that focuses on that. So if there is
19 going to be personal injury cases, sort of like the mass tort
20 kind of component that would not be part of any class
21 certification and those individual cases are before me, that
22 maybe can be on a little bit of a different track. But there
23 is going to be some overlap in terms of the science, some of
24 the issues.

25 So we need to coordinate that. And we shouldn't be

1 having personal injury trials that are going to interfere with
2 the process to getting some of these class action issues
3 resolved. Because those in some ways are less complex. You
4 know, if you have the economic loss where the machine is
5 defective or whatever, those issues are going to be part of a
6 class certification. But they may overlap a little bit with
7 the personal injury, because you're going to have to show that
8 the product was defective in some way. And that's going to be
9 part of class certification probably and some of the other
10 claims that are being asserted.

11 So you really have to have -- I don't like to be too
12 simplistic about this, but you really have to address what are
13 the core issues that you're going to have for class
14 certification. How do those overlap with personal injury?
15 Let's get those addressed. And let's get moving on getting
16 through class discovery on class issues and have that ready to
17 go.

18 And if you have a couple plaintiffs that you're
19 picking out that are going to be important for the class
20 certification issues, we can focus on those people, try to
21 have maybe more robust discovery and getting those cases
22 perhaps ready for a trial, if necessary. So that you're not
23 -- you're not going to have to go back and duplicate things.
24 It really takes a lot of effort to really sit down and say
25 this is how we're going to go forward.

1 And you're like one side is marching off this way
2 (indicating). The other side is marching off that way
3 (indicating). I have no clear understanding about when the
4 cases are going to be ready for the completion of class -- for
5 the class certification, fact discovery versus general fact
6 discovery, which portion of the cases are not going to be
7 subject to any class issues, but they're going to have
8 overlaps. How do we approach that?

9 So you really have to do a better job on both sides
10 sitting down and focusing on how efficiently are we going to
11 go forward and accomplish the tasks that we all have in front
12 of us. And I don't see with the way you're going that we're
13 going to come to any concrete resolution. I'm loathe to say
14 arbitrate deadlines. Now you have to have this done by this
15 date.

16 Well, if it's not feasible because you can't agree on
17 what the nature of the discovery is that you're going to be
18 doing, all we're going to be doing is fighting. The special
19 master will be overwhelmed with a multitude of issues that
20 eventually are going to have to come to me, at least in part
21 the ones that can't be resolved.

22 So you really need to do a better job of meeting and
23 conferring. I personally think you probably need to meet in
24 person. I have been on a lot of Zoom calls. It's so easy to
25 multi-task when you're doing this. You're not totally focused

1 on the one thing. So I do appreciate the opportunity
2 sometimes to really meet in person. Because you're there, and
3 you're captive. You can't be on your phone. You can't be
4 checking E-mails, reading something else while somebody else
5 is talking. You're there, and you have to be focused.

6 So I personally think you should meet and confer
7 about these issues that you've brought to me. I did look
8 through them. It's a lot of work and trying to read some of
9 the cases that are being cited and who wants this and who
10 wants that and why you want this and let's get to trial within
11 a year. But I don't understand what you're trying to do. And
12 what happened to the class certification? Where did that go?
13 I'm looking at plaintiffs now.

14 And on the defense side, well, what are the issues
15 that you want to tee up? What kind of discovery are you
16 seeking from your side during the class certification?
17 Because you're going to be looking at a lot of the plaintiffs,
18 from what I understand, at least on cases where you're talking
19 about the defective products, was there harm caused? I'm not
20 going to speak for anybody on what they should or shouldn't be
21 doing. But it's apparent to me that there is some fundamental
22 disconnection here.

23 I just wanted to make it clear what my view is on how
24 we go through this process. I'm not going to have trials that
25 are going to be disruptive of getting through the class

1 certification. That should be as early as practicable. That
2 means you need to focus on that.

3 What are the class issues? How are you approaching
4 it from the plaintiffs' side? What do you have to prove?
5 What's the defenses going to be? Meet and confer. Get that
6 discovery teed up. I do understand we've got multiple
7 different tracks going on here. And we're going to have a
8 different one for each one. But sometimes it's confusing.

9 I look at your charts. The dates are going this way
10 (indicating). Then I start to draw lines. This one wants it
11 here (indicating), and it's over here (indicating). Is it
12 three months? Is it six months' difference?

13 Then I started to realize it's really not just a time
14 difference. It's a fundamental approach difference. And then
15 you have this thing called substantial completion. I don't
16 know what that means, to be honest with you.

17 When is something substantially completed? Does it
18 mean you produced all the documents or you just have
19 depositions to go or -- I mean, I don't know what you mean by
20 that. So, anyway, for what it's worth, those are the concerns
21 that I have.

22 I really think there has to be more intense effort.
23 I really think that my suggestion would be that you meet in
24 person. Send your key people who know about it. Maybe the
25 key associate comes along. Because they're going to have to

1 be doing a lot of the underlying discovery work. But you need
2 to set up those dates. You need to do it early, and you need
3 to come back with a concrete time plan.

4 MR. LAVELLE: John Lavelle, Morgan-Lewis, for Philips
5 RS. I think Your Honor's guidance for what you expect is very
6 helpful, particularly on prioritizing class certification. I
7 think we can meet immediately after this case management
8 conference, get a meeting in person on the calendar; and we'll
9 see what we can do to fulfill your guidance and present a
10 unified proposal to you.

11 THE COURT: I want to move it forward. By the way,
12 bellwether mediations, my understanding is those are happening
13 early. That's a separate track from what you've said here for
14 the litigation track. The bellwether mediations, in my mind
15 what's hopefully going to be different about this MDL and the
16 SoClean MDL is that we were going to endeavor to do it early
17 to see, does it work? Doesn't it work? What was wrong? Was
18 it helpful?

19 And so we can give guidance to other MDLs. Hopefully
20 it will work in this one. I think we have maybe a little
21 better hope in the SoClean case. But it could work here, too.
22 At least resolve some of the issues.

23 Bellwether mediation isn't after trial. Bellwether
24 mediation is -- it's a separate track. You've got the other
25 one about how do you get class certification fact discovery?

1 And now we also need a track what do you have to do to have a
2 meaningful mediation and get that on track, too.

3 I don't know what teams you have lined up, but there
4 is lots of lawyers on each side. I know you have different
5 people that focus on different things. But let's not lose
6 sight of bellwether mediation, which I envision there is an
7 early one, not waiting until after the trial.

8 MR. SEEGER: Chris Seeger. I don't think my friends
9 are going to disagree with anything I say here. We are
10 actively meeting with Judge Welsh, and we are discussing
11 mediation. And all I will say about that is it is proceeding
12 well and in good faith. Both sides are very much engaged in
13 that.

14 THE COURT: Good.

15 MR. SEEGER: One thing we might have not done a good
16 job for you today is teasing out the issues you just raised so
17 you had a roadmap as to what our differences are. There is
18 stuff we agree on. Today we teed up for you our differences.
19 But I don't think we really laid that roadmap out as to how
20 we're teasing out the personal injury components from the
21 class case.

22 And I think in many respects -- and I think that both
23 sides will agree. Although we differ on the schedule, that we
24 see this as a multi-track approach. We've got the mediations
25 going, which we're doing. That will include bellwether

1 mediations in the personal injury cases. When the time is
2 right, we might need more feedback from the Court on some of
3 the science issues. Maybe not. We're going to talk about
4 them.

5 But if that isn't successful in the near future, we
6 need to have a schedule that brings this case to a closure
7 within ten years. Because with the number of cases you're
8 going to have in front of you and the issues, it has the
9 potential for being a very protracted litigation if we don't
10 agree on a settlement.

11 THE COURT: Well, I think we need to move the case.
12 I've said this all along. I don't want the case to languish.
13 I'm willing to work hard to meet with you, to resolve issues.
14 I've teed up the special master usage here so that we can be
15 more efficient and productive and go through all of this. I'm
16 a willing judge who wants to make this go smoothly and
17 efficiently. So you have my commitment to doing that.

18 Now, this isn't going to be ten years. Those poor
19 people. People have been harmed. I can't prejudge that.
20 They shouldn't have to wait ten years. So let's move this
21 forward. It's in everybody's interest. The defense doesn't
22 want to be paying legal fees for ten years.

23 MR. STEINBERG: Your Honor, I want to retire long
24 before then.

25 THE COURT: My goal was three to four years. The

1 fact discovery, my vision of fact discovery was that we would
2 be concluded with fact discovery within two years of the
3 actual start of the factual discovery, which I understand was
4 July 1st, but I don't think it really started July 1st.

5 MR. STEINBERG: It did. We actually provided
6 materials before. We very much -- Michael Steinberg,
7 Sullivan & Cromwell. We very much appreciate the guidance.
8 There is a couple big issues that are -- but you actually gave
9 a lot of guidance on one of the issues, which I think is very
10 helpful. I won't go over my little speech on it.

11 But I think we're all adults in the room. And we
12 work well together. I don't say that in all my cases, because
13 it's not true in all my cases, but this one is. So let us
14 come back to the drawing board, give you a better sense of
15 where we are. And if we do have disputes -- and there is one
16 large dispute that brews, which is a question of do you do the
17 general causation before you do specific causation, which is a
18 big question.

19 THE COURT: I think you have to do the general first.

20 MR. STEINBERG: That's our position.

21 THE COURT: I just want to give you my general
22 inclination, because that's going to be important to the class
23 certification.

24 MR. SEEGER: It could on medical monitoring, which is
25 a whole other point.

1 THE COURT: We have three different complaints here.
2 So let's have the time chart. I don't want them all mixed up.
3 It's just too confusing. So we have the time chart for the
4 personal injury, the time chart for the economic loss and then
5 the time chart for the medical monitoring. Then we can see
6 how we're going to approach.

7 MR. SEEGER: You can see the issues on each.

8 THE COURT: Then we can have a combined one, because
9 you'll have a timeline that is going to encompass all of
10 those. For the initial thing, I'm trying to, like I said,
11 draw lines on the different charts and trying to figure out
12 what's the real difference here? What are they really
13 fighting about? Is it three months? Is it six months?
14 That's when I realized it wasn't just months. It was
15 fundamental issues about approach.

16 So that's where I sort of got lost, because the one
17 side was arguing one thing; and the other one was totally
18 opposite. And it was hard for me to figure out what was the
19 real issue.

20 MR. BUCHANAN: Dave Buchanan for plaintiffs. We will
21 absolutely go back and with your guidance talk about that.
22 The issue that Mr. Steinberg highlighted as to whether the
23 general cause comes before case specific, the way it was
24 sequenced and proposed by plaintiffs was done in the context
25 of bellwether development and actually overlays in the

1 calendar with the class certification schedule in the other
2 two cases.

3 THE COURT: You can have discovery ongoing. I'm not
4 adverse to that, but it's coming to the close of it. And if
5 you can overlap some of it, because it will be overlapped,
6 some of the general will apply to the specific. Some of the
7 specific may be needed for class certification, if you're
8 looking at the individual plaintiff and are they
9 representative. All of those kinds of issues that come up.

10 But you're so intelligent, and you're all so
11 experienced in this area. You know far better than I how to
12 mesh those things together so we can be efficient and both
13 sides can get what they need.

14 MR. BUCHANAN: I think you've given us some good
15 guidance, Your Honor. Separately, I don't know that we
16 clearly presented everything in the manner that would be
17 easiest to see it all. There is three tracks. They're all
18 intertwined in some respect or another, and there is
19 overlapping dates. We'll go back and confer with our
20 colleagues here and see if we can present something.

21 THE COURT: Sit down with the special master. Map it
22 out. You're going to have different teams, I would imagine,
23 on these different tracks.

24 MR. STEINBERG: Not so much, Your Honor.

25 MR. SEEGER: On the issue you raised about bellwether

1 mediations in personal injury cases, I think we're on track to
2 begin putting that together this summer. Right, Dave?

3 MR. BUCHANAN: We had proposed that. Mindful of Your
4 Honor's guidance in the Western District considerations, we
5 had proposed that. But, obviously, we've got to get with
6 defense.

7 MR. LAVELLE: John Lavelle from Morgan-Lewis for
8 Philips RS. This is an issue we've had some initial
9 discussions with Judge Welsh about. And I don't want to get
10 into the details in the public record, but I think we need to
11 get the benefit of her guidance on timing and structure for
12 talking about those bellwether mediations. She has expertise
13 on this far beyond anyone else, and we would like to get the
14 benefit of her thoughts on how to go forward.

15 THE COURT: I don't need to see that timeline. But I
16 just need to know that that process is underway. And if you
17 have disputes about the discovery, that would have to come to
18 me in terms of if you want to prioritize something and there
19 is a dispute about it's too early, it needs to come later,
20 that needs to go to the discovery special master. She's got
21 to be in tune with the mediation special master so that can
22 all be worked out.

23 MR. STEINBERG: Understood, Your Honor.

24 MR. SEEGER: Very helpful. Thank you, Judge.

25 THE COURT: Okay. Now we have the status of the

1 proceedings with the Special Master Katz. We've already
2 discussed that a little bit. If there is further comment.

3 MS. McNALLY: I'm Laura McNally from Morgan-Lewis.

4 MS. ITRIE: Shauna Itrie from Seeger Weiss.

5 MS. McNALLY: Miss Itrie and I are mostly focused on
6 discovery, discovery conversations that we've had ongoing with
7 Special Master Katz throughout the whole -- throughout
8 eternity. Very frequent conversations with each other and
9 with Special Master Katz. I think most of the updates with
10 respect to the ongoing discovery have been provided. And the
11 submissions, I don't know if Your Honor has any particular
12 questions.

13 But other than the dispute regarding substantial
14 completion, which I understand -- unless Your Honor would like
15 us to discuss separately -- was probably covered in your prior
16 comments.

17 THE COURT: I still don't know what it means. If you
18 all are in agreement what it means, that's fine with me.
19 You're going to have to define it.

20 MS. McNALLY: I think we're generally under agreement
21 as to what "substantial completion" means. It's probably a
22 little twist on the term "completion of discovery" that
23 defendants put on to give us a little bit of comfort and
24 cushion. For example, in our view -- and I think plaintiff
25 appreciates this view -- that should really be the end of

1 document production.

2 But what happens at the end of document production is
3 you've got to roll out your privilege log 30 days later. When
4 you're reviewing documents, we look at documents and say
5 that's not really provided, so we're going to produce that
6 document.

7 THE COURT: In my mind, more simplistic, I would say
8 completion of document discovery. Then it would be privileged
9 log disclosures. Then you would have deposition time frames.
10 That's the way I would approach it. Substantial completion to
11 me says, "Hey, we're really done with fact discovery." There
12 may be a dangling issue or two, but if it's just really
13 document production, I think it would be -- at least for me I
14 would understand it better if you said, "We will have document
15 production completed by this date."

16 MS. McNALLY: So it's document production.

17 THE COURT: At least in my mind. Maybe that's a term
18 of art in your MDL dialogues.

19 MS. ITRIE: I think we generally agree on the term
20 "substantial completion of document production." I think to
21 date we've -- and you've probably seen it in the briefing
22 already. We've been discussing it generally is that we've
23 identified a corpus of documents so far. We have about 58,000
24 E-mails of those. Defendants are working on reviewing about a
25 corpus of five million E-mails.

1 And so always, as anticipated at the beginning when
2 we get our documents, we would look through those to see if
3 there are additional custodians we may have missed and if
4 there is a clean-up we need after we receive those documents.

5 So I think substantial completion may not be the
6 final-final, but getting most of the documents that you can
7 review them in time and discuss additional custodians, if need
8 be. Discuss any clean-up you need to anywhere else. That's,
9 I think, where I'm coming out with substantial completion of
10 documents.

11 MS. McNALLY: I don't disagree with that.

12 THE COURT: Okay. Then we know where you are. And
13 continue to meet with the special master and try and refine
14 this. The one thing I did notice -- and I didn't touch on
15 this -- is there seems to be some questions about are the
16 defendants reviewing as quickly as possible and producing?
17 And the plaintiffs are saying, "Well, you just need to turn
18 things over. You don't have to review. Then you can claw
19 back things when you get a chance to review it."

20 And I know that's a disagreement between the
21 plaintiffs' bar and defense bar nationally and in other cases
22 as well. But the defense has to have enough time for them to
23 be comfortable, because there may be confidential information
24 unrelated to your case that is part of that. And that doesn't
25 get clawed back, because it's not privileged.

1 It's confidential information that would be not
2 relevant to this case. And when you have large companies with
3 multiple kinds of operations and things that are unrelated to
4 the specific litigation before us, I'm loathe to tell them
5 they don't need to be careful.

6 So that has to be brought to bear when we're looking
7 at document production. So some dialogue with a special
8 master about what's an appropriate time frame so that we don't
9 have the defendant holding back maybe the most sensitive
10 documents they want to spring on you at the last minute. I'm
11 not saying they're going to do that. But there shouldn't be
12 gamesmanship on either side.

13 There has to be some respect for what the defendant
14 has to do to protect its business interest, their business
15 interest. And without providing an opportunity for delay,
16 that would not be appropriate. So it's incumbent on both
17 sides to really get together and try to come up with
18 appropriate time frames.

19 MS. ITRIE: And, Your Honor, I don't think the
20 plaintiffs' position has been that defendants are not allowed
21 to review their documents. I think this is second, and there
22 are levels of review is what plaintiffs are having renewed
23 conversations and in front of Special Master Katz a couple
24 weeks ago.

25 MS. McNALLY: I think on the defense side of things

1 we're -- it's incumbent upon us to conduct a responsible
2 document review for our client, and we're moving as fast as we
3 can. It's not just about that first level review, which is
4 done internationally. There is a second level review and then
5 review by the case team, which is necessary. And we have a
6 tremendous number of lawyers working on this and going as
7 quickly as we possibly can, frankly.

8 THE COURT: And you have rolling discovery? As soon
9 as something is finished, it will be rolled out. You're not
10 going to hold back and have a big dump?

11 MS. McNALLY: Correct. Let me be very clear. We've
12 been rolling out documents. We do custodial production every
13 three weeks and do noncustodial production on the interim
14 week. We typically do productions on Friday.

15 Sometimes we will do a production mid week. You'll
16 get a production today of 91,000 share point files. So we've
17 been continuing to roll these out. We've committed to what
18 I'll call substantially complete a certain group of priority
19 custodians by February 3rd. So if those documents are
20 sensitive or particularly -- to your point, are we keeping key
21 documents back? You're going to get them on February 3rd on
22 the priority custodians, if you haven't already gotten them.
23 I don't think plaintiffs has accused --

24 THE COURT: I'm not saying anybody has accused
25 anybody. I'm just trying to have an even playing field

1 between both parties.

2 MS. ITRIE: Your Honor, I guess for us, the
3 production of 10 to 20,000 E-mails every three weeks, we
4 appreciate that. But doing some simple math in our heads to
5 get to a date, there is five million documents being reviewed.
6 In our head, after the documents are produced, we then need to
7 do depositions. And a piecemeal production of rolling it out
8 in that manner can be prejudicial at times for us to be able
9 to identify issues and --

10 THE COURT: That's why I want you to prioritize. Who
11 are the key custodians? What are the key documents you need?
12 And let's get those out first, because those will likely be
13 the most meaningful. The issue of the search terms, has that
14 been a problem for you all?

15 MS. ITRIE: I think at the beginning Philips proposed
16 search terms. We added some. The moment that the plaintiffs'
17 counsel became aware that there was a responsiveness rate in
18 November, we worked diligently. I think we cut about
19 100 search terms, modified about 100 others, discussed why
20 certain terms were hitting on documents and why the
21 nonresponsive documents and modified accordingly.

22 We were a little bit surprised to see that the
23 responsive rate was five percent. We didn't see any
24 declarations or anything. We had information it was still
25 five percent after we worked together. There is a search term

1 protocol that's in place that talks about procedures you're
2 supposed to go through when that occurs.

3 We're happy -- plaintiffs are always happy to work
4 with Philips and have in the past, if there is a
5 responsiveness rate issue, and working with Special Master
6 Katz as well.

7 THE COURT: So far it's been satisfactory?

8 MS. McNALLY: Yeah. We've worked together well, I
9 think, to address the search term issues that we've
10 encountered.

11 THE COURT: Thank you.

12 MS. McNALLY: Thank you, Your Honor.

13 MS. DYKSTRA: Good afternoon, Your Honor. Lisa
14 Dykstra for Respirationics. I just wanted to give the Court a
15 quick update on the device visual inspections. So we have
16 been working with the plaintiffs to create a plan for moving
17 forward with the inspection of our devices. We're focussing
18 entirely at the moment on the personal injury plaintiffs.

19 THE COURT: These are the devices they returned?

20 MS. DYKSTRA: The devices they returned to us or the
21 devices that they are self-preserving in different locations.
22 So we've identified to plaintiffs the devices that we have at
23 Philips that the plaintiff -- any plaintiff, a class action
24 plaintiff, an economic harm plaintiff, medical monitoring
25 plaintiff or personal injury plaintiff, has returned to us.

1 So we're identifying which devices we have. And they
2 are in the process of identifying which devices are either
3 stored in general locations or being held by individual
4 plaintiffs. And this is the set of devices that are for named
5 plaintiffs, not the set of devices that are just being
6 preserved in like -- hundreds of thousands of devices are also
7 being preserved for the preservation order.

8 We are working -- we provided a protocol so that we
9 could begin the device inspections. And this is just a visual
10 inspection of these devices and get that underway. There is
11 one dispute --

12 THE COURT: Who is doing the inspecting?

13 MS. DYKSTRA: So we have a protocol that we put
14 together that explains basically how you would open the
15 machine and visually inspect the device.

16 THE COURT: Who is doing that?

17 MS. DYKSTRA: We anticipate that we would have an
18 expert come and actually take the photographs. And we still
19 need to work through some of those details with the
20 plaintiffs. They may want to have their own expert, of
21 course, take their photographs. But this is generally a
22 visual photography or like a filming of the devices itself.

23 It's not a chemical testing inspection. There is one
24 dispute, Your Honor, that we will be bringing up with Special
25 Master Katz. We believe it's appropriate for Philips to also

1 inspect the devices of the named class representatives in the
2 economic harm case and the medical monitoring case.

3 Plaintiffs at this point don't agree with that. They
4 think that we should only be entitled to inspect the devices
5 of the personal injury plaintiffs. We disagree. We think
6 it's relevant to a lot of different issues, and we'll be
7 bringing that up with Special Master Katz. And if it's not
8 resolved then, we'll bring it to the Court. Thank you, Your
9 Honor.

10 MS. IVERSON: Your Honor, Kelly Iverson for
11 plaintiffs. I don't think we actually agree with the
12 inspection protocol whatsoever, and we have raised objections.
13 Plaintiffs have serious concerns about the loss of evidence
14 that might occur. While they're calling this a visual
15 inspection, they're actually picking up the box, opening it,
16 taking it apart, taking off a circuit board, exposing areas
17 where particulates may escape when they do that.

18 Further, they've already done visual inspections and
19 said that through the opaque box, once you look at it, that
20 there is ten percent where you can actually see the
21 degradation, but that doesn't necessarily mean that that foam
22 hasn't degraded. What you do, the entire visual inspecting is
23 speculative at best. And what you need to do is chemical
24 analysis of the foam to determine whether it's degraded.

25 So we have objected. We do think it's a destructive

1 testing. But with the guidance of Special Master Katz, we've
2 come to an agreement whereby we've agreed to start with a
3 limited number, do an inspection of ten, get our experts out
4 there, get their experts out there. See how it goes. See
5 what's happened. If we continue to have concerns, come back,
6 work through those with Special Master Katz and with the
7 defendants; and if not, then continue on with this inspection.

8 THE COURT: Will there be chemical experts there at
9 the same time to take samples of the foam and then do the
10 chemical analysis, since you've got them already open? You're
11 going to have to open it up, anyway, I would think, to do
12 that. So why won't you do that at the same time?

13 MS. IVERSON: Judge, at this point we're still very
14 early in discovery. Like I said -- like Miss Itrie said,
15 we're getting documents, but some of those are coming out at a
16 snail's pace. We certainly need to have sufficient discovery
17 for our experts to determine what testing protocols they want
18 to use on this and to go through with actual invasive testing
19 of the sort.

20 So we're not in a position right now to say this is
21 exactly what we want to do and that's everything and then
22 we're done with it; right? We want to make sure we have the
23 information we need to come up with a proper testing protocol
24 for whenever you're going in to test the foam.

25 MS. DYKSTRA: Part of our issue on the visual

1 inspections, Your Honor --

2 THE COURT: Tell me what the purpose is of visual
3 inspection.

4 MS. DYKSTRA: Sure. About two percent of devices
5 that have been returned, five percent, two percent, have shown
6 actual evidence of visual -- visual degradation. I'm not
7 saying that some small particulates could have degraded and
8 you can't see that. But, in fact, most of the devices do not
9 appear to be degraded at all. And we think it's very relevant
10 to whether or not particulates have been ingested or inhaled
11 by the plaintiffs, as they allege, as to whether or not you
12 can see visually whether there is degradation.

13 Of course, there is going to be chemical testing.
14 And I'll give the Court an update later on, additional
15 information that's been provided to the FDA, along the
16 chemical testing. But the visual degradation level -- as you
17 saw earlier, sometimes you can actually see degradation; and
18 sometimes it's not. I think that's relevant to our case and
19 relevant to the dosage of any particulates that could come off
20 the machines.

21 The other issue you raised here about chemical
22 testing is an interesting one. Let me step back for one
23 moment. The reason visual degradation, visual inspection,
24 should occur now is we put forth a report and an assessment
25 that was created by our experts that if degradation has, in

1 fact, started, then it will continue to occur, even if the
2 device is just not being used and placed in storage.

3 It's something called autocatalytic conversion where
4 the device will continue to degrade, if already begun. The
5 plaintiffs have not disputed that that will occur. And so in
6 discussions with Special Master Katz, we said it's important
7 to do the visual inspection and not wait two years to when
8 maybe plaintiffs want to do a chemical inspection.

9 The other thing on the chemical inspection is this.
10 I don't think -- and we've asked plaintiffs; and they can take
11 time to decide this, of course -- that they're going to take
12 foam from every single plaintiff's device and run a
13 substantial comprehensive testing program on that foam. They
14 can.

15 THE COURT: How many devices have been returned?
16 What's this two percent or five percent?

17 MS. DYKSTRA: That's two percent of all devices
18 returned in our visual inspection. We assessed 70,000
19 devices, and that two percent was based on a visual
20 inspection.

21 THE COURT: Okay.

22 MS. DYKSTRA: We haven't had the chance to look at
23 plaintiffs' devices yet. That's why we want to go ahead and
24 do this. But we also have devices held off site as part of
25 the preservation order, hundreds of thousands of additional

1 devices. And plaintiffs can and we can use those devices --

2 THE COURT: Those are being preserved. And if they
3 started to degrade, they're going to continue to degrade.

4 MS. DYKSTRA: That's true, Your Honor. Yes. If
5 they're going to do chemical testing, they have already --
6 we've given them samples of new devices. We've made those
7 available. We've given them samples of field returned devices
8 -- not plaintiffs, just other returned field devices.

9 They can do chemical testing on those devices. So I
10 don't know whether they intend actually to go back to all of
11 the plaintiffs' devices and do chemical testing. I think,
12 really, we're talking about one time going out and looking.

13 THE COURT: You need some sample that has statistical
14 meaning, and that's going to be up to the experts to
15 determine?

16 MS. DYKSTRA: Right. Exactly. And the thing with
17 that protocol -- one last point. We did provide a protocol
18 about opening the box, opening the circuit board that comes
19 off the top and looking into the box. You can see with light
20 whether there is degradation. It is totally possible to do an
21 assessment. The plaintiffs have contended that a particulate
22 could float out of the box.

23 I get it. But their whole allegation is that while
24 the machine was in use, particulates floated out of the box
25 and went into the patient's lungs. And so the idea that

1 opening the box is going to somehow destroy evidence we don't
2 find to be particularly persuasive. And that's their whole
3 issue with opening the box and looking and even taking the
4 blower box out to look at it, which would be much more
5 effective, I agree. If you took the blower box out of the
6 machine, looked at it from all angles and took pictures, that
7 would be more informative.

8 They've alleged that taking it out of the box is too
9 destructive. So we said, fine, we'll just open the circuit
10 board and look in for right now and see how those visual
11 inspections go. So that's where we are. Thank you, Your
12 Honor.

13 MR. STEINBERG: Your Honor, Michael Steinberg,
14 Sullivan & Cromwell. Just to provide a little bit more at a
15 high level, there has been no allegation in any of the
16 plaintiffs' complaints actually of degradation. There is not
17 a photo. There is not a discussion. There is not a diagram.
18 There is just no evidence in their pleadings.

19 And that's what really causes us, in addition to the
20 degradation issue that Miss Dykstra mentioned, to want to see
21 them now, because we can't have this case go on forever
22 without having an inspection of these devices.

23 I would remind you we've talked about before the
24 ratio. .05 percent of the devices show in individual
25 inspections that Philips has done, it shows a degradation of

1 .5 percent for nonozone devices. Devices where the user does
2 not self-identify that they used ozone.

3 Seven percent of the devices do show degradation
4 where the users self-identify ozone use. So part of it is
5 there is going to be probably two different types of visual
6 inspections that we will see a large amount for an ozone user.
7 We expect to see a larger percentage of degradation for a
8 nonozone user. A much smaller percentage, .5 percent. Again,
9 so there may be also many that have no damage whatsoever.

10 Again, part of this is occasioned by the fact that
11 plaintiffs have no allegations in their complaint that they've
12 actually suffered from. It's not a point on the form. It's
13 not in any of the complaints. We just don't know.

14 So this is an important aspect of our discovery plan,
15 and we're doing everything we can to make sure that there is
16 no further degradation from the visual inspection. All of
17 these devices are bagged and maintained in a -- the ones that
18 we have custody over are bagged and put in a controlled
19 temperature facility.

20 So if we open up the bag and there is a black dot,
21 everyone can take a picture of it. Everyone can take a
22 picture of it. But it's important that we do this now. I
23 understand what the universe is of actual harm. That's going
24 to play into several of Your Honor's -- of the motions that
25 are going to be presented to Your Honor, and it plays in some

1 extent to what's already been presented to Your Honor.

2 We appreciate it. I would say Special Master Katz
3 has been particularly helpful here in discussing these various
4 competing issues. We recognize there are competing issues.
5 But like all competing issues, you have to resolve them and
6 move forward. That's the plan on how we expect to move
7 forward.

8 THE COURT: You're still in discussions; is that
9 correct? Or have you agreed on the ten?

10 MS. DYKSTRA: Have we agreed on the?

11 THE COURT: Ten that you are going to do the visual.

12 MS. DYKSTRA: We've identified the -- I think it's
13 more than ten at this point. We've identified a number of
14 devices. I think it's maybe 15 that are at Philips' facility.
15 And I believe -- and I'm not entirely sure -- plaintiffs have
16 agreed we would start with those, since they're in one
17 location.

18 MR. STEINBERG: But we've tried to lessen the burden
19 for sure, and that's why we're starting at those where they
20 are at our location. Thank you, Your Honor.

21 MS. IVERSON: Your Honor, Kelly Iverson again. There
22 is not an argument or a dispute here that the particulates
23 might be too small to see and too small to the visual eye.
24 There is also not -- and Philips has been very clear --

25 THE COURT: You're saying there are some are going to

1 be that small you might not be able to see them?

2 MS. IVERSON: Microscopic. Correct. They've been
3 very clear that when they want to take a visual inspection
4 that they are not saying that that means just because you
5 cannot see degradation that that means that it didn't degrade.
6 I think I got that correct with maybe potentially double
7 negatives. I apologize.

8 So all they're looking to see is if there is some
9 sort of visual severe degradation that you could see through
10 this opaque box of the DreamStation devices is what they're
11 looking at.

12 To the extent that the suggestion is that plaintiffs'
13 testing, chemical testing, with respect to devices should be
14 done on exemplar devices, it should be the same for the visual
15 inspections. If the testing and the data is going to come
16 from a statistically significant sample of devices -- and this
17 is done in cases all the time where you don't use the actual
18 devices and you look at exemplar devices, then we should be
19 doing the same thing.

20 I think Philips already has done that is what they're
21 telling you and that they've done a visual inspection of every
22 device that has been sent back to them for rework, took their
23 photographs. And it's two percent or five percent that show
24 visible degradation through the opaque glass.

25 So the relevance to us of doing a visual inspection

1 of these, coupled with the fact that particulates -- there
2 might be off-gassing. The microscopic particulates might be
3 lost through this process. You know, we are concerned about
4 that. That said, we have no problem moving forward with those
5 initial devices, see what happens, see how it goes and come
6 back, talk with Special Master Katz, to the extent that we
7 think there's remaining concerns that need to be addressed or
8 potentially just working out a change in the protocol. It
9 might be something as simple as that.

10 It might be that we're fine and we continue forward.
11 Plaintiffs have already provided them device locations for, I
12 think, at least 170 of the individual personal injury
13 plaintiffs. So that information is with defense, and it's
14 something we're continuing to work through with Special Master
15 Katz. But I wanted to make sure that you had the opportunity
16 to understand our position in light of what the defendants
17 have said here. Thank you.

18 MS. DYKSTRA: I just have one quick ending comment.
19 We have been exchanging information on the locations. So that
20 is absolutely a work-in-progress, and we are collaborating. I
21 think it is not fair to say that we don't need to do a visual
22 inspection of every plaintiff's device. One plaintiff's
23 device may be very different from a perspective of how much is
24 degraded than another plaintiff, as the individualized
25 assessment of whether that plaintiff's injuries were caused by

1 their device. So one patient may have no degradation, and one
2 patient theoretically could have a lot. And dosage matters.

3 So it's going to be very critical to actually inspect
4 each plaintiff's device. Chemical testing, as you said,
5 statistically different. The foam is generally from a
6 chemical standpoint the same. You can run many or a few tests
7 on the chemicals in the devices. And you can apply it across
8 the devices, since they're all the same devices which have the
9 same foam. Degradation levels are just different and more
10 individualized. Thank you, Your Honor.

11 THE COURT: Thank you. The Court has appointed
12 Special Master Vanaskie to handle -- I think there is the
13 three motions to dismiss that have been filed in the Philips
14 case; the one for the personal injury complaint, the one for
15 the economic loss complaint and the one for the medical
16 monitoring complaint.

17 So those are the three that have been assigned to
18 him. So who wants to talk about the status? I believe
19 Special Master Vanaskie is on the line.

20 MR. LAVELLE: Thank you, Your Honor. John Lavelle
21 from Morgan-Lewis for Philips RS. Your Honor's appointment
22 order directed the parties to confer and to offer proposed
23 dates and times for an initial call with Judge Vanaskie. We
24 have done that. And we have our initial call with Judge
25 Vanaskie scheduled for this Friday at noon Eastern.

1 I will say that at least from my reading of the
2 appointment order, it was not clear which specific motions had
3 been referred to him. So I don't know if Your Honor is
4 planning to issue a separate order addressing those
5 specifically or if we should just rely on Your Honor's
6 statement in the --

7 THE COURT: I can do a text entry to confirm that,
8 because I'm going to be doing the SoClean motion to dismiss
9 and the SoClean versus Philips, the business-to-business
10 motion to dismiss. So Special Master Vanaskie will take up
11 the master complaints that have been filed in this MDL. And,
12 ultimately, they come to me. It would be helpful, because
13 some of them may be more complicated in a number of states and
14 all those issues.

15 MS. DUGGAN: Sandra Duggan for the plaintiffs. Thank
16 you, Your Honor. For clarification purposes, you are right.
17 Sets of motions to dismiss have been filed with respect to
18 each of the class complaints and the master personal injury
19 complaint, but there are a multitude of motions to dismiss
20 with respect to each of those complaints.

21 THE COURT: Right.

22 MR. LAVELLE: So, Your Honor, again, this is John
23 Lavelle. Is Your Honor's intention that all of the motions to
24 dismiss that have been filed by Philips RS and other Philips
25 defendants, they will all be sent to Judge Vanaskie?

1 THE COURT: They were all related to that particular
2 master complaint. So those motions to dismiss -- I think it's
3 just more efficient if he addresses them in the aggregate.

4 MS. DUGGAN: And with respect to the motions that
5 have been filed for the economic loss complaint, the briefing
6 has already begun. We're in the process of responding to the
7 motions that -- most of the motions that were filed. We have
8 a deadline of February 6th with respect to four of the motions
9 that were filed. And then the one outstanding motion is the
10 personal injury -- personal jurisdiction, excuse me, motion.

11 THE COURT: I'm handling that. Is that the one with
12 the parent?

13 MS. DUGGAN: Correct.

14 THE COURT: You know, I'm going to handle that one.

15 MS. DUGGAN: Okay.

16 THE COURT: Sorry about that. I viewed that as a
17 little different. Sorry.

18 MS. DUGGAN: Your Honor, we don't have briefing
19 scheduled for that yet, because we were going to wait until
20 the close of discovery.

21 THE COURT: Sure. I'm handling that one. It's just
22 the sort of more -- the other issues that are related that are
23 going to be -- that are raised in those motions to dismiss
24 that the special master will be handling. He's also going to
25 schedule hearings, I believe, on those motions to dismiss.

1 My understanding is I offered my courtroom here for
2 him to come and have a hearing. Hopefully he could coordinate
3 and I can be present and hear those motions, and that can be
4 efficient as well.

5 MR. LAVELLE: Thank you, Your Honor.

6 MR. MONAHAN: Your Honor, just one question/
7 suggestion. Would it be helpful -- and totally up to Your
8 Honor, of course -- to prepare a proposed order making it
9 clear?

10 THE COURT: That would be fine.

11 MR. MONAHAN: Thank you, Your Honor.

12 THE COURT: That will be clear. Then everybody will
13 know exactly. Okay. We've already, I think, talked about the
14 status of the short form claimants and Rule 41 motions.
15 Anything further on that matter?

16 MS. DUGGAN: No, Your Honor.

17 THE COURT: Update on the census registry.

18 MR. LAVELLE: Your Honor, John Lavelle for Philips
19 RS. As of yesterday afternoon, we had 19,910 registrants in
20 the census registry. And of those, 19,583 were potential
21 claimants who identified potential personal injury claims. I
22 guess the other thing I would say is that the deficiency
23 process with respect to census registry applications is
24 ongoing. And we're notifying registrants regularly of any
25 deficiencies. And we've seen very good cooperation from

1 plaintiffs in addressing those.

2 THE COURT: What's the cut-off date for those
3 filings?

4 MR. LAVELLE: I believe that February 11th is the
5 last date when people who had been on the tolling agreement
6 previously, that their tolling agreement expiration becomes
7 effective. So that might be a date that people might rely on.
8 But census registry, registration can continue on. It's just
9 that we think that that middle of February date we will see a
10 spike in that new registrants.

11 THE COURT: I take it the plaintiffs are on top of
12 that in communicating with counsel who they have previously
13 registered -- previously been subject to the other tolling
14 agreement will note that they've got to get their registry in.

15 MS. IVERSON: Yes, they will. Defendants provided a
16 letter to each counsel that identified the exact date in which
17 the registry had to be filed. And that was with the sun
18 setting on the tolling agreement.

19 THE COURT: Thank you. Any update on state court
20 litigation?

21 MR. LAVELLE: Yes, Your Honor. John Lavelle again.
22 We previously notified Your Honor of the existence of a state
23 court case called Saint John, which is pending in
24 Massachusetts State Court, Middlesex County. That case is
25 currently stayed. The stay is scheduled to expire at the end

1 of this month as of next week.

2 And we have a status conference with the Court
3 scheduled for January 31st, which the Court is going to
4 consider whether to continue to maintain that stay. We've
5 been asked to submit a report to the Court by this Friday with
6 respect to the process and the current status of proceedings
7 here in the MDL, and we will be doing that.

8 In the interim, there have been an additional four
9 cases that have been filed in Middlesex County, Massachusetts,
10 making a total of five that are currently pending there.
11 There was one that was filed in September of 2022 called
12 LeBlanc (phonetic). That case has also recently been stayed.
13 There are three other cases. And I apologize I don't remember
14 the names of those, but they were just filed within the last
15 week.

16 THE COURT: Are they with the same judge? The same
17 judge assigned?

18 MR. LAVELLE: That is a very good question, Your
19 Honor. Middlesex County apparently has two different
20 vicinages, so there is one -- the LeBlanc case is before a
21 different judge than the other four.

22 THE COURT: Can you give a list of those to me and
23 who the judge is, so if I ever need to reach out to them, I'll
24 be in a position to do so.

25 MR. LAVELLE: Yes. Then the last development we

1 wanted to make Your Honor aware of is Judge Barry Smith, who
2 was the judge presiding over the Saint John case, has been
3 reassigned to the criminal docket. So there will be a new
4 judge. As yet, we do not know who that judge is who will be
5 taking over the Saint John case and presumably these other
6 cases.

7 THE COURT: Just notify me who they are, just in case
8 I need to reach out to them and try to coordinate matters.
9 They may be interested. I did invite Judge Smith to
10 participate in our science day. There may be some other
11 issues that are going to be overlapping that they would want
12 to participate in here. So I just want to give them the
13 opportunity to do that for judicial efficiency.

14 MR. LAVELLE: Yes, Your Honor. As I understand it,
15 the practice in that Court is for judges to rotate. Judges
16 typically are on the civil docket for a year and then rotate.

17 THE COURT: Okay.

18 MS. IVERSON: Your Honor, Kelly Iverson for
19 plaintiffs. We have been in contact with counsel for
20 plaintiffs in the Massachusetts cases, Matt Leckman. I think
21 you recall he attended the science day.

22 THE COURT: Yes.

23 MR. IVERSON: So we do understand that they have a
24 conference next week --

25 THE COURT: Is it the same counsel in each of these

1 litigations?

2 MS. IVERSON: No. I believe that the ones that were
3 recently filed that Ellen Relkin is counsel. We have been in
4 touch with her as well. I understand that two of the five
5 cases are stayed. They're going to be seeking a lifting of
6 that stay next week and trying to proceed forward with the
7 personal injury cases that are filed in the state court there.

8 That's all I have. Thank you. We'll continue to
9 stay in touch with them, of course, and try to work with them.

10 THE COURT: Thank you. My recollection is there is
11 some kind of -- there is provisions in the -- in how the fees
12 are going to be paid if they enter into agreements with
13 counsel in this case for sharing and how that will take place.

14 MS. DUGGAN: Yes, Your Honor. Sandra Duggan. You
15 entered an order called a benefit assessment order, and that
16 provides the details of how assessments would be paid in cases
17 where participating counsel have signed an agreement with
18 leadership in this case. And if they use the work product
19 that we have, they will be paying an assessment pursuant, of
20 course, to Your Honor's awarding of any fees.

21 THE COURT: Just so there is no confusion later on.

22 MS. DUGGAN: Exactly.

23 THE COURT: Thank you. Okay. Leadership development
24 update.

25 MS. HARRISON: Good morning, Your Honor. Kathryn

1 Harrison of Campbell & Levine here on behalf of plaintiffs'
2 Leadership Development Committee. Your Honor, just a brief
3 update. You had provided this opportunity for our members to
4 sit on this committee as an opportunity to get more experience
5 in this type of MDL litigation.

6 I can say from my perspective that as this case
7 progresses and I'm able to see the many moving parts and in
8 motion, it's really been an invaluable way to gain experience
9 in the MDL world.

10 Plaintiffs' leadership is very accessible to this
11 committee and I think has an understanding of the committee
12 members various skill sets and how we can utilize and also
13 help us to develop in this practice. And I've been here
14 before, Your Honor; and I don't think I'll come give an update
15 without giving special attention to Mr. Stroyd and the
16 invaluable mentoring he has provided for me, but also the
17 willingness of leadership and other MDL experienced members of
18 this team for just giving us an opportunity to be part of the
19 process and be willing to provide mentorship at all levels.

20 THE COURT: So are you doing substantive work? Are
21 you working on discovery matters?

22 MS. HARRISON: Your Honor, I'm on law and briefing
23 and have been pulled onto the discovery team as well. And I'm
24 helping in some other matters as well. So I'm starting to see
25 the big picture, and it's really been very valuable.

1 THE COURT: Thank you.

2 MS. HARRISON: Thank you.

3 MS. LABRINOS: Hello, Your Honor. Bethany Labrinos
4 on behalf of KP NV in the non Respironics Philips defendants.
5 I'm very grateful to be addressing Your Honor directly this
6 morning. I am a second year associate at Sullivan & Cromwell.

7 I just started working at the firm about five months
8 ago. And this is the first time I'm speaking in court, so I'm
9 very grateful for the opportunity.

10 Working on this case, which is, as Your Honor knows,
11 technically two separate but overlapping and coordinated MDLs,
12 has allowed me to start my legal career confronting many
13 multi-faceted legal and factual questions. And I appreciate
14 that the opportunity to speak in court as a junior lawyer is
15 extremely rare.

16 I can personally attest to what my colleague
17 Mr. Monahan described earlier with respect to the efforts that
18 have gone into satisfying our jurisdictional discovery
19 obligations. I have spent the past four weeks orchestrating
20 our team's jurisdictional discovery efforts. My role in this
21 process has been quite comprehensive.

22 I have been in daily communication with many people
23 at the client's, trying to learn the business and understand
24 what materials and information exists in order to respond to
25 plaintiffs' requests fully. Many of plaintiffs' requests are

1 broad. So understanding the big picture has been vital to
2 knowing what information to ask for and from whom.

3 I have gotten the opportunity to draft responses to
4 our interrogatories, communicate directly with people at the
5 client's and manage our associate team in reviewing and
6 compiling all necessary information. It hasn't always been
7 easy, especially during the holiday season when there was a
8 lot to be done.

9 But I have been able to work with our vendor during
10 all hours of the evening and early morning to make sure that
11 we have met internal deadlines for our productions. I have
12 tracked all incoming and outgoing materials relevant to
13 jurisdictional discovery.

14 Needless to say, there have been many late nights,
15 early mornings and virtually many no free weekends, but I
16 believe it's a small price to pay for this large step in my
17 career. And I'm learning more than I could have ever expected
18 when I started at Sullivan & Cromwell five months ago.

19 We're not done yet. We have a deposition scheduled
20 for next week, so I know it will be a busy week, but I'm
21 looking forward to going to Amsterdam. I've never been
22 before. Anyway, thank you again for affording me the
23 opportunity to address this Court.

24 THE COURT: Thank you.

25 MS. DYKSTRA: Lisa Dykstra, Respirationics. We had also

1 put on an agenda item that we would like to give the Court a
2 quick update on our submissions to the FDA.

3 THE COURT: That's the last one.

4 MS. DYKSTRA: Consistent with our prior updates of
5 things that are occurring with the FDA and the regulatory
6 submissions, Respironics has been continuing to conduct
7 testing on its machines. And we provided a substantial update
8 under the 518 notice of all of the data related to the
9 DreamStation 1 testing.

10 That testing program has been conducted together with
11 Philips Respironics and five independent certified
12 laboratories. The results have been reviewed by third-party
13 qualified experts, as well as an external medical panel.
14 That, in short, at a time was provided to the FDA on
15 December 21, 2022. It is getting, of course, produced to the
16 plaintiffs as well, both the summaries that are publicly
17 available on the websites as well as the underlying data and
18 reports.

19 THE COURT: Is there an FDA investigation underway
20 with respect to the DreamStation No. 1 and No. 2?

21 MS. DYKSTRA: This update is just the FDA had
22 required us under its 518 notice to provide to the public and
23 health care providers any data that may help them assess
24 information related to the devices. So that's what this data
25 has provided in connection with that order -- or that notice.

1 I guess it's a notice, not an order.

2 So we have continued to provide that data. It's made
3 public and in summary so hopefully health care providers would
4 find the summaries of data helpful to them to make assessments
5 of treatment decisions. Right now we are -- the update focus
6 on the DreamStation 1 devices, which we looked at the blower
7 boxes for those, are about 68 percent of the devices in the
8 registered population.

9 The results indicate two things. I would like to
10 summarize. One, with respect to the particulate matter that
11 the exposure to particulate emissions from the degraded foam,
12 visible or not visible, ingestible or respirable, is unlikely
13 to result in any appreciable harm to patients. And all of
14 that data with respect to the studies, the independent labs,
15 as well as the different standards that were tested, has all
16 been supplied to FDA.

17 Secondly, exposure to volatile organic components,
18 the VOCs, that is also not anticipated to result in any
19 long-term health term consequences to patients. Again, this
20 is limited to the DreamStation 1 devices at this time.

21 But we are continuing to provide additional data to
22 the FDA. The FDA is considering the data. They haven't
23 signed off on this data. And they may reach additional
24 information or additional conclusions, but we will provide
25 additional information to the Court as other substantial

1 updates are provided to the FDA.

2 THE COURT: Now, are these tests the kind of test
3 that the FDA has ordered? Or are these tests that you've
4 determined would be the appropriate test, that the defendant
5 determined would be appropriate?

6 MS. DYKSTRA: Very good question. We provided
7 information on the protocols to the FDA. Some of the tests
8 are standardized. Like 18562, which I now roll off my tongue,
9 is a specific type of approved internationally known standard.
10 There is 10993, which tests for sensitization and other types
11 of issues. Those are some of the tests we're doing.

12 Some of the tests are developed for the particular
13 purpose of understanding all of the potential risks and
14 chemicals in the foam. So some of the testing protocols
15 Philips has developed itself and provided that data to the
16 FDA. I wouldn't say that the FDA required these tests,
17 because the devices are already off the market.

18 So the FDA has required us to make sure that if we
19 have additional data, it's publicized so that patients and
20 physicians can be aware of it, but they haven't necessarily
21 required us to do the testing. Internally we decided it was
22 important to continue the testing.

23 Most particularly I think because the recall itself
24 was based on a limited data set. And Philips really wanted to
25 undertake a much more expansive and use independent certified

1 laboratories to do a much more comprehensive review. And
2 that's what this data is.

3 THE COURT: And so the devices that were used for the
4 testing, were they returned devices? Or were they devices
5 that were new and never been used? What kind of devices were
6 they?

7 MS. DYKSTRA: Yes. There were three different types.
8 There were new pristine devices. Then there were field
9 returned devices. And we focused on field returned devices
10 that showed actual levels of degradation. So we looked for
11 those kinds of devices.

12 Then we also took new devices and artificially aged
13 them. Because a field returned device might be subject to
14 like perfumes in the air or smoke or other things that are
15 additives. So we also took new devices, created a mechanism
16 to artificially age them to resemble what a field returned
17 device would look like, but without the other environmental
18 anecdotal issues that might affect the devices.

19 THE COURT: Thank you.

20 MS. DYKSTRA: Thank you, Your Honor.

21 MR. SEEGER: Chris Seeger. Your Honor, I just have
22 to make a couple brief comments about that. First of all, the
23 Court should understand that Philips had a pre-litigation
24 position on this, what you just heard; and now you're hearing
25 the litigation position, which is fueled by the lawyers, no

1 doubt. After these study results that are not peer-reviewed
2 were posted, the FDA still issued guidance with respect to the
3 reworked Trilogy device, warning the public that exposure to
4 degraded polyester foam can result in serious injury and
5 permanent impairment.

6 The Court should also be aware that in the period
7 between August and October of 2022, 21,000 adverse events were
8 reported in connection with the devices and 91 deaths. And I
9 would just caution the Court that --

10 THE COURT: What do you mean by "adverse"?

11 MR. SEEGER: Adverse events associated with the
12 devices reported by either doctors, patients.

13 THE COURT: Would that be some kind of physical harm?

14 MR. SEEGER: Yes, physical harm. I would also say to
15 the Court that if you are inclined to look at their study
16 being posted by them online to help them in this litigation,
17 you read the FDA 518(b) letter, which references what the
18 company's position was before the lawyers got involved and we
19 were in front of you. So we, obviously, are going to have a
20 lot to say about these studies. Our experts are looking at
21 these studies.

22 THE COURT: I'm sure it's going to be part of the
23 ongoing litigation.

24 MR. SEEGER: Yes. That's all. Thank you, Your
25 Honor.

1 MS. DYKSTRA: Thank you, Your Honor. Just two quick
2 closing comments from me. First, adverse means we have an
3 obligation as a medical device company to report any time
4 somebody says, "I was injured." So it could be something --
5 there is no proof required. So those are all reported, and
6 the FDA gets those as part of the regulatory scheme.

7 Second, Mr. Seeger mentioned that this is done for
8 litigation. We just want to reassert that while the testing
9 is comprehensive and ongoing, it is made public so that
10 patients and health care providers understand the full
11 dynamics with respect to the foam. It is extraordinarily
12 voluminous, and I don't expect plaintiffs to have read all of
13 it yet.

14 There is one study alone that basically looked at six
15 devices and said if you degrade those devices and you do an
16 assessment of the chemicals in those field returned devices --
17 and they looked at all of those devices and concluded that
18 even if you ingested or inhaled all of the foam in that
19 device, there was still no appreciable risk to patients.

20 And that study alone, just those six devices was over
21 1000 pages of data. So I understand that we're in litigation,
22 and everybody is going to have different arguments coming
23 forward. But there is a substantial amount of data going in.
24 We just want to inform the Court of the voluminous data. And
25 if the FDA has information they put forward, I'm sure

1 plaintiffs and we will bring it to your attention in the
2 future. Thank you.

3 THE COURT: Thank you. Okay. Is there anything else
4 for the status conference?

5 MS. IVERSON: I have nothing from plaintiffs, Your
6 Honor.

7 THE COURT: Thank you. We're done with the status
8 conference. This afternoon we'll be taking up the motion to
9 dismiss. Thank you all.

10 (Whereupon, the above-captioned matter was
11 concluded.)

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13 C E R T I F I C A T E

14 I, NOREEN A. RE, RMR, CRR, certify that the
15 foregoing is a correct transcript from the record of
16 proceedings in the above-entitled case.

17 s\ Noreen A. Re
18 NOREEN A. RE, RMR, CRR
19 Official Court Reporter

January 27, 2023
Date of Certification

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