

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 Thursday,
April 20, 2023, in the United States District Court,
700 Grant Street, Pittsburgh, PA 15219, before Honorable
Joy Flowers Conti, Senior United States District Judge.

APPEARANCES:

For the Plaintiffs: Sandra L. Duggan, Esq.
 Kelly K. Iverson, Esq.
 Steven A. Schwartz, Esq.
 Christopher Seeger, Esq.
 D. Aaron Rihn, Esq.
 Peter St. Tienne Wolff, Esq.
 Miriam Fresco Agrait, Esq.
 David R. Buchanan, Esq.
 Shauna Itri, Esq.
 Beena McDonald, Esq.
 Alex M. Kashurba, Esq.
 Elizabeth Pollock-Avery, Esq.
 Charles E. Schaffer, Esq.
 Caleb Seeley, Esq.

For the Defendants: Lisa C. Dykstra, Esq.
 Wendy West Feinstine, Esq.
 John P. Lavelle, Jr., Esq.
 Steven N. Hunchuck, Esq.
 Lauren Hughes McNally, Esq.
 Amanda B. Robinson, Esq.
 Michael H. Steinberg, Esq.
 Tracy Richelle High, Esq.
 William B. Monahan, Esq.
 Elizabeth N. Olsen, Esq.
 Eric Scott Thompson, Esq.

Court Reporter: Barbara Metz Loch, RMR, CRR
 700 Grant Street
 Pittsburgh, PA 15219

Proceedings recorded by mechanical stenography;
transcript produced by computer-aided transcription.

1 THE COURT: Next up is the Philips case, and we'll
2 switch everyone. This is a status conference in re Philips
3 Recalled CPAP, Bi-Level PAP and Mechanical Ventilator Products
4 Litigation at master docket miscellaneous No. 21-1230.

5 The parties have entered their appearances via a
6 joint notice. If anyone else wishes to enter an appearance in
7 this case and be reflected in the record, there is a pad of
8 paper. If you can come forward and sign that, we'll use that
9 to enter your appearance in this status conference today.

10 So there's a number of issues that have been raised
11 in the filings, and so we will talk about those and see how we
12 will go forward on those. Some of them are really overlapping
13 in some ways, so the first item to take up is the discovery
14 update status of proceedings.

15 MS. McNALLY: Good morning, Your Honor. Laura
16 McNally from Morgan Lewis & Bockius, counsel for Philips RS.
17 To date, the Philips parties have produced over a million
18 documents, over 3.8 million pages. I think as of today, it
19 will be 96 productions which have been made, so we are moving,
20 in our view, very quickly as we produce documents.

21 In addition, we have offered dates for depositions to
22 begin in May, so I know that we are working through a lot of
23 kind of nitty-gritty issues but nothing, from our perspective,
24 that needs to be brought to Your Honor's attention at this
25 time with respect to the document --

1 THE COURT: Is this the time we are going to take up
2 the issues about the scheduling of the close of fact
3 discovery?

4 MR. LAVELLE: No, Your Honor. That would be item 4
5 on the agenda.

6 THE COURT: This is just a pure status report.

7 MS. McNALLY: Yes, Your Honor.

8 THE COURT: Thank you.

9 MR. BUCHANAN: Good morning, Your Honor. Dave
10 Buchanan. Generally agree. I think we are starting to break
11 through what we may have perceived as a log jam and maybe on
12 their side too. Things are now starting to flow out.

13 As you know, Your Honor, we requested noncustodial
14 documents as well as custodial files, 70 or so custodians. I
15 think our first witness or two is substantially complete as of
16 last week.

17 We separately got dates for those two witnesses and
18 some assurances of some others and one former employee. Now
19 the work on our side is getting through the productions as
20 they are completed, contextualizing that, so from our side, I
21 think, that's where the work is going to get started now, and
22 we'll be starting depositions probably in May.

23 There are, I think -- generally, Your Honor, we had
24 an issue, I think we have raised a few times, about the
25 substantial completion date. You probably saw in each party's

1 submission that we did resolve that issue with the assistance
2 of Special Master Katz. There's some prioritization or
3 tranching of custodians in process. We have waves of those
4 coming throughout the summer. By the end of the summer, we'll
5 have substantial completion on the custodians currently
6 requested, and it will be just the supplemental requests that
7 arise out of those earlier productions that we'll complete
8 through the rest of discovery.

9 THE COURT: This discovery, is this targeted towards
10 the general causation issue, class certification?

11 MR. BUCHANAN: It is. We resequenced witnesses in
12 light of Your Honor's guidance and we've prioritized
13 accordingly.

14 THE COURT: So the -- just curious, because this is
15 going to come up when we talk about item 4. If you are able
16 to start the discovery now, you'll have substantial completion
17 of the documents with respect to the custodians that are going
18 to be relevant, and then how long is it going to take to
19 finish that process, and what else is going to be needed
20 during that process?

21 MR. BUCHANAN: After we get the documents, obviously
22 we have to review and analyze them. The defendants are
23 certainly more steeped in them at this point than we are, but
24 review them, we'll be consulting with others, probably third
25 parties and consultants with regard to the information we get.

1 There will be expert development, but there will also
2 be supplemental requests of the defense arising out of the
3 documents that we get. That will go throughout this year into
4 next year.

5 THE COURT: Okay. We may need some input when we get
6 to No. 4 in terms of where the status is, what you are
7 envisioning, how you are approaching this phase of discovery.

8 MR. BUCHANAN: That's fine, Your Honor. Thank you.

9 MS. McNALLY: That's fine, Your Honor. Happy to
10 provide any additional information at that time.

11 MS. IVERSON: Hi, Your Honor. With respect to
12 plaintiffs' productions, we responded to written discovery and
13 produced, for class plaintiffs, I think we produced about 3500
14 pages of documents and I think --

15 THE COURT: How many class plaintiffs are there
16 involved?

17 MS. IVERSON: In the economic loss complaint, there's
18 100 -- I had these numbers, but I don't have them on me now.
19 Somewhere over 100, probably 130, and there's 60 some in the
20 medical monitoring class complaint.

21 Then the personal injury plaintiffs have produced --
22 I think there's about 56,000 documents so far that have been
23 produced in that track.

24 THE COURT: Of those plaintiffs, who are you
25 producing with respect to those in the individual personal

1 injury cases?

2 MS. IVERSON: Sure. For the personal injury track,
3 each of those cases, when a short form complaint is filed, the
4 plaintiff then needs to complete the plaintiff fact sheet
5 which includes requests for certain documents as well as
6 medical records, and so I think 800 some of these are medical
7 records, but they have also produced documents related to
8 their case individually.

9 So collectively in the 400 some cases that have been
10 filed, there's been 56,000 documents produced.

11 THE COURT: That production is going on so we are
12 getting production in the individual plaintiff's cases.

13 MS. IVERSON: Correct. Yes, with respect to the
14 plaintiff fact sheet, correct. Everything else besides the
15 plaintiff fact sheet and defense fact sheet -- for now.
16 You'll address that in item No. 4 as far as what's going to go
17 on with additional discovery for the personal injury track.

18 THE COURT: Okay.

19 MS. IVERSON: We also, in February, finally got some
20 substantial privilege logs that are rolling from Philips, so
21 we have set up a weekly call with our privilege teams, so we
22 are doing every Monday, and I think that's been productive to
23 date and will continue to be productive to keep that process
24 rolling throughout the litigation.

25 THE COURT: I just want to note, for the record, that

1 Judge Vanaskie is on the line. He's listening in. He's the
2 special master who is going to be providing reports and
3 recommendations for the motions to dismiss that he's been
4 assigned, and I think we'll be adding on to our agenda here
5 that query as to whether oral arguments are going to be heard
6 on those motions, and if so, where.

7 I'd like to, if possible, be able to sit in on those
8 so you may have to come to Pittsburgh to do those, so we'll
9 have some dialogue and opportunity to dialogue with the
10 special master.

11 Also, today is really not a good time to resolve that
12 issue. You'll need to meet and confer with him and make
13 proposals to the Court about when and if the oral arguments
14 should take place. Okay.

15 MS. IVERSON: That makes sense, Judge. We do have
16 the status of briefing in front of Special Master Vanaskie as
17 number 3 on the list. My colleague, Sandy Duggan, will be
18 prepared to address that. I think we agree there needs to be
19 some meet and confer over the process and what makes sense for
20 those arguments.

21 THE COURT: Okay. I just wanted to mention something
22 beyond briefing that we might need to address.

23 MS. IVERSON: I don't know if Carole Katz reached
24 out, but Special Master Katz was not able to be here today,
25 but we told her we will provide her the transcript right away

1 whenever we have it. She'll stay up to date on it.

2 MS. WEST FEINSTEIN: Good morning, Your Honor. Wendy
3 West Feinstein with Morgan Lewis on behalf of Philips RS.

4 Just to comment on the discovery of the plaintiffs,
5 both the economic loss, medical monitoring plaintiffs as well
6 as the PI plaintiffs, the parties have been working through
7 discovery issues with Special Master Katz. There remains some
8 deficiency issues that we have been unable to address
9 collectively together, so we are going to be raising those
10 with Special Master Katz soon.

11 Of the PFS information that we have, we've received
12 several plaintiff fact sheets. Almost all of them have been
13 significantly deficient, so we have been sending deficiency
14 letters to the individual counsel. We appreciated the report,
15 the LDC report earlier of the team that's working with those
16 plaintiffs, but it's a bit of a slow process, so we think it's
17 moving along well, but we just wanted to alert the Court that,
18 although we've received about 311 PFSs thus far, the documents
19 produced with them have been deficient.

20 We've issued deficiency notices to 304 of those 311
21 plaintiffs, so it's moving, but it's not moving in the
22 complete way that we had hoped.

23 THE COURT: Does this tend to be the problem with the
24 personal injury plaintiffs.

25 MS. WEST FEINSTEIN: Yes. The PFS is only to the

1 personal injury plaintiffs.

2 In terms of the economic loss and medical monitoring
3 plaintiffs, we have been working well with all counsel,
4 including the personal injury plaintiffs. It's just that the
5 process is moving a little bit slower and a little less
6 completely than any of us had anticipated.

7 THE COURT: It's mainly the personal injury
8 plaintiffs. As to the other ones, that we would need, you
9 would need for the class certification hearings, the medical
10 monitoring issues as they come up for class cert? That's what
11 you would need?

12 MS. WEST FEINSTEIN: Right. We'll be teeing up those
13 issues for class cert very soon with Special Master Katz.
14 We've already previewed some with her.

15 In terms of the personal injury, we are working
16 through the deficiency letter process that was set forth in
17 our scheduling order. It's moving along, but we wanted to
18 inform the Court of that current status, and if we need the
19 Court's assistance, which we are all hopeful that we'll be
20 able to work through that, but we'll alert the Court if we do
21 need any assistance in that regard. Thank you.

22 MS. IVERSON: I'll just address we do have a team
23 working with the various plaintiffs' counsel with respect to
24 MDL centrality and the deficiencies on the PFS.

25 What we are seeing, one, I think that's pretty

1 natural in any litigation that you see deficiencies after any
2 discovery that goes through, whether it's something that gets
3 worked out or not.

4 However, we have seen that some of the deficiencies
5 raised by Philips, we believe, are beyond the scope of the
6 form, and that's something we are going to have to meet and
7 confer and coordinate and work out with them, but I have no
8 doubt, just like everything else, that that process will be
9 facilitated by Special Master Katz, and we'll be able to work
10 through those issues.

11 MR. BUCHANAN: Your Honor, Dave Buchanan again. On
12 the personal injury side, there are two written discovery
13 components. There's a plaintiffs' fact sheet and a defense
14 fact sheet. There are also deficiencies with the defense fact
15 sheet we are conferring on. I did not appreciate this was
16 going to be raised today, or I would have been prepared for a
17 summary in regard to the deficiencies my office has been
18 raising with the defense response.

19 This is natural, as Ms. Iverson highlighted. It's
20 something to be worked through in the first instance with
21 Special Master Katz, and we are happy to do so.

22 THE COURT: Thank you.

23 MS. DYKSTRA: Good morning, Your Honor. Lisa Dykstra
24 with Morgan Lewis for Philips RS. We just wanted to give you
25 a quick update. We also began the device inspections.

1 THE COURT: I did see that in the one report that
2 came in.

3 MS. DYKSTRA: We gave Carole Katz a summary of those.
4 They went very well. The parties were all cooperative. They
5 had their respective experts present. We met in Cleveland.
6 We reviewed 12 devices that were actually in Philips'
7 possession, so we could put them in one central location and
8 have the parties meet there. We were able to open the
9 machines and look into the boxes.

10 THE COURT: Are these the 11 that were referred to in
11 the report?

12 MS. DYKSTRA: 12, exactly. You could see into the
13 machines. You could see the foam clearly. You could see a
14 number of them that showed no evidence of visual degradation.
15 There were a couple that showed evidence of degradation. They
16 happened to be devices that also went through SoClean
17 treatment, which Tracy is going to address for you, and we are
18 scheduling, working with plaintiffs, we met and conferred this
19 morning, to continue those inspections.

20 Plaintiffs have suggested they may want to do
21 additional more destructive testing and they're meeting with
22 their experts. We are waiting to hear from them as to whether
23 they want to expand the scope of the visual examinations to
24 something more substantive, which we are open to do. We'll
25 keep you apprised of those examinations.

1 THE COURT: Thank you.

2 MS. HIGH: Good morning, Your Honor. Tracy Richelle
3 High, Sullivan & Cromwell.

4 As Lisa mentioned, we did our first inspection late
5 last month. We did it at the Philips RS facility in
6 Cleveland, Ohio. We examined 12 devices. Two were from the
7 medical monitoring plaintiffs and ten were the PI plaintiffs.

8 Of that lot, four self-reported that their devices
9 were treated with ozone, and of that 12, two showed visible
10 signs of degradation.

11 For those two --

12 THE COURT: Being treated with ozone, did they
13 specifically identify SoClean?

14 MS. HIGH: They did, yes. All four. The ones where
15 there was visible degradation, the two, they also reported
16 using SoClean specifically.

17 Here, there's an example of a device where there was
18 not any disclosure of being treated by SoClean and you can't
19 see any visible sign of degradation. Here's another example
20 of that (demonstrating).

21 THE COURT: Do you know the length of use of these
22 machines that these were subjected to? Was that part of your
23 analysis? If something was used for 30 days or 60 days versus
24 four years, you know, there might be a difference there.

25 MS. HIGH: Fair. It is. It will be, yes. And then

1 in this device that was self-reported as being treated by
2 SoClean, as you can see, the foam closest to the blower is
3 showing visible sign of degradation, and in the other device,
4 that also showed visible sign of degradation. We've given you
5 a picture of where you can see that as well.

6 We thought that the process was productive. It was
7 pretty easy and really only took four or five hours, and so we
8 look forward to continuing the process on a regularized basis
9 and hopefully monthly.

10 MS. IVERSON: Kelly Iverson again for plaintiffs. I
11 know we had expressed concerns, Your Honor, about the
12 relevance and burden in response to the limited relevance of
13 these visual inspections, because all parties agree that the
14 polyester polyurethane foam may be degraded but not actually
15 showed visible signs, particularly that you are going to see
16 through the opaque blower box in the process that's being
17 used.

18 In January, Philips was here talking about the
19 results of their December 2022 testing, much of which relied
20 just on visual testing that was internally performed by
21 Philips and they looked for significant visual foam
22 degradation. They came back and claimed that approximately
23 two percent of the devices that they looked at showed
24 significant degradation, and about seven percent with ozone
25 use in that testing.

1 Really with this initial 12 devices, it was very
2 telling for plaintiffs. While they claim only two had visual
3 signs of degradation, it was two that had significant visual
4 signs where you can see most of the foam was out of the blower
5 box, and that was 16 percent of the devices.

6 Another four of them showed some visual sign of
7 mechanical degradation. So at 50 percent, just visual,
8 without any chemical inspection, that showed some sign of
9 mechanical degradation.

10 The numbers from that initial sample are
11 significantly higher than what Philips reported to the public,
12 and the lack of the visual signs of degradation on the other
13 50 percent of devices doesn't mean that it doesn't exist
14 there.

15 THE COURT: Has anybody done any analysis of what
16 would be a statistically relevant sample of the devices? Do
17 you have anybody who has weighed in on that, any experts? I
18 think both sides are going to have to address that.

19 MS. IVERSON: You mean a statistically relevant
20 sample of what to test or as far as --

21 THE COURT: Number of devices that need to be tested
22 to make it statistically relevant. 12 devices, I mean, I'm
23 not a statistician, but I can tell that's not sufficient. It
24 could be swayed one way or the other, you know. It could
25 favor one side or favor the other side, but at the end, you

1 know, it has to have some statistical relevance
2 scientifically, it's my understanding.

3 MS. IVERSON: Harkening back to my statistics class
4 from when I was in undergrad, I recall feeling as though
5 statistics could be manipulated in ways for either side to use
6 to their benefit.

7 THE COURT: There will be statisticians when you have
8 11 million devices in use. What's the statistically relevant
9 number that would have to be viewed to be persuasive?

10 I can see in an individual case, you want, where
11 there's a personal injury claim, you want to look at that. It
12 may not be as relevant in the economic loss one, because you
13 could say, well, if these deteriorated, others are likely to
14 fall. You can have somebody with scientific background
15 looking at the foam, when does it happen. So it may be a
16 different thing, but for the medical monitoring or the
17 individual plaintiffs, some other statistical relevance may
18 have to be developed. I was curious.

19 MS. IVERSON: We are not here suggesting that 12 is a
20 statistically significant sample, Your Honor. We are just
21 discussing the results of that sample.

22 We do have the preservation order the parties agreed
23 to preserve 7.5 percent of the DreamStation 1s and agreeing
24 something within that range would wind up being a
25 statistically significant sample, but we have not worked with

1 the other side as far as what that would be. We certainly
2 have our own experts and they have theirs.

3 We are now working --

4 THE COURT: That's pretty expensive. You have to
5 have your experts with you when you are there. The lawyers
6 have to be there when you are doing the actual physical
7 inspection.

8 MS. IVERSON: Yes, it is going to be an expensive
9 process of going around the country. That's why we are trying
10 to make sure that we are doing what needs to be done when we
11 do that the first time if we can. It's pretty early to be
12 doing that, but we are trying to work with our experts to look
13 at what further testing might be appropriate at this time, and
14 like I said, we are working together in a process to get to
15 those additional inspections and hope to be able to reconvene
16 with them in a couple weeks and talk about what the process
17 might look like.

18 THE COURT: Is there any degradation that takes place
19 just because something is sitting for a while? As the time
20 goes by, is there any risk that those machines that are being
21 preserved, that there will be some natural degradation that's
22 going on during that process?

23 MS. IVERSON: There is some risk. Once hydrolysis
24 starts, you can in fact slow it down, and, you know, get it to
25 a near stop.

1 THE COURT: Is that how they store it, in the way
2 it's being stored, the temperature, climate, where it's being
3 stored? Is that what affects it?

4 MS. IVERSON: If you store it refrigerated, then it
5 will help slow down any kind of process of hydrolysis, but
6 here, they are storing it -- Philips is storing based on the
7 preservation order. They did not agree to refrigerate them,
8 so right now, it's being stored under a certain temperature, I
9 think it's 77, 75, something of the sort, degrees.

10 THE COURT: Like normal house conditions. You
11 wouldn't have air-conditioning and heating in the home at that
12 type of temperature?

13 MS. IVERSON: Yes.

14 MS. DYKSTRA: Lisa Dykstra. I just want to answer a
15 couple questions. You raised a couple of questions and the
16 term is auto catalysis, auto catalysis, something like that.
17 If hydrolysis does start, it will continue.

18 We did raise this with Carole Katz, so that was one
19 of the impetuses for actually going and starting the visual
20 inspections because if hydrolysis starts, the foam will
21 continue, so that was one of the issues of making timely
22 visual inspections.

23 Also, a couple of other comments on the inspections.
24 12 is definitely not a statistical sample. We have done --
25 there are approximately 3 million consumers who have returned

1 their devices and participated in the recall registration
2 database, and there is some inspection as those devices come
3 in. They are photographed to preserve at least what we can by
4 photograph at that time.

5 So the data that we referred to when we gave FDA
6 information about the numbers of devices that showed actual
7 evidence of significant visual degradation were, in large
8 part, based on those photos, and all of that data is getting
9 produced to plaintiffs through the course of discovery, so
10 everybody will have access to that.

11 You are absolutely right. One of your questions
12 earlier was are we looking at how long something is actually
13 being used or how old it is, how many days a week it's being
14 used. All of that data -- I don't remember when we showed you
15 on science day, the machines have a WIFI card in them. It's
16 transmitted into what's called Care Orchestrator. So that
17 data is actually kept and maintained.

18 So for every individual plaintiff, when they sign
19 their plaintiff fact sheet and do all of that, we do all have
20 access to their individual usage, so we will be able to tell.

21 THE COURT: Does every machine have that type of
22 card?

23 MS. DYKSTRA: Every machine from the last five years.
24 I think there's some differences as you get to older machines.
25 We will have that data for the individual plaintiffs.

1 Lastly, I'll just note that the December data that
2 Ms. Iverson referred to, obviously that was extraordinarily
3 broader than visual inspections. It included analysis of new
4 devices, field returned devices, artificially aged foam from
5 devices, over 100 devices across the platforms.

6 That was submitted to FDA in December. We made
7 another much more substantial leading off of that submission
8 to the FDA again in March, and we are in discussions with FDA,
9 and we'll be giving you another update on that as well.

10 That also, just to wrap it up, that also shows that
11 for the DreamStation 1, System 1 and DreamStation Go devices
12 that are subject of that report, that there is no sign of
13 appreciable risk of harm to human health whatsoever from that
14 foam. Thank you.

15 MS. IVERSON: Your Honor, I think we addressed that.
16 Obviously we have experts getting into it. We have not gone
17 through all of the issues with the testing that Philips has
18 released, for example, where they're using conditions that are
19 very different than the conditions using, for example, 75
20 liter per minute airflow rate, rather than the 85 per liter
21 airflow rate that the DreamStations actually run at in order
22 to do their testing.

23 That's not something for the Court today to address
24 and deal with whether there's an appreciable risk of harm.

25 THE COURT: I appreciate that.

1 MS. IVERSON: Thank you, Your Honor.

2 THE COURT: Huge difference between the parties'
3 perceptions.

4 MS. DYKSTRA: One note my colleague reminded me.
5 There's 3 million registered for the recall. They all have
6 not returned their devices, but we have 3 million registered
7 for the recall and we are processing and returning remediated
8 devices to those people.

9 MS. HIGH: Thank you.

10 THE COURT: Okay. The next item up on the agenda is
11 the May 25 argument on the jurisdiction issues and then the
12 12(b)(6) issues with respect to the parent defendant.

13 MR. SCHWARTZ: Good morning, Your Honor. Steve
14 Schwartz for the plaintiffs. The briefing on those two
15 motions that are scheduled for hearing before Your Honor will
16 be completed next week, and the parties will propose that,
17 after we see the vast briefs, we'll confer with each other and
18 propose some procedures for how we would conduct the hearing,
19 and of course, we are open to any guidance that Your Honor
20 would have.

21 THE COURT: Just to let you know what I envision
22 happening. There's going to be evidence, and you are going to
23 decide whether you are going to just submit to the Court
24 either the deposition or the documents, and if the documents
25 are submitted, you'll have to let me know whether or not

1 there's any objections to those documents. If there's not,
2 that I could consider them. If you are going to have live
3 testimony, you may want to do that to have somebody here to
4 explain A, B or C that may be relevant to it.

5 But in any event, whether it's just all on the record
6 and you'll be making argument that day so you would be laying
7 out what your positions are that has already been set forth in
8 the briefing, once it's all there and I -- it has to be
9 admitted into evidence.

10 Just because you attach it to a brief doesn't make it
11 evidence, so you'll have to be prepared to move whatever you
12 are relying on just in terms of record evidence that you've
13 submitted, and we'll have that come into evidence, and I would
14 normally have proposed findings of fact and conclusions of law
15 submitted, unless it's so crystal clear that I could make a
16 ruling on the record that day.

17 My understanding is you should be prepared to do
18 proposed findings of fact and conclusions of law. Those are
19 generally submitted simultaneously. You would have to move to
20 file a reply to that if you disagree with somebody's proposed
21 findings, but normally, I go on what each side submits, and I
22 will draft the final findings of fact and conclusions of law,
23 because it is a factual determination.

24 MR. SCHWARTZ: Thank you, Your Honor, for that
25 guidance. It's very helpful for us. We'll meet and confer

1 after we get the last brief.

2 THE COURT: When we do the presentation. Generally I
3 leave that up to you as counsel. You're the best informed in
4 making the best decision. I assume that with your briefing,
5 you've attached exhibits, correct?

6 MR. SCHWARTZ: Yes.

7 THE COURT: So you've submitted those in hard copy to
8 the Court?

9 MR. SCHWARTZ: Yes.

10 THE COURT: That's what you will be submitting. If
11 there's going to be some other document, you have to make sure
12 that if you are going to offer it up that day -- it is an
13 evidentiary hearing, so if there's something that's not in
14 those binders that you've already provided to the Court, you
15 should be prepared to present that to the Court and provide
16 hard copies.

17 Now, if you can jointly agree on joint exhibits that
18 you both agree on, that would be wonderful too. So if you
19 wanted to prepare a submission of what you jointly agreed to,
20 that would be good too.

21 MR. SCHWARTZ: We will do that, Your Honor, and as I
22 think Your Honor and Your Honor's staff knows, there's no
23 shortage of paper in connection with these motions that's
24 already in the back room and perhaps there will be more.

25 MR. STEINBERG: Your Honor, it's Michael Steinberg

1 for the parent. Is there an expectation that findings of fact
2 and conclusions would come at the day of the hearing?

3 THE COURT: No. I'll give you a briefing schedule
4 after that. Meet and confer. If you can get it done quickly,
5 great, but normally, I give someone between two and four
6 weeks, depending on the complexity of the issues. Just meet
7 and confer, which you both agree would be timely.

8 Sometimes you want to have the benefit of the
9 transcript, and we'll key it off the day of the transcript,
10 depending on, what comes up at that hearing. I may be asking
11 you questions and that type of thing as we go through it, but
12 at the end of the hearing, we'll talk about whether you need
13 to have the expedited transcript.

14 When the transcript comes in, that's when
15 generally -- the date would be from that date going forward
16 that you would determine what would be reasonable period of
17 time for you to submit on the same day your proposed findings
18 of fact and conclusions of law.

19 MR. STEINBERG: Excellent. Thank you, Your Honor.

20 MR. SCHWARTZ: Thank you, Your Honor.

21 THE COURT: Anything else? The 12(b)(6) motions,
22 those are not evidentiary hearings, so that's a little
23 different standard. Anything else on those motions? The
24 other 12(b)(6) motions? Okay.

25 The remaining 12(b) motions before the Special Master

1 Vanaskie. We have the special master on the phone.

2 MS. DUGGAN: Good morning, Your Honor. Sandra Duggan
3 for the plaintiffs. Good morning, Judge Vanaskie.

4 MS. WEST FEINSTEIN: Good morning, Your Honor.
5 Wendy --

6 SPECIAL MASTER VANASKIE: Good morning.

7 MS. WEST FEINSTEIN: Excuse me, Judge Vanaskie. Go
8 ahead.

9 THE COURT: He's just saying good morning.

10 SPECIAL MASTER VANASKIE: I just want to find out
11 what the status of the briefing, remaining briefs, when are
12 these cases going to be ripe to be scheduled for oral
13 argument?

14 MS. DUGGAN: The briefing will be completed by the
15 end of this week. The reply briefs are due tomorrow from
16 Philips RS. It was our understanding from the first meeting
17 with Judge Vanaskie that after the briefing was complete, we
18 would all reconvene and determine when the oral arguments
19 would occur.

20 And, Judge Vanaskie, since then, there's been a lot
21 of material that's been provided to you, and we were thinking,
22 the parties were thinking it would make sense for us to confer
23 and perhaps come up with a proposal that makes sense.

24 I think initially, Judge Vanaskie wanted to have
25 separate arguments based on the separate complaints at issue,

1 but there are a lot of overlapping issues, and it might make
2 sense to group the arguments by issues as opposed to strictly
3 by complaint.

4 MS. WEST FEINSTEIN: Wendy West Feinstein on behalf
5 of Philips RS. Completely agree with everything Ms. Duggan
6 just said. I would add if there's anything else that Special
7 Master Judge Vanaskie would like the parties to discuss in
8 order to meet and confer in order to make his review of the
9 motions and preparations for argument easier, we will
10 certainly work together to do that.

11 THE COURT: It would be my understanding, Judge
12 Vanaskie, that you would be reaching out to the parties at the
13 conclusion of this week when the final briefing is due to
14 discuss the issues that have been raised as to whether you are
15 going to group oral arguments by issues or by motion and then
16 to talk about the days that would be or time frame for those
17 oral arguments to take place, and if you could confer with my
18 law clerk to see if it's possible for those to be in
19 Pittsburgh and the day that I would be available.

20 Now, I'm not going to stand in the way if, for some
21 reason, it's impossible for me to be there. I will have to
22 rely on the transcript.

23 MS. DUGGAN: I think the parties' understanding was
24 the hearings would occur in Pittsburgh in Your Honor's
25 courtroom.

1 SPECIAL MASTER VANASKIE: That is correct. That is
2 my intention.

3 THE COURT: Thank you.

4 Anything else, Special Master Judge Vanaskie?

5 SPECIAL MASTER VANASKIE: No, nothing else. I'll
6 reach out to counsel. I would appreciate it if they would
7 meet and confer and perhaps suggest some dates for argument
8 and organization of the arguments by issue as opposed to
9 complaint so that we could prepare accordingly.

10 MS. DUGGAN: Your Honor, this is Sandra Duggan. We
11 will meet and confer next week and we will report back to you.

12 THE COURT: Special master?

13 MS. DUGGAN: Yes.

14 THE COURT: What I'm understanding is the special
15 master will wait to hear from you as to proposals on which you
16 agree or disagree, and then he'll set up a conference call
17 with you all to see how you would go forward?

18 Is that suitable, Special Master Judge Vanaskie?

19 SPECIAL MASTER VANASKIE: Yes, it is, Judge Conti.

20 MS. DUGGAN: Judge Vanaskie, as we've done in the
21 past, I think the parties will email you to try to set up a
22 call with Your Honor.

23 SPECIAL MASTER VANASKIE: That is fine.

24 THE COURT: Thank you all.

25 Here's the big issue for today then, which I'm not

1 sure will be resolved today, that's the remaining disputes on
2 the case management schedule.

3 MR. BUCHANAN: Good morning, Your Honor.

4 THE COURT: I haven't had a lot of time to really go
5 through and fine-tune all of the issues that have been raised
6 with respect to the schedule. There's some persuasiveness on
7 each side's view of certain of these issues, and there may
8 need to be report and recommendation from the special master
9 about what is the best way forward here, because she'll be a
10 lot more familiar with the other disputes that have gone on in
11 the discovery matters and what's remaining and that kind of
12 thing.

13 I'll just give you a sense, my sense. The defendants
14 are pushing for fact discovery at least for class
15 certification and the general causation issues to be completed
16 towards the end of February of 2024. About ten months away
17 from now is when you would be looking at the close of that
18 kind of fact discovery.

19 It would be typical in class certification type
20 situations where you would have to have some hard date for
21 that, because you'll never get to the end of class
22 certification if discovery keeps going on because new things
23 come in and they'll put it in. Everybody has to use their
24 best efforts to have a date where things will close.

25 On generally discovery, I'm hearing on -- excuse me,

1 on the general causation issue, the plaintiffs are saying,
2 well, things keep happening, new things develop, and I do
3 understand that, but there's still timing where things have to
4 come to sort of not a hard end but something that's
5 substantially done. This is it.

6 We are going to be moving forward. People will get
7 their experts, you get things lined up, but things keep coming
8 up, you know, what kind of further delays can come into that?

9 I think that's where I would be thinking that you
10 would set up a process as to whether the end of February is
11 the right date, I don't know about that because there's some
12 argument that things were delayed from what people originally
13 thought they would have all the documents. There's going to
14 be all these depositions, can they all be accomplished.

15 I think I need to hear from the special master on
16 that. Where are you in the discovery with respect to class
17 certification and the general causation? Where does all that
18 stand? There's going to be some date. Hopefully, it will be
19 somewhat early next year, because we'll never get to the end
20 of this case if we don't start moving this along.

21 If there's a problem and something pops up like with
22 the general causation issue, then that would go to the special
23 master and I would give her some leeway.

24 I mean, it wouldn't have to be something so dramatic
25 that it's going to turn everything on its head, but certainly

1 if something comes in that would be really relevant and could
2 have an effect on the determination, that should be permitted
3 to come in and be discovered, but just to have more
4 information along the same line, it's not going to be helpful
5 really in reaching a resolution.

6 So there should be some process put in place where
7 there could be an opportunity for an expeditious response. We
8 need this discovery. This just came up. This is a new issue.
9 Here's a new scientific study, something has happened,
10 something dramatic or just more relevant than what you already
11 have. It doesn't have to be extraordinary.

12 I don't think it's going to be a question of bad
13 faith or good faith, quite frankly. It's going to be whether
14 it would be helpful. I think that would be the issue. It has
15 to be helpful and relevant. Cumulative is not necessarily
16 what needs to be -- needs to happen.

17 There has to be some basis to say, yes, let's have
18 some more discovery on this, because that may then open up,
19 the experts need to look at this and it pushes the dates and
20 pushes the dates.

21 I don't think, just because it's such a highly
22 complex case, that we need to have dramatic extensions going
23 on forever. It has to come to a close. We have to have a
24 reasonable period for the discovery so that you are pretty
25 sure you've got everything you might need and you've looked at

1 everything.

2 So I think we do need to have some date that is going
3 to be a hard date and then a process, if things come in
4 afterwards that may need a prompting that could change the
5 analysis. That would be sort of what I would be envisioning.

6 I just want to finish here. That's the issues I see
7 with respect to class certification and the general causation.
8 I do think the general causation needs to be addressed, but on
9 the other hand, I don't want to delay looking at the
10 individual plaintiffs for two or three years, while this other
11 plays out.

12 We need to prioritize the class certification and the
13 general causation, but then we need to get started on the
14 individual cases too. I don't think that process needs to be
15 unduly delayed until I decided the issues.

16 My practice has been, in these more complex cases,
17 you know, let's get through what you need to get teed up, the
18 front load of issues, class certification, general causation,
19 but once you got through the discovery for those, you've got
20 to get started on the discovery for the personal injury, so
21 you need to work out a framework for that and not delay it
22 until the Court has finally issued a decision on class
23 certification or on the general causation.

24 That's sort of my overview, and I haven't given it a
25 definitive determination. I think I need the input of the

1 special master on that.

2 I did want to give you an overview of where I'm
3 coming from. The case has to move on all fronts, and we are
4 going to prioritize some things where more energy is going to
5 be expended on that, but we are not going to delay everything,
6 so I don't want to be here for ten years.

7 MR. BUCHANAN: That's very helpful.

8 THE COURT: It doesn't help the individual plaintiffs
9 on this. If there is a valid claim here for someone who has
10 been injured, they need to have an opportunity to have redress
11 for that. That shouldn't be delayed because we are dealing
12 with some of the other economic issues.

13 I'm not ruling that they have a valid claim or that
14 it's going to go to trial or anything like that, but those
15 claims have been made, and if there is an injury that is
16 specifically caused by the machine, they have to have a
17 relatively speedy resolution on that, and we see that in the
18 one remand issue that has come up, and we haven't talked about
19 that, but that's coming up next.

20 I have to weigh all of these things in approving
21 whatever schedule is there, but I think I need to hear from
22 both sides, I need to hear from the special master, and then
23 I'll make the decision.

24 I may need to have some further argument. Really how
25 many depositions are you going to have, how many plaintiffs

1 are going to go forward. You said there's 100 class
2 plaintiffs. You have to look at each of those class
3 plaintiffs. That's a big job. Are you going to streamline
4 that somehow so we don't have to look at each specific
5 individual? That's going to be something for further
6 discussion.

7 MR. BUCHANAN: Your Honor, if I'm understanding your
8 guidance, and you've certainly given some points to us and we
9 understand, I think. I have an impression of the road map you
10 would like to see us follow.

11 I did want to clarify one point, and it may not have
12 been clear from the submission, because we did as you
13 suggested with trying to prioritize the class actions.

14 THE COURT: I saw that. You have dates on some of
15 that, but you are not necessarily agreeing.

16 MR. BUCHANAN: We agreed on the class side. On the
17 class side, we are 100 percent aligned. We have proposed
18 schedules to submit if they are in line with Your Honor's
19 guidance.

20 On the PI issue, we have the two issues that you
21 provided further guidance on. We did have a proposed close on
22 general discovery as it related to the initial discovery pool
23 cases, so it was about in June, and I think that is a window
24 that we are probably going to need, given the delays we had.

25 With your guidance, I'm happy to work with defense

1 counsel, if we can reach an agreement, maybe Special Master
2 Katz and provide submissions there. I understand from your
3 comments you would like us to direct our next submissions back
4 to Special Master Katz, rather than oral argument today?

5 THE COURT: Yes. Quite frankly, you cite a bazillion
6 cases and other matters that I have to look at, and I would do
7 that, but it's very time consuming, and at the end of the day,
8 I could hear from you, but I would have to write a lengthy
9 opinion and do all that, and I don't necessarily think that's
10 in the best interests of judicial efficiency.

11 We are just talking about setting timeframes, and
12 I've given you my impressions as to what I would typically do
13 in these types of cases, and I don't know that I would differ
14 from that, other than you making me go do a lot of work to be
15 absolutely certain.

16 If I'm wrong and there's really one compelling
17 situation out there where you really say, Judge, you have to
18 look at this because you'll see it differently if you read
19 this, I'm happy to do that.

20 MR. BUCHANAN: I don't know that we need to trouble
21 the Court with that. I think you said a few things, Your
22 Honor. One of our concerns on the plaintiffs' side, it's
23 reflected in a remand application to the Court for an
24 accelerated remand schedule. That's just the concept.

25 We have done a very good job, I think, in this MDL as

1 leadership making this very much the center. A lot of that
2 was driven by Your Honor's comments about how this wasn't
3 going to languish and you were going to move quickly and we
4 want to deliver on that in terms of having cases that can be
5 ready when Your Honor -- after Your Honor decides the general
6 issue, so I understand your guidance, and we can certainly
7 prioritize the general matters.

8 As a practical matter, general causation does get
9 imbedded in case-specific causation in the considerations
10 there. I think --

11 THE COURT: It has come up in the medical monitoring.

12 MR. BUCHANAN: I can see, Your Honor, the experts
13 wanting to do as they do in their clinical practice and also
14 consider general with information on specifics. General being
15 informed by specifics, specifics being informed by general, so
16 we just have a stay right now on case-specific discovery
17 beyond the medical records.

18 We are going to be dealing with Settlement Master
19 Welsh in the coming weeks to discuss perhaps frame works, and
20 we are not under a lot of urgency to resolve this question
21 today. We do have a road map on general in front of us that
22 we are going to be working through.

23 We are prioritizing the class work, but we can get
24 with Special Master Katz in the near term informed by
25 conversations with Special Master Welsh.

1 THE COURT: If I'm mistaken, tell me. Were the
2 defendants seeking the end of February for the general
3 causation fact discovery to be concluded as well?

4 MR. LAVELLE: Yes, Your Honor. I'm here to respond
5 to Your Honor and make viewpoints, if I may. John Lavelle
6 from Morgan Lewis for Philips RS.

7 THE COURT: Do you agree that there's got to be at
8 least some looking at some of the specifics of a case in order
9 to inform the general causation issue?

10 MR. LAVELLE: I think there's a difference between
11 the parties on that. We believe that general causation is a
12 key issue in this MDL and maybe the dispositive issue in this
13 MDL. This is a situation where the plaintiffs have alleged
14 more than 20 different medical conditions, a wide range of
15 cancers, a laundry list of respiratory conditions.

16 This is not a case -- or, not an MDL where there is
17 an alleged signature injury. This is not, for example, like
18 mesothelioma where general causation is presumed. We've got a
19 wide variety of claimed illnesses, and every patient here was
20 prescribed a Philips medical device because of their existing
21 respiratory problems, so we've got respiratory claims, but
22 they already had respiratory issues.

23 You heard earlier about the testing that we've done.
24 We believe that the testing has been favorable for us and is
25 going to support our arguments, that general causation cannot

1 be established for any of those 20 plus medical conditions.

2 Plaintiffs obviously have a different view, but from
3 our standpoint, the key is we need to know what the -- which
4 are the cases that are going to go forward. Are there any of
5 these medical conditions for which general causation can be
6 established? Can the plaintiffs come forward with admissible
7 evidence that meets the standards of Rule 702 that would
8 establish general causation?

9 That is a separate issue from whether specific
10 causation occurred in an individual case.

11 THE COURT: Do they need to look to see if it's
12 specifically caused by that?

13 MR. LAVELLE: For an individual case, they would,
14 Your Honor. They would need to prove both general and
15 specific causation, but the approach that's been --

16 THE COURT: I guess my question is a little bit
17 different from that. This may be where the experts come in.
18 Can an expert, without looking at any specific individual,
19 individual's specific situation, in terms of what disease they
20 may have, can an expert just, by looking at testing say, yes,
21 because this particle comes off, that particle, they know, can
22 cause X, Y or Z disease, or will they have to look at some
23 individuals?

24 MR. LAVELLE: Your Honor, I think that's going to be
25 a question to be addressed in this litigation going forward is

1 what is necessary in order to prove general causation under
2 Rule 702.

3 THE COURT: I think we need to hear from the experts
4 on both sides as to what's needed. I think that's what you
5 need to be talking to your experts about and then talking to
6 the special master to see what will those experts need to have
7 to render opinions, and I'm assuming that the plaintiffs are
8 going to have maybe the more yeoman's burden on this with the
9 number of diseases that have been alleged to be caused by the
10 device, so, you know, you are going to have to do a lot of
11 work to figure out which experts because the expert in cancer
12 may be different than the expert --

13 MR. LAVELLE: Your Honor, the concern that we have is
14 that it's impossible at this point to pick bellwethers or
15 discovery pool cases, which is what the plaintiffs are now
16 calling them, without knowing where we are heading on general
17 causation. We would just be throwing darts up at a board to
18 try to pick cases. Otherwise, we are going to work up every
19 single personal injury case.

20 General causation is a discrete and gating issue.
21 The Zantac litigation is a perfect example of this. The Court
22 set a schedule for workup of general causation, including
23 presenting expert opinions, Rule 702 Daubert hearings, and the
24 Court made a determination that the experts that were
25 presented failed to establish causation of the injuries there,

1 and that was dispositive of the litigation. The Valsartan
2 litigation is another example.

3 THE COURT: I get that. It's a question of whether
4 the machine with those particles that come off the
5 degradation, would that cause this kind of disease.

6 MR. LAVELLE: Could it cause.

7 THE COURT: Could it cause that disease, and then you
8 have an individual who says I have that disease. I used the
9 machine. It caused this, and then you would have an expert to
10 testify about that individual, but you are going to need some
11 level of understanding about what diseases are caused for the
12 general causation so you can rule out certain of the diseases
13 or rule in certain of the diseases.

14 Now, that's a big undertaking when we have so many
15 diseases that are alleged to have been caused by this machine.
16 I agree with the defense, you know, if you get one or two
17 diseases, you can just really start focusing on that, but how
18 are you going to get this under control so that we can get to
19 the general causation issue?

20 MR. BUCHANAN: The proposal was, Your Honor, and
21 there are largely two big buckets, perhaps a third. There's
22 respiratory conditions, there are pathway cancers, lung
23 cancer, they dominate, if you will, the cases on the docket
24 today, those three large buckets.

25 Other cases are similar to this in terms of having

1 that type of range of injuries. I know counsel identified 20.
2 I think when you break them down, maybe there are, but these
3 are, unlike other cases, these are all of the risks that were
4 identified by the defense and provided to the medical
5 community -- by Philips and provided to the medical community
6 as the risk of this foam deterioration of the product. This
7 is not a situation where people are spinning this on their
8 own.

9 These are the potential risks identified by the
10 company in its statement in 2021, after their testing, which
11 they reaffirmed these potential risks, and they have never
12 withdrawn it. The FDA too has affirmed these are the risks.

13 This is a situation where we are not in a backdrop
14 where the company hasn't spoken on this. They have spoken on
15 this. They have identified these potential risks.

16 I think what they are challenging now is whether
17 people could have been exposed to enough of that foam. That
18 seems to be what they're saying today, but that turns into a
19 case-specific inquiry where you have to look at the plaintiff.
20 You have to look to see does this person have underlying
21 conditions that make them susceptible.

22 THE COURT: Just to interrupt you for a minute. I
23 want to clarify my understanding. What you are saying is that
24 the defense has already said, at sufficient levels, it can
25 cause X, Y and Z diseases?

1 MR. BUCHANAN: Yeah.

2 THE COURT: So you would be, at this general
3 causation, saying, yes, at this level of usage or exposure,
4 then these diseases could be caused.

5 MR. BUCHANAN: What the defense has said is the
6 potential exposure to particulates raises these potential
7 risks and safety hazards. The FDA has endorsed those in its
8 518 order and (a) and (b) orders where they said these
9 represent a substantial risk to human health, including death.
10 The FDA said that in response and after the defense testing.
11 It's been reaffirmed in the last 30 days that risk in FDA
12 statements.

13 THE COURT: I need to know what kind of discovery is
14 necessary to tee up those issues, and this is from the defense
15 and from the plaintiff, and I don't have enough information to
16 make that determination.

17 MR. BUCHANAN: I think we have a discovery plan that
18 does that, Your Honor. I think the question really was
19 whether we --

20 THE COURT: They are saying you can do it by February
21 and you are saying the end of June. What's entailed that
22 would make it possible or impossible to finish it by February?
23 That's what I need to know.

24 MR. BUCHANAN: Okay. I can tell you -- I don't know
25 if you want the argument today. Special Master Katz has the

1 context --

2 THE COURT: I don't have the information --

3 MR. BUCHANAN: -- where we are in discovery at this
4 point.

5 MR. LAVELLE: A couple points, Your Honor. Our
6 experts are focusing on whether the foam at all could cause.
7 That is general causation.

8 THE COURT: What about all these disclosures that
9 this risk and that risk?

10 MR. LAVELLE: There's a difference between the recall
11 notice and proving general causation. There are many cases,
12 and the two that I identified for you, Zantac and Valsartan
13 are good examples. Merely recalling a product because of a
14 potential risk is not a concession of general causation. It
15 is not.

16 There is a scientific analysis that has to be done.
17 Plaintiffs have an obligation to come forward with admissible
18 expert testimony to prove general causation. If they want to
19 wave the recall notice and say we are done, then maybe it will
20 be a very short hearing on general causation. I suspect
21 that's not what they are planning to do.

22 They will in fact present expert testimony, and there
23 will have to be decisions made as to whether it's admissible
24 and whether it satisfies their burden of proof.

25 THE COURT: I think you need to start talking about

1 what kind of experts are going to be used. Maybe you can use
2 the same expert for ten of the diseases, or however many you
3 are going to be asserting, and find out from those experts
4 what they need to render a decision, and that would be for
5 both sides because both sides are going to have the same
6 concerns. So both sides' experts need to be teed up. You
7 need to be finding out what they need in the way of discovery
8 so they can render their decisions.

9 Have you talked to the experts about what they need?

10 MR. BUCHANAN: I'm assuming the defense has as well.
11 Certainly we've spoken with experts, Your Honor, and that's
12 really the plan we've laid out. There's a number of internal
13 employees.

14 THE COURT: You need specifics in order to say
15 whether it's going to be February or June, you know.

16 MR. BUCHANAN: The proposed cutoff by the defense of
17 February was a close of general discovery on all issues, Your
18 Honor. It was broader than just general causation.

19 THE COURT: They agreed it wouldn't be for the
20 individual plaintiffs.

21 MR. BUCHANAN: I'm sorry. It would be all the other
22 elements of a personal injury claim. It wouldn't just be
23 limited to general causation.

24 THE COURT: You are telling me you are agreeing that
25 the February 24 is still a good day for class certification

1 and medical monitoring?

2 MR. BUCHANAN: No fuss there, Your Honor. We agree.
3 We stipulate with the defense.

4 THE COURT: Then we have the question on the
5 individual cases whether general causation can be teed up to
6 get ready for the expert reports. We can have time for any
7 discovery related to that and expert reports when they will
8 follow, and it sounds to me there might be numerous experts in
9 the various fields, so that's a big job, but you need to have
10 the experts tell you what they need in order to make a
11 decision.

12 These are probably esteemed scientists, doctors,
13 professors that hopefully they will be in position to tell you
14 what they would need in order to make a decision.

15 MR. BUCHANAN: That's true. That's absolutely true,
16 Your Honor. There was another element of this, and it was
17 really to try and leverage the process that Your Honor had
18 encouraged us to engage in that we agreed to, to see where the
19 parties had alignment and where they didn't have alignment in
20 the bellwether mediation phase this summer.

21 THE COURT: That's different. Mediation is on a
22 different track, and you are still going to come up with, and
23 I believe both sides agree, you would identify what discovery
24 you needed to make the mediation meaningful, and if the
25 special master needs to weigh in to help refine that, that's

1 going to be going on a separate track. You are going to have
2 to accomplish that discovery so you can have meaningful
3 bellwether mediations on the individual sides.

4 MR. BUCHANAN: I guess what I was trying to say is
5 that's happening over the next three months or so. I would
6 expect we'll get some guidance from Settlement Mediator Welsh
7 with regard to where we have alignment and where we don't and
8 help narrow some of the issues as it relates to any motion
9 practice next year on general causation.

10 THE COURT: Good. So is there anything else?

11 MR. LAVELLE: One more point and then Ms. Dykstra
12 wants to make a point as well. Just on the point we were
13 talking about. We agree that the mediation process with Judge
14 Welsh is going to be helpful, and for that reason, that is, we
15 think, the way that the workup of individual personal injury
16 cases in the near term before there's a determination on
17 general causation should be done.

18 We will follow her guidance, and she may well tell us
19 to do a variety of different things. It would be productive,
20 and we are willing to work with her on that, but that is not
21 the same as picking bellwether or discovery pool cases now
22 before we know which of these claims could be proceeding.

23 We are going to be discussing census registry in a
24 minute, but we have only a very tiny fraction of the potential
25 cases currently in court. We have less than one percent of

1 the potential claims here, so to pick bellwether or discovery
2 pool cases now, they are not going to be representative. We
3 need to get through the general causation determination first
4 before we can pick bellwether.

5 MR. BUCHANAN: I'm sorry. Real quick on that point.
6 We were not advocating the selection of discovery pool cases
7 until after the summer, after we had met with Mediator Welsh
8 regarding where we had alignment and where we didn't.

9 The concept as proposed, I think, by both sides was
10 to focus on that process over the course of the summer. Have
11 a report in to the Court in September, and we had proposed
12 that, based on that, we would come forward with what the
13 proposal would be for the selection of cases or not to go
14 forward in a discovery pool of cases.

15 That was a process with selection that happened, I
16 think, at the end of '23 or early '24, so that's what was laid
17 out. I think we have a lot of ground --

18 THE COURT: But I think, given what I understand,
19 that this kind of situation is one where there's a number of
20 diseases that have been alleged. It's not like there's just
21 one, so you are looking at all of these diseases. You have to
22 get a process together to see how you are going to prioritize
23 those and categorize those so you can have a meaningful
24 approach to resolving these issues, and we need to get through
25 the general causation.

1 I need to get a firm date for that fact discovery to
2 conclude and then you can start the fact discovery, because by
3 that time, you'll have -- your experts will be reviewing
4 whatever you presented and that process will be ongoing to
5 resolve general causation, and while that's happening, you are
6 going to be doing the individual specific discovery.

7 At that stage, you are going to have to start
8 prioritizing who you are going to be looking at. You are not
9 going to be looking at 300 plaintiffs all at the same time.
10 We are going to prioritize some of those, and for the
11 bellwether, I don't know if you are going to pick people off
12 the registry as well as off of just those that have filed the
13 short form complaints. I don't know what your approach is
14 going to be to do that.

15 MR. LAVELLE: I think Your Honor's guidance that you
16 provided today is very helpful. Maybe Mr. Buchanan and I can
17 take one more crack to work on an agreement that captures what
18 Your Honor just laid out and present it to Special Master
19 Katz.

20 THE COURT: Right. I think you need to get your
21 experts involved because one expert may need more than another
22 expert, and maybe they need to have the files of certain of
23 the plaintiffs presented to them. I don't know what they are
24 going to need for general causation, so I think you need to do
25 that. You need to meet and confer.

1 I'm going to refer this back to the special master to
2 work on this further. I think we all have a general
3 agreement, and we should prepare an order for me to sign for
4 the firm dates that everybody agrees to, and then we'll have a
5 further order that will address when the fact discovery will
6 close for general causation, how the specific causation
7 discovery will start, and then we can develop that, but at
8 least we'll have closure on the issues that you have all
9 agreed upon so we know you are working towards that, and we'll
10 be teeing up the other ones relatively soon. I would say
11 within the next 60 days.

12 MR. BUCHANAN: Would you like us -- it may make sense
13 for us to talk to Special Master Welsh as well.

14 THE COURT: Yes, you need to do that, because that
15 can help form some of the general causation issues as well.

16 MS. DYKSTRA: Your Honor, Lisa Dykstra for Philips
17 RS. I want to make clear on the record a couple points in
18 response to Mr. Buchanan's comments. There was never a
19 concession that these devices actually caused --

20 THE COURT: I get that. That's clear on the record.

21 MS. DYKSTRA: And the pre-recall testing was done on
22 less than five devices, I believe one device, and obviously
23 made at a time where you took a worst case scenario, you put
24 what potentially risks could be, you warn patients out of a
25 most conservative nature.

1 Post-recall testing has been done on over 100 devices
2 and that data has been submitted to the FDA. Plaintiffs are
3 well aware of that data and it's -- another report has been
4 submitted in March to the FDA which shows that there is no
5 appreciable risk to human health across the board, which is
6 why we are so strenuously pushing the issue of general
7 causation, which I think Your Honor has now dealt with.

8 Just as a side note, one issue we are going to be
9 addressing with Carole Katz this coming week is plaintiffs are
10 trying to preclude us from using any of the data that we
11 submitted to the FDA in this case, and so we are going to be
12 addressing that with Ms. Katz this week, and hopefully we'll
13 resolve that quickly.

14 THE COURT: Thank you.

15 MS. IVERSON: Your Honor, Kelly Iverson. I wanted to
16 address on the class schedule which -- two class schedules are
17 attached to plaintiffs' submission as Exhibit A. We have a
18 February 28, 2024 cutoff. We took to heart what you had said
19 about trying to make sure we are prioritizing getting the
20 class certification, but that's for precertification
21 discovery.

22 As you are well aware, Judge, while we're going to
23 have a lot of merits information because they are intertwined
24 with the class certification, we envision within the PI track
25 and all of these, that the merits deadlines would be the June

1 deadline that we've submitted and we would be able to proceed
2 with discovery and develop merits on liability and causation.
3 That's separate and distinct here obviously from what my
4 colleagues were talking about.

5 THE COURT: That has to be concluded by the 24th of
6 February.

7 MS. IVERSON: Right. They are suggesting that all
8 merits should be concluded at the same time as the class
9 certification, precertification discovery is concluded.
10 That's typically not workable with any class case.

11 I'm saying that's distinct from their discussion of
12 general causation and whether the experts -- I know
13 Mr. Buchanan addressed that with you as far as trying to go
14 through the process of then teeing up the discovery bellwether
15 pool to go through the specifics tied to the general.

16 That's completely separate from the deadline we are
17 talking about here on the merits discovery, and I just wanted
18 to make sure you understood that we do have a deadline in the
19 class tracks, but those are specific for precertification
20 discovery to make sure we are certifying that.

21 THE COURT: Thank you for that clarification.

22 MR. BUCHANAN: Thank you, Your Honor.

23 THE COURT: Thank you all. Forthcoming motion to
24 extend the deadlines for motions to remand. There was an
25 objection that did come in on that, so I need to know do we

1 have an opportunity for those to be heard. Is anyone here?

2 MR. LAVELLE: Your Honor, John Lavelle from Morgan
3 Lewis for Philips RS. There was a joint motion to modify
4 pretrial order No. 22 to extend the deadline for motions to
5 remand that was filed on Tuesday of this week, on April 18.
6 That's a joint motion by the defendants and by plaintiffs'
7 leadership, and the idea there would be to push -- under the
8 current pretrial order No. 22, the deadline for filing motions
9 to remand in cases that were removed is later this month,
10 April 28.

11 THE COURT: Right. You want to go --

12 MR. LAVELLE: We want to push it back four months so
13 that we would have the deadline for remand motions be August
14 31st, defendants' responses be due October 31st and then
15 plaintiffs' replies be due by November 15. Your Honor, the
16 filing that occurred this week, I understood and I read it to
17 be a motion to remand by an individual. That was --

18 THE COURT: Mr. Murray.

19 MR. LAVELLE: Yes, by Mr. Murray. He has a right to
20 file a motion to remand.

21 THE COURT: He's responding in opposition to the
22 joint motion to extend the dates. He doesn't want you to
23 extend the dates.

24 MR. LAVELLE: Right. We can certainly address his
25 comments today or at a later time. Maybe --

1 THE COURT: You need to respond to it and I'll have
2 to resolve that issue.

3 MR. LAVELLE: Your Honor, can we submit something in
4 writing?

5 THE COURT: Yes. Is anyone who represents Mr. Murray
6 present today? So he has to have notice and opportunity to be
7 heard on this, so I may just set up a separate telephone
8 conference hearing on the opposition to this. I'm not opposed
9 to it. I understand that everything is consuming and the
10 motions to remand may not be ripe at this time, so I'm not
11 disfavoring the motion to extend the time, but I do have an
12 opposition that hasn't been responded to, and they need to
13 have notice and opportunity.

14 MR. LAVELLE: Yes, Your Honor. We can confer with
15 Mr. Murray and see if we can reach agreement on a briefing
16 schedule, and we'll confer with plaintiffs' leadership as well
17 on that.

18 THE COURT: What I'm going to do is I'm going to
19 extend the time for remand by 30 days in order to have this
20 resolved, and I'll leave pending the motion to extend it for
21 the four months, and that way, we won't be having problems
22 with starting to file motions for remand. I'll extend it for
23 30 days from today, and hopefully, we'll have resolved the
24 motion to the -- the objection to the motion to remand within
25 that 30 day time frame.

1 MR. LAVELLE: Thank you, Your Honor. Will there be
2 an order entered on the docket along those lines?

3 THE COURT: Yes. I'm going to extend 30 days while
4 the Court considers the motion to extend for four months, and
5 then in the interim, you'll be responding, and we'll set up a
6 telephone conference hearing on that objection.

7 MR. LAVELLE: Yes, Your Honor. Thank you.

8 THE COURT: Update on the census registry and state
9 court litigation.

10 MR. LAVELLE: Again, John Lavelle from Morgan Lewis
11 for Philips RS. As of yesterday, April 19, there were 41,338
12 potential claimants who had registered in the census registry
13 and who are visible to the defendants. As Your Honor will
14 recall, we previously, in case management conferences, learned
15 that there is a larger number that's visible to plaintiffs
16 only in MDL centrality. I don't know what that number is.

17 Perhaps plaintiffs' leadership does know, but those
18 are people who started the census registry process but haven't
19 finished it. The number of people who actually completed it
20 41,338 as of yesterday.

21 On the state court litigation, Your Honor, we have
22 five cases that are pending that are not removable in
23 Massachusetts state court. They have been consolidated. They
24 are before Judge Barry-Smith in Middlesex County. We had a
25 status conference and hearing scheduled before Judge

1 Barry-Smith next Tuesday, April 25, at which time I expect
2 he's going to address whether to continue a stay of the
3 proceedings, there have been stays entered in two of the five
4 cases before consolidation, as well as to address whether
5 discovery is going to start in that litigation, and if so, how
6 it will proceed.

7 THE COURT: Okay. Would you like me to reach out to
8 him to offer whatever courtesies, assuming whatever discovery
9 they have, they can participate in the discovery going on
10 here?

11 MR. LAVELLE: Yes, Your Honor. I believe Your Honor
12 has previously reached out to Judge Barry-Smith.

13 THE COURT: I think it was a different judge.

14 MR. LAVELLE: Judge Barry-Smith was on the first case
15 and he rotated off to the criminal docket. He's now rotated
16 back to civil, which is now why we have the conference in
17 front of him next week.

18 THE COURT: Okay. Thank you.

19 MR. BUCHANAN: From plaintiffs' perspective, Your
20 Honor, if you are reaching out to the judge, we are happy to
21 coordinate with them in any efforts to aid in that.

22 THE COURT: I'll indicate to him that the parties in
23 this case are willing to cooperate with the counsel in their
24 case so they can get the benefits of whatever discovery is
25 going on here.

1 MR. LAVELLE: Yes, Your Honor. Thank you.

2 THE COURT: Thank you. Before we get to the
3 leadership development update, there's a couple other things.
4 Is counsel for Viemed Healthcare Staffing and Clinical Medical
5 Services here? I've had two motions to dismiss that have been
6 filed pursuant to Federal Rule of Civil Procedure 41 (b). No
7 one here representing those parties?

8 (No response.)

9 THE COURT: What's their role in this case?

10 MR. LAVELLE: Your Honor, John Lavelle from Morgan
11 Lewis. My understanding is they were named as defendants in a
12 case that was removed from state court to federal court. One
13 of the issues we have seen in some of the cases that were
14 initially filed in state court is that additional defendants
15 were added, presumably in an effort to try to avoid diversity
16 jurisdiction in federal court, and I believe that those two
17 defendants said in their motions that they did not believe
18 they should be sued in the case, and they were fraudulently
19 joined.

20 THE COURT: So I can just separately schedule
21 briefing on these motions. They are not subject to the
22 consolidated complaint; is that correct?

23 MR. LAVELLE: Your Honor, I think they are in
24 separate standing. I don't believe they are referred to in
25 the consolidated complaint at all -- consolidated complaints

1 at all.

2 MS. DUGGAN: That is correct, Your Honor.

3 THE COURT: So I'll have them teed up separately and
4 then proceed to address those separately.

5 MS. DUGGAN: I will just add though, Your Honor, that
6 in our short form complaint that accompanies the master
7 complaint for personal injuries, plaintiffs are able to add
8 additional individual defendants and claims.

9 THE COURT: Okay. Were these subject to short form?

10 MS. DUGGAN: Unfortunately, I don't have the answer
11 to that, Your Honor.

12 THE COURT: You may want to reach out to their
13 plaintiffs and say that, barring something else that would
14 come before the Court as part of the consolidated complaint, I
15 think I need to address this separately.

16 MS. DUGGAN: A member of our PSC regularly contacts
17 the plaintiffs' attorneys when any of these motions to dismiss
18 are filed. She appeared before Your Honor, Joyce Reichard.

19 THE COURT: Thank you. If you could follow up on
20 that with the plaintiffs in these cases, and these defendants
21 are not here today represented by counsel, so I'll have to
22 reach out to them separately, but I will be ordering a
23 response to the motions to dismiss, and then we'll see how
24 that goes.

25 MS. DUGGAN: We'll do that, Your Honor.

1 THE COURT: They may consent. I don't know.
2 Leadership development.

3 MS. FRESCO AGRAIT: Good afternoon, Your Honor.
4 Miriam Fresco Agrait from Rubenstein Law on behalf of the
5 leadership development committee on the plaintiffs' side.

6 As a status right now, I think about eight of the ten
7 LDC members are very heavily involved in document review with
8 the amount of documents that have been produced up to this
9 point. For me personally, it's been a surprising and eye
10 opening learning experience to see the amount of documents
11 that show the defendants' egregious liability despite how
12 minimally we are involved -- how minimally into custodial
13 review we've gotten into.

14 As far as where the LDC as a whole is looking forward
15 to getting involved, we are looking forward to being more --
16 excuse me. I have a frog in my throat. We are looking
17 forward to being more heavily involved in interactions with
18 defense counsel, interactions with the special master, even on
19 a shadowing basis just for the learning experience. As of
20 now, we are all very busy with document review.

21 THE COURT: Thank you.

22 MR. HUNCHUCK: Good afternoon, Your Honor. My name
23 is Steven Hunchuck. I'm from Pittsburgh, and I'm here with
24 Morgan Lewis & Bockius on behalf of Philips RS with the
25 leadership development committee update.

1 I'd like to thank the Court and my colleagues for the
2 chance to speak in front of you today. One of my favorite
3 parts of working on this case is the collaboration with world
4 class lawyers from different parts of the country, including
5 right here in Pittsburgh.

6 So I recently have been working with a cross-office
7 team of lawyers overseeing the affirmative discovery strategy
8 and its administration. This core team is not only in close
9 contact with the individual arms of the affirmative discovery
10 machine, but it's also working closely with the defensive
11 discovery team to ensure an informed and consistent approach
12 when it comes to all things discovery.

13 Relatedly, I've also been part of the team defending
14 against the TPP claim, specifically responsible for developing
15 strategy and preparing discovery, requesting and
16 correspondence with plaintiffs' counsel.

17 Finally I mentioned that I've been working closely
18 with partners investigating -- or navigating document review
19 and production which is a massive undertaking, as I'm sure you
20 are aware, but I'm grateful for the opportunity this MDL has
21 provided me and look forward to continued developments. Thank
22 you, Your Honor.

23 THE COURT: Thank you.

24 MS. OLSEN: Good afternoon, Your Honor. Beth Olsen
25 on behalf of KPNV and the other non-Respironics Philips

1 defendants. I wanted to provide a short update on the work
2 that myself and the associate team has been doing for this
3 litigation.

4 In particular, the reply briefing, we have been
5 working on as a part of our motions to dismiss. That briefing
6 involves the important issue of whether plaintiffs have met
7 their burden to have the legal separateness of KPNV and
8 Respironics be disregarded. As Your Honor previously noted,
9 when you are considering veil piercing, care should be taken
10 on all occasions to avoid making the entire theory of the
11 corporate entity useless.

12 Back in December at our status conference, you
13 discussed the factors and the circumstances from your opinion
14 in Enterprise and Trinity, and you emphasized we should delve
15 into those factors, and the factual circumstances that are
16 necessary for plaintiffs to prove that the parent controls the
17 day-to-day operations of the subsidiary as opposed to just
18 incidental control that naturally flows from the
19 parent-subsidiary relationship, and delve we have.

20 Our small team of associates has been really engaging
21 these considerations. It's been a great opportunity to work
22 together and bounce arguments and ideas off each other. I
23 think the best arguments, they come from meaningful
24 collaboration where everyone on the team, their voice is
25 heard. It's the dialogue and ongoing conversation.

1 For example, last night, my colleagues, Mr. Quiroz
2 and Ms. Labrinos and I, we posted up in one of our rooms after
3 the cocktail reception to go over new arguments and ideas that
4 we come up with throughout the day way into the night last
5 night. I'm constantly talking through our arguments and ideas
6 with my colleagues, working on these briefs, and I'll be
7 honest, actually so much so that Ms. Labrinos is one of the
8 first people to learn that I had gotten engaged this past
9 Friday, right after it. Literally, one of the first people I
10 spoke to.

11 THE COURT: Congratulations.

12 MS. OLSEN: Thank you. We have regular and open
13 lines of communication on our team, actually not just the
14 associate team. But so Ms. Labrinos had messaged me, wanting
15 to run an idea by me. I was like actually I just got engaged.
16 Can't talk about this right now. Of course, everyone is very
17 happy for me.

18 All this to say I'm learning a lot working on this
19 case and becoming a better lawyer and I do think a big part of
20 becoming a better lawyer is building these relationships with
21 my colleagues that's incredibly important and I really have
22 been doing that on this case.

23 THE COURT: Thank you.

24 MS. OLSEN: Thank you. Good afternoon, Your Honor.

25 MR. KASHURBA: Good afternoon, Your Honor. Alex

1 Kashurba. I'm an associate at Chemicles Schwartz, one of the
2 co-lead firms. I wanted to add perspective of a younger
3 lawyer working at one of the lead firms because a lot of us
4 are getting some really good experience too.

5 I have worked on this case since the beginning,
6 including drafting and filing the first complaint in the
7 Western District of Pennsylvania. I've had the opportunity to
8 work on many aspects of the case, but particularly with our
9 law and briefing committee. I took a lead role in
10 coordinating our motion to dismiss briefing as well as
11 drafting several of the briefs.

12 I've also worked a lot with Mr. Schwartz and
13 Ms. Duggan in developing our overall strategy with respect to
14 the motions, and I'm hoping to have the opportunity to argue
15 one or two of the issues. It's been a great experience
16 working on such a large MDL, and I and others wanted to thank
17 you for emphasizing giving opportunities to young lawyers.

18 And lastly, on a personal note, I very much enjoyed
19 the chance to travel back to Pittsburgh on a regular basis.
20 Thank you.

21 THE COURT: Okay. Is there anything else to come
22 before the Court today? Okay. Well, I think you are very
23 busy. I can tell that. The work has accelerated, I think, is
24 a fair way to describe it as the discovery is getting really
25 robustly underway. We have lots of motions to decide.

1 I'm so glad we have Special Master Vanaskie there to
2 assist me. I have some motions I need to resolve without his
3 input, so we'll both be working very hard on these matters,
4 and we have a lot more work ahead of us.

5 So I hope you all have a safe journey home. We are
6 now in better weather, as you are experiencing, and I'll see
7 some of you next week and then certainly again in May. Thank
8 you all.

9 (At 12:48 p.m., the proceedings were adjourned.)

10 C E R T I F I C A T E

11 I, BARBARA METZ LOCH, RMR, CRR, certify that the
12 foregoing is a correct transcript from the record of
13 proceedings in the above-entitled case.

14 \s\ Barbara Metz Loch
15 BARBARA METZ LOCH, RMR, CRR
16 Official Court Reporter

04/22/2023
Date of Certification

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