

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

3           IN RE: PHILIPS RECALLED CPAP,  
4           BI-LEVEL PAP, AND MECHANICAL           No. 21-mc-1230  
5           VENTILATOR PRODUCTS LIABILITY        MDL No. 30-14  
6           LITIGATION.

7           Transcript of Status Conference held on Thursday,  
8           May 25, 2023, in the United States District Court,  
9           700 Grant Street, Pittsburgh, PA 15219, before Honorable  
10          Joy Flowers Conti, Senior United States District Judge.

11          APPEARANCES:

12          For the Plaintiffs:                   Sandra L. Duggan, Esq.  
13   Kelly K. Iverson, Esq.  
14   Steven A. Schwartz, Esq.  
15   Christopher Seeger, Esq.  
16   D. Aaron Rihn, Esq.  
17   Peter St. Tienne Wolff, Esq.  
18   David R. Buchanan, Esq.  
19   Kathryn L. Harrison, Esq.  
20   Shauna Itri, Esq.  
21   Beena McDonald, Esq.  
22   Elizabeth Pollock-Avery, Esq.  
23   Charles E. Schaffer, Esq.  
24   Caleb Seeley, Esq.  
25   Ava Cavaco, Esq.  
   Maureen Barber, Esq.

                  For the Defendants:           Lisa C. Dykstra, Esq.  
   Wendy West Feinstine, Esq.  
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   Lauren Hughes McNally, Esq.  
   Yericca Morales, Esq.  
   Amanda B. Robinson, Esq.  
   Michael H. Steinberg, Esq.  
   Tracy Richelle High, Esq.  
   William B. Monahan, Esq.  
   Elizabeth N. Olsen, Esq.  
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                  Court Reporter:                Teresa M. Benson, RMR  
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                  Proceedings recorded by mechanical stenography;  
                  Transcript produced by computer-aided transcription.

1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: This is nice. We don't have to switch  
3 the seats. Philips counsel are already seated. All counsel  
4 are here, I believe, in the courtroom. We don't have anyone  
5 on Zoom. So we can proceed.

6 This is a status conference In Re Philips Recalled  
7 CPAP, Bi-Level PAP and Mechanical Ventilator Products  
8 Litigation, MDL No. 3014.

9 I have had a joint notice filed which listed those  
10 individuals who will be speaking. All of those others who are  
11 going to be participants, their names are noted for the  
12 record. If anyone else wishes to have their appearance  
13 entered of record, you need to come forward and sign the pad  
14 of paper with your name so we can include you.

15 I now have the proposed agenda. The first thing we  
16 have is a Discovery Update/Status of Proceedings with the  
17 Special Master.

18 MS. MCNALLY: Good morning, Your Honor. This is  
19 Laura McNally with Morgan-Lewis for Philips RS, along with my  
20 colleague, Yardena Zwang-Weissman.

21 With respect to discovery in the case, we are now up  
22 to 115 productions; by the end of this week, it will be 117.  
23 The Philips Defendants have produced over 1.3 million  
24 documents. That's over 4 million pages, and that includes  
25 over half a million mobile and text messages, and over 700,000

1 noncustodial documents. So we are very much deep into our  
2 document discovery.

3 We've also scheduled depositions to begin in June,  
4 and we've also been receiving discovery from Plaintiffs. It's  
5 been a bit slower than we would like. In total, we've gotten  
6 about a thousand documents from Plaintiffs, and my colleague  
7 will speak with respect to the Plaintiffs' actual process, if  
8 you would like to hear a little bit about that.

9 MS. ZWANG-WEISSMAN: Good morning, Your Honor.  
10 Yardena Zwang-Weissman for Philips RS, Your Honor. We have  
11 reviewed a number of Plaintiff fact sheets to date, and are  
12 going through the efficiency review process as contemplated in  
13 the pretrial Orders.

14 We are working very cooperatively, I believe, with  
15 Plaintiffs in that regard, and we intend to bring issues as  
16 they arise to Special Master Katz for her consideration and  
17 will continue to keep the Court apprised going forward.

18 THE COURT: Thank you.

19 MS. ZWANG-WEISSMAN: Thank you.

20 MS. ITRI: Good morning, Your Honor. Shauna Itri  
21 from Seeger Weiss on behalf of the Plaintiffs. I would agree  
22 with my colleague Laura that discovery is ongoing. We have  
23 received noncustodial documents. We are also expecting  
24 additional production of Complaint data from Sedgwick  
25 documents from the Sedgwick database.

1           In terms of the custodial files, we received about 30  
2 complete files so far. The latest production was last week,  
3 May 19th, included one of the CMOs from Royal Philips. We are  
4 including -- the end of June, we are getting 16 more custodial  
5 files, complete custodial files, which includes the former CEO  
6 of Royal Philips, the current CEO of Royal Philips, the former  
7 COO of Royal Philips and the former business leader of Royal  
8 Philips. We are getting eight custodial files in July and 17  
9 in August.

10           In the meantime, Your Honor, we have been working to  
11 schedule some depositions. We have had hits and hiccups. We  
12 have had issues with the late production of documents from a  
13 former, and some issues seeking schedules. We had one  
14 deposition in May that ended up getting bumped until June. We  
15 are hoping going forward we will be working out these hiccups  
16 with the guidance of Special Master Katz, and we will be  
17 building up the deposition schedule in the summer. I'll let  
18 my colleague speak about that.

19           MS. IVERSON: Good morning, Your Honor. Kelly  
20 Iverson for Plaintiffs. Liz Pollock-Avery from my office has  
21 been managing a lot of the defense's discovery, but she is out  
22 of the country, so I'm going to handle this on her behalf.

23           I understand another production on behalf of the  
24 class Plaintiffs went out just about a week or so ago of an  
25 additional 130 or 203 documents, and I think when Ms. McNally

1 is telling you there is a thousand documents from Plaintiffs,  
2 that's not actually counting all the documents that have come  
3 in for Plaintiffs. We have class Plaintiffs in the economic  
4 loss track; we have class Plaintiffs in the medical monitoring  
5 track; and also personal injury Plaintiffs.

6 My last check on the Plaintiffs, there has been over  
7 50,000, if not more, documents, and by this point, probably  
8 significantly more than that produced through the process of  
9 written discovery in the class tracks, as well as the  
10 Plaintiffs' fact sheets and documents corresponding with those  
11 that have been produced. So Plaintiffs are, in fact,  
12 producing documents, responding to written discovery and the  
13 Plaintiffs' fact sheets and continuing to do so, and I believe  
14 there has been, you know, continued back and forth with the  
15 personal injury Plaintiffs as far as any deficiencies in the  
16 Defendant's fact sheet, Plaintiffs' fact sheet and following  
17 the process that was set forth by the Court. That's all I  
18 have unless you have questions, Your Honor.

19 THE COURT: No, thank you. Does the Special Master  
20 want to --

21 SPECIAL MASTER KATZ: I agree with everything that  
22 you heard.

23 THE COURT: Thank you. Okay. The Rescheduling Date  
24 for the Evidentiary Hearing on the Rule 12(b)(2) Motion of  
25 Personal Jurisdiction.

1           MR. MONAHAN: Bill Monahan for the Dutch parent  
2 company, the other non-Respironics Philips Defendants. This  
3 is a scheduling issue, Judge. When Your Honor moved the  
4 evidentiary hearing from today to June 13th, June 13th is not  
5 going to be great for, I think, either side. We are all going  
6 to be, on June 12th, in Philadelphia meeting with another  
7 judge on this case, and I think all parties would like the day  
8 before the hearing to prepare on their side, their expert  
9 witness, and on our side, Ms. Roux, for the evidentiary  
10 hearing.

11           We all brought our calendars and, of course, want to  
12 work around Your Honor's calendar. We did certainly talk  
13 about some dates, and June 23rd was proposed as a date that  
14 works for all parties, as well as the two witnesses. That's a  
15 Friday, so I'm not sure if that's a good one for Your Honor,  
16 but I'm just mentioning that date.

17           THE COURT: So the 13th is not good because you're in  
18 Philadelphia on the 12th?

19           MR. MONAHAN: That's correct, Your Honor.

20           THE COURT: Is it expected to conclude on the 12th?

21           MR. MONAHAN: I think so, Your Honor. I'm told, Your  
22 Honor, that Mr. Dundon is not available on June 14th. And our  
23 witness --

24           THE COURT: Because we have the status conference on  
25 the 16th -- on the 15th.

1           MR. MONAHAN: That's correct, Your Honor, and the  
2 15th and 16th does not work for our witness. I think her son  
3 is graduating high school, I think.

4           THE COURT: Okay. Let me talk to -- my law clerk is  
5 not available that day. I have to check with my other clerk.

6                           (Discussion off the record)

7           THE COURT: My one law clerk that's been working with  
8 me on this particular motion is away that day, so that doesn't  
9 work for us. How about the 27th?

10          MR. MONAHAN: I already checked with our witness. I  
11 came with her schedule. That works not only for our witness,  
12 but our team, so that would be great.

13          THE COURT: Is that okay? So you can come in on the  
14 26th and get ready, and then we will start at 11:00 a.m. okay?

15          MR. SCHWARTZ: Yes, Your Honor. Steve Schwartz for  
16 the Plaintiffs. That date does work for us and our witness.  
17 We will discuss the issue about the Roux motion which will be  
18 held later, which may relate to this.

19          THE COURT: We're going to get to the Roux motion  
20 today.

21          MR. SCHWARTZ: Right. Otherwise, I agree with what  
22 my friend Mr. Monahan said.

23          THE COURT: Okay. Just one second. Can I see my law  
24 clerk?

25                           (Discussion off the record)

1 THE COURT: So we will do it that day then, on  
2 June 27th at 11:00 a.m.

3 MR. MONAHAN: Thank you, Your Honor.

4 THE COURT: Okay. The Oral Argument Before the  
5 Special Master Vanaskie.

6 MS. DUGGAN: Good morning, Your Honor. Sandra Duggan  
7 for the Plaintiff. Since we last appeared for the Court in  
8 April, the parties had conferenced with the Special Master and  
9 Your Honor has set hearing dates of July 10th and July 11th on  
10 the oral argument for --

11 THE COURT: That will be here in Pittsburgh.

12 MS. DUGGAN: That's correct.

13 MR. LAVELLE: John Lavelle from Morgan-Lewis. I  
14 confirm what Ms. Duggan said. I will add one additional  
15 point, which is the parties worked through and reached  
16 agreement on the proposed organization of the arguments since  
17 they had multiple motions which raise similar and overlapping  
18 issues, and so we have provided that to Special Master  
19 Vanaskie and confirmed with him on that, and I believe the  
20 parties agreed on organization as what will be followed.

21 THE COURT: That will be up to him since he is  
22 holding one of the hearings, and I'll be there to observe, and  
23 if I have a questions while it is going on, I'll be able to  
24 ask them as well.

25 Short Form Personal Injuries Complaints.



1 MS. ZWANG-WEISSMAN: Yardena Zwang-Weissman again for  
2 Philips RS. We have as of May 18th, 415 individual short form  
3 personal injury cases to date.

4 MS. REICHARD: There are a total of 456 cases filed  
5 and/or transferred into this jurisdiction, so we do believe  
6 there are a couple --

7 THE COURT: These are all personal injury?

8 MS. REICHARD: Yes.

9 THE COURT: Did you enter your appearance?

10 MS. REICHARD: No. This is Joyce Reichard on behalf  
11 of the Plaintiffs. Thank you.

12 THE COURT: So that brings us to the Census Registry.  
13 That's related to these number of issues that are out there.

14 MS. REICHARD: As of yesterday at 5:00 p.m., Your  
15 Honor, we have 45,572 census registry participants who are  
16 registered in the census.

17 THE COURT: Are we expecting more?

18 MS. REICHARD: We are expecting more. And I believe  
19 there are several pending, including approximately 5,000 that  
20 are pending the finalization of that process.

21 THE COURT: Okay.

22 MR. LAVELLE: Your Honor, John Lavelle from  
23 Morgan-Lewis for Philips RS. The only point I would make is,  
24 as was evident from the numbers we just provided to Your  
25 Honor, less than 1 percent of the potential claims here are

1 actually in suit before Your Honor. So we have a large volume  
2 of potential claims which may or may not be proceeding sitting  
3 on the census registry which we will have to deal with at some  
4 point.

5 THE COURT: Okay.

6 MR. BUCHANAN: Dave Buchanan from Seeger Weiss. As  
7 Your Honor may recall, the point of the census registry was to  
8 provide a place where people could actually develop those  
9 cases, check the records and then proceed in suit or not, but  
10 there is a tolling provision that's afforded by virtue of  
11 that, so long as Plaintiffs comply with the requirements.

12 THE COURT: That will probably get enough information  
13 on the census to see if they have enough information that  
14 would be able to be reviewed by the Defendants for purposes  
15 of --

16 MR. BUCHANAN: Certainly.

17 THE COURT: -- any settlement discussions.

18 MR. BUCHANAN: So I wouldn't expect that all valid  
19 claims would actually make it into suit. I think Your Honor's  
20 guidance was to try to prevent the situation where that would  
21 be necessary.

22 THE COURT: Right.

23 MR. BUCHANAN: Thank you.

24 THE COURT: Update on the State Court Litigation. I  
25 have my own update. I did reach out and speak to the judge,

1 and he was going to -- I guess they circulate what division  
2 they are in every six months, so the original judge is now  
3 back on, but he may be gone in another few months from  
4 oversight, but he was going to be having some separate  
5 discussions with the state lawyers who have that litigation.

6 MR. LAVELLE: Yes, Your Honor. John Lavelle. Judge  
7 Barry-Smith of Middlesex County, Massachusetts, I believe is  
8 the judge you're referring to. He is the judge that presided  
9 over the five consolidated cases in Massachusetts.

10 The lead case in that group is called St. John. We  
11 had a case management conference in front of Judge Barry-Smith  
12 on April 25th at which we discussed, among other things, the  
13 stay that was currently placed in the St. John case, as well  
14 as one other of these consolidated cases, the Le Blanc case.

15 Judge Barry-Smith indicated he was inclined to lift  
16 the stay and proceed in some fashion for discovery to be  
17 permitted that would be coordinated with the MDL.

18 We discussed specifically the idea that the document  
19 productions that have been stayed in the MDL would be made  
20 available to the Plaintiffs in Massachusetts, and to that end,  
21 we have provided the Plaintiffs in Massachusetts with the  
22 confidentiality stipulation and Order that's been entered by  
23 Your Honor here, a version of that that could be entered into  
24 Massachusetts, and they are considering that.

25 We also discussed before Judge Barry-Smith

1 depositions, and he left it to the parties to address how to  
2 coordinate on those. We provided to the Massachusetts  
3 Plaintiffs after that conference the discovery deposition  
4 protocol that Your Honor has approved and entered, and have  
5 conferred with them about the idea of adopting that discovery  
6 deposition protocol for the Massachusetts litigation, and they  
7 are considering that proposal right now.

8 We do not have yet an Order from Judge Barry-Smith.  
9 We are expecting one, but as of today, the stay is still in  
10 place on those two cases, and we are awaiting an Order.

11 The last point I would bring to Your Honor's  
12 attention is there were three additional cases that were filed  
13 in Massachusetts last Friday, May 19th. Those are unlike the  
14 five I mentioned earlier, because the Plaintiffs in those  
15 cases are not Massachusetts residents; they nevertheless are  
16 not removable because service was completed just prior to  
17 removal being attempted, so while they are technically in  
18 federal court, they will likely be moving back to state court,  
19 and we are going to be seeking to consolidate them, along with  
20 the five that are already before Judge Barry-Smith.

21 The last point I would make is Judge Barry-Smith did  
22 tell the parties during this case management conference that  
23 one way to address the fact that he is rotating back out of  
24 civil at some point in the near future is to request a special  
25 assignment to him. So that is another topic we have conferred

1 with Plaintiffs' counsel, and if we can reach agreement on  
2 that, that may be a way to have him continue to manage the  
3 litigation even as he rotates back and forth between criminal  
4 and civil.

5 THE COURT: Thank you.

6 MR. BUCHANAN: Plaintiffs here, don't have anything  
7 to add, Your Honor. We are proceeding with our discovery  
8 program interactions, and we have not been a part of those  
9 communications.

10 THE COURT: And Massachusetts is the only  
11 jurisdiction which there are state cases presently?

12 MR. LAVELLE: Yes, of any substance, Your Honor, that  
13 are proceeding, I believe.

14 THE COURT: I know they have remand cases that will  
15 be.

16 MR. LAVELLE: Right. There is a pool of cases that  
17 may be remanded, depending on what motions to remand in the  
18 future. I believe there are a couple cases that are currently  
19 pending that are in small claims courts here or there around  
20 the country, but nothing of any significance.

21 THE COURT: Okay. The Leadership Development  
22 Committee update.

23 MS. CAVACO: Good morning, Your Honor. Ava Marie  
24 Cavaco with Nigh, Goldenberg, Raso & Vaughn, co-chair of the  
25 Leadership Development Committee for Plaintiffs. This is my

1 second time appearing in front of you. It's been about a year  
2 since my appointment. It's been a very busy year.

3 In terms of my personal experience, I have been  
4 staffed on the discovery committee, so exclusively up to my  
5 eyeballs in discovery issues. I participate on the defense's  
6 discovery team with Liz Avery, and my personal experience is  
7 in mass tort injury cases, so on this case, I have been  
8 exposed to all class action movement, and so it's been very  
9 interesting to learn how economic loss actions are.

10 And I've had a lot of exposure, getting to  
11 participate in the meet and confers, and also because we have  
12 the monumental task of getting through the document  
13 production, and I also participate in document review when I  
14 am able.

15 I also wanted to report that the majority of my  
16 committee is doing doc review, but we are also involved in  
17 many other things. One of the committee members is involved  
18 in the device inspections; a couple of them have been very  
19 instrumental in the law and briefings for the motions that are  
20 in front of you today and in the next couple weeks.

21 And a couple of the other things that we have done is  
22 at the beginning of our appointments, lead counsel created a  
23 mentorship program for the committees. Each committee member  
24 has been paired with someone who is chairing a committee  
25 internally. My mentor is Virginia Buchanan of Levin,

1 Papantonia, and she has been extremely helpful in guiding my  
2 way through the process of learning how this will go from  
3 beginning to end. She invited me to her firm, and we have  
4 been able to catch up on this litigation and other things.

5 We also have monthly meetings which we meet just like  
6 the PFC does to update each other on what we are doing and  
7 learning different practice points from each other, and from  
8 that, lead counsel encouraged us to create a miniature  
9 practice series, so for the rest of the year, we will be  
10 exposed to different topics. Like we will be having a lecture  
11 with the time committee and the settlement committee, so as  
12 these things are coming up, we get to be exposed to different  
13 issues that we don't normally.

14 Do you have any questions for me, Your Honor?

15 THE COURT: No. I'm just glad I just remembered to  
16 keep notes of all this, so we can get a report. Hopefully  
17 some day when the MDL comes to a conclusion, we could have a  
18 report about what worked, what didn't work, and we can give  
19 that to the MDL panel and it can be disseminated.

20 MS. CAVACO: We have been keeping minutes of our --

21 THE COURT: I'm asking defense to do the same.

22 MS. CAVACO: Yes. When you would like a report  
23 drafted, we will be ready for Your Honor.

24 THE COURT: Thank you.

25 MS. CAVACO: Thank you.

1 MS. BARBER: Good morning, Your Honor. Maureen  
2 Barber of Morgan-Lewis for Philips RS. I'm working out of our  
3 Pittsburgh office, and I think I can speak on behalf of our  
4 Pittsburgh colleagues that it's been really fun to host all of  
5 these attorneys from across the country on a regular basis in  
6 our hometown.

7 I want to thank you for giving the associates in this  
8 case an opportunity to address the Court regularly. It's a  
9 great experience and opportunity for us. And I'd just like to  
10 give you a brief overview on the substantive work that I have  
11 been doing for the last several months on the MDL.

12 First, I, along with some associates on the east and  
13 west coast, have been working to manage and develop a strategy  
14 to handle our PFS, the Plaintiff fact sheets, and census  
15 register form work stream so we ensure that the submissions  
16 are responded to and reviewed timely.

17 We issue deficiency letters when appropriate. We  
18 field correspondence from Plaintiffs' counsel regarding their  
19 PFS and CRF submissions, and then naturally, we also meet with  
20 our defense action team to make sure we are getting the  
21 information we need from Plaintiffs in order to gather the  
22 data and information and material from our client to get that  
23 information timely over to the Plaintiffs pursuant to the  
24 pretrial Orders.

25 Additionally, Your Honor, I have participated in meet



1 and confers with Plaintiffs regarding the PFS and CRF work  
2 stream, just to work out kinks in that process, and to that  
3 end, I have a prepared motions to Your Honor to amend certain  
4 of those pretrial Orders just to make things move a little  
5 more smoothly for both sides.

6 And then finally, I have been involved in reviewing  
7 and identifying key documents that have come in from our  
8 client and that are going to be produced into the case, and I  
9 look forward to be involved in upcoming depositions in the  
10 matter. So I thank you so much for your time. It's been a  
11 pleasure working with incredible attorneys, and in particular  
12 the associates, who are very bright and hard-working,  
13 especially on the defense side that I have had the chance to  
14 work with. So thank you for your time.

15 THE COURT: Remember to keep notes of what you felt  
16 was helpful or not helpful. The process should get you the  
17 kind of experience that we hope will be helpful in the future  
18 and for other associates who are working on the Leadership  
19 Development Committee on behalf of the Defendant, because I  
20 know it's somewhat unique to the defense involved, and I think  
21 it would be helpful to have that report as well at the  
22 conclusion of this MDL.

23 I believe Judge Vanaskie has joined us on the call.

24 JUDGE VANASKIE: I have joined you. Thank you very  
25 much for accommodating me.

1           THE COURT: You're welcome. And we did have a report  
2 about the oral argument that's going to take place before you  
3 on July 10th and 11th, that there is an agenda that's being  
4 structured that you're overseeing to facilitate that hearing  
5 and be able to accommodate them in the two-day time frame, and  
6 those are to be in Pittsburgh. Any issues or questions that  
7 you might have, Judge Vanaskie?

8           JUDGE VANASKIE: No. I look forward to receiving the  
9 proposals from counsel, and being out there in Pittsburgh in  
10 July.

11          THE COURT: Okay. Is there anything else with  
12 respect to this status conference? Anyone else have anything  
13 they wish to bring up?

14          MR. SCHWARTZ: Not from Plaintiffs, Your Honor.

15          THE COURT: Okay.

16          MR. MONAHAN: Nothing else for the status conference.  
17 Bill Monahan. We did discuss, depending on Your Honor's  
18 schedule, moving right to the so-called emergency motion.

19          THE COURT: Yes. We are going to take a brief break  
20 and come back and finish that up. But what I want you to do  
21 during this break is I want you to meet with opposing counsel  
22 and -- who is working on this?

23          MR. SCHWARTZ: I am.

24          THE COURT: Okay. I need you to meet and confer. We  
25 have the hearing date moved to June 27th, and I need you to

1 meet and confer, because in order that a report be prepared by  
2 the expert, and there is going to be a deposition and then  
3 Ms. Roux is going to be deposed. All of that needs to be  
4 calendared, so I need you to meet and confer about timing for  
5 that. And perhaps the -- I assume -- I see those more of  
6 discovery issues, so maybe the Special Master can meet with  
7 you and see what you can accomplish before I come back out.

8 MR. SCHWARTZ: When would you like us to come back?

9 THE COURT: 12:15? Is that enough time?

10 MR. MONAHAN: I think so.

11 **(Brief recess taken.)**

12 THE COURT: Please be seated. I would ask that both  
13 counsel come forward who is going to be arguing. This is the  
14 hearing on Plaintiff's Expedited Emergency Motion for  
15 Expedited Prehearing Teleconference and to Exclude Witness  
16 Testimony of Deborah Roux at the May 25th Evidentiary Hearing.  
17 It's in the In Re Philips Recalled CPAP Bi-Level PAP and  
18 Mechanical Ventilator Products Litigation, MDL 30-14. Counsel  
19 for Plaintiff, please enter your appearance.

20 MR. SCHWARTZ: Steve Schwartz for the Plaintiffs from  
21 Chimicles Schwartz firm.

22 THE COURT: Counsel for Defendant, please enter your  
23 appearance.

24 MR. MONAHAN: Hello, Your Honor. Bill Monahan from  
25 Sullivan & Cromwell for Royal Philips or KP NV.

1           THE COURT: I'll give you my sense after having  
2 reviewed the motions. This is a hearing on personal  
3 jurisdiction issues. It is an evidentiary hearing that will  
4 be upcoming. And as I understand it, the Plaintiffs intend to  
5 use an expert, and the Defendant is asserting they have a fact  
6 rebuttal witness to the expert's anticipated testimony.

7           Now, Rule 26 does not explicitly apply in this  
8 context, because under Rule 26, it is limited to experts who  
9 will be expected to testify at trial. And there are a number  
10 of District Court decisions around the country who have  
11 analyzed this type of situation, In Re Regions Morgan Keegan  
12 Securities Derivative and ERISA Litigation. It is at Civil  
13 Action No. 08-2260 at 2012, Westlaw 12840260; the District  
14 Court for the Western District of Tennessee dated January 4,  
15 2012.

16           In that decision, the Courts deal with the  
17 requirement for disclosure of experts, and if you fail to do  
18 that, then under Rule 37(c)(1), that person could be precluded  
19 from testifying at trial. And the Court noted that the rule  
20 is limited by its express language to use at trial. But the  
21 footnotes notes that courts can explicitly Order that the  
22 Rule 26(a)(2)(b) requirements be applied to other experts who  
23 are not intended to testify at trial, but who may give expert  
24 opinions in connection with other pretrial matters such as  
25 class certification. It cites Hawkins Cotter versus Safeco

1 Insurance Company of Illinois, 2010, Westlaw 3984828 at \*3,  
2 Western District, Washington, October 11, 2010.

3 So I think, you know, it is really up to the Court to  
4 determine in this context in this case whether or not Rule 26  
5 should be complied with or some modification of the  
6 requirements of that rule, and then rebuttal experts  
7 technically do not have to be disclosed in advance of use at  
8 trial.

9 On the other hand, if the witness -- you get into  
10 arguments. Is it truly rebuttal, or is it going to be a fact  
11 witness who would be used for purposes of a defense, or how  
12 would that come about during the course of the trial and if it  
13 were at trial.

14 But I'm just going to cut through all of that. The  
15 purpose of the hearing is for me to have an appropriate record  
16 to make a decision about whether there was personal  
17 jurisdiction over the ultimate parent entity in this case. So  
18 those questions, I need to have a good record, and it is not  
19 going to be about hiding the ball or somebody has an expert  
20 but it is not fully disclosed, and the last minute the other  
21 side says, Well, what is the expert going to testify about?

22 I do understand there was at least a declaration that  
23 was presented here, but there was no opportunity, as I  
24 understand it, for deposition, and then we have the fact  
25 witness that's the rebuttal witness that may have information

1 that the other side doesn't know exactly what that witness is  
2 going to testify about, and here, you know, it really should  
3 be all about what is the truth. What are the real facts in  
4 this case? So if the expert is going to be helpful to analyze  
5 some of these things, you know, and most cases, unless it is a  
6 question of foreign law or something like that, I'm not sure  
7 quite how an expert is going to assist the Court, but be that  
8 as it may, you know, I tend to be a little bit lenient when  
9 it's just the Court, and I'm not infringing on the prerogative  
10 of a jury.

11 So that's why I asked you, let's just cut through all  
12 of this. Let's be practical so that each side can be  
13 comfortable that you're going to have a fair record on this  
14 issue. And to that end, what were the fruits of your  
15 discussion?

16 MR. SCHWARTZ: So Your Honor, Steve Schwartz on  
17 behalf of Plaintiffs. The discussions did not go well. They  
18 were as predicted, I guess, and Special Master Katz has not  
19 been fully involved in this issue at all. We had to try to  
20 bring her up to speed in a short period of time, but let me  
21 respond to the substance, because fundamentally, we agree with  
22 you. We don't want to play hide the ball; we don't want them  
23 to play hide the ball. We want to get to the truth. And  
24 typically what happens in these cases -- it happened in the  
25 Enterprise case that Your Honor did. It happened in the

1 Chinese drywall case before Judge Fallon. It happened in a  
2 slightly different context in the CRT case where Judge Tigar  
3 in the Northern District held -- basically supported our views  
4 of personal jurisdiction of KP NV and how it runs its  
5 business.

6 They usually happen after there has been a full set  
7 of discovery, but we did something different. Your Honor said  
8 we have 45 days to get on our bicycles and do jurisdictional  
9 discovery in a short period of time. And we did that, and we  
10 are okay proceeding on that record, but on that record, we  
11 sent document requests. We had a 30(b)(6) witness from KP NV,  
12 and the results of that was that the only financials at  
13 Philips RS was some thousand line spreadsheet, so that was the  
14 factual record. We were happy with that.

15 All we did is have our expert, Mr. Dundon, do a  
16 declaration which we filed in our opposition papers which  
17 said, "No complex business can be run by its executives  
18 independently based on a thousand page spreadsheet. You have  
19 the normal things that real executives have, an income  
20 statement, a balance sheet, cash accrual, reconciliations.  
21 Those are not thousand line spreadsheets, so that's like one,  
22 two, three-page reports. That's how you run a business.

23 So that was the factual record that he had, because  
24 experts don't make opinions and then find out the factual  
25 record. They have a factual record; the expert looks at it

1 and gives an opinion. After they filed their reply brief,  
2 they didn't identify any witness. They didn't tell us that  
3 they are going to have brand new documents coming out the  
4 door, and then after they filed their opposition, they said,  
5 We are going to have this new witness, Ms. Roux, who has never  
6 been identified before. We haven't had a single document from  
7 her produced. She is not a Philips RS person; she's a Philips  
8 NA person who does financial reports for Philips North America  
9 and oversees the preparation of Philips USA's financials, and  
10 they are going to have this person come in to talk about what  
11 kind of financials exist at Philips RS, which is bizarre,  
12 because she's not a Philips RS person.

13           Apparently there is no one at Philips RS who can  
14 testify about this stuff, and they want to change the record.  
15 And then when they identified her, they produced what they  
16 called a condensed spreadsheet, which, to our knowledge, did  
17 not exist in that form when discovery closed on personal  
18 jurisdiction. That's just something that the lawyers asked  
19 Ms. Roux to do a couple weeks ago, which she did.

20           So we have no idea what that was, and now in their  
21 papers, they said they were withdrawing those spreadsheets.  
22 We are not going to use them. Then on Friday we got a brand  
23 new spreadsheet that was reported to metadata -- no. Tuesday  
24 we got produced a brand new spreadsheet in a single document  
25 production that, according to metadata, was just created last



1 Friday by some guy or woman -- and I'm not sure from the name  
2 -- who apparently is Netherlands-based. We not sure what his  
3 or her role is in Philips.

4 So this is what our concern is. We don't know what  
5 the factual record is for experts, so they can testify based  
6 on the factual record. So what we proposed in the back room,  
7 because I was able to read the room and understand Your Honor  
8 wants to go forward with the hearing and have the truth come  
9 out. We proposed Ms. Roux as a fact witness. I'm not sure  
10 there is really anything such as a rebuttal fact witness. If  
11 the productions and the 30(b)(6) testimony that these are all  
12 the financials is not accurate and there is more stuff, and  
13 Ms. Roux is going to testify about more stuff, well, they  
14 should give us a written proffer so we know what she is going  
15 to say. We should take her depositions so we know what the  
16 contrast of her testimony is, because without the proffer, we  
17 are going to want to do full discovery on all kinds of  
18 financial stuff at Philips RS, Philips North America, Philips  
19 USA, but if they give us a written proffer, let us take her  
20 deposition, once we have that, if anything changes as to  
21 Mr. Dundon's opinions, because there will be a different  
22 factual record, we will update his declaration, update his  
23 report, and by the way, we've given them his opinions, the  
24 basis for his opinions, the list of all of the documents he  
25 considered, his compensation, prior testimony. We have given

1       them all that Rule 26 stuff.  If they want us to put it all in  
2       one place, we can do that, but that's the order we think it  
3       should happen.  Then Mr. Dundon can prepare an additional  
4       report or updated report based on the factual record.  If they  
5       want to depose him after we depose Ms. Roux, that's fine.  
6       Then we will go forward with the hearing.

7                 The only caveat is when we depose Ms. Roux, if it  
8       turns out she's going to talk about things that weren't  
9       produced, that weren't responsive, then we are going to have  
10      to track down and verify whether what she is saying is right  
11      or wrong.

12                So the dispute in the back room was they want  
13      Mr. Dundon to write a report based on the documents that were  
14      just produced and apparently just created, most of which were  
15      withdrawn, when he doesn't know what they are; try to guess  
16      what Ms. Roux might testify to; and then after she testifies,  
17      he'll only have to update opinions to the extent she has  
18      anything relevant to say.

19                We think that's out of order, so literally the whole  
20      dispute can be resolved if Your Honor gives guidance that we  
21      should get a proffer, depose Ms. Roux first, then our expert  
22      will provide in a nice, pretty, Rule 26 format the extent his  
23      opinions have changed, update his opinions.  They will get  
24      that; they can depose him; and then we go to the hearing.

25                MR. MONAHAN:  Hello, Your Honor.  Bill Monahan for

1 KP NV. I sort of want to step back for a moment. I just  
2 heard Mr. Schwartz explain this whole issue and what  
3 Mr. Dundon is going to talk about. All these things about,  
4 you know, documents and whatnot. I'm just wondering sort of  
5 off the get go what does any of this have to do with personal  
6 jurisdiction over KP NV.

7 THE COURT: This is a piercing of the veil kind of  
8 issue.

9 MR. MONAHAN: Exactly, Your Honor. And the standard  
10 there from Your Honor's decision in Enterprise, Plaintiffs  
11 must prove that the parent controls the day-to-day operations  
12 of the subsidiary. And what I'm hearing Mr. Dundon and  
13 Mr. Schwartz says Mr. Dundon is going to testify to is some  
14 dissatisfaction that Mr. Dundon has with how some of the U.S.  
15 entities keep their records or how they think they keep their  
16 records. They actually don't have it right factually, but I'm  
17 sort of at the get go here, Your Honor, and I think you  
18 alluded to this a little bit as to why you need expert  
19 testimony. What does any of this have to do with day-to-day  
20 control? It has nothing to do with it, but now I'll segue  
21 into, let's just imagine that person has relevant testimony.  
22 Ms. Roux is a rebuttal witness. She is a rebuttal to the  
23 expert we don't even know, because there is not a Rule 26  
24 expert report from Mr. Dundon, what he claims to be an expert  
25 in. We don't understand his methodology. I don't understand

1 at least what experience he has to opine on how all businesses  
2 should be keeping records. None of that is clear from his  
3 declaration. So I think certainly first, Step 1, we need a  
4 proper report from the person.

5 And by the way, there is a lot of complaints about,  
6 you know, so-called late production documents and whatnot.  
7 The truth of the matter is that none of that is responsive to  
8 the jurisdictional discovery request, but I have no problem  
9 whatsoever if, when he puts in his expert report, which I  
10 think should be Step 1, if he wants to reference those  
11 documents and talk about them, because what they actually  
12 show, Your Honor, is that he got it wrong. He should make  
13 those changes. He should not, to your point, be giving  
14 inaccurate statements. Your Honor wants to get the right  
15 facts, and that's all we are interested in as well. We like  
16 the facts here.

17 So Ms. Roux, if Mr. Dundon is still testifying and he  
18 gets up there and says something wrong, we need her to rebut  
19 that. She has been working at the company for 15 years. She  
20 is responsible for the consolidated financial reporting at the  
21 holding company level of the United States. So she gets fed  
22 to her the financial statements from all the subsidiaries,  
23 including Respirationics, including Philips North America, so she  
24 has all that information and she does that in her day-to-day  
25 life. So if Mr. Dundon gets something wrong, we need her in

1 rebuttal.

2 Now, what I've been hearing Plaintiff suggest in  
3 terms of a proposal, I might suggest is sort of exactly the  
4 opposite.

5 THE COURT: The Plaintiffs have the burden on this  
6 question.

7 MR. MONAHAN: That's correct, Your Honor.

8 THE COURT: So they go first. Why is it rebuttal and  
9 not a defense witness in your case-in-chief? There is a  
10 difference. I mean, the Plaintiffs go forward because they  
11 have the burden to show personal jurisdiction. So they will  
12 put in the case, and then the Defendants can put on their  
13 response, which would sort of be -- an analogy would be to a  
14 defense, and you generally you don't get -- rebuttal is when  
15 you have somebody who is not going to be testifying in that  
16 party's either claim or defense-in-chief, you know, so I'm not  
17 sure.

18 This is the problem when you get into these types of  
19 things. Is it really a rebuttal witness, or is it a fact  
20 witness that you would be relying on for your case-in-chief in  
21 terms of the defense?

22 MR. MONAHAN: Here is what I would say. We weren't  
23 planning on calling a witness until we learned -- I believe it  
24 was May 5th. On Tuesday, May 2nd, they told us they wanted to  
25 just submit this declaration of Mr. Dundon into the record,

1 and we said essentially we will consider it, but how are we  
2 going to cross it? What are we going to do with it if you  
3 just submit it? Then they tell us on Friday, May 5th, We are  
4 going to call in our case-in-chief, in their case-in-chief,  
5 Mr. Dundon. It is at that time we started to look for a  
6 witness. So whether you want to call it rebuttal or something  
7 in our case --

8 THE COURT: I'm not faulting either side here, okay.  
9 Because this is a murky area, because Rule 26 does not  
10 technically apply in this context. And the disclosures, you  
11 know, that's the problem with Rule 26. You know, it is all  
12 geared up to getting ready for trial, what you can do for  
13 trial. But we are going to have an evidentiary hearing, so I  
14 think we need to have some orderly process so that we don't  
15 have a lot of surprises, and then maybe we have to continue  
16 because something crops out and the other side says, No, I  
17 need to be able to respond. This is new to me.

18 So I want to cut through all of that, so I need to  
19 get to what will be most efficient and effective going forward  
20 to have this hearing. And is this enough time to accomplish  
21 this between these two, between the expert and the witness?  
22 Because if you're going to be -- if you have documents that  
23 you're not creating for the purpose of showing the Court; if  
24 these documents already exist --

25 MR. MONAHAN: They do, Your Honor.

1 THE COURT: -- they should just be turned over.

2 MR. MONAHAN: They have been, Your Honor.

3 THE COURT: Okay. And then they can depose her about  
4 those documents.

5 MR. MONAHAN: That's fine, Your Honor. My only  
6 suggestion, and I agree with everything you said. That's  
7 sequentially the way it should work, because Ms. Roux's  
8 purpose at this hearing is solely to respond to Mr. Dundon.  
9 That's her sole purpose.

10 THE COURT: I'm going to give you -- this is what I'm  
11 going to do. So she will go first, get the documents over.  
12 Depose her, get a report that complies with Rule 26 for this  
13 purpose, so that we know exactly what his opinions are going  
14 to be.

15 And then you will have an opportunity to depose him.  
16 He can file a supplemental report after the deposition if you  
17 need it. And then she will be able to respond to that, if you  
18 need something further from her that comes up that's new, but  
19 you will have to give notice and an opportunity for a brief  
20 supplemental deposition.

21 MR. MONAHAN: I think that makes sense. I think the  
22 main thing is that we just don't want to not have the  
23 opportunity to respond to his last word on this, because we  
24 don't know --

25 THE COURT: I understand. Both are the same way.

1 They need to know exactly what they will be looking at, what  
2 he's going to be looking at, so I want to clear this up. So  
3 what I'm going to ask you to do is meet with the Special  
4 Master and come up with a timeframe. And if the 27th doesn't  
5 work to accomplish this, then we will have to move that date,  
6 unfortunately. I'd rather have a complete opportunity for the  
7 parties at one hearing and not have to postpone it and  
8 postpone it. I think it is better to do it all together. So  
9 let's come up with a timeframe to see if we can make that date  
10 of the 27th work, if it can be helpful, so you will have  
11 whatever Ms. Roux has in terms of the documents that already  
12 exist, you know, that she would be reviewing. Then they can  
13 depose her on those.

14 The expert report will follow, whatever brief  
15 timeframe that would be. Everybody is going to be working on  
16 an accelerated basis, so the expert report will come in. He  
17 will be deposed, and if there is going to be any response to  
18 him after the deposition, if you want to do a supplemental  
19 expert report, that's fine. Or if there is going to be  
20 something else that you need from Ms. Roux to respond to  
21 something you didn't know before, then you will notify the  
22 other side. She can be re-deposed, and I think that that  
23 hopefully should be it, unless you need some brief follow-up  
24 again from the expert. I don't know if some new fact comes  
25 out.



1           MR. MONAHAN: On this document, I just want to be  
2 clear. So there is a suggestion these documents didn't exist  
3 from Mr. Schwartz, but what we're talking about here is a  
4 database. So you can print out the database looking like this  
5 into an Excel, or you can only show these rows.

6           THE COURT: They can ask her about all of that at the  
7 deposition. That's why I'm saying, I'm sure the data exists  
8 somewhere. It is not being made up. So if you're pulling it  
9 out for purposes of presenting it, this would be the data that  
10 you would be relying upon.

11           MR. MONAHAN: That sounds good. There was a  
12 suggestion by Mr. Schwartz of some sort of written proffer  
13 from our fact witness. I would just suggest, especially in  
14 light of the process Your Honor just outlined, where they get  
15 to depose Ms. Roux, that that is the opportunity --

16           THE COURT: That's the opportunity.

17           MR. MONAHAN: Very good. Thank you, Your Honor.

18           THE COURT: Just like any other fact witness at this  
19 stage.

20           MR. SCHWARTZ: She's a fact witness, and Your Honor,  
21 I think, has come up with the right sequencing, and we'll  
22 depose her, get what the facts are, and then we will put up a  
23 nice, pretty --

24           THE COURT: If something new comes out of the blue in  
25 the opinion, then the other side will have an opportunity to

1 call her if there's a problem, and if there's somebody else  
2 that needs to be called, you know, you need to meet and  
3 confer, and hopefully you can do all of this within the  
4 timeframe allotted.

5 MR. MONAHAN: We can do it, Your Honor.

6 THE COURT: If not, then we have to work with the  
7 Special Master and see what's the most efficient way to do  
8 this. Does that sound good to you, Ms. Katz?

9 SPECIAL MASTER KATZ: I have faith they will get it  
10 done.

11 MR. SCHWARTZ: We will do that.

12 THE COURT: This way, everybody will be orderly,  
13 everybody will know what the other side is going to say and  
14 can prepare their cases accordingly.

15 MR. MONAHAN: Sounds good, Your Honor. Thank you.

16 THE COURT: Then you can redo -- we will look at the  
17 agenda. You have to come up with a new agenda for me so I  
18 know exactly what you're proposing, so I'll need the agenda at  
19 least three days in advance of the hearing, okay.

20 MR. MONAHAN: That raises an interesting point. We  
21 are currently contemplating starting at 11:00 a.m. on the new  
22 date. I'm confident we can make that new date. Did Your  
23 Honor have in mind sort of an end time, because we are going  
24 to have now two witnesses.

25 THE COURT: You're going to have to tell me.

1 MR. MONAHAN: Okay.

2 THE COURT: So if you need more time, then you have  
3 to come to me and say, "Could you start earlier. Start at  
4 10:00." If you need five hours -- I would think that we would  
5 start at 11:00 and be done no later than 3:00.

6 MR. MONAHAN: Yeah.

7 THE COURT: But that's why I had to look for days  
8 where I would have a complete day. But if you say, Well, we  
9 are going to need a full six hours of which would be -- it  
10 depends on how you're presenting your evidence.

11 MR. MONAHAN: Understood.

12 THE COURT: If we have live witnesses, I've had them  
13 go on for days. It is an evidentiary hearing, but I'll hear  
14 the witnesses and just set it up like a regular trial date.  
15 But if it's going to be mostly presentation, and you mutually  
16 agree on what is admissible -- I need to know what is in the  
17 record, because I can't be having things that are attached to  
18 a motion. Everything has to be entered for purposes of the  
19 record.

20 And then if one side thinks I get it wrong, then you  
21 can go up on appeal and the appellate court knows exactly what  
22 is in the record.

23 MR. MONAHAN: I'm not sure if Your Honor saw it, but  
24 in terms of the positive news to report, we were able to  
25 effectively reach agreement on the vast majority of the

1 documents, and those are on a joint exhibit list. They will  
2 be admissible. And we submitted that, and I think there will  
3 have to be obviously some supplemental in light of this.

4 THE COURT: Are there any objected to?

5 MR. MONAHAN: There is a small universe, and we are  
6 going to try to get it down to zero.

7 THE COURT: Talk to the Special Master about those to  
8 see if you can get that refined. And if not, you have to let  
9 me know, because we will special calendar something to resolve  
10 those disputes so that -- I like each side to know exactly  
11 what they are going to be having to consider at the hearing  
12 itself. And so if something is not going to be in, that can  
13 change someone's preparation.

14 So we should try to do that hopefully prior to the  
15 27th, and at least a week in advance I would think. So if you  
16 can't agree, you're going to have to notify the Court. We  
17 will get the date scheduled, and then we can have that hearing  
18 on the objections to exhibits, and we don't have to take the  
19 trial date.

20 MR. MONAHAN: Sounds good, Your Honor.

21 THE COURT: I just need to know that you've agreed on  
22 the schedule, so if you can file a Notice of Agreement on the  
23 schedule, and then be meeting and conferring about the  
24 exhibits. If there is objections to the exhibits, speak with  
25 the Special Master, see if you can resolve those. If they

1 cannot be resolved with the Special Master, then you need to  
2 immediately notify the Court, and we will schedule a day to  
3 have those heard, okay?

4 MR. MONAHAN: Should be good, Your Honor. Thank you.

5 THE COURT: Anything else? The motion at this stage  
6 is denied. We did have an expedited pretrial hearing; that's  
7 granted. To the extent the Court did have a hearing on the  
8 motion and the motion is otherwise denied subject to the  
9 framework that the Court has Ordered on the record, and it is  
10 so Ordered. Thank you all.

11 -----

12 C E R T I F I C A T E

13 I, TERESA M. BENSON, RMR, certify that the  
14 foregoing is a correct transcript from the record of  
proceedings in the above-entitled case.

15 S\ Teresa M. Benson  
16 Teresa M. Benson, RMR  
17 Official Court Reporter

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