

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

IN RE: PHILIPS RECALLED CPAP, Master Docket:
BI-LEVEL PAP, AND MECHANICAL Misc. No. 21-1230
VENTILATOR PRODUCTS LITIGATION MDL No. 3014

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Transcript of proceedings on July 20, 2023
United States District Court, Pittsburgh, PA,
before Judge Joy Flowers Conti.

APPEARANCES:

For the Plaintiffs:	Sandra Duggan, Esq.
Co-Lead Counsel:	Kelly K. Iverson, Esq. Steven A. Schwartz, Esq. Christopher A. Seeger, Esq.
Co-Liaison Counsel:	D. Aaron Rihn, Esq. Peter St. Tienne Wolff, Esq.
Settlement Committee:	Lisa Ann Gorshe, Esq. Roberta Liebenberg, Esq. Arthur H. Stroyd, Jr., Esq.
Other Participants:	David Buchanan, Esq. Kathryn L. Harrison, Esq. Shauna Itri, Esq. Paige Noah, Esq. Elizabeth Pollock-Avery, Esq. Joyce Chambers Reichard, Esq. Charles E. Schaffer, Esq. Caleb Seeley, Esq. Keith Verrier, Esq.
Speaking on behalf of Philips RS North America LLC:	Lisa Dykstra, Esq. Wendy West Feinstein, Esq. Elizabeth M. Gary, Esq. John P. Lavelle, Jr., Esq. Amanda B. Robinson, Esq.
Speaking on behalf of Other Philips Defendants:	Michael H. Steinberg, Esq. William B. Monahan, Esq. Tracy Richelle High, Esq. Elizabeth N. Olsen, Esq. Bethany S. Labrinos, Esq. Eric Scott Thompson, Esq.
Court Reporter:	Marsia Balobeck, RMR, CRR

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P R O C E E D I N G S

(Held over Zoom videoconferencing)

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THE COURT: So we'll move on now to the In Re:
Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator
Products Litigation at Master Docket 21-1230.

So the first matter is an update on the proceedings
with the special master. I'll note for the record that the
parties have identified who the speakers will be and if anyone
else wishes to enter their appearance they can please notify
the court and we'll make sure that the court reporter receives
that information.

So at this stage, please state your name before you
speak. You need to be very careful to do that so the court
reporter can identify who is speaking.

So who is going to start with the update on the
proceedings with Special Master Katz?

MS. ITRI: Good morning, Your Honor. My name is
Shauna Itri from Seeger Weiss on behalf of the plaintiffs.

THE COURT: Okay. I'm trying to find you. Just a
moment. I see you now. Thank you. You move around, too. I
don't know if you know that. Some of the boxes change. So
okay, thank you.

MS. ITRI: Your Honor, plaintiffs received in the

1 mail last Tuesday a hard drive of documents, e-mails and Teams
2 chats for about eight custodians. And in addition, eight
3 other custodians, Royal Philips and other employees. These
4 are documents that hit on Dutch search terms so we will be
5 uploading those and reviewing those.

6 After that production, there's about 25 more
7 custodians to be produced through the end of August. We
8 plaintiffs are in the process of analyzing those documents and
9 conferring about potential additional sources, additional
10 custodians, searches of device and accounts. We're also
11 conferring about some non-custodial sources, some additional
12 complaint data.

13 As previously discussed at some of the other CMCs, we
14 are starting to build out the deposition schedule. We've
15 received dates from former employees for depositions. We have
16 about four depositions scheduled from late August through
17 October. We're looking to schedule others. We've hit some
18 hiccups in scheduling in terms of timeliness and getting dates
19 for some of the current Philips witnesses, but Special Master
20 Katz has been involved and we are working with her and
21 hopefully we're going to streamline this process going
22 forward. That's all I had for the plaintiffs.

23 THE COURT: Thank you. How about from the Philips
24 side?

25 MS. DYKSTRA: Thank you, Your Honor. This is Lisa

1 Dykstra from Morgan Lewis. Tell me when you find me.

2 THE COURT: I see you. Every time someone joins or
3 leaves, all the little boxes move. Okay, thank you.

4 MS. DYKSTRA: You always stay in the same place in
5 our boxes, so that's good.

6 Just quickly, I don't have much to add other than we
7 agree with Shauna, we're working to coordinate deposition
8 schedules get all the documents out the door. Big picture,
9 we've produced approximately 2 million documents to date; half
10 are custodial, half non-custodial. That includes custodial's
11 e-mail, hard copy, One Drive, mobile, everything we can get
12 that they believe has relevant information. And we're working
13 with the plaintiffs to make sure we produce everything
14 responsive in an appropriate manner.

15 We did have a request from plaintiffs this week, I
16 believe it was. They had some concerns identifying or
17 locating all of our testing data. So we're also working with
18 them. We've provided -- we're sending out today a spreadsheet
19 to help them identify all of the data we've produced to date.
20 There's about 500 rows of data from all of the different labs
21 that we've used, many post recall, including Intertek, UL,
22 WuXi and others. So we're helping them to identify all of
23 that data and getting that out the door to them today so they
24 have an ability to review our scientific data.

25 Other than that, I agree with Shauna, we are working

1 on getting depositions scheduled of both current and former
2 employees. And that's all I have to say.

3 THE COURT: Okay. There is the -- was there somebody
4 else who wanted to address that issue?

5 MS. POLLOCK-AVERY: My apologies, Your Honor. This
6 is Elizabeth Pollock-Avery. I was going to update the court
7 with plaintiff's document production, but I can also wait if
8 you prefer.

9 THE COURT: No, that's fine.

10 MS. POLLOCK-AVERY: Just to update the court on
11 document production so far. Plaintiffs have produced over
12 60,000 documents. That's includes both the personal injury
13 plaintiffs as well as the class plaintiffs. And that includes
14 335,000 pages of documents that -- and for the PI plaintiffs
15 there have been over 1,400 medical records produced and that
16 includes over 240,000 pages of medical records. And that is
17 for the PI plaintiffs.

18 THE COURT: Anything from the defendants on that
19 production? Okay. Well, the other thing I wanted to address
20 here is that the special master has issued a report and
21 recommendation. I did review that report on a preliminary
22 basis as well as an objection that was filed to it. And
23 unfortunately, along with the exhibit -- along with the
24 objection, there was voluminous pages of exhibits attached.
25 Now I haven't reviewed that. And a thousand-plus pages is

1 totally inappropriate unless there's some compelling reason
2 that each page is pertinent.

3 I mean if you have a discrete exhibit or a discrete
4 part of an exhibit that the court needs to look at, you need
5 to identify that. I'm not going to, you know, spend hours
6 going through these voluminous exhibits. And I need to know
7 that if you want me to look at something, it was something
8 that you submitted to the special master and the special
9 master reviewed that as prior to issuing the report and
10 recommendation.

11 So I didn't know if anybody is responsible for that
12 objection wants to be heard on that?

13 MS. IVERSON: Your Honor, Kelly Iverson for
14 plaintiffs. Thank you. We are delivering a courtesy copy
15 binder to your chambers per your local rules. Here, under the
16 appointment order on the special master for objections, you
17 know, we're directed in paragraph 25 to submit any record
18 necessary for the court to review, and if necessary any
19 documents submitted in connection with the underlying
20 proceedings.

21 This dispute is actually based upon various reports
22 and summaries that were prepared by a company Exponent, that
23 is a company -- I mean it's known for trying to help bail out
24 big businesses that are facing major public health crises. I
25 think in the '90s, they represented big tobacco to try to deny

1 lung cancer risks from secondhand smoke.

2 Well here, Philips produced Exponent's reports and
3 summaries to the FDA --

4 THE COURT: Excuse me, I'm not going to take those
5 kinds of statements as evidence. You know, if you have
6 evidence that this is a shady, inappropriate expert, you
7 better put up that evidence. I mean you can't just appear on
8 a Zoom and make these kinds of statements about an expert
9 unless you have something to really back it up. Because then,
10 you know, that is -- I'm just not going to permit that kind of
11 argument.

12 MS. IVERSON: That's fair, Your Honor.

13 THE COURT: It goes both ways. I mean it goes both
14 ways. I know there's some experts that plaintiffs always use.
15 And I would not permit a person who independent expert to be
16 vilified in terms of their validity unless there's real true
17 evidence to do that or if you have a cross-examination, you
18 depose them, and something has come out, that might be
19 appropriate. But just to make those kind of statements in a
20 public forum like this, I just have trouble with that.

21 MS. IVERSON: No, Your Honor. I understand. I
22 apologize for that. That comes from a book. It's cited. But
23 that is not the, you know, import of the briefing. The
24 dispute that was submitted is with respect to the scope of the
25 waiver. And that comes into play because of the reports that

1 were submitted.

2 So Your Honor, the reason there's voluminous exhibits
3 is because the question is what is in the same subject matter,
4 what ought in fairness to be considered together with those
5 reports? And those reports are voluminous. So they are
6 attached.

7 We have provided you with all of the briefing and
8 exhibits that were provided to the special master. There's
9 nothing outside of that that was provided with the reports.
10 Nearly everything is cited. But there are page references.
11 And I don't expect that you're going to have to review the
12 entire, reports, but we wanted to make sure that you have them
13 available because they're at the center of the dispute here
14 as, you know, what in fairness needs to be considered with
15 those reports with respect to a waiver of the work product
16 protection and/or attorney-client privilege.

17 So what you're going to see is the mass number of the
18 pages come from those reports. The other exhibits that are
19 cited are not quite as voluminous. We have highlighted in
20 certain instances where we've referenced certain passages in
21 exhibits. Those have been highlighted in the exhibits. So
22 whenever you receive those, those were highlighted for the
23 special master and they'll still be highlighted when you
24 receive them.

25 So hopefully that will be able to help you pinpoint

1 the production. In this instance, we felt like the entire
2 record was necessary to provide and most everything is cited
3 to. But we'll be cognizant in the future to the extent there
4 could be any limitation of a record that needs to be submitted
5 with an objection that we can do that.

6 THE COURT: Okay. Next is the update on personal
7 jurisdiction for the evidentiary hearing and related matters.
8 And this is where I wanted to bring up the question on the
9 exhibits. And I understand there's going to be some
10 objections to the exhibits.

11 MR. SCHWARTZ: Your Honor, good morning. It's Steve
12 Schwartz for the plaintiffs. Can you see me?

13 THE COURT: I see you there, yes.

14 MR. SCHWARTZ: Good morning, Your Honor. Let me
15 first bring you up to date where we are. Consistent with Your
16 Honor's instructions last time we spoke about this, we, on the
17 plaintiff's side, deposed Royal Philips witness Ms. Rue. We
18 provided Philips with an expert report for Dundon Advisors and
19 Philips deposed our two experts. They just completed the
20 second one yesterday. And we're working with Philips to
21 informally exchange exhibits.

22 The good news is that we've agreed that there will be
23 about 300-plus exhibits that can be submitted without
24 objection to Your Honor with the parties reserving arguments
25 regarding relevance and weight. So we have resolved most of

1 the objections about a majority of the documents. 300 is a
2 big number. So I know Your Honor has asked for binders and
3 we'll get Your Honor binders. But those are the documents
4 that both parties believe should be part of the record.

5 There are going to be objections to a smaller subset
6 of exhibits. And we're going to file those exhibits and our
7 respective objections on July 26th as Your Honor ordered. And
8 then each party will have responses to each other party's
9 objections on August --

10 THE COURT: Let me tell you what I would like you to
11 do with the -- how to handle the objections. I would like you
12 to put together a binder of the exhibits that are an issue,
13 just those. And you should have like one or two pages, I
14 didn't know how many exhibits there are, that will lead off
15 which will identify the exhibit number, what the nature of the
16 objection is, what the response of the other party to that
17 objection is. And then you can each have two pages to further
18 explain your objection and the response. So you're going to
19 be limited in the page numbers. But if I have a summary chart
20 at the beginning, and then you for each one you're each
21 limited to two pages for the objection and response, and you
22 put that in a binder for me and then you can bring it. It
23 doesn't have to be filed. I mean you should submit it on the
24 26th in the binder form. I don't need to have it on the
25 docket.

1 MR. SCHWARTZ: Understood, and that's --

2 THE COURT: In August. I'm sorry. Yes.

3 MR. SCHWARTZ: Understood. Steve Schwartz again,
4 Your Honor. Understood. That sounds like a very reasonable
5 procedure.

6 One thing we do propose is since there's so many
7 joint exhibits, we would propose just to number those exhibits
8 J-1 through J-whatever so we know they're joint. And then
9 separately for plaintiffs exhibits to which there will be
10 objections, maybe call them P-1 and defendants can use letters
11 as Your Honor suggested just so it's easier to keep track of
12 what exhibits are objected to and what exhibits are going to
13 be contested.

14 THE COURT: I think that would be fine.

15 From the defendant's point of view?

16 MR. STEINBERG: Your Honor, Michael Steinberg on
17 behalf of the defendants other than Philips RS. I think
18 that's perfectly fine. I think the procedure you've laid out
19 is clear. And we look forward to addressing these before Your
20 Honor.

21 Most of the -- just to be clear, most of those
22 exhibits that are coming in as joint exhibits were the
23 exhibits that accompanied the briefing on the motion. So it's
24 not that this going to be a 300 exhibit evidentiary hearing,
25 which sounds a lot like a two-week trial than anything else.

1 But this going to be much more limited in scope and we look
2 forward to presenting our evidence on the evidentiary hearing.

3 THE COURT: Okay. And the binder is going to be due
4 on August the 2nd. And so try to have all your objections and
5 the responses as part of that binder.

6 Now, have you agreed on an agenda for the hearing,
7 how it's going to be presented?

8 MR. SEELEY: Your Honor, this is a Caleb Seeley from
9 Seeger Weiss for the plaintiffs. Can you see me?

10 THE COURT: I see you there.

11 MR. SEELEY: Before we move off the exhibits, I just
12 wanted to clarify, does the court still want the binder of all
13 exhibits --

14 THE COURT: Yes.

15 MR. SEELEY: -- on the 26th?

16 THE COURT: Yes.

17 MR. SEELEY: Okay.

18 THE COURT: The ones that are unobjected to. But I
19 want a separate binder for those that are objected to.

20 MR. SEELEY: Understood. So on the 26th, we'll
21 provide a binder with all the exhibits.

22 THE COURT: Correct.

23 MR. SEELEY: And on August 2nd --

24 THE COURT: And if you're going to have some that --
25 are you reserving the relevancy to all of those exhibits or

1 just certain of them?

2 MR. SEELEY: That's a question for Philips counsel,
3 Your Honor.

4 MR. STEINBERG: Your Honor, Michael Steinberg again.
5 I think it's a smaller number of exhibits that we would be
6 making various relevancy and weight objections to. For the
7 most part, it should be a relatively limited subset of that.

8 THE COURT: Well, just put a chart in the front as to
9 those that you're reserving, those objections to. So at the
10 hearing if I need to look at those, I can understand which
11 ones you're reserving that right to.

12 MR. STEINBERG: Thank you, Your Honor.

13 One further question for the ease of the court, some
14 of these documents are going to be spreadsheets which are, you
15 know, might be voluminous and are sort of not the easiest to
16 handle physically. So we can certainly print them out and
17 provide them with Your Honor. Would Your Honor also want
18 electronic versions of these on a thumb drive or something
19 like that?

20 THE COURT: That would be helpful. Thank you.

21 MR. STEINBERG: Great.

22 THE COURT: So anything else on the evidentiary
23 hearing? We didn't finish talking about the agenda for the
24 hearing.

25 MR. SCHWARTZ: Yes, Your Honor. Steve Schwartz for

1 the plaintiffs again. We have a little more work to do on the
2 agenda. So perhaps we should set a date for us to submit a
3 proposed agenda to Your Honor.

4 THE COURT: Okay. Let me see.

5 MR. MONAHAN: Your Honor, I believe a prior minute
6 order or at the hearing, Your Honor said July 26th for the
7 proposed agenda. So I believe we have that date already if
8 that date still works for Your Honor.

9 THE COURT: Does it work for the parties?

10 MR. SEELEY: I thought it was August 2nd.

11 THE COURT: August 2nd was the exhibits.

12 MR. MONAHAN: I have July 26th, Caleb.

13 MR. STEINBERG: Which is fine with us.

14 THE COURT: Is that a good date for the parties to
15 meet and confer about the agenda?

16 MR. STEINBERG: Yes.

17 THE COURT: Okay. So I look forward to receiving the
18 agenda then. Talk about if you're doing to have live
19 witnesses, that type of thing, and identify those on the
20 agenda. Okay?

21 MR. STEINBERG: Thank you.

22 MR. SCHWARTZ: Thank you, Your Honor.

23 THE COURT: Okay. So anything else about the
24 personal jurisdiction hearing?

25 MR. SCHWARTZ: Not from plaintiffs, Your Honor.

1 MR. STEINBERG: Nor from defendants. Thank you.

2 THE COURT: The census registry update.

3 MR. LAVELLE: Good morning, Your Honor. John Lavelle
4 from Morgan Lewis for Philips RS. Am I popping up here? Can
5 you see me?

6 THE COURT: I'm looking for you. Wave your hand.
7 Okay, I see you now.

8 MR. LAVELLE: Good morning, Your Honor. Very brief
9 update. As of yesterday, July 19th, 2023, we had 50,342.
10 That's 5-0-3-4-2. Potential claimants registered in the
11 census registry.

12 THE COURT: Okay.

13 MS. REICHARD: Good morning, Your Honor. Joyce
14 Reichard on behalf of plaintiffs.

15 THE COURT: Yes, hi.

16 MS. REICHARD: Hi. I agree with counsel's assessment
17 of that number. And there has been an additional 1,552 since
18 our last status conference.

19 THE COURT: Do you anticipate more to come?

20 MS. REICHARD: Yes, Your Honor.

21 THE COURT: I still keep getting cases transferred in
22 so I assume there's more cases that may be in the pipeline.
23 Is that correct as well?

24 MS. REICHARD: From our understanding, yes, Your
25 Honor.

1 THE COURT: Okay. Thank you.

2 MS. REICHARD: Thank you.

3 THE COURT: Anything else on the census registry?

4 MR. LAVELLE: Not from Philips RS, Your Honor.

5 MS. REICHARD: Not from plaintiffs, Your Honor.

6 THE COURT: How is the fact sheets going?

7 MR. LAVELLE: Your Honor, that process is still
8 ongoing. And we are continuing to work through deficiencies
9 as they come up. We've had an initial discussion of those
10 deficiencies with Special Master Katz, but we haven't
11 presented any deficiencies as of yet to the special master.
12 We've been working through a process with plaintiffs that
13 seems to be fairly successful using the steps that are laid
14 out in the pretrial order in terms of identifying
15 deficiencies, providing notice and an opportunity to cure.

16 At some point, there may well be some issues that
17 we're going to need to present to the special master for
18 resolution. And we did find some general issues that we
19 needed to address that we did on a broader basis relating to
20 the scope of the releases that we were getting. But we have
21 received good cooperation from plaintiffs in response to that
22 feedback.

23 THE COURT: From the plaintiffs, any comment?

24 MS. REICHARD: Sorry, Your Honor. Joyce Reichard on
25 behalf of plaintiffs. That is correct, we have been working

1 with counsel and we are trying to make sure that all of the
2 deficiencies are properly and efficiently resolved.

3 THE COURT: Okay. Thank you.

4 MS. REICHARD: Thank you.

5 THE COURT: Okay. The leadership development
6 committee update. Who is going to be addressing that?

7 MS. HARRISON: Good morning, Your Honor. Kathryn
8 Harrison, representing the LDC this morning.

9 Just a quick update, Your Honor. As you may be
10 aware, several LDC members, including myself, were involved in
11 preparations for oral arguments in front of Judge Vanaskie
12 last week. And a few of us were able to attend in person and
13 to get that experience, which was really fantastic for those
14 of us involved.

15 We're continuing to work with our various committees,
16 continuing to communicate on a regular basis among one another
17 and with leadership, and also on a monthly basis with the
18 entire PSC. There was a comment from a PSC member about how
19 this LDC has stuck around for a long time and been very
20 active. And I think we can attribute that to, first of all,
21 the leadership in our LDC. Ava Cavaco, in particular, has
22 been just incredible, keeping us all informed of what's going
23 on and also the communication we're permitted to have with
24 leadership on a regular basis and to give them our feedback.
25 So it's going well for us on LDC.

1 THE COURT: Thank you. Anyone from the defendants?

2 MS. DYKSTRA: This is Lisa Dykstra. We have Beth
3 Olsen and Liz Gary. They may be on your second screen. Go
4 ahead, Beth.

5 MS. OLSEN: Good morning, Your Honor. Elizabeth
6 Olsen on behalf of KPNV and the other non-Respironics Philips
7 defendants. It's great to be speaking in front of you again.

8 In working on this case, I've been given really
9 significant responsibilities in areas ranging from big picture
10 strategy to preparing for and even taking depositions. For
11 example, after receiving a new expert report at the very end
12 of June from plaintiffs that was co-authored by two proposed
13 experts as opposed to just Mr. Dundon as we had expected, my
14 colleague, Mr. Steinberg, and I decided that we would split up
15 responsibility for taking their depositions.

16 So yesterday, I took the deposition of Mr. Dundon,
17 one of plaintiff's proposed experts and they've indicated may
18 be appearing at the upcoming evidentiary hearing on personal
19 jurisdiction. I had never previously taken the deposition of
20 an expert. So being given the chance to do so is really
21 exciting. And while Mr. Dundon's deposition itself didn't
22 last very long, the process of preparing for and actually
23 taking a deposition was invaluable. And I've been deeply
24 involved in KPNV's motion to dismiss briefing for a lack of
25 personal jurisdiction. And so of course I've spent a lot of

1 time delving into the ten enterprise factors. I'm really
2 familiar with both KPNV's and plaintiff's arguments that were
3 made in the extensive jurisdictional briefing we've had in
4 this case.

5 But because the joint report that Mr. Dundon
6 co-authored concerned issues that weren't included in any of
7 the arguments in the jurisdictional briefing, to prepare
8 effectively for his deposition, I had to really quickly
9 familiarize myself with things like accounting standards under
10 FRS and gap and the SEC's rules concerning consolidated
11 financial statements.

12 So it was a lot of work, but really great learning
13 experience. And I feel very fortunate to be able to work on
14 this case, particularly fortunate to have such a supportive
15 team, a ton of support from the partners with whom I work,
16 both at S&C and my co-counsel. Thank you, Your Honor.

17 THE COURT: Thank you. Was there someone else that
18 wanted to speak?

19 MS. GARY: Yes. Good morning, Your Honor. I'll wave
20 my hand as well until I'm up on your screen. Liz Gary on
21 behalf of Philips Respironics. I'm a former litigation
22 associate and relatively new to our firm's e-data practice.
23 And my focus is really on discovery in large litigations. So
24 this case does not disappoint. I've had really terrific
25 experiences liaising with our client regarding data

1 collection, leading a team of dozens of attorneys, reviewing
2 over 5 million documents and being the associate lead on
3 weekly cooperative discussions with plaintiffs regarding the
4 scope of Philips assertion of privilege. So it's just a
5 wonderful fit for my career and just offering a ton of
6 wonderful experiences.

7 THE COURT: Thank you. Okay. Is there anything
8 else? Okay. Well we're getting together again in just a
9 couple of weeks for the evidentiary hearing. So we'll see
10 those of you who will be attending that hearing. And then I
11 believe later in August, we have our next status conference.
12 Where is that date? The 17th. Yes. And then I start a very
13 lengthy criminal trial the following week.

14 So we'll have our status conference on the 17th. On
15 the 8th, we have our evidentiary hearing in the personal
16 jurisdiction matter.

17 Anything else to come before the court today?

18 MR. SCHWARTZ: Your Honor, Steve Schwartz. Nothing
19 for the plaintiffs.

20 THE COURT: Okay. Well, thank you all. And I look
21 forward to seeing you all at the in-person conference on the
22 17th. And to -- well, to have those who are appearing at the
23 evidentiary here on the 8th. Thank you.

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C E R T I F I C A T E

I, MARSIA L. BALOBECK, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case.

\s\ Marsia L. Balobeck
MARSIA L. BALOBECK
Official Court Reporter

07/22/2023
Date of Certification