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

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

5 Transcript of Status Conference held on Tuesday,
September 13, 2023, in the United States District Court,
6 700 Grant Street, Pittsburgh, PA 15219, before Honorable
Joy Flowers Conti, Senior United States District Judge.

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APPEARANCES:

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1 P-R-O-C-E-E-D-I-N-G-S
2 THE COURT: Okay. We will move to Philips.
3 Everybody settled now? This is the status conference In Re
4 Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator
5 Products Litigation, Master Docket No. 21-1230; MDL No. 3014.
6 The Court has received a notice of the persons who
7 are identified as the speakers and those will be automatically
8 entered as part of the record today. If there is anyone who
9 wants to enter their appearance, you may do so by coming
10 forward and signing the paper in front of the Court and their
11 names will be added to the record.
12 Now, we are at the agenda stage, and the first thing
13 that we will take up is the discovery update status
14 proceedings with the Special Master.
15 MS. MCNALLY: Laura McNally on behalf of Philips RS
16 to give you a brief update on the discovery. Defendants have
17 produced over 4 million documents in 149 productions. That
18 includes about 2.2 million documents from over 70 custodians,
19 traditional emails and Word documents that are on your
20 computer; 1.2 million Teams, which is kind of Philips' instant
21 messaging platform, and text messages from those custodians,
22 and about 1 million noncustodial documents from various
23 Philips systems.
24 We had agreed to what's called substantial completion
25 deadline by the end of August, meaning that's when the vast

1 majority of the documents would be produced by, and we have
2 met that deadline in our view based on the existing discovery
3 that said there are some continuing issues that we continue to
4 discuss and negotiate with Plaintiffs with the assistance of
5 Special Master Katz, so there is some small, minor productions
6 that will follow in the next few months as we work through
7 those, but I can say that we are substantially complete as of
8 that end of August deadline.
9 We have all worked very hard to achieve that very
10 ambitious quote, and we made it. So very happy to be able to
11 report that.
12 THE COURT: Thank you.
13 MS. ITRI: Shawna Itri with Seeger Weiss on behalf of
14 the Plaintiffs. We agree with Laura. We have gotten about
15 500,000 client files; about 500,000 SharePoint files, and we
16 continue to work through the custodial files, the e-mails, the
17 Teams that were produced in the last 60 to 90 days.
18 As we work through those documents, Plaintiffs are
19 identifying gaps, identifying potential custodians and working
20 with Special Master Katz and our colleagues at Philips to
21 identify potential deficiencies.
22 We do anticipate some additional supplemental
23 requests as we continue to work through this process. As
24 Laura, Ms. McNally, suggested, there is over 70 employees and
25 about 45 of those are former employees, so we have a lot of

1 discovery we are working through and coordinating with
2 third-party counsel and getting production of documents from
3 these former employees as well.
4 MS. IVERSON: Kelly Iverson on behalf of the
5 Plaintiffs, for Plaintiffs in the three tracks, economic loss,
6 medical monitoring and personal injury mass tort track.
7 There's also been over 72,000 documents produced. I think it
8 is like 700,000 pages with the track. We responded to written
9 discovery. I think additional written discovery has been
10 produced. It is in the works responding to, but we have been
11 working well with Philips in that regard and addressing any
12 issues with Special Master Katz. Thank you, Your Honor.
13 MS. MCNALLY: I have nothing to add to Ms. Iverson's
14 accounting of the Plaintiffs' production, so thank you.
15 THE COURT: Are the fact sheet issues worked out as
16 to any ongoing problems with that?
17 MS. FEINSTEIN: Wendy West Feinstein on behalf of
18 Philips RS. First, kind of backtracking, we agree with
19 Ms. Iverson's recitation of the medical monitoring tracks,
20 discovery, and Special Master Katz has been very helpful in
21 that regard, and we have some issues pending before her.
22 In terms of the PFS, the parties continue to work
23 cooperatively together. We very nearly completed the draft.
24 We have been exchanging drafts back and forth so that we can
25 submit agreed-upon motions to Your Honor to modify the PTO

1 related to the PFS resolution process and tweak a few things
2 to make that clear. We anticipate submitting that in the
3 coming days. We are very close to finalizing it.
4 THE COURT: What happens to those that have already
5 been filed? Do they resubmit or what happens?
6 MS. FEINSTEIN: We have been working with the
7 Plaintiffs' leadership as well as individual Plaintiffs'
8 counsel when we identify deficiencies. For the most part,
9 these deficiencies are resolved without the need for this
10 amendment to the PTO. So the amendment to the PTO will
11 address those for which remain kind of in dispute about the
12 resolution of the deficiency, whether or not this form --
13 THE COURT: So the form will help alleviate the
14 dispute?
15 MS. FEINSTEIN: Exactly.
16 THE COURT: So that dispute about those matters would
17 have to do a refiling.
18 MS. FEINSTEIN: Or amend their PTO. They won't have
19 to recreate the wheel. It is not our intention to backtrack
20 any of this. It is our intention to kind of move forward in
21 an efficient way to resolve any disputes and deficiencies.
22 MS. IVERSON: I agree with what Wendy said. The
23 changes to the fact sheet are solely meant to clarify so
24 everyone that's completed a fact sheet, if it doesn't have a
25 deficiency, they will not need to resubmit an additional fact

1 sheet. This is to address certain clarifications that were
2 needed in the deficiency process that we've established, so I
3 do expect that that's going to be forthcoming soon.
4 The deficiencies themselves, we have a committee
5 member that receives that, have been pulling up those with
6 counsel, and Plaintiffs counsel have generally been very
7 responsive. The number of deficiencies have overwhelmingly
8 been going down, and we think that clarifying some of the
9 requirements for the fact sheet is going to help resolve those
10 as well.
11 MS. FEINSTEIN: Thank you, Your Honor.
12 MR. MONAHAN: There is one discovery item, Your
13 Honor, that overlaps Agenda Items 1 and 2. It's related to
14 the evidentiary hearing as well. And so now may be a good
15 time for that, Your Honor.
16 Let me give you an update where we stand on the
17 evidentiary hearing. We had the oral argument hearing before
18 Your Honor on August 8th where the Court set the schedule
19 going forward. Plaintiffs, consistent with that schedule, put
20 in their brief and their witness list two weeks later, and
21 that was August 22nd, and again, consistent with that
22 schedule, we put in our brief and witness list two weeks
23 later. That's September 5th.
24 Now, since then, since we put in our witness list,
25 Plaintiffs are objecting to one witness we timely disclosed on

1 our witness list, a former employee who lives in California.
2 His name is Vita Rocha. He is a former KPNV executive
3 committee member. We want to take a quick deposition of him
4 in light of the new statements they made about him.
5 In their brief filed very, very recently, they
6 actually changed the theory about him, so we want to depose
7 him and actually get to the accurate facts which we think Your
8 Honor wants. We said we would limit our direct examination of
9 him to 20 minutes, a simple exam. We probably could have done
10 the deposition already --
11 THE COURT: This is your own witness?
12 MR. MONAHAN: This is a former employee, a former
13 KPNV executive committee member.
14 THE COURT: This is somebody you intended to call as
15 a witness?
16 MR. MONAHAN: That's correct, by deposition. We
17 wouldn't have him live. He lives in California, and he is a
18 former employee, but we would play or read to you or however
19 Your Honor wants to do that portions of the deposition, and
20 again, we said we would limit it to 20 minutes. Special
21 Master Katz has been involved, and we had many discussions
22 about this, and I actually think we could have gotten it done
23 already if we weren't fighting so much about it.
24 The deposition is not going to prejudice Plaintiffs,
25 is not going to result in a delay in the evidentiary hearing,

1 which is more than one month away, October 17th. Why we are
2 having this dispute, Your Honor, I alluded to this earlier.
3 They made a new statement about Mr. Rocha that they addressed
4 in their brief. They made some issues about him; now they are
5 changing them and changing them in a significant way. And
6 they want to -- essentially this is a bit of Groundhog Day,
7 Your Honor, sort of the Yogi Berra, deja vu all over again.
8 Remember when they were here; they put in their expert,
9 Mr. Dundon, and then made an emergency motion that we couldn't
10 call any sort of rebuttal to that. That's precisely what is
11 going on here. They make new assertions in their brief about
12 Mr. Rocha, and then we are arguing about whether or not we are
13 entitled to rebut that, and it's just not fair, Your Honor.
14 As Ms. Liu noted during her leadership development
15 presentation, Plaintiffs sought five jurisdictional
16 depositions. We didn't fight any of them. They ultimately
17 dropped two, took three, including the former CEO, but now we
18 apparently, according to Plaintiffs, can't take a 20-minute
19 deposition to address these newly-minted assertions.
20 The Court was clear at the August 8th hearing, this
21 is what Your Honor said. We should know exactly who the
22 witnesses are at the end of this 30-day response period. The
23 30-day response period was ended precisely the day we put in
24 our witness list disclosing Mr. Rocha as a person we wanted to
25 depose.

1 The parties also memorialized the Court's directions
2 in the August 16th status report as well. I'm reading from
3 that as well. September 5th is the day we did this. KPNV
4 renewed reply in support of its personal jurisdiction motions
5 -- responding to Plaintiffs' legal fact issues and identifying
6 witness list, and again, we met that deadline, Your Honor. We
7 are not talking about more live witnesses. There is only
8 going to be two live witnesses at the hearing: One of their
9 two experts; they are not going with the other. They are only
10 doing one. And then the rebuttal expert, Ms. Roux, that they
11 previously filed an emergency motion to exclude.
12 All we want here, Your Honor -- Your Honor talked at
13 the May 25th case management conference about getting an
14 accurate record and not hiding the ball, and we are not trying
15 to hide anything, Your Honor. We saw their brief. They made
16 this new argument, and now we should be able to respond to it.
17 Why are they trying to hide the ball, Your Honor?
18 Mr. Rocha was head of the North American market. It's a
19 geographic position. Head of North American market. He was
20 also on the KPNV executive committee. There's no dispute
21 about any of this. These are totally unremarkable facts that
22 aren't particularly relevant to jurisdiction. They said all
23 that in the original brief. Fine.
24 Now, here is what they say in their new brief about
25 Mr. Rocha. This is not in any prior papers they submitted.

1 "Mr. Rocha" -- I'm reading here -- "led the sales and
2 marketing of the recalled devices." So now their theory is
3 that Mr. Rocha is leading, is like the mastermind of sales and
4 marketing the recalled devices, and by the way, that's just
5 totally false, Your Honor, but what the main point of this
6 20-minute deposition is to understand if they are right, or if
7 we are right, so Your Honor has the right facts in front of
8 you.
9 This is a bit of the Wack-a-mole that we've seen
10 before where the positions are changing and we have to knock
11 them down, and that's what we are seeing here, because this is
12 the first time they are raising it in their new brief.
13 Mr. Rocha, his responsibilities for -- their
14 responsibilities for sales and marketing of the recalled
15 devices weren't with Mr. Rocha. They were with the lower
16 level sales and marketing people at Respironics and Philips
17 North America. That's what we think Mr. Rocha is going to
18 testify to. Why they've been saying it is because of the org
19 charts, recording lines and lines on org charts, and Mr. Rocha
20 is on the top of the org chart with a whole structure below
21 him.
22 Of course, just because someone is on the top of the
23 org chart with the structure below him doesn't mean that one
24 individual is making jurisdictionally-relevant decisions about
25 the recalled devices, which is what they are now claiming. In

1 fact, I think this is something Special Master Katz notes, but
2 she can speak for herself, I know for sure, but I think I
3 heard reported that she said that there is nothing in the
4 documents that says that Mr. Rocha was responsible for the
5 recalled devices, but that's their new theory, and they are
6 not backing away from it.
7 This is actually reminiscent of something else they
8 are doing with respect to Ms. Iverson. That's a person they
9 recently deposed, one of the three people they deposed -- they
10 dropped two -- but this theory got rebutted at her deposition,
11 and I think that might be why they don't want Rocha to be
12 deposed here. Ms. Iverson testified that sure, you know, she
13 is head of global quality and regulatory. She is the top of
14 global quality and regulatory, okay. That is what the org
15 chart says, and she thought she worked for KPNV. Now, she is
16 not -- it is not true, but she is like, Why does it matter who
17 I work for, because the people who are making the quality and
18 regulatory decisions are the people below me in the structure.
19 They are the people at Respironics who are making quality and
20 regulatory decisions about recalled devices, not the person at
21 the top over here. So it's a very similar org chart argument,
22 let me call it, that they were making for Ms. Iverson and now
23 Mr. Rocha.
24 Mr. Schwartz might talk a bit about a parade of
25 horribles here. Oh, my goodness. If we do this 20-minute

1 deposition, there will be others and others and, of course,
2 all of that is hypothetical, and I would suggest a little made
3 up, Your Honor. If Mr. Rocha testifies that he wasn't leading
4 the sales and marketing of the recalled devices, but people at
5 Respironics and Philips North American were, as we think he is
6 going to testify to, none of them is KPNV, so it's going to be
7 irrelevant to KPNV jurisdiction in any event.
8 The main goal, as I said back in May, is to have an
9 accurate, factual record, and this sort of hypothetical,
10 premature parade of horribles is not a basis to stop from
11 having an accurate record.
12 We've had multiple meet and confers with Special
13 Master Katz. We would do this remotely, 20 minutes.
14 Plaintiffs can, of course, cross. Probably, you know, we are
15 spending more time arguing about this than the deposition
16 would take. If we started it already, it would be done. What
17 are we going to ask him? This is going to be a simple,
18 targeted exam. Where did you work? Plaintiff says he works
19 in Pennsylvania. Is that correct? Is that not correct? What
20 was your job? What was your role, if any, with respect to the
21 recalled devices? Plaintiffs said you led the sales and
22 marketing of recalled devices. Is that right? Is that not
23 right? See what he has to say.
24 We are also more than happy to give a written proffer
25 if they wanted -- I know this was raised at a recent Special

1 Master Katz conference -- a written proffer of the subject
2 matter of our questions. We are not trying to hide anything
3 here. This is straightforward, super simple. This should not
4 be any reason to stop us from taking the short deposition,
5 especially when we met our disclosure deadline that the Court
6 previously Ordered for our witness list. And that's all I
7 have to say, Your Honor.
8 MR. SCHWARTZ: Good morning. Steve Schwartz on
9 behalf of Plaintiffs. This is a third time that we are ready
10 to go to the evidentiary hearing based on the record that we
11 have, and this is the third time my friends at KPNV don't want
12 to go to the hearing, because they don't think there's enough
13 discovery. They added Ms. Roux once. They came back last
14 month and said we have a relevancy argument. They said
15 Ms. Iverson never worked for KPNV. That's what they told
16 you, and it turns out we took her deposition; she said, "I
17 thought I worked for KPNV, and I reported directly to my boss,
18 who was the CEO of KPNV."
19 This is the correct chronology here. In March, we
20 filed our original brief. We made our statements about
21 Mr. Rocha. We had documents, evidence that supported those
22 statements. We never heard from them that they wanted to take
23 the deposition of Mr. Rocha.
24 Then we were here last month. Your Honor was very
25 upset with us. Your Honor tells us to get with Special Master

1 Katz immediately, right after the hearing, and figure out the
2 discovery. That's what we did. We got with Special Master
3 Katz immediately and with KPNV. We told them we want to
4 depose former CEO Van Halton; we want to depose Ms. Iverson.
5 We got us those depositions done, and they are done.
6 We talked about the documents we wanted. We gave
7 them our requests to clear out any ambiguities. They gave us
8 the documents. That's all done.
9 We then filed our brief in August, just like Your
10 Honor said. We provided our witness list, just like Your
11 Honor said. We provided the list of our documents and
12 evidence we are going to use for our hearing, just like Your
13 Honor said. We did not hear from them after we filed our
14 brief for two weeks. Then after two weeks of having our
15 brief, on the day that their brief was due, we had another
16 call with Special Master Katz, and we said discovery is done.
17 They said discovery is done. Never heard Mr. Rocha's name.
18 They filed the brief at midnight. They don't serve
19 it on us until the next day. And then in the brief, we get
20 the first indication, Oh, we want to take Mr. Rocha's
21 deposition.
22 THE COURT: Was he listed as a witness?
23 MR. SCHWARTZ: He was never disclosed to us before
24 they filed their brief. And so that was the --
25 THE COURT: When was their list of witnesses due?

1 MR. MONAHAN: We disclosed Mr. Rocha with our list of
2 witnesses on the deadline the Court set.
3 THE COURT: So the day the brief was filed?
4 MR. MONAHAN: Actually, September 5th.
5 THE COURT: Was that a name that had previously been
6 disclosed?
7 MR. MONAHAN: Yes, they knew all about him.
8 MR. SCHWARTZ: When you say "disclosed," we had put
9 stuff in our first brief about Mr. Rocha. We put stuff in our
10 second brief about Mr. Rocha. I can tell you there is no
11 difference what we put in, but rather than that, I'll read an
12 email from Special Master Katz, because KPNV gave her the two
13 briefs and said, "What they're saying about Mr. Rocha is
14 completely different."
15 Special Master Katz wrote to us after looking at the
16 two briefs, "I'm not sure I see the material difference."
17 The documents that rely on for what we say Mr. Rocha
18 did are the same exact documents, and in our March brief and
19 in our August brief. They had the August brief for two whole
20 weeks. They never mentioned Mr. Rocha's name once to us. We
21 only found out about Mr. Rocha's name from them when they
22 filed their brief.
23 We now have filed our prehearing statement, which
24 lists all our exhibits, and if we have to have another
25 deposition now, this late, of Mr. Rocha, then we are going to

1 -- obviously we are not going to sit like potted plants. We
2 are going to bring our own exhibits and cross him on those
3 exhibits.
4 MR. MONAHAN: Okay.
5 MR. SCHWARTZ: Let me finish, please. We are going
6 to bring our own exhibits, and we are going to expand our
7 exhibit list for the evidentiary hearing, and maybe there will
8 be new objections with that. And if he says something that
9 requires or implicates a need for another witness, we are
10 going to have this problem.
11 And that's what I'll call the deja vu all over again,
12 because Your Honor has been very clear, we need to finish the
13 games and get the record clean, and we need to proceed with
14 this hearing. And we just don't think it is fair, after we
15 filed both our brief and after our prehearing statement, that
16 it is going to be a new witness with new documents which may
17 implicate other witnesses, all because they sat for two whole
18 weeks after they had our brief not deciding to tell us, Oh, by
19 the way, we may want to have more witnesses.
20 So that's where we are. We are frustrated because we
21 are ready to go with the hearing, and every time we are ready
22 to go to the hearing, they come up with a new reason why
23 something new needs to be done or the hearing needs to be
24 delayed.
25 MR. MONAHAN: Can I respond, please? Your Honor, I

1 take a little bit of issue with Mr. Schwartz's statement about
2 finishing the games here. Mr. Schwartz led by saying this is
3 now the third time they are ready to go. Why are they ready
4 to go, Your Honor? Because this is the third time they
5 dropped a new theory, and then they are ready to go, because
6 they put in their new theory, and they want to say, We are
7 ready to go. You can't respond to --
8 THE COURT: What is the new theory? I haven't seen
9 any of these documents in terms of the briefing and Special
10 Master. Did you see a new theory?
11 SPECIAL MASTER KATZ: The legal theory is the same.
12 The wording in the second brief is more clear, and the
13 evidence cited is exactly the same. It is basically
14 organizational charts from which Plaintiffs are basing their
15 arguments, so to me, it comes down to does the Court prefer to
16 have to be asked to infer from org charts or to have a short
17 deposition so you don't have to infer and it is crystal clear?
18 That to me is the question.
19 THE COURT: In terms of the procedures we set up, I'm
20 trying to keep with our procedures. Could he be called as a
21 live witness?
22 MR. MONAHAN: I would have to reach out to him and
23 see if he in his schedule could make it. He's a former
24 employee. He is starting a new job, I believe in California,
25 so I think it might be a little challenging.

1 And I think the other problem with that, if we are
2 going to call him as a live witness, Plaintiffs would say they
3 want to depose him anyway in advance, so the deposition would
4 have to happen either way. On Your Honor's question --
5 THE COURT: A deposition for trial is the same thing
6 as calling the person at the trial, you know, so I don't think
7 they get to depose him before the hearing. They will
8 cross-examine him and do whatever they want to do at that
9 stage.
10 MR. MONAHAN: I'm glad you said that. They have
11 taken a bit of a different position, that anybody we are going
12 to call at the hearing, they get to depose in advance.
13 THE COURT: Is that true?
14 MR. SCHWARTZ: We have never been asked the question,
15 If we identify some new witness, do you want to depose him?
16 THE COURT: That's why I asked if this was a new
17 witness or something that everybody knew about. Is he a new
18 person? Do they have a list, getting ready for trial, and you
19 put on your trial witness?
20 SPECIAL MASTER KATZ: It is not a new name. It is
21 somebody that everyone was aware of, and arguments were made
22 in March based on the org charts and his role. Arguments were
23 made in the August brief that now bring in explicit recalled
24 devices, and so it was much more clear, whether it was
25 inferred or not. In the first brief, it could have been, but

1 it is much more clear now. So no, it is not a new name.
2 Technically it was by the two-week deadline. You
3 know, it would have been nice if it were earlier, but its by
4 the two-week deadline. And so I agree that we have spent a
5 lot more time fighting about this than I think the issue is
6 worth. I don't think it is a game-changer, but really, again,
7 does the Court want to infer from an org chart or want to have
8 the person -- hear it from the mouth of the person, what is
9 your role?
10 MR. MONAHAN: One other point. So their lead
11 argument now in this most recent brief is specific personal
12 jurisdiction. Previously their lead argument, as I think Your
13 Honor knows --
14 THE COURT: I did read the report.
15 MR. MONAHAN: Now it is specific person. Obviously
16 the specific -- the form contacts have to be related to the
17 claim, so related to the recalled devices. Back when alter
18 ego was their No. 1 star, they said of Mr. Rocha -- and this
19 is in their first brief -- he oversees the North American
20 market. Nothing about the recalled devices. Of course, at
21 least that's the geographic market he did. There is nothing
22 surprising or problematic about that.
23 Now, because they are moving to specifically
24 jurisdiction, they need a contact with the recalled devices.
25 They say he led the sales and marketing of the recalled

1 devices. And that's why it is not just a wording change; it
2 is a substantive change that goes along with their change from
3 alter ego to specific personal jurisdiction. That's why this
4 matters, and it is also just factually wrong, Your Honor.
5 And we don't need a lot of time. I'm happy to do the
6 Name That Tune. You do it in 15 minutes. I can do that. It
7 does not take long to have this quick deposition, just to
8 clarify this one clearly false statement.
9 MR. SCHWARTZ: Your Honor, once again, KPNV says we
10 have changed theories in our briefs. They made the same
11 argument to Special Master Katz. They gave Special Master
12 Katz our March brief and our August brief, and when Special
13 Master Katz wrote to us, I'll quote, "Both briefs clearly
14 argue specific jurisdiction. Reordering the arguments doesn't
15 seem material in this context." When they say our "main
16 argument," what they are saying is in what order do we present
17 the alter ego argument versus the specific jurisdiction
18 argument? Whether it is first or second in the brief makes no
19 difference.
20 THE COURT: But he is listed as a witness?
21 MR. SMITH: Well, he's in our brief, and probably
22 about 50 other people from KPNV.
23 THE COURT: I'm saying the Defendants have listed him
24 as a witness?
25 MR. SCHWARTZ: For the first time in the brief that

1 they filed --

2 MR. MONAHAN: On the deadline, Your Honor.

3 MR. SCHWARTZ: -- that they filed last week, without
4 giving us any notice and forcing us to file not just our own
5 brief, without notice that they wanted to bring him as a
6 witness, but also file a prehearing statement and all of our
7 exhibits, without ever knowing that he was going to be a
8 witness.

9 And so that's what we think the prejudice is, Your
10 Honor. There is no new theory here. And the same documents
11 were used in our March brief and in our August brief for
12 statements that we have made about Mr. Rocha.

13 And so when Your Honor does the evidentiary hearing,
14 I'm pretty sure Your Honor is not going to ask herself what
15 did we say in the brief about this person or that person?
16 What did they say in the brief? Your Honor is going to look
17 at the evidence, ask us for findings of fact/conclusions of
18 law and see if the evidence supports the statement. So the
19 evidence is the same. Nothing is changed.

20 And we could say, Well, if they want to bring in
21 Mr. Rocha, who was mentioned in a brief, we can say, We want
22 to bring in three or four other people mentioned in the brief,
23 and where does it end?

24 THE COURT: Well, it ends with the lists that were
25 filed.

1 MR. MONAHAN: Thank you, Your Honor.
2 THE COURT: That's what this is about. So my finding
3 is going to be the time for depositions is really essentially
4 over, you know, so if you want to call him as a witness, you
5 can bring him here. And we do have the electronic means of
6 him being able to be wherever he is located. We can specially
7 schedule his time, and you can call him as a witness in your
8 defense.
9 MR. MONAHAN: Thank you, Your Honor. That works for
10 us.
11 THE COURT: They will be able to cross-examine him.
12 If there is additional exhibits that were not included as part
13 of your pretrial statement, because you didn't know that he
14 was going to be listed as a witness, you can supplement that,
15 and I'll permit you some time to do it, so there is nothing
16 unfair about this coming forward. So he will have to be here
17 as a witness.
18 MR. MONAHAN: Thank you, Your Honor.
19 MR. SCHWARTZ: When do we have to identify any
20 exhibits we might use on cross-examination of this live
21 witness?
22 THE COURT: Well, it is not your evidence, you know,
23 so I think if you do it two days before would be sufficient,
24 two or three days. Two business days before.
25 MR. MONAHAN: No objection, Your Honor.

1 MR. SCHWARTZ: I have a question about Your Honor's
2 preference and practices. In many trials that we do, our
3 cross-examination exhibits are not shared with the other side.
4 They are provided to the Court. They are embargoed from the
5 other side, so we can do a cross-examination without
6 predesignation.
7 THE COURT: My understanding is that's done in
8 depositions, you know, where you don't have to disclose them
9 before the deposition. But at trial, you know, for the Court
10 to see, if you're going to introduce them as evidence, it is
11 one thing, but if it is just something to refresh the
12 recollection, that could be different. But I think you need
13 to disclose at least in order to have a smooth hearing so that
14 there is no surprises where we have to take extensive delays.
15 You're going to have to disclose them two business days in
16 advance.
17 MR. SCHWARTZ: Including impeachment exhibits?
18 THE COURT: Impeachment exhibits? If we don't know
19 what the testimony is, I would say you don't have to disclose
20 those, since you don't know whether they are going to be
21 impeached. But it may cause delays, because before you
22 impeach somebody, you have to show the other side the
23 document. But these are documents that have been produced to
24 you, I assume, from the Defendant itself.
25 MR. SCHWARTZ: Can't predict what we might impeach

1 him on, because we don't know what he is going to say. We
2 were told there was going to be a proffer what he is going to
3 be asked. Are we going to get a proffer what he is going to
4 say? There is an agreement that we would get that in writing
5 before Special Master Katz earlier this week, and the question
6 I have is whether we are going to go into this hearing and not
7 have an idea --
8 THE COURT: You should have a proffer seven days in
9 advance of when they do.
10 MR. MONAHAN: The proffer that was discussed was the
11 proffer of the subject matter of our questions. This is a
12 former employee that we can't control, so I think that should
13 be the nature of the proffer as opposed to the answers to the
14 questions.
15 THE COURT: You're not going to talk to him in
16 advance?
17 MR. MONAHAN: We were going to try to. We have been
18 reaching out to him.
19 THE COURT: So to the extent you have the responses
20 to the questions, you should put that as a part of the
21 proffer.
22 MR. MONAHAN: Okay, Your Honor.
23 THE COURT: But if he doesn't want to communicate
24 with you, I can't force a proffer other than the questions.
25 But if you do have a discussion with him and you asked him the

1 questions, which I would assume you would want to do so you
2 know what the person is going to say.
3 MR. MONAHAN: I don't want to be surprised, Your
4 Honor, but I'm hoping he agrees with me.
5 THE COURT: But if he doesn't want to communicate
6 with you, then you can --
7 MR. MONAHAN: Assuming we do the proffer, and I'm
8 totally on board about that, then they can give us their
9 impeachment evidence, because they'll have the proffer from us
10 in advance.
11 MR. SCHWARTZ: Your Honor, I don't know. Just
12 because they gave me a proffer doesn't mean that's what he is
13 going to say.
14 THE COURT: Well, I'll let you take this up with the
15 Special Master. It is hard to say. I mean, we are shooting
16 at windmills now, because I don't know what's going to be
17 there, what's not going to be there. But if there is
18 something that comes up that's going to implicate the
19 impeachment, then I think you need to meet and confer with the
20 Special Master.
21 MR. MONAHAN: Happy to, Your Honor. Thank you.
22 MR. SCHWARTZ: Thank you, Your Honor.
23 THE COURT: Okay. We going to have a separate
24 hearing on the objections to the RNR VCF 2108 and 2134. We
25 will do that separately.

1 The next item is the update on the census registry.
2 MR. LAVELLE: Good morning, Your Honor. John Lavelle
3 from Morgan Lewis for Philips RS. As of the end of day
4 yesterday, there are 53,731 potential claimants on the census
5 registry.
6 MS. REICHARD: Good morning, Your Honor. Joyce
7 Reichard for Plaintiffs. There is no disagreement in that
8 number, and there was an increase of 713 from last month.
9 THE COURT: Do you expect that to continue to rise?
10 MS. REICHARD: We do, Your Honor. Thank you.
11 THE COURT: Thank you. Okay. The last item that I
12 have would be the leadership development updates.
13 MR. TUCKER: Kevin Tucker on behalf of the
14 Plaintiffs. I'll try to get us back on track. Leadership
15 continues to make opportunities available to the LDC, whether
16 that be research, writing, participation in important
17 telephone calls and conferences and special emphasis on the
18 leadership development representative who's going to attend
19 the monthly hearing to give them even greater access in that
20 month for additional opportunities that they may not get
21 throughout the rest of the year. So I think the leadership
22 continues to do an excellent job balancing both the needs and
23 interests of the class members as well as creating
24 opportunities for the LDC, who are not a part of their firms
25 and therefore can be very difficult to incorporate seamlessly.

1 THE COURT: Have you been pleased with what you
2 learned so far?
3 MR. TUCKER: Certainly. I'm very interested in the
4 economics of MDLs, so it's been very interesting to watch the
5 settlement come across the Court's desk this week and all of
6 just the administrative work as well as obviously the
7 traditional litigation work that goes into crafting such a
8 document.
9 MS. HANNA: Martha Hanna from Morgan Lewis on behalf
10 of Philips RS. There will be two of us speaking. We have
11 just so much exciting news to share. I joined the Philips
12 case this summer after returning from parental leave. Given
13 how many work streams we have going, I was able to dive in and
14 get a lot of substantial experience.
15 Right now, I'm working closely with Laura McNally on
16 our interrogatory responses, so I've gotten to take the lead
17 in negotiating certain of those responses with Plaintiffs,
18 tracking down the root information with the client, reviewing
19 that information, drafting responses. It was actually a
20 really great way to kind of get introduced to key content and
21 key team members very quickly, given the broad range that the
22 interrogatories cover.
23 And also as the substantial completion discovery
24 deadline approached, I worked with Laura in responding to
25 questions from Plaintiffs, kind of been making sure the right

1 people are in the room, investigating and answering questions
2 in order to fulfill all of our obligations.
3 I've learned a lot of delegating work, managing
4 complex and really quick-moving projects. We have tried to
5 get responses out the door as quickly as we can. I just want
6 to thank you for the opportunity to be here. It's very
7 exciting. We appreciate it.
8 THE COURT: Thank you.
9 MR. WILT: Good morning, Your Honor. Jonathan Wilt
10 from Morgan Lewis on behalf of Philips RS. It is a privilege
11 to get to speak to you briefly today about some of the other
12 exciting and substantial work the leadership development
13 committee is engaged in.
14 Speaking personally, since I last presented for the
15 LDC back in March of this year, the most notable topical work
16 that I've gotten to perform is helping Ms. Dykstra and our
17 brilliant partners prepare our response brief to Plaintiffs'
18 objections and Special Master reporting recommendations slated
19 for oral argument later this morning.
20 Brief drafting and argument development is probably
21 my favorite sort of legal work, so I found getting to be
22 involved with that to be a very rewarding experience, so I'm
23 really looking forward to the organizational argument later
24 today. I think it's going to be very enjoyable and
25 educational for me.

1 Secondly, I have recently gotten deeply involved in
2 the deposition preparation and some of the other discovery
3 processes going on in the case that's allowed me to touch on
4 really all of the different parts of the factual story
5 particularly relating to our comprehensive post recall testing
6 program, so in sum, I couldn't have picked a better case,
7 better firm to shore up my legal career. For that I am very
8 grateful. I look forward to the opportunity to get courtroom
9 experience before Your Honor. Thank you.
10 THE COURT: Thank you. Thank you all. Is there
11 anything else for the status? Okay. So let's move into the
12 arguments. Do you want to take a break, or do you want to go
13 right directly into the arguments? We have had some inquiry
14 about what we should do.
15 MS. IVERSON: Could we have five minutes, Your Honor,
16 to use the restroom?
17 THE COURT: I just want to be clear on what's going
18 first. Are we going to do the SoClean two motions first and
19 then finish up with the Philips, or do you want to start with
20 Philips?
21 MS. IVERSON: I don't think we discussed either way.
22 We are fine starting, whatever you want to do.
23 THE COURT: With the Philips? We can start with
24 that. Then we will take a five-minute break, and then come
25 back and do the Philips, and go then into the SoClean.

1 One thing on the status, because it came up, do I
2 need to hear anything about this issue in terms of the breath
3 of the assignment that's contained in the hearing that we are
4 going to have on Monday?
5 MR. MONAHAN: I'm happy to cover that on Monday, and
6 Mr. Seeger and I are very familiar with it. I think that
7 Mr. Mason -- where is he? He didn't mention it earlier, but
8 Mr. Mason and Ms. French-Hodson and their concerns, we have
9 addressed their concerns. The claims that they are bringing
10 in the SoClean MDL, Ms. French-Hodson and Mr. Mason, those
11 claims are not the subject of the assignment. Maybe in the
12 future, I guess they could be, but those claims are not the
13 same.
14 THE COURT: Maybe confer to see if there is some
15 language that needs to be put in there so it is very clear.
16 MR. MONAHAN: Happy to, Your Honor.
17 **(Brief recess taken.)**
18 THE COURT: Please be seated. The first matter up
19 will be the objections to the Special Discovery Master's
20 Report and Recommendation in the post Order served by
21 Plaintiffs on Exponent, Inc. This is In Re Philips Recalled
22 CPAP, Bi-Level PAP and Mechanical Ventilation Products
23 Litigation, Master Docket No. 21-mc-1230 at MDL No. 3014.
24 Will counsel for the Plaintiffs please enter your
25 appearance.

1 MS. IVERSON: Kelly Iverson on behalf of Plaintiffs.
2 THE COURT: You're the person that will be discussing
3 it? And counsel for Defendants?
4 MS. DYKSTRA: Lisa Dykstra and John Wilt for Philips
5 RS.
6 THE COURT: Just some brief summary from the Court.
7 It is the Court's understanding from review of the submissions
8 that Defendant Philips, which is Respironics; is that correct?
9 MS. DYKSTRA: Yes, Philips Respironics.
10 THE COURT: I'll refer to that as Philips.
11 Litigation counsel Morgan Lewis retained Exponent, Inc. as a
12 non-testifying consulting expert to conduct the topological
13 risk assessment of a patient exposure to the foam. The
14 retention letters asserted work product and attorney/client
15 privilege.
16 Philips provided the final reports prepared by
17 Exponent to the FDA and Plaintiffs. The dispute is whether
18 Philips must also produce Exponent graph reports and
19 communications with counsel.
20 The Plaintiff argues that Exponent is not a
21 non-testifying expert or, in the alternative, that Philips
22 waived the attorney/client and work product protections on the
23 entire subject matter by making the final report public.
24 Philips responds that the waiver was specific to the
25 final report only. Federal Rule of Civil Procedure

1 26(b)(4)(D) governs non-testifying experts. That rule
2 provides experts employed only for trial preparation only.
3 Ordinarily a party may not, by interrogatories or deposition,
4 discover facts known or opinions held by an expert who has
5 been retained or especially employed by another party in
6 anticipation of litigation or to prepare for trial, and who is
7 not expected to be called as a witness at trial. But a party
8 may do so only as provided in Rule 35(b)(4)(2i) on showing
9 exceptional circumstances under which it is impractical for
10 the party to obtain facts or opinions on the same subject by
11 other means.
12 The Special Master concluded that Philips properly
13 invoked the rule's protection because Exponent was tendered as
14 a non-testifying expert by litigation counsel after the recall
15 when litigation was clear. Special Master recognized that
16 Exponent performed other work for Philips, but Philips
17 produced documents relating to those other roles. This
18 involves only Exponent's work as a non-testifying expert.
19 This Special Master concluded that the production of
20 the final reports was limited to the total subject matter
21 waiver specific to the documents Philips disclosed.
22 The Plaintiffs agree that the Federal Rule of
23 Evidence 502(a) governs. It provides disclosure made in a
24 federal proceeding or to a federal office or agency. Scope of
25 waiver. When the disclosure is made in a federal proceeding

1 or to a federal office or agency and waives the
2 attorney/client privilege or work product protection, the
3 waiver extends to an undisclosed communication or information
4 in a federal or state proceeding only if, one, the waiver is
5 intentional; two, the disclosed and undisclosed communications
6 or information concern the same subject matter and they ought
7 in fairness to be considered together.
8 The Advisory Committee notes to Rule 502(a) provide
9 in pertinent part that the subject matter waiver of either
10 privilege or work product is reserved for those unusual
11 situations in which fairness requires a further disclosure of
12 related protected information in order to prevent a selected
13 and misleading presentation of evidence to the disadvantage of
14 the adversary, and so subject matter waiver is limited to
15 situations in which a party intentionally puts protected
16 information into the litigation in a selective, misleading and
17 unfair manner.
18 Now, the Special Master concluded that because
19 Philips provides all of the information Plaintiffs would need
20 to assess, replicates and challenge Exponent's conclusions,
21 Philips need not make a selective and did not make a selective
22 and misleading disclosure that would trigger the subject
23 matter waiver.
24 Plaintiff agrees that Philips produced the entire
25 final reports with attachments, including the underlying

1 scientific data and facts relied upon in the reports and the
2 methodologies used. This Special Master characterized the
3 Plaintiff's request for the drafts and attorney communications
4 as speculation that Exponent did not act independently; in
5 other words, a fishing expedition.
6 The Special Master concluded that the Plaintiffs did
7 not show the essential circumstances needed to invade the Rule
8 26(b)(4)(D) protections because they have all the information
9 needed to retain their own expert to replicate Exponent's
10 work.
11 Special Master noted that pursuant to Rule
12 26(b)(4)(B), Plaintiffs would not be entitled to draft reports
13 even if Exponent became a testifying expert. In their
14 objection, the Plaintiffs argue again that there is a subject
15 matter waiver based on fairness and contend that Philips did
16 not prepare a proper privilege log.
17 The Court's assessment is that the Special Master has
18 the law right, and so the Court would need to be convinced
19 that there is a fairness issue that is present here when
20 Exponent is not going to be called as a testifying witness in
21 this case, but rather it provided information to Philips, was
22 then shared with the FDA, a governmental agency, and then was
23 also shared with the Plaintiffs and included all the other
24 matters.
25 We will take up the privilege log issue separately.

1 And so as to this first issue on the waiver, it clearly comes
2 down to, at least from my perception, a fairness argument. So
3 when it can be entirely replicated, and if Exponent has done a
4 terrible job that would be clear from any other expert who
5 would run the same, they would be able to absolutely poke
6 holes in what Exponent has done, so there doesn't seem to be a
7 need for an invasion of work product.
8 And it strikes me that the Special Master was correct
9 on the law and how it applied in this circumstance, so that's
10 my preliminary assessment on that issue.
11 So with that, having been said, I'll hear first from
12 the Plaintiffs' counsel.
13 MS. IVERSON: Thank you. May it please the Court,
14 Kelly Iverson on behalf of Plaintiffs.
15 THE COURT: Uh-huh.
16 MS. IVERSON: Your Honor, I appreciate the
17 recitation. We are here challenging the recommendation of the
18 grant of a broad Protective Order without the privilege log.
19 Special Master --
20 THE COURT: We will talk about that separately.
21 MS. IVERSON: The Special Master determined that
22 Exponent was a consulting expert. Plaintiffs are not
23 challenging that determination by the Special Master that
24 Exponent served as a consulting expert.
25 What we are challenging is that portion of the

1 reports and recommendation addressing Federal Rule of Evidence
2 502. To be clear, this was not limited to the draft reports
3 and communications with counsel. We are seeking the scope of
4 waiver that is appropriate and in fairness should be disclosed
5 with the matters that were disclosed, and I'll get to that.
6 And I don't want to conflate the standards, because obviously
7 Rule 26 is separate and distinct from Rule 502. So we have
8 accepted that they consult experts. We have accepted that
9 there is work product, but here there is no doubt that's
10 waived work product. They made a choice to intentionally
11 waive the work product and provide the summaries and the
12 reports to the FDA.
13 So the question that remains are what is in the
14 subject matter and how much must in fairness be disclosed?
15 Your Honor, Bear Republic is a case that's a good example
16 where the Defendant provided video footage, photographs and a
17 restaurant menu from his investigator. In response to a
18 subpoena, the Defendant asserted work product protections, and
19 the Court agreed that it was covered, that the Defendant had
20 hired the investigator in anticipation of litigation, was
21 working at their direction. But the Court proceeded through
22 the 502(a) analysis and did a pretty thorough analysis of it;
23 ruled the Defendant's counsel knew it was waiving work product
24 and that fairness requires disclosure of documents related to
25 the circumstances involved in obtaining those three items, and

1 that included any written, oral communications between the
2 investigator and defense counsel with respect just to those
3 three subject matters.
4 That same rule makes sense here. The Special Master
5 attempted to distinguish various cases by saying that they
6 were distinct because they were about partial disclosure, but
7 really 502(a) is always about partial disclosure. There
8 weren't undisclosed documents about the same subject matter.
9 We wouldn't be here arguing. Both Philips and Special Master
10 lean in to that advisory comment, but the advisory committee
11 note is not the law; the rule is. The comments can't add
12 elements to the rule.
13 What we looked to here, the Third Circuit has already
14 established the factors to be considered under the ought in
15 fairness standard, which is the same in Federal Rule of
16 Evidence 106 as 502(a). And it said that fairness requires
17 subject matter waiver where the undisclosed evidence is
18 necessary to explain the disclosed documents, to place the
19 disclosed documents in context, to avoid misleading the jury,
20 or to ensure fair and impartial understanding of the disclosed
21 documents.
22 Now, I know you asked about fairness, Your Honor, and
23 here, the Defendants have already used the Exponent reports in
24 an attempt to mold the public's view and in an attempt to mold
25 the FDA's view and this own Court's view of the litigation.

1 You may recall, Your Honor, that Philips came to this Court
2 over Plaintiffs' objections at the January 2023 status
3 conferences and presented its one-sided story about Exponent's
4 December summary and the reports' conclusions.
5 Even in their opposition, Your Honor, they emphasized
6 Exponent's conclusion, the ones they want this Court to hear,
7 claiming the foam is unlikely to result in an appreciable harm
8 to the health of patients. They will shout this to everyone
9 who will listen, despite the FDA itself raising concerns with
10 Exponent's summaries and reports about its 518(b) notice.
11 Now, as you said, Philips consistently to the FDA and
12 the public has touted Exponent as acting independently from
13 Philips, and while the Special Master allowed them to parse
14 those words, saying that "tout" is technically accurate,
15 because Exponent is a separately --
16 THE COURT: They are not controlled by them.
17 MS. IVERSON: They are not controlled by them, but
18 Philips actually went further than that. They asserted that
19 Exponent, because they are a consulting expert, is more
20 independent than a testifying expert. In Exhibit 2, Page 2,
21 Philips claims, "Independence reflects the quality of the
22 analysis necessary to inform Defendants' counsel of the true
23 risk of the litigation as opposed to a written piece of
24 advocacy that a testifying expert would prepare."
25 The testifying expert, we have the chance to

1 cross-examine them on their role as a hired gun, Your Honor.
2 Here the summaries and reports weren't formed by a testifying
3 expert.
4 Special Master accepted that Exponent was wearing
5 their consulting hat at that time.
6 THE COURT: The problem I have with this kind of
7 argument is it is sort of morphing the consulting into the
8 testifying. I mean, I'm not going to be persuaded as to the
9 truth of the matter because an attorney refers to some report
10 that's not going to be part of the evidence. That's not going
11 to affect me.
12 And I said that as much because there was one of your
13 co-counsel who jumped up and objected when the report was
14 referred to. I mean, I know that it's out in the public; it's
15 gone to the FDA. That's up to the FDA how they want to handle
16 that, you know, but that's not evidence. I'm not taking it as
17 the truth for what they are saying. I told that to the
18 counsel who objected.
19 You know, that's something if they can say that both
20 sides have submitted positions to the Court in various things
21 about, This is a very dangerous device. It has caused a lot
22 of harm to a lot of people, but now, that's something that is
23 being argued, and it will be part of what is going to have to
24 be proven as the case goes forward.
25 But just because a lawyer has told the Court that

1 this device is causing thousands of people to die of cancer,
2 that doesn't mean that I've accepted that as the truth of the
3 statement. I can't do that at this stage. I can only hear
4 that these are what the issues are going to be. That's the
5 way I've taken it. So in this Court, that's not evidence, and
6 it is not going to go to the jury. Because if they are not
7 testifying, that report doesn't go to the jury. It may be
8 useful as a consulting expert for the Plaintiff then for the
9 defense to then develop its strategies, how it is going to
10 approach things and who is ultimately going to get to testify
11 about certain matters, but the fact that Exponent has run some
12 tests, here is the results of the test, here is their opinion,
13 that doesn't go to the jury, unless they are testifying
14 experts.
15 And the jury is instructed by this Court that they
16 are to consider only the evidence that's in this court, and if
17 they received evidence about this outside of court, that's
18 fodder for having someone removed for cause from the jury or
19 being stricken as one of the peremptory strikes.
20 So at this stage, you know, it is not evidence. It
21 is not evidence. So to argue that somehow this Court is going
22 to be biased because I've heard about things -- I've heard
23 things on both sides, and I haven't reached a judgment. I'm
24 not making a final decision here. I take it that the lawyers
25 are fervent in their arguments. The Plaintiffs are fervent in

1 that they truly believe this is a device that when it was
2 being used was dangerous because of these particles and the
3 gases that were being produced within the machine, and that's
4 going to be what we are going to be arguing about when we come
5 to Daubert hearings, when we have summary judgment motions, if
6 there is going to be summary judgment motions, and ultimately
7 for trial.
8 But we are here today. We are just talking about a
9 disclosure that was made to an agency by the Defendant. The
10 entity is a consulting expert, not for purposes of testimony.
11 So what are you able to get in terms of that kind of
12 disclosure?
13 And we sort of really are constrained by 502 where we
14 have a disclosure to a federal agency. That's not in
15 question. So was the waiver intentional? Yes. Does the
16 disclosed and undisclosed communications concern the same
17 subject matter? Yes. And so the final thing, which is the
18 issue here, is they ought in fairness to be considered
19 together.
20 So my question is, what is the fairness issue here?
21 You know, whether or not Exponent is independent in the sense
22 that they have never been used by defense counsel in any other
23 proceeding, I mean, they are independent in the sense that
24 they are not governed by the entity; they hold themselves out
25 as separate; they hold themselves out as experts. If they are

1 lousy experts because they are so hopeful of getting future
2 business for Defendants and they do a lousy job and their test
3 results are slanted, you can disprove that easily by saying
4 they did a bad job. But that would only really come into play
5 if they were going to be testifying here in court.
6 But if it is an issue of what is out in the public
7 and we are misleading the public, I'm not certain that's my
8 job as a Judge to get involved with that. There may be
9 another lawsuit that spawns out of that, but at this stage, I
10 don't see that as what I'm doing here. I'm having to focus on
11 what's going on, what's happening in the discovery, what's
12 proper for the subject of discovery, when did you invite work
13 product privilege. That's what we are talking about here.
14 Those are my concerns.
15 MS. IVERSON: I agree with you, Your Honor.
16 THE COURT: I think we have to get away from some of
17 the arguments about, "I'm going to be prejudiced," or "I'm
18 prejudicing the jury." At this stage, I can't see that,
19 because those are things that will be dealt with appropriately
20 as the case proceeds.
21 MS. IVERSON: I understand. I agree with certain
22 things you've said here, but I think we are getting down the
23 road here to on remand what might happen at trial and what
24 might be admissible or could come in.
25 The admissibility of the report itself or of

1 testimony with regard to the report, that's going to be
2 something you deal with at trial. Here we are looking at Rule
3 502 of Evidence, because they actually waived work product
4 protections with respect to the report, and then we need to
5 look at what makes sense, you know, making a decision now with
6 respect to what might happen down the road.
7 THE COURT: I can't find the waiver unless I conclude
8 that it would be unfair not to have those other materials that
9 you want to discover be disclosed to you.
10 MS. IVERSON: That's where the prejudice in those
11 things come in. These reports by Exponent and summaries are
12 intertwined with so many other things within this litigation.
13 I'll give you an example. Exhibit 1.7 is a report by Denver
14 Faulk, and Mr. Faulk is an employee of Philips. And on
15 November 29, 2021, two weeks before the issuance of Exponent's
16 first reports, Mr. Faulk authored a report addressing
17 potential compounds of concern from VOC emissions in the fall.
18 This is an internal report of Philips. Mr. Faulk's report
19 expressly and heavily relies on Exponent's reports and
20 Exponent's discounting of PSN's testing, and based on that,
21 concludes that the polyester polyurethane foam does not
22 contain any compounds of concerns from VOC emissions. Again,
23 another conclusion that the FDA is concerned with.
24 That same Mr. Faulk went back and later appended
25 Exponent's reports to his internal Philips report. So these

1 reports are throughout not just the disclosure to the FDA,
2 they are relied upon and used by Philips. So we are going to
3 be deposing Mr. Faulk, and we are not going to have all the
4 underlying background with respect to the Exponent reports.
5 We don't actually know what the undisclosed documents are,
6 Your Honor. And that gets in a bit to the privilege log.
7 THE COURT: What we are looking for is drafts and
8 communications with counsel.
9 MS. IVERSON: No. We are looking for the
10 subpoena-sought internal documents, and that's why I said it
11 is not limited to that. And I think under 502, that's the
12 question is what is the scope of the subject matter and what
13 in fairness ought to be disclosed. And we think those things
14 should be disclosed. The Rule 26 protections for draft
15 reports and communications apply to testifying experts. We
16 are under a consulting expert, and we are dealing under 502
17 now. So conflating those rules, the question here is what
18 makes sense.
19 THE COURT: I don't think I have conflated, but I
20 think I'm asking -- I think when you look at 502, the
21 applicable portions, there is only one aspect that is at
22 issue, and it's the fairness.
23 MS. IVERSON: Right. They have Mr. Faulk relying on
24 the Exponent report. They have produced it to us, and with
25 the indication they are trying to use it at litigation.

1 Regardless of what happens down the road on an evidentiary
2 objection at trial, it has been presented here. Work product
3 has been waived with respect to it, and we are hamstrung in
4 our ability to analyze the report, to combat their assertion.
5 THE COURT: Is it not true that you have all the
6 tests and the communications with the labs that they were
7 using for the purposes of their report? At this stage, I
8 think you're only asking for the drafts and the attorney
9 communications with Exponent.
10 MS. IVERSON: Internal documents with respect to
11 Exponent. Even simply -- I mean, we don't have invoices.
12 THE COURT: You told me they were submitted to you
13 from the gentleman whose name you mentioned.
14 MS. IVERSON: No. Internal Exponent documents, not
15 Philips.
16 THE COURT: Internal Exponent documents.
17 MS. IVERSON: I apologize. This was a subpoena to
18 Exponent. We don't have invoices; we don't have anything with
19 respect to the compensation they were paid for these reports.
20 We don't have --
21 THE COURT: Which would be relevant if they were
22 testifying, but I'm not sure it is relevant to a consulting
23 expert.
24 MS. IVERSON: They've waived worked product with
25 respect to this, so this is now fact evidence that is here.

1 We might want to take Exponent's deposition and inquire with
2 respect to these reports, particularly when their own internal
3 Philips employees were relying on those reports. So we don't
4 have -- we are allegedly hamstrung on being able to explore
5 the bias.
6 THE COURT: Are you entitled to depose the consulting
7 expert?
8 MS. IVERSON: They become a fact witness with respect
9 to at least what's been disclosed. The summaries and reports,
10 there is a waiver of work product protection with respect to
11 those. So wouldn't we get to inquire into those?
12 THE COURT: I'll ask the other side. I'm going to be
13 asking the other side. Who is going to be addressing the
14 issue? Are they going to be able to depose Exponent?
15 MS. DYKSTRA: I haven't considered that. They never
16 requested that at this point in time.
17 THE COURT: Are they a fact witness, or are they part
18 of the -- they have given an opinion, but are they a fact
19 witness?
20 MS. DYKSTRA: At this time, no. They are not a fact
21 witness. They are a non-testifying consulting expert, and the
22 fact witnesses likely would be the laboratories. So there
23 were five different laboratories that generated hundreds of
24 tests. That 's all the underlying data that which Exponent
25 then essentially consolidated that data into this one.

1 THE COURT: Would they be able to --
2 MS. DYKSTRA: All of that has been produced. The
3 documents underlying the reports have been produced. The
4 communications with the laboratories have been produced. The
5 laboratories' documents themselves have been produced. The
6 documents that Ms. Iverson mentioned like Denver Faulk's
7 communication with employees, documents with Exponent related
8 to the reports have been produced.
9 All of that is fair game, and if they want to depose
10 the laboratory that did the actual testing, those independent
11 laboratories, we have not claimed any protection, work product
12 over those, that data or those communications. So that's fair
13 game, I think, for fact witness depositions, yes.
14 MS. IVERSON: We are hearing a lot more information
15 that they are claiming has been produced. I haven't had a
16 chance to fully --
17 THE COURT: I think there is a rolling production
18 response that said you may not have received everything from
19 the labs from their communications.
20 MS. IVERSON: Yeah. They are saying communications
21 between the employees and Exponent with regard to the reports
22 and summaries have been produced, which is something I believe
23 they were objecting to production before, so I am not clear on
24 that. I think we can get to that with the privilege argument,
25 that we really don't know the scope of what hasn't been

1 produced and what the undisclosed documents are. But Your
2 Honor, you know, they're here telling you, "Trust us. They
3 have everything," but in doing so, they are also seemingly
4 conceding that 3553(a), certain subject matter waiver, that
5 they want to self-define what that is.
6 And so it seems to be a moving target as far as what
7 they are producing initially.
8 THE COURT: Well, the waiver relates to anything that
9 they have actually produced to you, you know, but it doesn't
10 relate to anything that would be otherwise. Work product they
11 produced to you. They waived that. But there may be certain
12 other documents that they haven't produced to you, so the
13 waiver wouldn't extend to those, unless they ought in fairness
14 be considered together. The waiver was intentional, yes. The
15 waiver -- some of these other matters may relate to that, but
16 the question is whether they ought in fairness to be
17 considered together.
18 And that's something I haven't seen yet, you know,
19 that there is a fairness here. And then this maybe gets to
20 the privilege log issue, and the Court, in its pretrial Order,
21 provided that typically communications with work product for
22 this kind of thing would not have to be produced. The only
23 confusion here is that Exponent is not only a consulting
24 expert, but it has also been brought in to give some advice on
25 business issues and that work product would have to be

1 disclosed as part of the privilege log with respect to those
2 business-related issues.
3 Now, my suggestion here is going to be that it would
4 be incumbent on Philips to identify what areas of business
5 they are consulting on versus what areas of consulting
6 expertise they are consulting on, so that everybody clearly
7 knows. And I think the Defendant has to know this, too,
8 because you have to create a privilege log on the
9 business-related side.
10 So have you done that, and if you haven't, then you
11 have to make that disclosure as to what business aspects
12 Exponent is being consulted on.
13 MS. DYKSTRA: Thank you, Your Honor. Yes. So it is
14 very clear and the lines are very clearly drawn, the waiver,
15 the subject matter waiver, the reports produced pursuant to
16 the Order by FDA under 518(a) that required us to produce
17 final reports, that was the impetus for the production of the
18 reports that Exponent provided to counsel. They were final
19 results relating to the foam. We produced them to the FDA.
20 The subject matter waiver is limited, and the case
21 law is specific on this, including Baxter International, to
22 the reports and what is there. They are self-contained
23 reports, meaning as a term of art, all of the data in the
24 reports, and there is like 15 or 20 tables that outline the
25 data, all of the studies in the reports, all the assumptions

1 made in the reports, any reliance on limitations or
2 information, worse case scenario assumptions, that's entirely
3 included in the reports, and that was the intention when
4 Exponent consolidated all the data. That is what is being --
5 beyond that, the communications with counsel and Exponent's
6 role around the reports is protected.
7 On the other side, which was asking about the
8 business side, there are some regulatory information that they
9 have been helping with. They have been helping with HHE,
10 health hazard evaluations. I think that they had helped with
11 some of our regulatory guidance for the FDA. That has all
12 been produced, so it is a very clear line.
13 And I'll just note for the Court that we have
14 produced 7,000 documents relating to the post recall, related
15 to Exponent or the labs or communications with the labs and
16 involving Exponent.
17 THE COURT: So I want to be clear for the record.
18 You're representing to the Court that the only thing that's
19 been withheld are the communications between client -- excuse
20 me -- counsel and Exponent and the draft reports.
21 MS. DYKSTRA: And the only other I would add is if
22 Exponent talked about things that I've asked them to do, that
23 would be also another category; that's correct.
24 THE COURT: Okay.
25 MS. DYKSTRA: So --

1 THE COURT: Things that you asked to do with respect
2 to the reports?
3 MS. DYKSTRA: Or just general consulting questions.
4 THE COURT: That would be part of the
5 attorney/client.
6 MS. DYKSTRA: Correct. But the Denver Faulk
7 situation that Ms. Iverson mentioned, he is an employee of the
8 company. His communications with Exponent are produced. I
9 think we've put -- of the 7,000, I think there is 400. And
10 those are on a log. They have 77 custodians and a SharePoint
11 site with, I think, thousands of documents related to post
12 recall testing.
13 So if they requested a document that was with
14 Mr. Faulk and Exponent, and Mr. Faulk talking about the
15 reports, we produced it in the ordinary course through
16 Mr. Faulk's production, and we logged it in the ordinary
17 course. So all of that, if there is anything withheld from
18 that section, it is logged appropriately and goes to the
19 privilege log issue we want to discuss later, but that was a
20 clarification. And if we were to go in and require Exponent
21 to look at the communications between counsel and Exponent and
22 then put those on a log, that would basically eviscerate the
23 pretrial Order and the whole entire purpose of non-testifying
24 experts. Does that answer the question that you had?
25 THE COURT: Yes. I am going to direct that you make

1 clear -- make a disclosure as to what else Exponent is working
2 on that is on the business side.
3 MS. DYKSTRA: On the business side. Yes. No
4 problem, Your Honor.
5 MS. IVERSON: So, Your Honor, with respect to this,
6 Ms. Dykstra just told you Exponent as a business consultant is
7 working on HHE, the health hazard evaluations. I want to be
8 clear that the HHE that they are referring to actually
9 incorporates and references Exponent's reports that we are
10 talking about today. The HEEs are actually intended to
11 determine the risk to the public from the foam.
12 Like we talked about, they have not really provided
13 any true parameters what that business consultant role was to
14 the Special Master prior to her Report and Recommendation. I
15 think we are hearing more today.
16 In their brief, they say it is to provide technical
17 assistance related to Philips' general business needs and
18 regulatory compliance, and they cite things like the HHE,
19 including communications in and around March 2022.
20 THE COURT: You will be able to depose Exponent about
21 those matters. That's why I directed Philips to provide you
22 with the business areas. It has to be specific so that
23 anybody can understand exactly what Exponent is doing and so
24 that will be fair game for you to come in and ask for those
25 and to seek documents related to that business side.

1 MS. IVERSON: But that's exactly that same business
2 consultation that he was talking about, the HHE references
3 relied upon and used in the Exponent reports, but they have
4 waived work product with respect to. These are all
5 intermingled. Mr. Faulk relies on those reports; the HHE
6 relies on those reports.
7 THE COURT: So the problem here is -- what I'm
8 getting to is we are talking about the attorney work product
9 and attorney privilege. And that can be invaded when in
10 fairness you can't get to the attorney. You can't get to the
11 attorneys on the business side, unless it is purely business.
12 So if there is something that came up and they were asking for
13 legal advice on a certain matter, you're not going to get
14 those on that side either, even if Exponent was working on
15 that business side. So if Exponent was working for the
16 company and not for the law firm and they were providing
17 business advice, they are fair game. But if you're going to
18 get -- you want to get to the attorneys and you want to get to
19 what the attorneys were asking in terms of information the
20 attorneys needed to provide, their legal advice, that's the
21 work product, and that's what you can't invade under Rule 502
22 unless you can show fairness that has to be considered
23 together.
24 On the record before the Court today, I think that I
25 can't find that kind of unfairness when you have all the

1 supporting information that went into the report, you can
2 access the labs, you can look at communications between
3 Exponent and the labs, so all of that has been waived because
4 they turned it over to you.
5 But they are not willing to turn over the attorney
6 communications with Exponent, Exponent's draft reports which
7 were being prepared for counsel, and so at this stage, I can't
8 find that there is a basis for waiver.
9 Now, if something comes up in the litigation and we
10 learn something different, then, you know, you can renew this,
11 but at this stage, I think it will have to suffice, with the
12 direction to Philips to provide you with exactly what business
13 work or business counsel Exponent is providing, and then you
14 can explore that with Exponent. But the report has been
15 disclosed; yes, that was waived. We all know that. The
16 question is, can you get to the attorney/client communications
17 -- excuse me -- the attorney work product and the attorney
18 communications relevant to advice the attorneys are providing
19 with respect to this matter?
20 MS. IVERSON: Understood. Let me get a little
21 further into why I was explaining that to you, Your Honor.
22 This is with respect to the privilege log, and I think we just
23 need some clarity with respect to the breath of the Protective
24 Order, because this has been a moving target.
25 In October of 2022, we were told that every single

1 document Exponent had is privileged and protected and nothing
2 would be turned over.
3 Months later, they come out and say they were acting
4 also as a business consultant. We will turn this over. They
5 want to say we are giving you everything from the business
6 side and withholding everything from the consulting side, and
7 they are saying they are not going to log anything with
8 respect to the summaries and reports, but they will log
9 anything with respect to the business side, which technically
10 shouldn't be much, because they will be turning it over, and
11 it would just be the communications with counsel that they
12 talked about.
13 But where the actual work with respect to the
14 business side was so vastly overlapped in both timeframe and
15 substance with the summaries and the reports, we have no way
16 to actually challenge which hat they were wearing at which
17 time. When both the reports and the HEEs are discussing and
18 determining the risks to the public in the devices, we should
19 get to at least have a privilege log that we can look at and
20 challenge.
21 THE COURT: You don't get to look at their
22 attorney/client communications. You don't get to look at
23 their communications with the expert that's the consulting
24 expert as part of this.
25 If there is a serious problem that you see crop up, I

1 would be open to asking for the Special Master to do an
2 in-camera review of documents that are being withheld to see
3 if there is any serious problems there that they fall outside
4 of what's been described as the business side versus the
5 consulting side, but that's as far as I would go.
6 At this stage, I don't even see a need for that,
7 unless there is further confusion after we see the business
8 work that was being done versus the consulting work.
9 It would be very easy if they weren't also doing the
10 business side, but they are. So that's on Philips, you know,
11 to be clear as to the demarcation between business advice
12 versus the consulting expert advice.
13 MS. IVERSON: I'm clear on what your decision is.
14 THE COURT: Maybe the Special Master has to do some
15 in-camera review.
16 MS. IVERSON: I'm clear on your decision. My concern
17 is they are telling us here today they are turning over a lot
18 more than they said to the Special Master, and it's been a --
19 THE COURT: They made this representation, and they
20 will be held to it.
21 MS. IVERSON: They are telling us they are turning
22 over all communications with Exponent and Philips with respect
23 to the reports and the summaries. It is the first time we are
24 hearing that.
25 THE COURT: I don't think that's what they said.

1 That's not what I heard. Would you just clarify, please. Be
2 clear on the record so we don't have any --
3 MS. IVERSON: I heard they were turning over
4 communications between Exponent and Mr. Faulk regarding the
5 reports and summaries.
6 MS. DYKSTRA: No. That's okay. Yes. We are turning
7 over -- so this is why self-containing the report is so
8 important. The report itself is waived. All of the data in
9 the report is turned over. In addition, the communications
10 with the laboratories are turned over. Communications with
11 employees that involve Exponent and the labs are turned over.
12 So if there is something -- and we do our custodian
13 productions; Mr. Faulk, for example. If he communicates with
14 the lab and Exponent, that's the reports, which is the
15 substance of the waiver, that will be produced.
16 I'm not saying that there is nothing that might be
17 logged on a privilege log, that Denver Faulk and Exponent, for
18 example, may have had a conversation that is legitimately
19 privileged outside of this report, that we would log that
20 appropriately, and then Plaintiffs could challenge if they
21 chose to, but yes, I think the confusion was we are not
22 producing communications between Morgan Lewis or Sullivan and
23 Cromwell and Exponent. That's off the table.
24 THE COURT: That's the way I understood it.
25 MS. IVERSON: I'm sorry. I was talking about

1 Philips.

2 THE COURT: If there is further confusion on this,
3 meet with the Special Master and get it really definitively
4 worked out. If there is still a problem, you can come back to
5 me, but I think it is clear that everybody knows what the
6 ground rules are and how to move forward from this.

7 So my initial view on this is the Special Master's
8 Report and Recommendation is hereby adopted, subject to the
9 clarifications that have been set forth on the record today,
10 based upon the representations of counsel, with the directive
11 that counsel for Philips will provide in writing to the
12 Plaintiffs and the Special Master details about the business
13 consulting role and work of Exponent.

14 MS. DYKSTRA: Yes, Your Honor. Thank you very much.

15 THE COURT: Anything else that I need to deal with on
16 this matter?

17 MS. IVERSON: Nothing from Plaintiffs. Thank you,
18 Your Honor.

19 THE COURT: Thank you so much. Okay. So you want
20 another quick break here, okay, before we pick up SoClean.

21 **(Brief recess taken.)**

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1 C E R T I F I C A T E

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

4 S\ Teresa M. Benson
Teresa M. Benson, RMR
5 Official Court Reporter

6 9/15/23

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