

P R O C E E D I N G S

1
2 THE COURT: So this is the status conference in re:
3 Philips Recalled CPAP, Bi-level PAP, and Mechanical Ventilator
4 Products Litigation, MDL number 3014. A joint notice of the
5 parties who are going to be speaking and appearing has been
6 entered, and if anyone else wishes to be included, they should
7 come forward and either stand now and put your name on the
8 record or sign the sign-in sheet.

9 So let's go directly then to the agenda. The first
10 item on the agenda is discovery update status of proceedings
11 with the special master.

12 MS. ITRI: Good morning. Shauna Itri with Seeger
13 Weiss for the plaintiffs. Your Honor, we've been working
14 cooperatively with the defendants on some supplemental
15 discovery requests and custodians. We've also been working
16 cooperatively and pulling in Special Master Katz with some
17 discovery disputes that will hopefully resolve soon. So that
18 might lead to additional supplemental discovery.

19 For depositions, we are working through scheduling
20 issues, to the extent we have them, with Special Master Katz,
21 and these issues might be getting dates or moving dates around
22 to accommodate schedules of counsel, witnesses, and witnesses'
23 counsel. We have called Special Master Katz in to assist with
24 those, to get the dates on the calendars, and to the extent
25 they need to be moved to get schedules moved in a reasonable

1 time frame from their original date. So far we've taken about
2 10 to 15 depositions. The deposition protocol allows for
3 about 60 30(b)(6) or 30(b)(1) witnesses.

4 MS. ROBINSON: Hi, Your Honor. I'm Amanda Robinson
5 from Morgan Lewis on behalf of Philips RS. I'm here just to
6 echo everything that Ms. Itri said. We are making very good
7 progress responding to plaintiffs' requests. I just want to
8 offer as well that Philips defendants have produced 192
9 custodial productions totalling 2.3 million documents, 5.6
10 million pages, 1.3 million instant messages, which includes
11 Teams chats and text messages, and almost 1 million
12 noncustodial files. So that's representative of files that
13 Philips defendants had to go into various different Philips
14 platforms, so various different targeted pools in their
15 systems, and get that information.

16 And as Ms. Itri said as well, we've been working
17 cooperatively on depositions and working through everybody's
18 schedules. So thank you very much for allowing us to update
19 you.

20 MS. POLLOCK-AVERY: Good morning, Your Honor.
21 Elizabeth Pollock-Avery for the plaintiffs. Just a brief
22 update on productions for plaintiffs. We have produced over
23 80,000 documents and over 400,000 pages of documents so far,
24 and that's for personal injury and class plaintiffs. Thank
25 you, Your Honor.

1 THE COURT: Okay. Economic loss class settlement
2 notice.

3 MS. DUGGAN: Good morning, Your Honor. Sandra Duggan
4 for the plaintiffs. The class notice period is open. It
5 opened on December 11th of 2023. Notice is proceeding. All
6 the direct notices that were intended to be disseminated have
7 gone out. In the event any notice is returned, we are
8 reissuing that notice. The settlement website is up and
9 running.

10 Class counsel is responding to inquiries that come in
11 either through -- from class members through the settlement
12 website to Angeion Group or directly to us. And we're in the
13 process of trying to steer people in the right direction,
14 answer their questions and get them whatever information they
15 need.

16 It's a small note, but I think the publication notice
17 is working. We received notice from an incarcerated class
18 member who has no access to the internet, and he read about
19 the settlement on -- in People magazine, and he reached out to
20 us, and we're in the process of trying to get him all the
21 materials he needs.

22 MR. MONAHAN: I agree with everything Ms. Duggan
23 says. Hello, Your Honor. Bill Monahan for the
24 non-Respironics Philips defendants. I agree with everything
25 Ms. Duggan said. One coming attraction, the parties are

1 working on what I'll call a preservation and disposal order.
2 Essentially, we're getting a lot of devices back. Nobody
3 thinks we need to keep them all. So we're working on how many
4 to keep and how to do that, et cetera.

5 MS. DUGGAN: Your Honor, just for your own records,
6 there are two preservation orders that have currently been in
7 place in this case for some time. At ECF 773, there's a
8 preservation order that relates to all of the DreamStation One
9 devices, and then at ECF 2049, there's an amended preservation
10 order that pertains to the Trilogy devices. And we intend to
11 file a motion with the court to enter a third order that will
12 pertain to all of the remaining devices that are recall
13 devices so that anybody who wants to can sign up for the
14 registry and return their device and it will be preserved by
15 Philips.

16 THE COURT: Okay.

17 MR. MONAHAN: Thanks, Your Honor.

18 THE COURT: The Philips' motion to dismiss for
19 failing to file the plaintiff fact sheets, how is that going?
20 Have you heard anything back from the --

21 MS. ROBINSON: Yeah. So thank you, Your Honor. We
22 have heard back from some who have not filed their plaintiffs'
23 fact sheets, but we've not heard from all. So as you alluded
24 to, we've also on January 11th, we filed our motion to dismiss
25 and motion to show cause for the personal injury plaintiffs

1 who failed to file their fact sheets. You know, these
2 individuals are not prosecuting their claim, they're not
3 complying with a valid, you know, express court order, and
4 they're certainly not engaging in discovery.

5 I mean, that's just one piece of it. The second
6 piece would be the individuals whose plaintiff fact sheets are
7 deficient, and we've sent them notices, and we're working with
8 Special Master Katz, and we filed a submission to her working
9 through those individuals whose plaintiff fact sheets are
10 plainly deficient, and we just can't meaningfully defend a
11 case against them without that information.

12 THE COURT: Okay. Well, what I would intend to do
13 here is just to issue the court's order that they have to show
14 cause by that date or I'm going to grant the motion. So if
15 you've already received them from some, if you could withdraw
16 the motion as to those, and then I'll have the motion to -- or
17 the order to show cause filed as to the remainder.

18 MS. ROBINSON: Absolutely. Thank you, Your Honor.
19 Just one more thing I might add.

20 THE COURT: Sure.

21 MS. ROBINSON: This is sort of round one. We
22 continue to go through these fact sheets, and there may be
23 more deficiencies and more things to raise with you.

24 THE COURT: Sure.

25 MS. ROBINSON: And so meaningful engagement with

1 plaintiffs, the counsel for those plaintiffs as well as
2 plaintiffs' leadership would be really helpful.

3 THE COURT: Okay.

4 MS. REICHARD: Good morning, Your Honor. Joyce
5 Reichard for plaintiffs. Just as a point of clarification, I
6 do believe that the majority of the deficiencies that were
7 referred to by counsel are before the special master with
8 respect to the letter motion, and there are only five
9 particular plaintiffs that are deficient in their plaintiff
10 fact sheets that are before the court for ruling.

11 THE COURT: They didn't even file a fact sheet?

12 MS. REICHARD: That is correct, Your Honor, and my
13 understanding is that counsel for plaintiffs will be
14 responding accordingly.

15 THE COURT: You'll respond to them or they're
16 responding?

17 MS. REICHARD: No, Your Honor. They will be
18 responding on behalf of their individual clients.

19 THE COURT: Okay. But I will issue the rule to show
20 cause if they don't respond.

21 MS. REICHARD: Yes, Your Honor.

22 THE COURT: That way they're either going to be in or
23 out.

24 MS. REICHARD: Yes, Your Honor. We'll make sure
25 they're aware of that. Yes, Your Honor. Thank you. And with

1 respect to working with counsel, I believe that plaintiffs
2 have shown all along that we continue to do that and we will
3 certainly continue to relay that message to the counsel.

4 MR. BUCHANAN: I'm sorry. Dave Buchanan for
5 plaintiffs. I wasn't sure whether that was going to be noted.
6 We've been assisting as leadership to try and --

7 THE COURT: Okay. Coordinate?

8 MR. BUCHANAN: Yeah. To try to identify, you know,
9 are the deficiencies real or not as we're digging in. Perhaps
10 unsurprisingly or perhaps surprisingly, there seems to be a
11 little bit of confusion as to the Philips side, I would say,
12 but we'll be submitting our papers --

13 THE COURT: In response.

14 MR. BUCHANAN: -- for leadership. And then there
15 will be separate submissions to Special Master Katz by each of
16 the individual counsels on the subject of the motions. I
17 don't think today is the day to present that to Your Honor,
18 but we don't agree with the characterizations.

19 THE COURT: Okay. How about the census registry?
20 How are we going to be dealing with those deficiencies? How
21 are you going to deal with anybody that's on the registry that
22 really shouldn't be? Do you have a process for that?

23 MS. REICHARD: Your Honor, thank you. Joyce Reichard
24 again for plaintiffs. We are dealing with census deficiencies
25 in the same manner that we're dealing with plaintiff fact

1 sheet deficiencies. And again, counsel has been issuing
2 letters. There is some dispute with respect to the
3 fundamental characteristics of the deficiencies, but
4 regardless, those, I believe, are going to go before Special
5 Master Katz if they continue to be deficient. Thank you.

6 THE COURT: Thank you.

7 MS. ROBINSON: Again, Amanda Robinson for Philips RS.
8 That is exactly right in terms of how the census registry
9 deficiencies are working and will work. I just want to take
10 the opportunity to reiterate there is sort of an imbalance of
11 activity, though, from the defendants from a plaintiffs'
12 standpoint. We're issuing deficiency notices and only then,
13 when we are really routinely engaging with plaintiffs'
14 counsel, are we seeing any activity on their part, and we just
15 ask plaintiffs' leadership to engage a bit more.

16 THE COURT: I'm going to suggest that the special
17 master coordinate a special date where you'll all be getting
18 together in person and to go through what process you're in
19 for the deficiencies, talking about those things to get some
20 things resolved. I find it best if you have concrete,
21 schedule a case, we're going to meet this day, we'll talk
22 about these issues, and then get a process going forward so
23 that you can try to get a resolution sooner rather than later
24 to the deficiencies.

25 MS. ROBINSON: Understood.

1 MR. BUCHANAN: I think the existence or absence of
2 deficiencies will become apparent fairly quickly to Special
3 Master Katz when she receives those submissions.

4 THE COURT: Okay. Thank you. I'm sure she'll be
5 setting up a time for you all to get together about those
6 then.

7 MR. BUCHANAN: Yes. I'm not sure it's an agenda
8 item, but you wanted the update on the census registry as
9 well?

10 THE COURT: Yes.

11 MS. ROBINSON: While I'm here I might as well update
12 you on the census registry as Mr. Buchanan just offered. As
13 of yesterday, January 24th, 57,035 potential claimants have
14 registered in the census registry. Parties are discussing --
15 there's an ongoing discussion about supplemental census
16 registry form, and we're making changes and working towards
17 that.

18 THE COURT: Thank you.

19 MS. REICHARD: Thank you, Your Honor. Joyce Reichard
20 for plaintiffs again. That is correct, the number is correct,
21 and I believe that's a little more than 600 from our last
22 report last month.

23 THE COURT: Thank you.

24 MR. KOONS: Erik Koons, Baker Botts, on behalf of
25 Philips RS. I have one non-agenda item that we wanted to give

1 you a heads-up on, Your Honor. It's really by way of coming
2 attractions and then to get some advice from you, some
3 guidance on procedure.

4 We've talked to the parties about this, and Philips
5 is going to be filing a claim for contribution in this action
6 against SoClean asserting similar theories to what
7 Mr. Steinberg talked about earlier today, which is SoClean
8 knew that its ozone degraded the foam and, therefore, if
9 there's any finding of liability as to Philips on personal
10 injury claims --

11 THE COURT: You will be filing that in the
12 business-to-business claim?

13 MR. KOONS: I'm sorry?

14 THE COURT: In the business-to-business case?

15 MR. KOONS: We'd be filing it in this case, the
16 contribution claim in this case.

17 THE COURT: Okay.

18 MR. KOONS: But it's similar theories to what we're
19 asserting. That's important I think from a scheduling
20 perspective. This will not have a shock to the system or
21 require an adjustment of deadlines, and we've talked to the
22 parties about it.

23 The one procedural guidance we can use from you is
24 there's a pretrial order in place that governs the master
25 complaints related to personal injury claims.

1 THE COURT: Yes.

2 MR. KOONS: That order does not contemplate this type
3 of a claim, a contribution claim. And so what we would
4 recommend, if Your Honor is amenable, is that we would work
5 with the plaintiffs -- we've talked with them about this,
6 too -- to come up with a pretrial order similar to what Your
7 Honor ordered on the PI claims for a master complaint for a
8 contribution claim, and we can submit that for your
9 consideration.

10 THE COURT: And make sure that SoClean's involved in
11 those discussions.

12 MR. KOONS: Yes, and we have involved them in
13 discussions, and we'll continue to do so.

14 THE COURT: And you'll file a motion to file them
15 then, that new master complaint? That's the process you
16 decide to go through?

17 MR. KOONS: Yes. I mean, I think we can -- as far as
18 we will work with the plaintiffs to get the pretrial order in
19 place, we can submit that for your consideration. I'm not
20 sure that we need a motion to file a claimant intervention if
21 you're comfortable with us filing the master complaint that we
22 would contemplate in the order that we will submit to you.

23 THE COURT: That's just we've had such a detailed
24 process.

25 MR. KOONS: Yeah. We will follow Your Honor's

1 process.

2 THE COURT: Okay. Thank you.

3 MR. KOONS: Thank you.

4 MR. BUCHANAN: The MDL plaintiffs will have a comment
5 on that in a moment, but I'll let SoClean speak first.

6 MR. CABRAL: Hi, Your Honor. Colin Cabral on behalf
7 of SoClean. All we've heard is that we've gotten a heads-up
8 that they tried to bring SoClean into 3014. Regarding
9 procedure or how that would happen, the timing of it, we
10 haven't had any substantive conversations about that at all.

11 We have strong feelings about this. As pressure
12 increases in our case, it seems pretty clear to us what is
13 happening. They're trying to increase leverage against us and
14 increase our cost of the litigation, et cetera, et cetera. We
15 don't need to get into that here, but that's our view on it.
16 We believe this is vexatious and that there's no merit to any
17 of these allegations.

18 MR. BUCHANAN: And I guess I don't understand the
19 commentary from Philips as to meeting and conferring with
20 plaintiffs already in the process for this. We learned about
21 this, I learned about it this morning about an hour before the
22 conference.

23 THE COURT: I'm sure that you'll be getting together,
24 everyone talking about it.

25 MR. BUCHANAN: I think so. I think sooner rather

1 than later is really the timing around things just because
2 there can be implications under state law as to
3 collectability, et cetera. So plaintiffs need to see the
4 claims.

5 MR. KOONS: And we can just start talking to the
6 plaintiffs about the pretrial order submission this morning.
7 I didn't mean to suggest otherwise. But I think we have a
8 process set up where we can accommodate everybody's concerns.
9 I don't anticipate problems.

10 THE COURT: Okay. I mean, you can have an order, a
11 proposed order that you can have this filing or if there's
12 going to be a dispute about it, you know, then I'll have to
13 say file it and then we'll deal with it as objections.

14 MR. KOONS: And part of our motivation is to make it
15 easier, frankly, for SoClean, if we file the master complaint.
16 So they don't have to file a bunch of answers until there's a
17 bellwether process where there's a SoClean user involved. So
18 I think it will make it easier for everybody. That's the
19 intention anyway.

20 THE COURT: I get a sense they may be filing to
21 strike it as vexatious, but you know --

22 MR. KOONS: They may.

23 THE COURT: Everybody has to act in good faith here.
24 We all have our requirements.

25 MR. KOONS: And one thing, too, that's important on

1 this, from a scheduling perspective, I don't anticipate this
2 having a problem. Channelling Mr. Monahan's comment earlier,
3 to the extent that I anticipate what SoClean's going to do
4 with respect to DW is file some type of personal jurisdiction
5 motion and/or a motion to stay as scurrilous to them. To the
6 extent that discovery as to DW drags on, that could jeopardize
7 the July deadline that we're all contemplating across these
8 cases.

9 THE COURT: Try to avoid that.

10 MR. KOONS: Exactly. Thank you, Your Honor.

11 MR. BUCHANAN: What's clear to me, Your Honor, is
12 that Philips has a greater understanding of what it intends to
13 do and what it --

14 THE COURT: That's not really before me right now.

15 MR. BUCHANAN: I understand. And thank you. I was
16 just trying to anticipate the implications from the schedule
17 and the assertions that all goes well. I guess we'll see when
18 they file.

19 THE COURT: That should be part of your discussions
20 when you meet and confer.

21 MR. CABRAL: And Your Honor, Colin Cabral for
22 SoClean. One final point on this. Based on this strategic
23 move to try to bring SoClean into MDL 3014, that raises one
24 concern for us based on Morgan Lewis' involvement in 3014 and
25 a prior representation of SoClean in this matter. So this is

1 going to create a mess, we think. We have serious concerns
2 about that. We communicated those concerns to Philips'
3 counsel when they first gave us a heads-up that they would
4 potentially raise this issue, but that's a very serious
5 concern for our client. I just wanted to raise that with the
6 court.

7 THE COURT: Meet and confer about that, too.

8 MS. ROBINSON: I would just like to put on the
9 record, Your Honor, that there is no legal conflict that
10 Morgan Lewis has. We will be speaking with SoClean's counsel
11 separately and raising any issues with Special Master Katz.

12 MR. MONAHAN: I know we have to get out of here, Your
13 Honor. I just can't help but respond. There's a suggestion
14 by Mr. Cabral that this is being done in some strategic
15 chicanery or something like that. The reality is and it's
16 been our position all along, based on the tests in the five
17 labs, that nobody got hurt from using a CPAP or a BI-PAP, but
18 we're being sued for that for personal injury. And there is
19 no question from the record that if there was degradation and
20 somebody used SoClean, SoClean exacerbated the degradation,
21 and there's no question.

22 So in those cases where SoClean was used, we don't
23 think anybody was injured, and we're on the same side as
24 SoClean on this one or we will be on the same time, but if
25 there is a finding somehow of liability after Rule 702 in Your

1 Honor's gatekeeper role, then SoClean bears responsibility.
2 This is not a strategic move. This is based on the evidence.
3 Thank you.

4 THE COURT: Okay. I think we can reserve all the --

5 MR. CABRAL: Getting my steps in, Your Honor. This
6 is a final note. Look, Philips is on record publicly about
7 testing done with ozone saying that it does not substantially
8 increase harm.

9 THE COURT: I've heard this.

10 MR. CABRAL: It is -- again, our position is simple.
11 This is vexatious. This is not unlike the DW claims, from our
12 position, in terms of trying to increase leverage on a very
13 small company that has been harmed in this case. We'll leave
14 it at that, Your Honor.

15 THE COURT: Thank you. Okay. The LDC update?
16 Ms. Iverson, at the last hearing we heard the request of the
17 LDL participants that they be able to have more meaningful
18 work. Have you been able to resolve that?

19 MS. IVERSON: Your Honor, thanks. Kelly Iverson. We
20 have met with the entire LDC. Our view is that we have
21 engaged them throughout the litigation, and there may be some
22 individuals that haven't had as much work as others, and so
23 we're trying to make sure that everybody is engaged. We have
24 depositions that they're getting involved in today. You'll
25 hear from Ava, one of the LDC members, doing a part of the

1 argument with respect to the objections to the R&R, and I will
2 let Kristina follow up with respect to her experience. Thank
3 you, Your Honor.

4 MS. ANDERSON: Thank you, Your Honor. Kristina
5 Anderson, Hensley Legal Group, for the plaintiffs. As Kelly
6 said, since our last status conference, we have had several
7 meetings with the co-leads as well as some additional
8 leadership members. We've had some great discussions, and I
9 think that all of us are looking forward to continuing that.

10 We do have some members who have increased in work
11 getting ready for discovery with regards to experts and the
12 motions coming up for the medical monitoring argument. One of
13 our members will be arguing that. And I am personally looking
14 very much to getting more involved with the discovery process,
15 specifically, the depositions, preparations, summarizing them
16 afterwards.

17 And also, we have an update for you as far as our
18 mid-litigation report. We're planning on getting that to the
19 co-leads by sometime in February. So hopefully that will be
20 coming to you early this spring. And then our next meeting
21 with the co-leads is actually right before the next status
22 conference. So you should see most or all of us at that
23 status conference, and we are looking forward to this.

24 THE COURT: Thank you.

25 MS. ATTRIDGE: Good afternoon, Your Honor. Elise

1 Attridge on behalf of Philips RS. I am a senior associate in
2 Morgan Lewis' Washington, D.C., office. And I appreciate the
3 opportunity to get to present some of my meaningful and
4 substantial contributions to the case this morning.

5 As one example, I'm the lead associate on our
6 internal affirmative discovery team. So as a result, I've had
7 the chance to take the lead on all aspects of medical
8 monitoring discovery. In that role, I've personally assessed
9 all of the plaintiffs' discovery responses. I've prepared for
10 and led numerous meet-and-confer sessions with opposing
11 counsel, some of which were attended by Special Master Katz.
12 I fully briefed the parties' current medical monitoring
13 discovery dispute and, as a high point for me, got to present
14 oral argument to Special Master Katz. I also drafted the
15 briefing regarding the parties' objections to Special Master
16 Katz's report and recommendation which are currently pending
17 before Your Honor. Also, I'm pleased to report that soon
18 later today I will be handling the argument on those
19 objections on behalf of Philips RS.

20 Overall, I feel like a truly valued member of this
21 case team. I'm grateful that I get to work with colleagues
22 who I greatly respect and admire and who provide me with the
23 autonomy and support to grow as an attorney. So I look
24 forward to offering many more contributions to this case
25 including with respect to upcoming depositions and eventual

1 class certification issues. Thank you, Your Honor.

2 THE COURT: Thank you. Okay. I have just a couple
3 things that I want to mention, and then I do have to be --
4 there's another thing going on in the courthouse with the
5 judges, and I was hoping that we could come back around 2:00
6 to have the argument on the objections to the R&R for the
7 medical monitoring. I don't know if there's any individuals
8 here who -- if there's going to be a problem with scheduling
9 for that. Would we be okay?

10 MS. IVERSON: Your Honor, it looks like our team is
11 good at 2:00, if that works for everybody else.

12 MS. ATTRIDGE: Yes, Your Honor, that works for me as
13 well. This is Elise Attridge.

14 SPECIAL MASTER KATZ: Your Honor, I don't know if you
15 need me for that, but I have a 2:40 tele-med appointment.
16 Carole Katz.

17 THE COURT: If you could be here as long as you can.
18 I understand if you have to leave. So just a couple things.
19 There's the motion dealing with the judicial notice that KPNV
20 has filed. We'll take that up at our next status conference.
21 So be prepared for that at the next status conference. I just
22 issued the opinion upon the motions to dismiss, the master
23 personal injury complaint, and the one thing that I found in
24 there that was sort of interesting is that count 20 deals with
25 the medical monitoring, which is almost like a duplicate, if

1 you will, of the master complaint. And so I just need to
2 think about why it's in there or how we're going to weave
3 those together. I mean, the response to that is going to be
4 the same as the response to the medical monitoring master
5 complaint.

6 MS. DUGGAN: Hi, Your Honor. Sandra Duggan again.
7 You know, when we were drafting these complaints, Philips had
8 originally suggested that there be administrative divisions.

9 THE COURT: Right.

10 MS. DUGGAN: But we were never able to reach any kind
11 of stipulation with Philips on their waiver, for example, of
12 an argument that we split our causes of action. And so out of
13 an abundance of caution, we made sure to carefully craft
14 statements so that the plaintiffs will be protected in the
15 case in case they were successful in their argument, but we do
16 understand there is overlap. So of course, whatever ruling
17 Your Honor makes would apply.

18 THE COURT: Okay. Just so we're all clear about
19 that, you know, because as I said, it just seems like a lot of
20 effort to put something in there and then have to address it
21 again separately in the other master complaint. But at some
22 point we're going to have to talk about how, if there's no
23 global resolution on these matters, how they get back in one
24 complaint if they have to be referred back to the original --
25 court of origin.

1 MS. DUGGAN: Understood, Your Honor. And the parties
2 have already engaged in discussions with respect to the
3 economic loss claims.

4 THE COURT: Right. I put that in there because we do
5 have a settlement in there. So there may be some opt-outs.
6 And how those will be dealt with is something that needs to
7 come back here.

8 MS. DUGGAN: We're thinking that through and trying
9 to come up with a practical solution.

10 THE COURT: Good.

11 MS. DUGGAN: And we will present whatever
12 agreement -- I think we will reach an agreement -- to the
13 court.

14 THE COURT: Thank you. And then there's a pro se
15 plaintiff, Mr. King, who has filed, you know, motions with
16 this court. Respirationics has responded. But there is one
17 issue that I think it would be appropriate for the plaintiffs'
18 counsel to weigh in on. He's challenging the authority of
19 this court to essentially stay discovery for individual
20 plaintiffs and have all his discovery going through the
21 appointed leadership and that it's the leadership through this
22 interim period that would determine if there's going to be any
23 individual discovery.

24 So I think that really isn't something for
25 Respirationics, per se, but it's challenging the structure of the

1 MDL, which I think would be helpful just to have it on record
2 what the plaintiffs' position is on that. So if you could
3 file a response, say, within two weeks, that would be great.

4 MS. IVERSON: Yes, Your Honor. Thank you.

5 MS. DUGGAN: We can take care of that, Your Honor.
6 And liaison counsel, Aaron Rihn, as well as the co-leads in
7 this case have also reached out to Mr. King.

8 THE COURT: It's a little different because he's pro
9 se.

10 MS. DUGGAN: Yes.

11 THE COURT: So it creates complications, but I know
12 I'll have to rule on that.

13 MS. DUGGAN: We understand. Thank you.

14 THE COURT: So we'll take our recess now, and then
15 we'll be back for the argument on the R&R. Thank you.

16 (Recess.)

17 THE COURT: Thanks for everyone's patience. The
18 other hearing that I had went much longer than I expected.

19 The matter before the court now is in the In Re:
20 Philips Recalled CPAP, Bi-Level PAP, and Mechanical
21 Ventilation Products Litigation, MDL number 3014. And the
22 issue before the court has to do with objections to the report
23 and recommendation of Special Master Katz re: medical
24 monitoring discovery, and that was filed at ECF number 2341.

25 Who is going to be arguing this, if you could enter

1 your appearance at this time?

2 MR. RAM: Good afternoon, Your Honor. Michael Ram.
3 And if the court would allow, I'd like to share the argument
4 with Ms. Cavaco from the LDC.

5 THE COURT: Yes, you may do that.

6 MS. ATTRIDGE: Good afternoon, again, Your Honor.
7 Elise Attridge on behalf of Philips RS. I'll be handling
8 today's argument.

9 THE COURT: I'll just give you my sense. You can be
10 seated. And then I'll hear argument. I want to give you my
11 sense. Having reviewed your objections and reviewed the
12 special master's report and recommendation, by and large I
13 think the special master got it right. She has a thorough
14 analysis of the matters before the court.

15 There was one overarching issue, and that's whether
16 there should be any discovery at all of the plaintiffs'
17 medical conditions with respect to medical monitoring, and the
18 special master went through the case law that has come up in a
19 number of jurisdictions to review what considerations would be
20 and why you may or may not need the medical records. And I
21 think she got it -- it was appropriate in terms of her
22 analysis.

23 There was one thing that was brought up in that there
24 was an incongruity between her recommendation that the request
25 for production of documents number 2 should be granted, and it

1 would not be duplicative and moot. And I did make an inquiry
2 of the special master because it did seem to be to this court
3 that it was inconsistent and that to make sure that she was
4 recommending that be granted, and she said yes. And so the
5 other one was just a typo where the number 2 was left in
6 inadvertently. So I would like that clarification on the
7 record so that's clear.

8 There's one other one that seems to be pretty simple
9 to respond to, and that's for request of production of
10 documents, number 22. Philips is seeking a clarification that
11 the duty to produce includes the past ten years and current
12 treatment/monitoring. And I think that's implied in it. I
13 mean, if you had a record -- the records you're going to be
14 producing aren't for six months from now, which would be
15 future, but it would be anything that was prior to today,
16 which would include any current treatment that you're
17 undergoing. I mean, so it's not future treatment, but it
18 certainly would encompass any current treatment that you're
19 receiving because you would have been going to the doctor's
20 office and there had to be some treatment protocol, and it's
21 not a treatment that you will be receiving some time next year
22 because we don't even -- you haven't even been to the doctor
23 to get the treatment. So it only makes sense to include both
24 the past and current treatment.

25 Does anybody want to be heard on that?

1 MR. RAM: On that specific question, Your Honor, or
2 on the objection at large?

3 THE COURT: That specific question. Assuming the
4 special master was correct on the rest of it. I just think
5 that's a rational clarification.

6 MR. RAM: We, of course --

7 THE COURT: I know -- correct, correct.

8 MR. RAM: -- take issue, but assuming that the
9 special master was correct, that's right.

10 THE COURT: Okay. Thank you. Just other things.
11 The special master's taken essentially a two-part approach
12 here. Certain things you have to produce now if they're
13 really dealing with the conditions that the plaintiffs have
14 been asserting that were affected or their concerns for this,
15 for the conditions that are set forth. So those things are in
16 a separate category. And then we have some other ones that
17 you don't know whether or not there is some other condition
18 that could be out there that may be raised in the future. And
19 as to that, there's just a requirement of responding to
20 interrogatory, and if there's any targeted follow-up, then it
21 will come along. So it's not an onerous burden.

22 And the other question is maybe there's some
23 overbreadth because it's picking up everything except mental
24 health issues. So I don't know, because of some of the
25 conditions that are alleged here, reproductive, neurological.

1 I don't know if somebody is pregnant or they have a disease
2 that's sexually transmitted, you know, how does that play into
3 whether there could be a reproductive problem? Maybe it does;
4 maybe it doesn't.

5 I mean, I'm not an expert in these medical fields and
6 what kind of monitoring would go along with that type of
7 situation, but clearly there's a need for the parties to get
8 together and try to narrow this because there are going to be
9 some sensitive areas where there's no reason somebody has a
10 prior sexually transmitted disease that was treated nine years
11 ago, why do they have to turn over those records? Or if I had
12 a miscarriage, you know, four years ago, is that really
13 relevant?

14 So unless there's some tie-in that the parties are
15 going to be asserting that these prior conditions or treatment
16 for a prior condition could be relevant, you know. If I had a
17 knee replacement, is that relevant? I just don't know. It
18 just strikes me that there's a need for greater communication
19 between the parties to really narrow the kind of records that
20 you're going to really be seeking so it doesn't go overbroad
21 and require, one, the counsel to look through all these
22 voluminous records for conditions that may not have any tie-in
23 to this particular case and the need for medical monitoring.

24 So it's going to save money by narrowing it if we can
25 do that earlier rather than later, and it will also help focus

1 the case to get through the discovery more quickly. So you
2 need to get together on this and see what exactly it is you're
3 going to be doing, and I'm going to direct you to go back and
4 meet with the special master and try to come up with things
5 that would be excluded. It's hard to say, you know, unless
6 you know what it is, that it would be excluded, but there may
7 be some like you've already pointed out in the papers,
8 plaintiffs pointed out some of these things just don't seem to
9 make sense. So unless there's a reason, there's an expert
10 that can say, oh, no, you need to see that kind of record
11 because that could be pertinent to X, Y kind of monitoring,
12 but I'll leave you to back that out. But I do think it does
13 need to be narrowed.

14 But I do agree with the special master's reasoning,
15 you know, that, yes, you know, you have to answer some
16 questions. Your medical condition is relevant. It's not
17 irrelevant. It's going to be further narrowed. I'm working
18 on now the master complaint for medical monitoring, and
19 there's, I think, three categories of cases. There's the one
20 category where there's stand-alone claims. Then you have the
21 category where it could be a form of recovery, of relief. And
22 then there's the third one where it's not recognized at all.
23 It's not a claim, and there's no relief along those lines that
24 can be granted.

25 So for those patients who fall within states where

1 there's no recovery, no relief, no claim, you know, you don't
2 have to turn those records over. If it falls within a
3 category of it's a form of relief, then you may have another
4 subset in there that could also be relevant to those that have
5 a stand-alone claim, and then whether you need some form of
6 physical injury to have already have occurred. And then
7 there's a debate over whether it's subcellular or something
8 beyond that.

9 But that's all going to be flushed out in the master
10 complaint, in the court's rulings on the objections to the
11 special master's rulings in those cases. So there may be some
12 refinement that will come down, and you're going to have to
13 meet and confer on that when the court makes its ruling. But
14 just globally and when I looked at the analysis, I think the
15 special master did get it right. So I'll hear from the
16 plaintiffs.

17 MR. RAM: Thank you, Your Honor. And we appreciate
18 all the work the special master did and we appreciate all the
19 work the court did, and we're also hopeful that after you hear
20 us, you may have a different perspective as we certainly do.

21 And I'd like to go first, please, and just briefly
22 lay out the framework of the medical monitoring case, which is
23 very different from a PI case, and then Ava is going to talk
24 about the privacy issues that are implicated here, and then
25 I'll talk briefly --

1 THE COURT: Oh, one other thing I wanted to mention.
2 None of the cases also talked about, well, there are these
3 sensitive privacy issues, and they're best really addressed in
4 the -- in a protective order. Now, we do have a protective
5 order in this case, and my suggestion would be to, if you're
6 turning over these medical records at this stage, maybe they
7 should just be attorneys' eyes only so that they can have an
8 enhanced privacy protection, and it wouldn't be going to the
9 nonlawyers for review.

10 MR. RAM: Yes, Your Honor. And Ms. Cavaco will
11 discuss privacy, but first --

12 THE COURT: That's, technically, up to you all. I
13 think we have the capability to designate them attorneys' eyes
14 only, and if there's an objection to that, then I would hear
15 it, but that would be one way to approach this as well.

16 MR. RAM: Yes, Your Honor. I want to talk a little
17 bit about the framework of a medical monitoring case because
18 that informs the entire dispute. As the court knows, the
19 elements of the medical monitoring claim are very different
20 from a personal injury claim. We have to prove exposure to a
21 hazardous substance caused by Philips' negligence that, as a
22 result, gives everybody in the class an increased risk of
23 getting a disease in the future and there's a monitoring
24 procedure that's different from what the general public
25 usually gets.

1 So there's nothing in those elements that implicates
2 our current medical records. We're not suing for personal
3 injury --

4 THE COURT: Do you have any case that tells us that,
5 that in a jurisdiction say like Pennsylvania, for example,
6 that you would never see a medical record; it's just not
7 necessary?

8 MR. RAM: Well, it's not true that we haven't
9 produced or offered to agree to produce any medical records,
10 Your Honor -- and Ava can describe it better. But we have
11 produced the orchestrator care data or have agreed to sign
12 releases --

13 THE COURT: That just shows it was being used.

14 MR. RAM: Yes, yes, and that is a medical record, and
15 we've produced the SD cards, but Your Honor already touched on
16 the issue of overbreadth, and in light of the privacy
17 concerns, they have to narrowly tailor --

18 THE COURT: And step back a minute now.

19 MR. RAM: Yes, Your Honor.

20 THE COURT: Part of the problem is because these
21 issues about the harm have come up within the last two to
22 three years. Nobody was focusing on these machines could
23 potentially have caused a harm. We have so many diseases that
24 are alleged for monitoring. Cancer, including cancer of the
25 head, neck, kidneys, liver, brain, pancreas, blood-forming

1 tissue, respiratory system, gastrointestinal system,
2 reproductive system, and lymphatic system. The respiratory
3 diseases, such as asthma, chronic bronchitis, chronic
4 obstructive pulmonary disease, constrictive or obliterative
5 bronchiolitis, emphysema, interstitial lung disease,
6 pleuritis, pulmonary fibrosis, sarcoidosis, chronic sinusitis,
7 chronic rhinitis, and other forms of chronic inflammation, and
8 also damage to DNA as well as reproductive, neurological, and
9 other critical systems. All of those are pleaded conditions,
10 and they're enormous. You know.

11 So I don't know, you know, if you're talking about
12 breadth here of the kinds of diseases, it doesn't really ring
13 true to me that you could say, well, nothing would have
14 impacted these things other than some practical things that I
15 think you can sit down and narrow. I mean, knee replacements,
16 plastic surgery, you know, that type of thing that may not be
17 relevant to these conditions unless there's a treatment
18 protocol because of one of these conditions you needed some
19 kind of particular surgery. I don't know.

20 MR. RAM: Well, Your Honor knows the list comes from
21 Philips when they sent their notices out, they listed all of
22 these --

23 THE COURT: I understand that.

24 MR. RAM: Okay.

25 THE COURT: But it's still on this list.

1 MR. RAM: I understand, Your Honor. I get it. And
2 if they had asked us, which they've not, in a focused
3 interrogatory, which of your 63 plaintiffs have which of the
4 pleaded conditions, we would have answered that. But that's
5 not what we're about here. We're talking about our entire
6 medical history, and if I could just explain a little bit --

7 THE COURT: Well, my understanding is the pleaded
8 conditions you get the history; is that not correct? Medical
9 records?

10 MR. RAM: Some of the discovery --

11 THE COURT: But the other ones you just answer
12 interrogatories?

13 MR. RAM: Yes, Your Honor.

14 THE COURT: Am I incorrect?

15 MR. RAM: No, you're not incorrect. We're suing, as
16 Your Honor knows, for a testing program that's necessitated by
17 Philips exposing millions of people.

18 THE COURT: No, I understand that.

19 MR. RAM: Okay. So if we win, the court will order
20 one medical monitoring program for millions of people --

21 THE COURT: No, no, no, no, no. Because it's going
22 to differ from state to state.

23 MR. RAM: When we get to class cert, Your Honor, we
24 may ask you to apply the law of Pennsylvania to a nationwide
25 class, but even if the entitlement varies from state to

1 state --

2 THE COURT: Okay.

3 MR. RAM: -- the program is most likely -- and it's
4 obviously up to the court -- is most likely going to be one
5 medical monitoring program for millions of people regardless
6 of what their histories are. And Your Honor focused rightly
7 on the plethora of conditions that Philips says they may have
8 subjected us to. And if the court orders a medical monitoring
9 program, I can tell you right now some of our class
10 representatives will have some of those pleaded conditions and
11 some of the millions of class members will have some of the
12 pleaded conditions, but that doesn't mean that they get our
13 entire medical history. They could ask us, do you have these
14 pleaded conditions, and we won't.

15 And in the brief that we submitted, we cited the
16 medical monitoring program from the C8. This is where DuPont
17 poisoned some water in West Virginia. And it was one medical
18 monitoring program for everybody, and there were half a dozen
19 tests. And it expressly said if you already have this
20 condition, you don't get that test.

21 And like I said, we will stipulate some of our class
22 reps already have some of the pleaded conditions and certainly
23 some of the class members have some of the pleaded conditions,
24 but that doesn't implicate our entire medical history. I'm
25 going to turn it over to Ms. Cavaco --

1 THE COURT: I guess my question here is because we
2 don't know that somebody has those conditions already and
3 maybe they're already being tested for them, but wouldn't that
4 be helpful for the defendant to know that so that they can
5 formulate appropriate perhaps settlement offers on this
6 matter? Because you know how many people may not be in or
7 if -- we're just looking at the 63 plaintiffs now; is that
8 what you're saying?

9 MR. RAM: Yes. And if they asked us, "Your 63
10 plaintiffs" --

11 THE COURT: Right.

12 MR. RAM: -- "who has which of the pleaded
13 conditions?" that's proportionate. And we don't even think
14 that's relevant, but we understand why the court and the
15 defense may think it is. So we can see that that's relevant,
16 but to just open up our entire medical histories for some
17 fishing expedition and to all these conditions that we don't
18 have. If we came in with a broken arm in a car wreck, they
19 wouldn't get our gynecological records. They would get what
20 relates to the broken arm --

21 THE COURT: You see, the problem is if one of the
22 diseases is the reproductive disease -- this is why I was
23 saying, you know, I don't know what that encompasses, you
24 know, because if we don't know what is being alleged that
25 these toxins or whatever could affect, would it cause

1 miscarriages? Was there some other condition that could give
2 rise to that?

3 Typically, if you just had a baby or you've had
4 something like that or you've already been sterilized, you
5 know, that could be something that could say, well, you don't
6 need to be tested if you're not going to be, you know,
7 affected by having to go in and have these tests because, you
8 know -- or your age, you age out, you know, you're not able to
9 have children after a certain age.

10 I don't -- I think it just needs a little more work
11 in terms of what kinds of other conditions other than pleaded
12 conditions you would need to get records for, and what do you
13 mean by a record for a reproductive issue? I mean, how are
14 you going to tell your client, "I need these kind of records.
15 Do you have this?" What do you mean by reproductive? Because
16 that's what you're alleging you want some testing for, right?

17 MR. RAM: Well, if Philips' exposure had already
18 caused a miscarriage, that would be a personal injury. That
19 wouldn't be in this case. All this case is about is about the
20 risk of latent disease in the future. It's not about personal
21 injury. So if we had said Philips caused my miscarriage, then
22 we could come in here and they could say, well, you subjected
23 yourself to all these other comorbidities. That's not our
24 case.

25 Our case is we have millions of people who are

1 exposed, and we've got a list of different conditions, and
2 we're willing to proportionately say plaintiff one has this
3 pleaded condition, plaintiff two has that pleaded condition,
4 but it doesn't open up the entire medical history.

5 And I keep talking about Ms. Cavaco. I'm glad to
6 keep talking about proportionality, Your Honor, but I would
7 like her to get a chance now, if that's okay with the court.

8 THE COURT: Sure.

9 MR. RAM: Then I'll come back, if that's okay.

10 THE COURT: Okay.

11 MS. CAVACO: Good afternoon, Your Honor. Ava Cavaco
12 for the plaintiffs. So to continue the thread that Mr. Ram
13 started, what happened here is we would like to produce what
14 is proportional to the needs of the claim. The discovery
15 request from Philips is that -- we never got that from them.
16 For example, interrogatory number 13 reads that our plaintiffs
17 are asked to identify any and all diagnosed medical
18 conditions, injuries, medications, and treatments whether or
19 not it's related to the device. And I know that you
20 appreciate all of the unrelated things.

21 Our point here is that at no point in time have they
22 ever given us a rog that says, I would like to know if your
23 plaintiff has any and all of these conditions. And then it is
24 my responsibility to go back to my plaintiff and say, hey, we
25 you pleaded gynecological records as one of the things. I

1 might have to tell them about this. But the fact of the
2 matter is Philips has never asked the question. We may argue
3 that it's not relevant, but we'd be happy to turn over that
4 answer if they would like to give us a rog asking. Because at
5 the end of the day, that is what is proportional to this
6 claim, this medical monitoring claim which has all noninjured
7 plaintiffs.

8 It is our assertion that we don't need to turn over
9 such over-broad medical records because designing a medical
10 monitoring program does not require that they know all of this
11 about our plaintiffs. As Mike mentioned, medical monitoring
12 programs can be designed that if a person already has this
13 issue, they automatically do not get monitoring.

14 For example, I have asthma. I was born with asthma.
15 So every year I get a pulmonary function test with my
16 pulmonologist. So if I were enrolling in the medical
17 monitoring program, they would administratively have me fill
18 out a paper and say, what pleaded conditions do you have,
19 Ms. Cavaco? And I would say, oh, I have asthma. So
20 automatically I don't qualify for asthma monitoring because I
21 already get it. Why would I do it twice? But I do qualify
22 for gynecological issues, for cancer, for all of the other
23 pleaded conditions. But our point is that's why they don't
24 need it from us in discovery, these things. We can design a
25 medical monitoring program --

1 THE COURT: Well, here's interrogatory number 11.
2 Identify any and all medical monitoring in which you have
3 participated in the last five years including the frequency of
4 such medical monitoring, the nature and the conditions and/or
5 diagnosis for which you're being monitored. Why is that
6 overly broad to answer? That's the breadth of all of the
7 pleaded conditions is so broad.

8 MS. CAVACO: I read that to mean participating in
9 medical monitoring programs, but maybe it's different.

10 THE COURT: Isn't that what it means? I thought it
11 meant just any -- if you're being seen for asthma, that would
12 pop up here.

13 MS. CAVACO: I think that also goes along with
14 interrogatory 12 which it asks plaintiffs to disclose any
15 regular medical checkups, right, blood tests, x-rays,
16 diagnostic tests. And yes, my asthma condition would fall
17 into that, but again, it's asking for any regular checkups and
18 it's asking for the name of the doctor, the address, and to
19 describe with specificity why they seek those services.

20 So the defendants assert that not only do they want
21 to know these things, but they want to know when you do it,
22 with who, and why. We think that's overbroad. That's a lot
23 of information to ask from someone. And again, these things
24 would include colonoscopies, prostate exams.

25 THE COURT: Well, see, this is where, you know, if

1 you have colon cancer is one of the kind of cancers that you
2 could come down here and if you aren't receiving -- if you do
3 get your regular three years, five years, and you've been
4 regularly doing that --

5 MS. CAVACO: Sure.

6 THE COURT: -- then maybe you don't need it, I don't
7 know. Or if you need it more frequently, that would be a
8 different issue as well. But this is where I think it's not
9 so much that this is here but what should be excluded from
10 here is the more important thing.

11 MS. CAVACO: Absolutely. So we think, respectfully,
12 that the special master's recommendations got it wrong because
13 all she did was whittle down the time proportion, and you
14 know, bringing -- shortening the time frame does not change
15 the problem of the sheer lack of tailoring. If they change
16 this interrogatory to, you know, disclose any regular medical
17 checkups, blood tests in relation to the pleaded conditions,
18 it would be something we're willing to answer, but that's not
19 what happened here, and that's not what Special Master Katz --

20 THE COURT: See, some of the problem is that some of
21 the monitoring you may be having, say blood work, if you're
22 worried about your cholesterol levels and your doctor -- you
23 go in for your annual checkup, and the doctor gives you a
24 broad-based blood work --

25 MS. CAVACO: Yes.

1 THE COURT: -- that maybe would be picking up some of
2 these other abnormalities that is going to be something that
3 could affect your -- you know, one of them was a blood
4 disease.

5 MS. CAVACO: Sure.

6 THE COURT: Maybe that would be picked up in your
7 regular monitoring. So I mean, but they weren't being
8 monitored for the purpose of that disease.

9 MS. CAVACO: Correct.

10 THE COURT: But it could be picked up because of your
11 regular screening.

12 MS. CAVACO: I believe it would be our assertion that
13 as long as it relates back to the pleaded condition. If
14 they're getting blood tests for cholesterol and we're not
15 making a cholesterol, you know --

16 THE COURT: What I'm saying is that a lot of times
17 when you get your battery of testing for blood work --

18 MS. CAVACO: Yep.

19 THE COURT: -- it's usually much broader than that
20 one thing.

21 MS. CAVACO: Yes.

22 THE COURT: Because the doctor is screening for all
23 the problems.

24 MS. CAVACO: All the problems.

25 THE COURT: They want to get it early so they can

1 help you. They're not just checking your cholesterol
2 generally.

3 MS. CAVACO: Yes.

4 THE COURT: I mean, sometimes maybe they do.

5 MS. CAVACO: They'll do a panel.

6 THE COURT: Yeah. So that's the problem that I have.

7 MS. CAVACO: For sure.

8 THE COURT: Because when you come down to final
9 resolution about what kind of medical monitoring is going to
10 be needed --

11 MS. CAVACO: Yes.

12 THE COURT: -- people generally get or have access to
13 the blood work, you know. That could be something that if an
14 expert would say, oh, it would be picked up in that kind of
15 battery of the normal blood work analysis, then you wouldn't
16 need that. You might need other types of monitoring. I'm not
17 going to say that it's a blanket, you're going to see
18 everything in the blood, but it's that kind of thing that they
19 would need to know do you get regular testing for your blood
20 work or, you know, do you receive regular medical checkups,
21 you know, that kind of thing.

22 MS. CAVACO: And our assertion is that they don't
23 need our medical histories of our plaintiff in order to create
24 the program that we're talking about, right? We pleaded 20 or
25 so injuries as a result of the diseases that they listed on

1 their recall notice, but it is our burden to prove with expert
2 testimony that at the end of the day a list of injuries will
3 be monitored. We may whittle down to only four or five
4 because it's our responsibility to prove to you and the court
5 that these are actually proven, you know, because we did so
6 many. So it is under that logic and guise that we don't
7 believe that they need to know all of the blood tests that our
8 plaintiffs have in order to design this program.

9 THE COURT: I think that the special master's
10 approach to this was, well, let's hear what your conditions
11 are or what you're doing, and then if you need to actually see
12 the medical record, that's a matter for another day, that you
13 would be able to pick it up. They're not giving a blanket
14 that, yes, you have to turn over all these medical records.

15 Although I have to say, as a professional, when you
16 are going to be asserting these things on behalf of your
17 clients, what kind of, what kind of review do you do to be
18 satisfied that you've performed your professional
19 responsibilities? Do you just ask a plaintiff, you know, you
20 know, do you have any of these problems? And they may not
21 know. But there may be something in the medical record where
22 you would need to check the medical records yourself just to
23 be able to make assertions in pleadings or briefing.

24 So there's going to be some level of review that you
25 may have to do as part of your professional responsibilities.

1 I'm not going to direct what you do or don't do. It's just an
2 inquiry, you know, that if you have to do it, maybe the other
3 side needs to look as well.

4 MS. CAVACO: So Mr. Ram knows way more about medical
5 monitoring programs than I do.

6 THE COURT: Okay.

7 MS. CAVACO: But I just want to go back to the point
8 that because this claim specifically is not an injury claim
9 and the claim here is that all of our plaintiffs are not
10 injured, they might have some of the pleaded conditions, but
11 they're not injured by --

12 THE COURT: Well, there's some cases where you're
13 going to have to say there is a physical injury in order to be
14 able to get a medical monitoring claim in certain states.

15 See, my problem is we have an MDL here, but at the
16 end of the day, we can get through everything, get you trial
17 ready, but when you go back to your local forum state, we
18 don't have a global resolution, then it's not the law of the
19 State of Pennsylvania that may necessarily govern if they
20 filed a lawsuit in -- let's say they're in Ohio, and they were
21 using a machine in Ohio. Maybe that court would be applying
22 the law of Ohio, which would be different. And so that's just
23 too much -- and if I have to tell them, oh, yeah, the case is
24 trial ready, well, it may not be if there was no discovery on
25 these issues, if you follow what I'm saying.

1 MS. CAVACO: I do follow what you're saying, and I
2 believe that it -- I will let Mr. Ram address your question
3 just because I, honestly --

4 THE COURT: Okay.

5 MS. CAVACO: -- would not --

6 THE COURT: I don't mean to get, you know, I was
7 just --

8 MS. CAVACO: It's good for us to know where your
9 concerns were.

10 THE COURT: I was looking at, well, we have a medical
11 monitoring claim in the personal injury complaint. Now we
12 have a separate complaint for exactly the same thing in this
13 master complaint. And why is it in the personal injury
14 complaint when we already have a process to have it
15 separately?

16 Then I got to thinking, what if we're not successful
17 here? What if, you know, the case is -- successful in the
18 sense that I'm able to resolve the bulk or the majority of all
19 of these cases. And if that doesn't happen and these hundreds
20 of cases or thousands depending on what happens with the
21 people on the --

22 MS. CAVACO: Registry.

23 THE COURT: -- on the registry, then go back to their
24 courts, what happens, you know? So I don't know. It's an
25 interesting issue in terms of what an MDL judge is supposed to

1 do at this stage.

2 MS. CAVACO: Oh, absolutely.

3 THE COURT: Okay.

4 MS. CAVACO: And so you know, and the people on the
5 registry and in the personal injury bucket, if you will, by
6 all means, the court and Philips have a right to look at the
7 conditions and medical records at issue for them.

8 THE COURT: Well, that's over there, you know. So
9 how do we separate out these plaintiffs if they can get
10 everything they need in the medical monitoring claim under the
11 personal injury? You know, as I say, it's perplexing because
12 we do have this staged approach here with the different
13 complaints, master complaints.

14 MS. CAVACO: For sure. And again, I'll let Mr. Ram
15 get to that.

16 THE COURT: He can talk about that.

17 MS. CAVACO: Yes. But I think they will participate
18 in the monitoring program until and hopefully not when they
19 have an injury. Then they no longer participate because now
20 they have an injury claim.

21 THE COURT: Right.

22 MS. CAVACO: But back to the argument I'd like to
23 make today is that the recommendations made are over-broad.
24 They ask for any and all, and we're, you know, thankful that
25 the recommendations did bring the time down, but again, we

1 don't think that the timeliness resolves the problem.

2 You addressed a lot of this at the beginning. You
3 appreciate the argument I'm making, but then becomes the --
4 you said we should go back and figure out in the weeds where
5 did the lines blur and where do the lines end. And
6 respectfully, we ask that it is narrowed further down to the
7 pleaded conditions, not any and all for ten years. Because it
8 is something that even if it's not relevant for the structure
9 of our medical monitoring program is something we would --
10 could and would turn over because, you know, at the end of the
11 day we are -- someone's -- there's nothing more personal and
12 intimate to a person than their own medical histories, and
13 it's our duty to --

14 THE COURT: I'm appreciative of that.

15 MS. CAVACO: Yes, absolutely.

16 THE COURT: That's why I want to focus on the
17 protective order, whatever is produced, even if it's relevant
18 to this case in a way that you would be conceding that at
19 least some records could be relevant, how do you protect
20 those? And then I'm also concerned about overbreadth, and the
21 parties need to have a process to narrow the kind of records
22 that are going to have to be or conditions that are going to
23 have to be reported.

24 MS. CAVACO: Yes, absolutely.

25 THE COURT: Okay.

1 MS. CAVACO: Thanks very much.

2 MR. RAM: Your Honor, may I please follow up on the
3 questions about the general testing that plaintiffs might
4 already be receiving?

5 THE COURT: Right.

6 MR. RAM: As the court knows, we have to show that
7 there's medical monitoring that would be different from what
8 people ordinarily receive. So you know, we all get blood
9 tests. We have to show that there's something different, and
10 that will be the --

11 THE COURT: Like a unique test or something?

12 MR. RAM: Yes, Your Honor. That will be the subject
13 of expert testimony. So it doesn't matter what regular
14 testing the plaintiff might get.

15 THE COURT: The special master recognized that and
16 said you wouldn't have to opine on things that would be really
17 the province of the experts.

18 MR. RAM: And we have to show that the testing is
19 different from what people would be typically getting. We did
20 not allege physical injury other than subcellular. And then I
21 know that the court has been very patient with me, but I'd
22 just like to talk about the class cert.

23 THE COURT: Why is the Brown case wrong? Why is the
24 other decisions that the special master relied upon, why were
25 they -- I was looking for a case that would stand for sort of

1 your proposition that you get no -- you know, that there's
2 nothing that would really be turned over, and that was the
3 breadth of your argument.

4 MR. RAM: That was one of the Saint-Gobain cases.
5 The R&R also talks about Sullivan. In 2017, when the court
6 first got the Sullivan case, the court ordered some medical
7 records, but then in 2019, and we put it in our brief, after
8 the court lived with the case for a while -- because medical
9 monitoring is unique. We don't all have these every day. By
10 that point, when the court granted certification, it said the
11 strength of their claims does not depend on individual
12 features of their health. Plaintiffs seek only testing and
13 monitoring, which varies little between individuals. And then
14 the court in Sullivan v. Saint-Gobain went on to say if a
15 class member already suffers from elevated cholesterol, she
16 can skip the test.

17 Brown's wrong because it doesn't make any sense when
18 you think about what a medical monitoring case is. It's not a
19 personal injury case where we say they hurt me and I want
20 money for that. It's very different. It's where we have to
21 show, or we lose -- we have to show that there was a baseline
22 exposure to millions of people that puts millions of people at
23 risk.

24 Just a couple other class certification decisions,
25 Your Honor. The Meyer case, also in our papers, which shows

1 why Brown is wrong. Whether the individuals are presently
2 suffering from any lead-related injuries is primarily relevant
3 to a personal injury action, not a medical monitoring claim,
4 because the need for monitoring is based on a common threshold
5 of exposure.

6 And then most recently and closer to home, Valsartan.
7 When the court certified the class said every class member
8 shares a common legal question, the possibility of an
9 increased cancer risk, and then the court says, which can be
10 alleviated commonly by a medical monitoring program that
11 applies to all members.

12 We're not saying they don't get any medical records.
13 As I said, they get all of the usage orchestrator data, care
14 orchestra --

15 THE COURT: Well, those are medical records. All
16 that is shown is that you used the machine. It doesn't tell
17 you anything about the plaintiff's health other than perhaps
18 they had sleep apnea, but you don't even want to give them the
19 records to show why they had the device prescribed; is that
20 correct?

21 MR. RAM: Your Honor, we would, as I said, be glad to
22 answer an interrogatory about which plaintiffs have which of
23 the pleaded conditions because we can see how that's
24 marginally relevant, but everyone's medical history, the
25 millions of people in the class that they subjected this

1 formaldehyde to --

2 THE COURT: We're talking about 63 people.

3 MR. RAM: I understand, but we're talking about a
4 medical monitoring program, if we ask for it, would be for a
5 class, and Valsartan kind of acknowledges these cases only
6 make sense on a class basis. It doesn't matter to our claim
7 what our current medical history is. What matters is whether
8 Philips has subjected us to a baseline exposure to toxic
9 substances.

10 THE COURT: That's one element of the case.

11 MR. RAM: Well, I can go through all the elements,
12 Your Honor, but the elements do not involve us proving that
13 they caused a medical injury. The causation, which the Redlin
14 case talks about --

15 THE COURT: In some states you do have to show at
16 least a subcellular impact.

17 MR. RAM: Well, there's not going to be a doctor's
18 record that says I've just diagnosed you with subcellular.
19 That's not the sort of thing you go to the doctor and get
20 something diagnosed. That's going to be, obviously, the
21 subject of expert testimony. And that is the only physical
22 injury that we have alleged in our complaint --

23 THE COURT: I understand.

24 MR. RAM: -- Your Honor. So all that's left is are
25 we subject to an increased risk of something --

1 THE COURT: Can I just deviate from one point?

2 MR. RAM: Yes, Your Honor.

3 THE COURT: There is the medical monitoring in the
4 personal injury case. And so are you saying that medical
5 monitoring where you have another physical injury that you
6 demonstrated, that's going to be covered in the personal
7 injury complaint?

8 MR. RAM: Well, the lead counsel addressed that this
9 morning, Your Honor, and said that basically we are concerned
10 of some charge of claim splitting, and that's why that's in
11 the PI complaint. But the PI complaint is for the personal
12 injury --

13 THE COURT: There's some states that do require some
14 kind of injury, and it's a remedy. It's not a stand-alone
15 claim for most states. It's not a stand-alone claim. So it's
16 a form of relief and what you have to show to get the relief.
17 And is that going to be handled, if there is some kind of
18 physical injury, is that going to be in the personal injury
19 complaint?

20 I mean, these are just issues that I'm mulling over
21 because I'm trying to see why we have the claim in the
22 personal injury complaint. Is there another reason for it?
23 Maybe analyze somewhat to say as you were analyzing the
24 medical monitoring master complaint.

25 MS. IVERSON: Yes. Kelly Iverson. I wanted to step

1 in on the personal injury question. Obviously, with the
2 medical monitoring complaint here that's a class complaint,
3 we're dealing with the 69 named class plaintiffs.

4 THE COURT: Right.

5 MS. IVERSON: And the discovery issue in the report
6 and recommendation is specific to the discovery that's being
7 sought from those class representatives. The medical
8 monitoring claims are in the personal injury case, those
9 personal injury claims, they're turning over their medical
10 records already with respect to their personal injury case.
11 So that discovery is just not at issue here.

12 THE COURT: Okay.

13 MS. IVERSON: As Ms. Duggan explained this morning, a
14 part of that was with respect to the claim --

15 THE COURT: Are any of the 69 people involved in that
16 personal injury, these are people who have no -- they're not
17 asserting a personal injury claim?

18 MS. IVERSON: Correct.

19 MR. RAM: They're not.

20 MS. IVERSON: Correct. So the discovery and the
21 issue here is solely with respect to the class
22 representatives.

23 THE COURT: Okay.

24 MS. IVERSON: Now, if a class is certified and the
25 personal injury plaintiffs, you know, take part in that class,

1 they can get medical monitoring as a part of the class, right,
2 and as an absent class member as part of that relief and still
3 should be able to pursue their personal injury claim or they
4 could opt out of the relief and, you know, continue with
5 monitoring as their individual case.

6 But right now this discovery is focused on the class
7 case, the medical monitoring named plaintiffs and the medical
8 monitoring elements that you need to show the increased risk
9 and then a monitoring program different from the general
10 public, not different from these plaintiffs and these
11 plaintiffs now and what they're doing now, but different from
12 the general public. I will let Mike -- I just wanted to make
13 sure I addressed your personal injury question, Your Honor.

14 THE COURT: Why don't I hear from the defendant
15 Philips and then you can come back and reply.

16 MR. RAM: Thank you, Your Honor.

17 MS. ATTRIDGE: Thank you, Your Honor. Elise Attridge
18 again for Philips RS. I respect the court's time and Your
19 Honor's preference not to wade too deeply into discovery
20 disputes between the parties. So I'm going to focus on
21 certain statements that Mr. Ram and Ms. Cavaco made that I
22 believe need to be addressed and clarified.

23 So Mr. Ram first argued that plaintiffs should not
24 have to produce their medical information and records because
25 plaintiffs have produced SD cards, which is not accurate

1 because no plaintiff has done that yet. And he also said, we
2 have produced care orchestrator data or it's a matter of
3 signing the releases. I just want to point out for the record
4 that as of today, 11 medical monitoring plaintiffs have not
5 even signed those care orchestrator releases.

6 THE COURT: But they're saying they are going to turn
7 those over; they don't have a problem with that?

8 MS. ATTRIDGE: Correct, Your Honor. Mr. Ram also
9 made the argument that simply we, Philips, have not asked
10 which plaintiffs have had the pleaded conditions. "If they
11 did, we would have told them."

12 This is shocking to me because our interrogatories
13 and requests were served over a year ago. If you look at
14 interrogatory number 13, for example, it asked plaintiffs to
15 identify any and all diagnosed medical conditions or injuries
16 within the last ten years. If plaintiffs felt it was
17 appropriate at that time to identify which plaintiffs had the
18 pleaded conditions, they could have done so. Instead, we have
19 been stonewalled in getting any and all medical records or
20 information from them.

21 Additionally, Mr. Ram and plaintiffs do not cite
22 anything for the proposition that, just because some of the
23 plaintiffs may have pleaded conditions, that does not mean we
24 should get medical information. There's no case law that
25 plaintiffs cite. The only thing they cite to is the

1 settlement notice from the C8 DuPont case, but, of course, our
2 case is much different. We are not in settlement proceedings.
3 The plaintiffs still need to prove each and every element of
4 their cause of action. And as shown in our papers,
5 plaintiffs' medical histories and information are relevant to
6 a number of elements of their claims and defenses.

7 THE COURT: My question to you is you have excluded
8 any mental health conditions. So why aren't some of these
9 other things excluded as well?

10 MS. ATTRIDGE: That's a great question, Your Honor,
11 and I can answer that. I do want to make a special nod,
12 actually, to Special Master Katz. In footnote 5 of her report
13 and recommendation, she expressly acknowledges that the
14 parties raised this very issue in meet-and-confers and
15 promised to, when sensitive topics such as domestic violence,
16 substance abuse, things like that come up, the parties would
17 meet and confer. That's even in her proposed order attached
18 to her R&R.

19 THE COURT: I get that. But at this stage, rather
20 than getting into another fight -- because the plaintiffs are
21 going to get to see, if there's records to be turned over,
22 plaintiffs get to see those records before they're turned
23 over. That's part of the recommendation from the special
24 master. So then are they going to have to say, oops, you
25 know, there's some domestic violence in here, there's sexually

1 transmitted diseases? Well, I mean, that's the kind of thing
2 shouldn't you be including those now so we don't get into
3 these battles down the road?

4 I mean, what I would say is the plaintiffs have
5 specifically identified certain conditions or treatment for
6 certain situations that would not be likely to produce any
7 relevant information but would be highly sensitive, you know,
8 that most people would not want other individuals to look at
9 and see. And we are dealing with highly sensitive personal
10 medical information.

11 So I guess my question to you is why can't you just
12 agree now at least at a certain level? There may be some
13 other things that come up and they weren't apparent at first
14 blush, but that plaintiffs' counsel sees it and says, oops, I
15 think this should be included and then you can include those.
16 But it just strikes me -- I mean, why if I had a sexually
17 transmitted disease ten years ago, you know, you need to know
18 about it or you need somebody to be looking over it?

19 MS. ATTRIDGE: Sure.

20 THE COURT: So that would be my question.

21 MS. ATTRIDGE: I hear you, Your Honor, and I'm glad
22 you used that as an example, because, for example, it's now
23 known in the medical community -- and I'm not a doctor, but
24 just going based on my understanding -- that an infection with
25 HPV, which is a sexually transmitted disease, can lead to

1 throat cancer in the future. And so given the completely
2 limitless pleaded conditions in the complaint, that would
3 still be relevant as a pleaded condition, that HPV diagnosis.

4 During meet-and-confers, we expressly invited
5 plaintiffs to narrow their list of pleaded conditions, and
6 they declined to do so, but the Trask v. Olin case out of the
7 Western District of Pennsylvania tells us that the appropriate
8 scope of discovery, you look to the pleadings. And so here,
9 looking at paragraph 371 of the complaint, the plaintiffs use
10 open-ended and limitless language that puts their medical
11 conditions at issue.

12 Also, our interrogatories and requests are directly
13 supported by the case law, the relevant cases that compel
14 medical monitoring plaintiffs to provide the same type of
15 information if not broader information.

16 For example, in the Ballard case, that court
17 compelled plaintiffs to answer interrogatories, medical
18 monitoring plaintiffs, about every single medical condition,
19 psychiatric condition they've experienced ever in their lives.
20 Our requests and interrogatories are much more narrow.
21 They're based on the case law. They're based on the extremely
22 broad pleadings. And we have committed to plaintiffs to meet
23 and confer about highly sensitive areas of medical records,
24 and we believe that is appropriate.

25 THE COURT: Thank you.

1 MS. ATTRIDGE: Thank you, Your Honor. Let's see. A
2 few other points before I wrap up here, but just to point out
3 Mr. Ram argued that, in meeting the element where plaintiffs
4 need to show whether the prescribed monitoring differs from
5 that normally recommended in the absence of exposure, he is
6 taking far too narrow an approach just focusing on the general
7 population. I wanted to point out that the Barnes decision
8 from the Third Circuit holds that plaintiff needs to show the
9 monitoring compared to the general population and the specific
10 plaintiff.

11 I also wanted to address Mr. Ram's point on the two
12 Sullivan cases, Sullivan v. Saint-Gobain in 2017, in 2019.
13 Just to distinguish that 2019 case from ours, in that case,
14 the Sullivan 2 decision, the plaintiffs defined the class
15 based on the results of their blood test. And so the court
16 saw that, in light of that laboratory test, that placed all
17 plaintiffs in the same boat, so to say, their individualized
18 medical issues were less important. That still doesn't undo
19 the prior decision that compelled the exact records and
20 information the defense is seeking here, Your Honor.

21 I will start to wrap up here to be respectful of your
22 time, but we just want to recognize that Special Master Katz
23 has spent considerable time and effort working with the
24 parties over many months, has successfully narrowed some of
25 the issues. The parties had a chance to fully brief this

1 dispute, even submit supplemental written statements and
2 present oral argument to her. She issued her report and
3 recommendation which largely reaches the correct conclusions
4 and is fully supported by the existing case law here.

5 So we would like to respectfully reiterate our
6 request that the court adopt her R&R except for the three
7 narrow points or clarifications raised by Philips RS in its
8 objections, and I appreciate Your Honor taking the time before
9 we began to clarify your viewpoints on a few of those
10 objections. At this time I'm happy to address any other
11 questions the court may have.

12 THE COURT: No, that's fine. Once I hear back from
13 Mr. Ram and his colleague.

14 MS. ATTRIDGE: Great. And one final point from me,
15 please, Your Honor, given the importance of this discovery to
16 Philips RS and our desire to keep the case moving forward, we
17 would be welcome to a verbal ruling from the bench if the
18 court is so inclined today. Thank you.

19 THE COURT: Thank you.

20 MR. RAM: Three quick points in response, Your Honor.
21 Interrogatory number 13 that counsel was referring to, it
22 demonstrates the entire problem. Identify any and all
23 diagnosed medical conditions or injuries and any medications
24 or treatments that you have been prescribed, whether or not
25 such conditions, injuries, medications, or treatments were

1 related to the injuries allegedly attributable to use of a
2 recalled device.

3 That's absurd in the context of a case where we're
4 saying we're not even suing for a physical injury right now.
5 We're suing for an increased risk because of exposure.

6 THE COURT: You know what the problem is? Just put
7 yourself in the defendant's position now. You would be -- if
8 they don't have this interrogatory, you would be in a position
9 to say, oh, I looked at this and the sexually transmitted
10 disease is not attributable to the -- cannot be -- you cannot
11 use that disease to make it attributable to the recalled
12 device, but if, in fact, it's throat cancer and she's correct
13 and that could be something that would trigger the throat
14 cancer and you're going to be monitored for that because you
15 had that disease in the past, wouldn't that still be relevant?
16 And do they have to agree that you're the one that makes the
17 call on whether or not it's relevant rather than getting the
18 information, having their experts look at it just as you're
19 going to be having your experts look at the information as
20 well?

21 MR. RAM: If there were a personal injury, whether
22 it's some sort of disease, as Your Honor is describing, or
23 anything else, it wouldn't be in this case.

24 THE COURT: No, it's in the case in the sense that I
25 may -- I may get an injury of cancer because I used the

1 machine, right? That's what you're saying. You had this
2 exposure, toxic exposure and down the road you may get some
3 form of cancer. So you want to get medical monitoring to see
4 if you have that cancer. But if you already had a separate
5 disease that could result in the same kind of cancer and
6 you're going to be screened for that anyway as a result of
7 your -- that prior condition, wouldn't the defendants need to
8 know about that?

9 MR. RAM: That's what the Sullivan case addresses and
10 says, if you are already getting this test, then you just skip
11 this test and you get the other ones. It doesn't justify a
12 fishing expedition into one's entire medical records.

13 This is how in the C8 case which I mentioned, this is
14 how the medical monitoring program dealt with it. Medical
15 monitoring is for a vast array of people. If somebody's
16 already getting the test, they skip that one and get the other
17 test. In terms of trusting us, we have to trust them if they
18 answer an interrogatory that they're, you know, telling the
19 truth. If we answer an interrogatory as to which of the --

20 THE COURT: But it's your analysis. I'm not saying
21 that they're trusting you. You in good faith made that
22 analysis. Maybe their expert, when they review it, would come
23 to a different conclusion. It's that type of thing. Nobody's
24 questioning your integrity or your reasons for answering
25 something a certain way, but sometimes they want to have a

1 broader request so that they can make some of those same
2 determinations, too.

3 MR. RAM: Well, since it's a very questionable
4 relevance and invades a privacy, you would think that it would
5 suffice for us to just list which of the plaintiffs have been
6 diagnosed with which of the many diseases that Philips has
7 given us a list for. And when we get to class cert, we'll
8 likely narrow that down, but right now we don't have the
9 personal injury claim, so they're not entitled to all of our
10 medical -- and certainly they're not entitled to a broader
11 spectrum of information than if it were a personal injury case
12 where you'd never get everything you've ever been treated for.

13 Lastly, Barnes --

14 THE COURT: I don't think you're getting all the
15 medical records at this time. They're going to be just a
16 report, just an answer to an interrogatory. And then if they
17 feel they need those, they would have to come back. We're not
18 dealing with a pleaded condition issue. My understanding is
19 that the special master -- was she able to stay?

20 SPECIAL MASTER KATZ: I'm here.

21 THE COURT: Am I reading it correctly? They have to
22 answer the interrogatory, and then if there's a follow-up,
23 they have to come back and seek leave to take that additional
24 discovery.

25 SPECIAL MASTER KATZ: Yes.

1 MR. RAM: But we're answering an interrogatory about
2 medical conditions that are entirely irrelevant and are
3 privileged. That's the problem, Your Honor.

4 THE COURT: Well, you know, the privilege can be
5 overcome by court order to compel it and then having the
6 protective order in place, which we already have. So it's a
7 question of how you categorize your responses here. And the
8 questions of relevance, I mean, the special master has looked
9 at it and said, yes, it's relevant.

10 In the broad scheme of things, I haven't seen a
11 really good proportionality argument since you're going to
12 have to be looking at these records anyway for the most part
13 that would say it's disproportionate. And I mean, you raised
14 it, but I don't see any concrete evidence presented to the
15 court about proportionality.

16 MR. RAM: Okay. Well, from our perspective --

17 THE COURT: So I see this as purely a relevance issue
18 at this stage.

19 MR. RAM: Yes, Your Honor. From our perspective,
20 it's entirely disproportionate to inquire about private
21 medical history that is utterly unrelated to the claims that
22 we're bringing before the court, and Your Honor mentioned
23 proportionality. Proportionality came into Rule 26 --

24 THE COURT: Right.

25 MR. RAM: -- as Your Honor knows, in 2016. And the

1 Ballard case was 2012 and a number of the other cases that
2 they mentioned offered no proportionality analysis. And here,
3 in our papers, we show why this sort of --

4 THE COURT: Proportionality, it has to do with
5 disproportionate to the issues. And I guess what you're
6 arguing is that the privacy issue here is so important. And
7 I'd have to direct you to -- nobody cited to the Dobbs
8 decision which basically says that there's no constitutional
9 privacy issue like that.

10 We do recognize that information may be confidential,
11 you know, and it would be very concerning, if it would become
12 public, to individuals, and that's where the protective order
13 comes in. If you want to get additional protections for that,
14 which I think you already have a way to make it attorneys'
15 eyes only.

16 MR. RAM: Yeah, and Ava can address any further
17 privacy issues, but it's disproportionate because it's
18 irrelevant. It's not just private. It's irrelevant because
19 we're not bringing personal injury --

20 THE COURT: Well, I read the elements of the claim
21 and the way it's been interpreted by certain courts including
22 the Third Circuit. What do you say about the Barnes decision?

23 MR. RAM: Barnes. This is what the Eastern District
24 of Pennsylvania said about Barnes, and then I'll stop there,
25 Your Honor. And this is from Fen-Phen, 1999, Westlaw 673066.

1 Barnes involved numerous defendants who manufactured hundreds
2 of brands of cigarettes, many of which contained different
3 ingredients. At different times plaintiffs asserted that
4 levels of nicotine and other toxic substances were altered to
5 induce addiction, thus nicotine addiction and levels of
6 nicotine in cigarettes constituted individual issues which
7 destroyed cohesion. Plaintiffs did not allege that the
8 chemical compounds of --

9 THE COURT: This is a class certification case.

10 MR. RAM: Yeah, but the point is we're not -- Barnes
11 is almost sui generis. And you know, years later courts are
12 now certifying tobacco cases. But the point of Barnes is it
13 was really about addiction, and tobacco companies were
14 consciously, you know, titrating the amounts of nicotine in
15 cigarettes to addict kids and to addict everybody.

16 That's not our case. We're not saying they addicted
17 us to CPAP machines. We're not suing a whole number of
18 defendants. We're not talking about different or I guess it
19 was hundreds of brands of different cigarettes in that case.
20 So Barnes really has very little to do with our case, Your
21 Honor.

22 Our case is very simple. We have to show that
23 everybody was exposed to enough toxics that, regardless of
24 what their past history is, they're entitled to a variety of
25 tests. And if they're already getting that test, they can

1 skip that one. And I'll just stop there, Your Honor. Thank
2 you very much. Appreciate it.

3 THE COURT: Okay. Okay. At this stage, there's only
4 one of the other objections that the Philips defendants
5 raised, and that was with respect to request for production of
6 documents 7, 12, 15, 17, 19, and 34. It's recommended in the
7 report and recommendation that because Philips had conceded
8 mootness if the medical records are received. Philips is
9 denying that concession, but I did look over what was
10 submitted, and it appears that they did concede that. So I
11 think that the special master's correct in that.

12 So the clarification that the current treatment
13 monitoring would be included for RFP-22, the -- RFP-2 is
14 granted -- should be granted. And then I think I've handled
15 each of your issues then. Is that correct?

16 MS. ATTRIDGE: Your Honor, there's one. The third
17 and final objection pertains to request for production
18 number 27 which we believe falls under Special Master Katz's
19 proposed two-step process. And we respectfully submit that
20 step one has already been met, and that the plaintiffs are all
21 alleging subcellular injury or other physiological harm, and
22 so we believe the time is ripe for plaintiffs to be compelled
23 to respond to that request about their condition, injuries,
24 and damages.

25 THE COURT: I'm not sure that they're alleging

1 subcellular harm for all the plaintiffs. Are you, Mr. Ram?

2 MR. RAM: Yes, Your Honor.

3 THE COURT: Okay. So if you're making those
4 allegations, why wouldn't you have to turn over the records?

5 MR. RAM: So for 27, we're just talking about
6 subcellular, Your Honor?

7 THE COURT: Yes.

8 MR. RAM: Okay then.

9 THE COURT: Do you have any --

10 MR. RAM: Except to the extent that it's, you know,
11 expert testimony, it would be premature for us to have the --

12 THE COURT: Is there a record that the expert would
13 be relying on?

14 MR. RAM: No, I'm just saying to the extent that we
15 had expert testimony, we wouldn't be producing that.

16 THE COURT: Exactly. If there's something in the
17 files, a medical record?

18 MR. RAM: Yes.

19 THE COURT: Can I hear from the special master?

20 SPECIAL MASTER KATZ: I'm just confused. I'm looking
21 at number 27 request, and it's not limited to subcellular.

22 THE COURT: Subcellular.

23 MS. ATTRIDGE: Right. It specifically asked about
24 their present condition. However, the plaintiffs have all
25 alleged that they suffered subcellular injury, and in the

1 filings to this court, they represent that that constitutes --

2 THE COURT: So it would be granted to the extent of
3 any alleged subcellular -- any record that would pertain to a
4 subcellular injury but not to include any expert analysis; is
5 that fair?

6 MR. RAM: Thank you, Your Honor.

7 THE COURT: Okay. And then it would remain the same
8 recommendation as to non-subcellular injuries.

9 MS. ATTRIDGE: Thank you, Your Honor.

10 THE COURT: Okay. Okay. So my view, it's really not
11 a change. I did go back and read the decision. And there's a
12 difference between when you get to the class certification
13 because you're going to be narrowing some of these things.
14 You're going to have your experts weighing in and see what you
15 can prove, what you can't prove. And I don't know this for a
16 fact, of course, because we have to wait to see what happens,
17 but I would be -- I would not be surprised if there was a
18 narrowing and so some of these things may go away. But we're
19 not at that stage, and I think that's what discovery aids in
20 and getting it narrower, and if the plaintiffs have that
21 information -- excuse me. If the defendant has that
22 information, you know, it can help in the negotiations and
23 discussions about what actually you might need for a class
24 certification, how are you going to certify that particular
25 class.

1 So I think the decisions that were cited by the
2 special master's order per analysis are the better persuasive
3 decisions, and so I would adopt her R&R, and I'll have a short
4 order entered to this effect, but I'd be adopting it with the
5 corrections to the -- with the correction noted that the
6 request for production at request for production 2 is granted
7 and that the RFP 27 is going to be -- the special master's
8 would be modified to provide that if there are documents
9 related to the subcellular medical treatment, they would be
10 turned over, but the process would be as the special master
11 recommends with respect to any other injury. Okay?

12 Is there anything else to come before the court on
13 that matter?

14 MR. RAM: No, Your Honor.

15 MS. ATTRIDGE: No, Your Honor.

16 THE COURT: Any other clarifications? Okay. Thank
17 you all. I'll have a short order that comes out on this.
18 Thank you, all. Good arguments, and it was helpful for me to
19 get a better appreciation between the two complaints in terms
20 of how medical monitoring is being affected and the true
21 nature of these plaintiffs versus the plaintiffs in the PI
22 master complaint. Thank you all.

23 (Proceedings concluded at 3:51 p.m.)

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C E R T I F I C A T E

I, JANE PROUD, RDR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case.

S\ Jane Proud
JANE PROUD, RDR, CRR
Official Court Reporter