

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

**IN RE: PHILIPS RECALLED CPAP,
BI-LEVEL PAP, AND MECHANICAL
VENTILATOR PRODUCTS
LITIGATION**

Master Docket: 2:21-mc-1230

MDL No. 3014

This Document Relates to: ALL CASES

**ORDER APPOINTING AND SETTING DUTIES OF SPECIAL MASTER
FOR GENERAL DISCOVERY AND E-DISCOVERY**

In light of the size and complexity of the above-captioned MDL, and to preserve judicial resources, the Court, upon the joint motion of the parties, has determined that it would be beneficial to appoint a Special Master for General and E-Discovery to assist the Court. The Court finds that appointment of a Special Master is necessary to address practical matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of this District. In appointing a Special Master, the Court has considered the fairness of imposing the expenses on the parties and has taken steps to protect against unreasonable expense or delay. In light of the parties' agreement to the selection of Carole Katz, Esq., as a proposed Special Master, and the Court being advised by Ms. Katz that she is aware of no grounds for disqualification and of her ability to accept the Court's appointment,

IT IS HEREBY ORDERED, pursuant to Federal Rule of Civil Procedure 53 that Carole Katz, Esq. is appointed Special Master for General and E-Discovery in the above-captioned MDL until further order of this Court. The Court has received an affidavit from Ms. Katz disclosing whether there are any grounds for disqualification under 28 U.S.C. § 455. The Court has been advised that the parties have consented to waive any such grounds for disqualification.

See Fed. R. Civ. P. 53(a)(2) and (b)(3B). The Court finds that Ms. Katz is well qualified to carry out the responsibilities of this position.

IT IS FURTHER ORDERED that the Special Master shall oversee discovery between and among the parties and, if applicable, third parties. The Special Master and the parties shall follow the procedures provided in this Order.

Duties and Responsibilities of the Special Master

1. The Special Master shall oversee discovery and discovery planning between and among the parties and third parties. If the parties are unable to agree on the resolution of any discovery dispute between them or with third parties, the Special Master shall prepare and file a report and recommendation (R&R) with respect to that dispute, as discussed below. The Special Master may also perform any and all duties assigned to her by the Court as permitted by both the Federal Rules of Civil Procedure and Article III of the Constitution. For clarity, the Special Master shall not have the authority to lift the discovery stay in Pretrial Order 1.

2. Pursuant to Rule 53(b)(2), the Special Master is directed to proceed with all reasonable diligence to perform the duties set forth herein, as well as any additional duties that the Court in its discretion may impose from time to time as necessary by further orders.

3. The Special Master shall have the authority to take all appropriate measures to perform her assigned duties fairly and efficiently. To the extent the Special Master issues any R&R on any dispute referred to her by the Court or the parties, the Special Master shall comply with all the requirements of Rule 53(d) respecting entry of any such R&R.

4. The Special Master and the parties shall follow the procedures provided in this Order. The Court strongly believes that any discovery related disputes should be resolved between the parties without the need for judicial intervention. However, in the event that the

parties are unable to resolve a dispute, the Special Master shall prepare a R&R for submission to this Court consistent with paragraphs 22 through 26 of this Order.

5. As an initial matter, the Court directs the Special Master to meet and confer with the parties regarding a reasonable schedule and plan for discovery, including for written discovery (including ESI search methodologies and protocols, as well as regarding the number of interrogatories for each party), depositions, and expert discovery. The Special Master shall implement such deadlines as necessary to ensure the timely submission to the Court of an agreed-upon discovery plan.

6. The Special Master is authorized to hold regular status conferences to provide a forum for the parties to discuss progress of discovery, anticipated discovery, and any foreseeable issues arising in the discovery process between parties or with third parties, and to discuss such other matters as scheduled by the Special Master or requested by the parties or the Court. The Special Master may schedule as many or as few status conferences as she sees fit and may, in her discretion, hold the conferences via remote means (*e.g.*, Zoom) or require the parties to attend any status conference in person if reasonably possible. The status conferences need not be on the record, but shall be recorded to the extent feasible using reasonably available technology (*i.e.*, Zoom meeting recording; audio recording). The parties may agree to, or a party may request, transcription of a proceeding before the Special Master at the requesting parties' expense. To the extent the Special Master determines an in-person conference is necessary, to encourage efficiency, she may, to the extent practicable, endeavor to schedule any in-person status conferences in coordination with the regularly scheduled MDL status conferences occurring monthly before the Court, provided that such coordination does not result in undue delay.

7. The Special Master may hold other meetings or hearings as she deems appropriate. All adjudicative hearings in front of the Special Master shall be recorded by a court reporter as if the hearing was being held before the Court.

8. The parties intend for any overlapping discovery between MDL No. 3014 and MDL No. 3021 (*In re: SoClean Inc., Marketing, Sales Practices & Products Liability Litigation*) to be coordinated to the extent such coordination would result in greater efficiency and/or less burden and not cause undue prejudice or delay. To that end, the Special Master shall assist in the coordination of any overlapping discovery (and any disputes with respect thereto) between the two MDLs. The Special Master may in her discretion hold joint meetings, conferences, or adjudicative hearings between the parties she determines would be beneficial to have involved for the coordination envisioned by this paragraph.

9. Upon request, the parties shall furnish the Special Master with copies of all filings, briefs, discovery materials, and all documents requested by the Special Master reasonably necessary to perform the Special Master's duties under this Order. Any documents that are subject to any disputed claim of privilege may be submitted to the Special Master *in camera* for review.

10. The Special Master may correspond with counsel for the parties jointly through conference calls and written correspondence, including, but not limited to, emails and letters, and may, at any time, request additional information or documents from the parties relating to the duties described herein, including, without limitation, (i) briefs, letters, or position statements clarifying or providing additional information about the respective positions and (ii) documents that are not provided *in camera*, such as documents referenced in documents provided *in camera* or documents necessary to provide context to documents provided *in camera*.

11. Pursuant to Rule 53(b)(2)(C), the Special Master shall maintain orderly files consisting of all documents submitted to her by the parties and any of her written orders, findings, and/or recommendations. The Special Master shall report to the Court as directed by the Court.

12. Promptly upon entry of this Order, the Special Master shall hold a conference call with counsel for the parties to discuss the terms of this Order, the process for overseeing discovery, the coordination of discovery addressed in Paragraph 8, as well as the initial matters set forth in Paragraph 5.

13. Any discovery dispute brought in this MDL between a party and a third party shall be submitted to the Special Master to be resolved in accordance with the provisions of this Order. Any parties involved in such disputes shall provide a copy of this Order to the relevant party or third parties.

14. At the sole discretion of the Special Master, any discovery dispute noticed in accordance with the procedures set forth herein may be (1) ruled upon without oral argument, (2) heard by telephone or video conference, or (3) heard at a scheduled in-person conference.

15. The Special Master may have access to trade secrets, proprietary information, and other confidential information in this action, including but not limited to, information that may be subject to the Stipulated Protective Order, and any amendments thereto, entered by the Court in this MDL. The Special Master shall be bound by the terms of the Stipulated Protective Order. Any disputes under Section V of the Confidentiality Protective Order with respect to confidentiality designation are to be presented to the Special Master for determination via R&R. The Special Master is granted authority to make determinations via R&R on confidentiality designation challenges.

16. At either the Special Master's discretion, the request of the parties, or at the direction of the Court, if one of the Court's regularly scheduled status conferences involves a matter relevant to the Special Master, the Special Master shall be permitted to participate.

17. The Special Master shall make every effort to minimize expenses while at the same time carrying out the mandates of this Order. The Special Master shall have the sole discretion to determine the appropriate procedures for exercising all the assigned duties and shall have the authority to take all appropriate actions to perform the assigned duties.

18. The Court retains sole authority to issue rulings on all matters submitted to it, unless otherwise agreed to by the parties.

19. If in the conduct of her investigation, the Special Master believes it necessary to engage and direct employees and resources other than her own labor, in order to adequately conduct said investigation, the Special Master shall request approval of the same from the Court with proper notice to the parties and opportunity to be heard by the Court, if requested.

20. The Special Master is also responsible for resolving privilege log disputes; provided, however, that if in the course of this litigation, the Special Master determines that appointment of a separate Special Master for privilege log disputes is necessary, the parties shall notify the Court and work cooperatively to select an appropriate individual to propose for such appointment.

21. The duties and powers of the Special Master are limited to those specifically set forth herein. The Special Master shall not have the power to issue any binding orders or impose any sanctions.

Procedure for Reports and Recommendations

22. Any discovery dispute brought to the Special Master, and within the authority of the Special Master under this Order and Federal Rule of Civil Procedure 53, shall be resolved by the Special Master after such investigation, presentation of evidence, and argument as the Special Master may deem appropriate, upon such schedule as the Special Master shall set, and consistent with the rulings of the Court.

23. If the parties are unable to resolve a dispute amongst themselves or with the guidance of the Special Master and wish to raise a discovery dispute for adjudication, that party shall submit a letter-motion not to exceed five (5) single-spaced pages to the Special Master, setting forth the nature of the dispute, supporting arguments, and the requested relief. Unless there is a demonstrated need for an expedited schedule, the party opposing the motion shall have ten (10) business days within which to respond to the motion. Responses shall be in the form of a letter response not to exceed five (5) single-spaced pages. The party raising the dispute shall have five (5) days to file a reply in the form of a letter not to exceed three (3) single-spaced pages. Any party may also seek leave of the Special Master to exceed the page limits noted herein for good cause within the discretion of the Special Master. All submissions shall be served on the relevant parties via email. The Special Master is granted authority to hold oral argument on discovery disputes at her option and may resolve disputes without oral argument based only on written submissions of the parties at her option.

24. The Special Master shall prepare and file on the docket a written R&R concerning the nature and disposition of such dispute in accordance with Rule 53. Within fourteen (14) days of the filing of the R&R, any party may file an objection to the R&R, setting forth the basis for such objection. Any party opposing such objection shall file a response thereto within fourteen

(14) days of the filing of the objection. The failure to file a timely objection shall constitute a waiver of any objection.

25. The party filing the objection pursuant to the paragraph above shall submit with such objection any record necessary for the Court to review the Special Master's R&R, including, if necessary, any transcript of proceedings before the Special Master and any documents submitted by the parties in connection with the proceedings.

26. Pursuant to Federal Rule of Civil Procedure 53(f)(3)-(5), the Special Master's findings of fact and conclusions of law, procedural rulings, or recommendations shall be reviewed *de novo*.

Ex Parte Communications

27. Unless authorized by the Court or by express written consent of all parties, the Special Master shall not have *ex parte* communications with the parties. The Special Master may communicate with counsel for the parties *ex parte* for purely administrative matters.

28. The Special Master may, at any time, communicate *ex parte* with the Court for any purpose relating to the duties described herein. In particular, if the Special Master identifies any matters that pose particular or unique problems, the Court shall be consulted. The Court, in its discretion, may also communicate *ex parte* with the Special Master for any purpose relating to the Special Master's duties described herein

Fees and Expenses

29. The Special Master shall maintain detailed billing records of the time spent on these matters, with descriptions of the activities and matters worked on, which shall be submitted to the parties on a monthly basis for review and payment.

30. The Special Master shall be paid her standard hourly rate and reimbursed for reasonable out-of-pocket expenses in connection with the discharge of her duties.

31. The Special Master has submitted a proposed compensation schedule to the parties, including fee and/or rate information, any retainer, and expense reimbursement guidelines. The parties have agreed to the Special Master's proposed compensation schedule.

32. The Special Master shall submit to the parties on a monthly basis an itemized statement of all fees and costs incurred in connection with this Order during the previous one-month period, beginning on the first day and ending on the last day of such month ("Monthly Invoice"). Each Monthly Invoice shall detail the work performed, the hours spent, and the costs incurred during the corresponding one-month period. Any non-routine expenses, including expenses associated with outside consultants proposed to be engaged or engaged by the Special Master, must be approved in advance by the parties. If a party objects to any proposed non-routine expense or to any fee or other charge on a Monthly Invoice, the party shall provide notice of the objection to all other parties, and the parties and the Special Master shall work in good faith to resolve the objection. If the parties and the Special Master cannot resolve an issue, any party then may submit the dispute to the Court. As the Monthly Invoice may reveal confidential communications between the Special Master and the parties, the Court shall maintain any Monthly Invoice under seal when filed in connection with a dispute under this paragraph.

33. The parties shall be responsible for paying to the Special Master each Monthly Invoice within sixty (60) days of receipt of such Invoice in whatever manner is agreed upon by the parties and the Special Master. Generally speaking, Plaintiffs will pay 50% of the invoice, and Defendants will pay 50% of the invoice; provided, however, that this structure is based on the current composition of the parties and may be subject to change in the event parties are added

or removed from this case. To the extent that a dispute does not involve all parties, the parties shall meet and confer and apportion the costs among the parties involved in the dispute. Where the Special Master's work is relevant to this MDL and MDL No. 3021, the Special Master shall ensure any time billed is split equitably between the MDLs as appropriate based upon the work that is performed. If no resolution of those payment issues can be reached, then the dispute will be referred to the Court. The Monthly Invoice shall set forth in reasonable detail the tasks performed by the Special Master and the hours spent performing the tasks, as well as the expenses incurred. For disputes between parties and third parties, the Special Master's fees and expenses are to be divided proportionally among the parties to the case involved in the discovery dispute. To the extent that a discovery dispute involves a third party, the Special Master will determine how fees and expenses will be allocated. The costs associated with the services of the Special Master shall not be considered taxable under 28 U.S.C. § 1920(4).

This Order shall apply to all cases that are currently part of the above-captioned MDL, and those cases that are filed in or transferred to the Western District of Pennsylvania in the future and become part of the MDL. This Order may be amended from time to time if the Court finds it to be necessary and appropriate.

IT IS SO ORDERED.

DATED: May 4, 2022

s/Joy Flowers Conti

The Honorable Joy Flowers Conti
Senior United States District Judge

AGREED TO THIS 5th DAY OF MAY, 2022:

/s/ John P. Lavelle, Jr

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