

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

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

Master Docket: Misc. No. 21-mc-1230-JFC
MDL No. 3014

This Document Relates to: All Actions

PRETRIAL ORDER #16

APPOINTING SETTLEMENT MEDIATOR

AND NOW, on this 26th day of May, 2022, the Parties having agreed to the appointment of a Settlement Mediator, IT IS HEREBY ORDERED as follows pursuant to Local Rule 16.2 and this Court's ADR Policies and Procedures:

Appointment of Retired Magistrate Judge Diane Welsh. After conferring, the Parties have agreed to the appointment of Retired Magistrate Judge Diane M. Welsh of JAMS as the Settlement Mediator. The Court now enters this Order of Appointment appointing Judge Welsh as the Settlement Mediator pursuant to Local Rule 16.2.

Settlement Mediator Duties and Authority. The Settlement Mediator will assist the Court with settlement matters only. She may take all appropriate measures to perform her duties fairly and efficiently. As set forth in Section 2.5(B)(1)(c) of the Court's ADR Policies and Procedures, the Settlement Mediator shall adhere to the Model Standards of Conduct for Mediators and all other standards of professional conduct as required by this Court.

To facilitate settlements, the Settlement Mediator shall have the full authority provided in Local Rule 16.2 and the Court's ADR Policies and Procedures. The Settlement Mediator may, without limitation:

1. Order the Parties, including subsets of the Parties, to meet to engage in settlement discussions.
2. Construct an efficient procedure to engage the Parties in settlement discussions, including:
 - a. setting a reasonable schedule and plan for mediation, including the sequencing of mediations to attempt to resolve the claims for economic loss, medical monitoring, and personal injury;
 - b. identifying appropriate cases for Bellwether mediations;
 - c. identifying information that each Party should disclose in order to facilitate settlement discussions;
 - d. creating a form and a schedule for the voluntary exchange of such information;
 - e. coordinating with the Discovery Special Master, Carole Katz, to facilitate the exchange of documents or information relevant to settlement discussions; and,
 - f. conducting in-person and remote settlement discussions with the Parties and their counsel.
3. Identify any persons whose participation is necessary to settle any claims completely (including, if appropriate, non-parties whose participation may facilitate settlement).
4. Make recommendations to the Court concerning any issues that may require resolution to facilitate settlement or to efficiently manage the litigation.
5. Direct, supervise, monitor, and report upon implementation and compliance with the Court's orders.

Coordination with SoClean MDL. The Court also has appointed Retired Magistrate Judge Diane M. Welsh as the Settlement Mediator in MDL No. 3021 (*In re: SoClean, Inc.*,

Marketing, Sales Practices & Products Liability Litigation). The Settlement Mediator shall have the full authority to coordinate settlement discussions and other settlement-related proceedings between the two MDLs, and between some or all of the Parties in the two MDLs, in her discretion.

Proceedings. In performing her duties, the Settlement Mediator has the authority to schedule and hold conferences and to regulate all proceedings before her. The Settlement Mediator may require the Parties to appear in person, via video conference or telephonically.

Report of the Neutral. Pursuant to Section 3.10 of the Court's ADR Policies and Procedures, at a date to be determined by the Court, the Settlement Mediator will electronically file the "Report of the Neutral" reporting on the "date of the mediation, whether any follow up is scheduled, whether the case resolved in whole or in part, and any stipulations the parties agree may be disclosed."

Ex Parte Communications. Pursuant to Fed. R. Civ. P. 53(b)(2)(B), the Settlement Mediator may communicate *ex parte* with the Court. She also may communicate *ex parte* with a Party's counsel.

Access to Information. The Parties will make readily available to the Settlement Mediator any and all individuals, information, documents, materials, programs, files, databases, services, facilities, and premises under their control that the Settlement Mediator requires to perform her duties. The Settlement Mediator may require reports from any Party in a format specified, as reasonably required to enable the Settlement Mediator to perform all assigned duties.

Confidentiality. The Settlement Mediator may have access to trade secrets, proprietary information and other confidential information in this action including, but not limited to, information which may be subject to the Stipulated Protective Order (Dkt. 104). The Settlement

Mediator shall be bound by the terms of the Stipulated Protective Order and any amendments thereto.

As set forth in Sections 6.A through 6.C of the Court's ADR Policies and Procedures, the Settlement Mediator, all counsel and Parties, and any other persons (including non-parties) participating in settlement discussions shall treat as "Confidential Information" the contents of any written settlement statements or other settlement-related communications, anything that happened or was said, and any position taken or view expressed by any participant in connection with any settlement conference or discussion. "Confidential Information" shall not be:

- (i) Disclosed to anyone not involved in the settlement discussions;
- (ii) Disclosed to the Court; or,
- (iii) Used for any purpose, including impeachment, in any pending or future proceeding.

In addition, the Settlement Mediator will adhere to the Limited Exceptions to Confidentiality set forth in Section 6.D of the Court's ADR Policies and Procedures.

Notwithstanding the above, upon the agreement of all relevant participating Parties, the Settlement Mediator may communicate Confidential Information to the Court without violating this Order or the rules governing confidentiality of settlement discussions. The Settlement Mediator may otherwise communicate with the Court regarding non-confidential matters, including procedural issues, the nature of the Settlement Mediator's activities, and updates on the progress of settlement communications; but, as explained above, she shall not communicate any Confidential Information to the Court absent the relevant Parties' agreement.

To facilitate potential resolutions, the Court orders that any and all statements made during the course of proceedings before the Settlement Mediator are confidential and privileged settlement discussions, are made without prejudice to any Party's legal position, and are

inadmissible for any purpose in any legal proceeding. Any offers, promises, conduct, and statements (a) will not be disclosed to third parties except persons associated with the participants in the process, and (b) are privileged and inadmissible for any purposes, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule, or common law provisions. All communications with and submissions to the Settlement Mediator by the Parties or their counsel are for the purposes of mediation and are privileged under 42 Pa.C.S. Section 5949 (Pa. statutory privilege for mediation communications and documents).

Compensation. The Settlement Mediator shall be paid her customary hourly rate and expenses and may obtain assistance from her colleagues at JAMS at their customary hourly rates. The Settlement Mediator shall prepare detailed invoices for her services, which shall be provided to counsel for Plaintiffs and counsel for Defendants via email. The detailed invoices shall identify, specifically, the time spent on particular claims between the particular Parties so that there can be an equitable determination of the allocation of fees. Any objections or disputes regarding such fees and expenses shall be presented to the Court. The Settlement Mediator's invoices must be paid within sixty (60) days of receipt.

Payment. Without prejudice to later allocations, Plaintiffs will presumptively pay 50% of each invoice, and Defendants will presumptively pay 50% of each 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 work done by the Settlement Mediator does not involve all of the Parties, the Settlement Mediator will confer with the Parties on a preliminary determination of any allocation and provide that preliminary determination to the Parties to review. If a dispute arises relating to the Settlement Mediator's

apportionment of time billed and no resolution of the dispute can be reached after the Parties have met and conferred, then the dispute will be referred to the Court.

Affidavit. The Settlement Mediator shall file an affidavit stating that there is no ground for disqualification under 28 U.S.C. § 455 or, if a ground for disqualification is disclosed, that the Parties have consented, subject to the Court's approval, to waive the ground for disqualification.

Exclusion of Settlement Mediator's Liability. Each Party agrees to make no attempt to compel the testimony of the Settlement Mediator. Each Party agrees to make no attempt to compel the Settlement Mediator to produce any document provided or created by the Settlement Mediator or provided by the other Party to the Settlement Mediator. The Parties agree to defend the Settlement Mediator from any subpoenas from outside parties arising out of this Order or mediation. Should the Settlement Mediator be required to respond to a subpoena from any Party involved in this mediation, that Party will be billed for time and expenses incurred in connection with such a response. The Parties agree that the Settlement Mediator is not a necessary party in any arbitral or judicial proceeding relating to the mediation or to the subject matter of the mediation. The Settlement Mediator shall not be liable to any Party for any act or omission in connection with any mediation conducted under this Order.

IT IS SO ORDERED.

/s/ JOY FLOWRS CONTI

Joy Flowers Conti

Senior United States District Court Judge

AGREED TO THIS 25th DAY OF MAY 2022:

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