

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

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

No. 21-mc-1230

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Transcript of STATUS CONFERENCE proceedings recorded on  
March 22, 2022, in the United States District Court,  
Pittsburgh, Pennsylvania, before The Hon. Joy Flowers Conti,  
United States District Judge

APPEARANCES:

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P R O C E E D I N G S

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(2:08 p.m.; in open court:)

THE COURT: Good afternoon. Please be seated.

This is a status conference scheduled in In Re Philips Recalled CPAP, Bi-Level PAP and Mechanical Ventilator Products Litigation, Master Docket Miscellaneous No. 21-1230.

At this time anyone who's going to speak, I'm going to ask you to stand and introduce yourself for the record. Others that are here that wish to have your name recorded as having entered your appearance, there's a sheet that is available to you to sign. And then it will be part of our records. For the Plaintiffs?

MS. IVERSON: Your Honor, good afternoon. Kelly Iverson with Lynch Carpenter, co-lead counsel for the Plaintiffs.

MR. SCHWARTZ: Good afternoon, Your Honor. Steve Schwartz from Chimicles, Schwartz, Kriner & Donaldson-Smith, co-lead counsel for Plaintiffs.

MS. DUGGAN: Good afternoon, Your Honor. Sandra Duggan from Levin, Sedran & Berman, Plaintiffs' co-lead counsel.

MS. OLIVER: Good afternoon, Your Honor. May it please the Court, Alyson Oliver, Plaintiffs' counsel.

THE COURT: Thank you.

1           MR. RIHN: Aaron Rihn, Your Honor, co-liaison  
2 counsel for the Plaintiffs.

3           MR. PENDLEY: Patrick Pendley on the fee and  
4 expense committee. I may or may not speak.

5           THE COURT: But you might have to speak because I'm  
6 going to be asking you a couple questions about the proposed  
7 order.

8           MR. WOLFF: Good afternoon, Your Honor. May it  
9 please the Court, Peter St. Tienne Wolff, from the  
10 Pietragallo firm, co-liaison counsel for the Plaintiff.

11          MR. BUCHANAN: Good afternoon, Your Honor. David  
12 Buchanan, Seeger Weiss, on behalf of the Plaintiffs.

13          MS. CAVACO: Good afternoon, Your Honor. Ava  
14 Cavaco for the Leadership Development Committee.

15          MR. TUCKER: Kevin Tucker, Your Honor, also  
16 co-chair of the Leadership Development Committee.

17          THE COURT: Thank you. Okay. So we have an  
18 agenda -- oh, I'm sorry. For the defense side? We've got so  
19 many lawyers for the Plaintiffs.

20          MR. LAVELLE: Good afternoon, Your Honor. John  
21 Lavelle from Morgan Lewis for Philips RS North America.

22          MS. DYKSTRA: Good afternoon, Your Honor. Lisa  
23 Dykstra from Morgan Lewis for Philips RS.

24          MR. STEINBERG: Good afternoon, Your Honor.  
25 Michael Steinberg, Sullivan & Cromwell, for the Philips

1 Defendants, Koninklijke Philips NV, Philips Holding USA and  
2 Philips North America.

3 MR. MONAHAN: Good afternoon, Your Honor. William  
4 Monahan, from Sullivan and Cromwell for the same Defendants  
5 as Mr. Steinberg just mentioned.

6 MR. BODE: Good afternoon, Your Honor. Rick Bode  
7 for the Burnett Defendants.

8 THE COURT: Thank you all. So we have an agenda,  
9 and I had included some items, and I have a few additions to  
10 my items that may be discussed prior to the time we get to  
11 the Court's issues. But we'll start with the parties. First  
12 we'll hear about the master pleadings and the initial motion  
13 practice.

14 MS. DUGGAN: Good afternoon, Your Honor. Sandra  
15 Duggan.

16 A little over nine months ago, Your Honor, on  
17 June 14, 2021, Philips voluntarily recalled millions of CPAP,  
18 Bi-Level PAP and mechanical ventilator devices that treat  
19 sleep apnea and other breathing conditions due to problems  
20 with the polyester-based polyurethane foam in these devices.

21 And according to Philips in its recall notice, the  
22 foam may degrade into particles which may enter the devices  
23 air pathway and may be ingested or inhaled by users. And  
24 also, the foam may off-gas certain volatile organic compounds  
25 that can result in serious injury that can be life

1 threatening, cause permanent impairment or require medical  
2 intervention to preclude permanent injuries.

3           Since the recall, the FDA has been monitoring the  
4 effectiveness of Philips' communications with health  
5 professionals who prescribe these recalled devices and  
6 distributors, retailers and individuals who use the devices  
7 because of the importance of making sure that patients and  
8 their medical providers are notified, not only of the recall  
9 itself, but also of the health risks presented by the  
10 recalled devices.

11           Since the recall last June, 264 actions have been  
12 filed in more than 40 federal districts across the country.  
13 102 class actions have been filed on behalf of purchasers and  
14 users of recalled products manufactured by Philips.

15           Most of these actions are seeking economic damages  
16 for a nationwide class of purchasers and lessees of recalled  
17 machines from fifty states plus Puerto Rico and the District  
18 of Columbia. Many of these suits are also seeking  
19 certification of medical monitoring classes by state.

20           In addition, there are 162 individual actions  
21 seeking damages for personal injuries, and we anticipate that  
22 actions will be filed on behalf of Plaintiffs from all fifty  
23 states and Puerto Rico and the District of Columbia seeking  
24 personal injury relief.

25           In December Philips told this Court that it would

1 like to see three master complaints, and we agree. And we  
2 proposed to sequence the filing of an amended consolidated  
3 master complaint for economic damages, an amended  
4 consolidated master complaint for medical monitoring damages,  
5 and a master complaint for personal injuries with individual  
6 short form complaints.

7           Sequencing the filing of these complaints would  
8 provide an orderly and efficient process for initial motion  
9 practice and briefing regarding the complaints while  
10 discovery gets under way.

11           Now, there have been a number of recent important  
12 developments with regard to Philips' recall which impact the  
13 Plaintiffs' claims, and we need to incorporate those facts  
14 into the consolidated complaint.

15           Less than two weeks ago, on March 10, 2022, the FDA  
16 issued a 518 notification order pursuant to Section 518A of  
17 the Federal Food, Drug and Cosmetic Act.

18           And the FDA expressed concerns that Philips has not  
19 and is not providing patients and consumers with sufficient  
20 information regarding the progress of the recall and the  
21 process for obtaining a replacement device.

22           And the FDA has received numerous complaints from  
23 patients who are confused about the recall and the  
24 replacement process. And significantly, the FDA determined  
25 the degradation of the foam and the potential for debris to

1 be released into the device's air pathway has caused the  
2 recalled products to present an unreasonable risk of  
3 substantial harm to public health. And for that reason,  
4 proper notification of the recall to consumers, retailers,  
5 distributors and medical professionals is vital.

6           So taking into consideration these new  
7 developments, the fact that this is not a typical scenario  
8 where there's a finite set of facts that occurred in the  
9 past, the need to carefully incorporate all the viable claims  
10 into separate class complaints with appropriate subclassing  
11 where warranted and the need to vet and select the class  
12 representatives, we're proposing to file the consolidated  
13 economic damages complaint by June 20, in 90 days, and then  
14 the consolidated medical monitoring class complaint 60 days  
15 thereafter, in other words, on August 22, and also on  
16 August 22, the master complaint for personal injuries.

17           And because Plaintiffs will likely have both  
18 economic claims, some of them will have medical monitoring  
19 damages as well as possibly individual personal injury  
20 claims, we propose to the Defendants that we could enter into  
21 a stipulation whereby they would agree to allow the  
22 Plaintiffs to sever their claims into the various complaints  
23 and without triggering any claim splitting defenses.

24           This was done in -- well, in Juul and in Zantac.  
25 The Courts ruled in those cases it was a contested issue, and

1 because all of the Plaintiffs' claims are before the MDL  
2 court and separate complaints are filed for the convenience  
3 of the Court in managing its docket, and addressing the  
4 motions to dismiss would be easier in that manner, there's no  
5 claim splitting. And, of course, we're proposing there would  
6 also be no duplicative recovery on behalf of the Plaintiffs.

7 Now, Courts have held that the doctrine of claim  
8 splitting generally doesn't apply to class actions, and the  
9 reason for that is that Rule 23 permits resolution of claims  
10 that are common to all Plaintiffs. So if a Plaintiff had an  
11 individual personal injury claim, that would not be dealt  
12 with on a class basis.

13 The Restatement Section 26(1)(c) recognizes an  
14 exception to claim splitting where Plaintiffs are unable to  
15 seek a certain remedy or form of relief in the first action  
16 because of restrictions on the Court's authority to entertain  
17 demands for multiple remedies or forms of relief in a single  
18 action.

19 If I could just add one more thing, there is other  
20 cases, complex cases such as this where the 90 days is used  
21 to produce an amended omnibus complaint. In Chinese Drywall  
22 they produced an omnibus complaint 90 days after they had  
23 started the case. In BP Oil they filed bundled complaints,  
24 again, 90 days. I think in Juul it was 81, more than 81  
25 days. In Taxotere it's also that same period of time that

1 was required to carefully craft these complaints.

2 THE COURT: I was going to bring this up later, but  
3 maybe this is a good time to bring it up now since we're  
4 talking about these consolidated complaints.

5 I just had received a filing in one of the Puerto  
6 Rican cases, Fuentes-Hernaiz, and they're seeking leave to  
7 file an Amended Complaint. So I view that as it should be  
8 denied without prejudice because the consolidated complaints  
9 will be filed.

10 MS. DUGGAN: I think in that case it's an  
11 individual action for personal injury. So our suggestion  
12 would be that once the master complaint for personal injuries  
13 is filed, it would be a process by which Plaintiffs can file  
14 short form complaints in this court.

15 THE COURT: Is that the registry that we're talking  
16 about? Would they be listed on the registry?

17 MS. DUGGAN: Well, I would suggest, Your Honor,  
18 that would be a slightly different situation --

19 THE COURT: Do you want to explain the difference?

20 MS. DUGGAN: So the one is the complaint itself and  
21 requiring Plaintiffs to come in who have a viable claim to  
22 actually file a short form complaint that is sworn by the  
23 Plaintiffs.

24 The registry -- and again, it takes on different  
25 meanings, depending on the situation -- is a means to try to

1 capture the universe of claims that are going to be before  
2 this Court.

3 And the Plaintiffs as well as the Defendants,  
4 because we've spoken to them, are investigating a proper  
5 platform to do that whereby both sides would have this  
6 ability to whatever is agreed to is filed for each of the  
7 Plaintiffs, whether it's a detailed sheet or a --

8 THE COURT: What's the difference between that and  
9 filing the short form complaint? Why do you need the  
10 registry if everybody is going to have to file a short form  
11 complaint?

12 MS. DUGGAN: Most likely, Your Honor, we're going  
13 to be advocating that to be in this case you would actually  
14 have to file a complaint. But prior to that we may with the  
15 defense counsel institute a means by which we could analyze  
16 these claims on both sides, which would help with resolution  
17 as well as litigating the claims.

18 THE COURT: It's my understanding that the registry  
19 concept or whatever you call it substitutes for having to  
20 file an amended -- having to file a short form complaint.

21 MS. DUGGAN: I suppose that's possible, Your Honor.  
22 We would probably be advocating though that you would  
23 actually have to file a complaint so as to make sure that the  
24 claims that are coming in are viable claims.

25 THE COURT: I think that's what the registry was to

1 do because you can look at that and make a determination from  
2 what they're setting forth. I guess I just need to know a  
3 little bit more about why you would follow -- have both  
4 duplicative things in this case, because it seems that's the  
5 way it would be. I think the defense counsel wants to --

6 MS. DUGGAN: I was going to suggest, Your Honor,  
7 we're meeting with the defense counsel in person on April 5  
8 and 6, and we have a lot of different issues that we're going  
9 to be addressing, and that is one of those issues that we're  
10 going to be talking about.

11 MR. LAVELLE: Your Honor, John Lavelle from Morgan  
12 Lewis for Philips RS North America. I can try and address  
13 the census registry issue specifically and come back to some  
14 of the other points.

15 As we understand it, the census registry idea has  
16 been used in a couple of recent MDL's. And I believe that  
17 the purpose of that is to try to get an understanding of the  
18 universe of potential claims. Not necessarily claims that  
19 had been asserted in the case, but claims that could be  
20 asserted in the future by people who haven't filed a lawsuit.

21 So it gives the Court and the parties some sense of  
22 who is out there who hasn't yet filed suit, who may file suit  
23 at some point, and you get some information through this  
24 simplified form of fact sheet that they prepare. And that  
25 would allow for, at least in theory, planning in terms of

1 mediations and the like.

2 THE COURT: Well, that's what I was thinking about.  
3 You know, if you have a registry, and then they have to file  
4 a short form complaint, but the registry would in effect be  
5 the tolling. So if they file with the registry, there would  
6 be an agreement, a tolling, so that they can -- if this case  
7 were to be remanded and that type of thing, and they only  
8 were on the registry, they would be free to file a complaint  
9 in whatever jurisdiction would be appropriate.

10 So I guess my question is I don't see how they're  
11 going to work together --

12 MR. LAVELLE: I would say --

13 THE COURT: It doesn't seem too efficient to me.

14 MR. LAVELLE: There are disadvantages to doing it  
15 that way, and I do think that the parties generally have  
16 discussed the idea that short form complaints are important  
17 for Plaintiffs --

18 THE COURT: It's sort of like what you would put on  
19 your registry, meaning you have the three to five-page  
20 statement that's going to be every Plaintiff has to -- every  
21 person that's going to be on the registry that could be a  
22 potential Plaintiff would fill that out. And it would be the  
23 same kind of information, maybe even more than you would be  
24 receiving in a short form complaint.

25 So if you have the tolling, and then you're going

1 to have an opportunity to settle all those cases that are  
2 listed on the registry at the same time you're settling the  
3 other one, there wouldn't be a bellwether case, of course,  
4 but it just seems to me what's most efficient for people?

5 MS. DUGGAN: I think, Your Honor, a number of  
6 different scenarios could work, and that's what the parties  
7 are discussing right now, and we're definitely mindful of the  
8 various considerations, efficiency being one of them, and  
9 accountability being another.

10 THE COURT: You may want to talk to some of the  
11 counsel in the other cases where they used this. I always  
12 thought of it as a substitute for filing these short form  
13 complaints so that you don't get bogged down with numerous  
14 filings in every case. They're there, and their counsel are  
15 kept formed.

16 As long as they're on the registry, there's a  
17 tolling in place, so that they are going to get the benefits  
18 of any potential settlements. If they don't settle, they'll  
19 be able to file in their appropriate jurisdictions.

20 MR. LAVELLE: Your Honor, there are some challenges  
21 with the registries, too.

22 THE COURT: Okay.

23 MR. LAVELLE: And I will say that we've had some  
24 initial discussions. When we appeared in front of you in  
25 December, we heard Your Honor's message that the parties

1 should confer. I think we've had very productive discussions  
2 with Plaintiffs' leadership so far. We've scheduled a  
3 meeting in our offices in early April to discuss a variety of  
4 topics. This is one of the topics.

5 I know that Mr. Seeger, who is not here today, has  
6 some experience working with the registries and has some  
7 concerns about them that he wanted to talk through before we  
8 have a chance to present a position on that. So --

9 THE COURT: That will be a topic for our next  
10 conference.

11 MR. LAVELLE: I think we should try to defer that  
12 registry for discussion at the next conference. But I would  
13 like to address the pleadings. And I agree with Ms. Duggan  
14 that we are in agreement on the idea of these three master  
15 complaints. That was what we proposed in December, and we  
16 believe Plaintiffs are in agreement on that.

17 We do think that the timing is something that  
18 perhaps the parties could confer and try to reach agreement  
19 on rather than have Your Honor decide. We don't have an  
20 objection per se to staging it that way. We do think that  
21 the timing is a little bit stretched out, but we'd like to  
22 discuss that with Plaintiffs and see if we can reach  
23 agreement if there's any --

24 THE COURT: What you're going to do is to be  
25 meeting and conferring about this, and then I'm going to ask

1 that prior to our next conference, that you present the Court  
2 a scheduling, a proposed scheduling order, and you can note  
3 if you're still in disagreement on certain matters, just so  
4 that we have the timing for the filing of the master  
5 complaint, the response, if there's going to be motions to  
6 dismiss. I don't know if you're going to be filing motions  
7 to dismiss --

8 MR. LAVELLE: We will be, Your Honor. We expect --

9 THE COURT: There may be issues the parent company  
10 has versus --

11 MR. STEINBERG: There are definitely different  
12 defenses that will be presented in the Rule 12 motion, Your  
13 Honor.

14 THE COURT: So just so we get all the timing down  
15 and then how it's going to relate to discovery and the start  
16 of discovery and that kind of thing. So just work on when  
17 you can look at the Court's forms on the docket for filing  
18 the Rule 12(f) reports. Okay?

19 MR. LAVELLE: Yes, Your Honor.

20 MS. DUGGAN: Yes, Your Honor. Thank you.

21 THE COURT: So the gist of it from what I heard  
22 from this motion that was filed to amend the complaint, it's  
23 being denied without prejudice because there will be a  
24 process put in place for either the filing of -- they'll  
25 either be subsumed into the consolidated complaints, or they

1 will be able to file a short form complaint for the listing  
2 on the registry.

3 MS. DUGGAN: Yes, Your Honor.

4 MR. LAVELLE: Yes, Your Honor. We think that would  
5 be the appropriate course.

6 THE COURT: So that's what I will do. Okay.

7 Logistics is the next item I have under the topic parties'  
8 scheduled planning conference.

9 MR. SCHWARTZ: Steve Schwartz for the Plaintiffs,  
10 Your Honor. So as mentioned, on April 5 and April 6 we've  
11 scheduled an in-person meeting at Morgan Lewis's offices to  
12 work through Rule 26 issues; and as Your Honor can imagine,  
13 we've had several Zooms with defense counsel. There's been  
14 correspondence going back and forth and side conversations  
15 about issues.

16 So we're working on all those issues with them, and  
17 we hope that we're just going to lock ourselves into a room  
18 and try to get as much accomplished and get a proposed  
19 schedule for Your Honor and work on other things.

20 We have exchanged ESI protocols. So we are working  
21 on that. We're working on platforms for discovery. We have  
22 provided Defendants with initial priority document requests.

23 There's been discussions about getting the  
24 Defendants' communications that they've had to and from the  
25 FDA, and there's been some agreement. We're going to get

1 some of that. Hopefully we'll get all of that prior to the  
2 next conference.

3           So the long and short of it is that we've been  
4 working hard with Defendants to try to get the issues into a  
5 place so we can give Your Honor a good robust report and make  
6 progress, so at the next conference Your Honor will know what  
7 the next several months look like.

8           THE COURT: Have you talked about masters for ESI,  
9 special masters?

10           MR. SCHWARTZ: Yeah. We have discussed that. I  
11 don't want to steal anyone's thunder here, but we have  
12 discussed both potential settlement mediators and  
13 discovery --

14           THE COURT: That will come up later on the agenda?

15           MR. SCHWARTZ: Yes. That will, but we've had those  
16 discussions. We've provided some suggested names. We're  
17 going to get some back from the Defendants, and I would say  
18 both parties are eager to provide Your Honor some names to  
19 either approve or to tell us -- give us some advice on  
20 perhaps some different candidates but it's obviously  
21 important that we have masters for both discovery and for  
22 settlement.

23           THE COURT: Okay. Now, the process for that, as  
24 I've explained this morning when I had the SoClean status  
25 conference, was that if the parties agree on a person, I

1 generally will appoint that person to that position, and then  
2 we have to have a form of an order for the appointment, and  
3 you need to talk about that in terms of drafting a proposed  
4 order for the Court. If you can't agree, then I'll draft the  
5 order for that. So if you all agree, it's generally not an  
6 issue for the Court.

7 MR. SCHWARTZ: Understood.

8 THE COURT: Okay. Are you going to talk about the  
9 case specific discovery matters? Anything else? General  
10 discovery?

11 MR. SCHWARTZ: General discovery, as I said, we  
12 provided Defendants with what I'll call a list of priority  
13 document requests. We are in the process of finalizing what  
14 I would call the very first set of broad document requests.  
15 I think we have to have our conference first before we serve  
16 that.

17 So we're working on that. And I think that for  
18 things like fact sheets and profile forms, that kind of falls  
19 into the registry issue where we just have to talk through  
20 with Defendants what makes sense so we can do this in an  
21 efficient way both for us and also for Your Honor. So that  
22 we try to maximize efficiency while at the same time getting  
23 information shared so we can at least have a sense of what  
24 the lay of the land is because that will be helpful for  
25 settlement and for obviously other issues.

1 THE COURT: Okay. So the Plaintiff-Defense Profile  
2 Forms Fact Sheet, is that the registry that we're talking  
3 about?

4 MR. SCHWARTZ: It's part of the whole concept. And  
5 I think we need to conference -- as Mr. Lavelle said, I think  
6 we need to conference to sort through all these issues so we  
7 can present Your Honor something either more concrete because  
8 we have agreement or let Your Honor know that maybe we have  
9 some differences of views and may need some help figuring out  
10 what the right way to go is.

11 THE COURT: Okay. How about the in extremis  
12 depositions?

13 MR. SCHWARTZ: Nothing to report on that other than  
14 there's -- at the last hearing that we had there was one that  
15 had to be taken, and so there was agreement to have that  
16 happen. And if we have situations where it makes sense that  
17 someone needs to be deposed because they're very ill or  
18 something, we'll work it out with them, and if asked to get  
19 done, it will get done. I don't think Your Honor will have  
20 to decide any contested issues on that. That's certainly my  
21 hope.

22 THE COURT: Does the defense have anything they  
23 wish to say about that, the logistics or discovery matters?

24 MS. DYKSTRA: Yes. Lisa Dykstra, for Philips RS  
25 North America --

1           THE COURT: If you could come forward to the  
2 podium, it makes it easier for the court reporter. Thank  
3 you.

4           MS. DYKSTRA: Thank you, Your Honor. We agree, we  
5 have the conference scheduled in Philadelphia on August 5 and  
6 6 -- April 5 and 6. We have exchanged ESI protocols. We  
7 just got a red line back from the Plaintiffs. So we are  
8 moving along forward cooperatively.

9           We have a series of meetings on discovery. We've  
10 been exchanging data prior to our April 5 conference.  
11 Philips does want to cooperate as best as possible and has  
12 agreed already to provide certain information to Plaintiffs  
13 that they've requested related to communications to the FDA.  
14 And so we are under way.

15           I agree frankly with almost everything that  
16 Mr. Schwartz said. The only probably issue we may have to  
17 bring to the Court at a later date is the fact sheets. The  
18 Plaintiff fact sheets, as we see them, are very comprehensive  
19 and provide us with a lot of detail about the Plaintiffs. So  
20 it's more of a discovery tool for us.

21           But we will discuss that on the April 5 conference,  
22 and we will hopefully reach an agreement and, if not, bring  
23 that clearly to your court. And that's all I have, Your  
24 Honor.

25           THE COURT: Thank you.

1 MS. DYKSTRA: Thank you.

2 MR. LAVELLE: Your Honor, John Lavelle for Philips  
3 RS North America. Just on the in extremis deposition issue  
4 that came up back in December, that was -- the Plaintiff's  
5 name was Clampit. A motion was filed. We did not oppose it.  
6 Your Honor ordered that.

7 We've been in touch with Plaintiff's counsel,  
8 Mr. Clampit's counsel, since then. That deposition has not  
9 yet been scheduled. We have contacted and are awaiting word  
10 from them on when they want to produce Mr. Clampet for  
11 deposition, but we're prepared to go when they're ready to  
12 produce him, assuming we can get their cooperation on  
13 collecting medical records and what we need in order to take  
14 the deposition.

15 THE COURT: Is their counsel here?

16 MR. LAVELLE: Their counsel is Mr. Houssierre. I  
17 didn't see him here today.

18 THE COURT: Thank you. The next item on the agenda  
19 is the science tutorial. Who is going to address that?

20 MR. STEINBERG: Your Honor, I will. Michael  
21 Steinberg, Sullivan & Cromwell, for the Philips Defendants.

22 Your Honor, this was an idea that you raised, and  
23 we would like to be supportive of that, of what you'd like to  
24 have. We have ideas, and we plan on that as a topic of  
25 conversation for our upcoming meeting. But part of it is

1 around you and what you would like to hear.

2 I mean I think that this morning with the SoClean  
3 conference, I think it might be an excellent idea for us to  
4 jointly have a session to talk about -- the low-hanging fruit  
5 is how the devices work, to show you how the devices work,  
6 how they are operated, you know, some of the issues that come  
7 out. We'll show you the parts --

8 THE COURT: The parts that are in contention,  
9 trying to just grasp what it is and why there might be VOC's  
10 versus the particles coming apart and that type of thing.

11 MR. STEINBERG: Correct. And just understanding  
12 how the mechanisms work because the architecture of the  
13 devices I actually think are going to be quite important for  
14 how the issues of causation play out in this case.

15 THE COURT: I think it just would be helpful for me  
16 to have, when I get motions that come in, if I have an  
17 appreciation for how the devices work.

18 MR. STEINBERG: For sure. You know, in every  
19 consumer case I do, the first thing I do is I go buy the  
20 devices so I can understand how they work, the directions,  
21 how they interoperate. And I think that we are prepared at  
22 Your Honor's convenience for us to go forward and to give a  
23 presentation on how the devices work, to talk about foam  
24 degradation, to talk about VOC's, any of that.

25 So the question that the Plaintiffs have is they

1 don't believe themselves to be prepared yet for that, a full  
2 presentation. I think we can do sort of a bite-sized  
3 presentation about how the devices work and --

4 THE COURT: This is not the expert discovery.

5 MR. STEINBERG: No. Exactly.

6 THE COURT: It's not that, and there's no fact  
7 finding that's going to go on from this. This is just a  
8 tutorial.

9 MR. STEINBERG: Exactly. And I think as part of  
10 that, Your Honor, it would be really good to understand --  
11 there is a fair amount of science already out there on some  
12 of the issues related to the foam degradation, about issues  
13 related to do these -- do the foam degradation or the VOC's  
14 cause cancer.

15 THE COURT: I don't necessarily need to go into  
16 that level because that's really more to the heart of the  
17 case. It's really more understanding how the devices  
18 function and what are the parts that are going to be at  
19 issue, what the effects of those issues would be in terms of  
20 health conditions and that type of thing.

21 MR. STEINBERG: Correct.

22 THE COURT: Or the efficacy of what has happened in  
23 the recalls and all of that. That's really not for this  
24 tutorial.

25 MR. STEINBERG: Understood. Again, this is to help

1 the Court understand, as I understand it, so that you  
2 understand the working vocabulary around it.

3           And that's why we think it would be excellent to  
4 have a joint session with SoClean. They can show how their  
5 device works, and we can talk about other ozone cleaners as  
6 well, but the ozone cleaner aspect of that is going to be an  
7 important part of this case, Your Honor. For sure it is.

8           Just to be clear, the FDA's warnings about ozone  
9 use identify five or six symptoms, and those five or six  
10 symptoms are present in between a third and 50 percent of the  
11 complaints in this case. So there's substantial overlap  
12 between claims of harm and the way in which those symptoms  
13 are expressed and the ozone use.

14           The FDA's warning is pretty clear about what they  
15 believe to be the issues of that, and I think it would be  
16 good just to understand, sort of identifying what's in the  
17 complaints in this case, what's the percentage of people  
18 asserting cancer, people asserting respiratory diseases.

19           So we can go through and at a very high level talk  
20 to Your Honor about what are the issues that are going to be  
21 where both sides raise those issues and give you the  
22 vocabulary and the background around it. This I think would  
23 be a very important opportunity.

24           THE COURT: From the Plaintiffs' side, who's going  
25 to address this?

1 MS. IVERSON: Your Honor, Kelly Iverson. Is it all  
2 right for me to stand here?

3 THE COURT: Why don't you come to the podium,  
4 please? At the last hearing we weren't doing this because of  
5 the COVID protocols, but now since we are relieved of those,  
6 we can function as we used to.

7 MS. IVERSON: Thank you, Your Honor. Kelly Iverson  
8 with Lynch Carpenter. Your Honor, I think this was  
9 previewed. Plaintiffs really appreciate understanding your  
10 position on this, and I think understanding your view of this  
11 being more high level just on how the machine works will help  
12 us in discussing these matters with Defendants.

13 We have made a list of documents and information  
14 that we were hoping to receive from Defendants in order to  
15 help inform when we might be prepared and ready for a science  
16 day. They've agreed to produce those on a rolling basis even  
17 now in advance of getting to our 26(f) conference, and I  
18 believe having a lot of that information will inform when we  
19 will be prepared to present on science day.

20 And I think that the parties will have an  
21 opportunity then to the extent we're cavitating off effects  
22 of the degradation and VOC escaping from the polyester-based  
23 polyurethane foam, we might be prepared to have science day  
24 sooner than to the extent we need to bring to Your Honor what  
25 the effects are on the health conditions --

1           THE COURT: I'm not going to be resolving any of  
2 that at the science day. You know, it's just really to  
3 highlight how the machines work, where the areas of concern  
4 are that are going to be implicated in this litigation.

5           MS. IVERSON: Okay. And we appreciate that, and we  
6 just want to make sure that we get with Defendants and we  
7 have those parameters. Some science days are done and  
8 present presentations by attorneys. Sometimes you have  
9 experts. We'll work with them on kind of what the process  
10 is, using the federal judicial center guidelines, and  
11 hopefully come to you with an order and be able to come to a  
12 consensus on when might make sense to have a science day --

13          THE COURT: Do you think sometime this summer would  
14 be good, maybe after your master complaint is filed? Then we  
15 can set aside a morning or an afternoon to do that on a day  
16 when we're going to have a regular status conference. So if  
17 everybody is in town for the status conference, we can just  
18 have the science day, make it more of an extended day.

19          MS. IVERSON: I was going to recommend the same  
20 thing. It would be good for us to get our complaint on file.  
21 One thing that wasn't addressed with the pleadings is whether  
22 there will be additional Defendants to come in. And  
23 Burnett's counsel, Mr. Bode, is here, and we understand that  
24 there is a chain of --

25          THE COURT: Is this the foam manufacturer --

1 MS. IVERSON: This is the foam manufacturer,  
2 Burnett, but we understand that there are other entities in  
3 the chain of distribution coming from the foam manufacturer  
4 through to its customers, to its supplier at Philips, and we  
5 don't yet know where in that process various designs are  
6 happening or where the -- what's happening with the foam and  
7 need to understand --

8 THE COURT: It would be good to have all the  
9 parties so that we don't have to redo discovery. So  
10 hopefully the Defendants will -- it's going to be -- they're  
11 the ones that will bring them in as third party Defendants.  
12 Is that correct, or am I wrong?

13 MS. IVERSON: The Plaintiffs might want to bring  
14 them in under products liability theories for the tort cases,  
15 Your Honor.

16 THE COURT: Mr. Burnett? Or Mr. Bode? I'm sorry.

17 MR. BODE: Yes. Mr. Bode. I represent Burnett.  
18 So Burnett is a bulk producer of foam. And when I say bulk,  
19 it goes out of our factories in 18-wheelers. It's as far as  
20 from here to the wall and four to five feet high and then six  
21 feet wide.

22 And frankly, as the bulk supplier, we don't believe  
23 that we belong in this case. All we do is sell to third  
24 parties who remanufacture our foam.

25 So those parties are Polymer Technologies and

1 Soundcoat, and then they send to another company called  
2 Paramount. And frankly, we had no dealings with Philips. So  
3 it's the bulk supplier's position that all of this is  
4 interesting, but we really are hopeful that we won't be  
5 standing here soon. But I don't know how long that will be.

6 THE COURT: Okay. Thank you.

7 MR. BODE: Yes, Your Honor.

8 THE COURT: So that may affect some of the timing  
9 issues that we have here from the Defendants' point of view,  
10 from Philips' point of view. Does anybody want to address  
11 that, the third-party issues?

12 MR. STEINBERG: Your Honor, I'll address it. I  
13 mean for sure the clearest third party that we're going to  
14 have is SoClean in this case, because they have an  
15 unauthorized cleaning protocol for our products, for the  
16 Respironics products, and the result of using that ozone,  
17 which has never been a cleaning instruction that Philips has.

18 Philips has cleaning instructions. Respironics has  
19 cleaning instructions for its devices, and they do not  
20 include ozone cleaners.

21 The ozone cleaners do have -- it has a consequence.  
22 It has a health consequence for it, and for sure in any  
23 personal injury claim where there is an ozone use, we're  
24 going to assert counterclaims or cross-claims against SoClean  
25 and other ozone manufacturers.

1           You know, the devices that have been produced which  
2 the FDA calls illegal are not -- haven't been tested for  
3 these purposes and the like. So there's going to be third-  
4 party practice once the Complaint is settled for sure.

5           MR. BODE: And on behalf of Burnett, we were not  
6 planning on right now bringing anybody in. We're just  
7 planning on hopefully trying to extricate ourselves.

8           THE COURT: Okay. The next item -- I'm not sure if  
9 there's anything else on the science tutorial -- is the other  
10 proceedings. First will be the pipeline of further MDL  
11 tag-along cases.

12           MR. SCHWARTZ: Hi. Steve Schwartz again, Your  
13 Honor. Ms. Duggan provided the statistics for the other  
14 cases that either have been filed and transferred here or are  
15 out there and are probably going to be transferred here.

16           The one other case, at least one case I point Your  
17 Honor's attention to specifically is there's a case filed in  
18 the Eastern District of Pennsylvania on behalf of a durable  
19 medical equipment supplier which bought a supply of the CPAP  
20 or Bi-PAP machines; and before they were able to sell those  
21 through to the consumers, the recall happened. So they were  
22 kind of stuck with those machines.

23           So they filed a complaint on behalf of the class of  
24 durable medical equipment suppliers against Philips for the  
25 refund of the monies paid for that.

1           So that's a case that was filed recently. We are  
2 in contact with the counsel who filed that case, and we're  
3 going to evaluate what impact that would have in our master  
4 class action complaint. And we've had discussions with  
5 Philips about that case. And I think we'll have more  
6 information about what Philips' policy will be towards those  
7 equipment suppliers.

8           But other than that, Ms. Duggan provided Your Honor  
9 with a lay of the land of what I'll call the other cases out  
10 there and the ones that are likely to be transferred into  
11 this Court.

12           THE COURT: So from what I can tell then, the  
13 biggest impact would be on the potential Plaintiffs whose  
14 many cases may not have been filed, and that could have the  
15 most impact in terms of either through the short form  
16 complaint or the registry concept.

17           MR. SCHWARTZ: Yeah. I would agree with that. I  
18 think the universe of personal injury Plaintiffs who might  
19 eventually file a personal injury complaint, that would be  
20 the biggest impact I think in terms of numbers and in terms  
21 of what will affect the scope of the case.

22           THE COURT: And I haven't heard anything about that  
23 today because people don't really have a sense of that?

24           MR. SCHWARTZ: We certain had -- we've had informal  
25 discussions with other Plaintiffs' counsel, so we have

1 certain senses. I believe there's been probably discussions  
2 between various Plaintiffs' counsel and Defendants.

3 But because this science is still at an early  
4 stage, I think that before a lot of counsel and their clients  
5 will want to pull the trigger and file the complaint, they  
6 want to make sure that they understand the science because  
7 causation is an important issue, and just my personal view is  
8 that it's better to know the facts first before you file  
9 instead of filing and then hoping the facts catch up to the  
10 claim.

11 So that's probably going to be a moving target  
12 during this litigation. But as we start getting more  
13 advanced in terms of getting our pleadings on file and get  
14 some of this scientific information from Philips and get a  
15 full understanding of what information Philips and the FDA  
16 have exchanged, that we have all the studies that have been  
17 exchanged, I think as we get more of that information, then  
18 we'll be in a better position to identify in our master  
19 injury complaint what the specific diseases are that belong  
20 in this case.

21 And so I think the discovery that we get from  
22 Philips will help move along the process so I can give you a  
23 better answer than I'm giving you now, maybe similar numbers,  
24 or at least it's going to be these five or these ten or these  
25 15 diseases that will be front and center in this case.

1           THE COURT: And the SoClean MDL, we had an initial  
2 status conference this morning, and I selected the co-lead  
3 counsel and the steering committee in that case. And  
4 Ms. French-Hodson is on the steering committee, and she is  
5 one of the co-leads.

6           So we do need a liaison relationship between the  
7 two, and I've asked her to assume that on behalf of the  
8 SoClean steering committee, and also I think she would be  
9 good to be the liaison here. So when she comes to your  
10 meetings or interfaces, you know the point person to talk to.  
11 Is that acceptable? You can think about it and let me know  
12 if there's a problem.

13           MR. SCHWARTZ: Right. I think it's acceptable in  
14 this sense. I've had the opportunity to work with  
15 Ms. French-Hodson. Great lawyer. Love working with her. As  
16 Mr. Mason mentioned, we went to law school together, so we're  
17 old friends. And we've litigated cases together. So from a  
18 relationship point of view, we will have no problem working  
19 with them and liaison with them.

20           Before the applications were filed in the SoClean  
21 case, we did discuss with all counsel who are appointed to  
22 leadership positions within this Philips MDL who also had  
23 cases in the SoClean case, and we discussed the issues which  
24 kind of came to the floor today. What will the scope of the  
25 claims in the SoClean case be? Are there any potential

1 conflicts?

2 I think Mr. Mason mentioned the word conflicts  
3 today. I think Your Honor mentioned the words ethical wall  
4 today for information.

5 And our view was -- our initial view was that it  
6 would be complicated if we didn't have distinct and separate  
7 leadership in this Philips MDL and the SoClean case. That's  
8 an issue that I think that we need to talk with Mr. Mason and  
9 Ms. French-Hodson about more to understand whether there's a  
10 way to do it so that work product is protected to make sure  
11 if there are antagonistic or competing claims that are there,  
12 whether we need to have something more sturdy than an ethical  
13 wall out there.

14 And so I think that's an issue probably for the  
15 next status conference because I think we'd like to talk  
16 those issues through with them.

17 THE COURT: So it's inter-Plaintiffs' counsel. No  
18 defense counsel would be involved in these discussions. It  
19 would be just the Plaintiffs' counsel and this steering  
20 committee in this MDL speaking to the steering committee in  
21 the SoClean MDL.

22 MR. SCHWARTZ: Well, I would say this. I believe  
23 in listening to people. I have already had several  
24 conversations with SoClean's counsel, Mr. Cabral. So if  
25 people -- and the same thing with Philips counsel, if they

1 have thoughts that they wish to share, I'm happy to hear  
2 them, and our team is happy to hear them. We'll give them  
3 consideration.

4 But I think primarily that amongst Philips  
5 leadership and SoClean leadership on the Plaintiffs' side, we  
6 have to have some discussions. And if it turns out we just  
7 need completely separate and distinct leadership, then we can  
8 present Your Honor a way to do that. And if it turns out  
9 that we want to do something more nuanced, we can present  
10 Your Honor a way to do that.

11 I hope and expect we'll reach agreement, but I did  
12 want to point out the issue since Your Honor flagged it this  
13 morning, that there is still a concern that we have to  
14 navigate this to make sure that, especially since these are  
15 class cases where we as lawyers have fiduciary duties to our  
16 classes that we represent, then Your Honor has fiduciary  
17 duties to make sure that we're doing right by our classes.

18 And so I just want to make sure we do everything by  
19 the book and make sure that at the end of the day, that no  
20 one can criticize how it was done on our end as lawyers, on  
21 your end obviously as the presiding Judge. So it's an issue  
22 we take seriously, and rather than spouting off a suggestion  
23 now, I think there's more thought that needs to be put into  
24 it.

25 But as I said, we're working with excellent

1 counsel, and so I think we'll be able to work through these  
2 issues and come up with a solution that makes sense.

3 THE COURT: Okay. That would be fine. And if it  
4 has to be separate counsel, fine. But then just each side  
5 needs to have a liaison that I would appoint so that the  
6 liaison can be meeting and conferring about how to coordinate  
7 discovery and motions practice and other things that there  
8 will be some overlap.

9 MR. SCHWARTZ: And we totally agree with that.

10 THE COURT: From what I'm hearing from Philips in  
11 this case, you know, if they bring SoClean in here, then it's  
12 going to be a lot of the same issues that we'll have in the  
13 SoClean MDL that will be present in this one as well. So it  
14 will be -- there's a possibility to have some considerable  
15 overlap.

16 MR. SCHWARTZ: There certainly will be some  
17 overlap, and Philips has made its intentions clear, which  
18 informs the issue of are there going to be any conflicts. We  
19 absolutely -- no matter what the end result is, we will have  
20 strong coordination with the Plaintiffs' counsel, and we will  
21 work with SoClean's counsel also to try to be as efficient  
22 with Your Honor as possible and also to be as efficient with  
23 Philips as possible.

24 And if there are areas where we disagree and we  
25 have to have a battle, then we'll present those disagreements

1 to the Court for resolution. I'm sure there's going to be a  
2 lot of interesting issues with what looks like it's shaping  
3 up to be a three-headed monster here.

4 THE COURT: This is where I think having some  
5 discovery masters could be very helpful because if they have  
6 to coordinate matters, you can have those two people speaking  
7 with each other and trying to fashion something that is  
8 appropriate; and if there's ethical issues, they can also  
9 look at those and make recommendations to the Court. That  
10 could be helpful as well.

11 MR. SCHWARTZ: I agree. And we'll certainly have  
12 discussions whether it makes sense to have separate discovery  
13 masters or agree on a single discovery master for all the  
14 cases; and obviously we'll present, Your Honor, with  
15 Defendants and with SoClean's counsel what we think is the  
16 best way to proceed. Settlement may be more complicated, but  
17 maybe not. It's an issue that we have to look at.

18 THE COURT: Anything on those matters from the  
19 defense point of view?

20 MR. LAVELLE: Your Honor, John Lavelle for Philips  
21 RS North America. Just briefly, on the issue of further MDL  
22 tag-along cases, we essentially agree with the statistics  
23 that were provided by Plaintiffs' lead counsel earlier, that  
24 the case that Mr. Schwartz mentioned that was on behalf of  
25 the DME, I believe the Plaintiff's name there was Baird.

1 That's actually been tagged to be transferred here and is the  
2 subject of Conditional Transfer Order 22. So we expect it  
3 will be in this court by the end of this week.

4 There's also two matters that are currently being  
5 litigated in the Judicial Panel Multi-District Litigation.  
6 One you heard about this morning. That's the matter of  
7 SoClean versus Philips; and we expect, as was mentioned by  
8 SoClean's counsel earlier today, we expect a ruling within  
9 the next couple of weeks on whether that will be in this MDL,  
10 SoClean MDL or --

11 THE COURT: Are you counsel in that case, too?

12 MR. LAVELLE: My firm is representing Philips in  
13 that one. In addition, there's another case that is  
14 currently pending that was originally filed in the Eastern  
15 District of Pennsylvania that is before the judicial panel,  
16 and we expect that will be transferred here as well.

17 Obviously as new cases get filed, when they appear  
18 to be related, we are tagging them, and the judicial panel is  
19 moving them into this MDL.

20 THE COURT: Before you leave, state court actions,  
21 have there been any state court actions filed that I'll need  
22 to try to coordinate with?

23 MR. LAVELLE: Only a handful. Most of them have  
24 been removable to federal court, and every one that's been  
25 removable we've removed to federal court and tagged a

1 transfer here.

2           The only ones that are currently pending in state  
3 court, maybe a handful of them right now, are ones where we  
4 haven't had to remove them yet, and if they are removable, we  
5 will remove them. I think there are a couple that are in  
6 small claims court that aren't within federal jurisdiction,  
7 but those cases haven't moved outside of the pleadings and  
8 really -- so nothing has moved outside of the initial  
9 pleading stages --

10           THE COURT: There's no personal injury cases?

11           MR. LAVELLE: No.

12           THE COURT: These are all economic cases in state  
13 court?

14           MR. LAVELLE: Right. And they're small claims  
15 court cases. Anything that's a personal injury case has met  
16 the federal jurisdictional requirements, and we've removed it  
17 to Federal Court and then moved it into the MDL.

18           THE COURT: So if you could just make sure you keep  
19 an eye on those types of cases, if something comes up that we  
20 need to coordinate with for our purposes of discovery and  
21 that type of thing, I'm happy to reach out to the state court  
22 Judges and do so. But so far it doesn't seem to be much of  
23 an issue.

24           MR. LAVELLE: Correct, Your Honor. And, yes, we  
25 will do that. And, Your Honor, while I'm standing here,

1 maybe I should just address the special masters.

2 THE COURT: Sure. That's next up.

3 MR. LAVELLE: We've had discussions with  
4 Plaintiffs' counsel about that. I believe we're in agreement  
5 in principle with the idea that there should be a discovery  
6 special master as well as a settlement special master, and  
7 we've started the process of discussing specific candidates,  
8 and we're hoping we'll make progress, and we'll work towards  
9 either providing Your Honor with a joint recommendation or  
10 competing proposals.

11 THE COURT: Okay.

12 MR. LAVELLE: Thank you.

13 THE COURT: The preservation -- anything else on  
14 special masters from the Plaintiffs' point of view?

15 MS. IVERSON: No, Your Honor. I think that we've  
16 addressed it. We do have our settlement committee here to  
17 the extent you do have any questions with regard to  
18 settlement special masters --

19 THE COURT: Yes. Can we talk with the settlement  
20 committee members if they're here? I would like to look at  
21 particularly the concerns that we have with the personal  
22 injury cases and trying to see about doing some bellwether  
23 negotiations and settlement, and how are we going to work  
24 that? What kind of approach do we take to maybe do some  
25 bellwether settlement?

1           It's a little bit different with the class actions  
2 because there's so much overlap in the class actions. You  
3 just pick the topic, and then you go down from that and see  
4 how it will frame itself for the settlement.

5           But when you have all these personal injury claims,  
6 different kinds of injuries, that kind of thing, how will we  
7 pick out bellwethers? What will we do with the settlement  
8 issues? How are we going to tee that up?

9           These are just really being thought about now in  
10 MDL's across the country. There hasn't been a lot of  
11 emphasis on it until recently.

12           So if we can come up with the right approaches and  
13 protocols to use for the settlement purposes, that would be  
14 helpful, and then you're going to need to decide what  
15 discovery you need relevant to that, and how do you pick the  
16 right Plaintiffs to be the bellwether settlement Plaintiffs,  
17 that kind of thing.

18           And I don't have any answers for you. I just think  
19 hopefully that the people I asked to chair, because I think  
20 this is an enormous undertaking early in the case, and we  
21 have the leadership that's going to be involved with that,  
22 but also they have all the other issues that they're  
23 overseeing, I wanted to make sure we had a special separate  
24 focus on settlement, because I think if we start that early,  
25 we are in a better position to have the cases move along

1 expeditiously, and, if it's possible to settle them, then  
2 we'll get them to settlement at an earlier stage, which would  
3 be good for everyone involved.

4 MS. IVERSON: Yes. Judge, Bobbi Liebenberg is in  
5 Hawaii. So she is not here. Jerry Dever, one of her  
6 partners, is here today, but we do have Art and Lisa from the  
7 settlement committee, and I certainly welcome and invite that  
8 discussion. I think it would make sense to have Bobbi maybe  
9 put that on the agenda for the next conference in part  
10 because we also -- the co-leads have an in-person meeting  
11 scheduled with the settlement committee to spend the day  
12 talking on March 30 to come up with some plans and strategies  
13 with respect to a lot of those questions.

14 The settlement committee itself members are serving  
15 on other committees. So they're sitting with discovery and  
16 bellwether selection. So that they're enmeshed in a lot of  
17 those decisions already in the self-organizing that we've  
18 done as a Plaintiffs' group since appointment.

19 And then Bobbi is also going to be present at the  
20 26(f) conference that we're having on April 6 with defense  
21 counsel for Burnett and Philips where we'll be able to talk  
22 through a lot of those issues with Defendant as well. But  
23 I'll pass the floor to our settlement committee.

24 MR. STROYD: This is Art Stroyd. I think that  
25 summarizes where we stand, and this is certainly a top agenda

1 item for all counsel.

2 THE COURT: Thank you. So the personal injury I  
3 think is going to be the most difficult one to frame. And so  
4 I think the defense counsel are invited also to think about  
5 what's the best way to approach it? Because defense  
6 counsel's I'm sure interested in global settlement being  
7 reached expeditiously. So how do we approach this? What's  
8 the timing like? Can you do some of the economic issues  
9 earlier versus later?

10 The medical monitoring, I see an overlap with  
11 SoClean in that, too, because you're going to be monitoring  
12 people. Maybe this is relevant in a settlement for SoClean  
13 as well. So coordination here would be helpful.

14 MS. GORSHE: Yes, Your Honor.

15 THE COURT: Okay. Does defense want to say  
16 anything about that?

17 MR. LAVELLE: No, Your Honor.

18 THE COURT: So the preservation order update, who  
19 wants to address that?

20 MS. DYKSTRA: Thank you, Your Honor. Lisa Dykstra  
21 from Morgan Lewis. We've been making progress. We have --  
22 the FDA approved the remediation rework for the DS1, which is  
23 the DreamStation 1 device, which is the majority of the  
24 devices on the market. That is a CPAP machine. And we  
25 worked with Plaintiffs' counsel so that we have an amended

1 preservation order, which you entered, so that we can  
2 continue to rework those devices, remediate them and return  
3 them to the patients according to the FDA timeline.

4 We are now -- we have submitted to the FDA a rework  
5 protocol for the Trilogy device. The Trilogy is a different  
6 device that is generally used in institutions. It's a  
7 ventilator.

8 That preservation -- we have a preservation order  
9 that is ready or almost ready to be entered by Your Honor.  
10 We're still negotiating a couple terms because we do expect  
11 the FDA to approve our rework for the Trilogy devices very  
12 shortly.

13 So we have provided -- in advance of finalizing  
14 that order we've provided at their request to Plaintiffs the  
15 rework protocol that was submitted to the FDA along with a  
16 video that shows you how you actually take the device apart.  
17 And so we are sending that to Plaintiff this week.

18 On that point, Your Honor, if you would like in  
19 advance, because I know we were talking earlier about a  
20 science day and getting you some familiarity with the  
21 machines themselves just to see if it would be helpful to see  
22 these, if you would like also for us to send a video of what  
23 it looks like to actually take the device apart, it shows you  
24 where the foam is. It's a minute long. We could also  
25 forward that to Your Honor as well.

1           THE COURT: I think we could use that for the  
2 science day.

3           MS. DYKSTRA: We absolutely can.

4           THE COURT: What about the Bi-PAP machine?

5           MS. DYKSTRA: At this point in time I believe that  
6 the remediation protocols are only going forward for the  
7 Trilogy vent and the DS1. I need to confirm. I think that  
8 is already being remediated; and if you own a Bi-PAP, then  
9 you are getting a new device and perhaps a DS2, which was  
10 already manufactured with the silicone foam. I'll need to  
11 confirm that.

12           Do you have any other questions on preservation? I  
13 think that was all we had for an update.

14           THE COURT: No. There was some issue that was  
15 raised by Ms. Duggan about something where the FDA was  
16 unhappy with some of the notifications that were going along  
17 with this.

18           MS. DYKSTRA: We did have a conference call with  
19 the FDA. According to their analysis, the FDA stated that  
20 they only believed that 50 percent of patients had been  
21 notified of the recall itself. And they obviously want to  
22 make sure that patients are notified so they know how to  
23 proceed, how to send their information in or register for  
24 remediation.

25           We had a conference call with the FDA. I was on

1 that call. We explained to the FDA that our records show  
2 that over 80 percent of people actually know about the  
3 remediation, but we are absolutely willing to cooperate in  
4 any way the FDA requires to make sure that there is further  
5 communication.

6 One of the issues the FDA has raised and we are  
7 addressing is that the DMEs have a lot of the contact  
8 information for the users. We as Philips don't necessarily  
9 have a direct --

10 THE COURT: The DMEs would be --

11 MS. DYKSTRA: The durable medical equipment  
12 dealers. They're the ones that actually work with the  
13 patient. They provide the device to the patient. They get  
14 the prescription from the physicians to coordinate the device  
15 to service the patients.

16 We're not in that chain. So we did explain that to  
17 the FDA, and we are working with the DME's so we can either  
18 have them give us their list of patients so that we can  
19 notify them directly or work with the DME's to get  
20 notification out more affirmatively.

21 The other things that the FDA did raise, one, they  
22 said they want the ozone warning posted more prominently on  
23 the website, because the FDA has issued specific guidance  
24 that it is not approved for use in cleaning our machines. So  
25 we did that already. We put that more prominently on our web

1 site.

2           The FDA asks that we continue to use an application  
3 where we send out automatic notifications. Then the FDA also  
4 asked us to discuss how we might put information around our  
5 test results for these devices on our website, and we're in  
6 negotiations with the FDA about how to best do that, how to  
7 best inform health care providers of the risk to use or to  
8 continue to use -- discontinued or continued use of the  
9 devices. So we're engaged with the FDA right now on that  
10 process.

11           THE COURT: Thank you.

12           MS. DYKSTRA: You're welcome.

13           MR. SCHWARTZ: Your Honor, if I could address those  
14 issues?

15           THE COURT: Sure.

16           MR. SCHWARTZ: Steve Schwartz on preservation.  
17 Basically, Ms. Dykstra gave you the scoop. So I agree with  
18 what she said about that. We're working hard to get that  
19 nailed down.

20           When the FDA 518 notification order -- as Your  
21 Honor can imagine, these communications are of great interest  
22 to us. I'm not sure if Your Honor has actually seen the  
23 actual order the FDA has issued. It is a public order. I do  
24 have copies if Your Honor would like me to hand one up so --

25           THE COURT: Does the Defendant have any objection?

1 MS. DYKSTRA: No, Your Honor. We have no  
2 objection.

3 MR. SCHWARTZ: So I could talk about the language  
4 in this notification about "can result in serious injury and  
5 life threatening injury," And issues about concerns the FDA  
6 has about whether Philips is providing proper and effective  
7 notifications to health care providers and consumers, but  
8 Your Honor can read this just as well as I can talk about it.  
9 So I'm happy to just let Your Honor read it at your leisure.  
10 It will give Your Honor a lot of information.

11 And so I think, again, this is an ongoing,  
12 complicated issue. There's obviously a very serious issue  
13 out there, and that's why we're all here today.

14 THE COURT: Thank you.

15 MR. SCHWARTZ: Thank you, Your Honor.

16 MS. DYKSTRA: Your Honor, I just want to make you  
17 aware that Philips did provide a letter to the FDA in advance  
18 of this order, which we are providing to Plaintiffs as well  
19 this week. We'll send you a copy.

20 THE COURT: That will be fine.

21 MS. DYKSTRA: And we're responding to the order  
22 itself. We have a requirement that we put together a plan on  
23 how to better notify or how to reach more patients more  
24 speedily. And so that plan we will also share with Your  
25 Honor.

1 THE COURT: Thank you.

2 MS. DYKSTRA: And with the Plaintiff of course.

3 MR. SCHWARTZ: And that's what we're most  
4 interested in, and I think the free flow of information will  
5 help all of us.

6 THE COURT: Good.

7 MR. SCHWARTZ: Thank you.

8 THE COURT: Thank you. Other topics: Tolling  
9 agreement?

10 MR. LAVELLE: Your Honor, John Lavelle from Philips  
11 RS North America. Very briefly, the tolling agreement is a  
12 private agreement that we negotiated with some of Plaintiffs'  
13 interim leadership that's in place. Your Honor has made it  
14 available on the Court's website. And we set up a program  
15 and a procedure for attorneys who wish to sign up people to  
16 do that. And it is working, and that's really the extent of  
17 what we have to report today. It's operable, and it's  
18 available, should people wish to enter into it.

19 THE COURT: Okay. Is there any other communication  
20 that needs to be had on that from Plaintiffs to Plaintiffs?  
21 Steering committee, the leadership?

22 MS. IVERSON: No, Your Honor. All Plaintiffs'  
23 co-leads are happy with the tolling agreement. We put this  
24 on the agenda and are expecting Your Honor might want to know  
25 the number of people that have signed on to the tolling

1 agreement in the world of what we're looking at.

2           We've had discussions with Burnett's counsel as  
3 well about trying to do something similar. And in  
4 conjunction with -- I know Mr. Bode highlighted that they are  
5 seeking to try to get out of this case, which we can  
6 obviously not guarantee, but we're having discussions with  
7 them with respect to their position on that as well as the  
8 protective order and the 502(d) order that they're willing to  
9 agree to sign on to.

10           We'll work with defense counsel. There might need  
11 to be amendments at some point to the protective order, but  
12 where it stands right now works, and it can help facilitate  
13 the early discovery that the parties have been talking about.

14           THE COURT: So the next thing is the common  
15 benefit -- I'm sorry.

16           MS. DUGGAN: I was going to discuss the common  
17 benefits.

18           THE COURT: Okay. Thank you.

19           MR. BODE: On behalf of Burnett, what Ms. Iverson  
20 said was accurate. We agreed to the tolling agreement, and  
21 we agreed to the protective order. Thank you, Your Honor.

22           MS. DUGGAN: Sandra Duggan. Your Honor, you put on  
23 the agenda the common benefit order that was filed jointly by  
24 the co-lead counsel and the subcommittee for time and  
25 expenses, and we filed that at Docket 433.

1           THE COURT: I have it in front of me. I did not  
2 sign it. I mentioned that this morning. I had one issue  
3 with it.

4           MS. DUGGAN: I did want to address the Court's  
5 question, but I wanted to point out though that subsequent to  
6 our filing of this proposed order, we were contacted by the  
7 Philips Defendants. And they had provided us some suggested  
8 revisions to the order because they wanted to make it clear  
9 that Plaintiffs' participating counsel who received MDL  
10 common benefit work product as well as any state court work  
11 product, that those attorneys who are participating counsel  
12 are subject to the stipulated protective order --

13           THE COURT: Uh-huh.

14           MS. DUGGAN: -- that's entered in this court, and  
15 the amendments to that order as well as any protective orders  
16 entered in applicable state court litigation, and we agreed  
17 with them.

18           Just this morning -- Your Honor may not have seen  
19 it yet -- at Document 472 we filed an amended motion to enter  
20 an amended proposed order, and for the convenience of the  
21 Court we filed a red line version of it so you can see the  
22 edits, the additional language that we inserted, as well as a  
23 clean version that has as Exhibit A the Participation  
24 Agreement and Exhibit B the Task Definitions.

25           THE COURT: So the question that I have is on page

1 3, the third item there in the middle of the page, who would  
2 be -- to whom this order would apply, any attorneys who were  
3 not otherwise participating counsel, but who obtained access  
4 to or received the common benefit work product of MDL 3014.  
5 This has been a topic of concern in a number of other cases  
6 around the country.

7 MS. DUGGAN: I just want to add, Your Honor, that  
8 we added -- that was one sentence where we added some  
9 language, just saying thereby becoming participating counsel.  
10 Now, you're right, there are cases out there. There's  
11 L-Tryptophan. There's the Eighth Circuit in the Modified  
12 Rice litigation. If there's a state court Plaintiff that  
13 never comes to the MDL, Your Honor would not have  
14 jurisdiction over that Plaintiff or over --

15 THE COURT: Why don't you just put something in  
16 there to the extent the Court has jurisdiction.

17 MS. DUGGAN: I think that language would resolve  
18 it. I will just point out though that in the Diet Drugs  
19 litigation, the Third Circuit affirmed the District Court  
20 after objectors who objected to the common benefit fees said  
21 but we opted out early, and we weren't part of the MDL. We  
22 resolved our case in state court, and we didn't use any of  
23 the work product.

24 And the Third Circuit, using interesting language  
25 at 582 F.3d at 546 says, yes, but, the Defendants in

1 defending all of these suits are aware of the common benefit  
2 work product and the benefits that are provided to all  
3 Plaintiffs. And in that case --

4 THE COURT: The one I remember from the Third  
5 Circuit, and I'll have to go look at the one you're referring  
6 to -- it may be the same case -- there was a contract, and it  
7 all went on the basis of contract. And that's what gave the  
8 Court jurisdiction over it because those contracts became  
9 part of the Court's order. And I don't know that we have  
10 that here.

11 MS. DUGGAN: I think you're talking about the  
12 Avandia litigation --

13 THE COURT: Yes.

14 MS. DUGGAN: -- where the law firm had signed the  
15 participation agreement --

16 THE COURT: Right.

17 MS. DUGGAN: -- which is what we're implementing in  
18 this case, and then had only 25 cases in the MDL, settled  
19 thousands of cases in the California state court and didn't  
20 want to pay the assessment, and the Court did rule that we  
21 have definitely jurisdiction over the breach of contract  
22 claim.

23 So I think by adding language "provided the Court  
24 has jurisdiction" would solve this problem at this stage.

25 THE COURT: So if you can go back to your committee

1 and work on that and then file another proposed order, make  
2 sure you share it with the Defendants' counsel first, and  
3 then if everybody's in agreement, then I'll sign that as soon  
4 as possible so you can get this part of it under way.

5 MS. DUGGAN: Thank you, Your Honor. I'd appreciate  
6 it if we can get that done right away.

7 And just to give the Court some highlights from the  
8 order, it is really just to get us up and running. We  
9 followed the directives of the Court in Pretrial Order No. 8  
10 in conjunction with the time and expense subcommittee, and  
11 they're here if you have any questions.

12 We retained a CPA. We set forth protocols. The  
13 idea is that any attorney, participating counsel, that is  
14 going to be performing common benefits services would have to  
15 file their time and expenses on a monthly basis, submit them  
16 to the CPA. The time and expense committee will review the  
17 time. The CPA will review the expenses that are submitted,  
18 and we will be providing reports to the Court on a quarterly  
19 basis.

20 THE COURT: I think that's wise. Now, one thing  
21 that's not in there, this is more it affects the personal  
22 injury cases are hold backs or set asides from the gross  
23 recovery of the Plaintiffs, and there's always some dilemma  
24 about whether it should be initially determined, subject to  
25 adjustment later, or wait until the end of the case to set a

1 percentage.

2           But I think it's better done up front is my view.  
3 Everybody then knows what the scope is, what the percentages  
4 are; and if they need to be adjusted later, there will be a  
5 basis to have that handled by the Court later.

6           But I think if everybody has an understanding of  
7 what the scope is up front, it's going to be very helpful.

8           MS. DUGGAN: And we certainly appreciate that Your  
9 Honor raised this as an additional item to discuss. We had  
10 intended on filing such a motion and weren't ready to do it  
11 at the outset because we had been busy organizing ourselves  
12 and trying to get the process for keeping time and expense  
13 records up and running.

14           We're assessing amongst ourselves what would be an  
15 appropriate percentage to suggest to the Court. And I will  
16 point out I agree that it is good to have that in place,  
17 but -- and again, that could be adjusted as the litigation  
18 goes forward either up or down, depending on the results of  
19 litigation, and it's really just a fund that could be used to  
20 compensate --

21           THE COURT: Well, what I think is good is if it  
22 gets some early settlements, everybody knows what is set  
23 aside, and you're not going back years later and trying to  
24 get some money from somebody who settled. So I think it's  
25 important.

1           And as I understand it, too, there's two areas.  
2 One would be the hold back from the attorney's fees portion  
3 and then the hold back for the percentage of the expenses  
4 that would be borne by the -- out of the recovery of the  
5 individual Plaintiffs. So there's two percentages that you  
6 have to look at.

7           MS. DUGGAN: That's correct, Your Honor.

8           THE COURT: But that's good to have that up front,  
9 and then you have the hold back, and Defendants are aware of  
10 that, and they just all go into a separate fund that nobody  
11 touches until you get Court approval.

12           MS. DUGGAN: The Defendants would be subject to  
13 deposit those monies into a fund that Your Honor would  
14 oversee.

15           THE COURT: You're right. Okay.

16           MS. DUGGAN: Thank you.

17           THE COURT: Thank you. Anything else on common  
18 benefits?

19           (No response.)

20           THE COURT: So next is the Defendants'  
21 communications with users, consumers, putative class members  
22 and FDA 518 order.

23           MR. SCHWARTZ: Thank you, Your Honor. Steve  
24 Schwartz again. We discussed the 518(a) order. On the  
25 communications with putative class members, we're concerned

1 as Plaintiffs -- and I don't have an ask for Your Honor. I  
2 just want to highlight an issue that will have continuing  
3 discussions.

4           We're concerned -- we do appreciate that Philips  
5 needs to get reworked machines out to patients as soon as  
6 possible. And so we don't want to in any way slow down those  
7 trains. That's important. And so we're on board with that.

8           But at the same time, Philips is having  
9 communications with patients, putative class members, asking  
10 them questions about do they use ozone? What are your  
11 medical conditions that you have? A whole series of  
12 questions. And at the same time, they're not advising the  
13 putative class members that there are class actions filed,  
14 that their legal rights could be impacted, that their answers  
15 to the questions could possibly impact their legal rights.

16           There was some language in one of the questions  
17 that Philips has sent to CPAP users that the information  
18 would only be used for purposes of the retrofitting. We've  
19 asked Philips whether they would agree to embargo any  
20 information they get so it wouldn't be used in litigation.

21           So these are issues out there that are concerning  
22 to us. We're going to talk with Philips more about this  
23 issue. Hopefully we'll reach agreement. If we don't, we may  
24 have to bring an issue to the Court. But the concern that we  
25 have is if you ask someone a question one way, you might get

1 one answer, but if you ask it another way, you might get a  
2 different answer, and if people know their legal rights may  
3 be impacted, they'd be more careful about what they say.

4           And if you tell someone you'll get your machine  
5 sooner, your new machine sooner, your safe machine sooner if  
6 you check this box, some people may be incentivized to check  
7 a box that may not be 100 percent accurate to get that new,  
8 safer machine sooner.

9           So we just want to get an understanding up front  
10 how this information will be used and to make sure that we're  
11 not prejudiced, class members aren't prejudiced. And I think  
12 it will be helpful also for Defendants to make sure we have  
13 an understanding what the rules of the road will be for how  
14 this kind of information will be used.

15           So again, I'm not asking Your Honor to obviously  
16 make any decisions about this today, but this is an issue  
17 that has been going back and forth beginning I think when the  
18 interim committee was talking with Philips. At some point we  
19 are going to need to get some resolution, even if the  
20 resolution is what is this information going to be used for,  
21 and how will it be used or relevant for the litigation?

22           MR. LAVELLE: Your Honor, John Lavelle for Philips  
23 RS North America. Let me start by saying that, as  
24 Mr. Schwartz pointed out, there's no motion here before Your  
25 Honor. So this is premature.

1           What's important to keep in mind with respect to  
2 the issues that Mr. Schwartz raised is the company is  
3 regulated by the FDA. We have a recall that is being  
4 supervised by the FDA where communications must occur --

5           THE COURT: Right.

6           MR. LAVELLE: -- with patients and users concerning  
7 completion of the recall, getting the recalled devices out of  
8 the marketplace and getting them returned.

9           In addition, because this is a prescription medical  
10 device, Philips RS has reporting obligations under federal  
11 regulations.

12           If there is a report that comes to the company  
13 concerning an issue, the company has a federally mandated  
14 obligation to investigate in order to determine whether or  
15 not it is a reportable incident, whether it has to be  
16 reported to the FDA. And there is a requirement that the  
17 company do an investigation.

18           We've discussed with Plaintiffs, we've explained to  
19 them this, and we have also offered to explain how that  
20 works.

21           There is no motion before Your Honor, but I will  
22 say that there are no class members before Your Honor either.  
23 There are only putative class members. And the Supreme Court  
24 recognized in the Gulf Oil case that a company like Philips  
25 RS has the obligation and the duty and the right to

1 communicate with customers without interference just because  
2 a putative class action has been filed.

3           So we welcome continuing discussions with  
4 Plaintiffs. Lead counsel, we have shown them and shared with  
5 them a number of proposed communications going out to users  
6 and will continue to do that and solicit their comments.

7           MR. STEINBERG: Your Honor, just one other item.  
8 Michael Steinberg on behalf of Philips. It's also -- you  
9 know, Mr. Schwartz raised it. People are asking, well,  
10 what's your condition? And it's important because the FDA  
11 has asked Philips to prioritize how they get out the devices.

12           And so this is, again, the regulatory  
13 correspondence that the FDA is asking Philips to do so that  
14 they can prioritize the recall. So there's nothing nefarious  
15 about asking what is your condition? That's what the FDA  
16 wants to know so that we can choose, okay, these people are  
17 to be prioritized, get machines, get replacements --

18           THE COURT: Just so I understand, if somebody has  
19 like a respiratory problem where they can't breathe at night  
20 unless they have the machine --

21           MR. STEINBERG: Right.

22           THE COURT: -- that's what they would tell you, and  
23 that person goes to the head of the line --

24           MR. STEINBERG: Yes. Right. There's conditions  
25 that -- I don't know the actual hierarchy that the FDA

1 chooses for how they want to select them, but they have one.  
2 And so they are making choices about who's going to get the  
3 first ones and who's going to get other ones. So there is a  
4 segregation on that basis. So that's why the information is  
5 being sought.

6 THE COURT: I think what's most important is  
7 transparency in your discussions with the Plaintiffs' counsel  
8 so that they can understand why you're asking the question or  
9 why the form of the question is the way that it is. If  
10 there's a problem with the form of the question, you maybe  
11 can have some dialogue about that. And if there's problems,  
12 you know, you can come back to the Court.

13 MR. STEINBERG: Of course, Your Honor. That's why  
14 we have been providing them with advanced notice before  
15 sending them out. So we're working with them, and it's a  
16 two-way street on cooperation, we appreciate. But I wanted  
17 to make sure that Your Honor is not under any suggestion that  
18 this is sort of covert discovery --

19 THE COURT: No. You need to communicate with the  
20 people in order to -- to the users so that they can return  
21 the devices and get either replacements or repair.

22 MR. STEINBERG: Exactly. Thank you, Your Honor.

23 THE COURT: Okay. So the topics for the Court,  
24 we've had some discussion about how the technology would be  
25 set up for the registry. I'm aware in other cases where it's

1 possible if you use the right tool, you can get reports  
2 either monthly or quarterly about the nature of the illnesses  
3 being claimed, who the users are, geographic, age, different  
4 things like that that can be very helpful in getting ready  
5 for settlement or eventual trials.

6 MS. DUGGAN: Sandra Duggan. Your Honor, yes, we  
7 touched upon this earlier. I think Defendants and the  
8 Plaintiffs have both been in contact with certain companies.  
9 We're doing our due diligence. And our goal is to perhaps  
10 have a demonstration of the platforms at our meeting on April  
11 5 and April 6, and we will report back to the Court on that.

12 THE COURT: And there's a question for the funding  
13 for it. Who's going to bear the cost? How much of the cost?

14 MS. DUGGAN: I think our concurrent thinking is  
15 that we'll be splitting the cost.

16 THE COURT: Thank you. Now, the next question is  
17 the ordering of transcripts.

18 My thought on that is that any time we have a  
19 status conference or a hearing, that the transcripts will be  
20 automatically ordered, and the costs would be split between  
21 the parties. And then they would be posted on the Court's  
22 website so that we would have transparency for anybody who's  
23 interested in following the case, that they would be able to  
24 do so. Is that acceptable?

25 MS. DUGGAN: Yes, Your Honor.

1 THE COURT: Okay.

2 MR. LAVELLE: Yes, Your Honor.

3 THE COURT: I'll enter an order that each status  
4 conference and hearing will be transcribed at the joint cost  
5 of the parties to be shared 50 percent with the Defendants  
6 and 50 percent with the Plaintiffs.

7 Now, that brings up one other matter when we're  
8 talking about potentially affected individuals who may want  
9 to follow this case and also counsel who are not members of  
10 the steering committee.

11 Mr. Rihn, I do get calls here at my chambers which  
12 I do not take personally, but what I would intend to do in  
13 the future is to refer them to you or to Mr. Wolff. And so,  
14 depending on the nature of the inquiry, for the most part  
15 they tend to be Plaintiffs, individual Plaintiffs with  
16 personal injuries, but I think's that the best way for the  
17 Court to field those if that's an accepted protocol.

18 MR. RIHN: Yes, Your Honor.

19 THE COURT: I don't take any information, nor do my  
20 clerks take any information from the individuals, but just as  
21 a way for them to be advised about what's going on, then you  
22 can refer them to the website if you'd like.

23 MR. RIHN: Thank you, Your Honor.

24 THE COURT: We have next voluntary dismissals.  
25 We've had four voluntary dismissals, and I just wanted to

1 make sure everybody was in accord that the Court should  
2 recognize those and grant those. Does anybody want to be  
3 heard on that?

4 MS. IVERSON: Kelly Iverson for Plaintiffs, Your  
5 Honor. No Answer has been filed under 41(a), I think, the  
6 voluntary dismissals. If Plaintiffs' counsel elect to do so,  
7 it's proper.

8 In the tolling agreement there's also an  
9 opportunity for Plaintiffs to voluntarily dismiss, sign on to  
10 the tolling agreement in order to, you know, save their claim  
11 that way, and that might be where some of those dismissals  
12 come from.

13 THE COURT: I just want to make sure there's no  
14 problem with those.

15 MR. LAVELLE: Your Honor, John Lavelle for Philips  
16 RS. At least two of those dismissals were by individuals who  
17 filed initially in state court. We removed the cases to  
18 Federal Court. There was fairly extensive litigation in  
19 front of the judicial panel on multi-district litigation,  
20 which overruled the objections and moved the cases here, and  
21 then they were voluntarily dismissed.

22 We haven't had any discussions with that counsel.  
23 We would have concerns obviously if they were to file  
24 repeated lawsuits and try to abate this Court's jurisdiction  
25 because we think their cases, if they're going to move

1 forward, belong here, and they should not be litigated in  
2 another court. But that may or may not be an issue that ever  
3 occurs.

4 THE COURT: But I should grant the voluntary  
5 dismissal.

6 MR. LAVELLE: We don't object to the voluntary  
7 dismissal, but we would object to them seeking to evade Your  
8 Honor's jurisdiction.

9 THE COURT: Okay. Thank you. So leadership  
10 development, we have a leadership development committee here,  
11 and I was so impressed with the number of applicants, very  
12 talented younger lawyers that could benefit from some  
13 mentoring and opportunities that may be presented in this  
14 case.

15 So I'm periodically going to want to hear reports  
16 on how that process is working. I mean this is more of an  
17 issue nationwide, and there's an effort by the federal courts  
18 to make sure the next generation of lawyers coming up are  
19 able to get adequate opportunities. So I'll be interested to  
20 hear from you about the leadership development committee.

21 MS. IVERSON: Kelly Iverson again. Thank you, Your  
22 Honor. I think you know for one I was very excited about the  
23 leadership development committee. We have to date in our  
24 structure of organization, we have actually matched each of  
25 the leadership development committee attorneys with a PSC

1 member attorney mentor individually. We did that based upon  
2 people's interests so that they're serving on the same  
3 committees together, and that the PSC members then have a  
4 vested interest in making sure that the leadership  
5 development committee members are engaged in the process,  
6 engaged in the work.

7           Additionally, the committee itself -- and I'm going  
8 to let Ava and Kevin speak to this if you'd like to hear from  
9 them -- have helped organize some various events over the  
10 past month and internally selected through a blind vote to  
11 co-lead the -- Ava and Kevin to serve as co-chairs of the  
12 leadership development committee, and they are tasked with  
13 staying with the co-leads.

14           Sandy and I personally are serving as chairs, but  
15 Chris and Steve have been just as coordinated with the  
16 leadership development, making sure that they're engaged in  
17 the work and the process. But to make sure if somebody is  
18 not getting enough work, if there's any issues with mentors,  
19 if there's any ideas that the leadership development  
20 committee has for ways that we can engage them and get them  
21 involved, that those co-chairs are tasked with making sure  
22 that we as co-leads are up to speed on those ideas. But I  
23 would invite Kevin Tucker and Ava Cavaco.

24           THE COURT: I think at the end of all of this  
25 process it would be good to see a report of some kind after

1 the cases are no longer before me so that it can be helpful  
2 to Judges in other MDLs. Do you want to come forward?

3 MS. IVERSON: I believe that we just tasked Ava and  
4 Kevin with that task, Your Honor.

5 THE COURT: Keep good notes.

6 MR. TUCKER: Good afternoon, Your Honor. Kevin  
7 Tucker. I just want to say thank you for the opportunity.  
8 There's ten folks in this room who might not be here if it  
9 weren't for the creation of the leadership development  
10 committee.

11 In addition to the mentorship that we're getting,  
12 this is just a really intimidating space. So we're creating  
13 a safe space for the leadership development committee to  
14 hopefully grow, problem solve with one another and just  
15 bounce ideas off of one another before we take it to the  
16 group over here. So thank you again for the opportunity.

17 MS. CAVACO: And Kevin --

18 THE COURT: Introduce yourself.

19 MS. CAVACO: Ava Cavaco. Thank you. Kevin, he  
20 created -- we have weekly meetings with the LDC. So anyone  
21 that gets assigned a task, if they've never done it before,  
22 so we can group think with each other and say has anyone ever  
23 done this before? And all the LDC members that I've talked  
24 to have had conversations with their mentors, and everybody  
25 has been assigned meaningful work as litigation moves

1 forward. So if you have any questions, I would be happy to  
2 speak --

3 THE COURT: Great.

4 MR. TUCKER: And if I could just add on to that, I  
5 think it's important that the Court -- and I'm sensitive to  
6 the Defendants who might think that they're paying for our  
7 education. I think that anyone who knows a struggling  
8 associate or junior attorney might struggle with an  
9 assignment for a long time. But by spending an hour every  
10 single week bouncing ideas off of one another, I think that  
11 we're going to find a much more efficient contribution to the  
12 case.

13 THE COURT: I think it's a little different, too,  
14 when you're talking not about -- there's a way to benchmark  
15 attorneys fees in this kind of litigation, class actions.  
16 The ranges of recoveries are there. So I'm not sure that  
17 any -- you know, it's not like hourly based where you get  
18 somebody that can do it in an hour at a thousand dollars an  
19 hour and somebody that's going to take 100 hours even though  
20 it's \$250 an hour. You're going to be paying a lot more for  
21 the younger lawyer.

22 I'm not sure that is as sensitive an issue when you  
23 have percentage kinds of recoveries. That may be benchmarked  
24 against the lodestar, but I think it's a little bit different  
25 when you're talking about contingent fee cases.

1 MS. CAVACO: Absolutely.

2 THE COURT: Thank you.

3 MS. CAVACO: Thank you.

4 THE COURT: Any comments from the defense counsel?

5 MR. LAVELLE: Your Honor, John Lavelle. I'll just  
6 say that we have a wonderful and diverse team working on the  
7 case. The attorneys you see here today represent only a  
8 portion of the defense team for the Philips Defendants, and  
9 we will be looking for opportunities to bring in our next  
10 generation stars before Your Honor to give them an  
11 opportunity.

12 THE COURT: That would be good, too. I'm sure  
13 there will be other cases in the future with these members of  
14 the leadership development team here. So it's good to note  
15 that the Court is happy to have those lawyers present  
16 arguments.

17 As I said to the SoClean lawyers this morning, I do  
18 understand if it's the most significant issue in the case,  
19 the younger lawyers will not be arguing those matters, that  
20 it will be the senior lawyers who bear the brunt of the  
21 responsibility for the outcomes. So I do understand that.

22 But there will be many opportunities I would think,  
23 both in depositions, briefing, motions before the Court, that  
24 there will be opportunities for our younger lawyers to get  
25 experience and be able to take leadership roles themselves

1 for the defense side or the Plaintiffs' side.

2 But thank you. I'm glad to see that there's some  
3 organization, that initiatives have been undertaken to make  
4 this a meaningful experience, which is what the Court was  
5 hoping for.

6 Okay. We've already talked about the hold backs or  
7 the set asides. I mentioned the benchmark mediations,  
8 benchmark or bench trial mediations, that we have to come up  
9 with a format for that, and this is where both the defense  
10 and the Plaintiffs are going to have to use some creativity  
11 to see what's the best way when you have these mixed kind of  
12 cases where you have the economic loss plus the personal  
13 injury and then you layer in on top the monitoring claims.

14 So how do we get those to a meaningful mediation in  
15 a relatively expeditious fashion? So we'll be looking to  
16 everybody for that.

17 And I think that was it. Are there any other  
18 issues that need to come up?

19 MR. LAVELLE: Your Honor, are we scheduling the  
20 next case management conferences?

21 THE COURT: Yes. It's going to be -- we had some  
22 discussion this morning. With SoClean it's going to be at  
23 4:00 on April 20, which I believe is a Wednesday at 4:00.

24 And as I told everyone this morning, there will be  
25 cookies and I think some antipasta with coffee and tea and

1 maybe water. We don't have -- we lost our ice machine over  
2 the course of the pandemic. It was down in the cafeteria  
3 area, and then they just stopped using it. So we can't get  
4 ice in the courthouse. So it makes it difficult for soft  
5 drinks. So we do have a few of those for you though.

6 Is there anything else to come before the Court  
7 today?

8 MS. IVERSON: Nothing from Plaintiffs, Your Honor.

9 THE COURT: And on the scheduling going forward, I  
10 am going to come up and send out a proposed schedule for our  
11 monthly conferences. We will be having monthly conferences.  
12 Anything from the defense side?

13 MR. LAVELLE: No, Your Honor.

14 THE COURT: Okay. I just wanted to mention this, I  
15 had mentioned this this morning. The Court's preference is  
16 that these hearings be in person. I think it's helpful.  
17 People can communicate with each other in a different fashion  
18 when you're here in person.

19 Now, if, as we get into the case, if there's a  
20 month where there's nothing really of great significance that  
21 needs to be decided, if you mutually agree that you can meet  
22 by either phone or Zoom, I'll entertain that, and we can just  
23 have a very short hearing.

24 But if people have to talk or there's issues, and I  
25 need to engage in a dialogue with parties or both parties

1 want to speak on a particular topic, it's best to do that in  
2 person. I find, pandemic permitting, that we can get back to  
3 a sense of normalcy as to how these matters are conducted.

4 And I think that having a social, which I'll  
5 probably do maybe once a year, is really in the spirit of the  
6 Inns of Court movement. Any of those of you who have been  
7 involved in an Inn of Court know that sharing an opportunity  
8 to eat and talk with each other informally fosters the best  
9 of civility and professionalism going forward. So in that  
10 spirit that's why I'm going to do it. So I'm going to invite  
11 counsel to come back and meet us back in my atrium area  
12 behind this courtroom. Thank you.

13 LAW CLERK KATIE MCGEE: All rise.

14 (Proceedings were concluded at 3:44 p.m.)

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16  
17  
18 C E R T I F I C A T E

19  
20 I, Deborah Rowe, certify that the foregoing is  
21 a correct transcript from the record of proceedings in the  
22 above-titled matter.

23  
24 S/Deborah Rowe \_\_\_\_\_

25 Certified Realtime Reporter