BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: PHILIPS RECALLED CPAP, BI-LEVEL PAP, AND MECHANICAL VENTILATOR PRODUCTS LIABILITY LITIGATION	MDL No. 3014

DEFENDANTS PHILIPS NORTH AMERICA LLC AND PHILIPS RS NORTH AMERICA LLC'S RESPONSE TO MOTION TO TRANSFER AND COORDINATION OR CONSOLIDATION PURSUANT TO 28 U.S.C. § 1407

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Defendants Philips North America LLC and Philips RS North America LLC (together "Philips"), through their undersigned counsel, respectfully submit this response to the motion filed by Movant-Plaintiff in *Starner v. Koninklijke Philips, N.V., et. Al* ., No. 2:21-cv-2925 (E.D. Pa.) ("*Starner*") seeking coordination or consolidation, pursuant to 28 U.S.C. § 1407, of numerous cases related to the June 14, 2021 voluntary recall[1] of certain Continuous Positive Airway Pressure ("CPAP"), Bi-Level Positive Airway Pressure ("Bi-Level PAP"), and mechanical ventilator prescription medical devices (collectively, the "Recalled Devices") in the Eastern District of Pennsylvania before Senior Judge Timothy J. Savage. Dkt. 13.[2] For the reasons set forth below, Philips agrees with Movant-Plaintiff Starner that centralization of these matters is appropriate. Philips, however, respectfully submits that the most appropriate transferee forum in this matter is the District of Massachusetts where one of the defendants is headquartered and the largest number of cases are currently pending. Alternatively, Philips respectfully submits that the Western District of Pennsylvania where another defendant is headquartered and where the second largest number of cases is currently pending would also be an appropriate forum.

BACKGROUND

On June 14, 2021, Philips instituted a voluntary recall[3] of the Recalled Devices, which are used to treat certain sleep and respiratory conditions, including sleep apnea. The Recall Notice explained that the recall had been initiated "due to two issues related to the polyester-based polyurethane (PE-PUR) sound abatement foam used in" the Recalled Devices that could occur

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[1] *See* Philips Recall Notice (June 14, 2021) at 2 ("Recall Notice"), available at https://www.usa.philips.com/a-w/about/news/archive/standard/news/press/2021/20210614-philips-issues-recall-notification-to-mitigate-potential-health-risks-related-to-the-sound-abatement-foam-component-in-certain-sleep-and-respiratory-care-devices.html.

[2] The motion to consolidate also concerns the appointment of interim lead counsel, a matter as to which Philips takes no position.

[3] *See* Recall Notice at 2.

"over time under 'certain circumstances,'" specifically that: 1) the PE-PUR foam may degrade into particles which may enter the device's air pathway and be ingested or inhaled by the user, and 2) the PE-PUR foam may off-gas certain chemicals. (*See* Dkt 6-1 (Recall Notice)). Philips is voluntarily taking corrective action pending required regulatory approvals, including replacement of the PE-PUR foam in all Recalled Devices with a new material as expeditiously as possible.[4]

Plaintiffs in the various actions allege that Philips knew about and failed to disclose potential issues with the PE-PUR foam before the recall was announced and that Philips made misrepresentations in connection with the sale of the Recalled Devices. Plaintiffs assert claims for alleged violations of various state consumer protection statutes, as well as a host of other claims such as breach of warranty, product liability, and unjust enrichment.

As of the time of this filing, Philips is aware of at least 32 lawsuits (together with *Starner*, the "Actions") making similar allegations concerning the recall and asserting similar claims about the Recalled Devices, primarily in the form of putative class actions though some cases have been filed as individual actions.[5] Additional such suits continue to be filed with regularity in courts

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[4] Recall Notice at 3.

[5] *Algofi, et al. v. Koninklijke Philips N.V., et al.*, No. 1:21-cv-11150 (DJC) (D. Mass.); *Autry, et al. v. Koninklijke Philips N.V., et al.*, No. 2:21-cv-00983 (MRH) (W.D. Pa); *Bossey v. Koninklijke Philips N.V., et al*., No. 2:21-cv-930 (MRH) (W.D. Pa.); *Boudreau v. Koninklijke Philips N.V., et al*., 1:21-cv-11095 (DJC) (D. Mass.); *Emmino v. Koninklijke Philips N.V., et al*., No. 8:21-cv-1609 (MSS) (M.D. Fla.) ; *Graham v. Respironics, Inc., et al.*, No. 3:21-cv-00485 (BJB) (W.D. Ky.); *Griffin v. Koninklijke Philips N.V., et al.*, No. 1:21-cv-11077 (DJC) (D. Mass.); *Heilman v. Koninklijke Philips N.V., et al.*, No. 2:21-cv-00862 (MRH) (W.D. Pa.); *Heller v. Koninklijke Philips N.V., et al.*, No. 4:21-cv-0111 (CDL) (M.D. Ga); *Hufnus v. Philips North America LLC, et al.*, No. 1:21-cv-11130 (DJC) (D. Mass); *Jones, et al. v. Koninklijke Philips N.V., et al.*, No. 2:21-cv-00975 (MRH) (W.D. Pa); *McGuire v. Philips North America LLC, et al.*, No. 2:21-cv-11153 (DJC) (D. Mass.); *Mitrovich v. Philips North America LLC, et al.*, 2:21-cv-5793 (C.D. Ca.); *Oldigs v. Philips North America LLC, et al.*, No. 1:21-cv-11078 (DJC) (D. Mass.); *Peebles, et al. v. Koninklijke Philips N.V., et al.*, No. 2:21-cv-00962 (MRH) (W.D. Pa); *Ramirez v. Philips North America LLC, et al.*, No. 1:21-cv-11132 (DJC) (D. Mass.); *Schuckit v. Philips North America LLC, et al.*, No. 1:21-cv-11088 (DJC) (D. Mass.); *Shelton v. Koninklijke Philips N.V., et al.*, No. 1:21-cv-11076 (DJC) (D. Mass.); *Shrack v. Koninklijke Philips N.V., et al.*, No. 1:21-cv-00989 (D. Del.); *Starner v. Koninklijke Philips N.V., et al.*, No. 2:21-cv-2925 (TJS) (E.D. Pa.); *Swann v. Koninklijke Philips N.V., et al.*, No. 1:21-cv-11142 (DJC) (D. Mass.); *Thomas v. Koninklijke Philips N.V., et al.*, No. 2:21-cv-00874 (MRH) (W.D. Pa.); *Osman v. Koninklijke Philips N.V., et al.*, No. 21-cv-11017 (DJC) (D. Mass.); *Cohen*

across the country, and based on discussions with Plaintiffs' counsel, Philips expects the volume to continue to increase.

On July 7, 2021, the plaintiffs in *Starner* filed a Motion for Transfer and Coordination or Consolidation (the "MDL Motion") with the JPML, requesting centralization of the Actions (and any future-filed "tag-along" actions) for coordinated pretrial discovery and proceedings in a multidistrict litigation ("MDL") pursuant to 28 U.S.C. § 1407.[6]

Philips agrees that centralization of the Actions and follow-on actions is appropriate because it will promote judicial efficiency and prevent duplicative discovery, as well as serve to enable consistency in pretrial rulings. Philips, however, disagrees that centralization in the Eastern District of Pennsylvania is most appropriate. Only *one* of the 32 cases is pending in that District, and none of the defendants are located there.[7] The venue with the strongest nexus to the litigation is the District of Massachusetts, where Philips North America LLC's office is located and where fifteen cases currently are pending before Judge Denise J. Casper. Alternatively, the Western District of Pennsylvania, the location of Philips RS North America LLC's headquarters, and where

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v. Koninklijke Philips N.V., et al., No. 2:21-cv-00984 (MRH) (W.D. Pa.); *Bartley v. Koninklijke Philips N.V., et al.*, No. 1:21-cv-11206 (DJC) (D. Mass.); *Basemore v. Koninklijke Philips N.V., et al.*, No. 1:21-cv-11208 (DJC) (D. Mass.); *Manna v. Koninkelijke Philips N.V., et al.*, No. 1:21-cv-11017 (DJC) (D. Mass.); *Feick v. Koninklijke Philips N.V., et al.*, No. 1:21-cv-11221 (DJC) (D. Mass.); *Elaine Davis v. Koninkelijke Philips N.V., et al.*, No. 2:21-cv-01010 (AMM) (N.D. Ala.); *Thomas Davis v. Koninkelijke Philips N.V., et al.*, No. 2:21-cv-01009 (SGC) (N.D. Ala.); *Sizemore v. Koninklijke Philps N.V., et al.*, No. 1:21-cv-00134 (LAG) (M.D. Ga.); *Stewart v. Koninklijke Philips N.V., et al.*, No. 2:21-cv-01355 (EEF) (E.D. La).

[6] *See In re: Philips Recalled CPAP, Bi-Level PAP, and Ventilator Litigation*, MDL No. 3014 (J.P.M.L., filed July 7, 2021) (ECF No. 1-1).

[7] Notably, counsel for the *Starner* plaintiffs who filed the initial petition and suggested the Eastern District of Pennsylvania as an appropriate forum have subsequently filed an action in the Western District. *See Thomas v. Koninklijke Philips, N.V., et al.*, No. 2:21-cv-00874 (MRH) (W.D. Pa.). As noted, the *Starner* action is the sole identified action pending in the Eastern District of Pennsylvania whereas there are now fifteen identified actions in the District of Massachusetts and seven identified actions in the Western District of Pennsylvania.

seven cases currently are pending before Chief Judge Mark R. Hornak would be an appropriate forum.

ARGUMENT

Centralization is appropriate pursuant to 28 U.S.C. § 1407 if the movant establishes that "common questions of fact" exist,[8] that centralization will "be for the convenience of [the] parties and witnesses," and that centralization "will promote the just and efficient conduct of [the] actions." *See* 28 U.S.C. § 1407(a).

I. CENTRALIZATION IS APPROPRIATE.

Each prong of the standard is satisfied by the Actions because there is significant overlap among the factual bases for the various claims. This remains true even though there are individualized factual questions unique to each Action and named plaintiff, such as, *inter alia*, (a) whether the plaintiff purchased a device directly, (b) whether and to what extent the cost may have been covered by insurance or other sources, and (c) the plaintiff's period of usage of the device. *See In re Auto Body Shop*, MDL No. 2557, 2014 WL 3908000, at *1-2 (J.P.M.L. 2014). As the Panel has observed, "[t]ransfer under Section 1407 does not require a complete identity of common factual issues or parties as a prerequisite to transfer, and the presence of additional facts or differing

[8] The criteria listed in 28 U.S.C. § 1407 concerning the establishment of "one or more common questions of fact" are considerably different from the criteria set forth in Federal Rule of Civil Procedure 23 for class certification. *Compare* 28 U.S.C. § 1407, *with* Fed. R. Civ. P. 23(a)(2) *and* Fed. R. Civ. P. 23(b)(3). Under § 1407, the Panel is concerned only with common facts *alleged between and among* the filed actions. *See* 28 U.S.C. § 1407. Philips' recognition that the Actions share common allegations concerning the recall and therefore are likely to share common discovery does not correlate with the issue of whether there are common questions of fact *between* the members of the proposed classes or whether class certification would otherwise be appropriate. *See* Multidistrict Litig. Man. § 5:11 (West 2014) ("Transfer of multiple actions under 28 U.S.C.A. § 1407 for coordinated or consolidated pretrial proceedings is significantly different from certification of an action or actions to proceed as a class or classes under Fed. R. Civ. P. 23. . . . The Panel has recognized that the questions of class action certification and § 1407 transfer are sufficiently unrelated[.]"); *see also e.g.*, *Wal-Mart v. Dukes,* 131 S.Ct. 2541, 2551 (2011) (reiterating that district courts must conduct a "rigorous analysis" of the Rule 23 requirements prior to certifying a class).

legal theories is not significant where . . . the actions still arise from a common factual core." *Id.*; *see also In re Advanced Inv. Mgmt.*, 254 F. Supp. 2d 1377, 1379 (J.P.M.L. 2003) ("[T]ransfer of all related actions to a single judge has the streamlining effect of fostering a pretrial program that: 1) allows pretrial proceedings with respect to any non-common issues to proceed concurrently with pretrial proceedings on common issues and 2) ensures that pretrial proceedings will be conducted in a manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties").

Centralization also serves the convenience of the parties and witnesses by streamlining discovery. Plaintiffs here are likely to seek overlapping discovery concerning the design and manufacture of the Recalled Devices, the alleged defects, and when Philips became aware of the alleged defects. Consolidation thus is appropriate notwithstanding the presence of individualized questions of fact. *In re Yamaha Motor Corp. Rhino,* 597 F. Supp. 2d 1377, 1378 (J.P.M.L. 2009) (finding consolidation appropriate to minimize duplicative discovery regarding allegations of vehicle defects, even when numerous non-class cases also posed individualized factual questions).

With the benefit of consolidation, a single judge can structure discovery orders to eliminate duplicative discovery, such as the duplicative depositions of Philips witnesses likely to be sought by multiple plaintiffs. *See, e.g.*, *In re Auto Body Shop*, 2014 WL 3908000, at *1 (transfer before a single judge was beneficial because he or she could "structure pretrial proceedings to accommodate all parties' legitimate discovery needs while ensuring that common witnesses are not subjected to duplicative discovery demands"); *In re Enfamil Lipil*, 764 F. Supp. 2d 1356, 1357 (J.P.M.L. 2011) ("Centralizing the actions will allow for the efficient resolution of common issues and prevent unnecessary or duplicative pretrial burdens from being placed on the common parties and witnesses..").

Similarly, a single judge will be able to oversee the complex expert reports and *Daubert* hearings which are likely to take place in this matter. *See, e.g.*, *In re Natrol, Inc. Glucosamine/Chondroitin*, MDL No. 2528, 2014 WL 2616783, at *1 (J.P.M.L. 2014) ("Plaintiffs also contend that centralization is not warranted because voluntary coordination of discovery is practicable given the lack of complexity and the limited number of actions and involved counsel. The record shows, however, that complex scientific issues concerning the effectiveness of the active ingredients in the Natrol products . . . will be litigated and many of the same clinical studies will be challenged. In our view, extensive common expert discovery and one or more *Daubert* hearings likely will be required.").

Centralization would also conserve the resources of the judiciary. It would assign responsibility for overseeing a pretrial plan to one judge as opposed to many different federal judges. *See, e.g.*, *In re Pineapple*, 342 F. Supp. 2d 1348, 1349 (J.P.M.L. 2004).

Finally, "[c]entralization will enable the transferee judge to make consistent rulings on discovery disputes from a global vantage point" and will otherwise prevent inconsistent pretrial rulings on common matters thus avoiding conflicting outcomes and judgments. *See In re Yamaha,* 597 F. Supp. 2d at 1378; *see also In re Dow Chem.*, 650 F. Supp. 187, 188 (J.P.M.L. 1986). In addition, and perhaps most critically, it will prevent inconsistent pretrial rulings with respect to class certification. *See, e.g., In re H&R Block,* 435 F. Supp. 2d 1347, 1349 (J.P.M.L. 2006) ("The three actions contain competing class allegations and involve facts of sufficient intricacy that could spawn challenging procedural questions and pose the risk of inconsistent and/or conflicting judgments."); *In re Sugar Industry*, 395 F. Supp. 1271, 1273 (J.P.M.L. 1975) ("We have consistently held that transfer of actions under Section 1407 is appropriate, if not necessary, where the possibility of inconsistent class determination exists.").

One set of issues that is appropriate for determination in a consolidated proceeding relates to the entity known as Royal Philips (Koninklijke Philips, N.V.), which has been named as a defendant in a number of cases and which intends to move to dismiss on personal jurisdiction grounds. The questions of whether service has been completed and whether the U.S. Courts have personal jurisdiction over Royal Philips are best suited for consolidated resolution, rather than being litigated in disparate individual cases and forums, which could lead to inconsistent rulings.

For all these reasons, Philips submits that the Panel should enter an Order consolidating the Actions.

II. THE MOST APPROPRIATE FORUM FOR TRANSFER IS THE DISTRICT OF MASSACHUSETTS

The Panel should transfer the consolidated action to the District of Massachusetts because the largest number of cases are pending there (indeed, the very first action was filed there) and it has a strong nexus to the litigation. *See, e.g.*, *In re: Reciprocal of Am. (ROA) Sales Practices Litig.*, 281 F. Supp. 2d 1356, 1358 (J.P.M.L. 2003). Critically, the headquarters of Philips North America LLC is in Cambridge, Massachusetts and thus is located within the District of Massachusetts. *See In re GAF Elk Cross Timbers Decking Mktg., Sales Practices & Prods. Liab. Litig.*, 65 F. Supp. 3d 1407, 1408 (J.P.M.L. 2014) (transferring MDL to the District in which the common defendant was headquartered); *In re Bluetooth Headset Prods. Liab. Litig.*, 475 F. Supp. 2d 1403, 1404 (J.P.M.L. 2007) (same); *In re RC2 Corp. Toy Lead Paint Prods. Liab. Litig.*, 528 F. Supp. 2d 1374, 1375 (J.P.M.L. 2007) (same). Relevant witnesses and documents are located in Massachusetts. *See In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 780 F. Supp. 2d 1379, 1382 (J.P.M.L. 2011) (centralizing cases in the Eastern District of Kentucky, where "[r]elevant documents and witnesses" were likely located).

Currently, fifteen of the Actions are pending before Judge Casper in the District of Massachusetts. The District of Massachusetts has a lighter caseload (3,041 civil cases) than the Eastern District of Pennsylvania (7,491 civil cases), which the *Starner* Plaintiffs have proposed.[9]

As the *Heilman* Plaintiffs point out in their Response [Dkt. 6], Judge Casper (as well as Chief Judge Hornak) each are presiding over a single MDL.[10] Judge Casper was appointed to the bench in 2010 and has proven experience managing MDL proceedings, with both past and current experience managing such matters. *See In re Evenflo,* 466 F. Supp. 3d at 1385; *In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation,* No. 14-md-02503-DJC, 2015 WL 5458570, at *1 (D. Mass. Sept. 16, 2015) (complex litigation involving nationwide pharmaceutical antitrust class actions).

III. ALTERNATIVELY, THE WESTERN DISTRICT OF PENNSYLVANIA IS AN APPROPRIATE FORUM FOR TRANSFER

While the District of Massachusetts has the largest number of case filings, a clear nexus to the matter and an experienced assigned judge with past and current MDL experience, the Western District of Pennsylvania is home to the other defendant, Philips RS North America LLC (with headquarters in Murrysville, PA) and is also well-equipped to handle the consolidated actions. Seven of the Actions are pending before Chief Judge Hornak in the Western District of Pennsylvania, whereas only *one* is pending in the Eastern District of Pennsylvania before Senior Judge Savage, where no defendant is located. Chief Judge Hornak also has recent experience managing an MDL matter. *See, e.g.*, *In re Erie Covid-19 Bus. Interruption Prot. Ins. Litig.*,. MDL No. 2969, 2020 U.S. Dist. LEXIS 236055, at *9 (J.P.M.L. Dec. 15, 2020) (sending MDL to Chief

[9] https://www.uscourts.gov/file/28133/download (Last visited July 26, 2021).

[10] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-June-15-2021.pdf (Last visited July 26, 2021); *see In re Evenflo Co., Mktg., Sales Practices & Prods. Liab. Litig.*, 466 F. Supp. 3d 1384, 1385 (J.P.M.L. 2020).

Judge Hornak). Judge Hornak was appointed to the federal bench in 2011, and became Chief Judge of the Western District of Pennsylvania in December 2018.

The Western District of Pennsylvania also has a lighter caseload (2,717 civil cases) than the Eastern District of Pennsylvania (7,491 civil cases). [11] Further, the Western District has fewer judicial vacancies than the Eastern District, with 8 new Judges recently appointed to the Western District of Pennsylvania under the previous administration.

Because the District of Massachusetts has the strongest nexus to the litigation and is well equipped to handle the MDL in terms of available judicial resources and proximity to the relevant witnesses and documents, the Panel should order transfer to Judge Casper in the District of Massachusetts. In the alternative, the Actions should be transferred to Chief Judge Hornak in the Western District of Pennsylvania where there is also a strong nexus to the litigation and capable and available judicial resources.

CONCLUSION

For the foregoing reasons, Philips respectfully requests that this the Panel enter an Order consolidating and transferring the Actions to Judge Casper in the District of Massachusetts or, in the alternative, to Chief Judge Hornak in the Western District of Pennsylvania.

[11] https://www.uscourts.gov/file/28133/download (Last visited July 26, 2021).

Dated: July 29, 2021

Respectfully Submitted,

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BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: PHILIPS RECALLED CPAP, BI-LEVEL PAP, AND VENTILATOR LITIGATION	MDL Docket No. 3014

PROOF OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation ("JPML"), I hereby certify that on July 29, 2021, a true and correct copy of the foregoing Response to Motion to Transfer and Coordination or Consolidation on behalf of Philips North America LLC and Philips RS North America LLC was served on all parties electronically via the JPML's CM/ECF system. I further certify that I caused the foregoing to be mailed via the U.S. Mail or e-mail to the recipients identified on the attached Service List.

Dated: July 29, 2021

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