

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

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| IN RE PHILIPS RECALLED CPAP, | : | Master Docket: Misc. No. 21-mc-1230-JFC |
| BI-LEVEL PAP, AND MECHANICAL | : | |
| VENTILATOR PRODUCTS | : | MDL No. 3014 |
| LITIGATION | : | |
| | : | |
| This Document Relates to: All Actions | : | |

**[PROPOSED] ORDER APPOINTING
SETTLEMENT SPECIAL MASTER**

AND NOW, on this ___ day of May, 2022, having previously notified the Parties at the March 22, 2022 Status Conference and Minute Entry of this Court's intent to appoint a Special Master for Settlement and having received no objection to the appointment of a Special Master, IT IS HEREBY ORDERED as follows pursuant to Local Rule 16.2 and this Court's ADR Policies and Procedures:

Appointment of Retired Magistrate Judge Diane Welsh. After conferring, the Parties have agreed to the appointment of Retired Magistrate Judge Diane M. Welsh of JAMS as the Settlement Special Master. Having considered the Court's discussions with the Parties at the Status Conferences held on March 22, 2022 and April 20, 2022 and the Parties' consent to the appointment of Judge Welsh as set forth in their Rule 26(f) Report (ECF No. 510, ¶ 6), the Court enters this Order of Appointment appointing Judge Welsh as the Settlement Special Master pursuant to Fed. R. Civ. P. 53(a)(1)(A) and Local Rule 16.2.

Special Master Duties and Authority. Pursuant to Fed. R. Civ. P. 53(b)(2)(A), the Special Master will assist the Court with settlement matters only. She may take all appropriate measures to perform her duties fairly and efficiently. As set forth in Section 2.5(B)(1)(c) of the

Court's ADR Policies and Procedures, the Special Master shall adhere to the Model Standards of Conduct for Mediators and all other standards of professional conduct as required by this Court.

To facilitate settlements, the Special Master shall have the full authority provided in Fed. R. Civ. P. 53(c), Local Rule 16.2 and the Court's ADR Policies and Procedures. The Special Master may, without limitation:

1. Order the Parties, including subsets of the Parties, to meet to engage in settlement discussions.
2. Construct an efficient procedure to engage the parties in settlement discussions, including:
 - a. identifying information that each party should disclose in order to facilitate settlement discussions;
 - b. creating a form and a schedule for the voluntary exchange of such information; and
 - c. conducting in-person and remote settlement discussions with the Parties and their counsel.
3. Identify any persons whose participation is necessary to settle any claims completely (including, if appropriate, non-parties whose participation may facilitate settlement);
4. Make recommendations to the Court concerning any issues that may require resolution to facilitate settlement or to efficiently manage the litigation; and
5. Direct, supervise, monitor, and report upon implementation and compliance with the Court's orders, and make findings and recommendations on remedial action if required.

Coordination with SoClean MDL. The Court has also appointed Retired Magistrate Judge Diane M. Welsh as the Settlement Special Master in MDL No. 3021 (*In re: SoClean, Inc., Marketing, Sales Practices & Products Liability Litigation*). The Special Master shall have the full authority to coordinate settlement discussions and other settlement-related proceedings between the two MDLs, and between some or all of the parties in the two MDLs, in her discretion.

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

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

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

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

Confidentiality. The Special Master may have access to trade secrets, proprietary information and other confidential information in this action including, but not limited to, information which may be subject to the Stipulated Protective Order (Dkt. 104). The Special Master shall be bound by the terms of the Stipulated Protective Order and any amendments thereto.

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

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

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

Notwithstanding the above, upon the agreement of all relevant participating parties, the Special Master may communicate Confidential Information to the Court without violating this Order or the rules governing confidentiality of settlement discussions. The Special Master may otherwise communicate with the Court regarding non-confidential matters, including procedural issues, the nature of the Special Master's activities, and updates on the progress of settlement

communications; but, as explained above, she shall not communicate any Confidential Information to the Court absent the relevant parties' agreement.

To facilitate potential resolutions, the Court orders that any and all statements made during the course of proceedings before the Special Master are confidential and privileged settlement discussions, and are made without prejudice to any party's legal position, and are inadmissible for any purpose in any legal proceeding. Any offers, promises, conduct and statements (a) will not be disclosed to third parties except persons associated with the participants in the process, and (b) are privileged and inadmissible for any purposes, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions. All communications with and submissions to the Settlement Special Master by the Parties or their counsel are for the purposes of mediation and are privileged under 42 Pa.C.S. Section 5949 (Pa. statutory privilege for mediation communications and documents).

Preservation and Filing of Materials. Pursuant to Fed. R. Civ. P. 53(b)(2)C), the Special Master must maintain orderly files consisting of all documents submitted to her by the Parties, and any of her written orders, findings, and/or recommendations. She must preserve these files until such time that the Court grants permission for their destruction. Neither the Special Master nor the Parties are required to file on the record materials submitted to the Special Master in confidence to aid in her mediation of the proceedings. But, pursuant to Fed. R. Civ. P. 53(b)(2)(D) and 53(d), any order, findings, and/or recommendations issued by the Special Master must be filed by her with the Court via the Court's electronic case filing (ECF) system. Such filings shall fulfill the Special Master's duty to serve her orders on the Parties.

Actions on the Special Master's Filings. Pursuant to Fed. R. Civ. P. 53(b)(2)(D) and 53(f), any party wishing to file objections or motions related to the Special Master's filings must do so within 5 business days of the filing. Responses will be due within 5 business days of the objection or motion and replies within 5 business days of the responses. The Court will review such motions and objections under the standards provided in Fed. R. Civ. P. 53(f).

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

Payment. Without prejudice to later allocations, Plaintiffs will presumptively pay 50% of each invoice, and defendants will presumptively pay 50% of each invoice; provided, however, that this structure is based on the current composition of the parties and may be subject to change in the event parties are added or removed from this case. To the extent that work done by the Special Master does not involve all of the Parties, the Special Master will confer with the Parties on a preliminary determination of any allocation and provide that preliminary determination to the Parties to review. If a dispute arises relating to the Special Master's apportionment of time billed and no resolution of the dispute can be reached after the Parties have met and conferred, then the dispute will be referred to the Court.

Affidavit. Fed. R. Civ. P. 53(b)(3)(A) states that the Court may enter an Order of appointment “only after the [Special Master] files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455.” This Order shall become effective on the date on which the Special Master files with the Court an affidavit stating that there is no ground for disqualification under 28 U.S.C. § 455 or, if a ground for disqualification is disclosed, that the Parties have consented, subject to the Court’s approval, to waive the ground for disqualification.

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

IT IS SO ORDERED.

The Honorable Joy Flowers Conti
Senior United States District Court Judge