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

IN RE PHILIPS RECALLED CPAP, BI- LEVEL PAP, AND MECHANICAL VENTILATOR PRODUCTS LITIGATION	§ § § § § § §	Master Docket: No. 21-mc-1230-JFC MDL No. 3014
This Document Relates to: *Douglas Dobbs and Mildred Gobert*	§ §	

PLAINTIFFS DOUGLAS DOBBS' and MILDRED GOBERT'S MOTION TO REMAND

TO THE HONORABLE JUDGE JOY FLOWERS CONTI:

Plaintiffs, DOUGLAS DOBBS and MILDRED GOBERT, file this Motion to Remand under 28 U.S.C. §1447(c) and would respectfully show:

I.
SUMMARY OF ARGUMENT

1. This case should be remanded to the 165th Judicial District Court of Harris County, Texas because:

- Phillips RS NA, LLC's sole basis for removal is alleged diversity;
- All three Defendants in Plaintiffs' live petition at the time of removal are Texas citizens;
- Phillips RS cannot use its voluntary intervention into Plaintiffs' state court case as the basis for removal;
- And even if Phillips RS could base removal on its own intervention, the Texas Defendants destroy diversity and are proper parties under TEX. CIV. PRAC. REM. CODE § 82.003; and
- Phillips RS's Notice of Removal was not consented to by the other properly joined and served Defendants.

II.
BRIEF FACTUAL/PROCEDURAL OVERVIEW

2. In June 2021, an "urgent" recall of twenty models of Philips Respironics brand CPAP machines was issued. The recall warned a foam used in the CPAP machines breaks down and degrades over time into harmful particles and gases, causing the CPAP machines to pump toxic gas into users lungs while they sleep.

3. On June 22, 2022, Plaintiffs, Douglas Dobbs and Mildred Gobert filed suit in Cause No. 2022-37403 in the 165th Judicial District Court of Harris County, Texas against three (3) Texas Defendants, Aerocare Home Medical, Inc., Aerocare Home Medical Equipment, Inc. and Healthline Medical Equipment, Inc., (collectively the "Texas Defendants") who sold defective CPAP machines to Plaintiffs:[1]

Plaintiffs Sued Three Texas Non-Manufacturer Defendants

- Defendant Aerocare Home Medical, Inc., a domestic limited liability company formed under the laws of the State of Texas;
- Defendant Aerocare Home Medical Equipment, Inc., a domestic limited liability company formed under the laws of the State of Texas; and
- Defendant Healthline Medical Equipment, Inc., a domestic limited liability company formed under the laws of the State of Texas.

4. On September 9, 2022, the Texas Defendants filed their Original Answer.[2] Almost a month later, on October 4, 2022, Philips RS North America filed a Plea in Intervention in state court inserting itself as an Intervenor-Defendant in the case then immediately filed

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[1] *See* Exhibit 1: Plaintiffs' Original Petition.

[2] *See* Exhibit 2: Defendants Aerocare Home Medical Equipment, Inc., Aerocare Home Medical, Inc.'s Original Answer and Healthline Medical Equipment, Inc,'s Original Answer.

a Notice of Removal to the United States District Court for the Southern District of Texas Houston Division, Honorable Judge Eskridge, presiding.[3]

5. In its Notice of Removal, Philips RS stated its intent to transfer this case into a federal MDL pending in the Western District of Pennsylvania. Shortly after, Philips RS filed a Notice of Potential Tag-Along Action in *In re Phillips Recalled CPAP*, prompting the Judicial Panel on Multi District Litigation ("JPMDL") to issue a Conditional Transfer Order ("CTO") ordering the case to be transferred to this MDL pre-trial Court in the Western District of Pennsylvania unless transfer was otherwise objected to.

6. Plaintiffs objected to the CTO, resulting in a stay of the transfer and the JPMDL set a briefing schedule to consider Plaintiffs' opposition. On November 1, 2022, Plaintiffs filed Plaintiffs' Motion to Remand and Request for Expedited Ruling in the Southern District of Texas.[4] Judge Eskridge of the Southern District of Texas ultimately ordered the case was stayed pending the JPML's ruling on Plaintiffs objection to the CTO and deferred ruling on the Motion to Remand.[5]

7. Plaintiffs' claims were transferred to this MDL pre-trial Court on February 1, 2023. Plaintiffs filed their Short Form Complaints per the Court's Orders on March 31, 2023.[6]

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[3] *See* Exhibit 4: Philips RS North America, Inc.'s Notice of Removal.

[4] *See* Exhibit 5: Plaintiffs' Motion to Remand & Request for Expedited Ruling.

[5] *See* Exhibit 6: Order on Jurisdiction and Stay.

[6] *See* Exhibit 7: Douglas Dobbs' Short Form Complaint; and *see* Exhibit 8: Mildred Gobert's Short Form Complaint.

III.
NO GROUNDS FOR REMOVAL

8. The Court should immediately remand this case back to the 165th Judicial District Court of Harris County, Texas for three reasons:

- The three (3) Texas based Defendants destroy diversity jurisdiction;
- An intervenor-defendant cannot use its own intervention as the basis for removal; and
- Even if Philips RS could remove, remand would still be proper because Plaintiffs have asserted viable state law claims against the Texas Defendants pursuant to TEX. CIV. PRAC. REM. CODE § 82.003, "Liability of Non-manufacturing Sellers."[7]

A. NO FEDERAL JURISDICTION

9. State actions may only be removed if the action involves a federal question or if it is based on diversity of citizenship.[8] There is no federal question and the sole basis of Phillips' RS Notice of Removal is alleged diversity. However, a case may not be removed on the basis of diversity if "any parties in interest properly joined and served as defendants are a citizen of the State in which such action is brought."[9]

10. Under the no-local-defendant rule, a suit cannot be removed, even when there is complete diversity "when there is a single defendant who is a citizen of the forum state present."[10] Plaintiffs filed suit against, not one (1) but *three* (3) Texas citizens: Aerocare

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7 *See* TEX. CIV. PRAC. REM. CODE § 82.003.

8 *See* 28 U.S.C. § 1441(a)-(c).

9 *See id.*

10 *Id.*

Home Medical, Inc., Aerocare Home Medical Equipment, Inc. and Healthline Medical Equipment, Inc.

11. All three (3) Texas Defendants answered and appeared in the state law case before Philips RS intervened and before notice of removal was filed.[11] There can be no dispute, there is no diversity of parties in Plaintiffs' Original Petition and even if intervenor Philips RS had been named as a party in Plaintiffs' Original Petition, there would not be complete diversity of parties required for removal under 28 U.S.C. § 1441.

12. Additionally, there is no Federal Question. Plaintiffs' claims are based solely on Texas common law and statute.[12] Nor are Plaintiffs' claims removable under any other statute.[13]

B. PHILIPS RS HAD NO RIGHT OF REMOVAL AS AN INTERVENOR

13. Philips RS cannot base removal on its own intervention because the removal statute requires removal to be based on the claims in Plaintiffs' complaint at the time of filing (not an intervenor's plea) and Philips RS was not a defendant at the time of removal and had no right of removal.

14. A defendant's right to remove is set forth in 28 U.S.C. § 1441(a), which states "any civil action" over which a federal court would have original jurisdiction may be removed to federal court by "the defendant or the defendants."[14] In *Home Depot* the Supreme Court

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[11] *See* Exhibit 2: Defendants' Original Answer.

[12] *See* 28 U.S.C § 1441; s*ee also* Exhibit 1: Plaintiffs' Original Petition.

[13] *See id.*

[14] 28 U.S.C. § 1441(a).

of the United States held, § 1441(a) does not apply to third party defendants or any one other than the defendant or defendants named in the plaintiff's complaint:[15]

> Section 1441(a) does not permit removal by a third-party counterclaim defendant. Home Depot emphasizes that it is a "defendant" to a "claim," but § 1441(a) refers to "civil action[s]," not "claims." And because the action as defined by the plaintiff's complaint is the "civil action ... of which the district cour[t]" must have "original jurisdiction," "the defendant" to that action is the defendant to the complaint, not a party named in a counterclaim. This conclusion is bolstered by the use of the term "defendant" in related contexts. For one, the Federal Rules of Civil Procedure differentiate between third-party defendants, counterclaim defendants, and defendants. See, e.g., Rules 14, 12(a)(1)(A)–(B). And in other removal provisions, Congress has clearly extended removal authority to parties other than the original defendant, see, e.g., §§ 1452(a), 1454(a), (b), but has not done so here.

15. To determine whether jurisdiction is present for removal, the Court considers the claims in the state court petition as they existed at the time of removal.[16]

> This Court has long held that a district court, when determining whether it has original jurisdiction over a civil action, should evaluate whether that action could have been brought originally in federal court. See Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 208, 15 S.Ct. 563, 39 L.Ed. 672 (1895); Tennessee v. Union & Planters' Bank, 152 U. S. 454, 461, 14 S.Ct. 654, 38 L.Ed. 511 (1894). This requires a district court to evaluate whether the plaintiff could have filed its operative complaint in federal court, either because it raises claims arising under federal law or because it falls within the court's diversity jurisdiction.

16. Philips RS removed this case on October 4, 2022. Plaintiffs' Original Petition (Exhibit 1) was the live petition at the time of removal. As discussed above, at the time of removal, Plaintiffs' Original Petition identified the three (3) Texas Defendants as the sole Defendants in suit.

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[15] *Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1744, 204 L. Ed. 2d 34 (2019).

[16] *Id.* at 1748.

17. Philips RS was not a defendant and Plaintiffs could not have filed their lawsuit in Federal Court because there was no federal claim and there was (and still is) no diversity jurisdiction. As a result removal was improper and this Motion for Remand should be granted.

C. PLAINTIFFS ASSERT A REASONABLE BASIS OF RECOVERY FROM THE TEXAS DEFENDANTS UNDER STATE LAW

18. The Texas Defendants sold the defective CPAP products to Plaintiffs in violation of under TEX. CIV. PRAC. REM. CODE § 82.003, as specifically plead in Plaintiffs' pleadings. When considering removal on the basis of alleged improper joinder,"If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court."[17]

19. Furthermore, all doubts must be resolved in favor of remand.[18] "The fraudulent joinder doctrine is a narrow exception to the rule that diversity jurisdiction requires complete diversity. The burden of demonstrating fraudulent joinder is a heavy one. To establish fraudulent or improper joinder, the party seeking removal to the federal forum must either show 1) there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or 2) no real intention in good faith to prosecute the action against the defendants or seek a joint judgment.[19]

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[17] *Markham v. Ethicon, Inc*., 434 F.Supp.3d 261, 265 (E.D. Pa. 2020) (quoting *Boyer v. Snap-on Tools Corp*., 913 F.2d 108, 111 (3d Cir. 1990).)

[18] *A.S. ex rel. Miller v. SmithKline Beecham Corp*., 769 F.3d 204, 208 (3d Cir. 2014) (quoting *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d Cir. 1992)).

[19] *Boyer v. Snap-On Tools Corp*., 913 F.2d 108, 111 (3d Cir. 1990).

20. Philips RS has not made any allegation of fraud in the pleadings, or any claim at all Plaintiffs don't intend to seek a judgment against the Texas Defendants. The Court then must look to the face of the pleadings to determine if there is a reasonable basis for recovery under the law of the state. There can be no fraudulent joinder unless the claims made by against the allegedly fraudulently joined party are "so defective that they should never have been brought at the outset."[20]

21. Plaintiffs specifically plead facts supporting a state law claim against the Texas Defendants under TEX. CIV. PRAC. REM. CODE § 82.003, which states a non-manufacturing seller may be held liable for personal injury caused by a defective product when:[21]

> a. The seller made an express factual representation about an aspect of the product; the representation was incorrect; the claimant relied on the representation in obtaining or using the product; and if the aspect of the product had been as represented, the claimant would not have been harmed by the product or would not have suffered the same degree of harm; or
>
> b. The seller actually knew of a defect to the product at the time the seller supplied the product; and the claimant's harm resulted from the defect.

22. The undisputed allegations are:[22]

- Texas Defendants *knew* of the defect;
- Texas Defendants sold the defective product; and
- Texas Defendants were advising users to maintain and care for the Philips CPAP devices in a manner that increased their risk of harm.

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[20] *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 854 (3d Cir. 1992) (Citing *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)).

[21] TEX. CIV. PRAC. REM. CODE § 82.003.

[22] *See* Exhibit 1: Plaintiffs' Original Petition.

23. Not only do Plaintiffs plead sufficient facts to support a claim of liability under TEX. CIV. PRAC. REM. CODE § 82.003, but also, Philips RS acknowledges in its recall literature care instructions provided from many non-manufacturing sellers, like the Texas Defendants, accelerated break down of the toxic foam in the defective CPAP devices which can result in serious injury:[23]

URGENT: Medical Device Recall

Philips Respironics

CPAP and Bi-Level PAP Devices

Sound Abatement Foam
Susceptibility to Degradation and Volatile Organic Compound Emission

To the patients who use Philips Sleep & Respiratory Care devices:

Philips Respironics is voluntarily recalling the below devices due to two (2) issues related to the polyester-based polyurethane (PE-PUR) sound abatement foam used in Philips Continuous and Non-Continuous Ventilators: 1) 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. The foam degradation may be exacerbated by use of unapproved cleaning methods, such as ozone (see FDA safety communication on use of Ozone cleaners), and off-gassing may occur during initial operation and may possibly continue throughout the device's useful life.[1]

These issues can result in serious injury which can be life-threatening, cause permanent impairment, and/or require medical intervention to preclude permanent impairment. Philips Respironics has received complaints regarding the presence of black debris/particles within the airpath circuit (extending from the device outlet, humidifier, tubing, and mask). The potential risks of particulate exposure include: Irritation (skin, eye, and respiratory tract), inflammatory response, headache, asthma, adverse effects to other organs (e.g. kidneys and liver) and toxic carcinogenic affects. The potential risks of chemical exposure due to off-gassing include: headache/dizziness, irritation (eyes, nose, respiratory tract, skin), hypersensitivity, nausea/vomiting, toxic and carcinogenic effects.

24. Plaintiffs have plead viable state law claims against the Texas Defendants, and Philips RS has failed to meet the heavy burden of establishing grounds for removal on the basis of alleged fraudulent joinder.

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[23] *See* Exhibit 4: Philips RS North America recall notice.

D. PHILIPS RS DID NOT OBTAIN TEXAS DEFENDANTS' CONSENT FOR REMOVAL

25. When a case is removed solely on the basis of diversity, all defendants who have been properly joined and served must join in or consent to the removal.[24] Philips RS removed solely under 28 U.S.C. § 1441 and had to obtain the consent of all properly joined and served Defendants before removing.[25]

26. Philips RS did not obtain consent of any of the three properly joined and served Defendants before removing this case. Philips RS's failure to obtain consent is another basis for remand.

IV.
PRAYER

27. Plaintiffs ask the court to ***grant*** this Motion to Remand and for such other relief to which Plaintiffs may show themselves justly entitled.

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[24] 28 U.S.C.A. § 1446 (West).

[25] *See id.*

Respectfully Submitted,

THE GIBSON LAW FIRM

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing document was served to all counsel of record via ECF on August 31, 2023.

Jason A. Gibson

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Marilyn Burgess - District Clerk Harris County
Envelope No. 65673571
By: Maria Rodriguez
Filed: 6/22/2022 1:22 PM

Cause No. _____

DOUGLAS DOBBS and MILDRED GOBERT	§	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY, TEXAS
AEROCARE HOME MEDICAL, INC., AEROCARE HOME MEDICAL EQUIPMENT, INC. and HEALTHLINE MEDICAL EQUIPMENT, INC.	§	_____ JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs, DOUGLAS DOBBS and MILDRED GOBERT ("Plaintiffs"), bring this lawsuit complaining of Defendants, AEROCARE HOME MEDICAL, INC., AEROCARE HOME MEDICAL EQUIPMENT, INC. and HEALTHLINE MEDICAL EQUIPMENT, LLC ("Defendants"), and would respectfully show:

I.
DISCOVERY LEVEL

1. Plaintiffs request discovery be conducted under Level 3 in accordance with Rule 190.4 of the Texas Rules of Civil Procedure. This case is not subject to Texas Rule of Civil Procedure 169 because the damages Plaintiffs seek exceed $1,000,000.00.

II.
PARTIES

2. Plaintiff, Douglas Dobbs, is a resident of Dallas County, Texas.

3. Plaintiff, Mildred Gobert, is a resident of Harris County, Texas.

4. Defendant, Aerocare Home Medical, Inc., is a domestic limited liability company organized and existing under the laws of the State of Texas. The Defendant is authorized to do business in Texas and may be served through its registered agent, Mary Beth Covey, 15603 West Hardy Street, Suite 345, Houston, TX 77060.

5. Defendant, Aerocare Home Medical Equipment, Inc., is a domestic limited liability company organized and existing under the laws of the State of Texas. The Defendant is authorized to do business in Texas and may be served through its registered agent, Mary Beth Covey, 15401 West Hardy Street, Suite 345, Houston, TX 77060.

6. Defendant, Healthline Medical Equipment, Inc., is a domestic limited liability company organized and existing under the laws of the State of Texas. The Defendant is authorized to do business in Texas and may be served through its registered agent, Larry D. Andrus, 4709 Lydia, Wichita Falls, Texas 76038 or any owner, officer or authorized person at its principal place of business 1901 N. Glenville Drive, Suite 501, Richardson, Texas 75081.

III.
JURISDICTION

7. This Court has jurisdiction over Defendants because Defendants have done business in Texas, committed a tort in Texas and have had continuous contacts with Texas. In addition, the damages Plaintiffs seek exceed the minimum jurisdictional limits of the court.

IV.
VENUE

8. Venue is proper in Harris County, Texas because all or a substantial part of the events and omissions giving rise to the claim occurred in Harris County. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1).

V.
FACTS

9. Plaintiffs, Douglas Dobbs ("Dobbs") and Mildred Gobert ("Gobert"), rely on Philips CPAP machines to treat sleep apnea, a condition marked by abnormal breathing during sleep. Breathing lapses during sleep affect the body's supply of oxygen which can lead to potentially serious health consequences.

10. CPAP devices pump air under pressure into a users lungs to assure a steady supply of oxygen while sleeping. Philips CPAP devices contain a polyester-based polyurethane ("PE-PUR") foam used to dampen sound and vibration from devices while operating. The foam is supposed to keep devices quiet while users sleep.

11. On June 14, 2021, Philips issued an "urgent" recall of twenty models of its CPAP machines and ventilators. The recall warned the PE-PUR sound abatement foam breaks down and degrades into harmful particles and gases, causing Philips CPAP devices and ventilators to pump toxic gases into users lungs while they sleep.

12. The toxic gases have been linked to multiple illnesses including: respiratory illnesses, cancer, nodules, tumors and other serious injuries. The International Agency for Research on Cancer has classified toluene diisocyanate as a Group 2B, possible human carcinogen. The Environmental Protection Agency also recognized toluene diamine and similar chemicals are probable human carcinogens and can cause respiratory health problems, lung lymphomas, liver damage and cancer. Due to overwhelming health concerns, the U.S. Food and Drug Administration ("FDA") recalled Philips CPAP and ventilation devices on June 30, 2021.

13. Following nearly fifteen years of daily use of Philips DreamStation CPAP machine, Gobert began suffering from shortness of breath, coughing, sinus issues and headaches. Gobert has also been diagnosed with pulmonary nodules in her lungs.

14. Plaintiff Dobbs used a Philips DreamStation CPAP machine for nearly three years. On June 15, 2021, a day after the Philips recall, Dobbs was diagnosed with pancreatic cancer. Dobbs has since completed six rounds of chemotherapy.

15. Defendants, Aerocare Home Medical, Inc. and Aerocare Home Medical Equipment, Inc., (collectively "Aerocare") and Healthline Medical Equipment, Inc. sold Philips CPAP devices to Plaintiffs despite knowledge of the dangers associated and continues to sell and service Philips CPAP devices without warning of the dangers or providing a safe alternative.

16. As a result of their exposure to the toxic chemicals in Philips' defective CPAPs, Plaintiffs have suffered life altering illnesses and incurred significant costs treating their injuries.

VI.
NEGLIGENCE -
Aerocare Home Medical, Inc., Aerocare Home Medical Equipment, Inc. and Healthline Medical Equipment, Inc.

17. Defendants owed various duties to Plaintiffs, Defendants breached these duties and was negligent in one or more of the following ways:

a. Failing to use ordinary care in selling a safe product free from known defects;

b. Failing to warn users the Philips CPAP devices were defective;

c. Failing to warn users of the risk of illness, injury and cancer associated with using the defective Philips CPAP devices;

d. Representing to users Philips CPAP devices were safe; and

e. Advising users to maintain or care for the Philips CPAP devices in a manner that increased the risk of illness, injury or cancer.

18. Aerocare's acts and omissions proximately caused Plaintiffs' injuries.

VII.
NEGLIGENT MISREPRESENTATION -
All Defendants

19. Defendants made representations to Plaintiffs in the course of their businesses and supplied false information for the guidance of Plaintiffs. Defendants supplied false or misleading information for the specific purpose of guiding Plaintiffs in the purchase or use of Philips CPAP devices and accessories.

20. Defendants failed to exercise reasonable care and competence in obtaining and communicating the information to Plaintiffs by:

a. Failing to use reasonable care in adequately and properly disclosing the dangers associated with the defective accessories; and

b. Marketing Philips CPAP devices as safe despite overwhelming health concerns and knowledge of defects.

21. Plaintiffs justifiably relied on representations made by Defendants, and the negligent misrepresentations made by Defendants proximately cause Plaintiffs' damages.

VIII.
DAMAGES

22. Plaintiffs request the following damages to be considered separately and individually for the purpose of determining the sum of money that will fairly and reasonably compensate them:

a. The physical pain and suffering Plaintiffs have suffered in the past and will continue to suffer in the future;

b. The physical disfigurement Plaintiffs have suffered in the past and will continue to suffer in the future;

c. The physical impairment Plaintiffs have suffered in the past and will continue to suffer in the future;

d. The mental anguish Plaintiffs have suffered in the past and will continue to suffer in the future;

e. The loss of opportunity Plaintiffs have suffered in the past and will continue to suffer in the future;

f. The loss of enjoyment of life Plaintiffs have suffered in the past and will continue to suffer in the future;

g. The amount of reasonable medical expenses Plaintiffs necessarily incurred in the past and will be reasonably incurred in the future; and

h. The loss of any earnings sustained by Plaintiffs in the past, and the loss or reduction of earning capacity in the future.

IX.
EXEMPLARY DAMAGES

23. Defendants' conduct, when viewed from the standpoint of the actors at the time of the occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others. Furthermore, Defendants' conduct illustrates not only an attitude of conscious indifference for the rights, safety and welfare of others, but also shows Defendants' actual and subjective awareness of the dangers of such conduct.

24. Nevertheless, Defendants proceeded with a conscious indifference for the rights, safety or welfare of others, including Plaintiffs. Therefore, Defendants are liable for exemplary damages. Plaintiffs seek maximum exemplary damages allowed by TEX. CIV. PRAC. & REM. CODE § 41.008.

X.
CONDITIONS PRECEDENT

25. All conditions precedent have been performed or have occurred as required by Texas Rule of Civil Procedure 54.

XI.
JURY DEMAND

26. Plaintiffs DEMAND A TRIAL BY JURY and submit the appropriate fee.

XII.
PRAYER

27. For the above reasons, Plaintiffs pray they have judgment against Defendants, with interest on the judgment at the legal rate, pre-judgment interest, costs of court and for such other further relief, both in law and equity, to which Plaintiffs may show themselves justly entitled.

Respectfully Submitted,

THE GIBSON LAW FIRM

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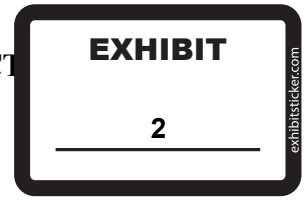

DOUGLAS DOBBS AND MILDRED GOBERT,	§	**IN THE DISTRICT**
Plaintiffs,	§	
v.	§	**HARRIS COUNTY, TEXAS**
AEROCARE HOME MEDICAL, INC., AEROCARE HOME MEDICAL EQUIPMENT, INC. AND HEALTHLINE MEDICAL EQUIPMENT, INC.	§	**165TH JUDICIAL DISTRICT**
Defendants.	§	

DEFENDANTS' ORIGINAL ANSWER

Defendants Aerocare Home Medical, Inc.; Aerocare Home Medical Equipment, Inc.; and Healthline Medical Equipment, Inc. (collectively, "Defendants") file this Original Answer to Plaintiffs Douglas Dobbs and Mildred Gobert's (collectively, "Plaintiffs") Original Petition and would respectfully show this Court as follows:

GENERAL DENIAL

Pursuant to Rule 92 of the TEXAS RULES OF CIVIL PROCEDURE, Defendants generally deny, in whole or in part, each and every allegation contained in the petition, and any amendments thereto, and demand strict proof of each such allegation in accordance with the Constitution and the laws of the State of Texas.

REQUEST FOR RELIEF

WHEREFORE, Defendants request that Plaintiffs take nothing by their claims, and that Defendants recover their costs and be awarded such other and further relief to which they may be justly entitled, either at law or in equity.

Date: September 9, 2022

Respectfully submitted,

/s/ Greg Jackson
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ATTORNEYS FOR DEFENDANTS AEROCARE HOME MEDICAL, INC., AEROCARE HOME MEDICAL EQUIPMENT, INC., AND HEALTHLINE MEDICAL EQUIPMENT, INC.

CERTIFICATE OF SERVICE

This is to certify that on September 9, 2022, a true and correct copy of the foregoing document has been served upon all counsel of record, pursuant to the TEXAS RULES OF CIVIL PROCEDURE.

/s/ Greg Jackson
T. Gregory Jackson

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Greg Jackson		greg.jackson@arcadijackson.com	9/9/2022 2:01:20 PM	SENT
Aaron C.Christian		aaron.christian@arcadijackson.com	9/9/2022 2:01:20 PM	SENT
Lilia Garcia		lilia.garcia@arcadijackson.com	9/9/2022 2:01:20 PM	SENT

Casey Gibson

From: JPMLCMECF@jpml.uscourts.gov
Sent: Tuesday, October 18, 2022 8:37 AM
To: JPMLCMDECF@jpml.uscourts.gov
Subject: Activity in Case MDL No. 3014 IN RE: Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator Products Liability Litigation Notice of Filed Opposition to CTO and Publication of Briefing Schedule

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

United States

United States Judicial Panel on Multidistrict Litigation

Notice of Electronic Filing

The following transaction was entered on 10/18/2022 at 9:37 AM EDT and filed on 10/18/2022
Case Name: IN RE: Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator Products Liability Litigation
Case Number: MDL No. 3014
Filer:
Document Number: 585(No document attached)

Docket Text:

*****TEXT ONLY NOTICE*****

NOTICE OF FILED OPPOSITION TO CTO-52 AND PUBLICATION OF BRIEFING SCHEDULE *re: pldg. ([584] in MDL No. 3014, 10 in TXS/4:22-cv-03408)*

BRIEFING SCHEDULE IS SET AS FOLLOWS:
Notices of Appearance due on or before 11/1/2022.
Corporate Disclosure Statements due on or before 11/1/2022.
Motion to Vacate with Brief in Support due on or before 11/1/2022.
Responses due on or before 11/22/2022.
Reply, if any, due on or before 11/29/2022.

Appearance forms (JPML form 18) and Corporate Disclosure forms can be downloaded from our website. Important: A Corporate Disclosure Form, if required, must be filed, even if one has previously been filed in this MDL.

Please visit the CM/ECF Filing Guidelines & Forms page of our website for additional information.

Signed by Clerk of the Panel John W. Nichols on 10/18/2022.

Associated Cases: MDL No. 3014, TXS/4:22-cv-03408 (CMD)

Case Name: Dobbs et al v. Aerocare Home Medical, INC. et al
Case Number: TXS/4:22-cv-03408
Filer:
Document Number: 11(No document attached)

Docket Text:

*****TEXT ONLY NOTICE*****

NOTICE OF FILED OPPOSITION TO CTO-52 AND PUBLICATION OF BRIEFING SCHEDULE *re: pldg. ([584] in MDL No. 3014, 10 in TXS/4:22-cv-03408)*

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Please visit the CM/ECF Filing Guidelines & Forms page of our website for additional information.

Signed by Clerk of the Panel John W. Nichols on 10/18/2022.

Associated Cases: MDL No. 3014, TXS/4:22-cv-03408 (CMD)

MDL No. 3014 Notice has been electronically mailed to:

D. Aaron Rihn arihn@peircelaw.com

Peter S. Wolff psw@pietragallo.com

MDL No. 3014 Notice will not be electronically mailed to:

TXS/4:22-cv-03408 Notice has been electronically mailed to:

Jason A Gibson jag@jag-lawfirm.com

John Patrick Lavelle, Jr john.lavelle@morganlewis.com, jlavelle@morganlewis.com, judith.hanratty@morganlewis.com

Michelle Dawn Pector michelle.pector@morganlewis.com

Casey L. Gibson cgibson@jag-lawfirm.com

TXS/4:22-cv-03408 Notice will not be electronically mailed to:

Aerocare Home Medical Equipment, INC.
3325 Bartlett Boulevard
Orlando, FL 32811

Aerocare Home Medical, INC.
3325 Bartlett Boulevard
Orlando, FL 32811

Healthline Medical Equipment, INC.
4709 Lydia Drive, Suite A
Wichita Falls, TX 76308

6/15/2022 10:18 AM
Marilyn Burgess - District Clerk Harris County
Envelope No. 65456535
By: Lewis John-Miller
Filed: 6/15/2022 10:18 AM

CAUSE NO. 2022-29399

DOUGLAS DOBBS AND MILDRED GOBERT *Plaintiffs*, v. KONINKLIJKE PHILIPS N.V., PHILIPS NORTH AMERICA, LLC, PHILIPS RS NORTH AMERICA, LLC, AEROCARE HOME MEDICAL, INC., AEROCARE HOME MEDICAL EQUIPMENT, INC., and HEALTHLINE MEDICAL EQUIPMENT, INC. *Defendants*.	§ § § § § § § § § § §	DISTRICT COURT OF HARRIS COUNTY 55TH JUDICIAL DISTRICT HARRIS COUNTY, TEXAS

DEFENDANT PHILIPS RS NORTH AMERICA LLC'S NOTICE OF FILING OF NOTICE OF REMOVAL

Please take notice that on June 15, 2022, Defendant Philips RS North in the above-captioned action removed this action to the United States District Court for the Southern District of Texas, by filing a Notice of Removal in that Court. A copy of the Notice of Removal is attached as Exhibit A and is fully incorporated herein by reference. Accordingly, and under 28 U.S.C. § 1446(d), this Court may proceed no further unless and until the case is remanded.

Respectfully submitted,

/s/ Michelle Pector
Michelle Pector
State Bar Number: 24027726
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana St., Suite 4000
Houston, TX 77002-5006
Telephone: +1.713.890.5455
Facsimile: +1.713.890.5001

Attorneys for Defendant Philips RS North America LLC

Dated: June 15, 2022

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2022, a true and correct copy of the foregoing Notice Of Filing Of Notice Of Removal and all attachments were served in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure by Email and First Class Mail on the parties or their counsel of record listed below:

VIA EMAIL AND FIRST CLASS MAIL

Jason A. Gibson
Casey L. Gibson
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cgibson@jag-lawfirm.com

Attorneys for Plaintiffs

/s/ Michelle Pector
Michelle Pector

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Norma Orozco on behalf of Michelle Pector
Bar No. 24027726
norma.orozco@morganlewis.com
Envelope ID: 65456535
Status as of 6/15/2022 10:27 AM CST

Case Contacts

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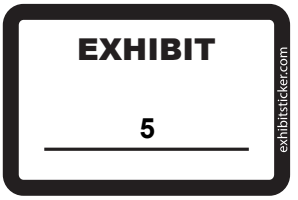

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOUGLAS DOBBS and MILDRED GOBERT	§	
v.	§	CIVIL ACTION NO. 4:22-cv-03408
AEROCARE HOME MEDICAL, INC., AEROCARE HOME MEDICAL EQUIPMENT, INC., and HEALTHLINE MEDICAL EQUIPMENT, INC. *Defendants*	§	
PHILIPS RS NORTH AMERICA, LLC, *Intervenor-Defendant*	§	

PLAINTIFFS' MOTION TO REMAND AND REQUEST FOR EXPEDITED RULING

TO THE HONORABLE JUDGE KEITH ELLISON:

Plaintiffs, DOUGLAS DOBBS and MILDRED GOBERT, file this Motion to Remand under 28 U.S.C. §1447(c) and would respectfully show:

I.
SUMMARY OF ARGUMENT

1. This case should be remanded to the 165th Judicial District Court of Harris County, Texas because:

- Phillips RS NA, LLC's sole basis for removal is alleged diversity;
- All three Defendants in Plaintiffs' petition are Texas citizens;
- Phillips RS cannot use its voluntary intervention into Plaintiffs' state court case as the basis for removal;
- And even if Phillips RS could base removal on its own intervention, the Texas Defendants destroy diversity and are proper parties under TEX. CIV. PRAC. REM. CODE § 82.003; and
- Phillips RS's Notice of Removal was not consented to by the other properly joined and served Defendants.

II.
BRIEF FACTUAL/PROCEDURAL OVERVIEW

2. In June 2021, an "urgent" recall of twenty models of Philips Respironics brand CPAP machines was issued. The recall warned a foam used in the CPAP machines breaks down and degrades over time into harmful particles and gases, causing the CPAP machines to pump toxic gas into users lungs while they sleep.

3. On June 22, 2022, Plaintiffs filed suit in the 165th Judicial District Court of Harris County, Texas against three (3) Texas Defendants who sold defective CPAP machines to Plaintiffs (the "Texas Defendants"):[1]

Texas Non-Manufacturer Defendants

- Defendant Aerocare Home Medical, Inc., a domestic limited liability company formed under the laws of the State of Texas;
- Defendant Aerocare Home Medical Equipment, Inc., a domestic limited liability company formed under the laws of the State of Texas; and
- Defendant Healthline Medical Equipment, Inc., a domestic limited liability company formed under the laws of the State of Texas.

4. On September 9, 2022, the Texas Defendants filed their Original Answer. Almost a month later, on October 4, 2022, Philips RS North America filed a Plea in Intervention in state court inserting itself as an Intervenor-Defendant in the case then immediately filed a Notice of Removal to this Court.

5. In its Notice of Removal, Philips RS stated its intent to transfer this case into a federal MDL pending in Western District of Pennsylvania.[2] Shortly after, Philips RS filed

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[1] *See* Exhibit 1: Plaintiffs' Original Petition;

[2] *See* Philips RS North America, Inc.'s Notice of Removal.

a Notice of Potential Tag-Along Action in *In re Phillips Recalled CPAP*, prompting the Judicial Panel on Multi District Litigation ("JPMDL") to issue a Conditional Transfer Order ("CTO") ordering the case to be transferred to the MDL pre-trial court in the Western District of Pennsylvania unless transfer was otherwise objected to.

6. Plaintiffs objected to the CTO, resulting in a stay of the transfer and the JPMDL set a briefing schedule to consider Plaintiffs' opposition.[3] Plaintiffs are opposed to a stay of this proceeding and the transfer of this proceeding the to Federal MDL because there is no federal jurisdiction.

III.
NO GROUNDS FOR REMOVAL

7. The Court should immediately remand this case back to the 165th Judicial District Court of Harris County, Texas for three reasons:

- The three (3) Texas based Defendants destroy diversity jurisdiction;
- An intervenor-defendant cannot use its own intervention as the basis for removal; and
- Even if Philips RS could remove, remand would still be proper because Plainitffs have asserted viable state law claims against the Texas Defendants pursuant to TEX. CIV. PRAC. REM. CODE § 82.003, "Liability of Nonmanufacturing Sellers."[4]

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[3] *See* Exhibit 2: JPMDL Briefing Schedule for Plaintiffs' Opposition to CTO.

[4] *See* TEX. CIV. PRAC. REM. CODE § 82.003.

A. NO FEDERAL JURISDICTION

8. State actions may only be removed if the action involves a federal question or if it is based on diversity of citizenship.[5] There is no federal question and the sole basis of Phillips' RS Notice of Removal is alleged diversity. However, a case may not be removed on the basis of diversity if "any parties in interest properly joined and served as defendants are a citizen of the State in which such action is brought."[6]

9. Under the no-local-defendant rule, a suit cannot be removed, even when there is complete diversity "when there is a single defendant who is a citizen of the forum state present."[7] Plaintiffs filed suit against, not one (1) but *three* (3) Texas citizens: Aerocare Home Medical, Inc., Aerocare Home Medical Equipment, Inc. and Defendant Healthline Medical Equipment, Inc.

10. All three (3) Texas Defendants answered and appeared in the state law case before Philips RS intervened and before notice of removal was filed.[8] There can be no dispute, there is no diversity of parties in Plaintiffs' Original Petition and even if intervenor Philips RS had been named as a party in Plaintiffs' Original Petition, there would not be complete diversity of parties necessary for removal under 28 U.S.C. § 1441.

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5 *See* 28 U.S.C. § 1441(a)-(c).

6 *See id.*

7 *Id.*

8 *See* Exhibit 3: Defendants' Original Answer.

11. Additionally, there is no Federal Question. Plaintiffs' claims are based solely on Texas common law and statute.[9] Nor are Plaintiffs' claims removable under any other statute.[10]

B. PHILIPS RS CANNOT BASE REMOVAL ON ITS OWN INTERVENTION

12. Philips RS cannot base removal on its own intervention because the removal statute requires removal to be based on the claims in Plaintiffs' live petition (not an intervenor's plea) *and* a claim can only be become removable based on Plaintiffs' voluntary act.

13. A defendant's right to remove is limited "on the basis of claims brought against them and not on the basis of counterclaims, cross-claims, or defenses asserted by them."[11]

14. "To determine whether jurisdiction is present for removal, the Court considers the claims in the state court petition as they existed at the time of removal." Philips RS removed this case on October 4, 2022. Plaintiffs' Original Petition is the only petition filed in the case. As discussed above, at the time of removal, Plaintiffs' Original Petition identified the three (3) Texas Defendants as the sole Defendants in suit.

15. Philips RS was not a named party in Plaintiffs' Original Petition and at no time since have Plaintiffs voluntarily joined Philips RS to this action. When a plaintiff's pleadings do

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[9] *See* 28 U.S.C § 1441; s*ee also* Exhibit 1: Plaintiffs' Original Petition.

[10] *See id.*

[11] *City of San Antonio v. NRG Energy, Inc.*, No. SA-10-CA-0033-XR, 2010 WL 324542, at *3 (W.D. Tex. Jan. 21, 2010); *see also In re Crystal Power Co., Ltd.*, 641 F.3d 82, 85 n.10 (5th Cir. 2011) (noting a party intervening in state court to assert rights but having no claims pending against it had no right to remove).

not demonstrate basis for removal, the case can only later become removable "as a result of a voluntary act of the plaintiff."[12] Intervention is the *involuntary* joinder of a third party to an existing case. Plaintiffs have not voluntarily availed themselves of Federal Jurisdiction in anyway.

C. THE TEXAS DEFENDANTS ARE THE SOLE DEFENDANTS AND PLAINTIFFS ASSERT A REASONABLE BASIS POF RECOVERY FROM THE TEXAS DEFENDANTS UNDER STATE LAW

16. The Texas Defendants sold the defective CPAP products to Plaintiffs in violation of under TEX. CIV. PRAC. REM. CODE § 82.003, as specifically plead in Plaintiffs' pleadings. When considering removal on the basis of improper joinder, the Court's must determine whether "a reasonable basis of recovery under state law" exists at the time of removal.[13]

17. "The fraudulent joinder doctrine is a narrow exception to the rule that diversity jurisdiction requires complete diversity. As such, "the burden of demonstrating fraudulent joinder is a heavy one." To establish fraudulent joinder, the party seeking removal to the federal forum must either show "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court.""[14]

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[12] J. Baxter Brinkman Oil & Gas Corp. v. Thomas, 682 F. Supp. 898, 900 (N.D. Tex. 1988); *see also McKinney Econ. Dev. Corp. v. McKinney Shores Props.*, No. 4:09cv284, 2010 WL 3855553, at *2, *4 (E.D. Tex. Aug. 27, 2010); *Murphy v. Joshua Fin. Servs., Inc.*, No. 3:06-CV-1253-K, 2006 WL 3299999, at *1 (N.D. Tex. Oct. 24, 2006).

[13] *See Estate of Briscoe v. FCA US LLC,* 2021 U.S. Dist. LEXIS 144647 (W. D. Tex. August 3, 2021), *Smallwood v. Illinois Cent. R. Co.,* 385 F.3d 568, 573 (5th Cir. 2004).

[14] *Smallwood v. Illinois Cent. R. Co., 385 F.3d 568, 573 (5th Cir. 2004)*

18. There has been no allegation of fraud in the pleadings. The Court then looks to the face of the pleadings to determine if there is a reasonable basis for recovery under the law of the state. "There can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition to remand is heard."[15]

19. Plaintiffs specifically plead facts supporting a state law claim against Texas Defendants under TEX. CIV. PRAC. REM. CODE § 82.003, which states a nonmanufacturing seller may be held liable for personal injury caused by a defective product when:[16]

a. The seller made an express factual representation about an aspect of the product; the representation was incorrect; the claimant relied on the representation in obtaining or using the product; and if the aspect of the product had been as represented, the claimant would not have been harmed by the product or would not have suffered the same degree of harm; or

b. The seller actually knew of a defect to the product at the time the seller supplied the product; and the claimant's harm resulted from the defect.

20. The undisputed allegations are:[17]

- Texas Defendants *knew* of the defect;
- Texas Defendants sold the defective product; and
- Texas Defendants were advising users to maintain and care for the Philips CPAP devices in a manner that increased their risk of harm.

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[15] *See id. (*citing *McKee v. Kansas City S. Ry. Co.*, 358 F.3d 329, 334 (5th Cir.2004); see also *Parks v. New York Times, Co.*, 308 F.2d 474, 478 (5th Cir.1962).

[16] TEX. CIV. PRAC. REM. CODE § 82.003.

[17] *See* Exhibit 1: Plaintiffs' Original Petition.

21. Not only do Plaintiffs plead sufficient facts to support a claim of liability under TEX. CIV. PRAC. REM. CODE § 82.003, but also, Philips Respironics acknowledges the care instructions provided from many non-manufacturing sellers, like the Texas Defendants, accelerated break down of the toxic foam in the defective CPAP devices:[18]

URGENT: Medical Device Recall

Philips Respironics

CPAP and Bi-Level PAP Devices

Sound Abatement Foam
Susceptibility to Degradation and Volatile Organic Compound Emission

To the patients who use Philips Sleep & Respiratory Care devices:

Philips Respironics is voluntarily recalling the below devices due to two (2) issues related to the polyester-based polyurethane (PE-PUR) sound abatement foam used in Philips Continuous and Non-Continuous Ventilators: 1) 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. The foam degradation may be exacerbated by use of unapproved cleaning methods, such as ozone (see FDA safety communication on use of Ozone cleaners), and off-gassing may occur during initial operation and may possibly continue throughout the device's useful life.[1]

These issues can result in serious injury which can be life-threatening, cause permanent impairment, and/or require medical intervention to preclude permanent impairment. Philips Respironics has received complaints regarding the presence of black debris/particles within the airpath circuit (extending from the device outlet, humidifier, tubing, and mask). The potential risks of particulate exposure include: Irritation (skin, eye, and respiratory tract), inflammatory response, headache, asthma, adverse effects to other organs (e.g. kidneys and liver) and toxic carcinogenic affects. The potential risks of chemical exposure due to off-gassing include: headache/dizziness, irritation (eyes, nose, respiratory tract, skin), hypersensitivity, nausea/vomiting, toxic and carcinogenic effects.

22. Plaintiffs have plead viable state law claims against the Texas Defendants, and Philips RS has failed to meet the heavy burden of establishing grounds for removal on the basis of alleged fraudulent joinder.

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[18] *See* Exhibit 4: Philips RS North America recall notice.

D. PHILIPS RS DID NOT OBTAIN TEXAS DEFENDANTS' CONSENT FOR REMOVAL

23. When a case is removed solely on the basis of diversity, all defendants who have been properly joined and served must join in or consent to the removal.[19] Philips RS removed solely under 28 U.S.C. § 1441 and had to obtain the consent of all properly joined and served Defendants before removing.[20]

24. Philips RS admitted it did not obtain consent of any of the three properly joined and served Defendants before removing this case. Philips RS's failure to obtain consent is another basis for remand.

IV.
REQUEST FOR EXPEDITED SUBMISSION

25. Philips RS's apparent goal is to circumvent Texas law and force Plaintiffs' state law claims into the federal MDL. As a result of the limited amount of time before expiration of the CTO and this Court loses jurisidiction to the Western District MDL, Plaintiffs ask the Court to hear Plaintiffs' Motion for Remand on an expedited basis and issue a ruling on or before November 29, 2022 when the briefing schedule on Plaintiffs' Notice of Opposition to the CTO is set to expire.

V.
PRAYER

26. Plaintiffs ask the court to ***grant*** this Motion to Remand and for such other relief to which Plaintiffs may show themselves justly entitled.

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[19] 28 U.S.C.A. § 1446 (West).

[20] *See id.*

Respectfully Submitted,

THE GIBSON LAW FIRM

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State Bar No. 24000606
Fed. Bar No. 28491
Casey L. Gibson
State Bar No. 24090599
Fed. Bar No. 2608907
3701 Kirby Drive, Suite 101
Houston, Texas 77098
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ATTORNEYS FOR PLAINTIFFS
e-Service: efile@jag-lawfirm.com

CERTIFICATE OF SERVICE

I certify a copy of the foregoing document was served to all counsel of record via ECF on November 1, 2022.

Casey L. Gibson

CERTIFICATE OF CONFERENCE

Philips RS North America LLC is opposed to Plaintiffs' Motion to Remand. At the time of filing, counsel for Defendants Aerocare Home Medical, Inc., Aerocare Home Medical Equipment, Inc. and Healthline Medical Equipment, Inc. Could not be reached.

Casey Gibson

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOUGLAS DOBBS and MILDRED GOBERT	§	
v.	§	CIVIL ACTION NO. 4:22-cv-03408
AEROCARE HOME MEDICAL, INC., AEROCARE HOME MEDICAL EQUIPMENT, INC., and HEALTHLINE MEDICAL EQUIPMENT, INC. *Defendants*	§	
PHILIPS RS NORTH AMERICA, LLC, *Intervenor-Defendant*	§	

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

On _____, 2022, the Court considered Plaintiff's Motion to Remand. After considering the pleadings, the motions and arguments by counsel, if any, the Court ***GRANTS*** Plaintiffs' Motion to Remand.

_____
HONORABLE JUDGE KEITH ELLISON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOUGLAS DOBBS and	§	CIVIL ACTION NO
MILDRED GOBERT	§	4:22-cv-03408
Plaintiffs,	§	
	§	
	§	
vs.	§	JUDGE CHARLES ESKRIDGE
	§	
	§	
AEROCARE HOME	§	
MEDICAL INC, *et al,*	§	
Defendants.	§	

ORDER

The motion by Defendant Phillips RS to stay the proceedings pending transfer is GRANTED. Dkt 5.

The motion by Plaintiff Douglas Dobbs to remand will not be addressed. Dkt 8. To the extent it includes request for expedited decision, that request is DENIED.

This case was removed on October 4, 2022, from the 165th Judicial District of Harris County, Texas. Dkt 1. The Judicial Panel on Multidistrict Litigation entered a conditional transfer order on October 14, 2022, transferring the case to the Western District of Pennsylvania to be included in MDL Docket No 3014. Dkt 7. The docket sheet reflects that the case was transferred electronically on October 17, 2022. It also reflects that the stay of the conditional transfer order was reinstated on October 18, 2022. Dkt 11.

The parties were ordered to provide briefing on the question of this Court's jurisdiction and the necessity of proceeding on the remand motion by way of expedited schedule. Dkt 12. They agree that jurisdiction exists to rule on the motion to remand. See Dkt 16 at 3; Dkt 18 at 3. The

Court is satisfied of its jurisdiction. See Judicial Panel on Multidistrict Litigation Rule 2.1(d).

Dobbs provides no persuasive reason as to why this Court should address its motion to remand by way of expedited schedule, instead simply arguing the merits in favor of remand. See Dkt 18 at 3–4.

Phillips RS rightly contends that it's preferrable to allow the "transferee MDL court to address all jurisdictional issues on a uniform and efficient basis through coordinated proceedings." Dkt 16 at 3. Because the JPML will rule on Dobbs' objection shortly, not ruling on the motion to remand promotes judicial economy and doesn't open Defendants up to potentially inconsistent rulings. Id at 4.

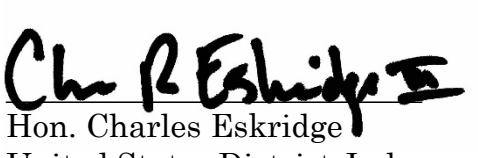
Phillips RS also argues persuasively in favor of a stay of proceedings. See Dkt 5-1 at 8–14, citing *Walker v Merck &* Co, 2010 WL 4255911, *9 (SD Ill 2005); see also *Curtis v BP America, Inc*, 808 F Supp 2d 976, 979 (SD Tex 2011) (summarizing factors to be considered of potential prejudice if stayed, hardship and inequity if not stayed, and judicial resources and avoidance of duplicative litigation). In short, Dobbs won't be prejudiced because the stay will be brief under the briefing schedule set by the JPML. See Dkt 5-1 at 9. Dobbs points generally to supposed prejudices that plaintiffs experience when litigating in federal court and litigating away from home. Dkt 9 at 3–4. Nothing specific is set forth as proof of either assertion. Phillips RS, on the other hand, is subject to the potential of conflicting judicial determinations if the proceedings in this Court aren't stayed. And the promotion of judicial economy outweighs any minimal hardship endured by Dobbs due to a brief stay.

The motion by Phillips RS to stay the proceedings pending transfer to the MDL court is GRANTED. Dkt 5.

The parties are ORDERED to provide a status report when the MDL court has ruled on Dobbs' objections to the conditional transfer order, if notice isn't otherwise promptly posted on the docket.

SO ORDERED.

Signed on November 28, 2022, at Houston, Texas.



Hon. Charles Eskridge
United States District Judge

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

IN RE: PHILIPS RECALLED CPAP, BI-LEVEL PAP, AND MECHANICAL VENTILATOR PRODUCTS LITIGATION	:	**Master Docket: Misc. No. 21-mc-1230-JFC**
	:	**MDL No. 3014**
This Document Relates to:	:	**SHORT FORM COMPLAINT FOR PERSONAL INJURIES, DAMAGES, AND DEMAND FOR JURY TRIAL**

DOUGLASS DOBBS

Plaintiff(s) incorporate(s) by reference the Amended Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial filed in *In re Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator Products Litigation*, MDL No. 3014, Master Docket Misc. No. 21-mc-1230 (the "Master Long Form Complaint"). This Short Form Complaint adopts the allegations, claims, and requested relief as set forth in the Master Long Form Complaint. As necessary herein, Plaintiff(s) may include: (a) additional claims and allegations against Defendants; and/or (b) additional claims and allegations against other Defendants not listed in the Master Long Form Complaint.

Plaintiff(s) further allege(s) as follows:

I. DEFENDANTS

1. Plaintiff(s) name(s) the following Defendants in this action:

Koninklijke Philips N.V

Philips North America LLC

Philips RS North America LLC

Aerocare Home Medical, Inc.

Aerocare Home Medical Equipment, Inc.

Healthline Medical Equipment, LLC

II. PLAINTIFF(S)

2. Name of Plaintiff(s):

Douglass Dobbs

3. Name of spouse of Plaintiff (if loss of consortium claim is being made):

Not Applicable

4. Name and capacity (*i.e.*, executor, administrator, guardian, conservator, etc.) of other Plaintiff, if any:

Not Applicable

5. State(s) of residence of Plaintiff(s) (if the Recalled Device user is deceased, residence at the time of death):

Douglass Dobbs - State of Texas

III. DESIGNATED FORUM

6. Identify the forum (United States District Court and Division) in which the Plaintiff would have filed in the absence of direct filing:

Plaintiffs' action was involuntarily removed from the165th Judicial District Court of Harris County, Texas to the United States District Court for the Southern District of Texas on October 4, 2022 before transfer into this MDL.

IV. USE OF A RECALLED DEVICE

7. Plaintiff used the following Recalled Device(s):

☐ *E30 (Emergency Use Authorization)* ☐ *DreamStation ASV* ☐ *DreamStation ST, AVAPS* ☐ *SystemOne ASV4* ☐ *C-Series ASV* ☐ *C-Series S/T and AVAPS* ☐ *OmniLab Advanced +* ☐ *SystemOne (Q-Series)* ☑ *DreamStation* ☐ *DreamStation Go* ☐ *Dorma 400*	☐ *Dorma 500* ☐ *REMstar SE Auto* ☐ *Trilogy 100* ☐ *Trilogy 200* ☐ *Garbin Plus, Aeris, LifeVent* ☐ *A-Series BiPAP Hybrid A30 (not marketed in U.S.)* ☐ *A-Series BiPAP V30 Auto* ☐ *A-Series BiPAP A40* ☐ *A-Series BiPAP A30* ☐ *Other Philips Respironics Device*; if other, identify the model: _____

V. INJURIES

8. Plaintiff alleges the following physical injuries as a result of using a Recalled Device together with the attendant symptoms and consequences associated therewith:

- Other Pulmonary Damage/Inflammatory Response;
- Cancer – Pancreatic;
- Coughing, sinus issues, headaches and shortness of breath.

VI. CAUSES OF ACTION/DAMAGES

9. As to Koninklijke Philips N.V., Plaintiff(s) adopt(s) the following claims asserted in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial, and the allegations and prayer for relief with regard thereto, as set forth therein:

Count I: Negligence

Count II: Strict Liability: Design Defect

Count III: Negligent Design

Count IV: Strict Liability: Failure to Warn

Count V: Negligent Failure to Warn

Count VI: Negligent Recall

~~Count VII: Battery~~

Count VIII: Strict Liability: Manufacturing Defect

Count IX: Negligent Manufacturing

Count X: Breach of Express Warranty

Count XI: Breach of the Implied Warranty of Merchantability

Count XII: Breach of the Implied Warranty of Usability

Count XIII: Fraud

Count XIV: Negligent Misrepresentation

~~Count XV: Negligence Per Se~~

~~Count XVI: Consumer Fraud and/or Unfair and Deceptive Practices Under State Law~~

~~Count XVII: Unjust Enrichment~~

~~Count XVIII: Loss of Consortium~~

~~Count XIX: Survivorship and Wrongful Death~~

~~Count XX: Medical Monitoring~~

Count XXI: Punitive Damages

Count XXII: Other [specify below]_____

Physical pain/suffering suffered in the past/future; Physical Disfigurement suffered in the past/future; Physical Impairment suffered in the past/future; Mental Anguish suffered in the past/future; Loss of Opportunity suffered in the past/future; Loss of Enjoyment of Life suffered in the past/future; Amount of Reasonable Medical Expenses necessarily incurred in the past and will be incurred in the future and Loss of any earnings sustained in the past and loss or reduction of earning capacity in the future.

10. As to Philips North America LLC, Plaintiff(s) adopt(s) the following claims asserted in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial, and the allegations and prayer for relief with regard thereto, as set forth therein:

Count I: Negligence

Count II: Strict Liability: Design Defect

Count III: Negligent Design

Count IV: Strict Liability: Failure to Warn

Count V: Negligent Failure to Warn

Count VI: Negligent Recall

~~Count VII: Battery~~

Count VIII: Strict Liability: Manufacturing Defect

Count IX: Negligent Manufacturing

Count X: Breach of Express Warranty

Count XI: Breach of the Implied Warranty of Merchantability

Count XII: Breach of the Implied Warranty of Usability

Count XIII: Fraud

Count XIV: Negligent Misrepresentation

~~Count XV: Negligence Per Se~~

~~Count XVI: Consumer Fraud and/or Unfair and Deceptive Practices Under State Law~~

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~~Count XVIII: Loss of Consortium~~

~~Count XIX: Survivorship and Wrongful Death~~

~~Count XX: Medical Monitoring~~

Count XXI: Punitive Damages

Count XXII: Other [specify below]_____

Physical pain/suffering suffered in the past/future; Physical Disfigurement suffered in the past/future; Physical Impairment suffered in the past/future; Mental Anguish suffered in the past/future; Loss of Opportunity suffered in the past/future; Loss of Enjoyment of Life suffered in the past/future; Amount of Reasonable Medical Expenses necessarily incurred in the past and will be incurred in the future and Loss of any earnings sustained in the past and loss or reduction of earning capacity in the future.

11. As to Philips RS North America LLC, Plaintiff(s) adopt(s) the following claims asserted in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial, and the allegations and prayer for relief with regard thereto, as set forth therein:

Count I: Negligence

Count II: Strict Liability: Design Defect

Count III: Negligent Design

Count IV: Strict Liability: Failure to Warn

Count V: Negligent Failure to Warn

Count VI: Negligent Recall

~~Count VII: Battery~~

Count VIII: Strict Liability: Manufacturing Defect

Count IX: Negligent Manufacturing

Count X: Breach of Express Warranty

Count XI: Breach of the Implied Warranty of Merchantability

Count XII: Breach of the Implied Warranty of Usability

Count XIII: Fraud

Count XIV: Negligent Misrepresentation

~~Count XV: Negligence Per Se~~

~~Count XVI: Consumer Fraud and/or Unfair and Deceptive Practices Under State Law~~

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~~Count XIX: Survivorship and Wrongful Death~~

~~Count XX: Medical Monitoring~~

Count XXI: Punitive Damages

Count XXII: Other [specify below]_____

Physical pain/suffering suffered in the past/future; Physical Disfigurement suffered in the past/future; Physical Impairment suffered in the past/future; Mental Anguish suffered in the past/future; Loss of Opportunity suffered in the past/future; Loss of Enjoyment of Life suffered in the past/future; Amount of Reasonable Medical Expenses necessarily incurred in the past and will be incurred in the future and Loss of any earnings sustained in the past and loss or reduction of earning capacity in the future.

12. As to Philips Holding USA Inc., Plaintiff(s) adopt(s) the following claims asserted in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial, and the allegations and prayer for relief with regard thereto, as set forth therein:

13. If additional claims against the Defendants identified in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial are alleged above, the additional facts, if any, supporting these allegations must be pleaded. Plaintiff(s) assert(s) the following additional factual allegations against the Defendants identified in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial:

Not applicable.

14. Plaintiff(s) contend(s) that additional parties may be liable or responsible for Plaintiff(s)' damages alleged herein. Such additional parties, who will be hereafter referred to as Defendants, are as follows (must name each Defendant and its citizenship):

Aerocare Home Medical, Inc. (Texas)
Aerocare Home Medical Equipment, Inc. (Texas)
Healthline Medical Equipment, Inc. (Texas)

15. Plaintiff(s) assert(s) the following additional claims and factual allegations against other Defendants named in Paragraph 16 above:

Above defendants failed to use ordinary care in selling a safe product free of defects; failed to warn users Phillips CPAP machines were defective; failed to warn users of the known risk of illness, injury and cancer associated with using defective CPAP devices; represented Phillips CPAP devices were safe; and advised users maintain or care for Phillips CPAP products in a manner that increased the risk of illness, injury or cancer.

WHEREFORE, Plaintiff(s) pray(s) for relief and judgment against Defendants and all such

further relief that this Court deems equitable and just as set forth in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial and any additional relief to which Plaintiff(s) may be entitled.

Respectfully Submitted,

THE GIBSON LAW FIRM

Jason A. Gibson
State Bar No. 24000606
Fed. Bar No. 28491
Casey L. Gibson
State Bar No. 24090599
Fed. Bar No. 2608907
3701 Kirby Drive, Suite 101
Houston, Texas 77098
Ph: (713) 650-1010
Fax: (713) 650-1011

ATTORNEYS FOR PLAINTIFFS
e-Service: efile@jag-lawfirm.com

CERTIFICATE OF SERVICE

I certify a copy of the foregoing document was served to all counsel of record via ECF on March 31, 2022.

Jason A. Gibson

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

IN RE: PHILIPS RECALLED CPAP, BI-LEVEL PAP, AND MECHANICAL VENTILATOR PRODUCTS LITIGATION	:	**Master Docket: Misc. No. 21-mc-1230-JFC**
	:	**MDL No. 3014**
This Document Relates to:	:	**SHORT FORM COMPLAINT FOR PERSONAL INJURIES, DAMAGES, AND DEMAND FOR JURY TRIAL**

MILDRED GOBERT

Plaintiff(s) incorporate(s) by reference the Amended Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial filed in *In re Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator Products Litigation*, MDL No. 3014, Master Docket Misc. No. 21-mc-1230 (the "Master Long Form Complaint"). This Short Form Complaint adopts the allegations, claims, and requested relief as set forth in the Master Long Form Complaint. As necessary herein, Plaintiff(s) may include: (a) additional claims and allegations against Defendants; and/or (b) additional claims and allegations against other Defendants not listed in the Master Long Form Complaint.

Plaintiff(s) further allege(s) as follows:

I. DEFENDANTS

1. Plaintiff(s) name(s) the following Defendants in this action:

Koninklijke Philips N.V

Philips North America LLC

Philips RS North America LLC

Aerocare Home Medical, Inc.

Aerocare Home Medical Equipment, Inc.

Healthline Medical Equipment, LLC

II. PLAINTIFF(S)

2. Name of Plaintiff(s):

Mildred Gobert

3. Name of spouse of Plaintiff (if loss of consortium claim is being made):

Not Applicable

4. Name and capacity (*i.e.*, executor, administrator, guardian, conservator, etc.) of other Plaintiff, if any:

Not Applicable

5. State(s) of residence of Plaintiff(s) (if the Recalled Device user is deceased, residence at the time of death):

Mildred Gobert - State of Texas

III. DESIGNATED FORUM

6. Identify the forum (United States District Court and Division) in which the Plaintiff would have filed in the absence of direct filing:

Plaintiff's action was involuntarily removed from the165th Judicial District Court of Harris County, Texas to the United States District Court for the Southern District of Texas on October 4, 2022 before transfer into this MDL.

IV. USE OF A RECALLED DEVICE

7. Plaintiff used the following Recalled Device(s):

☐ *E30 (Emergency Use Authorization)* ☐ *DreamStation ASV* ☐ *DreamStation ST, AVAPS* ☐ *SystemOne ASV4* ☐ *C-Series ASV* ☐ *C-Series S/T and AVAPS* ☐ *OmniLab Advanced +* ☐ *SystemOne (Q-Series)* ☑ *DreamStation* ☐ *DreamStation Go* ☐ *Dorma 400*	☐ *Dorma 500* ☐ *REMstar SE Auto* ☐ *Trilogy 100* ☐ *Trilogy 200* ☐ *Garbin Plus, Aeris, LifeVent* ☐ *A-Series BiPAP Hybrid A30 (not marketed in U.S.)* ☐ *A-Series BiPAP V30 Auto* ☐ *A-Series BiPAP A40* ☐ *A-Series BiPAP A30* ☐ *Other Philips Respironics Device*; if other, identify the model: _____

V. INJURIES

8. Plaintiff alleges the following physical injuries as a result of using a Recalled Device together with the attendant symptoms and consequences associated therewith:

- COPD (new or worsening);
- Asthma (new or worsening);
- Other Pulmonary Damage/Inflammatory Response;
- Coughing, sinus issues, headaches and shortness of breath.

VI. CAUSES OF ACTION/DAMAGES

9. As to Koninklijke Philips N.V., Plaintiff(s) adopt(s) the following claims asserted in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial, and the allegations and prayer for relief with regard thereto, as set forth therein:

Count I: Negligence

Count II: Strict Liability: Design Defect

Count III: Negligent Design

Count IV: Strict Liability: Failure to Warn

Count V: Negligent Failure to Warn

Count VI: Negligent Recall

~~Count VII: Battery~~

Count VIII: Strict Liability: Manufacturing Defect

Count IX: Negligent Manufacturing

Count X: Breach of Express Warranty

Count XI: Breach of the Implied Warranty of Merchantability

Count XII: Breach of the Implied Warranty of Usability

Count XIII: Fraud

Count XIV: Negligent Misrepresentation

~~Count XV: Negligence Per Se~~

~~Count XVI: Consumer Fraud and/or Unfair and Deceptive Practices Under State Law~~

~~Count XVII: Unjust Enrichment~~

~~Count XVIII: Loss of Consortium~~

~~Count XIX: Survivorship and Wrongful Death~~

~~Count XX: Medical Monitoring~~

Count XXI: Punitive Damages

Count XXII: Other [specify below]_____

Physical pain/suffering suffered in the past/future; Physical Disfigurement suffered in the past/future; Physical Impairment suffered in the past/future; Mental Anguish suffered in the past/future; Loss of Opportunity suffered in the past/future; Loss of Enjoyment of Life suffered in the past/future; Amount of Reasonable Medical Expenses necessarily incurred in the past and will be incurred in the future and Loss of any earnings sustained in the past and loss or reduction of earning capacity in the future.

10. As to Philips North America LLC, Plaintiff(s) adopt(s) the following claims asserted in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial, and the allegations and prayer for relief with regard thereto, as set forth therein:

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~~Count XX: Medical Monitoring~~

Count XXI: Punitive Damages

Count XXII: Other [specify below]_____

Physical pain/suffering suffered in the past/future; Physical Disfigurement suffered in the past/future; Physical Impairment suffered in the past/future; Mental Anguish suffered in the past/future; Loss of Opportunity suffered in the past/future; Loss of Enjoyment of Life suffered in the past/future; Amount of Reasonable Medical Expenses necessarily incurred in the past and will be incurred in the future and Loss of any earnings sustained in the past and loss or reduction of earning capacity in the future.

11. As to Philips RS North America LLC, Plaintiff(s) adopt(s) the following claims asserted in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial, and the allegations and prayer for relief with regard thereto, as set forth therein:

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Count XXII: Other [specify below]_____

Physical pain/suffering suffered in the past/future; Physical Disfigurement suffered in the past/future; Physical Impairment suffered in the past/future; Mental Anguish suffered in the past/future; Loss of Opportunity suffered in the past/future; Loss of Enjoyment of Life suffered in the past/future; Amount of Reasonable Medical Expenses necessarily incurred in the past and will be incurred in the future and Loss of any earnings sustained in the past and loss or reduction of earning capacity in the future.

12. As to Philips Holding USA Inc., Plaintiff(s) adopt(s) the following claims asserted in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial, and the allegations and prayer for relief with regard thereto, as set forth therein:

13. If additional claims against the Defendants identified in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial are alleged above, the additional facts, if any, supporting these allegations must be pleaded. Plaintiff(s) assert(s) the following additional factual allegations against the Defendants identified in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial:

Not applicable.

14. Plaintiff(s) contend(s) that additional parties may be liable or responsible for Plaintiff(s)' damages alleged herein. Such additional parties, who will be hereafter referred to as Defendants, are as follows (must name each Defendant and its citizenship):

Aerocare Home Medical, Inc. (Texas)
Aerocare Home Medical Equipment, Inc. (Texas)
Healthline Medical Equipment, Inc. (Texas)

15. Plaintiff(s) assert(s) the following additional claims and factual allegations against other Defendants named in Paragraph 16 above:

Above defendants failed to use ordinary care in selling a safe product free of defects; failed to warn users Phillips CPAP machines were defective; failed to warn users of the known risk of illness, injury and cancer associated with using defective CPAP devices; represented Phillips CPAP devices were safe; and advised users maintain or care for Phillips CPAP products in a manner that increased the risk of illness, injury or cancer.

WHEREFORE, Plaintiff(s) pray(s) for relief and judgment against Defendants and all such

further relief that this Court deems equitable and just as set forth in the Master Long Form Complaint for Personal Injuries, Damages and Demand for Jury Trial and any additional relief to which Plaintiff(s) may be entitled.

Respectfully Submitted,

THE GIBSON LAW FIRM

Jason A. Gibson
State Bar No. 24000606
Fed. Bar No. 28491
Casey L. Gibson
State Bar No. 24090599
Fed. Bar No. 2608907
3701 Kirby Drive, Suite 101
Houston, Texas 77098
Ph: (713) 650-1010
Fax: (713) 650-1011

ATTORNEYS FOR PLAINTIFFS
e-Service: efile@jag-lawfirm.com

CERTIFICATE OF SERVICE

I certify a copy of the foregoing document was served to all counsel of record via ECF on March 31, 2022.

Jason A. Gibson