UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KONINKLIJKE PHILIPS ELECTRONICS N.V. and PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, Plaintiffs, v. ZOLL LIFECOR CORPORATION, Defendant.	C.A. No. 2:12-cv-01369-NBF Judge Nora Barry Fischer Electronically Filed

ZOLL'S SUPPLEMENT BRIEF IN SUPPORT OF ITS MOTION TO STAY

ZOLL Lifecor Corporation ("ZOLL") writes to address several further considerations raised by the Court at the conclusion of the January 14, 2013 hearing.

I. Stay Is Warranted Given The Substantial Overlap Of Issues With Those In Play In The Massachusetts Matter

As discussed in the pre-hearing briefing, six of the eight patents asserted in this case are also asserted in the Massachusetts matter. With regard to the remaining two asserted patents (U.S. Patent Nos. 5,593,427 and 5,749,904) in this case, they are members of the same family as the six overlapping patents, have the same named inventors, and are allegedly based on the same priority document filed on August 6, 1993. As the chart below illustrates, they also significantly overlap in terms of both substance and phraseology (illustrative overlapping patent on the left):

U.S. Patent No. 5,836,978 (Claim 1)	U.S. Patent No. 5,593,427 (Claim 9)	U.S. Patent No. 5,749,904 (Claim 1)
A method for applying electrotherapy to a patient through electrodes connected to an energy source, the method comprising the following steps:	A method for applying electrotherapy to a patient through electrodes connected to an energy source, the method comprising the following steps:	1. A method for delivering electrotherapy to a patient through electrodes connectable to a plurality of capacitors, the method comprising the following steps:

discharging the energy source across the electrodes to deliver electrical energy to the patient in a multiphasic waveform having an earlier phase and a later phase, the later phase having a fixed duration;	discharging the energy source across the electrodes to deliver electrical energy to the patient in a multiphasic waveform;	discharging at least one of the capacitors across the electrodes to deliver electrical energy to the patient;
simultaneously monitoring a patient-dependent electrical parameter and time during the discharging step;	monitoring a patient-dependent electrical parameter during the discharging step;	monitoring a patient-dependent electrical parameter during the discharging step; and
adjusting a discharge parameter based on a value of the monitored electrical parameter and the monitored time.	adjusting a discharge parameter based on a value of the monitored electrical parameter, the adjusting step comprising discharging the energy source across the electrodes in a phase of the multiphasic waveform until the end of a predetermined time period or until the monitored electrical parameter reaches a predetermined value, whichever occurs first.	adjusting energy delivered to the patient based on a value of the electrical parameter.

Thus, almost every claim term in each of the non-overlapping patents is found in one, if not all, of the overlapping patents.

Of course, a finding in the Massachusetts Matter that any or all of the asserted claims in the six patents there that overlap with patents in this case are invalid or unenforceable will moot those claims for purposes of this case. *Blonder–Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971).

Moreover, the subsidiary issues bearing on invalidity and inequitable conduct that will be addressed in the Massachusetts Matter potentially have direct applicability to the issues in this case, on both the six overlapping patents and the two non-overlapping patents. For instance, in the Massachusetts Matter, Philips has taken the position that it is entitled to a date of invention that predates its priority filing date. Given the substantial overlap in claim scope, the

development and resolution of that issue in the Massachusetts Matter should at minimum streamline this same inquiry in this case, including by providing a more fully-developed record, with regard to all eight of the patents at issue here.

Given the substantive overlap among all eight patents in this case, this is generally true also for other subsidiary invalidity issues, since the prior art will likely overlap substantially if not entirely between the two cases. So too the inequitable conduct defenses. By pausing this case while the Massachusetts Matter proceeds through the liability trial, this Court would generally have the benefit of rulings on these issues, as well as of a more fully developed record on the overlapping issues of invalidity and inequitable conduct, including as a consequence of expert reports, inventor and expert deposition testimony, and expert and inventor trial testimony.

In addition, the defense of laches is also at issue in the upcoming liability trial in the Massachusetts Matter. That is also a defense in this case, and in both it is predicated on Philips' long—and inexcusable—delay in pressing the claims in the two cases. The Court's resolution of that defense in the Massachusetts Matter should thus focus and streamline the consideration of that defense in this case, especially where Philips delayed even longer in pursuing the allegations in this case than in the Massachusetts Matter.

In short, there is substantial overlap of issues in this case as in the Massachusetts matter, and the potential for streamlining the issues in this case, and/or offering a more fully developed record, as a consequence of pausing this action for several more months until the liability trial in the Massachusetts Matter concludes warrants the stay ZOLL seeks.[1] *Resco Products, Inc. v. Bosai Minerals Group Co., Ltd.*, 2010 WL 2331069 (W.D. Pa. June 4, 2010) (stay favored

[1] By contrast, the suit that ZOLL's parent company recently brought suit against Philips' Respironics subsidiary in District of Delaware concerns a different patent than any of the ones in this case or the Massachusetts Matter, and the accused product in that case concerns a technology for treating sleep maladies, not a defibrillation product.

because "the court agrees with defendants' position that substantial time, effort, and resources may be saved by" staying action).

Finally on this point, there is the practical matter that cases as a general rule are more likely to settle as trial nears, or shortly after verdicts are rendered. The parties' settlement discussions to date have uniformly contemplated that any settlement would necessarily resolve all of the defibrillator actions, including this one. Pausing this action thus offers the possibility of this case being fully resolved through settlement. Towards this end, ZOLL joins Philips in the willingness that Philips expressed at the hearing to participating in an early ADR procedure in this Court, should the Court decide to grant ZOLL's motion in part, but deny it in part so that the parties could get the benefits of the Court's ADR offices.

II. Philips Has No Product That Competes With The LifeVest Product, Further Warranting The Stay ZOLL Seeks

This case is about wearable defibrillators. A wearable defibrillator is worn over a continuous period of time, whereas the defibrillators at issue in the other cases are deployed only when needed. The products are not interchangeable, and serve different markets. Philips does not sell a wearable defibrillator or any other product in competition with the LifeVest product that is accused of infringement in this case. Philips and ZOLL are thus not "competitors" for purposes of evaluating whether a stay of this case is warranted, and a stay would not unfairly prejudice Philips given that this long-overdue cause of action is entirely about whether Philips can recover monetary damages from ZOLL.

III. The Public Interest In Conserving Judicial Resources Also Warrants Staying This Action

The public has an interest in conserving judicial resources, and that interest further warrants the stay ZOLL seeks. *Del Rio v. Creditanswers, LLC*, 2010 WL 3418430 (S.D. Cal.

Aug. 26, 2010) ("[a] stay pending the outcome of the appeal will serve the public interest by potentially preserving judicial resources"); *McArdle*, 2010 WL 2867305, at *4 ("[T]he public interest in the preservation of judicial resources weighs in favor of staying this case."); *Richards v. Ernst & Young LLP*, 2012 WL 92738 (N.D. Cal. Jan. 11, 2012) ("the economical use of judicial resources lead the public interest to favor a stay"); *N. Am. Film Corp. v. Cincinnati Milacron, Inc.*, 1994 WL 642701 (E.D. Pa. Nov. 14, 1994) (noting the public interest "to avoid duplicative and expensive litigation"); *Creative Waste Mgmt., Inc. v. Capitol Envtl. Services, Inc.*, 2004 WL 2384991 (E.D. Pa. Oct. 22, 2004) (recognizing "public interest in conservation of scarce judicial resources").

Philips' pursuit of multiple, time-staggered actions in disparate forums on overlapping issues to obtain a tactical advantage over ZOLL is an inefficient use of scarce judicial resources, and does not warrant the deference that a typical plaintiff might expect in terms of securing as early a resolution of its claims as the Court's schedule would provide. *See Hawkins v. U.S. Parole Com.*, 2006 WL 3313728 (D. Kan. Oct. 6, 2006) (*quoting Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)) ("**Duplicative litigation in the federal courts is to be discouraged**.").

Moreover, stay or no stay, because Philips delayed so long in bringing this suit, all of the asserted patents in this case will expire before this case is resolved. This Court's invalidity findings will thus only affect Philips' right to damages. *Sears*, 376 U.S. at 230 ("when the patent expires the monopoly created by it expires, too, and the right to make the article-including the right to make it in precisely the shape it carried when patented-passes to the public"). Thus,

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