

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 BRIEF IN SUPPORT OF ITS MOTION FOR SANCTIONS FOR PLAINTIFFS'
FAILURE TO MEDIATE IN GOOD FAITH**

ZOLL brings this motion for sanctions because Philips' actions at the April 17, 2013 mediation show a lack of good faith in attempting to settle this and the other litigations between the parties. Philips was represented at the mediation by only two people, neither of whom attended the prior court-ordered mediation in Massachusetts. Philips' counsel with primary responsibility for handling of the trial of the matter did not attend, even though he was at the prior mediation. The two Philips corporate representatives who attended the Massachusetts mediation—including a senior executive who flew in from the Netherlands—were likewise absent from the mediation. Philips instead sent one member of its outside counsel team who has had little or no visible role in any of the extensive prior negotiations. Philips' corporate representative was a mid-level patent prosecution and transactional attorney, rather than a member of senior management of any of the Philips entities involved in this action.

ZOLL is also a member of a large corporate family, and certainly recognizes the need in mediations such as this for corporate authority to be delegated as appropriate to people with the

appropriate seniority and grasp of the fundamental issues. ZOLL by bringing this motion also does not seek to impugn the capabilities of either of Philips' representatives at the mediation. But where the stakes are as high as they are here, where the dispute spans four lawsuits in three courts with myriad asserted patents and accused products, and where the negotiations between the parties date back to [REDACTED], continuity is paramount. That is undeniable, and toward that end, ZOLL sent the same core team that has been dealing directly with settlement issues since the outset, over countless in-person meetings, exchange of correspondence, and telephone discussions: its President, its general counsel, its director of IP, and two members of its trial team, including of course its lead counsel.

Philips' failure to seriously and meaningfully engage in mediation was further reflected in the tectonic shifts in its settlement positions. Just three weeks before the mediation, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED], effectively ensuring that nothing would be accomplished at the mediation

At a critical and demanding time, and despite the fact that experts reports in the first Massachusetts action were due the next day, ZOLL devoted enormous time and resources—not to mention the attention of its entire senior in-house and outside legal team—to the April 17th mediation, and to preparing the mediator for that session. It is now apparent that Philips' true motivation in readily agreeing to mediation at the January 14th hearing on ZOLL's motion to stay this case, and in the subsequent briefing on that issue, was primarily, if not entirely, driven by a desire to avoid the stay that ZOLL was seeking. Philips' lack of commitment to the process,

and its failure to send any members of its core negotiating team to that mediation, either business or legal, doomed the mediation to failure, and wasted all of ZOLL's efforts. ZOLL respectfully submits that sanctions are warranted on these facts, including an award of its fees and costs for this wasted effort. However, ZOLL continues to place great stock in the ADR offices of this District, and further requests that Philips be ordered to re-engage in mediation with the requisite level of commitment, at Philips' expense, and with the stay continuing until such time as that effort concludes.

I. Background

To make plain that Philips' conduct at the April 17, 2013 mediation failed to meet the good faith standard required by the rules and the Court, ZOLL sets forth the history of the negotiations and settlement discussions between the parties. Over the course of the various lawsuits, Philips has repeatedly made material, and arbitrary, changes in its settlement demands, and often pursued courses of conduct that seem designed to hinder settlement, rather than to reach a business resolution.

A. History of Litigation Between the Parties

This Pittsburgh action is one of four pending patent infringement suits between the parties—with two others in the District of Massachusetts and one in the District of Delaware. The same two law firms represent ZOLL and Philips respectively in all four lawsuits. (Docket No. 42, Hearing Tr., p. 35; Docket No. 45, p. 3). Attorneys Michael Jakes and Denise DeFranco have been the primary Philips attorneys in all four cases, while attorneys Kurt Glitzenstein and Adam Kessel have been the primary ZOLL attorneys. All four attorneys have appeared in this case, with Mr. Jakes serving as Philips' lead counsel, and Mr. Glitzenstein as ZOLL's.

Three of the four lawsuits involve infringement allegations by Philips against ZOLL (with one involving infringement counterclaims by ZOLL against Philips), all relating to

defibrillators, while the fourth involves infringement claims by ZOLL against Philips' subsidiary Respiroics, relating to remote monitoring and control of Respiroics' positive airway pressurization devices for problems such as sleep apnea, with sales that dwarf those of the defibrillators at issue in the other three cases.

B. The Parties' Prior Settlement Discussions

[Redacted text block containing multiple paragraphs of blacked-out content]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The next serious settlement discussions took place as part of the first Massachusetts action. The parties participated in a Court-ordered mediation before Magistrate Judge Boal on January 11, 2013. Attorneys Jakes and DeFranco represented Philips, and Edward Blocker (IP & Standards Manager Healthcare) and Stephanie van Wermeskerken (IP & Standards General Manager Healthcare from the Netherlands) were present as Philips' corporate representatives. Attorneys Glitzenstein and Kessel represented ZOLL, and Jonathan Rennert (President of ZOLL), Aaron Grossman (Vice-President and General Counsel), and Robert Follett (Director of IP) were present as ZOLL's corporate representatives. Just before that mediation, Philips [REDACTED]. Not surprisingly, the mediation was unsuccessful. On March 14, 2013, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The terms of that demand encompassed this case.

C. The Pittsburgh Litigation and Hearing Before the Court

On January 14, 2013, three days after the unsuccessful mediation in Boston, the parties appeared before this Court at a hearing on ZOLL's motion for a limited stay. At that hearing, the parties discussed the prior attempts at settlement. (Docket No. 42, Hearing Tr., pp. 15–16, 26–29). Those discussions between the Court and counsel for ZOLL turned to this Court's well-regarded ADR program, in which it uses skilled neutrals to help parties resolve their disputes, at

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