

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

B. The Parties' Prior Settlement Discussions

[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] 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

which point Philips' counsel interjected, stating that "Philips would be agreeable to additional mediation in this court with such a person." (*Id.* p. 29). Philips repeated this assertion in its supplemental brief after the hearing. (Docket No. 43, p. 8). ZOLL also indicated that it would be interested in further mediation. (Docket No. 42, p. 29; Docket No. 44, p. 4).

After taking the parties' positions under advisement and considering the additional briefing on ZOLL's motion for a stay, the Court issued an opinion granting in part and denying in part the motion and ordering the parties to mediation pursuant to Local Rule 16.2. (Docket No. 45). The Court ordered mediation based, in part, on the parties' expressed desire for additional mediation and as an initial alternative to ordering the stay ZOLL requested. (*Id.*, p. 4).

In ordering the parties to mediation, the Court noted in its order that it expected the parties to treat the process seriously and engage in good faith efforts to resolve the litigation:

Last, given past unsuccessful attempts, the Court advises that it expects all parties and counsel to proceed in good faith. *See* ADR Policies and Procedures 2.4. (If a party files a motion with the Court alleging matters such as bad faith the assigned US District Judge may adjudicate the motion or may elect to request another judge to do so.) To the extent any party and/or counsel fails to adhere to the Court's ADR Policies, then and in that event, the Court will entertain motions for sanctions.

(*Id.*, p. 6).

D. The April 17, 2013 Mediation

At the Court's direction, the parties retained Robert Lindefeld as the mediator and scheduled the mediation to occur in Boston on April 17, 2013. As before, ZOLL was represented by attorneys Glitzenstein and Kessel, and by corporate representatives Jonathan Rennert (President of ZOLL), Aaron Grossman (Vice-President and General Counsel), and Robert Follett

(Director of IP).¹ All five of ZOLL's representatives have been involved in the extensive prior negotiations with Philips. ZOLL also spent a substantial amount of time preparing for the mediation, including drafting a twenty-page mediation statement and spending hours in discussions, planning, and review of Philips' claims.

Philips chose a different approach. None of the individuals who attended the January 11, 2013, mediation, or who were significantly involved in the long history of negotiations between the parties, attended the April 17th mediation. Instead, Philips only sent attorney Robert Shaffer and corporate representative Brinton Yorks (principal attorney in Philips IP & Standards organization). Mr. Yorks handles patent prosecution and transactional work for Philips and is substantially less senior than either Mr. Blocker or Ms. van Wermeskerken. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ ZOLL has a parent company, Asahi Kasei. [REDACTED]

[REDACTED]

² ZOLL recognizes the confidentiality obligations of ADR Rule 6 regarding the mediation process. At the guidance of the Court's ADR Coordinator, ZOLL has intentionally generalized its discussion of what occurred during the mediation in order to maintain the confidentiality of those discussions. ZOLL will supplement these details (including providing documents, affidavits, or testimony) as appropriate at the Court's request or during the status hearing on May 7, 2013, should the Court find these details to be important in resolving this Motion.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. Law and Procedures Regarding the Court's ADR Process

By both Rule and the Court's February 6, 2013, Order, parties to a mediation are obligated to proceed in good faith and make reasonable efforts to resolve both the current lawsuit and other issues between the parties. *See, e.g.*, ADR Rule 3.1; Docket No. 45, pp. 5–6.

To facilitate the mediation and to maximize the chances of resolving the parties' dispute, the attorney "who will be primarily responsible for handling of the trial of the matter" must be in attendance, as well as a corporate representative "who has full settlement authority and who is knowledgeable about the facts of the case." ADR Rule 2.7(A)(1) and (B). "Any party who fails to have physically in attendance the necessary decision maker(s) will be subject to sanctions." ADR Rule 2.7(A)(3).

In lieu of granting the full stay requested by ZOLL, the Court specifically and explicitly required the parties to engage in good faith negotiations or face sanctions. (Docket No. 45, p. 6).

III. Argument

Despite affirmatively representing both during and after the hearing on ZOLL's motion for a stay that it wanted to mediate to reach a global settlement of all four lawsuits, that was apparently an effort to avoid this case being stayed in its entirety. Philips did not mediate in good faith, and did not reasonably attempt to resolve the disputes between the parties. Instead, Philips sent individuals with limited if any continuity to the extensive prior settlement discussions, and

[REDACTED]. It is

readily and objectively apparent that Philips had no interest or intent in engaging in a mediation that had any realistic chance of succeeding.

In addition to the time and effort ZOLL wasted preparing for this unproductive mediation, Philips' actions interfered with ZOLL's defense of the claims pending against it in the lawsuit pending in the District of Massachusetts. Rebuttal expert reports in that case were due on April 18, 2013, the day after the mediation, and the preparation for and participation in the mediation necessarily diverted resources and attention from those reports.

ZOLL also sent three of its senior management to the mediation—its president, vice president and general counsel, and director of intellectual property—to be able to have the necessary individuals present to reach a global settlement. All three had been extensively involved in the long history of prior settlement negotiations with Philips.

In contrast, Philips sent Mr. Yorks. Mr. Yorks is a patent prosecutor and transactional attorney who primarily works in Philips' ultrasound business.³ Early on in the parties' prior settlement negotiations Mr. Yorks was replaced with Mr. Blocker as Philips' lead negotiator, and Mr. Blocker did attend the prior Massachusetts mediation. Mr. Yorks is also at least two steps below Ms. van Wermeskerken, who also attended the Massachusetts mediation.

Mr. Shaffer similarly was not the primary negotiator or counsel for Philips during the prior negotiations, and he did not attend the January 11, 2013, mediation in the Massachusetts action.

It appears clear that Philips substantially increased its settlement demand and did not send its senior personnel because it had no intention of engaging in a serious mediation. Philips'

³ However, Mr. Yorks does spend some of his time working with Philips' defibrillator products.

failure to engage meaningfully violated both the spirit and letter of the ADR Rules and the Court's order, and warrants the relief ZOLL seeks on this motion.

IV. Conclusion/Relief Requested

In light of Philips' failure to participate in this mediation in good faith, sanctions are appropriate. ZOLL remains optimistic that with the Court's assistance and appropriate participation from Philips, the parties can at least ascertain what the true gap is between them, and evaluate whether a full resolution of all of the disputes between them is feasible at this time. As a sanction for Philips' misconduct, ZOLL specifically requests:

1. its costs and fees associated with preparing for and attending the mediation, including its share of Mr. Lindefjeld's fees;
2. the Court order the parties to conduct another mediation before Mr. Lindefjeld (at Philips' cost for everything, including ZOLL's attorney time at the mediation, travel costs, and share of the mediator's fee) in the next sixty days in which lead counsel for Philips and senior management from Philips with full settlement authority attend; and
3. a continuation of the stay of this litigation pending the outcome of the mediation.

ZOLL believes that these remedies would be adequate to sanction Philips for its misconduct and act as deterrent to engaging in further misconduct going forward.

Dated: May 4, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the following registered participants as identified on the Notice of Electronic Filing (NEF) on this 4th day of May, 2013. In addition, an unredacted version of this document was sent by e-mail to the individuals listed below on this date.

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