

**BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

IN RE: FRESENIUS GRANUFLO/
NATURALYTE DIALYSATE
LITIGATION

MDL No.: 2428

**INTERESTED PARTY RESPONSE OF PLAINTIFFS
SEEKING TRANSFER & COORDINATION OF ACTIONS
TO THE SOUTHERN DISTRICT OF MISSISSIPPI;
OR, IN THE ALTERNATIVE, THE NORTHERN DISTRICT OF ALABAMA**

ORAL ARGUMENT REQUESTED

ATTORNEYS FOR PLAINTIFFS

B. Kristian W. Rasmussen
Jon C. Conlin
Alyssa N. Daniels
CORY WATSON CROWDER & DeGARIS, P.C.
2131 Magnolia Avenue
Birmingham, AL, 35205
Telephone: (205) 328-2200
Facsimile: (205) 324-7896

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COME NOW the Plaintiffs¹, pursuant to 28 U.S.C. § 1407 and Rules 6.1(c) and 6.2(e) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, and respectfully submit this Interested Party Response seeking an Order transferring and consolidating the cases included as part of MDL No. 2428 to the United States District Court for the Southern District of Mississippi, or in the alternative, the Northern District of Alabama.

Oral argument requested.

For good cause, Plaintiffs state the following:

The undersigned currently represents seven hundred and thirty-two (732) clients from forty-six (46) different states. To date, the undersigned has received inquiries from thousands of individuals from across the country (most from the Southeastern United States) with potential claims. The undersigned expects many more cases will be filed. It is noteworthy that the undersigned represents the plaintiffs in thirteen (13) of the twenty-seven (27) related actions currently pending.²

¹ *Infra* pp. 3 (list of plaintiffs).

² Currently, cases are pending in the following Federal District Courts: Middle District of Alabama, Northern District of Alabama, Northern District of California, Southern District of Florida, Middle District of Georgia, Northern District of Georgia, Southern District of Georgia, District of Massachusetts, Southern District of Mississippi, District of New Jersey, Eastern District of New York, Southern District of Ohio, and Middle District of Pennsylvania.

This Interested Party Response is submitted on behalf of all Plaintiffs represented by the undersigned, including the following Plaintiffs:

- Judy Ladner, individually, and on behalf of the Estate, Survivors, and Beneficiaries of Herman Charles Williams, deceased v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 1:12-cv-00412 (SDMS);
- John Laster v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 1:12-cv-00413 (SDMS);
- Samuel Calahan v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 1:12-cv-00414 (SDMS);
- Valerie Watkins v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 1:12-cv-00415 (SDMS);
- Jennifer Baldwin, individually and on behalf of the Estate of Barbara Baldwin v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 2:12-cv-1105 (MDAL);
- Carlon Stricklin and Linnie Stricklin v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 4:12-cv-04130 (NDAL);
- Kimberly Cornelius and Phillip Cornelius v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 4:12-cv-04131 (NDAL);
- John G. Rustin and Lori Rustin v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 2:12-cv-04132 (NDAL);
- Ernest Brewster and Effie Brewster v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 4:12-cv-04133 (NDAL);
- Roy C. Davis, Jr., individually and on behalf of the Estate of Glenda Davis v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 7:12-cv-4140 (NDAL);
- Dixie W. Thomas, individually and on behalf of the Estate of Joseph L. Thomas v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 2:12-cv-04141 (NDAL);
- Gladys Callahan, individually and on behalf of the Estate of Juan Callahan v. Fresenius Medical Care Holdings Inc. *et al.*, Case No.: 4:12-cv-04142 (NDAL);
- Waddell Bishop, individually, as next of kin of and as Administrator of the Estate of Frances Carol Bishop, deceased v. Fresenius Medical Care Holding, Inc. *et al.*, Case No.: 6:12-cv-00086 (SDGA).

I. Transfer and Coordination is Appropriate.

Transfer and coordination is appropriate and consolidation necessary because all of the lawsuits involve identical questions of law and fact that arise from the same course of conduct. All of the Plaintiffs allege identical or similar product liability claims which plead identical and/or virtually identical causes of action based on identical theories of recovery. All of the claims seek damages based on allegations arising from the exact same misconduct; i.e., allegations of the Defendants' intentional, reckless and/or negligent conduct related to the design, testing, manufacturing, marketing, advertising, promoting, labeling, selling and/or distribution of GranuFlo® and NaturaLyte®. Thus, coordination is proper and necessary in accordance with the purpose of 28 U.S.C. § 1407.

Transfer and coordination serves the best interests of the parties. Economically, coordination conserves resources (e.g., time, money, etc.) of the judiciary, parties and counsel. Equitably, coordination helps ensure the claims are treated fairly instead of risking disparate rulings from different courts that result in additional litigation and, ultimately, incongruent results. Without the benefit of coordination and consolidation, the parties and judiciary will be forced to needlessly spend time, money and resources because many common issues (e.g., matters related to discovery of common issues and generic experts) will be replicated.

II. The Southern District of Mississippi is the Best Venue for Transfer & Consolidation; or, in the Alternative, the Northern District of Alabama.

Plaintiffs respectfully request that the cases be transferred and consolidated in the Southern District of Mississippi; or, in the alternative, the Northern District of Alabama. The Southern District of Mississippi is the best location for the transferee court. This Panel has found this District to be an appropriate forum in MDL proceedings such as the following: *IN RE*:

Wayne Farms LLC Fair Labor Standards Act Litigation (MDL 1872), *IN RE: Progressive Games, Inc., Patent Litigation* (MDL 1209), and *IN RE: Regions Bank ATM Fee Notice Litigation* (MDL 2202). Thus, the judiciary has experience with complex litigation and centralization in the Southeastern United States is convenient for all parties.

The Southern District of Mississippi is capable of and has experience with handling a sudden increase in the volume of cases. In the aftermath of Hurricane Katrina which struck the Mississippi Coast in August 2005, cases began to be filed almost immediately covering a variety of claims related to the hurricane. In all, approximately 2372 cases were filed in the Southern District of Mississippi. Despite damage to the courthouse that caused the relocation of both staff and judges, ultimately the vast majority of the cases were timely and promptly resolved through settlement, trial, or pretrial motions.

As an alternative venue, Plaintiffs assert the Northern District of Alabama which is recognized as experienced and equipped to handle complex and multidistrict litigation. In 2009, the JPML transferred MDL No. 2092 to the Northern District of Alabama. The JPML stated: “The Northern District of Alabama, however, is favored by a clear majority of plaintiffs, and currently is home to only one pending multidistrict litigation proceeding.” *IN RE: Chantix (Varenicline) Products Liability Litigation*, MDL No. 2092.

Previously, the JPML transferred a mass tort to the Northern District despite the fact that no cases were pending in the district, because of the experience and qualifications of the Judges. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926. Templates for use as guides and exemplars of Mass Tort Case-Management Orders for other judges were “derived in large part from orders issued in the breast implant litigation. ... Most, perhaps all, of the orders issued in that litigation are available through LEXIS and Westlaw.” MCM 3rd at 312. The JPML

entered an order transferring MDL No. 926 to the Northern District of Alabama noting, “The record before us suggests that more than a million women have received silicone gel breast implants.” JPML Order, 793 F. Supp. 1098; 1992 U.S. Dist. LEXIS 9299; *In re Silicone Gel Breast Implants Prods. Liab. Litig.* MDL 926. “[T]ens of thousands of implant recipients had sued Dow Corning, claiming to have been injured by various autoimmune reactions to the silicone in their implants.”³ The Northern District was found to have “ability and temperament to steer this complex litigation on a steady course that will be sensitive to the concerns of all parties.” *In re Silicone Gel Breast Implants Prods. Liab.* JPML Order.

A. Convenience of the Parties and Witnesses: Centralization in Mississippi or Alabama is proper because most of the current and future plaintiffs reside in the Southeast and the Defendants operate nearly six hundred (600) clinics in the Southeast.

Most of the plaintiffs reside in the Southeastern United States.⁴ The greatest number of filed cases are pending in the Southeastern United States and the greatest number of cases are represented by counsel located in the Southeastern United States. Accordingly, a large number of documents produced during discovery will originate from witnesses in the Southeast.

Centralization in the Southeastern United States is convenient for the Defendants.⁵ In all, the Defendants operate five hundred and seventy (570) clinics in the Southeastern United States,

³ 78 Am. Bankr. L.J. 93; *Mass Torts Bankruptcies: The Who, The Why and The How*, Winter, 2004.

⁴ “Southeastern United States” for these purposes includes Florida, Georgia, Alabama, Mississippi, Louisiana, South Carolina, North Carolina, Tennessee, and Arkansas. <http://careers.fmcna.com/about-us/locations.aspx>

⁵ The Defendants are all owned in whole or part by the same corporation. All of the currently filed cases name one or several of the following Defendant entities: Fresenius Medical Care Holdings, Inc.; Fresenius Medical Care Holding, Inc. d/b/a Fresenius Medical Care North America; Fresenius USA, Inc.; Fresenius USA Manufacturing, Inc.; Fresenius USA Marketing, Inc.; Fresenius USA Sales, Inc.; Fresenius Medical Care AG & CO. KGAA; Fresenius Medical Care Management, AG; Fresenius SE & CO. KGAA; and Fresenius Management, AG.

including forty-five (45) dialysis clinics in Mississippi and sixty-one (61) clinics in Alabama.⁶ Conversely, Fresenius only operates thirty-one (31) clinics in Massachusetts and sixty-six (66) clinics in all of New England.⁷

There are currently over three hundred and fifty thousand (350,000) dialysis patients in the United States.⁸ A disproportionately large number of these dialysis patients reside in the Southeastern United States -- over ninety thousand (90,000) individuals in the Southeast regularly receive dialysis treatment.⁹ Of those patients, more than three thousand (3,000) dialysis patients reside in Mississippi and over seven thousand (7,000) reside in Alabama.¹⁰ By comparison, only eleven thousand (11,000) dialysis patients reside in all of New England.¹¹

The undersigned filed the first cases in the entire country, including the earliest listed case filed on September 14, 2012.¹² Since then, twenty-six (26) cases have been filed -- sixteen (16) of the twenty-seven (27) currently filed are pending in the Southeastern United States; including four (4) in the Southern District of Mississippi and seven (7) in the Northern District of Alabama.

⁶Fresenius Medical Care's website: <http://careers.fmcna.com/about-us/locations.aspx> (According to the website, Fresenius operates over 1,800 clinics across the United States.)

⁷ "New England" for these purposes includes Rhode Island, Connecticut, Massachusetts, New Hampshire, Vermont, and Maine. <http://careers.fmcna.com/about-us/locations.aspx>

⁸Garrick R, Kliger A, and Stefanchik B, "Patient and Facility Safety in Hemodialysis: Opportunity and Strategies to Develop a Culture of Safety," *Clin J Am Soc Nephrol*, 2012 Apr; 7(4):680-8; also, <http://www.dialysispatients.org/patient-assistance-state-advocacy> and

⁹ *Id.*; <http://www.dialysispatients.org/patient-assistance-state-advocacy>

¹⁰ *Id.*

¹¹ *Id.*

¹² *Bishop v. Fresenius, et al.*, Case No.: 6:12-cv-00086 (SDGA).

B. The Southern District of Mississippi is efficient

The Southern District of Mississippi has a well managed docket. In fact, the median time from filing to disposition for civil cases was 9.0 months in 2011 and 5.8 months in 2009; the median time from filing to trial was 20.7 months in 2011 and 24 months in 2009.¹³ Comparatively, in the District of Massachusetts, the median time from filing to disposition for civil cases was 8.7 in 2011 and 10.3 months in 2009; the median time from filing to trial was 32.3 in 2011 and 32 months in 2009.¹⁴

C. Criteria for Selecting Transferee Court: The District of Massachusetts Is Not An Optimal Venue.

The Southern District of Mississippi does not have any MDL cases pending and the Northern District of Alabama currently has two: *IN RE: Chantix (varenicline) Products Liability Litigation* (MDL 2092) and *IN RE Blue Cross and Blue Shield* (MDL 2406).¹⁵ Conversely, the District of Massachusetts is overburdened, as it currently has eight (8) pending MDLs.¹⁶ Previously, the Panel selected a transferee court based, in part, on the fact that the District was

¹³ <http://www.uscourts.gov/cgi-bin/cmsd2009.pl>; <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>

¹⁴ *Id.*

¹⁵ http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets-By-District-November-2012.pdf (This MDL Statistics Report has not yet been updated to include the *IN RE Blue Cross and Blue Shield Antitrust Litigation* (MDL 2406). However, the Public Access to Court Electronic Records (PACER) reflects that MDL 2406 is an active MDL case in the Northern District of Alabama.)

¹⁶ The eight (8) MDL cases currently pending in the District of Massachusetts are: *IN RE: Celexa and Lexapro Marketing and Sales Practices Litigation* (MDL 2067); *IN RE: Prudential Insurance Company of America SGLI/VGLI Contract Litigation*, (MDL 2208); *IN RE: Pharmaceutical Industry Average Wholesale Price Litigation* (MDL 1456); *IN RE: Neurontin Marketing Sales Practices and Products Liability Litigation* (MDL 1629); *IN RE: Body Science LLC Patent Litigation* (MDL 2375); *IN RE: JPMorgan Chase Mortgage Modification Litigation* (MDL 2290); *IN RE: Bank of America Home Affordable Modification Program (HAMP) Contract Litigation* (MDL 2193); and *IN RE: Prograf Antitrust Litigation* (MDL 2242).

“not currently overtaxed with other multidistrict dockets, and possesses the necessary resources to be able to devote the substantial time and effort to pretrial matters that this complex docket is likely to require.” See, *IN RE: Phenylpropanolamine Products Liability Litigation*, 173 F. Supp. 2d 1377, 379-80 (J.P.M.L. 2001),

The criteria utilized by the JPML in determining the most appropriate transferee forum under 28 U.S.C. § 1407 include: the convenience of the parties and witnesses; the relative degree of progress achieved in pending actions; the location of parties, witnesses, and documents; the likelihood that a given district’s location would enhance the prospects for cooperation among the federal and state courts; and, when no clear choice emerges from these factors, the preference of the majority of the parties. *IN RE New Mexico Natural Gas Antitrust Litigation.*, 482 F. Supp. 333, 337 (J.P.M.L. 1979); *IN RE Factor VIII or IX Concentrate Blood Products Liability Litigation.*, 853 F. Supp. 454, 455 (J.P.M.L. 1993).

The Southern District of Mississippi is an appropriate forum for transfer and consolidation because it has the resources and judicial expertise to conduct this multi-district litigation promptly and efficiently, and because that District is centrally and conveniently located. Under 28 U.S.C. § 1407, the transfer and coordination will serve the convenience of the parties, witnesses, counsel, and the judicial system. Absent pretrial coordination or consolidation, the possibility of inconsistent pretrial rulings exists, especially with respect to issues concerning class certification, discovery, and the merits of Plaintiffs’ claims, including damages.

No judicial resources will be wasted if these cases are transferred to the Southern District of Mississippi given that all of the other cases have only recently been filed and no significant discovery or other rulings have occurred in those cases.

WHEREFORE, Plaintiffs respectfully request that the Honorable Panel enter an Order granting Plaintiffs' motion for transfer and consolidation; and, that such coordination be centralized in the Southern District of Mississippi; or, in the alternative, Northern District of Alabama.

Respectfully submitted, this the 3rd day of January, 2013.

/s/ B. Kristian W. Rasmussen

Kristian W. Rasmussen, Esq.

Jon C. Conlin, Esq.

Alyssa N. Daniels, Esq.

CORY WATSON CROWDER & DeGARIS, P.C.

2131 Magnolia Avenue

Birmingham, AL, 35205

Telephone: (205) 328-2200

Facsimile: (205) 324-7896

Attorneys for Plaintiffs Baldwin, Bishop, Brewster,
Calahan, Callahan, Cornelius, Davis, Laster, Rustin,
Stricklin, Thomas, Watkins and Williams.