

**BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

IN RE: FRESENIUS GRANUFLO/
NATURALYTE DIALYSATE
LITIGATION

MDL Docket No. 2428

**INTERESTED PARTY RESPONSE OF PLAINTIFFS ALFORD, HEARD, ROBERTS
AND TAYLOR IN SUPPORT OF MOTION FOR TRANSFER OF ACTIONS TO THE
DISTRICT OF MASSACHUSETTS PURSUANT TO 28 U.S.C. § 1407 FOR
COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS**

Oral Argument Requested

I. INTRODUCTION

Plaintiffs Latara Alford¹, Charleston Heard², Steven and Dorothy Roberts,³ and Cherry Taylor and Roger Spann⁴ have all filed complaints against Fresenius⁵ for injuries caused by its defective GranuFlo products. They respectfully submit this Interested Party Response pursuant to Rule 6.2(e) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation to voice their support for the transfer of all Fresenius GranuFlo / Naturalyte Dialysate products liability and similar actions against Fresenius to the District of

¹ *Alford v. Fresenius USA, Inc., et al.*, Case No. 1:13-cv-10060-JLT (D. Mass.).

² *Heard v. Fresenius USA, Inc., et al.*, Case No. 1:13-cv-10063-JLT (D. Mass.).

³ *Roberts et al. v. Fresenius USA, Inc., et al.*, Case No. 1:13-cv-10061-JLT (D. Mass.).

⁴ *Taylor et al. v. Fresenius USA, Inc., et al.*, Case No. 1:13-cv-10062-JLT (D. Mass.).

⁵ The Plaintiffs presenting this response named as defendants Fresenius USA, Inc., Fresenius USA Manufacturing, Inc., Fresenius USA Sales, Inc., and Fresenius Medical Care Holdings, Inc. d/b/a Fresenius Medical Care North America. The term “Fresenius” shall be used to describe these various related entities as well as other related parent and subsidiary companies named by plaintiffs in other related actions.

Massachusetts for consolidated pretrial proceedings pursuant to the MDL Statute, 28 U.S.C. § 1407 *et seq.*

II. ARGUMENT

A. **The Panel should Consolidate the Fresenius GranuFlo / Naturalyte Dialysate Cases Pursuant to 28 U.S.C. § 1407.**

There is no dispute among the parties as to whether the Fresenius GranuFlo / Naturalyte cases are appropriate for consolidation and transfer under the MDL Statute. The moving Plaintiffs (Jones and Haerinck, *see* MDL No. 2448, Dkt. No. 1), Fresenius itself (*see* Dkt. No. 21), and all of the responding Interested Parties to date agree that these cases present common issues of fact and law warranting consolidation. The factors weighing in favor of consolidation and transfer have been discussed thoroughly in prior briefing. Plaintiffs will not burden the Court with a re-hashing of those issues, but will simply state that they agree with the so-far unanimous consideration that consolidation is appropriate and warranted.

However, Plaintiffs will offer one additional fact in support of the present Motion to transfer and consolidate actions under the MDL Statute. As other Interested Parties have pointed out, the current list of related actions is only the tip of the iceberg insofar as the GranuFlo / Naturalyte litigation is concerned. Indeed, counsel for the Plaintiffs, filing this response (Hagens Berman Sobol Shapiro LLP) currently is investigating literally hundreds of potential GranuFlo / Naturalyte claims on behalf of its clients, and anticipates filing dozens of additional complaints against Fresenius in the coming weeks. That number could well reach into the hundreds as counsel works its way through the flood of claims it has received from prospective clients for injuries arising out of the use of GranuFlo / Naturalyte. Clearly,

given both the numerosity of the claims and their substantial similarity, consolidation is appropriate and would serve the interests of all parties as well as the federal judicial system.

B. The District of Massachusetts is the Most Appropriate and Convenient Transferee Forum.

The sole point of disagreement between the parties relating to the consolidation and transfer of the GranuFlo / Naturallyte cases is identifying the best transferee forum. The moving parties have requested transfer to the District of Massachusetts (*see* Dkt. No. 1). Other interested parties including the present Plaintiffs join in that request (*see* Dkt. No. 9). The Fresenius Defendants also agree that Massachusetts is the most appropriate transferee forum (*see* Dkt. No. 21). Another group of interested parties oppose transfer to Massachusetts and request transfer to either the Southern District of Mississippi or the Northern District of Alabama (*see* Dkt. Nos. 19, 36, 38, 42, 43, 46, 52, 57 and 58).⁶ The District of New Jersey (Dkt. No. 38), the Eastern District of Louisiana (Dkt. No. 55), and the Northern District of California (as an alternative to Mississippi, *see* Dkt. No. 46) have also been proposed as transferee courts. Plaintiffs agree with the moving parties and with Fresenius that Massachusetts is the most appropriate transferee court.

In selecting the transferee court for an MDL action this Panel looks to several factors relating to the convenience and suitability of the proposed transferee court, including (1) the

⁶ Interested Party responses were filed on behalf of 20 Plaintiffs supporting transfer to Mississippi and /or Alabama, though several of those responses are essentially identical. At this time, nine Plaintiffs (including the present Plaintiffs) and the Fresenius Defendants have filed responses supporting transfer to Massachusetts. One filing on behalf of six Plaintiffs is in support of transfer to New Jersey, and one filing on behalf of one plaintiff supports transfer to Louisiana. Because New Jersey and Louisiana have received so little support from commenting parties, this brief will focus on the districts that have been the focus of the majority of discussion to date, namely, Massachusetts, the Southern District of Mississippi and the Northern District of Alabama.

location of the parties, witnesses and documents (*i.e.*, whether the transferee court is at or near the “center of gravity” of the case); (2) the accessibility of the proposed transferee court to parties and witnesses; and (3) the respective ability of the transferee district to accommodate the MDL (*i.e.*, caseload). *See, e.g., In re Corn Derivatives Antitrust Litig.*, 486 F. Supp. 929, 930-32 (J.P.M.L. 1980).

a. Massachusetts is the most convenient forum, closest to the “center of gravity” of the GranuFlo cases.

While all of the proposed districts have judges who are well-qualified and capable of presiding over an MDL of this magnitude, Massachusetts has a clear advantage when it comes to serving the convenience of the parties, witnesses and attorneys.

This is not a case where the events underlying the claims occurred in one specific location or where a large majority of claimants are present in one particular district. Fresenius operates clinics throughout the United States, and it supplied its GranuFlo and Naturalyte products to dialysis clinics operated by other companies throughout the United States.⁷ Thus, the claims at issue in this proposed MDL will spring from all over the United States – there simply is not one specific “center of gravity” in terms of the location of the Plaintiffs. While there may be slight variations in the number of dialysis patients from region to region or increases in the number of patients near population centers, the fact is that this is, from the perspective of the Plaintiffs, a truly nationwide case.

⁷ Several Interested Parties have cited the number of dialysis clinics operated by Fresenius in the Southeast in support of their argument in favor of transfer to Mississippi or Alabama. However, the claims against Fresenius are not limited to injuries and deaths that occurred as a result of the use of GranuFlo / Naturalyte at Fresenius-owned dialysis centers. Fresenius supplied its GranuFlo / Naturalyte products to dialysis centers owned by other companies as well, with equally devastating results.

On the other hand, it is clear that the center of gravity of the essential facts common to each and every GranuFlo / Naturalyte claim is in the District of Massachusetts. Fresenius is based in Waltham, Massachusetts. The witnesses with knowledge relevant to Plaintiffs' common claims – witnesses who can establish key facts about the development and marketing of GranuFlo / Naturalyte and with knowledge about what Fresenius knew about those products and when it knew it – are very likely to be located in or around the District of Massachusetts near Fresenius's headquarters. Those high-level decisions are central and common to the Plaintiffs' common claims – and the center of gravity for those common issues is in the District of Massachusetts.

The District of Massachusetts is also convenient because it is readily accessible from all over the United States, being close to Logan International Airport. As stated previously, the Plaintiffs and their attorneys in this proposed MDL will be located all over the country. Boston is a major national destination, and is reachable by direct flights from all over the country. The same cannot be said for the Southern District of Mississippi or the Northern District of Alabama. Neither of those districts has within it a major national destination airport that would provide for convenient direct access to the same extent as would the District of Massachusetts, particularly for Plaintiffs and counsel located on the west coast where flights directly to the Northern District of Mississippi or Southern District of Alabama are rare or nonexistent.

The District of Massachusetts, which is readily accessible from all over the country, is a superior location for a truly nationwide MDL such as this. And because the majority of witnesses with knowledge relevant to the Plaintiffs' common claims and issues are likely to be found within that district, it is the most convenient and sensible transferee district.

b. Massachusetts has the capacity and ability to preside over this litigation.

An important consideration in determining the appropriate transferee district is the capacity of the transferee district to accommodate an MDL action. *See In re Webvention LLC ('294) Patent Litig.*, 831 F. Supp. 2d 1366, 1367 (J.P.M.L.); *In re Xyberbaut Corp. Sec. Litig.*, 403 F. Supp. 2d 1354, 1355 (J.P.M.L. 2005) (transferring case to district with “relatively favorable caseload statistics” which was a “likely source of relevant documents and witnesses” because defendant’s headquarters were located there). While the District of Massachusetts is a busy district, an examination of the available caseload statistics shows that the judges in that district handle their docket with exceptional efficiency.

According to the latest available Federal Judicial Caseload Statistics published by the United States Courts,⁸ the District of Massachusetts had 3,046 pending civil cases in 2011. During that same period, the Southern District of Mississippi had 1,945 pending civil cases and the Northern District of Alabama had 3,884 pending civil cases. Clearly, the District of Massachusetts has much more favorable docket conditions than the Northern District of Alabama, though it appears to have less favorable conditions than the Southern District of Mississippi. However, the caseload in Massachusetts is distributed among 21 judges (including 3 senior judges and 7 magistrate judges), while the caseload in the Southern District of Mississippi is distributed among only 15 judges (including 4 senior judges and 5 magistrate judges). Thus the relative caseloads per judge in the two districts are relatively similar, at 145 cases per judge in Massachusetts and 129 per judge in the Southern District of Mississippi. The

⁸ See <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>.

Northern District of Alabama is comparatively heavily burdened, with 17 judges (including 4 senior judges and 5 magistrate judges) and 179 cases per judge.

The statistics also show that the district of Massachusetts is very efficient in handling its caseload. For the twelve month period ending March 31, 2011, the median interval of time for cases in the District of Massachusetts from filing to disposition was 8.8 months (for 2,322 cases). In the Southern District of Mississippi, the median time to disposition during that same time was 8.3 months (for 1,781 cases) and in the Northern District of Alabama, it was 8.7 months (for 2,069 cases).

Although these numbers are fairly close and appear to favor Mississippi, a closer look reveals that the Southern District of Mississippi's numbers are somewhat skewed by an inordinately large number of cases dismissed without court action. In Massachusetts, only about 16% (374 of 2,322) of cases were resolved without court action, at a median time of 3.7 months. The Northern District of Alabama had about 10% (205 of 2,069) resolved without court action, at a median time of 4.4 months. During that same time, the Southern District of Mississippi had over half of its cases (903 of 1,781) resolved without court action at a median time of 4.3 months. As a result, the Southern District of Mississippi's overall median time to resolution of 8.3 months is significantly understated due to the large number of quick dismissals not requiring court action. Tellingly, the District of Massachusetts compares favorably when viewing its statistics for disposing of cases before pretrial (971 cases at a median time of 6.4 months) and during or after pretrial (911 cases at 14.4 months), versus the Southern District of Mississippi (802 cases at 10.9 months before pretrial and 35 cases at 19.0 months during or after pretrial) and versus the Northern District of Alabama (1,812 cases at 8.7 months before pretrial and 22 cases at 20.7 months during or after pretrial).

What is clear from these figures is that the docket conditions of the District of Massachusetts and the Southern District of Mississippi, when taking into account the judicial resources of each district, are relatively equal and that the Southern District of Alabama is relatively over-burdened. It is also clear that the judges in the District of Massachusetts are extremely efficient in handling their dockets and bring their cases to resolution at rates comparable to and even faster than those other districts. The District of Massachusetts is well-positioned, in terms of both docket conditions and a proven track record of efficient case management, to preside over the GranuFlo / Naturalyte litigation.

Moreover, while there are qualified and capable judges from all of the proposed districts, the qualifications and experience of the judges in the District of Massachusetts cannot be questioned, as evidenced by the Judicial Panel on Multidistrict Litigation's history of entrusting MDL cases to judges within that district. The District of Massachusetts has completed 45 MDL cases, including 23 since the year 2000.⁹ By contrast, the Northern District of Mississippi has completed only one MDL, in 1997, and the Southern District of Alabama has completed four MDLs, the most recent having been completed in 2001. The experience within the District of Massachusetts in handling MDLs, on both the judicial and staff levels, will allow the District of Massachusetts to efficiently and effectively manage this litigation.

There are several judges within District of Massachusetts who have the experience, qualifications and capacity to manage this proposed MDL. Judge Saris is a highly respected jurist who has successfully completed three MDL actions. Although she currently has two MDL actions assigned to her, those actions (*In Re: Pharmaceutical Industry Average Wholesale Price*

⁹ United States Judicial Panel on Multidistrict Litigation "Multidistrict Litigation Terminated Through September 30, 2012." Available at <http://www.jpml.uscourts.gov/statistics-info>.

Litigation and *In Re: Neurontin Marketing, Sales and Products Liability Litigation*) are in their latter stages and therefore are not especially burdensome to the Judge's docket.¹⁰ Likewise, Judge Stearns is highly experienced and qualified, having completed three MDL actions (the latest in 2012). Judge Stearns currently has one MDL action assigned to him (*In Re: JPMorgan Chase Mortgage Modification Litigation*). With his experience handling MDL actions, including handling multiple MDL actions simultaneously, Judge Stearns is eminently qualified. Judge Young also has significant experience presiding over MDL actions; he has completed three MDLs (the latest in 2010), and is currently presiding over *In Re: Nexium (Esomeprazole) Antitrust Litigation*. With his experience and history of efficiently and aggressively managing his docket, it is clear that Judge Young has both the qualifications and capability of handling this MDL. Any one of these three judges would make an excellent choice to preside over the GranuFlo / Naturalyte litigation.¹¹

III. CONCLUSION

For the foregoing reasons, Plaintiffs Latara Alford, Charleston Heard, Steven and Dorothy Roberts, and Cherry Taylor and Roger Spann respectfully request that the motion for transfer be granted and the pending federal cases transferred to the District of Massachusetts.

¹⁰ Judge Saris also has responsibilities relating to her work with the Sentencing Commission. However, given her track record and experience, Plaintiffs believe that she would still be more than capable of giving this case the attention it will require.

¹¹ Certainly, there are other judges within the District of Massachusetts who could effectively preside over this litigation. Plaintiffs have simply highlighted Judges Saris, Stearns and Young as being probably the most qualified and capable among that group.

DATED: February 8, 2013

By: /s/ Steve W. Berman

Steve W. Berman
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
E-mail: steve@hbsslaw.com

Lauren Guth Barnes
HAGENS BERMAN SOBOL SHAPIRO LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
Telephone: (617) 482-3700
Facsimile: (617) 482-3003
E-mail: lauren@hbsslaw.com

Robert B. Carey
HAGENS BERMAN SOBOL SHAPIRO LLP
11 West Jefferson Street, Suite 1000
Phoenix, AZ 85003
Telephone: (602) 840-5900
Facsimile: (602) 840-3012
E-mail: rob@hbsslaw.com

*Attorneys for Plaintiffs Latara Alford, Charleston
Heard, Steve and Dorothy Roberts, Cherry Taylor
and Roger Spann*