

**BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

**IN RE: Fresenius GranuFlo/Naturalyte
Dialysate Litigation**

MDL No. _____

**BRIEF IN SUPPORT OF PLAINTIFFS JONES' AND HAERINCK'S MOTION
FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407 FOR
COORDINATED OR CONSOLIDATED PETRIAL PROCEEDINGS**

Oral Argument Requested

Pursuant to 28 U.S.C. § 1407 and Rule 7.2(a)(1) of the Rules of Procedure for the Judicial Panel on Multidistrict Litigation (“Panel”), Plaintiffs Patricia Jones, personal representative of the Estate of Frank Jones, and Dwaine Haerinck, personal representative of the Estate of Linda May Church (Case No. 12-cv-120222, Motion Exhibit A), respectfully file this Brief in Support of their Motion for Transfer and Consolidation of Pretrial Proceedings. Movants request an Order transferring all pending actions listed on the attached Schedule of Actions (Motion Exhibit B), as well as subsequently filed “tag-along” actions, to the District of Massachusetts.

Transfer and consolidation is appropriate because the pending actions are product liability cases involving nearly identical legal issues and factual allegations. The District of Massachusetts is the most appropriate venue to consolidate the cases, because the District: (1) has cases pending before it;¹ (2) is the most convenient for parties and witnesses, and (3) has sufficient capacity to adjudicate this litigation.

¹ In addition to the Jones complaint, to date three related actions have been filed and assigned to District Judge Tauro: Johnson 1:12-cv-12295, Boone 1:12-cv-12296 and Dubose, 1:12-cv-12306.

I. BACKGROUND

Movants are the survivors of dialysis patients who suffered cardiopulmonary arrest resulting from dialysis treatment with defendants' dialysate products Naturalyte GranuFlo Acid Concentrate and Naturalyte Liquid Acid Concentrate ("GranuFlo"). Movants and plaintiffs in related actions seek damages for wrongful death and personal injuries. Pending actions involve common Defendants, Fresenius Medical Care North America, Inc., Fresenius USA, Inc., Fresenius USA Manufacturing, Inc., Fresenius Medical Care Holdings, Inc. and Fresenius USA Marketing, Inc. (collectively hereafter referred to as "Fresenius"). Fresenius designed, developed, manufactured, sold, marketed and distributed the subject products throughout the United States for treatment of dialysis patients. Fresenius is based in Waltham, Massachusetts.

Since 2003, Fresenius has distributed GranuFlo using a formula that was the subject of a Federal Food & Drug Administration Class I recall in June 2012. Plaintiffs in all pending actions contend that GranuFlo causes a rapid and unsafe elevation of bicarbonate, which creates a substantially increased risk of cardiopulmonary arrest and death that is unique to GranuFlo. Plaintiffs in all pending actions claim that Fresenius knew or should have known of the substantially increased risk of cardiopulmonary arrest from rapid and dangerous increases in bicarbonate levels from the use of the subject product.

Plaintiffs further allege that the causal link between the use of GranuFlo and cardiopulmonary arrest was confirmed by a case-control study conducted by Fresenius, which concluded that, during 2010, some 941 patients treated with GranuFlo in roughly one-third of its clinics suffered cardiopulmonary arrest and sudden cardiac death.

Movants allege, *inter alia*, that Fresenius designed, manufactured, marketed, distributed and/or sold GranuFlo, which is unreasonably dangerous in that it causes rapid and dangerous

increases in bicarbonate and a resulting 6 to 8 fold increased risk of cardiopulmonary arrest and death; that Fresenius knew or should have known of the risk of cardiopulmonary arrest and death associated with GranuFlo; that Fresenius marketed, distributed and sold GranuFlo without adequate warnings and instructions concerning its risks and proper usage; and that as a direct and proximate result of the use of GranuFlo, the plaintiffs' decedents suffered serious injury and death.

II. ARGUMENT

A. This Litigation Satisfies the Requirements for Consolidation and Transfer Under 28 U.S.C. § 1407

The underlying purpose of transferring related actions under 28 U.S.C. § 1407 is to serve the convenience of the parties and witnesses and promote the just and efficient adjudication of actions. *In re Hydrogen Peroxide Antitrust Litig.*, 374 F.Supp. 2d 1345,1346 (J.P.M.L. 2005). A key factor in transferability and coordination under Section 1407 is the presence of common questions of fact. *In re Federal Election Campaign Act Litig.*, 511 F.Supp. 821,823 (J.P.M.L. 1979). To date, eleven known actions have been commenced against Fresenius in several judicial Districts. See Schedule of Actions. Each of these actions includes substantially similar claims and seeks substantially similar relief. Movants expect substantial numbers of additional cases to be filed in various districts based on the wide-spread use of the subject products at dialysis clinics throughout the United States.²

Under 28 U.S.C. § 1407, the transfer and consolidation of these actions is appropriate, and will serve the purpose of judicial economy, national coordination of discovery and other pre-

² Based upon the number of cases Movant's counsel currently has in review, those in review at other firms, and the number of deaths from cardiopulmonary arrest during dialysis in its own clinics identified by Fresenius in its 2010 study (941), and the extrapolation of that data to all clinics using GranuFlo nationwide from 2003 to present, it is expected that hundreds, if not thousands, of cases may eventually be filed.

trial efforts, will prevent duplicative and potentially conflicting pretrial efforts, will prevent duplicative and potentially conflicting pretrial rulings, will reduce the costs of litigation and allow cases to proceed more efficient to trial. Title 28, section 1407(a) of the United States Code provides, “when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.” 28 U.S.C. § 1407(a). The Panel “shall” make such transfers when in furtherance of the “convenience of the parties and witnesses” and when transfer “will promote the just and efficient conduct of such actions.” *Id.* Because of the number of current and anticipated GranuFlo claims and the existence of common questions of fact, the requirements for transfer under § 1407 are easily met here. Each of the currently pending GranuFlo actions involves common questions of fact, including whether Fresenius knew or should have known of the dangerous propensity of GranuFlo to cause injuries, whether GranuFlo is dangerously defective and/or defectively designed or manufactured; whether adequate pre-market testing was performed; whether GranuFlo is safe for its intended use; whether Fresenius provided adequate instruction and warnings; whether Fresenius was negligent in designing, manufacturing, testing, marketing, promoting or distributing GranuFlo; and whether GranuFlo conformed to the defendants’ express and implied warranties. Because of the common issues of fact and the number of current and anticipated claims, these cases are well suited for transfer and pre-trial consolidation. Consolidation will foster the just and efficient conduct of these actions by preventing duplicative discovery and preventing inconsistent resolution of pretrial issues.

Transfer and coordination or consolidation of the actions will best serve the interests of justice and efficiency by permitting a single court to coordinate discovery and resolve disputes common to the pending actions, thus avoiding unnecessary taxing of the judicial system’s and

the litigants' finite resources. *See In re Temporomandibular Joint (TMJ) Implant Prod/'s Liab. Litig.* 844 F.Supp. 1553, 1554 (J.P.M.L. 1994).

The convenience of the parties and witnesses clearly supports transfer and pre-trial consolidation. Because of the common defendants, virtually identical issues of law and fact, and the number of current and anticipated claims, transfer and consolidation is most convenient for the parties and potential witnesses common to these actions.

B. The District of Massachusetts is the Appropriate Transferee Forum

The factors considered by this Panel in determining the appropriate MDL forum include: (1) location of the parties, witnesses and documents; (2) the accessibility of the proposed transfer district to parties and witnesses; and (3) the respective caseloads of the proposed transferee district courts. *See In re Corn Derivatives Antitrust Litig.* 486 F.Supp 929, 93 1-32 (J.P.M.L. 1980). Analysis of these factors supports transfer of these actions to the District of Massachusetts for consolidated pre-trial proceedings.

1. The District of Massachusetts is Convenient to Parties and Witnesses

An important factor for consideration by the Panel is the district with convenient and easy access for the parties and witnesses. Fresenius is based in Waltham, Massachusetts. Currently, there are four pending actions venued in the District of Massachusetts and many additional actions anticipated to be filed in this Court. The majority of remaining actions are located in relatively close geographic proximity, i.e., judicial Districts in Ohio, New York and Georgia. Wherever cases are filed, the District of Massachusetts provides an easily accessible location given its proximity to a major airport just minutes from the courthouse, allowing easy access for litigants, witnesses and counsel. *See In re Webloyalty.com, Inc. Marketing and Sales Practices Litigation*, 474 F. Supp. 2d 1353, 1354 (J.P.M.L. 2007) ("The Panel is persuaded that the District

of Massachusetts is an appropriate transferee district for this litigation. Webloyalty is headquartered nearby and it is likely to be the source of a substantial number of witnesses and documents subject to discovery.”) The courthouse is three miles from Logan International Airport, which is one of the country’s best connected airports, with direct flights to numerous U.S. cities and over 1,000 daily domestic departures. Therefore, the District of Massachusetts provides a convenient and central hub for the litigation.

The District of Massachusetts is convenient for counsel, witnesses and parties for any hearings or other proceedings relating to the MDL. Fresenius is headquartered in Waltham, Massachusetts, which is likely to be the source of a substantial number of witnesses and documents subject to discovery.

2. The District of Massachusetts Has Sufficient Capacity to Adjudicate the Cases

Another relevant factor is the transferee court’s capacity to handle the cases. The Panel favors districts where the transferred cases will not add to an already overburdened docket. *In re Webvention LLC* (‘294) *Patent Litig.*, 831 F. Supp. 2d 1366, 1367 (J.P.M.L.)(avoiding transfer of districts with “large civil caseloads” and choosing a transferee court with “more favorable” docket conditions). The Panel thus places a premium on speed and efficiency. *In re Maxim Integrated Prods.*, 2012 U.S. Dist. LEXIS 79496, at * 8 (J.P.M.L. June 8, 2012)(transferring to court in part because “litigants can expect a prompt claim construction ruling” from that court.).

Most recently, this Panel assigned *In re: Nexium (Esomeprozole) Antitrust Litigation*, MDL No. 2409 to the District of Massachusutes on December 6, 2012, noting “that the district...is...relatively underutilized.... We find that ...centralization under Section 1407 in the District of Massachusetts will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation.” Moreover, the District of Massachusetts has able

jurists, to whom this Panel has already entrusted previous MDLs, including: *In re: Nexium (Esomeproazole) Antitrust Litigation*, MDL No. 2409; *In re: Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456; *In re: Neurontin Marketing and Sales Practices Litigation*, MDL 1629; *In re: Celexa and Lexapro Marketing and Sales Practices Litigation*, MDL 2067; *In re: Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, MDL 2193; *In re: Prudential Insurance Company of America SGLI/VGLI Contract Litigation*, MDL 2208; *In re: Prograf Antitrust*, MDL 2242; *In re: JPMorgan Chase Mortgage Modification Litigation*, MDL 2290; *In re: Body Science LLC Litigation*, MDL 2375; *In re: Citigroup, Inc., Capital Accumulation Plan Litigation*, MDL 1354; *In re Zonolite Attic Insulation Products Liability Litigation*, MDL 1376; *In re Xcelera.Com Inc. Securities Litigation*, MDL No. 1400; *In re Pharmatrack, Inc., Privacy Litigation*, MDL No. 1380 and *In re Fidelity Magellan Funds/ Micron Technologies, Inc. Securities Litigation*, MDL No. 1157.

3. District Judges Joseph L. Tauro and Patti B. Saris are Experienced Judges Capable of Handling this Type of Litigation

The experience and ability of District Judges Joseph L. Tauro and Patti B. Saris are other factors which support the transfer of these actions to the District of Massachusetts. The availability of an experienced, competent judge weighs heavily in favor of transferring a case to that district. *See In re Hawaiian Hotel Room Rate Antitrust Litig.*, 438 F.Supp. 935, 936 (J.P.M.L. 1977); *In re Sugar Indus. Antitrust Litig.* 437 F.Supp. 1204, 1208 (J.P.M.L. 1977); *In re Ampicillin Antitrust Litig.* 315 F.Supp. 317, 319 (J.P.M.L. 1970). The experience and knowledge of a particular judge is one of the factors that is considered in determining the appropriate transferee forum for a case. *See In re "Factor VIII or IX Concentrate Blood Prod. Liab. Litig.*, 853 F.Supp. 454, 455 (J.P.M.L. 1993); *In re Silicon Gel Breast Implants Prod. Liab.*

Litig., 793 F.Supp. at 1101; *In re Data General Corp. Antitrust Litig.*, 470 F.Supp. 855, 859 (J.P.M.L. 1979).

Judge Joseph L. Tauro is eminently qualified to preside over this litigation. The Movants' case, *Jones v. Fresenius Medical Care North America, Inc. et al.* (Case No. 12-CV-12022 JLT) and several related cases have been assigned to Judge Tauro, who has 40 years experience in the District Court and served as Chief Judge from 1992-1999. During his tenure on the bench, Judge Tauro presided over *In re Volkswagen and Audi Warranty Extension Litigation*, MDL No. 1790, which involved defendants' failure to disclose knowledge of product defects and misrepresentation of product warranty. In this matter, Judge Tauro was able to bring the case to a conclusion through monetary settlement and injunctive relief for the plaintiffs. As such, Judge Tauro is eminently qualified to preside over this MDL.

Judge Patti B. Saris is also eminently qualified to preside over this litigation. Judge Saris has served as a federal Judge in the District of Massachusetts for 19 years, during which time she presided over *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL 1456. In this matter, Judge Saris brought the case to a final conclusion through settlement. This case involved common questions of fact pertaining to pharmaceutical defendants' allegedly fraudulent marketing, sale, and/or billing schemes pertaining to Medicare-covered prescription drugs. Judge Saris is currently presiding over *In re: Neurontin Marketing and Sales Practices Litigation*, MDL No. 1629. This pending action involves the alleged illegal promotion and sale of defendant's pharmaceutical drug. As such, Judge Saris is highly qualified to preside over this litigation.

III. CONCLUSION

Transfer and consolidation for pre-trial proceedings of all pending and subsequently filed

GranuFlo actions will promote the just and efficient conduct of these actions by allowing national coordination of discovery and other pre-trial efforts, will prevent duplicative and potentially conflicting pre-trial rulings, will reduce the costs of litigation, and allow cases to proceed more efficiently to trial. For all of the foregoing reasons, Movants respectfully request the Panel enter an order that the related actions be consolidated and transferred to the District of Massachusetts.

Respectfully submitted.

/s/ Anthony Tarricone
Anthony Tarricone, Esq.
Noah H. Kushlefsky, Esq.
Kreindler & Kreindler LLP
277 Dartmouth Street, 3rd Floor
Boston, MA 02116
Telephone: (617) 933- 5950
Fax: (617) 424-9120
ATarricone@Kreindler.com
NKushlefsky@Kreindler.com

Date: December 12, 2012