

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**IN RE: FRESENIUS
GRANUFLO/NATURALYTE DIALYSATE
PRODUCTS LIABILITY LITIGATION**

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MDL NO. 1:13-md-02428-DPW

This Document Relates to:

All Cases

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF PLAINTIFFS’
COUNSEL FOR AN INITIAL CASE MANAGEMENT CONFERENCE
AND APPOINTMENT OF PLAINTIFFS’ LEADERSHIP STRUCTURE**

I. INTRODUCTION

The Plaintiffs’ Counsel identified herein (“Movants”) respectfully request that the Court schedule an initial case management conference to address the appointment of leadership in this MDL, with notice given to all litigants. Furthermore, Movants respectfully request that this Court approve the leadership and organizational structure presented herein, which consists of: (1) a six (6) member Plaintiff Executive Committee (“PEC”), which will serve collectively as lead counsel, and be chaired by Anthony Tarricone, who will also serve as Plaintiffs’ Liaison Counsel; (2) an eleven (11) member Plaintiff Steering Committee (“PSC”); and (3) two (2) Plaintiffs’ Federal-State Liaison Counsel to report to this court on activities in the parallel state litigation in Massachusetts and California. As an experienced litigator, Mr. Tarricone will efficiently and effectively handle all local administrative matters and work as an effective liaison between the Court, Fresenius and other counsel. The remainder of the undersigned counsel are those attorneys who have been working collectively on this litigation for many months prior to and continuously since the transfer, and have met consistent with the *Manual for Complex Litigation* (Fourth) §10.22 (2004)[hereafter “MCL”], to coordinate and form the proposed

organizational structures, including the proposed Executive Committee and Steering Committee. Each of these firms has extensive experience in complex litigation and is comprised of exceedingly capable lawyers. As such, they understand their obligation to this Court and to Fresenius to act in a manner which promotes the “just, speedy and inexpensive determination” of this coordinated proceeding,¹ to avoid needless controversy and confrontation, and to always place the Plaintiffs’ best interests at the forefront. The PEC and PSC will work together with other Plaintiffs’ counsel to bring this litigation to a successful resolution.

II. BACKGROUND

Over 300 actions have been filed throughout the United States against various Fresenius entities, including Fresenius USA, Inc., Fresenius USA Manufacturing, Inc., Fresenius USA Marketing, Inc. and Fresenius Medical Care Holdings, Inc. (collectively referred to herein as “Fresenius”).² Anthony Tarricone, a partner in Kreindler & Kreindler LLP of Boston, Massachusetts, filed the first complaint in this District and the initial motion with the Judicial Panel on Multidistrict Litigation (“JPML”) to transfer these related actions to this District Court. On March 29, 2013, the JPML transferred all pending actions to this Court for coordinated proceedings, and other actions are anticipated to follow in due course.³ This Court responded rapidly to the transfer order by implementing its MDL Procedural Order. *In re Fresenius Granuflo/Naturalyte Dialysate Products Liability Litigation*, MDL 2428, MDL Procedural Order (D. Mass. April 5, 2013). Given the large number of cases being centralized in this Court, it is appropriate for the Court to create an organizational structure of plaintiffs’ counsel so that the

¹ See Fed.R.Civ.P. 1.

² Movants are certain this is the tip of the iceberg. Collectively they are currently investigating thousands of cases which will comprise future filings.

³ See http://www.jpml.uscourts.gov/sites/jpml/files/MDL-2428-Initial_Transfer-03-13.pdf.

cases are situated to maximize the administrative efficiencies attendant to multidistrict litigation. The approval and appointment of a plaintiffs' organizational/leadership structure, including federal-state liaison counsel,⁴ is necessary so that plaintiffs can speak to defense counsel with one unified voice. Defense counsel has agreed to meet to discuss scheduling and other important matters once appointments are made by the Court. To that end, Movants respectfully request that the Court schedule an initial case management conference to address the appointment of leadership, with notice given to all litigants.

The plaintiffs in these cases are dialysis patients or their survivors alleged to have suffered cardiopulmonary arrest and other injuries resulting from dialysis treatment with Fresenius' dialysate products Naturalyte GranuFlo Acid Concentrate and Naturalyte Liquid Acid Concentrate ("GranuFlo"). These plaintiffs seek damages for wrongful death and personal injuries. Fresenius designed, developed, manufactured, labeled, supplied, 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 contend that GranuFlo causes a rapid and unsafe elevation of bicarbonate, which creates a 6 to 8 fold 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.

⁴ The prompt appointment of California and Massachusetts state-federal liaison counsel and their participation in an early meeting with defense counsel will serve to promote coordination between the federal and state court litigants, eliminate conflict and promote coordination and cooperation.

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. As a consequence, plaintiffs claim that Fresenius knew or should have known of the risk of cardiopulmonary arrest and death associated with GranuFlo; that Fresenius marketed, designed, developed, labeled, 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.

Prior to and since the JPML's transfer order, Movants met in person or conferred telephonically on multiple occasions to address the need for early organization to manage the multiplicity of lawsuits filed and expected to be filed. Mr. Tarricone reached out to other plaintiff firms around the country. Meetings of counsel took place in New York, NY (December 6, 2012), Boston, MA (January 11, 2013), San Diego, CA (immediately before the hearing with the JPML), in Washington, DC (on April 4, 2013), in Boston, MA (on April 23, 2013) and again in Washington, DC (May 14, 2013). At the last meeting in Washington, DC counsel attending agreed to the organizational structure presented in this motion, which includes: (1) a Plaintiffs' Executive Committee comprised of six (6) members: Anthony Tarricone (Kreindler & Kreindler, LLP); Michelle A. Parfitt (Ashcraft & Gerel, LLC); Steve W. Berman (Hagens Berman Sobol Shapiro LLP); James C. Klick (Herman, Herman & Katz, LLC); Arnold Levin (Levin, Fishbein, Sedran & Berman); Chris Seeger (Seeger Weiss, LLP), with Mr. Tarricone serving as Chair and Liaison Counsel; and (2) a Plaintiffs' Steering Committee (PSC) comprised of the PSC members and the following additional members: Richard Golomb (Golomb & Honik, PC); Bruce Steckler

(The Steckler Law Firm); R. Clay Milling (Henry Spiegel Milling, LLP); Randi Kassan (Sanders Viener Grossman LLP); Ellen Presby (Nemeroff Law Firm); Jim Dugan (The Dugan Law Firm, LLC); Troy Rafferty (Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A.); Richard “Flip” Phillips (Smith Phillips Mitchell Scott & Nowak, LLP); Kristian Rasmussen (Cory Watson Crowder & DeGaris, P.C.); Frank Woodson (Beasley Allen Crow Methvin Portis & Miles, P.C.) and J. Burton LeBlanc (Baron & Budd, P.C.). All of the proposed PEC and PSC members have substantial numbers of cases, some filed and others being readied for filing.

Movants have and will continue to work cooperatively with other plaintiffs’ counsel in this litigation. While Movants intend to be inclusive of all the plaintiffs’ firms, they respectfully suggest that it would be unwieldy to manage this litigation without an orderly structure being approved early in the litigation as is often the practice in complex litigation. *See, e.g.*, MCL §10.22 (encouraging counsel to coordinate their activities without court assistance); Mass Tort Litigation Manual, *Appointment of MDL Leadership* §3.04[2] (Amer. Col. of Trial Lawyers 2006); *In re Carbon Black Antitrust Litigation*, MDL No. 1543, Case 1:03-cv-10191, Case Management Order No. 2 (D. Mass. Nov. 10, 2003)(Woodlock, J.)[ECF Doc. No. 75](noting with approval that counsel “have met and conferred among themselves” prior to appointment of co-lead and liaison counsel).⁵

III. ARGUMENT

A. EARLY ORGANIZATION OF THE LITIGATION IS ESSENTIAL TO PROTECT THE INTERESTS OF THE PARTIES AND EASE THE BURDEN ON THE COURT

Courts have broad discretion and authority to manage multidistrict litigation and need capable counsel to assist them to manage their prolix dockets. *In re Showa Denko K.K. L-*

⁵ Attached hereto as Exhibit “A”.

Tryptophan Prods. Liab. Litig., 953 F.2d 162, 165 (4th Cir.1992), citing *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1019 (1st Cir.1988)(“[A] district court needs to have broad discretion in coordinating and administering multi-district litigation.”). In the First Circuit, it is widely recognized that a district court’s best chance to manage multidistrict litigation is to simplify matters. *In re Recticel Foam Corp. (In re San Juan Dupont Plaza Hotel Fire Litig.)*, 859 F.2d 1000, 1004 (1st Cir.1988)(“In multi-party, multi-case litigation, the district court's success is largely dependent on its ability to uncomplicate matters”).

One of the key organizational tools the district court has in its management arsenal is to appoint seasoned lead counsel and liaison counsel. See *In re Bendectin Litigation*, 857 F.2d 290, 297 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989)(upholding the lower court's decision to appoint a “lead counsel committee” that would serve as counsel for the plaintiffs in a multidistrict litigation case); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1009 (5th Cir. 1977)(recognizing the authority of the trial court to appoint lead counsel to conduct all pretrial matters). These principles were more recently explained in *In re Linerboard Antitrust Litigation*, 292 F.Supp.2d 644, 643 (E.D.Pa. 2003):

The multiplicity of suits requires that the district court be allowed to combine procedures, appoint lead counsel, recognize steering committees of lawyers, limit and manage discovery, etc. to minimize expense to all litigants and to provide judicial efficiency.” *In re Showa Denko*, 953 F.2d at 165 (citing *Manual for Complex Litigation* (Second) §§ 33.22, 33.25 (1985)(suggesting mechanism to organize counsel and discovery in mass tort litigation). The district court's ultimate goal in multidistrict litigation is to “... promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407(a).

The *MCL* recognizes that an early effort by the Court to structure and organize complex litigation best serves the interests of all parties. *MCL* at §10.11. In implementing this important

early involvement, the *MCL* notes, “[t]he attorneys—who will be more familiar than the judge with the facts and issues in the case—should play a significant part in developing the litigation plan and should have primary responsibility for its execution.” *Id.* at §10.13. Obviously, the first order of business in overseeing coordinated litigation is the appointment of counsel to act on behalf of other counsel and their clients. Once that order is in place, many other tasks may be addressed by the appointed counsel. Through prompt appointment of designated counsel, Plaintiffs’ counsel can assist the Court and the Defendants in managing resources and avoiding unnecessary disputes.

B. DESIGNATION OF A PLAINTIFF MANAGEMENT STRUCTURE BEFORE THE INITIAL CASE MANAGEMENT CONFERENCE IS BENEFICIAL

For an effective initial case management conference to be successfully conducted, Lead Counsel should be appointed to coordinate a number of preliminary administrative matters that are best addressed *in advance* of the conference. These matters may include: (a) a proposed agenda for the conference; (b) a broad description of the claims; (c) the procedural status of the litigation, including the status of motions and state-court related litigation; (d) a preliminary estimate of the number of cases that may become part of the MDL; (e) the content of a proposed Case Management Order addressing issues such as establishment of a document repository; (f) submission of a list of all counsel of record and their contact information; (g) the use of medical releases and fact sheets; (h) suggestions on the content of potential preservation and protective orders; and (i) whether the appointment of a Special Master is appropriate for any functions pursuant to Fed. R. Civ. P. 53(1)(A&C). Additionally, the early appointment of leadership is important to facilitate communications with the Defendants on the matters above and generally.

Early appointment of leadership is beneficial to ensure orderly communication among involved parties, including those Plaintiffs' firms that have not yet entered an appearance in the MDL. Here, the defendants have expressed some reluctance to proceed on any definitive plans due to their uncertainty of their opposing counsel's authority. Early appointment of a leadership structure insures such impediments to progress can be avoided. As noted in the *MCL*, "[t]he [initial] conference is not a perfunctory exercise, and its success depends on establishing effective communication and coordination among counsel and between counsel and the court." See *MCL*, §11.211. Even interim appointment of Liaison Counsel in advance of the initial conference is authorized. *Id.*, §11.12. See also *In re Orthopedic Bone Screw Products Liability Litigation*, MDL 1014 (E.D. Pa), and *In re Diet Drugs*, MDL 1203 (E.D.Pa)(in both cases the Honorable Louis Bechtle appointed Arnold Levin to be liaison counsel shortly after transfer by the Panel); *In Re: Oral Sodium Phosphate Solution-Based Prods. Liab. Litig.*, MDL No. 2066, Pretrial Order No. 1, (N.D. Ohio, Jul. 16, 2009)(appointment of interim liaison counsel was court's first order of business prior to initial conference); *In re: Vioxx Product Liability Litigation*, MDL No. 1657, Pretrial Order No. 1 (E.D.La., Feb. 17, 2005)(Fallon, J.)(order entered day after Panel Transfer Order issued directing plaintiffs' counsel to confer and seek consensus on the selection of a candidate for the position of liaison counsel prior to the initial case conference, and appointment of Russ M. Herman as liaison counsel with instruction to organize plaintiffs);⁶ *In re Rezulin Product Liability Litigation*, 2000 WL 1530005, *3 (S.D.N.Y. Oct. 16, 2000)(approving slate of counsel with Executive and Steering Committee that was submitted prior to initial status conference); *In re Vytarin/Zetia Marketing Sales Practices and Products Liability Litigation*, MDL No. 1938, CMO No. 3 (D.N.J. June 4, 2008)[ECF Doc.

⁶ See <http://vioxx.laed.uscourts.gov/Orders/vioxxpto1.pdf>.

52](upon issuance of JPML transfer order the court appointed Christopher Seeger and James Cecci as interim-liaison counsel, who were responsible for presenting a slate of counsel for Executive and Steering Committees which management structure the court approved).⁷

C. THE PROPOSED PLAINTIFFS' LEADERSHIP STRUCTURE⁸

Movants propose the following leadership structure which includes Liaison counsel, a PEC and a PSC comprised of counsel that are interested in protecting the interest of all plaintiffs, working together, sharing resources and avoiding duplicative effort, and two Federal-State Liaisons.⁹ None of the applicants have financial side deals with each other. While the below lists are not (and could never be) exhaustive of every lawyer or law firm with a GranuFlo case, it encompasses and embodies those who meet the above requirements, who represent the overwhelming and vast majority of plaintiffs, and who are the most qualified attorneys interested in devoting their time and efforts to this litigation.

1. THE PROPOSED PLAINTIFFS' EXECUTIVE COMMITTEE AND PLAINTIFFS' LIASION COUNSEL

Movants propose the following as members of the PEC: Anthony Tarricone, Esquire, KREINDLER & KREINDLER LLP; Steve W. Berman, Esquire, HAGENS BERMAN SOBOL SHAPIRO LLP; James C. Klick, Esquire, HERMAN, HERMAN, & KATZ LLC; Arnold Levin,

⁷ Attached hereto as Exhibit "B".

⁸ Such requests were based on a disinterest in the litigation, or a plan to garner support for their own PSC slate. Despite such situations, suffice it to say that this group has actively sought the involvement of every plaintiff lawyer with a GranuFlo case by utilizing both known service lists and those maintained by private organizations, such as the American Association for Justice.

⁹ A statement of qualifications from each attorney is attached hereto as Exhibit "C".

Esquire, LEVIN FISHBEIN SEDRAN & BERMAN; Michelle A. Parfitt, Esquire, ASHCRAFT & GEREL, LLP; and Chris Seeger, Esquire, SEEGER WEISS, LLP.¹⁰

2. THE PROPOSED PLAINTIFFS' STEERING COMMITTEE

Movants propose the following additional members of the PSC: James R. Dugan, Esquire, THE DUGAN LAW FIRM, LLC; Richard Golomb, Esquire, GOLOMB & HONIK, P.C.; Randi Kassan, Esquire, SANDERS VIENER GROSSMAN P.C.; J. Burton LeBlanc, IV, Esquire, BARON & BUDD P.C.; R. Clay Milling, Esquire, HENRY SPIEGEL MILLING LLP; Troy Rafferty, Esquire, LEVIN PAPANTONIO THOMAS MITCHELL RAFFERTY & PRCTOR P.C.; Richard "Flip" Phillips, Esquire, SMITH, PHILLIPS, MITCHELL, SCOTT & NOWAK, LLP; Ellen Presby, Esquire, NEMEROFF LAW FIRM; B. Kristian Rasmussen, III, Esquire, CORY WATSON CROWDER & DEGARIS, P.C.; Bruce Steckler, Esquire, THE STECKLER LAW FIRM; AND Frank Woodson, Esquire, BEASLEY ALLEN CROW METHVIN PORTIS & MILES, P.C.¹¹

3. THE PROPOSED FEDERAL/STATE LIASON COUNSEL

In recent MDLs, it has become regular practice to work jointly with the counsel of parallel state court actions and for the MDL court to appoint state-federal liaison counsel.¹² A high level of cooperation between the MDL leadership and the attorneys who are leading the

¹⁰ A complete list containing the names and address of the members of the proposed PEC is attached as "Exhibit D."

¹¹ A complete list containing the names and address of the members of the proposed PSC is attached as "Exhibit E."

¹²A few recent of examples of MDL Courts that appointed state-federal liaison counsel include: *In re: Tylenol® (Acetaminophen) Marketing, Sales Practices and Products Liability Litigation*, MDL 2436 (E.D.Pa.)(appointed New Jersey federal-state liaison); *In re: Zoloft (Sertraline Hydrochloride) Products Liability Litigation*, MDL No. 2342 (E.D.Pa.)(appointed a Multidistrict Coordinator); *In re: Yasmin and YAZ (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, MDL 2100 (S.D. Ill)(appointing federal-state liaison for Pennsylvania, California and New Jersey); *In re: Avandia Marketing, Sales Practices and Products Liability Litigation*, MDL No. 1871 (E.D. Pa.)(appointing state liaison counsel).

parallel state court cases has proven to be an integral component in moving towards an effective resolution of all litigations involved. The best interests of the PEC/PSC often align with those of the state counsel, and collaboration can be somewhat effortless. However, where interests or even timelines may not coincide, a certain level of diplomacy and compromise is essential to success in both venues. In addition, the MDL court and state courts often work jointly on issues affecting all parties, and all counsel must support and coordinate with each other in order to fulfill the requirements of the courts. To this end, Movants propose the following federal-state court liaison counsel, each of whom is in the leadership group of their respective state litigation, to liaise between this MDL and the parallel litigations pending in Massachusetts and California: Lauren Barnes, Esquire, HAGENS BERMAN SOBOL SHAPIRO LLP for Massachusetts and Gretchen M. Nelson, Esquire, KREINDLER & KREINDLER LLP for California.¹³

**D. THE BASIS FOR APPOINTING PROPOSED COUNSEL
TAKES INTO ACCOUNT A MULTI-FACTORED ANALYSIS**

Generally speaking, courts recognize in the class context that experience and knowledge of counsel is the “most persuasive” factor in appointing counsel for plaintiffs. *See In re Cardinal Health Inc. ERISA Litigation*, 225 F.R.D. 552, 555 (S.D. Ohio 2005). Clearly the attorneys proposed herein have a wealth of relevant experience and knowledge of the claims. Without exception, each of the counsel comprising the Movants Group has direct and extensive experience in pharmaceutical mass tort litigation. Movants include counsel who acted as lead counsel, liaison counsel, executive committee or steering committee members in a significant number of multidistrict litigations and a host of other major litigations. By appointing counsel with such credentials and backgrounds, both Fresenius and the Court will find that the experience of Plaintiffs’ counsel is an asset in managing this complex litigation.

¹³ A complete list containing the names and address of the members of the proposed Federal-State Liaison Counsel is attached as “Exhibit F”.

The calculus employed by district courts to evaluate counsel to manage the complex proceedings in an MDL is never precise. Nevertheless, there are a number of factors that courts evaluate and consider in determining who should be appointed lead counsel or a member of a leadership committee. Among many considerations, courts take into account at least some of the following: 1) The number of known and represented clients of Counsel; 2) Counsel's availability to be involved in the litigation; 3) Counsels' interest in the litigation to perform meaningful work; 4) Counsels' past experience in similar litigation; 5) Counsel's past success in related cases; 6) Counsels' unique and special talent or ability that would benefit this litigation; 7) Counsels' ability to work collectively; 8) Counsels' ability to meet financial commitments; and 9) the reputation of counsel. Taking each of these into consideration in this litigation demonstrates that the attorneys comprising the Movants Group are exceptionally well-qualified to protect the interest of all plaintiffs in this MDL by working together, sharing resources and avoiding duplicative effort.

1) Number of known and represented clients from each firm

The number of clients a firm has (whether under investigation or filed) is a highly relevant factor. Ultimately, lawyers with the most clients likely have the most at stake, and therefore have a significant interest in ensuring a fair and successful outcome for the litigation as a whole. While the principle of common benefit reimbursements can be utilized to incentivize lawyers with fewer cases to commit time and expenses, it is lawyers with the bulk of clients and cases who should drive the litigation. Thus far, the Movants represent a large majority the Plaintiffs who have cases pending in both the state and federal courts. They have a substantial stake in the litigation.

2) Time involved in the litigation

The attorneys and firms who have demonstrated commitment to this litigation before the case was transferred to this Court are those with the greatest interest and those who have committed to this litigation. The Movants have been litigating GranuFlo cases for the greater part of a year and thus already have considerable time and resources invested. Appointing the Movants will maintain continuity and serve to advance the goal of efficiency by allowing experienced attorneys familiar with the case to avoid reinventing the wheel. It will also enhance strategic coherence in the litigation and promote coordination with the state court.

3) Interest in the litigation to perform meaningful work

While the numbers of known and represented clients is an important factor in determining which attorneys and law firms have the greatest stake in the litigation (as noted above), another important quality to consider is whether those attorneys show a genuine impassioned interest in the litigation as a whole. Those with less than a fiery interest in doing the work necessary to ensure the success of the litigation should not be allowed to lead it. Therefore, in terms of personal case-load and vested interest, it is not only size that matters, but the quality of commitment to fighting for the clients of all involved. The attorneys that are part of the Movants Group have demonstrated this commitment well before the formation of the MDL and will continue as a cohesive group, if appointed by this Court.

4) Past experience in pharmaceutical mass torts litigation

When evaluating requirements for the PEC/PSC members, one can hardly dispute that an attorney or law firm must have had some involvement in the inner workings of pharmaceutical mass tort litigation in order to effectively serve as a leader of one. While one cannot suggest that every MDL leadership structure should be repeatedly comprised of the same “cast of characters”

and a new perspective is always an impetus to progress, one cannot overlook the fact that it is imperative for every member to be able to base his/her beliefs on some foundation of relevant and practical experience in this highly complex field of law. Each decision required of the PEC/PSC at every stage of this litigation will affect the next, and must be thoroughly contemplated with an eye to the expected outcomes and repercussions it will bring. Such foresight can only be borne of hindsight. Therefore, experience should weigh heavily in determining who among all those interested was more or less qualified to shoulder that weight, aided by what they had learned in past complex pharmaceutical mass tort litigations. The credentials of the attorneys comprising the Movants Group reflect extensive past experience in litigating pharmaceutical and complex mass tort cases.

5) **Past success in pharmaceutical mass torts and complex mass tort cases**

This factor goes hand-in-hand with past experience, as detailed above. Great experience can come from not only prior successes, but also failed attempts. However, the value of such experience is proven by later success.¹⁴ In that way, one must not only look at an attorney's or law firm's experience, but also at how they learned from it and put it to use in their future endeavors. It is important to the success of this litigation to have the benefit of the wisdom of those who have succeeded in this type of litigation, and therefore know the best course to take when presented with various options. Often a decision which may seem to be the most obvious has unforeseen or unconsidered consequences, which has been proven time and time again in complex litigation. This proposed PEC/PSC aims to avoid as many of those pitfalls as possible

¹⁴ Success is not simply measured by jury verdicts and table-pounding, but rather, success is and should be measured by the ability to bring closure to litigation. The team comprised herein has all the crucial elements to help make this a successful litigation.

by including those attorneys and firms who have proven their abilities in this area and are devoted to ensuring the same level of success in this litigation.

6) **Current commitments in other mass tort and/or complex litigations**

Even if an attorney or law firm has met every proposed guidepost (and any others which this Court may deem appropriate), one must take into account whether the proposed attorney is already committed to other litigations that are in early stages, which would hinder his/her ability to fully commit their attention to this case. Each of the moving counsel represent that they have the time and resources to commit to this case aside from their responsibilities in other cases.

7) **Unique and special talent or ability that would benefit this litigation**

As in any group setting, a team is only as powerful as its component parts. One can rely on that axiomatic principle in concluding that if every member has the same strengths and weaknesses, then the whole will ultimately be weaker. In that way, successful organizational structure contains attorneys and firms who are talented in many different areas of knowledge and practice, including medical science, depositions, technology, legal and medical research, brief and legal writing, epidemiology, pharmacology, regulatory and marketing issues, organization, expert reports, *Daubert* motions, and other areas. Each of the members of the proposed PEC/PSC, both individual attorneys and sponsoring firms, has a unique quality or area of expertise to bring to the table in order to make this PEC/PSC as well-rounded and strong as possible.

8) **Proven ability to work collectively with parallel state court venues**

In recent pharmaceutical MDLs, it has become regular practice to work jointly with the counsel of parallel state court actions. A high level of cooperation between the MDL PEC/PSC

and the attorneys who are leading the parallel state court cases has proven to be an integral component in moving towards an effective resolution of all litigations involved. The best interests of the PEC/PSC often align with those of the state counsel, and collaboration can be somewhat effortless. However, where interests or even timelines may not coincide, a certain level of diplomacy and compromise is essential to success in both venues. In addition, the MDL court and state courts often work jointly on issues affecting all parties, and all counsel must support and coordinate with each other in order to fulfill the requirements of the courts. It is absolutely necessary and critical that the PEC/PSC members be more than willing and able to work side-by-side with those involved in the state court venues in order to reach the same level of success and the proposed PEC/PSC is designed to accomplish this objective. For this case, the moving counsel are cooperatively working in the parallel state court litigation pending in Massachusetts and California, and therefore this criteria is easily met.

9) Liquidity of firm for financial commitments

Consideration of the adequacy of the resources of counsel is appropriate and necessary when appointing leadership in complex litigation. *See MCL §10.221*. An attorney or a law firm must have the financial means to serve on the PEC/PSC. Each member of the PEC/PSC must be prepared to bear and sustain a substantial financial burden. It can be estimated that this litigation will cost no small sum, and will require continuous financial support from all PSC members, both in cash contributions and held costs. Thus, despite any other qualifications, if an attorney or law firm cannot handle the financial strain of this MDL, they would not be able to serve equally and efficiently as a member of the PEC/PSC.

10) Commitment to excellent work in this case

A PEC/PSC sets the tone for the level of devotion and work product of everyone involved, from the members of the subcommittees to those serving peripheral roles. Therefore, it is absolutely imperative that every member of the PEC/PSC be completely bound to the goal of producing the finest—and nothing short of excellent—work in every aspect of this case in order to properly serve and represent the clients. The attorneys that comprise the Movants Group represent with utmost certainty that each and every one of the proposed attorneys and respective law firms in this proposed PSC have pledged themselves and their resources to doing just that.

11) Reputation of the lawyer and sponsoring law firm on a national level and by judiciary, if available.

A PEC/PSC essentially acts as one collaborative law firm prosecuting a general case in many ways on behalf of all lawyers and all individual plaintiffs against a large corporation defended by some of the most skilled law firms. To this end, one must ensure that the PEC/PSC, its members, and their respective firms adhere to the highest levels of ethical standards both in their dealings on this case and in any matters that could potentially come to bear or reflect on this PEC/PSC, and therefore reflect on this litigation and this Court. Thus, the PEC/PSC and leadership not only have demonstrated the highest ethical standards but must have the appearance of the same. The attorneys comprising the Movants Group meet this requirement.

As this Court is well aware from its prior MDL experience, while there are many gifted and talented attorneys, one must conduct the process of picking and compiling a team with utmost care and with the ultimate goal of setting the course for an efficient and effective MDL in the interest of all parties involved and to meet the expectations of this Court. *In re Carbon Black Anti-Trust Litigation* MDL 1543 (D.Mass); *In re M3 Power Razor System Marketing and Sales Practices Litigation* MDL 1704 (D.Mass).

E. COUNSEL APPOINTED TO ACT FOR PLAINTIFFS MUST BE PROFESSIONAL AND COOPERATIVE

It is axiomatic that all counsel practicing law in a federal court are expected to display the highest degree of professionalism. However, as noted in the *MCL* (Fourth) “[t]he added burdens and demands of complex litigation place a premium on attorney professionalism and the judge should encourage counsel to act responsibly.” *MCL* (Fourth) at §10.21. Such responsibility must include a sincere effort to avoid burdening the Court with unnecessary issues that counsel should be able to resolve through courtesy and communication. The *MCL* notes:

Counsel need to fulfill their obligations as advocates in a manner that will foster and sustain good working relations among fellow counsel and with the court. They need to communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible.

MCL (Fourth) at §10.21.

The Movants Group has already followed this mandate in this litigation by working cooperatively with defense counsel to minimize burdening the Court with unnecessary issues. For example, the Movants have sent Fresenius a proposed Protective and a Preservation Order, a comprehensive set of document requests and corporate designee deposition notices. Additionally, after months of negotiations the Movants successfully convinced Fresenius to produce a comprehensive list of dialysis clinics where GranuFlo was administered which will benefit all Plaintiffs in this litigation who can utilize the list to verify exposure. The Movants will continue to communicate with defense counsel in order to reach agreements, compromises and to minimize burdening the Court unnecessarily, if appointed by the Court.

IV. CONCLUSION

It is respectfully suggested that given the magnitude of this MDL, and that other state court proceedings are already underway, that it is important for this Court to act swiftly in

approving an organizational structure for Plaintiffs. Movants respectfully request that the Court schedule a case management conference to address the appointment of leadership, with notice given to all litigants. Additionally, in light of the above factors and reasoning, and after much careful thought and consideration, we respectfully submit to the Court this proposed PEC/PSC and leadership slate, and respective applications, to lead this MDL, and jointly and uniformly request that the Court so appoint.

We, the members of this proposed slate, thank the Court for its time and consideration.

Respectfully submitted,
By the proposed PEC and PSC,

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