

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

IN RE: FRESenius

GRANUFLO/NATURALYTE DIALYSATE
PRODUCTS LIABILITY LITIGATION,

This Document Relates To:

Aurora Nunez, et al. v. Fresenius USA, Inc., et al

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

) Case No.: 1:13-cv-11986-DPW

) **DEFENDANTS' STATEMENT**
) **REGARDING REMAND OF CASES**
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DEFENDANTS' STATEMENT REGARDING REMAND OF CASES

At the status conference in this matter on September 27, 2013, the Court directed the parties involved in the remand issues in the California GranuFlo cases to file a joint statement (1) identifying the cases that present those issues, (2) setting forth the issues raised by the remand motions, and (3) discussing appropriate procedures for fact development and fact resolution. The Plaintiffs disagree with the Defendants interpretation of what this Court ordered and instead filed what is in effect a lengthy brief in support of their pending remand motions. As a result, in order to address the Court's request, Defendants are filing this separate statement regarding remand.

1. California cases removed or likely to be removed

As of this date, twenty-two (22) GranuFlo cases have been filed in California state court. Twelve of those cases have been removed to federal court (based on diversity jurisdiction) and identified as tag-along actions that should be transferred to this MDL proceeding. Six other cases in California state court are expected to be removed shortly. A list of all cases filed in California state court is attached as Exhibit A.

Two of the removed California cases that already have been transferred to this MDL proceeding — *Nunez* and *Casian* — have pending motions to remand. Two more cases with remand motions — *Tate* and *Jennings* — are awaiting decision by the JPML on motions to vacate conditional transfer orders. The transferor courts in both cases have withheld ruling on the motions to remand until the JPML decides the transfer issue. Moreover, the complaints in all 22 of the cases that were originally filed in state court expressly present one or more of the remand issues identified below, and the plaintiffs who have not yet moved for remand presumably will do so if the plaintiffs who have so moved are successful.

2. The remand issues. The remand/dismissal motions in the different cases focus on one or more of three defendants – Walter L. Weisman, Ben Lipps, and Fresenius USA, Inc. – each of which the plaintiffs claim is a California citizen and therefore non-diverse. The factual issues with respect to these defendants are as follows:

- Walter L. Weisman is a citizen of California. The plaintiffs in all 22 cases contend that Mr. Weisman is personally liable for the manufacture and distribution of GranuFlo or NaturaLyte by which they were allegedly injured. The Fresenius defendants and Mr. Weisman contend there is no factual basis for any such liability and that he was fraudulently joined as a defendant in these cases. To the extent that he has responded to complaints in these cases, Mr. Weisman has moved to dismiss for failure to state a claim under Rule 12(b)(6).
- The plaintiffs in nine cases contend that Ben Lipps is a citizen of California. The Fresenius defendants and Dr. Lipps contend that he is a citizen of Nevada.
- The plaintiffs in all 22 cases contend that Fresenius USA, Inc. (“FUSA”) is a citizen of California. The Fresenius defendants contend that FUSA is a citizen of Massachusetts but not

California. The specific issue is the location of FUSA's principal place of business under the *Hertz* "nerve center" test.

3. Steps to reach a factual resolution of the disputed claims.

Defendants believe that the Court will be able to reach a final factual determination of these issues on the basis of affidavits, deposition transcripts, and documentary proof. A short evidentiary hearing could also be held to the extent necessary. Defendants propose that plaintiffs proceed with discovery first with respect to the disputed issues. Defendants could then conduct any additional discovery not already covered by plaintiffs. Such discovery should not be extensive. For purposes of this exercise, it should be narrowly focused on the three removal challenges identified above, with depositions of Mr. Weisman, Dr. Lipps, and an appropriate representative of FUSA confined solely to the remand issues.¹ Discovery can be completed by December 13, 2013.

All plaintiffs in the cases listed in Exhibit A should be invited to participate in the discovery with respect to these issues, and all such plaintiffs should be invited to participate in any fact-finding submissions or hearings. In order to expedite and streamline the process, however, plaintiffs' participation should be coordinated through and conducted by a single lead counsel.

The goal should be for these issues to be addressed just once, in a coordinated fashion, and not addressed multiple times in different forums, multiplying costs for everyone and risking inconsistent results. The JPML has made it clear, by twice denying plaintiffs' motions to vacate orders for transfer to Massachusetts, that the cases listed on Exhibit A will eventually be

¹ Plaintiffs' current position is that no discovery is necessary. However, Plaintiffs took the opposite position when asking Judge Edmon to lift the discovery stay arguing: "Indeed, a very real and current issue is the pending remand motions. We need to depose the forum defendants, including Mr. Walter Weisman, Mr. Ben Lipps and an individual from Fresenius USA, Inc. who has the most knowledge about the corporation." *See*, letter attached as Exhibit B.

transferred once they are removed. They will be transferred quickly if the plaintiffs do not object to the transfer orders; they will be transferred more slowly if the plaintiffs object to transfer and then engage in motion practice to try to have the transfer orders vacated.

Dated: October 11, 2013

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/s/ Juanita R. Brooks

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CERTIFICATION OF SERVICE

I, Juanita R. Brooks, hereby certify that a true and correct copy of the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on October 11, 2013.

/s/ Juanita R. Brooks

Juanita R. Brooks