UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: FRESENIUS GRANUFLO/NATURALYTE DIALYSATE PRODUCTS LIABILITY LITIGATION	MDL No. 1:13-md-2428-DPW
This Document Relates to: *All Cases*	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' POSITION RE: SCOPE OF PHASE II BELLWETHER DEPOSITION DISCOVERY

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I. INTRODUCTION

The parties agree on nearly all aspects of the protocol for Phase II discovery for the ten remaining bellwether cases proceeding under Case Management Order No. 10, but part ways on one significant issue: the ability to retake depositions without agreement or a showing of good cause.[1] Preparing and sitting for a deposition takes a great deal of time and energy – and can cause significant expense. Recognizing this, Plaintiffs do not believe non-parties to these actions – namely, the victims' physician(s) – should be subjected to a second deposition without an agreement by the parties or a showing of good cause to this Court that further questioning is warranted. Fresenius seeks unlimited do-overs without cause, re-deposing individuals questioned during the first phase of bellwether discovery and imposing undue burdens and expense on the parties and the deponents. Fresenius has already had ample opportunity to depose up to eight witnesses in each case and offers no demonstrable need or good cause for these additional or duplicative depositions; its motion seeking the ability to unduly harass non-parties with duplicative depositions should be denied.

II. FACTS: THE PARTIES HAVE ALREADY DEPOSED SEVERAL CRITICAL WITNESSES IN EACH CASE.

During the first phase of bellwether discovery, the parties took over forty (40) depositions in the ten cases now constituting the bellwether pool, ranging from 3-8 depositions per case. These depositions included the victim's treating nephrologist, clinic medical director, and other health care providers, in addition to witnesses to the injury or death, other clinic employees, and family members.

[1] The parties have agreed to follow the discovery limits of the Federal Rules as to numbers of deposition and written discovery (as to the latter, though, parties will be "debited" the number of interrogatories and requests for documents served per case in Phase I discovery).

Following the selection in mid-March of these ten cases for further pre-trial discovery and possible bellwether trials and consistent with Case Management Order No. 10 (Bellwether Case Selections and Trial Deadlines), the parties attempted to negotiate a joint proposed protocol "for completion of additional fact witness discovery in the ten (10) bellwether cases, not to exceed an additional one-hundred fifty (150) days of case-specific fact discovery."[2] The parties reached agreement on the majority of the protocol but reached an impasse on the ability to re-take depositions of non-parties to these actions. Plaintiffs propose that an individual who has already been deposed may not be questioned again, absent mutual consent or by leave of court and that where the court allows a duplicative deposition, the moving party shall bear all costs, including expenses relating to attorney time and travel.

Fresenius seeks the unlimited ability to use one or more of the additional depositions to re-depose witnesses from the first phase of bellwether discovery. Fresenius's proposal unduly burdens non-parties to these cases, forcing them to sit for a duplicative deposition, and runs contrary to the Federal Rules of Civil Procedure and case law supporting the efficiency and economy of litigation.

III. ARGUMENT: FRESENIUS OFFERS NO GOOD CAUSE FOR RE-TAKING DEPOSITIONS OF MULTIPLE NON-PARTIES TO THESE ACTIONS.

> Depositions are often overused and conducted inefficiently, and thus tend to be the most costly and time-consuming activity in complex litigation. The judge should manage the litigation so as to avoid unnecessary depositions, limit the number and length of those that are taken, and ensure that the process of taking depositions is as fair and efficient as possible.[3]

The Federal Rules of Civil Procedure are clear: absent stipulation of the parties, a party must obtain leave of court to take a deposition if the person to be examined has already been

[2] Omnibus Case Management Order, Doc. No. 730, at p. 164.

[3] Manual for Complex Litigation (Fourth) at § 11.45 (2004).

deposed in the case.[4] The Rules place limitations on discovery "to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case."[5] Limiting the number of depositions allowed "force[s] counsel to think long and hard about who they want to depose and to depose only those who are really important" and limitations on "repetitive depositions of some witnesses promotes efficiency."[6]

While it has discretion to grant leave to take the deposition of a previously deposed individual, a court need balance interests of fairness and efficiency and "must limit the frequency or extent of discovery" if "the discovery sought is unreasonably cumulative or duplicative…; the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or the burden or expense of the proposed discovery outweighs its likely benefit..."[7] As another court in this district recently noted, "courts should not freely grant relief from the limits without a showing of need."[8]

Courts disfavor efforts to take multiple depositions of the same person or entity, particularly where a party has shown no good cause for the duplicative questioning:

> [T]he court will generally not require a deponent to appear for a second deposition absent some showing of a need or good reason for doing so . . . Scheduling a second deposition of the same person without a showing of good reason will generally support a finding of annoyance and undue burden or expense . . . The court rarely grants the opportunity for a second deposition.[9]

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[4] Fed. R. Civ. P. 30(a)(2)(A)(ii). *See Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 192 (1st Cir. 2001).

[5] *Coach, Inc. v. Gata Corp*., 2011 WL 198015, *1 (D.Mass. 2011).

[6] Manual for Complex Litigation (Fourth) § 22.84.

[7] Fed. R. Civ. P. 26(b)(2)(C).

[8] *San Francisco Health Plan v. McKesson Corp*., 264 F.R.D. 20, 21 (D.Mass. 2010).

[9] *Cuthbertson v. Excel Indus., Inc*., 179 F.R.D. 599, 604-605 (D. Kan. 1998) (internal citations and quotations omitted). *See State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 254 F.R.D. 227, 235 (E.D. Pa. 2008) (holding that multiple depositions of a witness are "costly and burdensome" because "[e]ach new deposition requires the deponent to spend time preparing for the deposition, traveling to the deposition, and providing testimony"); *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 945 F. Supp. 693, 732-33 (S.D.N.Y. 1996) (denying leave to re-depose the individual where the plaintiffs sought only to "rehash old testimony")

Good cause may exist where "[b]ecause of the time that has elapsed, the addition of new claims, and the evident knowledge of the witnesses in particular areas, re-examination . . . is likely to provide additional information not obtainable at the first depositions,"[10] or "where new information comes to light triggering questions that the discovering party would not have thought to ask at the first deposition."[11]

But no good reason exists for a blanket ability to re-depose non-parties to these bellwether actions. These cases do not entail any new global claims and Fresenius can point to no new global information triggering questions not asked or implicating issues nor contemplated at the first deposition of witnesses in the bellwether cases.[12] Fresenius's proposed depositions would likely be solely duplicative, creating the type of undue burden and expense courts are required to limit.[13] And both parties had ample time and opportunity to conduct a full, fair, and thorough examination of each deponent.[14]

This Court recently expressed skepticism about allowing the retaking of depositions even with good cause; in response to Plaintiffs' motion to re-question two FMCNA employees in light of new, previously undisclosed information, the Court raised "concern[] about going back again under circumstances in which this could have been nailed down with those witnesses, or at least

[10] *Collins v. Int'l Dairy Queen*, 189 F.R.D. 496, 498 (M.D. Ga. 1999).

[11] *Bos. Scientific Corp. v. Cordis Corp.*, Nos. 5:02CV1474 JW (RS), 03–CV–5669 JW (RS), 2004 WL 1945643, at *2 (N.D. Cal. Sept. 1, 2004).

[12] *See Arugu v. City of Plantation*, No. 09-61618-CIV, 2010 WL 2609394, at *3 (S.D. Fla. June 27, 2010) (denying plaintiff's motion to depose a witness a second time because a party's failure to inquire into a particular topic at a party's first deposition does not provide sufficient cause to require a witness to sit for a second deposition); *Graebner v. James River Corp.*, 130 F.R.D. 440, 441 (N.D. Cal 1990) (holding "repeat depositions are disfavored except in certain circumstances, [including] long passage of time with new evidence, new theories to the complaint, etc.").

[13] *See* Fed. R. Civ. P. 30(a)(2)(A); Fed. R. Civ. P. 26(b)(2).

[14] *See Jones v. Cunningham*, No. C 99-20023 RMW, 2009 WL 3398801, at *2 (N.D. Cal. Oct. 20, 2009) (denying request for duplicative second deposition where the requesting party had ample prior opportunity to obtain discovery by deposition).

you get the witness testimony with respect to [the disputed issue] on it."[15] This Court allowed only limited additional questioning upon Plaintiffs' showing of good cause and imposed all costs on Plaintiffs for the second depositions.[16] Plaintiffs propose the same process apply here: absent agreement on the need for re-questioning, a party must show good cause for a second deposition of an individual and, where granted, bear all costs for the deposition, including the non-party's time and expenses.[17]

IV. CONCLUSION

Where the parties agree or a party has and can show good cause for a supplemental deposition, additional questioning may be warranted with appropriate cost-shifting. But Fresenius offers no compelling reason for a blank check allowing the parties to burden and harass non-parties to this litigation with multiple depositions. Plaintiffs respectfully request this Court deny Fresenius's request unlimited do-overs.

Dated: April 28, 2015

Respectfully submitted,

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[15] Transcript of Status and Scheduling Conference and Motion Hearing, dated Apr. 10, 2015, at 72.

[16] *Id.*

[17] Fed. R. Civ. P. 26(c) ("The court may… issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.").

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via electronic mail to counsel of record for the Fresenius Defendants as follows:

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