

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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IN RE: FRESENIUS)	
GRANUFLO/NATURALYTE DIALYSATE)	MDL No. 1:13-md-02428-DPW
PRODUCTS LIABILITY LITIGATION)	
_____)	

**FMCNA DEFENDANTS’ MOTION FOR JOINT DAUBERT/LANIGAN
HEARINGS IN THIS MDL AND RELATED MASSACHUSETTS STATE COURT
LITIGATION**

Defendants Fresenius Medical Care Holdings, Inc., Fresenius USA, Inc., Fresenius USA Manufacturing, Inc., and Fresenius USA Marketing, Inc., (collectively “FMCNA” or “Defendants”) submit this Motion for Joint Daubert/Lanigan Hearings in this MDL and the consolidated Superior Court action pending in Massachusetts.

Thirty of the thirty-four experts disclosed by the parties in this MDL were also disclosed in the Massachusetts consolidated action. As to those thirty experts, the parties simply adopted the reports that had been exchanged in the Massachusetts consolidated action. Depositions of those experts are also being conducted with joint involvement by plaintiff leadership for both the MDL and the Massachusetts state consolidated action. Daubert motions and evidentiary hearings challenging the admissibility of expert testimony in this MDL will therefore be substantially identical to the Lanigan motions and hearings in the Massachusetts state consolidated action.

Recent changes in the Massachusetts state trial calendar mean that the parties will now be presenting substantially the same motions and evidence in both courts at roughly the same time. Given this and in the interests of efficiency and judicial economy, FMCNA requests that this

Court conduct Daubert/Lanigan hearings jointly with Massachusetts Superior Court Associate Justice Maynard Kirpalani on dates convenient for both courts.

ARGUMENT

Coordination between state and federal courts presiding over related mass tort actions has been endorsed – indeed encouraged -- by the National Judicial Center as a means to promote judicial economy, reduce costs, and minimize unnecessarily duplicative litigation efforts. See Manual for Complex Litigation §§ 20.14, 22.4, 20.313 (4th ed.); see also In re Phenylpropanolamine (PPA), 2003 WL 22417238, at *1 (N.J. Super. L. 2003). It is particularly appropriate to coordinate hearings on the admissibility of expert opinions in this MDL and the related Massachusetts state litigation because: (a) thirty (30) of the thirty-four (34) generic discovery experts identified by the parties in this MDL have also been identified by the parties in the related Massachusetts state litigation; and (b) the standard for determining the admissibility of expert opinions under Daubert is substantially identical to the corresponding Massachusetts state court standard set forth in Commonwealth v. Lanigan. See 419 Mass. 15, 26 (1994) (“We accept the basic reasoning of the Daubert opinion because it is consistent with our test of demonstrated reliability.”). Indeed, due to an increasing recognition amongst jurists of the “importance of coordination of related claims in federal and state litigations,” judges in multiple other courts, including the District of Massachusetts, have implemented a coordinated approach with respect to hearings on the admissibility of expert opinions in order to “reduce costs, delays, and duplication of efforts.” In re Neurontin Marketing Sales Practices and Products Liability Litigation, 612 F.Supp.2d 116, 122 and n.3 (D. Mass 2009) (citing Manual for Complex Litigation § 20 (4th ed.)) (Chief Judge Saris, D. Mass., together with New York state court judge, jointly conducted Daubert-Frye hearings for generic causation experts identified in both

jurisdictions); see also In re Bausch & Lomb, Inc. Contact Lens Solution Prods. Liab. Litig., 2009 WL 2750462 (D.S.C. Aug. 26, 2009) (same); see also In re Phenylpropanolamine (PPA), 2003 WL 22417238, at *1 (presiding New Jersey state court judge attended *Daubert* hearings in the related federal MDL by videoconference and incorporated in its decision “the testimony, transcript, arguments, and briefs from the United States District Court for the Western District of Washington to the extent they appl[ied] to experts offered by Plaintiffs in New Jersey....”); In re Avandia Marketing, Sales Practice and Products Liability Litigation, 07-md-01871-CMR, Dkt. No. 1878 (E.D.Pa. Oct. 21, 2011) (presiding federal judge invited participation of interested state court liaison judges in Daubert hearings in order to “coordinate [the] litigation with state court jurisdictions as much as practicable....”).

On June 18, 2015, Massachusetts Superior Court Associate Justice Kirpalani cancelled the first GranuFlo-related trial in Massachusetts, which was scheduled for October 5, 2015. As a result, the first state bellwether trial will begin on December 7, 2015 – roughly four weeks before the first GranuFlo trial in this MDL on January 11, 2016. Accordingly, it is now feasible to structure the expert discovery and dispositive motion deadlines in this MDL and the state court so as to allow for coordinated Daubert/Lanigan proceedings where they were not previously practicable. Moreover, in light of the fact that there is nearly complete overlap between the pool of experts identified in this MDL and those identified in the Massachusetts state court, coordinated proceedings will serve to avoid significant duplicative litigation efforts and burdens on the expert witnesses and counsel.

In light of the foregoing, FMCNA requests that this Court hold Daubert/Lanigan hearings jointly with Massachusetts Superior Court Associate Justice Kirpalani. To the extent that the Courts agree that such coordinated hearings should take place, FMCNA recognizes that Case

Management Order No. 11 (Bellwether Expert Discovery and Trial Deadlines) may have to be modified to accommodate coordinated hearings dates and suggests that the parties meet and confer for purposes of presenting a joint proposed Amendment to Case Management Order No. 11. FMCNA is filing a similar request for Associate Justice Kirpalani's consideration.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(2)

Undersigned counsel hereby certifies that defense counsel has conferred with counsel for the Plaintiffs' Executive Committee in an effort to narrow the issues raised in this Motion.

Respectfully submitted,

/s/ William H. Kettlewell
William H. Kettlewell (BBO # 270320)
Maria R. Durant (BBO # 558906)
Sara E. Silva (BBO # 645293)
COLLORA LLP
100 High Street, 20th Floor
Boston, MA 02110
(617) 371-1000
(617) 371-1037 (fax)
wkettlewell@collorallp.com
mdurant@collorallp.com
ssilva@collorallp.com

Leigh Anne Hodge
Kevin C. Newsom
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8000
(205) 521-8800 (fax)
lhodge@babco.com
knewsom@babco.com

James F. Bennett
Megan S. Heinsz
DOWD BENNETT LLP
773 Forsyth Blvd., Suite 1410
St. Louis, MO 63105

(314) 889-7300
(314) 889-7302 (fax)
jbennett@dowdbennett.com
mheinsz@dowdbennett.com

Juanita Brooks
FISH & RICHARDSON
12390 El Camino Real
San Diego, CA 92130
(858) 678-5070
(858) 678-5099 (fax)
brooks@fr.com

Thomas Melsheimer
Fish & Richardson
1717 Main Street, Suite 5000
Dallas, TX 75201
(214) 747-5070
(214) 747-2091 (fax)
melsheimer@fr.com

Michael Florey
Fish & Richardson
3200 RBC Plaza
60 South Sixth Street
Minneapolis, MN 55402
(612) 335-5070
(612) 288-9696 (fax)
florey@fr.com

Counsel for FMCNA

Dated: June 24, 2015

CERTIFICATION OF SERVICE

I 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 June 24, 2015.

/s/ William H. Kettlewell
William H. Kettlewell

