UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

PLAINTIFFS' RESPONSE TO FMCNA DEFENDANTS' MOTION FOR JOINT *DAUBERT/LANIGAN* HEARINGS IN THIS MDL AND RELATED MASSACHUSETTS STATE COURT LITIGATION

> "In all cases, consider whether extensive *Daubert* hearings are an effective use of both judicial and party resources."[1]

The Court and the parties have limited time and resources. At this juncture, several months before the parties in the MDL litigation even begin to brief any challenges to experts under *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), the Court need not make any decision regarding whether it requires a *Daubert* hearing at all. It certainly need not determine now how any such hearing should be structured – whether jointly with the Massachusetts state court litigation or not, how long, for which experts, etc. To do otherwise risks making decisions in a vacuum, without knowing how the parties have framed the issues and without reviewing the extent of evidentiary support provided through any paper record on *Daubert* challenges, including expert reports, deposition transcripts and videos, and more.[2] Indeed, neither the parties nor the Court know, at this time, how many experts will even be subject to challenge. While understanding it may make sense logistically to reserve a potential

[1] Manual for Complex Litigation (Fourth) § 23.353 (2004).

[2] The parties, with few exceptions, are taking the fully allotted time of seven hours to examine and explore expert opinions and depositions of Plaintiffs' experts have all been videotaped.

joint hearing date now, Plaintiffs also urge the Court to postpone any decision on the necessity and shape of any *Daubert* evidentiary hearing until after (a) receipt and review of *Daubert*-related briefing in early October 2015[3] and (b) a presentation of arguments by counsel.[4] Doing so will preserve the Court's and parties' resources as dictated by FRCP 1 and comport with both the recommendations of the Manual for Complex Litigation and well-considered practices by other MDL courts.

FMCNA's proposal assumes that both the Massachusetts state and MDL Courts will require a lengthy evidentiary hearing and is both presumptuous and unnecessary so many months removed from the filing of any *Daubert* or *Lanigan* briefs. After reviewing the competing briefs and supporting material, this Court and Judge Kirpalani will know exactly what the relevant issues are and, as desired, can confer as to the nature and scope of any joint hearing to address them, including among other things:

1. Whether a need exists for additional testimony from experts and, if so, whether it is testimony by subject matter or topic, or whether it is testimony from certain experts as to certain issues;[5] and,

2. Whether the hearing will require only arguments from counsel, as to certain subjects or topics or experts.

FMCNA correctly observes that an overlap of experts and issues exists between the two proceedings. The question here is whether making a decision now on whether a joint hearing is

[3] In the Massachusetts state court litigation, moving briefs pursuant to *Commonwealth v. Lanigan*, 419 Mass. 15 (1994) are currently due September 14 and oppositions to the same are due October 5.

[4] Judge Maynard Kirpalani of the Massachusetts state court litigation has set aside the week of October 12; the state court plaintiffs' leadership has proposed that that court likewise hold off on any decision about the need for and scope of an evidentiary until after oral argument by counsel that week.

[5] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) "affords trial judges wide discretion in deciding whether or when a special briefing or other proceedings are needed to investigate reliability." MCL 4th § 23.353. *See also In re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124, 1138-1139 (9th Cir. 2002) (trial court did not abuse it discretion in declining to conduct evidentiary hearing on *Daubert* motions where court could have determined that it had sufficient record to rule on motions based on experts' reports, deposition testimony, and affidavits).

sensible and if so, the nature and extent of it, is sufficiently informed and advances the litigation in a time and cost-efficient manner or instead opens the possibility of expenditure of needless time, resources and money, both for the Courts and for the parties. The *Manual of Complex Litigation* (Fourth) cautions against just this kind of decision-making in a vacuum:

> There is some disagreement as to whether a full-blown evidentiary hearing is ever appropriate. Some courts gave afforded an expanded *Daubert* hearing that has taken the form of a minitrial, focused solely on the question of expert admissibility. The Third Circuit has stated that the decision to grant a hearing does not entitle the party to "an open-ended and never-ending opportunity to meet a *Daubert* challenge until [the party] "gets it right". If an evidentiary hearing is necessary, the extensiveness of the hearing will be determined by the nature of the case and the type of expert testimony being offered. Obviously, the expanded proceedings can consider a broader range of issues and delve more deeply into the underpinnings of expert testimony. However, the court should take care to avoid assessing the credibility of expert testimony and should ensure that it is not encroaching into the province of the jury in deciding factual disputes among the parties. In all cases, consider whether extensive *Daubert* hearings are an effective use of both judicial and party resources.
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> When a hearing is appropriate, the court should precisely define the hearing's scope and control its progress; otherwise, hearings may take on a life of their own, resulting in a lengthy, expensive and unnecessary preview of the trial.[6]

The Honorable Barbara Rothstein, Director of the Federal Judicial Center during the writing of the fourth edition of the *Manual for Complex Litigation*, presided over the Phenylpropanolamine (PPA) Products Liability Litigation (MDL no. 1407) in the Western District of Washington and coordinated a joint *Daubert* hearing with several other state court proceedings therein but waited to make any decision about the hearing until after being informed by the parties about the *Daubert* issues at hand through the briefs as well as a one-day "informational" hearing. Shortly after the informational hearing, Judge Rothstein ordered

[6] MCL 4th § 23.353.

particular experts to appear for an evidentiary hearing, on certain limited issues, rather than as to all issues presented in the *Daubert* briefs.[7] Waiting until after a review of the papers and argument by the parties allowed the PPA MDL court to make an informed decision and appropriately manage the parties' and the court's time and resources.

Likewise, in the *Lipitor* MDL, The Honorable Richard Gergel recently stated from the bench his preference to first review the submissions before making a decision about the necessity or scope and content of any *Daubert* hearing:

> I know the parties have raised with me the issue of the format for [the *Daubert* hearing]. My present inclination is to simply have oral argument by the lawyers, but I haven't yet received your submissions. And to the extent that I think live testimony or further information would be helpful to the Court, I'll let you know that. But that generally – I'm anticipating I will not need it, but I'm open to it once I read everyone's briefs, and more importantly, frankly, the supporting documents. As wise as I'm sure you all think you are, it's actually the underlying reports and testimony that I'm most interested in, and getting down and making my own judgment about the *Daubert* issues based on what the experts say, and frankly not so much what the lawyers say about what the experts say.[8]

In the *Yaz/Yasmin* litigation, the MDL and state courts initially scheduled a joint evidentiary hearing prior to the filing of *Daubert* briefing and related state court challenges.[9] After reviewing the briefing, all three judges – The Honorable David Herndon for the MDL, The Honorable Sandra Moss for the Pennsylvania state court litigation, and The Honorable Brian

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[7] *In re PPA MDL Litigation* Preliminary Ruling on Defendants' Motion To Preclude Plaintiffs' Expert Opinions And On Parameters of Daubert Hearing, dated April 4 2003 (**Tab 1**).

[8] *In re: Lipitor Marketing, Sales Practices and Products Liability Litigation* (MDL No. 2502) Status Conference Transcript, April 23, 2015, at 12 (**Tab 2**).

[9] *In re: Yasmin and YAZ (Drospirenone) Marketing, Sales Practices and Products Liability Litigation* (MDL 2100); *In re: Yaz/Yasmin/Ocella/Gianvi Litigation*, Sept. Term 2009, Case No. 01307 (First Jud. Dist., Phila. Court of Common Pleas); *In re: Yaz/Yasmin/Ocella/Gianvi Litigation*, BER-L-3572-10 (Sup. Ct. New Jersey). The parties used identical generic expert witnesses in the MDL, Pennsylvania and New Jersey litigations.

Martinotti for the New Jersey state court litigation – then cancelled the hearing, with the consent of the parties, finding no need for it (but not until after the parties expended significant time and effort preparing for it).

So too, here, Plaintiffs urge this Court, as the Massachusetts state court plaintiff leaders have asked Judge Kirpalani, to first review any briefs and supporting *Daubert/Lanigan* paper materials before deciding upon the necessity of a joint hearing or its nature and scope. The plaintiffs' leadership in both proceedings will be prepared to execute on short notice either or both of this Court's and the Massachusetts state court's decisions about a hearing, jointly or not, at that juncture.

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CERTIFICATE OF SERVICE

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