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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

STATUS/SCHEDULING CONFERENCE AND MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
Wednesday, October 7, 2015
2:30 p.m.

Brenda K. Hancock, RMR, CRR
Official Court Reporters
John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, MA 02210
(617) 439-3214

1 APPEARANCES:

2 ON BEHALF OF PLAINTIFFS:

3 KREINDLER & KREINDLER
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7 ON BEHALF OF DEFENDANTS:

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25 ALSO PRESENT:
Ronald Castle, Esq.

1 (The following proceedings were held in open court
2 before the Honorable Douglas P. Woodlock, United States
3 District Judge, United States District Court, District of
4 Massachusetts, at the John J. Moakley United States Courthouse,
5 One Courthouse Way, Courtroom 1, Boston, Massachusetts, on
6 Wednesday, October 7, 2015):

7 (The Honorable Court entered the courtroom at 2:30 p.m.)

8 THE CLERK: This Honorable Court is now in session.
9 You may be seated.

10 This is Civil Action 13-2428, In Re: Fresenius
11 GranuFlo Litigation.

12 Will counsel please identify themselves for the Court
13 and for the record.

14 MR. TARRICONE: Anthony Tarricone for the plaintiffs.

15 MR. GOTZ: Good afternoon, your Honor. James Gotz for
16 the plaintiffs.

17 MR. MELSHEIMER: May it please the Court, Tom
18 Melsheimer for Fresenius. Good afternoon.

19 MS. BROOKS: Good afternoon, your Honor. Juanita
20 Brooks on behalf of the Fresenius U.S. defendants.

21 MR. CASTLE: Ron Castle, Fresenius Medical Care.

22 MR. KETTLEWELL: William Kettlewell for the Fresenius
23 U.S. defendants, your Honor.

24 MS. HODGE: Leigh Anne Hodge, Fresenius U.S.
25 defendants.

1 MR. DENNING: Roger Denning, Fresenius defendants.

2 MR. CUMMINGS: Charles Cummings for the European
3 defendants.

4 THE COURT: There has been a request for modest
5 personae for the people who are on the phone, so we have gone
6 through that exercise.

7 First, I guess I should start because I was asked at
8 the outset about the Dr. Miller deposition, that the parties
9 want to take that up in some fashion.

10 MR. MELSHEIMER: Yes, your Honor. May it please the
11 Court, that's our Motion to Compel with regard to the Miller
12 deposition. Just briefly, your Honor, Dr. Miller refused to
13 answer questions at his deposition or produce certain documents
14 based on a privilege he claimed. There's no objection to
15 relevance or burdensomeness or anything of that nature; it's
16 simply a ground of privilege. With respect to the questions he
17 refused to answer, they generally fall into the category of
18 factual information that he provided to the FDA and other
19 government agencies. It's our view that factual information is
20 not shielded by any privilege, and he should be required to
21 answer those questions. So, we are entitled, I think, to what
22 he told the FDA in these various communications.

23 It appears, and we set this out in our papers, your
24 Honor, that Dr. Miller began communicating with the FDA in 2012
25 at the urging of the CEO of a competitor of Fresenius,

1 Rockwall, and he admits that those communications he had with
2 the FDA at the urging of a Fresenius competitor were, in part,
3 to try to get GranuFlo taken from the market.

4 THE COURT: Mr. Tarricone, are you going to respond to
5 it?

6 MR. TARRICONE: Well, your Honor, the issue I have is
7 that counsel for Dr. Miller -- we didn't realize this was going
8 to be on today. I don't know whether she's available or
9 whether she's on the phone or not, but she filed the opposing
10 papers.

11 (The Court conferred with the Clerk off the record)

12 MR. MELSHEIMER: It is certainly not our intent to
13 proceed without the other side, your Honor, on this.

14 THE COURT: Right.

15 MR. MELSHEIMER: I thought they were notified. It was
16 our understanding that they were.

17 THE COURT: But apparently not.

18 MR. TARRICONE: I didn't even see this on an agenda
19 for today. I'm sorry. I must have missed it.

20 THE COURT: Well, let me go back to that. I am not
21 sure I have seen an agenda for today, as a matter of fact.

22 MR. TARRICONE: Today's hearing was scheduled for the
23 bellwether. I didn't realize we were taking up this other
24 matter.

25 THE COURT: I will deal with whatever I can deal with,

1 but apparently I cannot deal with this right now.

2 But let me understand, has the FDA taken any position
3 at all on this, or is this simply Dr. Miller saying, "I have
4 some sort of relationship"?

5 MR. MELSHEIMER: Your Honor, I believe that it is only
6 Dr. Miller. We understand from his submission to your Honor
7 that they have submitted something under seal about this that's
8 supposed to address it. Obviously, we haven't seen that, but
9 we are not aware of any position the FDA has taken certainly,
10 and certainly he wouldn't have whatever privilege he has to
11 prosecute something, he wouldn't have it with the FDA.

12 THE COURT: Well, perhaps. But, in any event, I guess
13 we are just going to have to put this over.

14 Remind me of the next hearing date, Mr. Tarricone, or,
15 Mr. Kettlewell.

16 MR. KETTLEWELL: Well, we're here on the 14th, your
17 Honor, obviously.

18 THE COURT: So, let's do it on the 14th.

19 I'm sorry. I did that without asking you. Is the
20 14th okay?

21 MR. MELSHEIMER: I am ready to go, your Honor, on the
22 14th, absolutely.

23 THE COURT: Well, you are ready to go now.

24 MR. TARRICONE: We will notify counsel.

25 THE COURT: So, we will get them in for that for the

1 14th.

2 MR. MELSHEIMER: Thank you, your Honor.

3 THE COURT: I guess let me identify some issues, and
4 maybe this is just a filing matter. I did believe that we were
5 going to talk about bellwether and a few other things as well,
6 but the only opposition I can find on the docket right now on
7 these expert motions has to do with Colton and Zydney. I
8 assume that there are more oppositions coming. Were they filed
9 or not? What am I missing here?

10 MR. GOTZ: Your Honor, they were all filed, so there's
11 an opposition to all four of the Fresenius motions that are in
12 the MDL.

13 THE COURT: When were they filed?

14 MR. GOTZ: They were all filed by hand and under seal
15 on October 5th.

16 THE COURT: Because they do not appear on the docket,
17 and, because I have been involved in another matter, I have not
18 had a chance to do that. But they are filed, as far as you are
19 concerned. Dan agrees.

20 And I assume that you have a few oppositions to them.

21 MS. BROOKS: Yes, your Honor, we did file oppositions
22 to every single one of their motions also on October 5th.

23 THE COURT: Is there anything else we need to talk
24 about in terms of the scheduling of the Daubert-Lanigan
25 hearings? What I do have is your Proposed Schedule, which both

1 Judge Kirpalani and I thought made sense here, but is there
2 something more that we should be thinking about?

3 MR. TARRICONE: Not that I'm aware of, your Honor.

4 MS. BROOKS: We just have two things, your Honor, and
5 I also informed Judge Kirpalani of this this morning. In
6 plaintiffs' opposition to our motion regarding the Hakim memo
7 and the opinions contained therein --

8 THE COURT: Remind me. This is a consolidated
9 memorandum in opposition?

10 MS. BROOKS: Yes, your Honor.

11 THE COURT: Go ahead.

12 MS. BROOKS: Both for MDL and for Massachusetts State.
13 And in plaintiffs' opposition, at Exhibit 44 plaintiffs attach
14 a 17-page expert report from a Dr. Goldstein containing brand
15 new analyses and opinions. Now, Dr. Goldstein isn't new. He
16 has filed a general causation opening report in this case and
17 also a general causation rebuttal report, but in this new
18 report that's attached as Exhibit 44 he says that plaintiffs
19 gave him five files that contain the underlying data that
20 resulted in the opinions in the Hakim memo. Now, those five
21 files plaintiffs have had in their possession since
22 September 14th of last year and well before Dr. Goldstein did
23 his opening report or his rebuttal report but apparently just
24 now has decided to do a new analysis where he takes the data
25 and, according to him, compiled it into one and then did a

1 logistic regression analysis and then details in this 17-page
2 attachment the results of that analysis.

3 I'm just informing the Court of this, because we are
4 planning on bringing a Motion to Strike. We only got it on
5 Monday, so at the first available opportunity we are going to
6 be bringing a Motion to Strike that exhibit as being an
7 untimely expert report that Dr. Goldstein certainly could have
8 done in his opening or his rebuttal. He has been deposed.

9 THE COURT: What is the story? Give me a sneak
10 preview of where this stands.

11 MR. GOTZ: The sneak preview is this: This is an
12 affidavit. It's actually a three-page affidavit from Goldstein
13 with 14 pages of his work papers. The only reason it's being
14 submitted in opposition to the Hakim motion is for the very
15 first time in this Hakim motion an issue was raised that's not
16 in any of the defense expert reports, not in any of the defense
17 expert depositions, and it's a singular point.

18 The point is there's a whole bunch of reasons they say
19 why the Hakim Study, as they call it, is no good. One reason
20 is it doesn't disclose the confidence intervals that they
21 found. The Goldstein three-page affidavit only responds to
22 that point, and he's only submitting it as a Daubert affidavit
23 to respond to that new point.

24 THE COURT: Well, does that mean you are going to be
25 filing something the end of this week?

1 MS. BROOKS: Yes, your Honor, as a Motion to Strike.

2 THE COURT: And you want us to be thinking about that
3 for the a.m. session on October 14?

4 MS. BROOKS: That is what we would ask, your Honor,
5 and if the Court does not grant the Motion to Strike, again,
6 more from an informational perspective, we would ask
7 permission, then, to be able to respond orally to what is
8 contained in this exhibit, because, obviously, we're not going
9 to have time to prepare a rebuttal expert report to
10 Dr. Goldstein's new report.

11 And I would just add this is not a new issue. The
12 reliability, or lack thereof, of the opinions in the Hakim memo
13 have been front and center of this case from the beginning,
14 including the fact that there is no known error rate or
15 confidence intervals in that memo.

16 THE COURT: When can you, as opposed to when do you
17 want to, file your Motion to Strike?

18 MS. BROOKS: I'm looking at Ms. Durant and she's --
19 Thursday, your Honor.

20 THE COURT: Monday?

21 MR. GOTZ: Sure.

22 THE COURT: So, at least we will have the papers on
23 that, and it will be taken up at that point.

24 Mr. Kettlewell, you mentioned October 14th, and I can
25 barely think of tomorrow, but it now occurs to me that plugging

1 in the Dr. Miller Motion to Compel --

2 MR. KETTLEWELL: Starts to take up some time.

3 THE COURT: Right. So, when is the next scheduled
4 time after that, or, alternatively, can we do it on the Friday?
5 Because I think Judge Kirpalani is going to be dealing with --

6 MR. KETTLEWELL: Yes. He agreed earlier today, you
7 may not even know this, that Judge Kirpalani would take your
8 invitation to hold that hearing on the case-specific expert
9 issues here on Friday, so we could also do it Friday before
10 that hearing began as well.

11 THE COURT: This courthouse has many mansions, and
12 there are other courtrooms I can use to deal with it, but does
13 this apply to him, too? I guess it does, doesn't it, in his
14 cases?

15 MR. KETTLEWELL: Yes.

16 THE COURT: Is there a joint motion -- he has a motion
17 in the Massachusetts case on --

18 MR. KETTLEWELL: No, there is no Motion to Compel
19 filed in the Massachusetts case. It was filed here, your
20 Honor.

21 THE COURT: Just here?

22 MR. KETTLEWELL: Yes.

23 THE COURT: So, he does not have to hear that matter.

24 MR. KETTLEWELL: No, he does not, your Honor.

25 THE COURT: So, we can do it somewhere else in the

1 building here.

2 MR. KETTLEWELL: Correct.

3 THE COURT: I just wanted to be sure that people did
4 not have to move around. Are there people that can be
5 separated off from Judge Kirpalani's proceedings on Friday?

6 MR. MELSHEIMER: Yes, your Honor. I don't think it
7 will take a long time to hear this. It's going to be up to the
8 Court, of course, but, yes, I can break away from that,
9 absolutely.

10 THE COURT: Why don't we say 9:00 on Friday morning at
11 a place to be determined. It may even turn out to be this
12 courtroom for that. We will have counsel for Dr. Miller
13 present as well, and we will try to deal with it then. So, it
14 is October 16th that we will be dealing with this at 9:00. We
15 will figure out where it is going to be.

16 Are you going to put your oar in on that one, too?

17 MR. GOTZ: On the Miller? We're not.

18 MR. TARRICONE: Well, we might. We want to see the
19 papers, first.

20 THE COURT: Right. Mr. Tarricone wants to steer
21 rather than --

22 MR. TARRICONE: I want to see the papers.

23 THE COURT: Right.

24 MR. TARRICONE: It is being handled by counsel for the
25 other side.

1 THE COURT: Well, in any event, I will just assume
2 that you are dealing with that. I might suggest to
3 Judge Kirpalani that he start his at 9:30, maybe, but we will
4 see.

5 MR. MELSHEIMER: And, your Honor, they are going to
6 notify counsel for Mr. Miller or Dr. Miller.

7 Is that correct?

8 MR. TARRICONE: We will do so.

9 THE COURT: And is counsel likely to be here, or are
10 they likely to want to be on the phone?

11 MR. GOTZ: I'm going to guess by phone. I think
12 counsel is in Louisiana.

13 THE COURT: All right. So, back to that. So, we will
14 get the papers and see what happens with that, at least inform
15 the discussions and see where it leads on this. There has to
16 stop being an infinite regression of additional reports and so
17 on at some point, but we will see where that leads.

18 So, otherwise, we are okay for the hearing date, and
19 that looked fine to Judge Kirpalani. I have not talked to him
20 since, I gather, he has had his hearing this morning.

21 MS. BROOKS: Yes, your Honor. He was fine with the
22 schedule proposed and the order in which we were going to do
23 it.

24 So, we only have one more issue to bring up with the
25 Court, the ABChD Study. Plaintiffs on Monday served three

1 supplemental reports based on that study from a Dr. Colton, a
2 Dr. Zydney and a Dr. Fine. Originally, when we thought we were
3 going to be in session on Tuesday, starting the Dauberts on
4 Tuesday, your Honor gave us until this Friday to file whatever
5 rebuttals we might have to their supplements. In light of the
6 fact that we are starting a day later, could we have till
7 Monday to do that?

8 THE COURT: All right.

9 MS. BROOKS: Thank you, your Honor. We appreciate
10 that.

11 THE COURT: So, I am not certain that we are going to
12 be dealing with that in this expert collection, but that
13 regularizes the filings on it.

14 MS. BROOKS: Thank you very much, your Honor.

15 THE COURT: So, we have got a schedule of some sort
16 here for next week. I guess one of the things that Mr. Hohler
17 and I are going to be talking about as well is trying to
18 regularize some of what I will call "ancillary motions." I now
19 have Motions to Dismiss With Prejudice in the Booker matter and
20 another matter.

21 I think what I am going to suggest, and maybe the
22 parties will find it agreeable, is something like a consent
23 calendar, that is to say, motions that will be allowed, unless
24 somebody wants to be heard on them. We will, with your
25 assistance, try to get that out before any of these hearings so

1 I do not wade through these various motions, and sometimes we
2 have people on the phone and sometimes we do not.

3 I do, however, want to talk about the -- if we have
4 counsel for Terry Clayborn on the phone.

5 (The Court conferred with the Clerk off the record)

6 THE COURT: Is there going to be some sort of
7 opposition to Mr. Gunn's Motion to Withdraw, or is anybody
8 familiar enough to take a view? I am a little concerned about
9 this. I do not want to talk in the absence of Mr. Gunn, but I
10 am a little concerned about someone disappearing from a case
11 when it is still not clear who is the privileged wife in the
12 series of wives that Mr. Clayborn had.

13 MS. HODGE: Your Honor, I am not familiar with that
14 case. Do you have a number?

15 THE COURT: It is 14-13790. But Mr. Gunn reports that
16 he has done research on this, that his client is adamant that
17 she is the rightful surviving spouse, but there is at least one
18 other claimant to be surviving spouse here, and I want to be
19 sure I want to get in the middle of that one.

20 MS. HODGE: We will check on that one before next
21 time. I know there had been a number of other of those kinds
22 of motions, motions to appear as counsel, motions to withdraw
23 as counsel, but I don't remember this particular one, but we
24 will check into it.

25 THE COURT: All right. I am going to allow, however,

1 now that I have got you here, unless there is an objection, I
2 do not think there is, dismissal with prejudice of the Booker
3 matter, which is 13-10649, and of the Darby matter, which is
4 13-10597.

5 MS. HODGE: Yes.

6 THE COURT: But that is the kind of thing that I
7 anticipate being on a consent kind of calendar that deals with
8 particularly these duplicative cases. The stipulation the
9 parties have seems fine to me, I will try to carry it out, but
10 I want to be able to clean these off without undue difficulty
11 locating who is who and having hearings and getting them on the
12 phone and that sort of thing. So, we will try to develop some
13 sort of process like that.

14 Now, to the point that I think we are here on, I
15 communicated to Mr. Lovett, I am not sure that it got to all of
16 you, that the bellwether seems fine to me. I am not sure I
17 have much else that I wanted to add to it, but are there things
18 that the parties want to alert me to? The schedule seems fine.
19 The order seems fine. You know more about these cases at this
20 point than I do, so I will defer on that. But is there
21 something else we need to talk about?

22 MR. TARRICONE: Your Honor, the only thing I would add
23 is that we are working out a proposed tracking order for the
24 two cases, and we will have that to you by early next week.

25 THE COURT: And that is anticipated to be agreed upon?

1 MR. TARRICONE: Yes.

2 THE COURT: So, I do not see it as an issue for
3 purposes of having a hearing on it, except to acknowledge it.

4 MR. TARRICONE: If there's something on it that you
5 have a question about, of course we will be able to respond.

6 THE COURT: Right, but it looks to specific causation
7 hearings in December; is that it?

8 MR. TARRICONE: I would expect so, your Honor.

9 THE COURT: All right. Now, in terms of the other
10 cases, Judge Kirpalani has got them scheduled for April 4th and
11 March 23rd, and then there is a tentative date for, and perhaps
12 more than one, St. Louis trial. Do you know more about the
13 timing of the St. Louis trials? Has that been clarified any
14 more?

15 MS. BROOKS: Your Honor, my understanding is that
16 St. Louis is now scheduled to go on March, the 7th.

17 THE COURT: Just one?

18 MS. BROOKS: No, your Honor. Then there is a second
19 one scheduled for May, the 16th.

20 THE COURT: So, they will be shadowing
21 Judge Kirpalani's cases?

22 MS. BROOKS: That's our understanding, yes, your
23 Honor.

24 THE COURT: All right. Well, let me just ask
25 generally what about the summer for the MDL cases as further

1 bellwether?

2 MR. TARRICONE: We would welcome that, your Honor.

3 THE COURT: Maybe I will too, but I will look at my
4 trial schedule a little bit more. But I am going to try and
5 squeeze something in. But two?

6 MR. TARRICONE: I think that makes sense, your Honor.

7 MS. BROOKS: That's fine on our end, your Honor. Our
8 preferences are, due to lead counsels' trial schedule, that it
9 be no later than mid-August, only because some of us have
10 trial, believe it or not, in a non-GranuFlo case. Some of us
11 are actually going to be in trial in another matter in
12 September.

13 THE COURT: So, you want it or them before August 15;
14 is that it?

15 MS. BROOKS: That would be ideal, your Honor.

16 THE COURT: I will have to consult with Mr. Lovett a
17 little bit more about it, but I will get to that. But I would
18 like to do at least one, maybe two, in the summer, and at that
19 point we will try to have a greater constellation of
20 alternative cases that you can look at that.

21 But under present circumstances shouldn't that be
22 enough for bellwether cases, do you think?

23 MR. TARRICONE: Time will tell.

24 THE COURT: I am just trying to figure out -- you are
25 covering the waterfront, that's all.

1 MR. TARRICONE: I would think with the number of
2 trials through that time frame we would have a pretty nice
3 constellation of cases to look at.

4 THE COURT: All right. Well, to be continued, but I
5 will look at the schedule and see what I can do about that.

6 Is there anything else that we need to talk about,
7 then?

8 MR. TARRICONE: Not from the plaintiffs, your Honor.

9 MS. BROOKS: Nothing from us. Thank you, your Honor.

10 THE COURT: All right. So, I will see you next week,
11 and I will keep looking in my mailbox for the arrival of
12 things.

13 MR. KETTLEWELL: Thank you, your Honor.

14 MR. MELSHEIMER: Thank you, your Honor.

15 THE COURT: You can leave gracefully, but I have
16 another matter on.

17 (Laughter)

18 MR. MELSHEIMER: May we be excused, your Honor? Thank
19 you.

20 (WHEREUPON, the proceedings adjourned at 2:55 p.m.)
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C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of *In Re: In Re: Fresenius GranuFlo/ Naturalyte Dialysate products Liability Litigation*, No. 1:13-md-02428-DPW.

Date: November 18, 2015

/s/ Brenda K. Hancock
Brenda K. Hancock, RMR, CRR
Official Court Reporter