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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

STATUS CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
Friday, April 29, 2016
2:20 p.m.

Brenda K. Hancock, RMR, CRR
Official Court Reporter
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
4 By: Anthony Tarricone, Esq.
5 277 Dartmouth Street
6 Boston, MA 02116

7 ON BEHALF OF DEFENDANTS:

8 COLLORA LLP
9 By: William H. Kettlewell, Esq.
10 Maria R. Durant, Esq.
11 100 High Street
12 20th Floor
13 Boston, MA 02110

14 ALSO PRESENT: Ronald L. Castle, Fresenius
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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 Friday, April 29, 2016):

7 THE CLERK: The next case is Civil Action 13-MD-02428,
8 In Re: Fresenius GranuFlo/NaturaLyte Dialysis Products
9 Liability Litigation. Court is in session.

10 The parties will please come forward and identify
11 themselves for the Court and the record.

12 MR. TARRICONE: Good afternoon, your Honor. Anthony
13 Tarricone, representing the plaintiffs.

14 MR. KETTLEWELL: Good afternoon, your Honor. William
15 Kettlewell, together with Maria Durant and Ronald Castle,
16 representing the defendants.

17 THE COURT: All right. Well, I wanted to bring you in
18 because I cannot let a month go by without seeing you, but also
19 because I am a little troubled by the specifics of the Special
20 Master appointment. Let me explain that a bit.

21 My reading of the Proposed Order seems to me to
22 suggest that what is involved is a private settlement, which,
23 obviously, the parties can structure in any way they want, but
24 I am being asked to make an appointment of someone whose work I
25 am not going to review; at least that is the way it appears

1 here. If Professor Green makes a resolution of one or another
2 of these what I will call "matrix" issues and there is a party
3 who is dissatisfied with it, I do not think they have anyplace
4 to go, at least under this order.

5 Now, am I reading that right, and if I am reading that
6 right why am I entering an order like this to deal with your
7 private resolution?

8 I think that is more your call, Mr. Tarricone.

9 MR. TARRICONE: Well, I think those are good
10 observations. It is a private settlement agreement, and it's
11 not a class settlement.

12 THE COURT: Right. There are some vagrant classes. I
13 say "vagrant," but there are still some classes in the case --

14 MR. TARRICONE: Correct.

15 THE COURT: -- that I assume either get dismissed, or
16 I have to deal with that in a settlement.

17 MR. TARRICONE: Well, for instance, in the NFL case
18 which I'm involved in, that was a large MDL where the
19 settlement was -- it was settled as a class settlement --

20 THE COURT: Right.

21 MR. TARRICONE: -- but, as you know, that requires all
22 kinds of additional procedures and perplexities.

23 THE COURT: Right.

24 MR. TARRICONE: And we are not doing that here for a
25 lot of reasons. So, it is a private settlement. We do expect

1 that there might be disputes. I think we can anticipate there
2 will be disputes about how a handful of cases, anyway, are
3 handled by the Administrator, and we want to have an orderly
4 process for addressing that, so we would like to have Professor
5 Green be the one to be the arbiter of that. Now, if he has an
6 appointment as Special Master the parties still have the
7 authority to opt in or opt out. So, if the order is in place
8 and the parties are aware that Professor Green, and they've
9 already been informed that he is the one who will be the
10 arbiter of disputes, they would be opting in with the knowledge
11 that he is the one who was doing that and that would be the
12 Court of last resort, if you will, on these issues.

13 THE COURT: So, why do I make the order? All of the
14 elements of the settlement I have kept myself more or less
15 innocent of. Just, I understand there is a settlement out
16 there, it is global in nature, and the parties are working
17 through various things, and it is good to kind of keep up, just
18 so I know what is perhaps looming for me, but I do not know why
19 I need to have a Special Master who is not doing anything for
20 the Court except assisting the parties in their private
21 negotiations.

22 MR. TARRICONE: I understand.

23 THE COURT: That is the fishbone for my throat.

24 MR. TARRICONE: I understand the issue. From the
25 perspective of the plaintiffs' leadership we think having the

1 imprimatur of the Court on this settlement, especially given
2 the large number of claims, we believe things will go more
3 smoothly. There are two ways to do this. One would be not to
4 have an order and we simply inform people that he will be the
5 arbiter and they can opt in or opt out with that knowledge. I
6 suppose an alternative would be that there would be some
7 reporting to the Court or some conditions that attach to this
8 that would involve the Court, and perhaps the Court is not
9 interested in that --

10 THE COURT: I am here to serve. No, I am not looking
11 for the opportunity to resolve matrix disputes for however
12 number of cases there are, but if that has to be done, that has
13 to be done. This much I think I do know, is that it is nice to
14 be asked to provide an imprimatur. That invokes a different
15 forum in some ways, but it strikes me as to some degree not my
16 responsibility to provide imprimaturs to various kinds of
17 things. The indulgences go down the road to another forum.

18 The second issue is, if there are people that are
19 opting in on that, they should know, and I assume that they do,
20 opting in or opting out on that basis, but unless I have a role
21 or the Court has a role in doing it I do not think there should
22 be a Court order with respect to it. It seems to me to make
23 all the sense in the world.

24 I have tried to pull out a few other settlement
25 appointment orders in different places, but generally they have

1 some sort of review mechanism by the Court. As I said, I have
2 enough to do. I do not need that. But if that is what it
3 takes, I do that sort of thing.

4 So, I put it in that form because I try not to
5 exercise my jurisdiction when I do not really have the
6 authority there or it is the judicial equivalent of a blurb on
7 the back of a new best seller. That is all I can offer.

8 MR. TARRICONE: Yeah, I understand, your Honor. I
9 think I would want to take up with some of the other people
10 involved in leadership whether we would want to add something
11 to this that means the Court would have ultimate authority over
12 some aspect of it.

13 THE COURT: Or -- I do not know, I am just trying to
14 think this through, because it is the thing that has been kind
15 of bothering me about it -- the class cases, and I had asked
16 this way back six months, a year ago, class cases are still in
17 it. They can provide a vehicle for some form of approval, I
18 suppose, of the mechanism. I do not think it is improper to
19 provide for a private resolution of that sort of thing, of the
20 overall settlement. It would be for the class. I do not know
21 if the class cases are going to stay alive, but they become a
22 vehicle for me to exercise something. But that brings in a
23 whole lot of other stuff.

24 MR. TARRICONE: It does. It means we would have to
25 have probably multiple class representatives in different

1 categories of cases, and the notice requirements are arduous
2 and costly, and then the time factor is one that is
3 extraordinary. I mean, the NFL case was settled almost two
4 years ago. We're still in the Appeals Court.

5 THE COURT: Right. I am trying to raise things that
6 are practical that do not involve me compromising what I think
7 are my core responsibilities. I can say, well, notice is
8 enough, that you provided notice, and I can say, although I
9 have not said it here, you have provided notice some time ago,
10 but, no party objecting, it goes into effect. If a party
11 objects, then I take up the objection and say, at least from my
12 present perspective, this is a private settlement. I do not do
13 anything with respect to it. But that gives that some sort of
14 judicial action, if that is what you are looking for, on it.
15 It is just a very uncomfortable situation for me to enter an
16 order like this that does not do much.

17 MR. TARRICONE: If we added the Court's review of any
18 decision, and I understand you are not looking for --

19 THE COURT: I am thinking why did I ever raise this?
20 You add it, that gets it in there. On the other hand, then we
21 have further activities. But I suppose you can set a standard
22 that says something, that gross, unbelievable, unconscionable
23 abuse of discretion on the part of Professor Green, but if I am
24 going to be involved in it --

25 MR. TARRICONE: There has to be something.

1 THE COURT: -- I think there has to be something.

2 MR. TARRICONE: I really do understand the issue.

3 THE COURT: Right.

4 MR. TARRICONE: And we weren't trying to just slip
5 this under the door.

6 THE COURT: No, I do not suggest it. I just, as I
7 thought about it some more, I just found it, because, as you
8 know, I allowed it in principle, I guess I said, initially and
9 wanted an order, got the order, and then the devil is always in
10 the details, and then I started to ask around for other orders
11 that people had in these things, and they invariably involve
12 some sort of potential for if there is a Master appointed, as
13 opposed to the parties agree on a worthy individual to help
14 them out with their resolution.

15 MR. TARRICONE: Having a Master gives comfort to all
16 the lawyers involved in the case, and it really does help
17 contain things, so the imprimatur of the Court is not an empty
18 symbol.

19 THE COURT: No, I understand that, but I am not here
20 to provide symbolic acts.

21 MR. TARRICONE: I understand.

22 THE COURT: I am here to exercise my jurisdiction when
23 I have my jurisdiction, and I do not think I have it to provide
24 the symbol of the judge saying, "Professor Green is a good guy.
25 I will let him go ahead."

1 MR. TARRICONE: We have a leadership meeting next
2 week, so let me confer with my colleagues.

3 THE COURT: This does not stand on --

4 MR. TARRICONE: It's not holding anything up.

5 THE COURT: It is not across the critical path of the
6 case. The plaintiffs are aware that Professor Green is going
7 to be involved and the present structure that you have is
8 that --

9 MR. TARRICONE: Yes, they already know that, they
10 already know what the allocation plan looks like, and we're
11 working now with the defendants concerning medical records that
12 people need to have the essential data for the grid and also
13 product ID issues, and we're working really hard to get through
14 all of that.

15 THE COURT: All right. So, now that I have you on
16 that, things are moving along in a way that does not suggest
17 difficulties with the settlement?

18 MR. TARRICONE: For the most part they are. There are
19 some bumps in the road that we are trying to deal with, but I
20 don't think we need the Court's involvement at this point. But
21 I do think we should have these, continue to have these
22 meetings.

23 THE COURT: Well, that would be my inclination, at the
24 minimum, just continue to kind of find out what is going on
25 pending -- is the date July 30th? I can't recall.

1 MR. TARRICONE: July 15.

2 THE COURT: July 15th. But that is a point at which
3 the vehicle could turn into a pumpkin or not.

4 MR. TARRICONE: The next 30 days are really going to
5 be important.

6 THE COURT: Well, I am prepared to flip this around
7 promptly, but you now have my functional concern about that,
8 and I will try to deal with it from that perspective.

9 Let me raise, because I have got you, two other things
10 and anything else that you want. I got, as did everybody who
11 has got large MDL, defined as something with more than 1,000
12 constituent actions, a letter from Judge Vance asking questions
13 about whether the Court or the parties have developed software
14 programs, that sort of thing. What I am going to do is pass it
15 back.

16 We have not developed a software program to deal with
17 this. You may have. You may want to participate in this.
18 What she is looking for is some idea of what might be helpful
19 in other cases as a way of ensuring that there is a meaningful
20 data collection that could be uniform perhaps, and what I would
21 ask here is perhaps if you can get back to me just with a
22 letter maybe by next Friday. Is that too fast to do it? It
23 may be that this is proprietary stuff, and I fully understand
24 that, that the parties had developed it as proprietary common
25 benefit, proprietary to the defendant, all of that, but I feel

1 an obligation to get back to her here.

2 MR. TARRICONE: Yeah, I think Friday's fine. I will
3 survey our leaders again and see what people have.

4 THE COURT: All right.

5 Mr. Kettlewell?

6 MR. KETTLEWELL: We will do the same, your Honor.

7 THE COURT: So, next Friday you will give me a letter
8 and I will look at it. Again, talking about the limits of my
9 writ, and hers, it is not something I can enforce, but it is
10 for a good cause, trying to make it possible for people to have
11 a better understanding of what they might be getting into in
12 these kinds of cases and to make sure that the panel's
13 information and perhaps the Court's information is consistent
14 or consistently developed. For example, I kept asking
15 Mr. Newsom for census data on this. Maybe he has got something
16 more than just an Excel spreadsheet, but maybe not.

17 The final thing, I keep asking this, and I probably
18 should have made it much more specific, it arises out of the
19 Dillingham and Brown cases. Those are the Oklahoma cases that
20 had the removal/remand issue with respect to the non-Fresenius
21 defendants, and, as I have kept promising, or perhaps
22 threatening, I am going to try to write something. I have been
23 writing something, and it keeps growing and growing, but I do
24 not want it to be disruptive of settlement, even for these
25 cases or be beyond my writ.

1 As I understand it, however, and looking at the docket
2 it kind of confirms it, but I am not sure that I am reading the
3 docket as intelligently as I should, the Brown and Dillingham
4 cases, first, have all been severed, that is all done, but then
5 they filed subsequent Short Form Complaints without these
6 additional defendants in them, and they have done whatever they
7 want to do about pursuing those claims in Oklahoma. That is my
8 understanding broadly. But I think what I would like is just a
9 confirmation of that in some form.

10 Ms. Durant?

11 MS. DURANT: Yes, your Honor. That is exactly
12 correct, and it is our understanding that, when filing the
13 Short Form Complaints in both Brown and Dillingham, and as well
14 the Carol Cook matter, that the new cases did not name any
15 Oklahoma defendants, thereby curing or remedying, if you will,
16 the issue that was presented through Fresenius's Motion to
17 Sever.

18 THE COURT: But what is happening with those other
19 defendants? Are they being pursued in Oklahoma, or do you
20 know?

21 MS. DURANT: It is my understanding, although I would
22 like to confirm, that they are not.

23 THE COURT: Mr. Castle --

24 (Counsel conferred off the record)

25 MS. DURANT: So, we think at the moment -- I could

1 certainly follow up and inform Mr. Hohler, if you would like --
2 but those matters are stayed for the moment.

3 THE COURT: Stayed where, in the state court?

4 MS. DURANT: The matters against the individual
5 defendants in Oklahoma.

6 THE COURT: So, what was the format? I guess I have
7 lost track of this. I indicated what I was going to do. They,
8 apparently, anticipated that they wanted to continue to
9 participate here, but the cases have not formally been remanded
10 here, and the formal Remand Order has not severed them out.

11 MR. CASTLE: I may not have the precise cases in mind.
12 There was a proceeding in the state court, a scheduling
13 hearing, and everybody agreed to stay for a prolonged period, I
14 think until after this election period for opt-ins, and I think
15 that is the status, but that is as far as I can speak to it.

16 THE COURT: But did they bring a new case or new cases
17 in Oklahoma, or do you know?

18 MR. CASTLE: I don't know the answer to that.

19 THE COURT: If you can try to confirm, and also I
20 think it is Mr. Sill who is the fellow from Oklahoma --

21 MR. TARRICONE: That's correct, your Honor.

22 MS. DURANT: That's correct.

23 THE COURT: -- just so I know what has happened with
24 those cases.

25 MS. DURANT: Sure. I will confer with Mr. Tarricone

1 before we respond jointly to Mr. Hohler with the status.

2 THE COURT: All right. So, it would be nice if that
3 came in, just so I do not have to remember lots of dates, by
4 next Friday also.

5 MS. DURANT: Mm-hmm.

6 THE COURT: Anything else that we need to talk about
7 at this point?

8 MR. TARRICONE: Not that I can think of, your Honor.

9 THE COURT: So, if you submit something that seems to
10 respond to the issues that I have raised with respect to the
11 settlement, it may be that I will not have to have a hearing,
12 but I think if there is going to be a request for additional
13 court action there has to be notice, notice is provided, and if
14 somebody wants to oppose it, they can oppose it. At least I
15 would hold onto it for that time period, and then we would just
16 take it up -- I think we have got time to take it up at the
17 next conference date.

18 MR. TARRICONE: Thank you, your Honor. What I will
19 try to do, if we are going to submit something, try to get it
20 in by the end of next week as well, just to keep things moving.

21 THE COURT: All right. But, in any event, you will
22 tell me, and if the answer is "To Be Continued," then tell me
23 that too, so I know that I am not waiting patiently or
24 impatiently at the Inbox to make sure that I am reaching these
25 things.

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MR. TARRICONE: Thank you, your Honor.

THE COURT: All right. Thanks very much. We will be
in recess.

THE CLERK: All rise.

(The Honorable Court exited the courtroom at 2:45 p.m.)

(WHEREUPON, the proceedings adjourned at 2:45 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: May 3, 2015

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