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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: FRESENIUS GRANUFLO/
NATURALYTE DIALYSATE
PRODUCTS LIABILITY LITIGATION

No. 1:13-md-02428-DPW

FLORELLA DIAL, PERSONAL
REPRESENTATIVE OF THE ESTATE OF
CARLEY DIAL,

Plaintiff.

No. 1:14-cv-11101-DPW

Vs.

FRESENIUS MEDICAL CARE
HOLDINGS, INC., ET AL.,

Defendants.

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

PRETRIAL CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, MA 02210
Monday, September 19, 2016
2:30 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

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APPEARANCES:

KREINDLER & KREINDLER
By: Anthony Tarricone, Esq.
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On behalf of the Plaintiffs.

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On behalf of the Dial Plaintiffs.

THE PAYNTER LAW FIRM, PLLC
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On behalf of the Dial Plaintiffs.

COLLORA LLP
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On behalf of the Defendants.

FISH & RICHARDSON PC
By: Roger A. Denning, Esq.
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On behalf of the Defendants.

ALSO PRESENT:

Ronald L. Castle
Fresenius Medical Care NA

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 Monday, September 19, 2016):

7 THE CLERK: All rise.

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

9 THE CLERK: This Honorable Court is now in session.
10 Please be seated. Civil Action Number 14-11101, Dial v.
11 Fresenius.

12 THE COURT: So, where were we? I understand the case
13 will go. The question of trial counsel, I guess, is open,
14 depending on the settlement one way or the other. Is that
15 correct or not?

16 MS. BOOKER: Good afternoon, your Honor. My name is
17 Molly Booker. I'm with Hagens Berman Sobol Shapiro, and
18 co-counsel here is the Paynter law firm, Stuart Paynter, who
19 you have met. So, we do intend to opt Ms. Dial out of the
20 settlement and intend to try this case in February.

21 THE COURT: Let's assume that the settlement does not
22 go through. I am just exfoliating the branches of the decision
23 tree. It does not go through. Doesn't it stay with the PEC or
24 not?

25 MR. TARRICONE: Your Honor, if the settlement does not

1 go through, then this case will remain a bellwether trial for
2 which the Plaintiffs' Steering Committee will have
3 responsibility.

4 THE COURT: Is there any question about that?

5 MS. BOOKER: I think we do have a question about that.
6 I don't fully understand why we couldn't remain as trial
7 counsel, and obviously the --

8 THE COURT: Well, I do not understand fully the
9 arrangements that were made, and I cannot say whether I would
10 be involved in that question.

11 But, Mr. Tarricone, what is your view?

12 MR. TARRICONE: Well, if it is a bellwether trial, the
13 Steering Committee will be responsible for getting the case to
14 and through trial. As a bellwether trial, I was going to be
15 lead counsel, together with some other lawyers. There would be
16 three of us. We haven't really discussed with the
17 Dial-specific lawyers about what will happen if the settlement
18 doesn't go through, but it does remain a bellwether case with
19 the responsibility of the Steering Committee, as we see it.

20 THE COURT: Well, I am not sure, but maybe you will
21 tell me, whether I would be deciding anything like that.

22 MR. TARRICONE: I think we will have to work it out.

23 THE COURT: I set a trial date, and if someone shows
24 up and if there is like a world caucus, I will have to, I
25 suppose, decide who gets to sit where, but ultimately it is

1 whoever the Dial plaintiffs want, I guess.

2 MR. TARRICONE: Your Honor, I'm sure we will work it
3 out.

4 THE COURT: Well, in any event, I will move on that
5 assumption, but it may lead to different views concerning this,
6 and really that gets to Point 3 in your Proposed Agenda. I
7 thought the case was ready to go. I do not know what else
8 needs to be done.

9 MS. BOOKER: So, if I may, your Honor, I think the
10 issue of trial counsel actually is significant in the sense of
11 what we can accomplish here today, and I think I agree that I
12 am not certain that you need to be involved in the decision of
13 who Dial's counsel is.

14 THE COURT: I want to know whether there is some
15 disagreement between potential trial counsel about whether
16 anything else has to be done. We had a fairly extensive
17 pretrial, and the case was, as I understood it, ready to go,
18 and then settlement intervened. But I do not know what else
19 needs to be done or should be done in this case, except if
20 someone new comes in, they look at it and have some different
21 ideas, but I think that is maybe not something I would defer
22 to.

23 MS. BOOKER: Well, and I think that would be the issue
24 as new trial counsel for Dial.

25 THE COURT: What do you want?

1 MS. BOOKER: We want the ability to revise the final
2 pretrial work, including --

3 THE COURT: In what sense?

4 MS. BOOKER: Well, additional motions *in limine*,
5 potentially.

6 THE COURT: No. We have been through --

7 MS. BOOKER: Final jury instructions.

8 THE COURT: Just a moment. I have not done final jury
9 instructions. But we have been through this before. If
10 someone parachutes into the case, that is fine, but, as I said,
11 I am not making those kinds of determinations. On the other
12 hand, everything does not stop and get a redo because someone
13 new potentially is in the case. Insofar as we have dealt with
14 motions *in limine* in the broadest sense, which, of course, are
15 essentially expert motions *in limine*, I think that is done. To
16 the degree we are talking about instructions, we will set a
17 time frame for it, but I have to tell you I have not stopped
18 talking about instructions with counsel until I talk directly
19 to the jury, and so that is an iterative process that goes on
20 throughout.

21 So, apart from those generic categories, what else is
22 there?

23 MS. BOOKER: Well, we only have one other additional
24 request, which would be that we recently learned, meaning this
25 week we learned that potentially Fresenius has made

1 modifications to its equipment and computer system. This is
2 something that we were not aware of when the trial was going to
3 go in February.

4 THE COURT: Well, certainly that is not going to be
5 relevant, is it, as evidence?

6 MS. BOOKER: Well, we believe it is relevant.

7 THE COURT: How is it relevant if it is a kind of
8 adaptation to circumstances?

9 MR. PAYNTER: I think it would be relevant to
10 alternatives, feasible alternatives, your Honor.

11 THE COURT: Probably not. You can put alternatives on
12 yourself, but I am not going to let it come in as a backdoor to
13 avoid what the *Rules of Evidence* make clear, that you do not
14 get to pull the rug out from under somebody who tries to make
15 adaptations. So, I am not sure what you are talking about,
16 number one.

17 Number two, under almost all circumstances that I can
18 conceive it is not something that you are going to get before
19 the jury. But if that is it, we will talk about it.

20 MR. PAYNTER: Yeah, your Honor. This is literally
21 within the last week we learned this, and so, I think it would
22 be premature at this point in time. We have not even
23 confirmed --

24 THE COURT: No. We are setting some schedules now and
25 setting expectations, too, and so I want to understand, apart

1 from it is different now than it was before, what do you think
2 is going on? What is it that makes a difference?

3 MR. PAYNTER: Again, we were told by an industry
4 source that now the machines are programmed such that there
5 have been modifications to the software where they, like we
6 said they should have been, took into account the excess
7 bicarbonate and they actually flash a warning, the number "8,"
8 if GranuFlo is used.

9 Again, at this point it is totally unconfirmed. I do
10 not know if that is the case or is not the case. This was just
11 told to us.

12 THE COURT: So, you have an expert already in this
13 case dealing with the design, right?

14 MR. PAYNTER: Right.

15 THE COURT: And that expert could not figure that out,
16 that it is possible to create a machine that flashes lights and
17 tells you various things?

18 MR. PAYNTER: Your Honor, yes, I think that has been
19 part of the case.

20 THE COURT: So, it is part of the case, and so what
21 you want to do is say to Fresenius, "We are going to introduce
22 this modification that you made under the rubric of feasibility
23 but with the obvious purposes of presenting to the jury that
24 this was an alternative that should have been undertaken at the
25 time," and that is an improper use.

1 MR. PAYNTER: I think to a certain extent we are
2 putting the cart before the horse, because I don't know the
3 details of what has been done, and what we were proposing to
4 ask for was some limited discovery. So, I don't know whether
5 it's something our expert could have come up with. I don't
6 know whether it's --

7 THE COURT: Why couldn't he have? I just came up with
8 it, and I have heard about two minutes of discussion about
9 this. This is, frankly, close to pretextual. But, okay, that
10 is one thing that you want to add. That is it?

11 MR. PAYNTER: Yes. I think that the only other
12 thing -- we certainly don't intend to reinvent the wheels in
13 terms of what has been done pretrial, but certain probably
14 tweaks to the exhibit list, stuff that the Court isn't
15 necessarily involved in, anyway.

16 THE COURT: But that is not stuff that I would get
17 into --

18 MR. PAYNTER: Correct.

19 THE COURT: -- or would not have gotten into at that
20 time, but we are pretty much there, and there is going to have
21 to be some sort of justification for why, apart from somebody
22 new coming in, there are any material changes in this case.

23 MR. PAYNTER: Certainly, I don't think we envision any
24 revisiting of the Court's rulings, if that is what the Court is
25 concerned about. It would be possibly an additional motion *in*

1 *limine* or two, things that we would have --

2 THE COURT: "An additional motion *in limine* or two"?
3 What does that mean? Unless you are just simply, as sometimes
4 lawyers do, saying, "We reserve the right to do this." Bear in
5 mind you do not have a right to do that, and so you are going
6 to have to have a justification for me for why it is that some
7 motion *in limine* or two comes in over the transom late.

8 MR. PAYNTER: Right. So, I think what we had
9 envisioned is potentially some motions *in limine* dealing with
10 causation, because I think --

11 THE COURT: Why haven't we dealt with causation
12 already? We had two weeks of both general causation and
13 specific causation in connection with this case. We did it
14 with Judge Kirpalani. It was fully developed. I am not sure
15 what is new.

16 MR. PAYNTER: Your Honor, there is nothing new. If
17 your Honor is saying that your Honor doesn't want more motions
18 *in limine*, we can certainly deal with --

19 THE COURT: I am saying I have not heard a
20 justification for more. I am a member of the "Clean Plate
21 Club." If somebody offers it up, I will try to eat it, but it
22 had better be nutritious --

23 MR. PAYNTER: Sure.

24 THE COURT: -- and it had better justify my taking the
25 time and everybody else's time.

1 MR. PAYNTER: Sure.

2 THE COURT: -- for some reason other than a new kid
3 has come to town.

4 MR. PAYNTER: So, the issue, from our perspective, is
5 that there is a lot in the way the state case was tried there's
6 a lot of the defendant just kicking up dust about how the
7 plaintiffs are in bad health, obese, they have trouble
8 breathing, little oxygen, et cetera, which, from our point of
9 view, makes them vulnerable. There are nothing in the expert
10 reports in this case connecting these overall health problems
11 as a trigger of the cardiac event.

12 THE COURT: What is the problem with Dial? Because I
13 do not know the specifics.

14 MR. PAYNTER: Dial had cardiac arrest or a myocardial
15 infarction. There is a dispute. But the point is there is a
16 lot of background. The defense experts recite this huge
17 history of how unhealthy these people are, but then when you
18 look at it there is no actual connection between these
19 pre-existing conditions, which we agree make them vulnerable to
20 cardiac events, and actually triggering something on that day.
21 So, they don't actually take that final step and say, for
22 example, "He was obese and this caused his death," and it has
23 the potential to confuse the jury, this kind of idea out there
24 in the ether that, well, they were so unhealthy they might have
25 died anyway, when there's nothing actually connecting these

1 other conditions, there's no causation opinion connecting
2 obesity --

3 THE COURT: I am not sure that it is necessary to have
4 a specific causation opinion in that sense, that this person
5 died because of obesity, particularly when we deal with a
6 complex medical condition.

7 MR. PAYNTER: I would agree that it is not necessary
8 for a defendant to have that, they can certainly just criticize
9 our reports, but our concern is that the implication to the
10 jury is going to be that they died because of obesity, when
11 obesity is not the cause of death. No one has ever died of
12 obesity. It's a risk factor.

13 And so, that was what our motion *in limine*, the one
14 we're considering, would be targeted to. Of course, your
15 Honor, we could also deal with this through jury instructions
16 or as it comes up in trial. But your Honor wanted more
17 details.

18 THE COURT: Right. So, I just do not understand it,
19 frankly, as being meaningful in this context. Is that it now?

20 MR. PAYNTER: Yeah.

21 THE COURT: Have we touched the basic topics?

22 MR. PAYNTER: Yes.

23 THE COURT: So, let me understand it from the defense
24 point of view.

25 MR. DENNING: Good afternoon, your Honor. Roger

1 Denning of Fish & Richardson for defendant Fresenius. We don't
2 think there should be any additional motion practice in this
3 case. The global settlement was reached on Saturday. This
4 case was set to begin jury selection on the following Tuesday,
5 four days later. We were ready for trial. Plaintiffs had
6 ample opportunity to file any motions *in limine*, including the
7 one that they just mentioned, before trial. They didn't, and
8 so we would --

9 THE COURT: Let's just talk about this a bit. Any
10 reason why you cannot give them some information about the
11 newest version or new version of Fresenius machines?

12 MR. DENNING: I don't know a lot of about that, your
13 Honor. I admit factually I don't have a basis for that. I
14 would submit two things. One, it is a subsequent remedial
15 measure and, therefore, is not admissible into evidence in this
16 case.

17 Second, the element that he was talking about, that it
18 would flash an "8" when GranuFlo was used, as I'm sure your
19 Honor remembers from the Dial case he was not treated on
20 GranuFlo. He was treated with NaturaLyte for the last ten
21 months of his treatment, and there's no allegations that
22 GranuFlo had anything to do with his death. So, I don't see
23 how that relates to any issue in this case, other than trying
24 to bring in this backdoor that there were things that Fresenius
25 should have done that they didn't. So, we would submit that

1 that is inappropriate.

2 THE COURT: So, let's just say that I tell them there
3 is no moratorium on motions, at least these two that he has
4 identified, that reasonable people would probably think long
5 and hard about whether to devote their resources to something
6 that is not particularly likely to be successful, but that is
7 their resources, not mine, though it touches on mine, but mine
8 are supposed to be used to resolve whatever disputes people
9 raise here. I just do not see it, but maybe they think there
10 is something there. So, I will let them file a motion with
11 respect to discovery on that; similarly with respect to this
12 question of how you fine tune questions of obesity or other
13 medical conditions which would conceivably lead to risk factors
14 here.

15 Remind me what your person said about what the
16 causation is, specific causation here.

17 MR. DENNING: So, our "person," meaning our expert?

18 THE COURT: Yes.

19 MR. DENNING: Our expert says that Mr. Dial died of a
20 myocardial infarction, of a heart attack.

21 THE COURT: But contributing factors?

22 MR. DENNING: The contributing factors, including an
23 uncontrolled diabetes mellitus, an uncontrolled hypertension,
24 he had left ventricular hypertrophy, he had lipidemia, he was
25 obese. He had a number of risk factors for myocardial

1 infarction, and those risk factors lead to the conclusion that
2 he died of a myocardial infarction.

3 THE COURT: But what caused the myocardial infarction,
4 from your perspective?

5 MR. DENNING: The untreated hypertension over time
6 leads to the myocardial infarction.

7 THE COURT: I don't have it in front of me, so I do
8 not have the expert report clearly in mind.

9 MR. DENNING: Dr. Peter McCullough is a cardiologist
10 in this case. Dr. Duffy was our nephrologist in this case.
11 They both offered that same opinion, that this was a myocardial
12 infarction. I don't have the reports in front of me either,
13 and other than what I said that they say those are risk factors
14 that led to the heart attack, and importantly they say the
15 treatment with NaturaLyte that day did not in their opinion
16 contribute to his death, was the sum and substance of their
17 testimony, from my recollection here today.

18 THE COURT: Well, again, it seems like fishing in a
19 dry hole. On the other hand, they have asked for these two
20 things. I will give them the right to do it or the
21 opportunity, I should say, to do it, and you can respond to it,
22 those two. That is it. Now, I suspect I am not going to say
23 very much different than what I said with respect to obesity
24 before, which is, I do not understand that it is being offered
25 as a cause of the myocardial infarction, and I will police the

1 boundaries of what properly can be introduced in a case like
2 this to suggest that there are other immaterial factors. But
3 it strikes me that a person's obesity is a factor that would be
4 considered here, and then it is a battle of what does the jury
5 thinks of the parties' kind of outline of the general
6 condition. We are not dealing with an either/or situation,
7 frankly. We are dealing with, as I keep saying, complex
8 medical conditions that I suspect will be explored in front of
9 the jury, and if you think I am going to cut that off, you are
10 wrong.

11 MR. PAYNTER: Yes, your Honor. I would just like to
12 say that I think you saw, though, what our concern is, is that
13 there is a lot of talk of risk factors which are kind of
14 classic eggshell plaintiff vulnerabilities and very little
15 discussion, and he couldn't point to anything in their expert
16 reports about what actually triggered that --

17 THE COURT: Whose burden is that? Whose burden is
18 proving causation?

19 MR. PAYNTER: It's our burden.

20 THE COURT: Right. And so, if someone challenges it
21 and says there are these various factors that are out there, it
22 seems to me that that is fair game if your guy puts himself on
23 the stand and he is subject to cross-examination. Now, if
24 somebody says, "Isn't it the case that he had HIV?", of course
25 I would keep that out, or I think I would. I assume that that

1 is not in this case. But someone who is obese has associated
2 conditions which can conduce to myocardial infarction, and
3 whether it did or did not is something that the jury can
4 consider in thinking about whether or not your person's expert
5 opinion that you can lay it off on NaturaLyte is sufficiently
6 credible to be more likely than not.

7 MR. PAYNTER: I understand, your Honor, and I think if
8 we are allowed to put in the motion, we could clarify. But,
9 again, it goes to their experts have no explanation of what
10 triggered his myocardial infarction on that day.

11 THE COURT: Cross-examine him, cross-examine him. You
12 will find that out.

13 MR. PAYNTER: I understand.

14 THE COURT: But you are the one who bears the burden
15 of it --

16 MR. PAYNTER: Absolutely.

17 THE COURT: -- and if the various approaches to
18 attacking considerations erode the credibility of your expert's
19 testimony, then I think it is fair game so long as we are
20 dealing with a condition of this fellow and those conditions
21 can lead to -- or this woman --

22 MR. DENNING: It's a man, your Honor, Carle Dial.

23 THE COURT: Carle Dial is a man. Florella is the
24 personal representative.

25 MR. DENNING: Correct.

1 THE COURT: I am likely to let it come in, but I am
2 not sure that more fine tuning is going to be possible or I am
3 likely to undertake it before what I hear at trial, without
4 some general description, which I think I have already given.
5 But, apparently, you have those two things on your mind. When
6 are you going to file them?

7 MR. PAYNTER: Would 20 days be sufficient, your Honor?

8 THE COURT: It is the rule of parsimony, generally, in
9 criminal cases. Sufficient but no more than necessary is what
10 I am looking for.

11 MR. PAYNTER: If your Honor has a specific deadline in
12 mind, but my co-counsel says 30 days, if the Court would
13 indulge us.

14 THE COURT: So, by October 7 you will file these two.
15 That is it.

16 MR. PAYNTER: Okay.

17 THE COURT: Now, whether Mr. Tarricone, on behalf of
18 the PEC, has some reservations about this or not I leave to the
19 two of you. You presumably have some relationship with the
20 plaintiff in the case that authorizes you to appear here on her
21 behalf, and I am not looking beyond that, unless somebody
22 challenges that.

23 MR. PAYNTER: I think we can talk to
24 Mr. Tarricone. In terms of the trial itself, I think we can
25 work something out. Our only concern is having two teams

1 preparing for trial and not knowing which one will do the
2 trial.

3 THE COURT: Well, there is only going to be one in
4 front of me.

5 MR. PAYNTER: Exactly.

6 THE COURT: You can prepare for the preparation for
7 the trial. So, the 7th for your motion.

8 A response by the 21st?

9 MR. DENNING: That should be fine, your Honor. Thank
10 you.

11 THE COURT: We will talk further about schedules here.
12 I do intend to impanel in this case on the 6th. I have another
13 case the week before, but we will stay tuned on that. But you
14 are held for trial starting the 6th on this.

15 Now, the pending Motion for Summary Judgment, let me
16 tell you my -- I think I did -- but my general approach to this
17 sort of thing, and it was at the time inflected by the
18 imminence of trial. But, ordinarily, I would take something
19 like this sort of summary judgment matter and say we will deal
20 with it as a judgment at the conclusion of the plaintiff's case
21 or in post-trial motions. I have been through it really
22 quickly again. That was the way I thought of it then, although
23 I think it may have been also my view that I did not want to
24 take a month or two out of the trial preparation, because I
25 wanted to get this thing going, that I did not devote more time

1 to it. But having in mind that you are now in the position of
2 the gander upon whom sauce is about to be ladled, do you have
3 any reason why I should revise my views before?

4 MR. DENNING: One point on that, your Honor. Before,
5 when we brought the motion, you had expressed that as a
6 bellwether case you thought it was important to take evidence
7 in a NaturaLyte case and see how it plays out. If the
8 settlement goes forward in October and this is not a bellwether
9 case, we wanted to raise just that fact with you and see if
10 that affected your view of the summary judgment motion and
11 maybe made you more amenable to argument on that before the
12 trial.

13 THE COURT: But this is really kind of what do you do
14 with these people at trial; it is a sufficiency kind of thing.
15 It is flavored by what happened in the trial before Judge
16 Kirpalani, I suppose, and I did read that on a daily basis, but
17 I do not know why I would invest the time in it that way. So,
18 if there is some justification for it, I will think about it,
19 but I am not sure there is a justification for it in terms of
20 simply efficient use of judicial resources. Is there something
21 more there that I am missing?

22 MR. DENNING: Just simply, if it would be more
23 efficient to resolve this on summary judgment than to go
24 through trial, given that it may no longer be a bellwether
25 case, does that shift the evaluation of that issue?

1 THE COURT: My inclination is to say no, as a general
2 proposition, but if there is something that we need to talk
3 about further, I will think about it. I did tell the
4 plaintiffs that they could have a summary kind of argument, not
5 a full argument, with respect to the case again, because I
6 wanted to get it teed up for trial, and I think, unless there
7 is some further motion here that makes a more compelling
8 argument for treating this pretrial than that, this is, at
9 least under one theory, no longer a bellwether case, I am
10 inclined to say I will take up these issues, denying it without
11 prejudice to them being raised in the context of actual
12 evidence at trial.

13 MR. DENNING: Understood. Thank you, your Honor.

14 THE COURT: So, then we talk about pretrial conference
15 kinds of stuff. What do you want, I guess is what I want to
16 know? What do you want in terms of pretrial? We have done
17 most everything here. I understand there is some chatter about
18 instructions. I did work a little bit with jury questions. I
19 will put it to the jury on various kinds of questions, special
20 questions, and I probably will refine the questions that were
21 used in Judge Kirpalani's case in the way in which they are
22 done. But what is simmering here that I am missing?

23 MS. BOOKER: Your Honor, I think we just wanted
24 clarification on whether, to the extent any of that final
25 pretrial worked such as the jury questionnaire had been

1 finalized before, whether new trial counsel had any opportunity
2 to weigh in on it before the February trial date.

3 THE COURT: You can weigh in on it at some point. If
4 you are the new trial counsel, you will weigh in on it at some
5 point. The question for me is what are we doing in terms of
6 timing, what makes sense in terms of timing and scheduling for
7 doing that? I guess I can get it worked up, say, a month ahead
8 of time for some further discussion sometime in January.

9 MS. BOOKER: I think that time frame makes sense for
10 us.

11 THE COURT: All right. As I say, this is an iterative
12 process that continues right until the Jury Clerk takes the
13 questionnaire out of my hands and says, "You cannot have it
14 anymore; we will not have a jury." But I have a pretty good
15 idea, I think, or had a pretty good idea. I have not revisited
16 the good idea I had back then of what I am going to do here.
17 So, we will have some sort of pretrial conference about a month
18 ahead of time on it.

19 Now, what else do we need to talk about?

20 MR. DENNING: That's it. I was going to ask your
21 Honor if we could not have the final pretrial conference in the
22 last two weeks of January. I'm in trial in another court.

23 THE COURT: Sure.

24 MR. DENNING: But if we could have it any time the
25 week of January 16th or earlier would be just fine. I start on

1 January 23rd in another court. Thank you, your Honor.

2 THE COURT: But the 16th is possible?

3 MR. DENNING: The week of the 16th is fine.

4 THE COURT: Are there limitations for any of the
5 potential trial counsel for Dial?

6 MR. PAYNTER: Not in that time frame, your Honor.

7 THE COURT: So, how about January 11th at 2:30? Does
8 that do it?

9 MR. DENNING: That would be fine. Thank you, your
10 Honor.

11 MR. PAYNTER: Yes, your Honor.

12 THE COURT: And we will send out a further order, but
13 I would like from you by the 6th of January some schedule or
14 agenda to be discussed. I will look at these other motions as
15 well. I may have a view about them before that as well, but we
16 will take it up essentially on the 11th. Now, is there likely
17 to be some fine-tuning that someone else could be handling
18 while you are on trial?

19 MR. DENNING: Absolutely, your Honor.

20 THE COURT: Are you going to be principal trial
21 counsel?

22 MR. DENNING: With Mr. Bennett, who I know your Honor
23 knows.

24 THE COURT: Right.

25 MR. DENNING: And Ms. Durant.

1 THE COURT: Okay.

2 MR. DENNING: So, the three of us will be trying the
3 case together. If things need to be done in those last two
4 weeks of January, I'm sure they will be able to handle it.

5 THE COURT: In terms of allocation of responsibilities
6 do I think of you as counsel regarding experts? I know you are
7 expert counsel, but counsel regarding experts; is that the
8 allocation of responsibility?

9 MR. DENNING: I think it's fair that it's probably
10 going to shake out that way.

11 THE COURT: All right. So, we have got that. What
12 else? Anything else we need to talk about?

13 So, I have got this firmly on trial. Maybe there will
14 be an epiphany with respect to summary judgment. I have not
15 heard it yet. It is going to try. It is going to try
16 basically in light of what was done before. I have the two
17 suggestions of some fine-tuning. I am not sure that the tuning
18 has not been done already with respect to associated medical
19 conditions, but if it needs to be restated I guess I will do
20 that with the motion *in limine* and with respect to the
21 discovery and see what there is there.

22 But it does not strike me as being an altogether
23 productive area of further development, but I have not seen a
24 motion, I have just heard this discussion, and you have heard
25 my response, so you will tailor your further initiatives, if

1 there are any, to my response.

2 Anything further?

3 MS. BOOKER: Nothing further.

4 THE COURT: Okay. We will be in recess.

5 THE CLERK: All rise.

6 (The Honorable Court exited the courtroom at 3:05 p.m.)

7 (WHEREUPON, the proceedings adjourned at 3:05 p.m.)

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C E R T I F I C A T E

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Date: 01/06/17

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