

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

**IN RE: FRESENIUS  
GRANUFLO/NATURALYTE  
DIALYSATE PRODUCTS  
LIABILITY LITIGATION**

**MDL No. 1:13-md-2428-DPW**

**This Document Relates to:**

*All Cases*

**SUPPLEMENT TO PEC’S MOTION FOR APPOINTMENT OF ERIC D. GREEN  
AS GLOBAL SETTLEMENT SPECIAL MASTER WITH SUBMISSION OF REVISED  
PROPOSED ORDER**

The PEC previously moved this Court to enter an Order pursuant to FRCP 53 and the broad authority granted by 28 U.S.C. sec. 1407, to appoint Professor Eric D. Green, Esq. as Special Master to perform certain roles as described in that motion concerning the recently announced global agreement-in-principle to settle all personal injury and wrongful death claims in this case. (*See*, “Motion” filed at Doc. 1734). Counsel for FMCNA did not oppose the Motion.

On April 15, 2016 the Court “conditionally allowed” the PEC’s Motion subject to submission of a “fully detailed proposed order”. The PEC thereafter submitted a proposed Order, which was the subject of discussion at a status conference on April 29, 2016. During that status conference, the Court advised the PEC that while generally the Court agreed that Professor Green be appointed as Special Master, the Court did not approve of the PEC’s proposed order and indicated that the PEC could submit a revised proposed order for the Court’s consideration.

Accordingly, the PEC files this Supplement to address issues the Court raised with respect to the original proposed order and to provide the Court with additional information and

exemplar orders from other litigation in further support of the PEC's request that Professor Green be formally appointed as Special Master.

As the PEC's Motion described to the Court, Professor Eric Green is an internationally recognized and respected neutral who has performed the role of Special Master in other litigations. He has no conflicts that would disqualify him from serving, which is verified by his Declaration in support of his appointment, attached hereto as Exhibit "A", which also provides a copy of his curriculum vitae. The link to the website of his firm, [www.resolutionsllc.com](http://www.resolutionsllc.com), provides an overview of the scope and breadth of Professor Green's experience in complex litigation resolution including mass torts.

The PEC's original Motion also informed the Court that Professor Green was acting as a mediator to assist the plaintiffs' leadership and FMCNA reach the agreement-in-principle. Presently, the parties are negotiating the terms of the Master Settlement Agreement along with various forms and components thereto, such as the "release" and "opt-in" forms, and other forms for implementing the settlement. As he is already well acquainted with this mass tort through his role as mediator, he is uniquely suited to perform the roles described below as Special Master for the case.

In order to facilitate completion of the negotiation of the terms the settlement, the PEC believes it is appropriate to appoint a Special Master to act as a mediator and liaison between the Fresenius Defendants and the Plaintiffs' Negotiating Committee so as to assist the parties in finalizing the terms of the Master Settlement Agreement and the various component documents thereto. The appointment of a Special Master to act in this capacity has occurred in other cases involving global settlements of pharmaceutical cases. *See, In re Yasmin and Yaz (Drospirenone Marketing, Sales Practices and Products Liability Litigation)*, MDL 2100 (S.D. Ill.) (Case

Management Order 66, Doc. No. 3481, Aug. 28, 2014) (Attached hereto as Exhibit “B”); In re Hydroxycut Marketing and Sales Practices Litigation, Case No. 09-MD-2087 BTM (S. D. Calif.) (Order Appointing a Special Master, Doc. No. 747, June 16, 2011) (Attached hereto as Exhibit “C”); In Re: Yaz/Yasmin Litigation, No. 1307, September Term, 2009 (Court of Common Pleas of Philadelphia County) (Order January 6, 2012 and Case Management Order No. 28 March 15, 2013) (Each attached hereto as Exhibit “D”).

Further, the PEC believes upon the execution of the Master Settlement Agreement that various post-settlement issues may arise between not only the Fresenius Defendants and the Plaintiffs’ Negotiating Committee, but also involving the Claims Administrator that is to be retained pursuant to the Master Settlement Agreement to administer the settlement and claims process for individual Plaintiffs/Claimants participating in the settlement. The PEC believes that empowering a Special Master to approve an Allocation Plan and to have the further role of presiding over post-settlement disputes that might arise concerning the terms and implementation of the Master Settlement Agreement will be useful and efficient for resolving issues and disputes. The appointment of a Special Master to act in this capacity has also occurred in other global settlements of pharmaceutical and medical device cases. *See, Hydroxycut, supra.* (Special Master having dual role to assist in completing terms of settlement documents, and to preside over post-settlement issues); In re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation, MDL Docket No. 1:10-md-2197 (N. D. Ohio) (Case Management Order No. 17, Doc. No. 636, November 22, 2013) (Attached hereto as Exhibit “E”); In re: Actos (Pioglitazone) Products Liability Litigation, MDL No. 6:11-md-2299 (W. D. La.) (Order Regarding Settlement Agreement and Deadlines, Doc. No. 5552, April 28, 2015) (Attached hereto as Exhibit “F”); In

re: Vioxx Products Liability Litigation, MDL No. 1657 (E. D. La.) (Order, Doc. No. 13228, January 14, 2008) (Attached hereto as Exhibit “G”).

The PEC therefore requests that Professor Green, as the Court-appointed Special Master be empowered to:

a. Assist the parties to resolve disputes relating to the final terms of the Master Settlement Agreement that cannot be settled by the parties on their own despite best faith efforts;

b. Facilitate the implementation of the terms of the Master Settlement Agreement by and between the Fresenius Defendants and the participating Plaintiffs/Claimants and the Claims Administrator retained;

c. Facilitate the creation of, and approve, an Allocation Plan for the distribution of settlement funds to the individual claimants who meet eligibility criteria;

d. Facilitate the resolution of any issues that might arise concerning the parties’ efforts to establish a reasonable and efficient process for the production of various medical records and records containing product identification information that Plaintiffs/Claimants may be required to produce to the Claims Administrator pursuant to the terms of the Master Settlement Agreement, including the production of such records that may be in the possession, custody or control of the Fresenius Defendants;

e. Preside over the post settlement allocations of the global settlement amount to the Plaintiffs/Claimants pursuant to a final settlement Allocation Plan;

f. Resolve any issues or questions raised by any counsel for Plaintiffs/Claimants related to the final settlement Allocation Plan, including the implementation and application thereof;

g. Oversee the claims administration process, in concert with the plaintiffs' leadership and the Claims Administration firm retained to administer the settlement, with power that includes, but is not limited to, his right to:

- i. Resolve appeals from compensation awards; and
- ii. Resolve questions or conflicts concerning the sufficiency of submissions in support of compensation awards

h. Address other matters generally related to the settlement process appropriate for the Special Master as he and/or the plaintiffs' leadership may identify.

With respect to determinations made by the Claim Administrator that are appealed to the Special Master for resolution, the Parties intend the Master Settlement Agreement to be self-executing and that reviews of determinations made by the Claims Administrator shall generally be conclusive for any given claim. However, it is contemplated that the Special Master be empowered to review determinations by the Claims Administrator so as to provide Claimants with an "appellate" right in lieu of Claims Administrator determinations being final and conclusive.

The PEC also recognizes that FRCP 53 provides that determinations made by a Special Master are to be reviewed pursuant to "clear error" standard of review. The PEC's revised proposed order therefore provides that no Plaintiff/Claimant shall seek review by this Court of a determination made by the Special Master unless the attorney for the Plaintiff/Claimant, aware of the "clear error" standard of review set forth in FRCP 53 and applicable to Court review of the Special Master's determination of eligibility or amount of payment to an individual plaintiff, has a good faith belief that the Special Master's findings and application of the Allocation Plan with respect to the particular claimant was clearly erroneous. The PEC believes that by setting forth the standard of review of a Special Master's determination under FRCP 53 in the Order, that

frivolous appeals to this Court shall be greatly minimized while at the same time preserving an appellate right to this Court for appeals that clearly appear to be meritorious.

Professor Green will be prepared to report from time to time to this Court, as requested, with a status of the settlement program and to address any other matters as may arise relating to same.

The PEC's prior Motion informed the Court that, if appointed, Professor Green has generously offered to perform his role *pro bono*, and this offer remains.

For the foregoing reasons, it is in the interests of judicial and economic efficiency and the furtherance of the parties' settlement-in-principle to appoint Eric D. Green as Settlement Special Master.

Dated: May 19, 2016

Respectfully submitted,

/s/ Anthony Tarricone  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served via electronic mail to counsel of record for the Fresenius Defendants as follows:

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