

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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In Re: Fresenius Granuflo/Naturalyte Dialysate Products Liability Litigation	:	MDL No. 2428
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APPLIES TO ALL CASES	:	
	:	
	X	

**PLAINTIFFS’ MOTION TO ESTABLISH QUALIFIED SETTLEMENT FUND FOR  
GRANUFLO/NATURALYTE SETTLEMENT AND RESOLUTION PROGRAM AND  
TO APPOINT QSF ADMINISTRATOR**

Anthony Tarricone, Esq. (“Counsel”), Liaison Counsel for Plaintiff’s Executive Committee, on behalf of the Plaintiff’s Negotiating Committee (“PNC”), and on behalf of all claimants settling claims (“Claimants”) against Fresenius Medical Care Holdings, Inc., for itself and on behalf of all entities and persons defined as “Fresenius” in the Master Settlement Agreement dated August 2-3, 2016 (the “Defendant”), moves this Court for an Order to: (i) establish a Qualified Settlement Fund, which shall be called the Granuflo Settlement Fund (the “Fund”); (ii) to appoint Providio MediSolutions, LLC as the administrator for the Fund (“QSF Administrator”) pursuant to the terms, conditions, and restrictions of the Master Settlement Agreement and this Motion; (iii) to appoint Esquire Bank (the “Bank”) as the financial institution that will hold the monies deposited into the Fund (the “Settlement Funds”); and (iv) to approve investment vehicles for the Fund. In support of this Motion, Counsel respectfully states as follows:

1. Claimants are seeking damages from Defendant alleging personal injury from the use of the dialysis products Granuflo and NaturaLyte (collectively, “Granuflo/NaturaLyte

Claims”) through claims and various legal actions in state and federal courts, including but not limited to actions consolidated in this Court by the Judicial Panel on MultiDistrict Litigation by a transfer order pursuant to 28 U.S.C. § 1407.

2. Defendant and the PNC entered into a Settlement Agreement dated August 2-3, 2016 (the “MSA”), which establishes a global private settlement program to resolve Granuflo and NaturaLyte Claims (whether filed or unfiled) of U.S. Claimants against Defendant and through which the Claimants have agreed to settle their Granuflo/NaturaLyte Claims.

3. Consistent with the terms of the MSA, and if the MSA is not voided, the amount of the Settlement Funds to be deposited by Defendant into the Fund is \$222,500,000.00 (the gross settlement of \$250,000,000 less the 11% holdback for the Common Benefit Assessment pursuant to Case Management Order 14 as modified by Order dated September 12, 2016). The Court should establish this Fund to receive the Settlement Funds in satisfaction of the terms and conditions of the MSA to resolve the Granuflo/NaturaLyte Claims of the Claimants and allowing for the final disbursement of the Settlement Funds to the Claimants once all allocations and final disbursements are determined. All settlement payment obligations of the Defendant under the MSA are satisfied once the Settlement Funds are transferred to the Fund. Defendant will have no responsibility for the monies in the Fund, its investments, administration or disbursements therefrom. Defendant shall have no responsibility for any costs, expenses, fees, or taxes associated with the Fund, QSF Administrator, or Bank.

4. The Fund shall be a Qualified Settlement Fund as described in Treas. Reg. Section 1.468B-1, established by order of this Court, and the Fund shall remain subject to the continuing jurisdiction of this Court.

5. This Court has jurisdiction over this matter under Treas. Reg. Section 1.468B-1(c)(1), which states in relevant part that a Qualified Settlement Fund “is established pursuant to an order of, or is approved by, the United States, any state (including the District of Columbia), territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) . . . and is subject to the continuing jurisdiction of that governmental authority.”

6. Claimants request that the Court approve Providio MediSolutions, LLC (“Providio”) as the “QSF Administrator”. Providio possesses the requisite resources and experience to properly and effectively administer the Fund, as described in the accompanying **Affidavit of Ginger Susman, Esq.**, President of Providio. Providio’s address is 5613 DTC Parkway, Suite 700, Greenwood Village, Colorado, 80111. Providio submits personally to the jurisdiction of this Court for purposes of this matter. Upon the dissolution or bankruptcy of Providio, its appointment as QSF Administrator shall terminate and the Claimants and Defendant will seek Court approval of their nominated successor QSF Administrator.

7. The Fund, by and through the QSF Administrator, shall only make payments to the Claimants (by and through their counsel), counsel to Claimants, any entities asserting a claim of subrogation in accordance with the terms of the MSA, the **lien resolution administrator**, the QSF administrator and any valid third party assignee for the purpose of funding a special needs trust, pooled trust, structured settlement annuity or similar vehicle permitted within the meaning of Section 130(c) of the Internal Revenue Code to the qualified assignee.

8. The Fund, by and through the QSF Administrator, may purchase and assign any structured settlements created under any Release Agreements and/or in connection with attorney

fees earned by any Claimant's counsel. Any structured settlement annuity contract shall be issued by a life insurance company that is rated A+ or better by A.M. Best Company.<sup>1</sup>

9. The Granuflo/NaturaLyte Claims made against the Defendant are made on account of physical bodily injury and arise out of alleged liability in tort or violation of law.

10. The Settlement Funds are the sole property of the Fund. Until such time as monies are distributed, the Claimants and their counsel shall not possess any rights to demand or receive any portion of the Settlement Funds or to mortgage, pledge, or encumber the same in any manner. To the extent possible, this Motion shall be construed so as to prevent the Claimants and their Counsel from being in constructive receipt, as determined under federal income tax principles, of any amounts held by the Fund.

11. The QSF Administrator shall be indemnified and held harmless by the Claimants from any claims made by any alleged lien holder, or other person or entity that attempts to assert a right of payment, reimbursement or garnishment against the Fund. Should the QSF Administrator be named as a party to, or threatened to be made a party to, any threatened, pending or completed action, suit or proceeding of any kind, whether civil, administrative or arbitative, and whether brought by or against or otherwise involving the Fund, by reason of the QSF Administrator having served in any capacity on behalf of the Fund, the QSF Administrator shall be indemnified and held harmless by the Claimants against reasonable expenses, costs and fees (including attorney fees), judgment, awards, costs, amounts paid in settlement, and liabilities of all kinds incurred by the

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<sup>1</sup> Structured Settlement Payments are assigned to a qualified assignee by entering into qualified assignments of such structured settlement payments within the meaning of Section 130(c) of the Internal Revenue Code. The qualified assignee shall, respecting each person who is to receive periodic payments under a settlement agreement, purchase one or more qualified funding assets within the meaning of Section 130(d) of the Internal Revenue Code to fund any structured settlement payments assigned to the qualified assignee.

QSF Administrator in connection with or resulting from such actual or threatened action, suit or proceeding; except to the extent that it is finally determined by this Court that the QSF Administrator was grossly negligent or acted with willful misconduct in connection with the administration of this Fund.

12. Claimants request that no bond be required, provided that all monies received by the Fund, which includes all principal and interest earned thereon, shall be deposited in an account held in custody at Esquire Bank<sup>2</sup> (the “Bank”), a financial institution doing business in Garden City, New York, for the benefit of, and titled in the legal name of, the Fund. The Bank shall invest monies deposited pursuant to the instructions of the QSF Administrator. Such investments may be (a) with third parties in instruments/securities comprised of United States Agency, Government Sponsored Enterprises or Treasury debt securities or obligations (maturities not to exceed five years at a time of purchase) or mutual funds invested solely in such instruments (average maturity not to exceed five years); (b) with third parties in cash equivalent securities including SEC registered money market funds and collateralized money market accounts; and/or (c) in one or more non-interest bearing corporate accounts at the Bank up to current FDIC insurance limits. Such funds shall be invested by the QSF Administrator such that safety of the principal investment policy is implemented. The Bank shall be responsible for following the written investment instructions of the QSF Administrator. Notwithstanding the foregoing, the Bank shall not be allowed to distribute any income or principal from the Fund except upon written instructions of the QSF Administrator, or, if requested, upon the order of this Court upon the joint motion of the

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<sup>2</sup> Esquire Bank is uniquely qualified to serve as depository for the funds as it has a Qualified Settlement Fund banking program managed by knowledgeable senior employees; customized QSF account applications and investments; and experience handling more than 50 QSFs, including multi-plaintiff litigations such as Chinese Dry Wall, Avandia, Yaz, Actos, Topamax, Chantix, and Seroquel.

parties. The QSF Administrator retains the right to remove the Bank with or without cause, in its sole and absolute discretion. The QSF Administrator may designate a replacement bank upon the written consent of the PNC. In the event of such replacement, the terms and conditions of this paragraph 13, including without limitation, those addressing bond requirements, investments, and distributions from the Fund, shall apply to any such replacement bank.

13. The QSF Administrator is permitted to retain for itself as partial payment for its services all excess interest accrued to the Fund(if any), after the disbursement of Claimant funds along with associated payment of fees, expenses and taxes for the Fund.

14. The QSF Administrator shall be authorized to distribute all attorney fees and litigation expenses to counsel for Claimants consistent with existing contingency fee contracts and to the extent required by law, and, where required by law in an individual case, upon Court approval on motion of a Claimant's counsel.

15. All taxes on the income of the Fund and expenses and costs incurred in connection with the taxation of the Fund (including, without limitation, the expenses of tax attorneys and accountants) shall be paid out of the Fund, shall be considered to be a cost of administration of the settlement, and shall be paid as instructed by the QSF Administrator.

16. Upon request, the QSF Administrator will prepare and deliver Fund Statements ("Statements") to Counsel and/or this Court. The Statements shall include a statement of receipts, investment earnings, and disbursements. The QSF Administrator shall provide the Statement no later than ten (10) business days following the request.

17. The QSF Administrator shall have the right to rely upon any affidavit, certificate, letter, notice, electronic mail or other document believed by the QSF Administrator to be genuine and sufficient, and upon any other evidence believed by the QSF Administrator, in its reasonable

judgment, to be genuine and sufficient, which may be provided to the QSF Administrator by Counsel and/or other members of the PNC.

18. Upon final distribution of all monies paid into the Fund, the QSF Administrator shall take appropriate steps to wind down the Fund and thereafter be discharged from any further responsibility with respect to the Fund.

19. The QSF Administrator will obtain a Federal Taxpayer Identification Number for the Fund upon the execution of an Order by this Court establishing the Fund.

**WHEREFORE**, Counsel and Claimants respectfully request that the Court consent to take continuing jurisdiction over the Fund pursuant to Treas. Reg. Section 1.468B-1(c)(1), and issue an Order (attached hereto as Exhibit 1) which:

1. Establishes said Fund as a Qualified Settlement Fund within the meaning of Treasury Regulation Section 1.468B-1;

2. Appoints Providio MediSolutions, LLC as QSF Administrator pursuant to the terms, conditions and restrictions of this Motion and the MSA, thereby granting the QSF Administrator the authority to conduct any and all activities necessary to administer this Fund as described in this Motion;

3. Authorizes the QSF Administrator to establish a bank account for the Fund with Bank and to effect qualified assignments of any resulting structured settlement liability within the meaning of Section 130(c) of the Internal Revenue Code to the qualified assignee;

4. Authorizes the QSF Administrator to distribute all Settlement Funds in accordance with the terms and conditions of this Motion and the MSA; and

5. Authorizes the QSF Administrator, upon final distribution of Settlement Funds, to take appropriate steps to wind down the Fund and thereafter discharging the QSF Administrator from any further responsibility with respect to the Fund.

**DATED** this 7<sup>th</sup> day of October, 2016.

Respectfully submitted,

/s/ Anthony Tarricone  
Anthony Tarricone, Esq.  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been duly served upon the following individuals via electronic mail on the 7<sup>th</sup> day of October, 2016.

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/s/ Anthony Tarricone  
Anthony Tarricone, Esq.

