

**UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION**

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

MDL No. 2428

TRANSFER ORDER

Before the Panel:* Plaintiffs and several defendants in the three actions listed on Schedule A move under Panel Rule 7.1 to vacate our orders that conditionally transferred those actions to MDL No. 2428. The responding defendants (collectively, Fresenius)¹ oppose the motions.

In their motions to vacate, plaintiffs in the actions pending in the Southern District of Alabama (*Moore*) and the Western District of Oklahoma (*Cook*) principally argue that transfer should not take place unless and until their motions for remand to state court are decided. We have held repeatedly that a motion for remand alone is generally an insufficient basis to vacate a conditional transfer order.² Indeed, we have rejected similar arguments in support of motions to vacate conditional transfer orders in this litigation. *See, e.g., In re Fresenius GranuFlo/NaturaLyte Dialysate Prods. Liab. Litig.*, MDL No. 2428, ECF No. 660 (J.P.M.L. Jun. 4, 2014) (Transfer Order). Plaintiffs in *Cook* can present their motion for remand to the transferee judge. *See, e.g., In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 170 F. Supp. 2d 1346, 1347-48 (J.P.M.L. 2001). The transferor court denied the motion to remand in the *Moore* action in an order issued on October 27, 2014.

Several non-Fresenius defendants in the *Cook* action also argue that transfer is not warranted because they are separate corporate entities from Fresenius that do not manufacture or design

* Judge Charles R. Breyer took no part in the decision of this matter.

¹ The responding defendants that oppose the motions to vacate include: Fresenius Medical Care Holdings, Inc. d/b/a Fresenius Medical Care North America; Fresenius USA, Inc.; Fresenius USA Manufacturing, Inc.; Fresenius USA Marketing, Inc.; Bio-Medical Applications of Alabama, Inc. d/b/a Fresenius Medical Care Thomasville; Fresenius Medical Care Pharmacy Services; and Fresenius Medical Care OKCD, LLC. Fresenius also has indicated that the ninety-nine “in-state” clinic defendants named in the Middle District of Louisiana action join its opposition to the motion to vacate as to that action.

² Panel Rule 2.1(d) expressly provides that the pendency of a conditional transfer order does not limit the pretrial jurisdiction of the court in which the subject action is pending. Between the date a remand motion is filed and the date that transfer of the action to the MDL is finalized, a court generally has adequate time to rule on a remand motion if it decides to do so.

-2-

GranuFlo Acid Concentrate (GranuFlo) or NaturaLyte Liquid Acid Concentrate (NaturaLyte). Instead, Defendant Renal Treatment Centers-West, Inc., provides dialysis services to patients. Defendants Muskogee Regional Medical Center LLC and its “John Doe” Medical Director assert that they do not even offer such services and have filed motions to dismiss on this and other grounds. All of these defendants contend that *Cook* will involve unique questions of fact not shared with the actions in the MDL. They also argue that the Panel should not require them to participate in a nationwide MDL in which they are parties to only one action.

None of these arguments is persuasive. *Cook*, like all the actions in MDL No. 2428, involves allegations that GranuFlo and NaturaLyte were defective and that Fresenius failed to provide adequate warnings about the risks associated with these products. The claims against the non-Fresenius defendants, while distinct, may implicate these core factual questions. And, other actions pending in the MDL involve similar claims against dialysis centers and medical providers. In any event, transfer under Section 1407 does not require a complete identity or even a majority of common factual issues as a prerequisite to transfer. *See In re National Sec. Agency Telecomms. Records Litig.*, 444 F. Supp. 2d 1332, 1334 (J.P.M.L. 2006). As with plaintiffs’ remand motion, defendants can raise their motions to dismiss with the transferee court.

The plaintiff in the action pending in the Middle District of Louisiana (*State of Louisiana*) also argues that a pending remand motion should preclude transfer of this action. For the reasons previously stated, plaintiff can present its arguments for remand to the transferee court. Plaintiff also argues, though, that *State of Louisiana* involves unique factual and legal issues because the gravamen of that action is that Fresenius and some ninety-nine in-state dialysis clinics and corporations administering GranuFlo or NaturaLyte used false, deceptive, fraudulent, and misleading practices in the promotion, marketing, sale, and administration of their dialysate products and services within the State of Louisiana. In contrast, most of the actions in the MDL are personal injury actions.

This distinction alone is not an impediment to transfer. *See In re Fresenius GranuFlo/NaturaLyte Dialysate Prods. Liab. Litig.*, MDL No. 2428, ECF No. 660, at 1-2 (J.P.M.L. Jun. 4, 2014) (rejecting Mississippi Attorney General’s argument that an action asserting a claim under the Mississippi Consumer Protection Act should not be centralized with personal injury actions); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 1871, ECF No. 572, at 1 (J.P.M.L. May 20, 2011) (rejecting argument by the State of Louisiana that its action was not a personal injury action). The pleadings demonstrate that, while plaintiff in *State of Louisiana* may seek different relief, its claims are based on the same underlying facts as the actions already in MDL No. 2428—namely, that use of GranuFlo or NaturaLyte allegedly results in alkalosis in patients, and that Fresenius failed to provide adequate warnings regarding the risks associated with these products. As we have repeatedly observed, the existence of unique claims is not a bar to transfer where common factual issues exist. *See, e.g., In re MF Global Holdings Ltd. Inv. Litig.*, 857 F. Supp. 2d 1378, 1380 (J.P.M.L. 2012) (“Where actions share factual questions, the Panel has long held that the presence of disparate legal theories is no reason to deny transfer.”).

-3-

After considering the argument of counsel, we find that the actions listed on Schedule A involve common questions of fact with the actions previously transferred to MDL No. 2428, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. In our order centralizing this litigation, we held that the District of Massachusetts was an appropriate Section 1407 forum for actions sharing factual questions arising out of allegations that plaintiffs suffered injury or death caused by the use of GranuFlo or NaturaLyte during hemodialysis, which allegedly may cause metabolic alkalosis in patients resulting in low blood pressure, hypokalemia, hypoxemia, hypercapnia, cardiac arrhythmia, or cardiopulmonary arrest. *See In re Fresenius GranuFlo/NaturaLyte Dialysate Prods. Liab. Litig.*, 935 F. Supp. 2d 1362 (J.P.M.L. 2013). The actions listed on Schedule A involve similar allegations that plaintiffs or their decedents (or, in *State of Louisiana*, citizens of the State of Louisiana) suffered or were placed at an increased risk of suffering metabolic alkalosis as a result of the use of GranuFlo and/or NaturaLyte during hemodialysis. These actions likewise involve factual questions relating to whether these products were defectively designed or manufactured, whether Fresenius, the manufacturer of these dialysate products, knew or should have known of the alleged propensity of these products to cause injury, and whether it provided adequate instructions and warnings with these products.

IT IS THEREFORE ORDERED that the actions listed on Schedule A are transferred to the District of Massachusetts and, with the consent of that court, assigned to the Honorable Douglas P. Woodlock for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION



Sarah S. Vance
Chair

Marjorie O. Rendell
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**IN RE: FRESENIUS GRANUFLO/NATURALYTE
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MDL No. 2428

SCHEDULE A

Southern District of Alabama

MOORE v. FRESENIUS MEDICAL CARE HOLDINGS, INC., ET AL.,
C.A. No. 1:14-00381

Middle District of Louisiana

THE STATE OF LOUISIANA v. FRESENIUS MEDICAL CARE HOLDINGS,
INC., ET AL., C.A. No. 3:14-00490

Western District of Oklahoma

COOK, ET AL. v. FRESENIUS USA, INC., ET AL., C.A. No. 5:14-01005