

UNITED STATES DISTRICT COURT
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

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PROPOSED CASE MANAGEMENT ORDER NO. 8
(PRIVILEGE PROTOCOL)

This Order is entered to set forth guidelines and protocols that shall govern (1) assertions of the attorney-client privilege and/or the work product doctrine; (2) the protocol that shall be followed regarding the preparation of privilege logs pursuant to Fed. R. Civ. P. 26(b)(5)(A)(i)-(ii); and (3) the method for resolving privilege disputes by and among Plaintiffs and Defendants.

I. GOVERNING LAW

A. Attorney-Client Privilege:

1. The parties agree that Massachusetts law will govern the existence and scope of the attorney-client privilege.

B. The Work Product Doctrine:

2. The parties agree that Federal law will govern the assertion of and claim to protection under the work product doctrine.

II. PROTOCOLS GOVERNING ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

A. Redactions Relating to Attorney-Client Privilege and Work Product Doctrine

3. The parties shall redact only those portions of a document that fall within the scope of the work product doctrine and/or attorney-client privilege or as necessary to comply with foreign privacy and data protection laws relating to documents produced by the European Fresenius Defendants, and not the entire document or page unless the entire document or page is within such scope.

4. When a document is redacted on the basis of privilege, the producing party shall list the information pertaining to the redacted portion of the document on a privilege log as set forth in Paragraph 5 below. If a redaction is subsequently changed by order of the Court or by agreement of the parties, the party claiming privilege shall provide a replacement document with the redaction removed bearing the same bates number as the original document, with an associated load file containing the replacement image.

B. Privilege Log

5. The parties shall produce privilege logs in Excel format or a similar electronic format that allows text searching, sorting and organization of data. Consistent with Rule 26(b)(5)(A) and the Advisory Committee Comments thereto, and subject to all relevant foreign privacy and data protection laws¹, a privilege log shall contain, where available, the following:

- a. The document date;
- b. The source of the document;
- c. The identity of the person(s) who prepared the document;
- d. The identity of any person(s) to whom the document was disseminated;
- e. The subject/title and document type;
- f. The specific privilege or protection allegedly applicable to the document;

¹ In the event that foreign privacy or data protection laws prohibit the specific identification of a party or parties to a communication, sufficient information will be provided to identify the basis for the privilege and to enable other parties to assess the claim.

- g. Information pertinent to the applicability of the privilege or protection sufficient to enable the other party to evaluate the applicability of the claimed privilege or protection; and,
 - h. The number of pages in any document withheld for privilege.
6. The producing party will produce an updated privilege log within 30 days of each production.

The parties shall have the right to request an expedited privilege log, but not sooner than 15 days, for certain custodians or document sources for purposes of deposition preparation. In addition, the parties shall have the right to request an extension of the privilege log deadline, not to exceed 45 days, for document productions involving a large volume of privileged documents. If the producing party objects to the expedited or extension request, the parties will meet and confer in good faith in an attempt to resolve the disagreement without court intervention. If the parties cannot reach an agreement, the requesting party may seek court relief. Privilege logs shall be supplemented under Fed. R. Civ. P. 26 (e)(1) as to any document that becomes producible thereafter.

C. Challenges to Claims of Privilege and/or Work Product Doctrine

7. A receiving party may challenge a redaction or claim of privilege at any time after the document or a privilege log identifying the document subject to such redaction or claim is produced. A receiving party does not waive its right to challenge a redaction or claim of privilege by electing not to challenge promptly after the subject document or privilege log identifying it has been produced.

8. A receiving party may challenge a producing party's redaction or designation of privilege from production by notifying the producing party, in writing (a letter to lead and liaison

counsel delivered by email shall be sufficient), of its good faith belief that the redaction or designation was not proper, including a brief explanation of the basis of the dispute with regard to each redaction or claim of privilege at issue.

9. Thereafter the producing party shall have seven (7) days to review the redacted or designated material, to consider the circumstances, and to meet and confer with the receiving party. If no resolution can be reached after those seven (7) days, the receiving party may file and serve a motion that challenges the redaction or claim of privilege. The burden of proof in connection with any claim of privilege shall be on the producing party.

III. GENERAL PROVISIONS

10. If any party produces a privileged document through mistake, inadvertence or otherwise, the producing party may have the privileged document returned and/or destroyed by the receiving party by following the procedure set out in CMO No. 5 or consistent with agreement of the parties or further order of the Court.

SO ORDERED this 28th day of January, 2014.


DOUGLAS P. WOODLOCK, J.

