

**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

**MOTION OF THE GCL LEADERSHIP TO MODIFY CMO 14 RELATING
TO THE PERCENTAGE HOLDBACK TO BE PAID INTO THE
GRANUFLO MDL 2428 COMMON BENEFIT ACCOUNT**

Introduction

The GCL Leadership for this case (the “GCL Leadership” is defined in CMO 14 as the PEC in this MDL and the Mass-PSC for the Massachusetts GranuFlo State Litigation) hereby requests the Court to modify CMO 14 by increasing the overall percentage “holdback” for attorneys’ fees and costs from 9% to 11%. As the Court may recall, the present CMO 14 provisionally provides that 7% of the holdback be allocated for attorneys’ fees and 2% of the holdback be allocated for costs. *See*, CMO 14 at ¶ 38.¹

The proposal that the GCL makes is that the 2% increase in the total holdback percentage all be allocated for costs, so that the requested 11% holdback would be allocated 7% for attorneys’ fees and 4% for costs. The reason for this request is that the amount of common benefit costs incurred for this litigation well exceeds the 2% provisionally allocated for such by the GCL when it originally moved for the entry of a CMO 14. The original motion for entry of the Order that

¹ “For any case or claim subject to an Assessment under the terms of this Order, the amount of the Assessment shall be nine percent (9%) of the Gross Monetary Recovery, or such other amount as ordered pursuant to Paragraph 44 of this Order. This total Assessment shall be provisionally allocated as seven percent (7%) to compensate for common benefit fees, and two percent (2%) to compensate for common benefit expenses, and is subject to the right of PEC of this MDL and the Mass-PSC to request reallocation of the nine percent (9%) total Assessment between fees and expenses at the time the application for disbursement is made.”

became CMO 14 was filed in 2014, and since that time the amount of costs incurred well exceeds the amount anticipated to be incurred. In fact, approximately \$11.6 Million in audited costs have been incurred for the case, and with the present provisional 2% allocation for costs applied to the aggregate settlement value of the case of \$250 Million, the calculation is that \$5 million in costs will be reimbursed, leaving a shortfall of approximately \$6.6 million. The instant proposal would result in \$10 Million of the \$11.6 million costs incurred be reimbursed through the portion of the common benefit holdback allocated to costs.

The GCL Leadership recognizes that some of this shortfall could be addressed by changing the allocation of the present 9% holdback to a larger percentage allocated for costs and a smaller percentage allocated for attorneys' fees, but believes this alternative would not be fair and equitable because the amount of time incurred in litigating this case well exceeds the value of the 7% amount that is provisionally allocated to attorneys' fees. As of the present, in excess of 150,000 common benefit hours were incurred in litigating this case. Using the present 7% allocation for attorneys' fees with the \$250 Million aggregate settlement, this produces an attorneys' fee of \$17.5 million. The average hourly rate for 150,000 hours compensated at \$17.5 million is \$116.66 per hour. Were the shortfall for reimbursing costs be made up by reducing the allocation to the attorneys' fee component, e.g., reallocating \$5 Million from the attorneys' fee component to the cost component, that would leave \$12.5 million for attorneys' fees, and reduce the hourly rate to \$83.33 per hour.

Even with the proposed increase of the holdback to 11% with 4% allocated for costs, there will still be a shortfall to pay for costs of about \$1.6 Million, which the GLC Leadership plans to address by reducing the amount available for attorneys' fees. This would mean that the \$17.5

million allocated for attorneys' fees would be reduced to \$15.9 million. At that amount, the average hourly rate computes to \$106 per hour.

The GCL Leadership recognizes that the litigation of a case like this occurs on a contingent basis, but nevertheless, where an aggregate settlement is achieved as here, the common benefit expenses are usually, properly reimbursed from the common benefit holdback. The instant request is one that merely governs the amount that Defendants will pay into the Common Benefit Fund when the settlement is funded, *to be held in escrow*, still subject to the Court adjudicating a Fee and Cost Petition at a late date. *See*, CMO 14 at §V., ¶ 28 governing the filing of a Fee Petition in this case.²

Certainly, if at the time the Court rules on the Fee and Cost Petition in this case the Court determines that the holdback in escrow was excessive, the Court can order a refund. However, to not provide for the escrow of the funds now, when the settlement is funded, presents the problem that if the Court were to determine that a higher holdback should have been ordered, it could be difficult for the GCL Leadership to recover money that was already disbursed and not held in escrow.

Further, it is also noted that the Master Settlement Agreement in the case contains specific provisions noting that the GCL Leadership might move to amend CMO 14 to change the holdback

² "A Joint Petition for an Award of Fees and Reimbursement of Expenses from the *GranuFlo Account* shall be made to this Court if and when this Court authorizes the filing of such a Joint Petition. Only Eligible-Participating Counsel shall have a right to request inclusion in the Joint Petition for an award of fees and reimbursement of expenses, subject to the requirement of this Order that to request inclusion in such a Joint Petition, the attorney must have performed common benefit work and incurred common benefit expenses and only the common benefit work and common benefit expense incurred shall be included in the Joint Petition. In other words, if the attorney is not bound to the Assessment the attorney has no right to seek common benefit fees and common benefit expense reimbursement. To the extent an Eligible Participating Counsel disagrees with the manner and the extent to which they may be included or not included in a Joint Petition that is filed, they reserve their rights at that time to request leave of this Court to file a supplemental petition or objection to the Joint Petition to express any further information that they think is relevant to the matter and extent to which they are or are not included in the Joint Petition. No Counsel shall file any request for an award of fees or expenses from the *GranuFlo Account* other than as and when authorized by this Court."

percentage. Defendants were notified during negotiations to finalize the Master Settlement Agreement that this motion would likely be filed.

Finally, CMO 14 reserved the right for the GCL to seek a modification of the holdback percentage. Prior to the filing of this motion, the GCL Leadership held a meeting to consult about its filing, and voted in favor of the filing. *See*, CMO 14 at ¶ 44.³

As such, the GCL Leadership submits that the increase in the total holdback percentage under CMO 14 is appropriate for the reasons set-forth in this motion.

Brief Discussion as to How and Why GCL Leadership Incurred Approximately \$11.6 Million in Common Benefit Costs and Expended Approximately 150,000 Hours to Litigate this Case

As this Court is well-aware, MDL-2428, commenced by transfer of the Judicial Panel on Multi District Litigation ("JPML") to this Court by order dated March 29, 2013. Since that time, up until the stay of the action in light of the settlement, the GCL Leadership engaged in approximately 30 months of intense discovery, including the review of 20-plus million pages of documents produced, 100-plus "generic" and case-specific depositions taken by the parties, expert reports, expert discovery, *Daubert* motions (and rulings on the same), summary judgment motions (and rulings on the same), Bellwether trial preparations, motions *in limine* (including oral argument and rulings on the same), a trial in the coordinated Massachusetts state court case, and then shortly before the first MDL trial was set to commence, the parties agreed to pursue settlement resulting in the entry of the stay.

³ "This Assessment represents a hold back (See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 467 F.Supp.2d 256, 266 (2d. Cir. 2006) and shall not be altered in any way unless each of the following occurs: (1) the GCL Leadership is consulted and provided an opportunity to be heard at a formally announced meeting prior to the filing of any motion to change the Assessment amount; (2) the GCL Leadership approves the proposed change to the Assessment by a majority vote; (3) a noticed motion (including notice to Defendant's Liaison Counsel) with an opportunity to be heard is granted by the Court, and (4) this Court, upon good-cause shown, amends this Order."

With the assistance of Professor Eric D. Green as a mediator, in February 2016, the parties reached a memorandum of understanding for the resolution of cases pending in this MDL, in the coordinated Massachusetts state court litigation and the cases pending in St. Louis. Since that date, the terms of the settlement have been negotiated, reaching a final signed Master Settlement Agreement signed on August 2-3, 2016. As noted above, the aggregate settlement of \$250 million was accomplished with the expenditure of 150,000 hours of time and approximately \$11.6 million of costs.

To this end, given that the settlement, if implemented after the Opt-In deadline of September 15 2016, will be funded soon thereafter, the GCL Leadership respectfully submits that it is prudent at this time to amend CMO 14 to modify the holdback for common benefit attorneys' fees and costs, so that the payment Defendants make into the *GranuFlo MDL 2428 Common Benefit Account* will be at the 11% holdback rate to be held in escrow. The instant motion applies only to the cost portion of the holdback – the attorneys' fee portion remains at 7%. Further, the modification is a “placeholder” pending the Court making a final determination of an award of attorneys' fees and costs.

Given the amount of substantial and necessary work performed to date, and the amount of the settlement reached, it is clear that the amount of the holdback will be insufficient to provide for the fair and equitable sharing among the Plaintiffs of the costs incurred and for the services performed by attorneys acting for the administration and common benefit of all Plaintiffs. The GCL Leadership is certainly accepting the burden of the shortfall, based on the anticipated low hourly rate that will be paid from the attorneys' fee component of the holdback.

This case did not resolve as a “super-mega-fund” case, i.e., a case with a settlement of \$1 Billion settlement or more. As the GCL Leadership will show when the formal petition for an

award of fees and costs is filed, the fee percentage average for such super-mega-fund cases is about 9+%. Thus, to maintain the provisional allocation of 7% for attorneys' fees here, where the number of hours of work is about 150,000, and will produce a fee award at an hourly rate that will be substantially less than market rates, will be appropriate so as to support maintaining the attorneys' fee component of the holdback at 7%.

CMO 14 specifically addresses the possibility of modifying the holdback amount and establishes a procedure for doing so. *See*, CMO 14 at ¶ 44. Per the requirements of CMO 14, the entire GCL Leadership has been consulted, given an opportunity to be heard, and has voted to approve this proposed amendment to CMO 14.

The Court has the Authority to Modify the Holdback and an 11% Total Holdback is in Line with Assessments in Other MDLs.

The Court derives the authority to modify the holdback amount in this case from the terms of CMO 14 that reserved that right, the terms of the settlement agreement entered into with Defendants that made provision for the possibility of an amendment to CMO 14, and pursuant to substantial judicial precedent that is supported by the principles of equity, quantum merit and the Court's inherent managerial authority. *See In re Vioxx Products Liab. Litig.*, 760 F. Supp. 2d 640, 649 (E.D. La. 2010). In the *In re Vioxx Products Liability Litigation*, the court cited the *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, and noted "the Court's equitable and managerial authority and duty to award fair common benefit fees or to adjust contingent fees" that existed independent of any contractual agreement. *In re Vioxx Products Liab. Litig.*, 760 F. Supp. 2d 640, 649 n. 15 (E.D. La. 2010).

The terms of the Participation Agreement provide that assessment amounts be withheld from the Gross Recovery Amount and grant this Court the authority to effectuate these holdbacks (*See* CMO 14 at §IV. discussing the Participation Agreement attached to CMO 14 as Exhibit A).

Furthermore, the Court explicitly provided a mechanism for modifying the holdback percentage in CMO 14. In addition, the GCL's requested increase, to a total 11% assessment holdback for attorneys' fees and costs with a provisional allocation of 7% for fees and 4% for costs: (a) has been voted on and approved by the GCL Leadership; and (b) is well in line with previous MDL assessments.

Courts have previously modified the assessment in other MDL litigations, raising the assessment for common benefit attorney fees in the *Ortho Evra* litigation from 1.5% or 3% (depending on the time period in which the assessment was agreed to) to 4% or 6%, respectively. *See In re Ortho Evra Products Liability Litigation*, MDL No. 1742, Third Amended Case Management Order No. 9 (Amending Second Amended CMO No.9 and CMO No. 9A Regarding Common Benefit Fees and Expenses) (N.D. Ohio July, 23, 2009). The Court in the *Vioxx* litigation similarly increased the assessment, granting a 6.5% fee award. *In re Vioxx Products Liab. Litig.*, 760 F. Supp. 2d 640, 662 (E.D. La. 2010). In *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, the Court allowed the assessment for common benefit attorney fees to be increased from 2% to between 8% and 10%. *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, MDL No. 1699, Pretrial Order No. 8A: Amendment to Order Establishing Common Benefit Fund (N.D. Cal. July 7, 2008). On March 3, 2014 in the 8,000 plus plaintiff MDL involving the DePuy ASR metal-on-metal hip system, an order was entered raising the common benefit attorneys' fees holdback from 3% to 5% upon the announcement of a global settlement.

The portion of the holdback for common benefit attorney fees here (7%) falls at the average range of fee awards granted in other MDLs, which generally range from 5% to 12%. *See In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1011 (5th Cir. 1977)

(8% assessment); *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522, 529 (D. Nev. 1987) (increased to 7% assessment from 5%); *In re Orthopedic Bone Screw Products Liab. Litig.*, MDL 1014, 1996 WL 900349 at *4 (E.D. Pa. June 17, 1996) (12% fee assessment); *In re Diet Drugs*, 553 F. Supp. 2d. 442,485 (E.D.Pa 2008) (6.75% fee award); *In re Protegen Sling and Vesica System Prods. Liab. Litig.*, MDL 1387, 2002 WL 31834446 at *1, 3 (D. MD. 2002) (9%/6% assessment); *In re Fosamax Prods. Liab. Litig.*, MDL 1789, CMO 17 3(f)(3), (S.D.N.Y. Apr. 28, 2011(6% - 9% assessment); *In re St. Jude Med., Inc.*, MDL 1396, 2002 WL1774232, at *2 (D. Minn. Aug. 1, 2002) (6% assessment); *In re Baycol Prods. Litig.*, MDL 1431, 2002 WL 32155266, at *4 (D. Minn. June 14, 2002) (6% assessment); *In re NuvaRing® Products Liab. Litig.*, MDL 1964, Amended CMO 3, Dec. 9, 2011 (E.D.M.O.)(11% assessment). *In re Kugel Mesh Hernia Patch Litig.*, MDL 1842, Amended PPO 22 1(C), (D.R.I. May 21, 2012) (12% assessment).

Thus, the overall assessment here at 11% with 7% allocated for attorneys' fees is consistent with holdback orders enter by other Courts. And the total of 4% specifically to be allocated for costs, remains a modest amount by any standard.

Conclusion

The GCL Leadership has satisfied the requirements of CMO14 for requesting modification of the common benefit holdback assessment, both by obtaining consent by the GCL Leadership as well as setting forth the reasons supporting an increase in the assessment to address the substantial costs incurred to litigate this case. This Court has the authority to modify its previous order and allow a 11% total holdback which is in line with similar MDLs and appropriate and warranted here given the work and costs incurred by the GCL Leadership. As such, the GCL Leadership respectfully requests that the Court modify the common benefit holdback in this case to 11% with a provisional allocation of 7% for attorneys' fees and 4% for costs on the total settlement amount

of \$250 million. The approval of this request will result in a deposit in the *GranuFlo MDL 2428 Common Benefit Account* by Defendants when they fund the settlement of \$27.5 Million. Once again, this amount will be held in escrow pending a future Order from the Court concerning is disbursement.

Dated: August 8, 2016

Respectfully submitted,
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CERTIFICATE OF SERVICE

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