

**UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND**

IN RE: KUGEL MESH HERNIA PATCH) **MDL Docket No. 07-1842-ML**
PRODUCTS LIABILITY LITIGATION)
) **JUDGE LISI**
THIS DOCUMENTS RELATES TO:)
ALL ACTIONS)

PLAINTIFFS' MOTION FOR ENTRY OF AN ASSESSMENT ORDER IN MDL 1842

Plaintiffs, by their attorneys, bring their Motion for Entry of an Assessment Order in MDL 1842 ("Motion"), requesting the entry of Proposed Practice and Procedure Order No 21 (attached hereto as Exhibit A), and in support thereof, state as follows:

I. INTRODUCTION

In mass tort cases involving consolidated MDL proceedings, counsel who have been appointed by the Court to manage the litigation for the benefit of all plaintiffs should receive reimbursement for the costs expended in that effort and compensation for their services from all of the plaintiffs on a ratable basis pursuant to case law and the Manual for Complex Litigation ("MCL"). The practice of fee assessment proposed by the Kugel Mesh PSC is consistent with established MDL practices and the court has clear authority to grant this order. *See* Manual for Complex Litigation – 4th § 14 Attorney Fees; § 22.927 Mass Torts - Awarding and Allocating Attorney Fees; and §20.31 Related State and Federal Cases – Coordination; *see also, In re Orthopedic Bone Screw Products Liability Litigation*, MDL No. 1014 (E.D. Pa.); *In re Propulsid Products Liability Litigation*, MDL No. 1355 (E.D. La.); *In re Rezulin Products Liability Litigation*, MDL No. 1348 (S.D.N.Y.); *In re Phenylpropanolamine (PPA) Products Liability Litigation*, MDL No. 1407 (W.D. Wash.); and *In re Diet Drugs Products Liability Litigation*, 1999 WL 124414 (E.D. Pa.).

The PSC has prepared Proposed Practice and Procedure Order No. 21 to establish Plaintiffs' Common Benefit Fund to compensate and reimburse attorneys for the services performed and expenses incurred for the common benefit of all plaintiffs. Co-lead plaintiffs' counsel and the members of the Plaintiffs' Steering Committee for MDL 1842 agree to terms set forth in Proposed Practice and Procedure Order No. 21. The Order proposes the establishment of the Common Benefit Fund in one or more of three ways: assessments on plaintiffs who obtain monetary recovery;¹ a separately negotiated payment; or a combination of the two. To promote coordination and equity, substantially similar assessment orders have been proposed in both the United States District Court for the District of Rhode Island and the Superior Court of Rhode Island.

II. ARGUMENT

A. The Manual for Complex Litigation Supports Entering the Assessment Order.

The Manual for Complex Litigation – 4th edition (MCL) explains that the basis for awarding attorneys' fees for common benefit work performed by co-lead counsel or a PSC is grounded in equity:

The common-fund exception to the American Rule [that each party pays its own attorney fees] is grounded in the equitable powers of the courts under the doctrines of *quantum meruit* and unjust enrichment.

See MCL – 4th § 14.121, p. 186. Additionally, the MCL recognizes that regulating and awarding attorneys' fees presents the court with an opportunity and a mechanism for managing class actions and other forms of complex litigation. *See* MCL – 4th § 14, p. 183. As such, the court has considerable discretion to use fees as a tool in a class action or a multidistrict consolidation. *Id.* Because of the sums involved, the calculation of fee awards often is complex, burdensome, bitterly contested, and a precursor to satellite litigation, establishing guidelines and ground rules – even establishing budgets or rates for payment – early in the litigation helps ease the Court's burden and

¹ The proposed assessment is 12% of the gross monetary recovery (8% for attorneys' fees and 4% for costs).

helps prevent later disputes. *Id.* Plaintiffs' Co-Lead Counsel and the PSC seek to establish these necessary guidelines and ground rules through the entry of Practice and Procedure Order No. 21.

- i. *MCL Section 22.927 Permits Allocating Attorneys' Fees as a Percentage of a Plaintiff's Award or Settlement.*

In discussing the allocation of attorneys' fees in the mass tort setting, Section 22.927 relies on the approach maintained in Section 14.12, which discusses standards for reviewing attorney fee petitions in common fund class actions. *Id.* at page 461 (and discussed below). In mass tort litigation that has been centralized, like in class actions, lead counsel or a PSC is appointed to litigate common issues and prepare that case for trial and settlement. *Id.* Section 22.927 recognizes that linking the attorney fees awarded (to lead counsel and the PSC) to the value of the settlement benefits actually received by plaintiffs is important in mass tort litigations. In determining fee allocation, the MCL provides:

If there is a combination of individual settlements and a class-wide settlement, the judge sometimes orders individual plaintiffs' lawyers to pay a certain percentage of the fees they received into a common fund to contribute to the fees of the class counsel, whose work in discovery and trial preparation contributed to the settlement of the individual cases as well.

See Id. at page 462-463. As such, Plaintiffs' Co-Lead Counsel's proposed assessment based upon a percentage of the gross monetary recovery is appropriate under the MCL.

- ii. *MCL Section 14 Also Supports Awarding Attorneys' Fees as a Separate Settlement Fund in Mass Tort Cases.*

In addition to approving of the award of attorneys' fees for common benefit work in the form of an allocation of a percentage of a plaintiff's award, the MCL also specifically allows for the creation of a separate settlement fund from which to pay attorneys' fees for common benefit work.

See MCL – 4th § 14.11, n. 471 and 473. Specifically, the MCL states:

A variant on the traditional common-fund case occurs **frequently in mass tort litigation – in both class actions and large consolidations – where a separate**

fund to pay attorney fees is created as a part of a settlement. The court must distribute the fund among the various plaintiffs' attorneys, which may include class counsel, court-designated lead and liaison counsel, and individual plaintiff's counsel.

Id. (emphasis added). Therefore, the proposed assessment order's inclusion of the option for Plaintiffs' Co-Lead Counsel to separately negotiate with Defendants for the payment of attorneys' fees is also supported by the MCL.

iii. Plaintiffs' Co-Lead Counsel Propose Similar Assessment Orders in both the District Court of Rhode Island and the Superior Court of Rhode Island.

Mass tort litigation frequently involves filings in both federal and state court, as is the case in the Kugel Mesh litigation. *See e.g.* MCL – 4th § 22.4 Multiple Filings in State and Federal Court. In this litigation, numerous cases have been filed in both the United States District Court for the District of Rhode Island and in the Superior Court of Rhode Island. Plaintiff's Co-Lead Counsel has been appointed to a leadership role by both of these Courts.

The MCL advises that state and federal judges should coordinate pretrial orders to avoid potential conflicts, such as handling of fee issues and addressing state and federal lawyers' concerns about being fairly compensated. *See* MCL – 4th § 20.312, p. 234. The MCL provides that extending the comprehensive approach to state-federal cooperation that the judges created in the silicone breast implant and diet drugs litigations to other mass torts could build upon generally accepted models for resolving local mass torts – such as here. *See Id.*, p. 235. As such, Plaintiff's Co-Lead Counsel have proposed (substantially) the same assessment order in both the state and federal court.²

B. Case Law Supports Entering the Assessment Order.

The Common Fund Doctrine is a principle of equity designed to prevent unjust enrichment by providing that "a litigant or a lawyer who recovers a common fund for the benefit of persons other

² Plaintiffs' counsel also suggests that entering similar assessment orders in the state and federal litigations will ensure that a plaintiffs' decision regarding where to file his or her case is not affected by differences in the applicable assessment order.

than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

Courts maintain the equitable power to ensure that lead or liaison counsel procure reasonable compensation for efforts made in creating a common benefit fund, and such compensation may derive directly from the fund. *Goldberger v. Integrated Res.*, 209 F.3d 43 (2d Cir. N.Y. 2000) (citations omitted). Further, a court may award "supplemental fees to counsel for work performed in relation to the litigation or settlement following counsel's initial fee application." *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 civ. 4911, 2007 U.S. Dist. LEXIS 48151 (S.D.N.Y. July 5, 2007).

Apart from application of the common fund doctrine as an equitable principle governing the payment of counsel fees and litigation expenses, it has consistently been recognized that federal courts possess the inherent power to appoint counsel to coordinate and manage complex multi-party litigation and to require that such counsel be paid for discharging these duties out of the proceeds of the litigation generally. *See, e.g., In re Orthopedic Bone Screw*, MDL No. 1014, 1996 WL 900349 (PTO 402) (E.D. Pa. June 17, 1996) (parties ordered to sequester 12% of recoveries for fees and 5% of recoveries for costs in order to create fund from which Court-appointed Plaintiffs' Legal Committee could seek reimbursement for the work performed on behalf of all plaintiffs); and *In re MGM Grand Hotel Fire Litigation*, 660 F Supp 522 (D. Nev. 1987) (court awarded legal committee seven percent of gross recovery of "global settlement" funds to reasonably compensate committee for professional labors and for bearing considerable long-standing risks).³ *In re Nineteen Appeals* articulated the principle of assessing fees:

³ *See also, In re Propulsid*, MDL No. 1355, PTO No. 16 (E.D. La. Dec. 26, 2001); *In re Rezulin*, MDL No. 1348, PTO No. 67 (S.D.N.Y. March 20, 2002); *In re Diet Drugs*, 1999 WL 124414 (E.D. Pa. Feb. 10, 1999) (PTO No. 467); *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation*, 982 F.2d 603, 606-07 (1st Cir. 1992); *In re Air Crash Disaster at Florida Everglades*, 549 F. 2d 1006 (5th Cir 1977).

Under standard American rule practice, each litigant pays his or her own attorneys' fees. Yet, there are times when the rule must give way....

A court supervising mass disaster litigation may intervene to prevent or minimize an incipient free-rider problem and to that end, may employ measures reasonably calculated to avoid unjust enrichment of persons who benefit from a lawsuit without shouldering its costs. Such courts will most often address the problem by specially compensating those who work for the collective good, chiefly through invocation of the so-called common fund doctrine.” ...

Here, [the District Court's] decision to use a steering committee created an occasion for departure from the American rule. In apparent recognition of the free-rider problem, **the judge served notice from the beginning that he would eventually make what he ... later termed a "common fund fee award" to remunerate PSC members for their efforts on behalf of communal interests. This was a proper exercise of judicial power.**

In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation, 982 F.2d 603, 606-07 (1st Cir. 1992) (emphasis added) (internal citations omitted).

The amount of the fee to be awarded can be determined under the percentage of the fund approach based upon a judicial assessment of the amount and quality of work performed by the common benefit lawyers in relation to the size of the recoveries which have been generated. *See e.g. In re Diet Drugs, supra; In re Orthopedic Bone Screw*, MDL 1014, PTO 402 (12% for fees and 5% for costs sequestered); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989); *In re Thirteen Appeals*, 56 F. 3d at 304-07; *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1295 (9th Cir. 1994), *aff'd in part*, 19 F 3d 1306 (9th Cir 1994); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F 3d 513, 516 (6th Cir 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Brown v Phillips Petroleum Co*, 838 F.2d 451, 454 (10th Cir.) *cert. denied*, 488 U.S. 822 (1988).

Moreover, in recent MDLs, the defendants have had the responsibility of withholding assessment funds and paying them into the common benefit fee and cost account. *See e.g. Rezulin*,

MDL 1348 Pretrial Order # 67 ("Before making any Claim Payment, each paying defendant shall deduct therefrom and pay to the Clerk for deposit to the CRIS Account the Escrow Amount."); *Fen-Phen*, MDL # 1203 Special Discovery Master Memorandum # 26 ("This Order placed primary responsibility on Defendants to withhold the specified percentage of any settlement funds covered by those Orders and to remit those funds to me as Escrow Agent").⁴

The absence of an Assessment Order would lead to litigants and counsel being unjustly enriched by the efforts and hard work performed by Co-Lead Counsel and the PSC on their behalf, and could lead to future conflict and litigation. As such, both equity and precedent support entering Proposed Practice and Procedure Order No. 21.

C. This Court Should Appoint Edgar C. Gentle, III as Escrow Agent Based on His Experience and Qualifications.

Edgar C. Gentle, III is a qualified public accountant who should be appointed by his Court to establish an interest-bearing account and act as escrow agent to receive and disburse funds, keep detailed records of all deposits and withdrawals, and prepare tax returns and other tax filings.

Mr. Gentle has a Bachelors of Science degree from Auburn and a Master of Science Degree from the University of Miami. He studied law at the University of Oxford in England as a Rhodes Scholar, receiving a B.A. with honors in Jurisprudence. Subsequently, he received his Juris Doctor from the University of Alabama School of Law. Mr. Gentle has extensive

⁴ In order to protect the right of common benefit attorneys to receive a fee from the proceeds of the litigation in which they have participated and diligently worked on behalf of plaintiffs, courts have consistently ruled that it is appropriate to direct that all or part of the counsel fees which may become payable in each action which was the subject of coordinated or consolidated proceedings be deposited in an escrow account for allocation by the Court in accordance with appropriate legal standards. *In re Diet Drugs, supra*; *In re Thirteen Appeals*, 56 F.3d at 300; *Smiley v. Sincoff*, 958 F.2d 498, 499 (2d Cir. 1992); *In re Orthopedic Bone Screw*, MDL No. 1014; *In re Agent Orange*, 611 F. Supp. at 1317; *In re Silicone Gel Breast Implant Product Liability Litigation*, MDL 926, Pretrial Order Nos. 13 & 23 (N.D. Ala. July 23, 1993 and July 28, 1995).

experience in serving as escrow agent and special master in mass tort litigation, and providing claims administration and financial and business advice to mass tort settlement and qualified settlement funds. Specifically, Mr. Gentle managed similar funds in other multidistrict litigation, including serving as Escrow Agent for MDL 926 Silicone Gel Breast Implants Products Liability Litigation, and as Special Master for MDL 1387 ProteGen Sling and Vesica Products Liability Litigation. Mr. Gentle's curriculum vita is attached hereto as Exhibit B.

III. CONCLUSION

In light of the foregoing, it is appropriate for the Court to enter Proposed Practice and Procedure Order No. 21 providing for an assessment of each individual case in which a settlement is entered into, or judgment is paid, to be withheld by Defendants for distribution to Plaintiff's Common Benefit Fund for work performed by Co-Lead Counsel and the PSC for the common benefit of all litigants.

Dated: June 5, 2009

Respectfully submitted,

/s/ Donald A. Migliori

Donald A. Migliori (# 4936)

Motley Rice, LLC

321 S. Main Street

Providence, RI 02903

401-457-7700

401-457-7008 FAX

MDL-1842 Plaintiffs' Liaison Counsel

Ernest Cory

Cory Watson Crowder & DeGaris, PC

2131 Magnolia Ave.

Birmingham, AL 35205

205-328-2200

205-324-7896 FAX

MDL-1842 Plaintiffs' Co-Lead Counsel

Teresa Toriseva
Toriseva Law
1446 National Road
Wheeling, WV 26003
304-238-0066
304-238-0149 FAX
MDL-1842 Plaintiffs Co-Lead Counsel

Edward Wallace
Wexler Wallace LLP
55 West Monroe St., Suite 3300
Chicago, IL 60603
312-346-2222
312-346-0022 FAX

Alex Alvarez
The Alvarez Firm
355 Palermo Ave.
Coral Gables, FL 33134
305-444-7675
305-444-0075

Vance R. Andrus
Andrus, Boudreaux, Lemoine & Tonore, PLC
416 W. Main, P.O. Box 3347
Lafayette, LA 70502
337-984-9480
337-984-9488 FAX

Robert J. Binstock
Reich & Binstock LLP
4265 San Felipe, Suite 1000
Houston, TX 77027
713-622-7271
713-623-8724 FAX

Amy M. Carter
Williams Kherkher Hart Boundas LLP
8441 Gulf Freeway, Suite 600
Houston, TX 77017
713-230-2200
713-643-6226 FAX

W. Lewis Garrison
Heninger, Garrison & Davis LLC
2224 1st Avenue North
Birmingham, AL 35203
205-326-3336
205-326-3332 FAX

Michael A. London
Douglas & London, P.C.
111 John St., 14th Floor
New York, NY 10038
212-566-7500
212-566-7501 FAX

Jerrold S. Parker
Parker Waichman Alonso LLP
111 Great Neck Road
Great Neck, NY 11021
516-466-6500
516-466-6665 FAX

Sol H. Weiss
Anapol, Schwartz, Weiss, Cohan,
Feldman & Smalley, P.C.
1900 Delancey Place
Philadelphia, PA 19103
215-735-2098
215-875-7701 FAX

Stephanie Hatzakos
Milberg LLP
One Pennsylvania Plaza
49th Floor
New York, New York 10119
212-594-5300
212-868-1229 FAX

Derek Potts
The Potts Law Firm, LLC
908 Broadway, 3rd Floor
Kansas City, Missouri 64105
816-931-2230
816-931-7030 FAX

Jeff Kuntz
Wagstaff & Cartmell
4740 Grand Avenue, Suite 300
Kansas City, MO 64112
816-701-1100
816-531-2372 FAX

MDL-1842 Plaintiffs Steering Committee

CERTIFICATE OF SERVICE

I, Donald A. Migliori, hereby certify that a copy of the foregoing Plaintiff's *Motion for Entry of an Assessment Order in MDL 1842* was electronically filed. Those attorneys who are registered with the Electronic Filing System may access these filings through the Court's System, and notice of these filings will be sent to these parties by operation of the Court's Electronic Filing System.

Dated: June 5, 2009

/s/ Donald A. Migliori
Donald A. Migliori
MOTLEY RICE LLC
321 South Main Street
Suite 200
Providence, RI 02903
401-457-7700
401-457-7708 FAX