

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF RHODE ISLAND

3 IN RE: KUGEL MESH HERNIA PATCH ) MDL Docket No. 07-1842-ML  
4 PRODUCTS LIABILITY LITIGATION )  
5 THIS DOCUMENTS RELATES TO: ) JUDGE MARY M. LISI  
6 ALL ACTIONS )

7 DECLARATION OF PROFESSOR WILLIAM B. RUBENSTEIN

8 I, WILLIAM B. RUBENSTEIN, declare:

9 The Johnson Law Firm has retained me as an expert witness to submit an Opinion regarding the  
10 Plaintiffs' Steering Committee's (PSC) Proposed Practice and Procedure Order Number 21 and the  
11 supporting Motion for Entry of An Assessment Order in MDL 1842. Specifically, I have been asked  
12 to address the following issues:

13 (1) *How are attorneys typically compensated for common benefit work?* My brief answer  
14 to this question (discussed in greater detail in Part III below) is that there are two distinct types of fee  
15 structures to compensate attorneys who perform common benefit work in federal multidistrict  
16 litigation: "common benefit assessments" (typically ascertained early in litigation and utilized often in  
17 litigation not culminating in one aggregate settlement or judgment) and "common fund attorney fee  
18 awards" (typically percentage awards given to attorneys who resolve class actions or other aggregate  
19 cases). The differences between the two types of awards are important for purposes of the pending  
20 motion. *Common benefit assessments* are a mechanism for allocating a contingent fee between local  
21 counsel and steering committee or liaison counsel in mass tort cases. These assessments essentially  
22 "tax" local counsel who settle during the course of the litigation to pay for common benefit work  
23 performed by steering committee or liaison counsel, *if local counsel has relied on common benefit*  
24 *work in resolving individual cases.* By contrast, *common fund attorney fees* are awarded when steering  
25 committee or liaison counsel secure a single settlement fund to pay the claims of individual plaintiffs  
26 in the consolidated litigation. In such cases, courts typically award lead counsel a percentage of the  
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1 fund for their work in achieving a settlement on behalf of all plaintiffs. Although the PSC does not  
2 distinguish between these two types of cases in the motion supporting their proposed order, these fee  
3 arrangements and the precedents supporting them are distinct. This Court should ensure that it relies  
4 on the appropriate authorities when evaluating the components of the PSC's proposed order, and in  
5 particular when evaluating the proposed 12% common benefit assessment.  
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7 (2) *Is the PSC's request for a 12% common benefit assessment consistent with the rates*  
8 *that courts typically adopt in these types of cases?* My brief answer to this question (discussed in  
9 greater detail in Part IV below) is "no." A 12% assessment is at the high end of what federal courts  
10 typically withhold as a common benefit assessment in MDL coordinated proceedings. Courts most  
11 frequently adopt assessment rates of 4-6%.

12 (3) *Is there anything unique to this litigation that would warrant a 12% assessment?* My  
13 brief answer to this question (discussed in greater detail in Part V below) is "no." There is nothing  
14 remarkable about the instant case that should compel this Court to impose an assessment rate higher  
15 than the 4-6% that courts normally set. There are two arguments that the PSC might raise in an  
16 attempt to justify a high withholding rate here, as they did in their papers in the related state court  
17 proceeding, but neither argument is convincing. First, the PSC could claim that this litigation is  
18 relatively small in size, necessitating a higher withholding rate. However, the relevant case law defies  
19 that claim. For one, there is nothing remarkable about the number of claims involved in this litigation;  
20 if anything, it is typical of the common benefit assessment cases discussed below. Additionally, there  
21 is no apparent correlation between number of claims and the amount that courts withhold in  
22 multidistrict and consolidated litigation. Second, the PSC could claim that a higher rate is necessary to  
23 ensure that attorneys do not go uncompensated for their common benefit work. However, in this  
24 litigation, individual plaintiffs' claims are potentially independently economically viable; further, the  
25 PSC itself has proposed multiple mechanisms to ensure that common benefit work is compensated.  
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1 Thus, there is no reason to break from the established precedent in this area by ordering an assessment  
2 that represents two to three times that of the average rate.

3 In sum, there is nothing about this litigation that warrants anything more than a standard 4-6%  
4 common benefit assessment, if this Court should decide that a common benefit assessment is even  
5 appropriate at this time.  
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7 **I**  
8 **BACKGROUND AND QUALIFICATIONS**

9 1. I am a Professor of Law at Harvard Law School. I graduated *magna cum laude* from  
10 Yale College in 1982 and *magna cum laude* from Harvard Law School in 1986. I clerked for the Hon.  
11 Stanley Sporkin in the United States District Court for the District of Columbia following my  
12 graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a  
13 law professor at UCLA School of Law for a decade, and an adjunct faculty member at Harvard,  
14 Stanford, and Yale Law Schools while a litigator in private practice during the preceding decade. I am  
15 admitted to practice law in the Commonwealth of Massachusetts, the state of California, the  
16 Commonwealth of Pennsylvania (inactive), the District of Columbia (inactive), the United States  
17 Supreme Court, four U.S. Courts of Appeals, and two U.S. District Courts.  
18

19 2. My principal area of scholarship is complex civil litigation, with a special emphasis on  
20 class action law. I am the author, co-author, or editor of four books and more than a dozen scholarly  
21 articles, as well as many shorter publications. Much of this work concerns various aspects of class  
22 action law.<sup>1</sup> I am the author of the leading national treatise on class action law, *Newberg on Class*  
23

24 <sup>1</sup>My recent scholarship on class action law includes: *How Transparent Are Class Action Outcomes?:*  
25 *Empirical Research on the Availability of Class Action Claims Data, in CAN INCREASED*  
26 *TRANSPARENCY IMPROVE THE CIVIL JUSTICE SYSTEM?* (forthcoming 2009) (with Nicholas M. Pace,  
27 *RAND Corporation*); *The Public Role in Private Law Enforcement: Visions from CAFA* (forthcoming  
28 2009); *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 791 (2007); *The*  
*Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006); *Why*  
*Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L.  
(continued . . .)

1 *Actions*. I also publish a monthly column entitled, *Expert's Corner*, in the publication, CLASS ACTION  
2 ATTORNEY FEE DIGEST.<sup>2</sup> My work has been excerpted in leading casebooks on complex litigation.<sup>3</sup>

3 3. My expertise on procedural matters is recognized by scholars and lawyers in private  
4 practice throughout the country for whom I regularly provide consulting advice and educational  
5 training programs. The American Law Institute selected me to be one of nine law professors in the  
6 United States to serve as an Adviser on a Restatement-like project developing the *Principles of the*  
7 *Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the  
8 Mass Torts Committee of the ABA's Litigation Section. I am a co-editor of the Mass Tort Litigation  
9 Blog, [http://lawprofessors.typepad.com/mass\\_tort\\_litigation/](http://lawprofessors.typepad.com/mass_tort_litigation/). I am on the Advisory Board of the  
10 publication, *Class Action Law Monitor*. I present continuing legal education programs on class action  
11 law at law firms and conferences. For example, I am a regular participant at the ABA's annual  
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14 (. . . continued)

15 REV. 709 (2006); *On What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV.  
16 2129 (2004); *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002); *A*  
17 *Transactional Model of Adjudication*, 89 GEO. L. J. 371 (2001); *The Myth of Superiority*, 16  
18 CONSTITUTIONAL COMMENTARY 599 (1999); *Divided We Litigate: Addressing Disputes Among Clients*  
19 *and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997).

20 <sup>2</sup>My recent *Expert's Corner* columns have included: *2009: Emerging Issues in Class Action Fee*  
21 *Awards* (Jan. 2009); *2008: The Year in Class Action Fee Awards* (Dec. 2008); *The Largest Fee Award*  
22 *– Ever!* (Sept. 2008); *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for*  
23 *Imprecise Fee Submissions* (Aug. 2008); *Supreme Court Round-Up* (July 2008); *Fee-Shifting for*  
24 *Wrongful Removals: A Developing Trend?* (May 2008); *You Cut, I Choose: (Two Recent Decisions*  
25 *About) Allocating Fees Among Class Counsel* (Apr. 2008); *Why the Percentage Method?* (Mar. 2008);  
26 *Reasonable Rates: Time To Reload The (Laffey) Matrix* (Feb. 2008); *The "Lodestar Percentage:" A*  
27 *New Concept For Fee Decisions?* (Jan. 2008); *The American Law Institute's New Approach to Class*  
28 *Action Objectors' Attorneys Fees* (Nov. 2007); *The American Law Institute's New Approach to Class*  
*Action Attorneys Fees* (Oct. 2007); *"The Lawyers Got More Than The Class Did!": Is It Necessarily*  
*Problematic When Attorneys Fees Exceed Class Compensation?* (Aug. 2007); *Supreme Court Round-*  
*Up* (July 2007); *On The Difference Between Winning and Getting Fees* (June 2007); *Divvying Up The*  
*Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?* (May 2007); *On Plaintiff Incentive*  
*Payments* (Apr. 2007); *Percentage of What?* (Mar. 2007); *Lodestar v. Percentage: The Partial Success*  
*Wrinkle* (Feb. 2007) (with Alan Hirsch).

<sup>3</sup>*See, e.g.,* COMPLEX LITIGATION 63, 72, 390, 393, 429, 506, 523 (Kevin R. Johnson, Catherine A.  
Rogers, & John Valery White eds., 2009); COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 120-  
123 (Jay Tidmarsh & Roger Trangsrud eds., 1998).

1 *National Class Action Institute* and, at the 2006 International Law Association meeting, I was asked to  
2 present a talk about the international aspects of class action law.

3 4. My teaching focuses on procedure and complex litigation. I regularly teach the basic  
4 Civil Procedure course to first year law students and a variety of advanced courses on complex  
5 litigation, remedies, and federal litigation. I have received honors for my teaching activities, including  
6 the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the  
7 2001-2002 school year, and the John Bingham Hurlbut Award for Excellence in Teaching, as the best  
8 teacher at Stanford Law School during the 1996-1997 school year.

9  
10 5. In the past few years, I have been retained as an expert witness in more than a dozen  
11 class action cases and as an expert consultant in about another dozen cases. These cases have been in  
12 state and federal courts throughout the United States, including a number of MDL proceedings. I have  
13 been retained to testify as an expert witness on issues ranging from the propriety of class certification,  
14 to the reasonableness of settlement and fees.

15  
16 6. I have been retained in this case to provide an opinion on the questions outlined above.  
17 I am being compensated for my work.

18 7. In analyzing these issues, I have communicated about the case with Steven M. Johnson,  
19 John Deaton, and Samuel D. Zurier. I have reviewed documents from this litigation, including:

- 20  
21 a. Petition for Appointment of Plaintiffs' Steering Committee (dated Sept. 6, 2007);  
22 b. Practice & Procedure Order # 2 (granting Petition for Appointment of Plaintiffs'  
23 Steering Committee) (dated Sept. 28, 2007);  
24 c. Practice and Procedure Orders # 1 & 3-17;  
25 d. Agenda and Meeting Minutes (dated Sept. 27, 2007 to Dec. 9, 2009);  
26 e. Proposed Practice and Procedure Order Number 21 (filed June 5, 2009);  
27 f. Plaintiffs' Motion for Entry of An Assessment Order in MDL 1842 (filed June 5, 2009);  
28 g. Several decisions of this Court provided by counsel pertaining to the instant litigation.

26 I have also reviewed documents from the consolidated state litigation, including:

- 27 a. Order Appointing Plaintiffs' Steering Committee (dated Aug. 11, 2008);  
28 b. Transcript, Hearing Before the Honorable Alice Bridget Gibney (Dec. 9, 2008);  
c. [Proposed] Assented to Assessment Order (apparent draft, undated);

- 1 d. Plaintiffs' Steering Committee's Memorandum In Further Support Of The Proposed  
2 Assessment Order (undated);  
3 e. Several decisions of Judge Alice Bridget Gibney provided by counsel pertaining to the  
4 state court litigation.

4 I have also reviewed the applicable case law and scholarship on the topics of this Declaration.

5 8. I offered an Expert Declaration on the common benefit fee issue in the state court  
6 proceedings related to these and attended the hearing on that motion held in Rhode Island Superior  
7 Court on March 24, 2009.

8 9. I have not analyzed the merits of the substantive contentions in any of the plaintiffs'  
9 complaints, nor have I undertaken an independent investigation of their claims. I take no position on  
10 whether the plaintiffs or defendants would prevail were their cases to be fully tried on the merits. I  
11 offer this affidavit to bring to the court the perspective of an expert on attorneys' fees in complex and  
12 multidistrict litigation.  
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16 **II**  
**THIS LITIGATION<sup>4</sup>**

17 10. This coordinated action involves products liability cases relating to alleged defects in  
18 the Composix Kugel Mesh Patch ("Kugel Patch"), a device designed, manufactured and distributed by  
19 the Defendants for use in the repair of hernias. Individual plaintiffs, alleging that they sustained  
20 personal injuries from the use of the patch, have filed claims on an individual basis in state and federal  
21 courts throughout the United States.  
22

23 11. The Judicial Panel on Multidistrict Litigation (JPML) consolidated cases pending in  
24 federal courts throughout the United States in a federal multidistrict litigation (MDL) in the United  
25 States District Court for the District of Rhode Island. Specifically, on June 22, 2007, the JPML  
26 ordered the transfer of all cases that involve "allegations of defects in various models of hernia patches  
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28 <sup>4</sup>The facts in this section are culled from the documents listed in ¶7, *supra*.

1 manufactured and sold by [the Defendants]” to this Court.

2 12. In addition to the cases pending before this Court as part of the MDL proceedings, there  
3 are a number of pending cases alleging personal injury from the Kugel Patch in a parallel proceeding  
4 in Rhode Island state court. As of August 26, 2008, over 1,000 plaintiffs had filed suit in Rhode Island  
5 state court. The Chief Judge of the Rhode Island Superior Court has consolidated those cases before  
6 Judge Alice Bridget Gibney.  
7

8 13. Both this Court and the Rhode Island state court have granted petitions for the creation  
9 of a Plaintiffs’ Steering Committee (PSC), with significant overlap between the two. The three “co-  
10 lead plaintiffs’ counsel” in the federal MDL proceeding – Mr. Migliori, Ms. Toriseva, and Mr. Cory –  
11 occupy three of the eight seats in the state court proceeding, and the Liaison Counsel (Mr. Migliori) is  
12 the same in both proceedings.  
13

14 14. On June 5, 2009, Liaison Counsel filed a Proposed Practice and Procedure Order  
15 Number 21 which proposed to “provide for the fair and equitable sharing among plaintiffs of the cost  
16 of services performed and expenses incurred by attorneys acting for MDL administration and common  
17 benefit of all plaintiffs in this complex litigation.”<sup>5</sup> Liaison Counsel also filed a motion in support of  
18 the proposed order.<sup>6</sup>  
19

20 15. The Proposed Order, which the PSC notes is “substantially similar” to the order that the  
21 PSC proposed in the Rhode Island state court proceedings,<sup>7</sup> would impose a 12% assessment on the  
22 “gross monetary recovery” of plaintiffs and attorneys “who have agreed or agree to settle, compromise,  
23 dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary  
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26 <sup>5</sup>Proposed Practice and Procedure Order Number 21 at 1 [hereinafter Proposed Order].

27 <sup>6</sup>See Plaintiffs’ Motion for Entry of An Assessment Order in MDL 1842 [hereinafter PSC Motion].

28 <sup>7</sup>PSC Motion at 2.

1 damages, with respect to any relevant products contained within the scope of this MDL.”<sup>8</sup> This 12%  
2 assessment, which consists of an 8% deduction for fees and a 4% deduction for costs, provides that the  
3 Defendants must withhold the amount from four types of cases, including “any case in which counsel  
4 receives any benefit from the efforts of the Plaintiffs’ Steering Committee toward the common  
5 interests of this MDL, including, but not limited to, any unfiled and state court filed cases settled with  
6 any pending MDL cases.”<sup>9</sup> The Proposed Order also indicates that, in addition to a common benefit  
7 assessment, the PSC’s common benefit work may be funded by “a separately negotiated payment from  
8 defendants,” or some combination thereof.<sup>10</sup>  
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12 **III**  
13 **THE PSC’S RELIANCE ON COMMON FUND FEE AWARD CASES IS MISPLACED AS**  
14 **COMMON BENEFIT ASSESSMENTS ARE DISTINCT FROM**  
15 **COMMON FUND ATTORNEY FEE AWARDS**

16 16. There are three distinct types of complex aggregate proceedings, each producing its  
17 own fee structure:

18 a. *Class Action Lawsuits With Only Class Counsel.* The classic aggregated  
19 proceeding is a small claims class action. In such an action, class counsel represent class members  
20 with such small claims that no individual class member has retained her own attorney – the size of her  
21 claim is not large enough to attract individual counsel to represent her for a contingent fee. Class  
22 counsel are paid out of the recovery they produce for the class, typically a percentage of that recovery;  
23 this is referred to as a “common fund attorney fee.”

24 b. *Aggregated Individual Lawsuits With Local Counsel and PSC Counsel.* The  
25 classic mass tort case is distinct from the paradigmatic class action suit in that often individual class

26 <sup>8</sup>Proposed Order at § 2(A).

27 <sup>9</sup>*Id.* at § 2(B)(iv).

28 <sup>10</sup>*Id.* at § 1(A).



1 members have such significant injuries that they are able to retain their own individual counsel to  
2 pursue their cases in return for a contingent fee. Such individual cases could proceed through the  
3 litigation system individually with no complicated fee issues: each individual's counsel would take his  
4 fee from his client's recovery. However, these individual cases are often aggregated for pre-trial  
5 proceedings in a coordinated forum such as this one. In such instances, lawyers at the aggregated  
6 proceeding provide legal services that benefit each of the individually-represented clients around the  
7 country. At the end of such aggregated proceedings, the individual cases may be settled locally by  
8 individual counsel who will take their contingent fee from the client's recovery. Arguably, however,  
9 the lawyers at the aggregated proceeding who provided work for the common benefit should be  
10 rewarded for their work as well. Typically, that reward is produced by the MDL judge ordering that a  
11 "common benefit fee" be taken out of individual recoveries; these fees essentially "tax" local counsel's  
12 contingent fee, leaving local counsel with less money but acknowledging that they may have done less  
13 work than they otherwise would have because the PSC attorneys provided common benefit work.

16 c. *Class Action Lawsuits With Class and Local Counsel.* A third type of  
17 proceeding is one that starts in a fashion similar to the second type just described (a mass tort with  
18 aggregated individual lawsuits) but that ends in a manner similar to the first type described, namely  
19 with an aggregate or "class" resolution. What is complicated about this situation is that the aggregate  
20 attorneys who negotiate the common fund settlement will want to simultaneously negotiate a common  
21 fund fee as they would in a case of the first type – a class action with small claims. However, the  
22 difference is that in this third type of case, individual class members have pre-negotiated contingent fee  
23 awards with their own retained local counsel – local counsel who has often performed significant legal  
24 work in the matter as well. In these circumstances, then, if PSC counsel are able to negotiate a  
25 common fund fee award during the aggregate settlement, they are negotiating without the presence of a  
26 very interested party – the local counsel who also are entitled to a fee for the legal work they produced.  
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1 The best practice in these situations is to prohibit PSC attorneys from negotiating a common fund fee  
2 with defense counsel and to leave to the court the task of determining the proper fee for common  
3 benefit work following the aggregate resolution.

4 17. To summarize the two distinct types of fee arrangements – common benefit assessments  
5 and common fund attorney fees – that arise in the three types of aggregate litigation:

6 a. *Common benefit assessments* are essentially a mechanism for *allocating* a  
7 contingent fee between local counsel and steering committee or liaison counsel in mass tort cases. In  
8 cases such as this one that have coordinated central proceedings for many pending individual cases, the  
9 local attorneys generally have contingent fee contracts with their clients, typically guaranteeing them  
10 33-40% of the client’s recovery. Yet if in coordinated proceedings, the central attorneys do work for  
11 each of the local clients, they have an argument that they should be paid for that work by the local  
12 clients. To tax the local clients on top of their already-negotiated contingent fee contract with local  
13 counsel, however, might result in an unethically high fee. The common benefit assessment solves this  
14 problem by taxing local *counsel* to pay for the common benefit work out of his already-negotiated 33-  
15 40% fee award. Assuming the common benefit assessment is not too high, it is not unfair to local  
16 counsel to extract it since the work done in the coordinated proceedings should lessen local counsel’s  
17 workload accordingly. This “common benefit assessment” is typically held back by the defendant  
18 when disbursing a settlement to an individual client and placed in a “common benefit fund” under the  
19 auspices of the MDL court.<sup>11</sup> At the conclusion of the case, lawyers who did work for the common  
20 benefit must then apply for a final fee from this fund. As Part IV below illustrates, the courts that order  
21 assessments do so in the range of 4-6%.

22 b. *Common fund attorney fees* are different. In class action cases, and occasionally

23 <sup>11</sup>FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, FOURTH § 20.312 at 233 (2004)  
24 (stating that “MDL judges generally issue orders directing that defendants who settle MDL-related  
25 cases contribute a fixed percentage of the settlement to a general fund to pay national counsel”).  
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27  
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