UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

In re KUGEL MESH HERNIA PATCH PRODUCTS LIABILITY LITIGATION	§	
	§	**MDL Docket No. 07-1842-ML**
THIS DOCUMENT RELATES TO: ALL ACTIONS	§	**JUDGE LISI**

THE PLAINTIFFS' STEERING COMMITTEE'S MEMORANDUM IN FURTHER SUPPORT OF THE PROPOSED ASSESSMENT ORDER

Plaintiffs' Steering Committee ("PSC"), by and through the Plaintiffs' Liaison Counsel, states as follows in further support of their Motion for Entry of an Assessment Order ("Motion"):

I. INTRODUCTION

The Proposed Assessment Order is inherently and explicitly fair, reasonable, and necessary to maintain this litigation. First, it is merely a *withholding*. The Assessment Order provides that at the resolution of this Multi-District Litigation ("MDL") every firm contributing common benefit work must justify and substantiate, at a hearing and by documents, the amount of time and expenses for which they seek payment or reimbursement. At that time, the Court will determine the reasonableness of those fees and expenses, and determine if they were for the "common benefit" of all plaintiffs. Second, we are not yet at that stage of the litigation. Neither the parties nor the Court can accurately predict the amount of time and expenses that will ultimately be expended by the PSC; nor can anyone accurately predict the ultimate value of each of the cases in this MDL. At this time, the most prudent course for the Court to take is to attempt to withhold sufficient funds in order to compensate, at a later date and upon review, the

numerous attorneys and firms prosecuting this case on behalf of all plaintiffs.[1]

To accomplish this, the PSC and plaintiffs' counsel from across the nation negotiated the Proposed Assessment Order. Roughly 99% of the counsel representing plaintiffs in this litigation agree that the amount (and the manner) of assessment proposed by the PSC is appropriate for this MDL. That determination was made by all counsel – through multiple discussions and over a period of months – based upon: (1) the amount of work that has been and will need to be completed; (2) the size of the MDL; (3) the potential for recovery; and (4) the number of firms contributing common benefit work.

In order to promote consistency in the state and federal proceedings, and to discourage forum shopping based upon the assessment applied for common benefit work, the state and federal PSCs submitted substantially similar Proposed Assessment Orders in the federal MDL and the Rhode Island consolidated litigation. On August 11, 2009, Judge Gibney of the Superior Court of Rhode Island determined "that a 12% set-aside is fair and reasonable" and entered the Proposed Assessment Order as submitted. *See,* Opinion of August 11, 2009, p. 16, Master Docket No. PC-2008-9999 (Attached as Exhibit A). [2]

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[1] As stated by Professor Paul D. Rheingold in his treatise Litigating Mass Tort Cases: "Setting the amount of the withhold sum is a matter of guesswork. The court and the parties have to evaluate, as best they can, the amount of work which will be done by lawyers at various skill levels' the number of cases which will be settled; and what the settlements will run. *Obviously the amount should err on the high side* since you can always rebate money to the lawyers, as was done in the diet pill cases, whereas you cannon realistically go back to the lawyers later and ask for a contribution." Paul D. Rheingold, Mass Tort Litigation § 7:29 (1996 & Supp. 2002) (emphasis added).

[2] In response to the Objector's argument before the Rhode Island state court that the assessments should be consistent in both the state and federal consolidated actions, Judge Gibney stated:

> The Court agrees with the objecting attorneys that federal-state coordination on this issue is preferable. As of the March 24, 2009 hearing, the PSC had not made a request to the federal MDL court to enter an assessment order. This Court received correspondence from the PSC that a Motion for Assessment Order was filed in federal court on June 5th, 2009. Since then, this Court has communicated with the federal MDL court regarding this issue. The objecting attorneys may rest assured that reasonable efforts are being made to achieve consistency.

One attorney, Steven Johnson, Esq. of the Johnson Law Firm (the "Objector" or "Objecting Attorney"), disagrees with the other 99% of plaintiffs' counsel (and Judge Gibney) regarding the reasonableness of this set-aside; Mr. Johnson asks that the Court not withhold these funds from his cases. For the reasons below, Mr. Johnson's objections are without merit and premature.

II. BACKGROUND AND SUMMARY

The firms that comprise the PSC have already expended tens of thousands of attorney hours and fronted hundreds of thousands of dollars on behalf of all of the plaintiffs in this consolidated litigation. In fact, the PSC in this litigation has been a model of inclusiveness with nearly every firm on the PSC contributing thus far to common benefit work necessary to advance this litigation. In order to compensate those attorneys for their past and future contributions, a common benefit fund must be established.

As such, on June 5, 2009, the PSC (via the Plaintiffs' Liaison Counsel) submitted a Proposed Assessment Order providing for the withholding of 8% of the gross monetary relief from any settlement or judgment for attorney fees and 4% for costs. The PSC prepared the Proposed Assessment Order 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. The Order proposes the establishment of the Common Benefit Fund in one or more of three ways: (1) assessments on plaintiffs who obtain monetary recovery; (2) a separately negotiated payment; or (3) a combination of the two.

At the time the Proposed Order was drafted, every firm known to represent a plaintiff in this litigation was consulted with, had agreed to the Proposed Order. These percentages were arrived at after significant negotiation and input from plaintiffs' counsel in Rhode Island and

from across the nation.[3] Indeed, approval was unanimous by plaintiffs' counsel in this Federal MDL, with the exception of attorney Steven Johnson, Esq. of The Johnson Firm.

Upon information and belief, the Objecting Attorney has filed approximately forty Kugel Mesh cases. The Objecting Attorney makes several erroneous assertions in support of his objections. Essentially, his grounds for objection are directed to the amount of the proposed assessment and the possibility of a separately negotiated contribution into the Common Benefit Fund by Defendants.

Liaison Counsel has explained to the Objector why such a percentage is necessary, and has offered these attorneys the opportunity to off-set any loss in fees that he may perceive by participating in common benefit work and being compensated for his common benefit time and expenses. Essentially, the Objector has been asked to help. The Objector declined that offer.

II. ARGUMENT:

THE WITHHOLDING IS NECESSARY, APPROPRIATE AND ALMOST UNANIMOUSLY AGREED UPON

What the Objector seems to ignore is the fact that this is simply a *withholding* of funds. This Court retains the authority to review all common benefit time and costs reimbursement requests submitted. Should the common benefit fund exceed the fees and costs necessary to fairly compensate the attorneys for their efforts, the Court can refund all or some portion of the money withheld. However, it is necessary *now* to withhold the percentages proposed by the PSC. In order to maintain the support and contribution that Liaison Counsel has solicited (and received) from other attorneys and firms thus far – and continue to advance this litigation forward – Liaison Counsel must be able to assure these attorneys that they will be fairly compensated for the efforts and reimbursed for the expenses they incur on behalf of *all* plaintiffs.

[3] Indeed, Co-Lead Counsel even held a conference in South Carolina to allow plaintiffs' attorneys an opportunity to discuss the proposed assessment order and voice any concerns that they had.

1. Everyone Agrees that the Court has the Authority to Enter this Assessment Order

The Proposed Assessment Order is clearly within the power and purview of this Court for the fair and just administration of these actions – even the Objector does not argue to the contrary. Further, the practice of fee and cost assessment proposed by the PSC is consistent with established practices in coordinated actions 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.

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 in coordinated or consolidated proceedings be deposited in an escrow account for allocation by the Court in accordance with appropriate legal standards. *See, e.g., In re Orthopedic Bone Screw*, MDL No. 1014, 1996 WL 900349 (PTO 402) (E.D. Pa. June 17, 1996). 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 than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co.* v. *Van Gernert*, 444 U.S. 472,478 (1980).

2. The Assessment is Merely a *Withholding* of Funds Subject to Subsequent Court Approval

Most importantly, this is merely a withholding. The proposed assessment is not an award of fees to any particular firm. It is an assessment at the time of settlement or verdict of a percentage of a gross recovery. As such, the assessment funds at issue, under the Proposed

Order, are only being *withheld at this point*, and counsel will still have to submit their time and expenses to the Court for review.

As stated throughout the Proposed Assessment Order, the Court retains the purse strings on the Common Benefit Fund. Indeed, Paragraph 4(D) specifically states: **"No amounts will be disbursed without review and approval by the Court or such other mechanism as the Court may deem just and proper under the circumstances."** Moreover, the Proposed Assessment Order specifically contemplates and provides for the potential situation where the Common Benefit Fund exceeds the amount of common benefit time and expenses submitted by counsel, or approved by the Court. As stated in Paragraph 4G: "[i]f the Common Benefit Fund exceeds the amount needed to make all payments of court approved costs, fees, and any Court approved multiplier on any fees, the Court may order a refund to those who have contributed to the Common Benefit Fund."

Stated differently, the due process protections sought by the objecting parties are inherent in and specifically provided for by the Proposed Assessment Order. Because of the oversight provided by the Court, any assertion that the PSC and all attorneys who contribute common benefit work will receive excessive compensation from the Common Benefit Fund is simply in error. Any application for the approval of attorneys' fees and costs must first be deemed reasonable by this Court. For that reason, the PSC has made – and will continue to make – efforts to record and explain the time and money they expend for the common benefit. In the end, the Court will have the final say in what is awarded to these attorneys for their years of hard work - and any excess will be refunded to the contributing attorneys and parties.[4]

[4] The Objector's own cases demonstrate Court's ability to issue a withholding and then later evaluate the appropriateness of the total funds withheld in light of the work performed. More specifically, the objector points out that in *In re Diet Drugs* and *In re Silicone Gel Breast Implant Product Liability Litigation*, the court originally ordered a withholding of one percentage, but later lowered that percentage based upon the

Conversely, the assessment withholding must take place now; if sufficient funds are not initially collected from the cases which settle between now and the final resolution of this litigation, the Court's ability to compensate the attorneys for common benefit work and expenses will be limited, if not non-existent.

The parties are more than two years into this litigation and trial cases are being set in the MDL.[5] As such, we have reached a point in the litigation where settlement of certain cases might be contemplated or discussed. In fact, cases have already been settled. The time to enter this order to protect the firms that have contributed to this effort for more than two years is now; in order to ensure that those firms are fairly, adequately and appropriately compensated later for the common benefit work that they have provided and will continue to provide.

3. The Assessment is Necessary

To use Objector's words, in addition to "finding" and "minding" their own cases, the PSC (and other attorneys providing common benefit work) have been "grinding out the necessary legal work" for the common benefit of all plaintiffs for several years. *See,* Mem. at 5. The PSC members initiated and have pursued this litigation for years without seeking an assessment order to guarantee them compensation for their time and efforts. Without any legitimate basis, the Objector asserts that "there is no indication that the discovery in this case will be at the level of prior MDLs." Only his late arrival to this litigation can explain this misconception.

Having been involved in this litigation for almost the last two years, the Court is well aware of the scope of this litigation and the amount of time, effort and expenses incurred by the

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Court's review of the amount of work performed and the benefit to the individual plaintiffs. Obj. Mem. at 7.

[5] Additionally, several cases have been accelerated for early resolution in the Rhode Island Superior Court consolidation.

parties and the Court this far. This MDL involves almost fifty separate products and a host of injuries, ranging from infections, through organ adhesions, to ring and bowel perforations. The products implicate numerous complex federal regulations, and the defendants sold over 100,000 of the offending devices starting in the year 2000 through the recalls of 2005 and 2006, and manufactured them in numerous locations, including Puerto Rico.

As the Court is also aware, document discovery alone has already been voluminous; Defendants have provided over *500,000 documents, totaling almost* 5 *million pages,* for the PSC to review. The personnel power required to review and evaluate this production is vast, and the electronic management of this production has been exceptionally expensive. Those documents were produced by 290 separate document custodians from the two defendants. Exclusive of these custodians, the PSC has identified literally hundreds of potential deposition witnesses related to the Defendants. The foregoing is also exclusive of the plaintiffs, their families, treating physicians, surgeon trainers, medical experts, biomaterials engineers, and damages witnesses (just to name a few). Additionally, as the Court is aware, numerous nonparties connected to this litigation demand discovery attention, such as Quintiles, Inc. and Q.S.E., Inc. Additionally, the PSC has engaged in extensive motion practice in this case already, and has no reason to doubt that more hundreds of hours of motion practice and argument are still ahead of them. Finally, Co-Lead Counsel and the PSC have already settled Kugel Mesh cases, including one of the cases selected for bellwether treatment – demonstrating the real value of the common benefit work being performed.

These contributions (to the common benefit of all plaintiffs) required the tireless efforts of Co-Lead Counsel and the numerous PSC firms. As the Court has witnessed, the Defendants (represented by prior counsel) in this litigation have vigorously opposed nearly each and every

discovery effort put forth by the plaintiffs, requiring motion practice above and beyond typical litigation.

The Objector belittles these efforts, and discounts the benefits that they provide to the individual plaintiffs. Moreover, the Objector would have this Court make a preliminary determination, *now*, regarding the amount of work that will be necessary to prosecute this litigation on behalf of all plaintiffs. As stated above, the Court will have the final say regarding: (1) the amount of work performed by the PSC (and the many attorneys that they include in common benefit work); and (2) the benefit that these efforts have conferred on all plaintiffs. But that can only be a retrospective determination. In the meantime, the PSC will continue to expend thousands of attorney hours pushing this litigation forward. However, in order to ensure competent and eager participation from co-counsel, there must be an assurance that, should these cases be resolved successfully, the attorneys who contributed their time and expertise will be fairly compensated. As explained below, at this stage of the litigation, the proposed 12% assessment (of the gross monetary relief) is a reasonable and non-excessive way of assuring these attorneys and firms that there will be a fund sufficient enough to compensate them for their common benefit time and expenses.

4. The Assessment is Appropriate

A. *An Assessment of* 8% *for Fees and* 4% *for Costs is Not Excessive*

The Objecting Attorney attempts to argue that an 8% assessment for fees and a 4% assessment for costs are excessively high and inappropriate. On the contrary, an assessment total of 12% of the gross monetary recovery is well within the bounds of the percentages of the gross recovery awarded to attorneys for common benefit work in consolidated litigation.

For example, in *In re Otho Bone Screw*, the parties were ordered to sequester 12% of

recoveries for fees and 5% of recoveries for costs - totaling of 17% of the gross monetary relief - in order to create fund from which Court-appointed Plaintiffs' Legal Committee could seek reimbursement for the work performed on behalf of all plaintiffs. *In re Orthopedic Bone Screw,* MDL No. 1014, 2000 U.S. Dist. LEXIS 15980 (PTO 402) (E.D. Pa. June 17, 1996); *see also In re Copley Pharm., Inc.,* 1 F. Supp. 2d 1407, 1415 (D. Wyo. 1998) ("counsel should receive 13% of the fund as a fee"). If a 17% assessment was appropriate in *Ortho Bone Screw,* surely a 12% assessment (pursuant to Court review and approval) is appropriate in this litigation.

In fact, according to a legal periodical from 2003, which provides a highly instructive survey of lodestars, multipliers, and fee percentages in common fund cases, on average the common benefit fee award in mass tort litigation is 16.1% of the gross monetary relief - well above the 12% proposed in this litigation. *See* Stuart J. Logan, Dr. Jack Moshman & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions,* 24 Class Action Reports (March-April 2003) (Attached as Exhibit B). More specifically, the authors of that article undertook a survey of the common benefit fee awards entered by state and federal courts between 1973 and the present, in 1,120 class action or mass tort cases. The authors also parsed the common benefit fee awards by size of recovery, type of case, and time of award. Among other things, the authors found that: (1) when measured as a percentage of the total recovery, common benefit awards (including both fees and expenses) averaged: (a) 18.4% across all 1,120 cases, (b) 15.1% across the 64 cases where the recovery exceeded $ 100 million, and (c) 16.1% across the 10 mass tort cases; and (2) the courts' effective multipliers averaged: (a) 3.89 across a111,120 cases, (b) 4.50 across the 64 cases where the recovery exceeded $ 100 million, and (c) 2.97 across the 10 mass tort cases. *See, id.* These statistics confirm that a withholding of the proposed assessment, in the amount of 12% of the gross monetary relief, is not excessive.

Additionally, in the very recent Medtronic mass tort MDL, counsel for plaintiffs and defendant negotiated a separate common benefit fund at the time of settlement - equaling roughly 18.25% of the gross monetary recovery. *In re Medtronic, Inc. Implantable Defibrillators Products Liab. Litig.*, MDL No. 05-1726. Similarly, in the recent Guidant mass tort MDL, the PSC was awarded 19% of the gross monetary recovery. *In re Guidant Corp. Implantable Defibrillators Products Liab. Litig.*, MDL No. 05-1708 (15% for fees and roughly 4% for costs).

The entry of a clear and unambiguous order providing for a 12% assessment withholding (with only 8% of that withheld for fees) may prevent later complications resulting from a separately negotiated attorneys' fees agreement – amounting to a higher percentage of the gross monetary relief as it did in the Medtronic and Guidant litigations. Based on the foregoing, the 12% total assessment is more than reasonable.

The Objector in his memorandum and Dr. Rubenstein in his Declaration go to great lengths to explain the different *mechanisms* by which common benefit work can be compensated. The Objector attempts to distinguish class action cases, where a "common benefit fund" is granted, and mass tort cases where a "common benefit assessment" is established. The Objector and Dr. Rubenstein then assert – without support or citation – that the Court should not compare the percentages received by plaintiffs' counsel in the separate mechanisms. Rubenstein Dec. at 12. However, whether common benefit work is compensated by a "common benefit assessment" or a "common benefit fund," in both situations the court still conducts an independent review of the time and expenses incurred by plaintiffs' counsel and awards or assesses a fair and reasonable percentage of the recovery to compensate plaintiffs' counsel for the work they have performed. Tellingly, the Objector makes no argument that the amount of common benefit work or the benefit conferred on individual plaintiffs is in any way effected by the mechanism with

which the court and the parties decide to collect funds. In any event, as demonstrated by the case survey above, the average recovery in consolidated mass tort cases (as opposed to class actions) is 16.1% of the gross monetary recovery. Therefore, the Objector's request for an "apples to apples" comparison demonstrates the reasonableness of the proposed assessment.

The Objector admits that if a global settlement is reached "the role of individual counsel is clearly reduced, as there is no longer any prospect of individual trials." Obj. Mem. at 5. In fact, if a global settlement is reached, the role of Individually Retained Plaintiffs Attorneys ("IRPA") would be extremely limited. Based upon this, Objector asserts that the Court must distinguish between assessments made during the course of the MDL and assessments ordered upon a global settlement. However, the Objector's concession (that the IRPA's role significantly decreases upon a global settlement) only supports the PSC's argument that a sufficient *withholding* must be made now, to preserve adequate funds (from all cases) to fairly compensate attorneys providing common benefit work should a settlement occur. Moreover, the apparent reason that the Objector draws such a distinction (between the percentage withheld pursuant to an assessment order during the conduct of an MDL and the fees that result after a global settlement) is because the proposed 12% assessment is well below the average recovery (16.1%) in Mass Tort cases. *See*, Ex. B.

B. *The Assessment is a Reasonable Split of the Attorneys' Fees Paid by Plaintiffs*

As explained in the Affidavit of Herbert M. Kritzer, submitted herewith, the extent of common benefit work that will be ultimately necessary (and the amount of recovery) cannot be currently known. However, based upon reasonable estimates, "the [common benefit work] by the PSC could constitute almost half of all the work devoted to cases in the MDL." Kritzer Affidavit at ¶28 (Attached as Exhibit C). If one assumes that the IRPAs have contingency

agreements with their clients in the 33⅓% to 40% range, with a mean of 36%, then an 8% assessment on the total recovery in a case is only about 22% of the total attorney's fees collected in that case. *Id*. at ¶29. At the very least, it is reasonable to believe that common benefit work will account for 22% of the work performed toward the resolution of a case. *Id*.

C. The Size of this Litigation should be Considered

As the proposed assessment is in the form of a percentage of gross monetary relief, it is important to consider the fact that this litigation is not as large as many other MDLs. *See, In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407. There are currently over 1000 cases pending before this Court; and between the federal and state litigations, there are currently a total of over 2000 cases alleging injuries as a result of the Defendants' hernia patches. While this is not an insignificant number of cases, some other MDLs have contained far more. For example, it has been reported that the *Vioxx* settlement will likely settle upwards of 27,000 cases. An increased number of consolidated cases means an increased number of settlements from which to collect money to compensate attorneys for common benefit work. As such, a court awarding a smaller assessment percentage in a larger litigation - such as *Vioxx* - is not instructive here.

At the same time, this litigation, while smaller than many other MDLs and consolidated litigations, is still extremely complex or costly to pursue for the attorneys charged with that duty. Indeed, there are a fewer number of cases here, but that doesn't mean there's any less work; that doesn't mean this litigation is going to be any shorter, any easier, or any less expensive. The PSC will still have to go through all of the document discovery, all the corporate representative depositions, all the fact depositions, and all the expert depositions. That work is just as labor intensive and costly in this MDL as it is in others. In fact, this MDL encompasses more that 50 separate products (unlike Vioxx which only dealt with one). This large number of products only

adds to the complexity of this MDL and the amount of common benefit work that will be necessary.

The Objector argues that the size of an MDL should not have an effect the assessment percentage because the PSC's burdens increase with the number of parties. Obj. Mem. at 10. However, as objector himself has points out, the primary focus of an MDL PSC is to conduct discovery toward establishing general liability against defendants – not to develop and try individual case filed. As such, the *burdens* that stem from that responsibility depend little on the actual number of cases filed. On the other hand, it is elementary that the greater the number of cases from which an assessment can be withheld, the smaller assessment percentage necessary to fairly compensate common benefit work.

The Objector also asserts – without support or justification – that a lower assessment percentage is applicable due to the "significant" value of the cases in this litigation. Obj. Mem. at 10. However, as evidenced by the mediations before this Court, Defendants attribute little value to a large percentage of the cases in this MDL. In fact, Defendants have previously stated that they place zero value on many non-ring break cases – and all infection cases – which comprise a portion of the cases filed. While plaintiffs' counsel strongly disagree with that assessment, if true, it is possible that a successful resolution will be achieved in only a small percentage of these cases that the PSC is charged with pursuing. For this reason, the PSC and the Court cannot yet determine the eventual size of the Common Benefit Fund – or even know whether the amounts withheld will cover the time and expenses submitted. In a relatively small consolidated litigation like this, it is imperative that the cases, and attorneys, receiving the benefit of the common benefit work (provided by the PSC) pay their share.

D. The Number of Attorneys and Firms Contributing to Common Benefit Work should be Considered when Withholding the Assessment

Unlike many other mass tort litigations, where only one or two leadership firms participate in common benefit work, this has been an incredibly inclusive MDL. Many firms on the PSC have committed substantial common benefit hours thus far (and will continue to do so). When both the federal and state court PSCs are taken into consideration, no less than 22 different firms are contributing to the prosecution of this litigation. Indeed, for this very reason, the Kugel Mesh MDL has been repeatedly referred to in mass tort circles as the model of inclusivity for other plaintiffs' steering committees. This fact is important here, as the inclusive nature of this MDL will result in many different attorneys and firms seeking compensation for the substantial (and necessary) common benefit work they perform.

E. Professor Rubenstein's Arguments are not persuasive.

First off, Professor Rubenstein admits that he has made no inquiry into the merits of plaintiffs' claims, stating:

> I have not analyzed the merits of the substantive contentions in any of the plaintiffs' complaints, nor have I undertaken an independent investigation of their claims.[6]

Rubenstein Dec. at 6. Therefore, Dr. Rubenstein has no understanding of the amount of work required of the PSC or the amount of potential recovery in this MDL. Without knowing (at least) that much, he cannot provide a credible opinion on what is a reasonable assessment in this MDL.

Moreover, as explained by Dr. Kritzer, Dr. Rubenstein only examined a small subset of cases, his collection of cases does not constitute a substantial systematic empirical study regarding attorney's fees in mass torts or MDLs, and his collection of cases contains omissions an/or inconsistencies. *See,* Ex. C at ¶¶11-15. For these reasons, Dr. Rubenstein's Declaration

[6] This is noteworthy, given the fact that the Objector has roughly 40 cases from which Dr. Rubenstein could have gained an understanding of the litigation upon which he opines.

is not persuasive.

5. The Assessment is *Almost* Unanimously Agreed to by Plaintiffs' Counsel

A. The Assessment percentages were Negotiated and Accepted by All Counsel - except the Objecting Attorney

Over the course of the last year, the PSC members negotiated the terms of the Proposed Assessment Order. At the time, those members constituted the known universe of counsel representing Kugel Mesh plaintiffs in this Court. Among these numerous law firms, from across the nation, are many with extensive experience in numerous MDLs and which have been subject to a variety of assessment orders, many of which were cited above as having assessments exceeding 12%. Extensive and repeated long-term negotiations were conducted to arrive at the agreed upon assessment percentages. Not one attorney objected that the assessment was too high. In fact, several attorneys voiced the concern that, due to the potentially small amount of insurance coverage, the assessment percentages should be *higher*.[7] The product of these negotiations, the Proposed Assessment Order presented to the Court in December, represents a unanimous *negotiated* agreement of over a dozen firms representing over 96% of the Kugel Mesh plaintiffs in this Court.

Moreover, as this Court is well aware, there has been substantial negotiation with defense counsel over the terms of the Propose Assessment Order; Defendants now agree to the entry of the Proposed Assessment Order, as drafted.

B. A Similar Assessment Order was ENTERED in the State Court

There are over 1,000 related cases are pending in front of Judge Gibney in the Superior Court of Rhode Island. The PSC in the Rhode Island state court litigation proposed a

[7] It is worth noting that in order to become federal PSC members, the attorneys and their firms had to contribute a significant amount of money to initially fund the prosecution of this MDL. As the PSC firms have filed the vast majority of the cases in this MDL, essentially, these firms have already paid once directly into the common benefit fund; yet they agreed to the 8% and 4% assessment on each their cases.

substantially similar assessment order to the one proposed here.[8] PSC Motion at 2. On August 11, 2009, Judge Gibney entered an order approving the exact same assessment withholding (8% and 4%) and fee application review process requested in this MDL. *See*, Ex. A. In part, Judge Gibney held:

> The Court is mindful that the PSC and Liaison Counsel have shouldered the lion's share of expense and work thus far in the litigation. The Court also acknowledges that the objecting attorneys and all plaintiffs who subsequently file claims, but who are not signatories to the Proposed Order, will likely benefit to some degree from the work that is being performed.
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> At this stage, however, the 12% common benefit fund set-aside is merely a holdback, not a levy.
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> [T]he objecting attorneys will have an opportunity, at the appropriate time, to challenge the proposed 12% assessment, and this Court may exercise its discretion to modify that percentage downward, if warranted. In light of this fact, the Court finds that the withholding is not unreasonable. Moreover the 12% figure is the result of extensive negotiation and reflects the consensus of plaintiffs' attorneys representing 94% of approximately 1000 plaintiffs in this litigation.

Id. at 11, 15 (quotations omitted). Therefore, based upon this recognized benefit, and because the Proposed Assessment Order is merely a withholding and allows for judicial review of any fee applications, Judge Gibney entered the Proposed Assessment Order as drafted. Not only does Judge Gibney's opinion demonstrate the reasonableness of the proposed assessment, but the potential for uniform assessments in the state and federal actions (which would prevent forum shopping based on those assessments) is further justification for entry of the Proposed

[8] While there is some overlap between the PSC in the state court litigation and the PSC in this MDL, the membership of these two PSCs is substantially different. However, while composed of many different attorneys and firms, the reaction of these two PSCs to the Proposed Assessment Order was the same – unanimous acceptance. In fact, the only objection to the assessment order in the state court was The Johnson Law Firm and one attorney affiliated with the Johnson Law Firm. Ex. A at 4. This (almost) unanimous acceptance is a testament to the reasonableness of the assessment.

Assessment Order in this MDL.

C. PSC Members Assessment Requests in Other MDLs Only Demonstrates the Appropriateness of the Proposed Assessment in this MDL

The Objector stops to point out that several of the members of the PSC were involved in MDLs where the Court awarded common benefit fund assessments of lower percentages than what is sought here. Obj. Mem. at 8. However, the fact that these attorneys have petitioned other MDL courts for lower assessment withholding percentages in other MDLs, but have unanimously agreed to petition the Court for a 8% and 4% assessment here, only demonstrates that they recognized the connection between the size of an MDL, the amount of work necessary, the number of firms and attorney contributing common benefit work and the assessment percentage withhold in order to make sure that there are funds available at the end of the litigation to fairly compensate the attorneys providing common benefit work for their efforts and contributions. Indeed, the logical inference drawn from PSC members petitioning other MDL courts for lower assessments in other litigations is that they are tailoring their assessment requests to the circumstances of the present litigation – and not simply applying fixed, non-case-specific, and inapplicable formulas like those that fill the Objecting Attorney's brief.

D. The Objecting Attorney was Offered, and Refused, the Opportunity to Provide Common Benefit Work for the PSC

As detailed above, this is a coordinated litigation, with much work already completed and much more yet to complete. The Objector has declined to perform common benefit work, and yet is not willing to pay others to do it. The Objector simply seeks to receive the benefit of years of litigation and of workup. In *In re Nineteen Appeals*, the First Circuit addressed what it referred to as "the free-rider problem," where "each attorney, rather than toiling for the common good and bearing the cost alone, will have an incentive to rely on others to do the needed work, letting those others bear all the costs of attaining the parties' congruent goals." *In re Nineteen*

Appeals Arising Out of the San Juan Dupont PlazaHotel Fire Litigation, 982 F.2d 603, 606 (1st Cir. 1992). In that case, the First Circuit held:

> 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.'
>
> .

Id. at 606-607.

Plaintiffs' Liaison Counsel, on behalf of the PSC, previously invited counsel for the objectors to assist the PSC in common benefit work. Counsel for the objectors declined the offer. That refusal is well within counsels' rights. Yet, counsel should not be permitted to enjoy the benefits of the efforts and expense of the PSC and to derail the Proposed Assessment Order, assented to unanimously by counsel for over 96% of the plaintiffs in this litigation. Aside from fairly compensating the attorneys who perform this work and commit their expenses, the Proposed Assessment Order also prevents firms from filing cases *en masse*, doing essentially nothing to prosecute those cases and reaping the benefit of the multiple firms that are involved in doing the heavy lifting.

6. The *Possibility* of a Separately Negotiated Common Benefit Fund Payment is Necessary and Proper

A. The Objector's Own "Expert" Recognizes that Separately Negotiated Common Benefit Funds are Appropriate and might be Necessary to Accomplish a Global Settlement in this MDL

The Objector's objection to the Proposed Assessment Order's provision for the possibility of a separately negotiations common benefit fund is directly at odds with the Declaration of his "expert," Dr. Rubenstein. Indeed, on Page 6 of his Declaration, Dr. Rubenstein explicitly states that it may be "appropriate" to look to separately negotiated common benefit fund cases as an approach to compensating attorneys for common benefit

work:

> To be sure, if this case does in fact end in a global settlement, it might at that time, be appropriate to look at common fund fees (and their relevant passages) as an approach to paying the PSC.

Rubenstein Dec. at 6. The objector's assertions to the contrary are undermined by his own expert's understanding of the importance and necessity of providing for such a mechanism to help resolve the cases on a global basis.[9]

B. The Negotiation of a Separate Common Benefit Fund to be Funded by the Defendants Benefits the Objector and his Clients

The Proposed Assessment Order's provision allowing the PSC to negotiate a separate common benefit fee with the defendants is to the benefit of the Objector's clients. Attorneys and firms contributing common benefit work will be compensated from the fund *only after* the Court's review of their time and expenses. The time and expenses incurred by those attorneys must be established by documentation. Simply put, the number of hours worked toward the common benefit and the amount of costs incurred will not increase (or decrease) based on the PSC's negotiations with Defendants for contribution into a common benefit fund. And at the end of the day, if the PSC is able to negotiate payment by Defendants into a common benefit fund that is beyond what they have contributed in common benefit fees and costs (approved by the Court), then those funds will be distributed to the plaintiffs and their IRPA. That is not a

[9] Moreover, for the simple fact that there are medical monitoring class action claims in this MDL, the assessment order must allow for the possibility of a separately negotiated common benefit fund. The PSC is charged with prosecuting all of the cases transferred to this MDL. Numerous medical monitoring class actions are pending before this Court. While the Court has required the PSC to file a consolidated class action complaint, Defendants have not to waive their *Lexecon* rights, and those individual class actions must be transferred back to the districts in which they were filed for purposes of trial. *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998). While the proposed 12% assessment is reasonable and appropriate withholding for the individual actions pending in this MDL, it may or may not be an appropriate assessment in the class action cases. As such, it is vital for the Proposed Assessment Order to allow the parties the flexibility to negotiate a separate settlement fund for these class actions.

conflict, it's a way to potentially get even more money for the clients and their attorneys.

C. The "Potential" Concerns Raised by Objector are Baseless and (at best) Premature at this Stage of the Litigation

The Objector raises what he himself must admit are only "potential concerns" with the possibility of a separately negotiated common benefit fund. Obj. Mem. at 12. This Court is well acquainted with the code of professional conduct and potential ethical concerns arising during settlement discussions. The PSC anticipates that the Court will review any application for the payment of fees or costs and will insure that any settlement negotiations are proper if fees are negotiated separately. In fact, the Court is required to conduct a review of the settlement terms, including any agreements related to attorneys' fees if fees are negotiated separately. *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. However, the Objector's "potential concerns" – which are present in all MDLs – should not prevent the entry of an assessment order.

First, the Objector cites *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 58, 524 (1st Cir. 1991) for the assertion that there "*might*" be an incentive for plaintiffs' counsel to put their own interests ahead of the plaintiffs' interest. Remarkably, after spending several pages of his brief urging the Court to "compare apples to apples", the Objector cites a class action case as opposed to a mass tort MDL such as this one. Obj. Mem. at 3-7. While the Objector's arguments regarding the amount of common benefit work required of lead counsel in a class action as opposed to a mass tort are not well founded, one difference that does exist is in the settlement process. Unlike in the class action setting, here, each individual plaintiff will choose whether or not he or she accepts the proposed settlement. As such, there is less danger of the PSC settling the plaintiffs' claims for a small amount in exchange for a larger common benefit

fund. Moreover, in *Weinberger*, the First Circuit merely took issue with the fact that the parties had entered into a "clear sailing" agreement after plaintiffs' counsel agreed to dismiss their claims "as moot, contingent upon payment of attorney's fees and expenses." *Id*. at 521. In support of their fee application, plaintiffs' counsel "submitted only a short memorandum chronicling the course of the litigation. They did not provide the district court with contemporaneous time records, affidavits, or other supporting documentation." *Id* at 522. At the parties' request, the district court dismissed the actions as moot, but denied the unsupported fee application. *Id.* Plaintiffs' counsel appealed the district court's review of their time and expense reports (or lack thereof) and the First Circuit merely held that the district court had a duty to review the fee application and the attorneys had a duty to support their fee application with suitable documentation. *See, Id*. That is exactly what the Protective Order provides for. The PSC in this case request (and anticipate) this Court's review of any fee application submitted. For this reason, the Objector's arguments find absolutely no support in *Weinberger*.

The Objector attaches as an exhibit – and mentions in passing – a letter sent by various attorneys and academics to the Standing Committee on Ethics and Professional Responsibility, dated September 17, 2007 (the "Letter"). This Letter has absolutely no precedential value. Moreover, by its own language and guidance, a consideration of the issues it presents is premature as no global settlement has been negotiated. The Letter criticized the terms and public statements surrounding one specific settlement, the Master Settlement Agreement in the tobacco litigation. The thrust of the Letter submitted by these non-judicial, self-appointed experts is that attorneys negotiating a common benefit fund paid by a defendant should not be able "preclude[] judicial or ethics-based review of the propriety of the fees….." *See* Obj. Mem. at Ex. D, pp 2-3. Indeed, the majority of the Letter is a discussion of *potential* ethical issues that may arise and

should be considered. However, potential ethical issues are present at all stages of litigation; the Objector does not point to – or even hint at – any ethical violations on behalf of the PSC. To do so would be patently false. As such, warning of potential ethical issues involved with a global settlement is unwarranted and premature. At best, the Letter calls for judicial review of settlements and attorneys fees, and proposes a rule against attorneys precluding such judicial review in the terms of the settlement agreement. Such a discussion is irrelevant here, because the proposed assessment order explicitly contemplates judicial review of the PSC's submitted time and expenses.

Next, the Objector claims that the Rhode Island Rules of Professional Conduct ("RI RPC") do not allow aggregate settlements. More specifically, the Objector asserts that the Proposed Assessment Order should be rejected under RI RPS Rules 1.5(e)(2) and 1.8(g). RI RPC Rule 1.5(e)(2) relates to *fee sharing* agreements between counsel – requiring the client to agree to the *fee sharing* agreement. The Objector fails to explain how a Court ordered assessment on the gross recovery in an MDL is a private fee sharing agreement between counsel. Indeed, if this were a fee sharing agreement, the PSC would not have to petition the Court to impose it. This is a Proposed Assessment Order issued by the Court under authority granted by law. *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. RI RPC Rule 1.5(e)(2) regarding fee sharing agreements does not prevent approval of this assessment order.[10]

The Objector then asserts that RI RPC Rule 1.8(g) prevents the inclusion of the provisions allowing for a separately negotiated (and Court approved) common benefit fund

[10] The Objector devotes more than a page of his brief to an irrelevant discussion of fee sharing agreements with non-profit organizations and volunteer attorneys in Rhode Island and other states. Obj. Mem. at 13-14. Those cases are not relevant to the issues before the Court.

because it requires a client to give informed consent before an aggregate settlement offer is accepted on behalf of that client. Obj. Mem. at 15-16. More specifically, the Objector states: "therefore, the Rhode Island Supreme Court's ethical rules require counsel (in this case individually retained plaintiff's attorneys) to obtain the client's written consent before allowing a settlement of this kind to go forward." *Id*. However, the Objector's argument has no teeth because that is exactly what would happen in the event of a global settlement in this MDL. The PSC and defense counsel would negotiate global settlement terms and each individual plaintiff would decide whether or not he or she will accept the settlement in their case. If the individual plaintiff chooses not to participate in the global settlement, his or her case will simply continue on as before – and in no case will it be dismissed without consent. Any signature requirement under the rules will be met – but for now, the assessment order must keep open the *opportunity* for a global settlement. To do otherwise would be to abandon a potential – and valid – method for resolution of this litigation. As such, RI RPC Rule 1.8(g) does not prevent approval of this assessment order.

Finally, the Objector argues that because the PSC attorneys are fiduciaries of the IRPAs the "*potential issues* raised by red carpet treatment on fees" prevent them from negotiating with Defendants for a separate common benefit fund. Obj. Mem. at 16 (emphasis added). The Objector provides no relevant case law in support of this argument.[11] Moreover, if a successful settlement is negotiated, the attorneys providing common benefit work will receive only the compensation that the Court approves. As such, the compensation that they receive for common benefit work will not unjustly "reduc[e] the fees received by the [IRPA]". Indeed, if any part of the separately negotiated fund is left over after the Court reviews the submitted time and expense reports and compensates the attorneys performing common benefit work, it will be distributed to

[11] *See discussion of Weinberger*, 925 F.2d 518, *supra* at p. 19-20.

the plaintiffs and their individual counsel.

7. The Assessment Must Apply to All Settlements and Verdicts Because the PSC Acts on Behalf of All Plaintiffs

In addition to conducting discovery on behalf of the plaintiffs in this MDL, the PSC is also acting on behalf of and for the benefit of all state court plaintiffs and individuals with claims who have not filed cases – especially those state court plaintiffs and individuals whose attorneys also represent plaintiffs in this multidistrict litigation. It is impossible for an attorney with both MDL cases and state court cases to segregate the two in such a way that his state court cases are not benefiting from the common benefit work performed in this multidistrict litigation. "Permitting [such attorneys] to use discovery information in their state cases without charge would produce an anomalous and undesirable predicament. As the Special Master noted, the CMO attempts to avoid 'imposing upon any counsel, including Mr. Benjamin, who has cases pending in both state and federal court, the dubious burden of utilizing PSC's work product exclusively in federal court cases and not in state court litigation'". *In re Latex Gloves Prods. Liab. Litig.*, 2003 U.S. Dist. LEXIS 18118 at *5 (E.D. Pa. Sept. 5, 2003). Likewise, here, the Objector himself has cases in both the federal MDL and the coordinated cases in the state court. It is incongruous to think that Mr. Johnson will somehow forget, or choose to ignore, the information, documents and other beneficial material that he receives as a result of the common benefit work performed by the federal PSC when he is prosecuting his state court cases or negotiating pre-suit settlement in any unfiled cases.

Moreover it is important to extend the assessment to any claims settled by Defendants, whether filed or un-filed, in order to protect the substantial efforts made by the PSC should they be able wear down Defendants' defenses and resolve such that Defendants look to settle cases early or before filing. Often, as a result of the hard work and victories of an MDL PSC, a

mass tort defendant will start to seek out claims that have not yet been filed – hoping to settle them early and for less money. In these situations, a defendant may put out the word that it prefers that counsel bring new claims not by suit, but directly to the defendant's claim facilities for payment. In such a case, it is undeniable that the claimant (and his or her attorney) benefited from the efforts of the PSC to put the defendant on-the-ropes. As such, principles of equity demand that a portion of those settlements be withheld for the common benefit fund.

IV. CONCLUSION

In light of the foregoing, it is appropriate for the Court to enter the Proposed Assessment Order providing for an assessment of each individual case in which a settlement is entered into, or judgment is paid, in the amount of 8% assessment for attorneys' fees and 4% for costs, for work performed by the PSC for the common benefit of all litigants.

Dated: August 13, 2009

Respectfully submitted,

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CERTIFICATION

I, Donald A. Migliori, hereby certify that a copy of the foregoing ***THE PLAINTIFFS' STEERING COMMITTEE'S MEMORANDUM IN FURTHER SUPPORT OF THE PROPOSED ASSESSMENT ORDER*** 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: August 13, 2009

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