

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * *		MDL NO. 07-MD-1842ML
		*
IN RE:	KUGEL MESH HERNIA	*
	PATCH PRODUCTS	* JULY 23, 2009
	LIABILITY LITIGATION	* 1:00 P.M.
		*
* * * * *		PROVIDENCE, RI

BEFORE THE HONORABLE MARY M. LISI,
CHIEF JUDGE
(Status Conference -- Open Session)

Court Reporter: Karen M. Wischnowsky, RPR-RMR-CRR
One Exchange Terrace
Providence, RI 02903
(401) 351-8311

1 23 JULY 2009 -- 1:00 P.M.

2 THE COURT: Good afternoon, and welcome to those
3 of you who have come from afar. I see the usual cast
4 of characters in the front row; but as you know, in the
5 course of this MDL, we conduct what we call open
6 meetings about every third monthly meeting so that any
7 of the participants in any of the cases, anyone who has
8 an interest in what is going on in this MDL may come
9 and hear for themselves and, if you have any questions
10 about the matters that are under discussion for today's
11 meeting, that you will have an opportunity to do so.

12 For those of you who don't know us, I'm
13 Judge Lisi. I've been assigned to handle this MDL. To
14 my right is Magistrate Judge Almond, who assists me
15 with the MDL, primarily dealing with any of the
16 discovery disputes. At this point it sounds like
17 things are running pretty smoothly in that regard.

18 Over to my left is Barbara Barletta, who handles
19 all of the docketing in this case. So if you have
20 questions about how to file things, what to file, where
21 to file, that sort of thing, you can talk to Barbara.

22 And John Duhamel, who is standing off to my
23 left, is my courtroom deputy but also assists Barbara
24 with all of the mechanics that go on in the clerk's
25 office.

1 If you're looking for transcripts, we have Karen
2 Wischnowsky on keyboards off to my right, and you can
3 find Karen in the court directory as well if you need
4 to contact her.

5 We do have a published meeting agenda for today,
6 and we'll stick pretty closely to it. After we have
7 gone through all of the items on the agenda, I will ask
8 if any of our visitors have any issues that you want to
9 raise or address to me or liaison counsel.

10 We'll start with Item Number 1, which is the
11 bellwether trial status and the status of the proposed
12 pretrial case management order.

13 Mr. Migliori, please.

14 MR. MIGLIORI: Good afternoon. Thank you, your
15 Honor. At the Court's instruction, we jointly put
16 together a proposed case management order which sets
17 out for the four cases the Court identified, I should
18 say the four remaining cases, one settled, for the four
19 remaining bellwether trial cases, we set out to group
20 them in twos and tried to organize the discovery that
21 was meaningful, efficient and reasonable to accomplish.

22 So we're asking that the Court adopt a pretrial
23 case management order which sets the first case, which
24 would be the John Whitfield case, for trial on
25 March 15th, and then every six weeks after that date

1 have the next case up and ready for trial .

2 Just to give an update to the Court in
3 considering this, we've worked, as the Court knows,
4 very, very much in hand with the state court to try to
5 make things efficient.

6 We met this morning with Judge Gibney, and the
7 Court there did accept a jointly proposed first trial
8 date of June 1st for a case, one of four cases that
9 will be decided at a later time.

10 So when we worked out, that is, the Defendants'
11 counsel and I worked out this proposed case management
12 order for your Honor, we were very much aware of our
13 responsibilities in the state court as well, and we
14 tried to include that thinking in the dates that we
15 proposed for you.

16 THE COURT: I know that you have in the case
17 management order specified dates when these cases will
18 be tried. I may simply delete the date and put in the
19 month and then, when we get closer to that month, set
20 an actual commencement of trial date only because it's
21 hard to pin me down this early on.

22 So if that's all right with you, that's in all
23 likelihood what I'll do with the order.

24 MR. MIGLIORI: That would be great, your Honor.
25 In fact, in some instances we put "to be determined"

1 just because we didn't know where the Court would want
2 it.

3 THE COURT: It's too far out.

4 Has Judge Gibney or is she going to enter a
5 similar case management order?

6 MR. MIGLIORI: No, your Honor. In the state
7 court, with the rules in the state court, the process
8 pretty much goes right up to 10 days before trial date
9 as a matter of practice and procedure.

10 So we will -- we are agreeing to cross-notice
11 all liability depositions taken in this litigation so
12 that we're not doubling up.

13 So we're pretty much going to track this, but
14 we'll have a few extra months, I think, in the state
15 court to get things done.

16 THE COURT: And so you'll know, whatever orders
17 I enter in this case we have been forwarding over to
18 Judge Gibney so that she has a copy for her file and
19 she can follow what's going on here.

20 Anyone have any questions on the status of
21 bellwether trial cases?

22 Our usual discovery status report.

23 MR. MIGLIORI: If I may, your Honor. We
24 provided one this morning as well. Discovery is going
25 very, very smoothly. Where we've had issues, we've

1 been able to discuss them, work it out. We've sent
2 some letters back and forth. We've followed up with
3 phone calls.

4 And just to give the Court a status, we have
5 completed five liability depositions. We've got about
6 28 or so more that we're working out the availabilities
7 of the witnesses. We're working efficiencies where
8 we're trying to, at Defendants' request, have those
9 that are in New Jersey take place around the same time.

10 So it's, I think, fair to say that everything's
11 running very smoothly and cordially, and the
12 depositions are going without a hitch when they
13 actually do take place.

14 THE COURT: Very good.

15 MR. MIGLIORI: There are some outstanding
16 document issues. Five million pages, approximately,
17 have been produced. We're identifying for Defendants
18 like missing Bates page ranges and sort of types of
19 anomalies that we're asking them to follow up on.

20 Defendants have been extremely responsive in
21 getting back to us with information or at least a
22 timetable of when they can get information to us.

23 So I think with the case management order as we
24 understand it will be entered, discovery is not going
25 to be a problem to get done within the fact period.

1 MR. HOOPER: Your Honor -- I don't need the
2 microphone. I'll speak loudly.

3 THE COURT: You almost have to because it's a
4 trade-off between air conditioning and quiet or
5 stifling heat.

6 MR. HOOPER: I thought Don just wanted his Phil
7 Donahue impersonation, but I like this. It helps me.

8 Your Honor, John Hooper for Bard. We would echo
9 what Mr. Migliori has said. The Plaintiffs have been
10 extremely helpful as well; and, you know, in any
11 litigation you have disagreements, but we've first
12 responded enough to go to the Court, and the magistrate
13 has been able to work the details out.

14 One issue that we don't have a disagreement on,
15 we just want to be clear on the record, we hope, and
16 we've had discussions with Don, that down the road we
17 really aren't looking at another 28 depositions; and we
18 hope at some point when we get to a natural point that
19 the Plaintiffs are comfortable, that perhaps we aren't
20 adding additional depositions.

21 I only put that on the record because we may
22 come back to the Court with Don and request a different
23 schedule.

24 THE COURT: My understanding was that the
25 Plaintiffs were going to develop a list of people whom

1 they intended to depose so that you would have an
2 understanding of who they were looking for so that you
3 could organize them.

4 MR. HOOPER: And that's gone very well, and
5 we've actually had them prioritized with the hope or
6 expectation at some point you reach a maturation point
7 and perhaps we won't need to take 28 more depositions;
8 but we're not even close to being there, and we'll
9 again try to work cooperatively on that.

10 THE COURT: Well, it's always good to hear that
11 you're doing that.

12 Pending motions. I have a couple of comments on
13 pending motions, but why don't you start, Mr. Migliori.

14 MR. MIGLIORI: As you can tell, your Honor, I am
15 far less intelligible and intelligent today because
16 Leah is not here.

17 THE COURT: That's the difference.

18 MR. MIGLIORI: She is in Orlando enjoying a
19 well-deserved break.

20 THE COURT: Good for her.

21 MR. MIGLIORI: So in this regard, I may not have
22 intelligent answers for your questions. We did provide
23 a list of pending motions that tend to be the same
24 types of issues in terms of pending motions to dismiss
25 and the like, but the major one out there is one that

1 relates to an assessment order.

2 THE COURT: Well, that one's not ripe. I think
3 that the Defendants had asked for and I gave them or
4 someone asked for and I gave an extension until
5 tomorrow to file a response.

6 MR. MIGLIORI: And, your Honor, on that issue,
7 we did ask, the Plaintiffs asked for more time.

8 THE COURT: And I see Mr. Zurier's here as well
9 for that.

10 MR. MIGLIORI: The reason I raise it now, your
11 Honor, is that, consistent with what we had represented
12 to the Court last time, the Defendants -- you gave us
13 extra time for the Defendants and Plaintiffs to work
14 out a joint assessment order. We did, in fact, file
15 that last Friday.

16 THE COURT: I have seen that. I need to ask
17 you, though, whether you shared that with Mr. Zurier.

18 MR. MIGLIORI: And that I believe we have, and
19 what I was going to ask the Court is if we can get
20 another extension of time to allow Mr. Zurier and
21 Mr. Johnson to review the most updated version because
22 the objection they filed was actually subject to -- was
23 actually related to a now outdated proposed assessment
24 order.

25 They may need a week or two weeks or whatever

1 time they would like to review it, and we'd like to
2 actually have more time to have our expert look at
3 their objection in light of the actual assessment
4 order, not the original.

5 THE COURT: Before I ask Mr. Zurier what he
6 feels about that, what is the status of the assessment
7 order in Superior Court?

8 MR. MIGLIORI: This morning we reported to the
9 Superior Court that we had earlier provided a courtesy
10 copy of our filing that we had here, and we gave the
11 Court in the state court an identical version for entry
12 in the state court of a proposed assessment order,
13 again, assented to, but changing MDL to the court
14 consolidated state cases.

15 So the substance of what we gave the Court this
16 week is -- mirrors what we filed with the Court last
17 week, and Judge Gibney had reported that she's in
18 communication with this Court in terms of trying to
19 make sure that both orders are complementary or
20 consistent or not inconsistent.

21 THE COURT: And that's the case. That's why I
22 asked. I know that she has something that she's
23 working on, but I want to make sure that we're not
24 working at cross-purposes.

25 If you wouldn't mind, Mr. Zurier is here, and

1 perhaps he can speak to your request for another week
2 or two beyond tomorrow in order to give him and
3 Mr. Johnson an opportunity to review the proposal that
4 you've submitted to the Court.

5 Do you have any problem with that, Mr. Zurier?

6 MR. ZURIER: Thank you, Judge. We're not -- we
7 don't have any particular deadline. We have not seen
8 anything yet.

9 One comment I have is that if documents are
10 being exhibited to Judge Gibney, I haven't seen those;
11 and I did not appear in the Superior Court case, but
12 Mr. Johnson has not told me of anything that was filed
13 with Judge Gibney.

14 In addition to seeing whatever was filed with
15 your Honor on this, we'd like to see whatever was filed
16 with Judge Gibney.

17 THE COURT: I think what Mr. Migliori just said
18 is that what was given to Judge Gibney was a copy of
19 what was sent to me.

20 MR. ZURIER: Well, we haven't seen what was
21 filed with your Honor either.

22 MR. MIGLIORI: I can stipulate to --

23 THE COURT: We're going to make sure that you
24 get that.

25 MR. MIGLIORI: Your Honor, what I will send

1 today is the cover letter, the courtesy copy of the
2 filings here and the proposed state version which
3 complements it. I'll send that over to Mr. Zurier
4 today.

5 THE COURT: And then, Mr. Zurier, do you want
6 two weeks from tomorrow? Do you have any problem with
7 my giving Mr. Migliori two weeks from tomorrow to get
8 some sort of a response?

9 MR. MIGLIORI: I can also represent that with
10 the case -- the five cases that settled, we won't do
11 anything, obviously, until an order is entered. So
12 there won't be any prejudice in terms of action.

13 MR. ZURIER: That sounds fine, Judge, although
14 I'll add one more thing with apologies for the burden
15 it may impose on the Court.

16 If there's not an agreement on this and if an
17 extensive legal argument is filed by the steering
18 committee, we may be asking the Court to respond to
19 whatever they file.

20 THE COURT: That's fine. That's fine. And all
21 you need to do is pick up the phone or send a letter in
22 saying that all parties agree that you can have some
23 additional time. That's fine.

24 MR. ZURIER: Thank you, Judge.

25 THE COURT: I can tell you with my schedule this

1 summer, my trial schedule this summer, the likelihood
2 is I'm not going to get to it much before the end of
3 August anyway. So take the time that you need.

4 MR. MIGLIORI: I was going to ask your Honor,
5 the people that are actually working on it said that --
6 there are expert affidavits involved as well, so if we
7 can take three weeks.

8 THE COURT: Sure. Three weeks okay for you,
9 Mr. Zurier?

10 MR. ZURIER: Yes, Judge.

11 THE COURT: But you're going to get a copy of
12 whatever I have, whatever Judge Gibney has, you're
13 going to get today. And then I would encourage you,
14 it's not a bad thing, to talk to each other.

15 MR. MIGLIORI: Of course.

16 THE COURT: Let's talk about the remainder of
17 the pending motions. On Hadley, my note is that the
18 Defendants have sent a draft order to Plaintiff's
19 counsel and are awaiting a response.

20 This is the motion to remand, but this is the
21 one that had a little bit of a different -- you need
22 more time on this?

23 MR. HOOPER: Actually, I think the Plaintiffs
24 have requested that they have some more time.

25 MR. MIGLIORI: Your Honor, if I may, I think

1 this is Mr. Cerilli's case. So if that was requested,
2 it didn't involve me; but I know that it was actually
3 an accommodation to the way the Defendants wanted the
4 case to sit in posture. It's not a substantive issue.

5 So wherever it ends up, I think it's just a
6 matter of getting the right paperwork before you. So I
7 don't think there's a time-sensitive issue.

8 THE COURT: For our record keeping, right now
9 it's still an active case with us. It shows up on the
10 pending motions list. And so I would encourage you to
11 get with Mr. Cerilli.

12 MR. MIGLIORI: I will involve myself, and I'll
13 make sure it's not on next month's.

14 THE COURT: Okay. Very good. On Philburn and
15 Holley and Anderson, Baker, Myers and Purcell, defense
16 counsel are new to the case, and the way we were
17 handling these was that once I had granted an order of
18 withdrawal and entered that 30-day order, then
19 Defendants' counsel were preparing the actual dismissal
20 order.

21 So we're waiting on you to send those over to
22 us. These are dismissals without prejudice. So if you
23 would take care of preparing those dismissal without
24 prejudice orders, I can sign those and those cases also
25 will go away.

1 On Humphrey, at the top of the second page,
2 apparently there was a motion to withdraw as counsel.
3 There was no response. So this one could be granted,
4 and I'll ask someone to prepare an order to that
5 effect, again, with the 30-day provision for the party
6 to enter pro se or have successor counsel enter.

7 MR. MIGLIORI: We'll do that.

8 THE COURT: And I think that takes care of
9 pending motions. We're in good shape in terms of
10 pending motions.

11 MR. MIGLIORI: In this context, your Honor,
12 again, this is just to update the Court, there's
13 nothing to really discuss -- there was a pending motion
14 that we filed in the state court that related to issues
15 that were brought up here relating to confidentiality
16 designations. The Court encouraged us to file a motion
17 because we thought they were overbroad.

18 I don't know if the Court receives orders from
19 the state court, but just yesterday Judge Gibney did --

20 THE COURT: The only one I got was a proposal on
21 the assessment. I don't routinely receive orders that
22 are entered over there.

23 MR. MIGLIORI: As a courtesy, we'll send you an
24 order that was entered by Judge Gibney yesterday or the
25 day before relating to an outstanding discovery issue.

1 THE COURT: Why don't you do that.

2 Any questions or -- I'm sorry.

3 MR. HOOPER: Your Honor, we did file -- it was
4 the subject of our last hearing, we did file our motion
5 to file a master answer.

6 THE COURT: I saw that.

7 MR. HOOPER: And it was only filed yesterday,
8 but obviously we'll return to the Court if there are
9 any other issues later.

10 THE COURT: I saw that it was filed. I have, by
11 virtue of my hyperactive clerk, a paper copy on my
12 desk; but to be honest with you, I've been on trial for
13 a week and a half.

14 MR. HOOPER: Well, your Honor, I assumed that
15 you wanted more than nine hours to make a decision, but
16 I just didn't want to get yelled at for not having
17 filed that.

18 THE COURT: I know it's there.

19 MR. MIGLIORI: Your Honor, that's unopposed, as
20 I understand the motion.

21 THE COURT: I understand that. I still think I
22 need to read it before I sign it.

23 MR. MIGLIORI: I wouldn't trust him either, your
24 Honor.

25 MR. HOOPER: I don't think you read it, Don.

1 MR. MIGLIORI: I didn't. I have people.

2 THE COURT: Any other questions or comments on
3 pending motions?

4 All right. I think you've already answered my
5 question as I was looking over the minutes from last
6 month's conference. You were going to tell me about
7 the status of trial cases in Superior Court. You've
8 indicated that Judge Gibney has set June 1 of '10 for
9 the first trial in that case.

10 MR. MIGLIORI: June 1 of 2010, and there are
11 four cases that have been accelerated. We'll decide
12 which one shortly.

13 THE COURT: Before we set our next meeting date,
14 are there any other matters of business that lead
15 counsel wish to address at this time?

16 MR. MIGLIORI: Not from our side, your Honor.

17 MR. HOOPER: No, your Honor.

18 THE COURT: I'll then open it up to any of our
19 other attendees. Are there any other matters or
20 questions that any of you have which you would like to
21 address to me or Judge Almond or the people who do all
22 the work?

23 Hearing none, then, I thank you all for coming.
24 I know some of you come from quite a distance. And I
25 would encourage you if you do have any questions in the

1 time between the open sessions that you make full use
2 of our Web site where we publish not only the agendas
3 but we publish all of the orders that are entered as
4 well as the minutes of the monthly meetings so that you
5 can follow pretty much what is going on.

6 And then, of course, for those of you on
7 Plaintiffs' side, as most of you are, Mr. Migliori and
8 his staff as well as all of his liaison counsel
9 committee members are always available, I know, to
10 answer your questions and to work with you on any
11 things that you might have pending.

12 Did you have anything that you wanted to
13 address?

14 MAGISTRATE JUDGE ALMOND: No. I would like to
15 get a copy of that order on the confidentiality
16 designations, if you don't mind. Thanks.

17 THE COURT: I don't know. This is the 23rd of
18 July, and usually we meet the first week of August.
19 And I looked at that, and I thought I don't think these
20 guys want to come back that soon.

21 I looked at my calendar; and if you have no
22 problem with going into September, we could do either
23 September 9th or 10th, I think that's a Wednesday and
24 Thursday, and we could do it at 1:00.

25 You all have those fancy little gizmos so you

1 know where you're going to be.

2 MR. HOOPER: It gives me an excuse not to go
3 back to New York for Labor Day, your Honor, so that
4 would work for me.

5 THE COURT: You really shouldn't do that. You
6 should not go --

7 MR. HOOPER: I'd rather stay here. So if I'm
8 under order, my wife would understand that.

9 THE COURT: We'll get that out immediately.

10 MR. HOOPER: Thank you, your Honor.

11 THE COURT: Mr. Migliori, don't gum it up.

12 MR. MIGLIORI: If I had a nickel for every time
13 I've been told that. Either one's fine.

14 THE COURT: What's better, 9 or 10?

15 MR. BROWN: The 9th is fine, your Honor.

16 THE COURT: The 9th is fine? He's shooting for
17 the 10th. He wants one more day.

18 MR. HOOPER: Can we get back to you, your Honor,
19 on the day?

20 THE COURT: Sure. And you said, Mr. Migliori,
21 either day is fine?

22 MR. MIGLIORI: Yes.

23 THE COURT: Just let us know which is better for
24 you, and that will be posted.

25 MR. HOOPER: Thank you, your Honor.

1 THE COURT: That's fine. Thank you all again
2 for coming.

3 (Adjourned)

4
5 * * * * *

6 C E R T I F I C A T I O N

7
8
9 I, Karen M. Wischnowsky, RPR-RMR-CRR, do
10 hereby certify that the foregoing pages are a true and
11 accurate transcription of my stenographic notes in the
12 above-entitled case.

13
14
15
16 /s/ Karen M. Wischnowsky

17 Karen M. Wischnowsky, RPR-RMR-CRR

18
19
20
21
22 August 18, 2009

23 Date
24
25