UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

IN RE: KUGEL MESH HERNIA PATCH PRODUCTS LIABILITY LITIGATION	**)** **)** **)**	**MDL Docket No. 07-1842-ML** **JUDGE LISI**

THIS DOCUMENT RELATES TO:
ALL ACTIONS

SUR-REPLY MEMORANDUM OF JOHNSON LAW FIRM PLAINTIFFS IN FURTHER SUPPORT OF PARTIAL OBJECTION TO MOTION FOR ENTRY OF AN ASSESSEMENT ORDER IN MDL 1842

Plaintiffs Dora Johnson *et al.* (referred to below as the "JLF Plaintiffs") submit this sur-reply memorandum in further support of their partial objection to the Plaintiffs Steering Committee and co-Lead Counsel's ("PSC/LC") Motion for Entry of an Assessment Order in MDL 1842 ("Motion"). This sur-reply supplements the Memorandum in Opposition ("Opposition Memorandum") JLF Plaintiffs filed on June 24, and it responds to the arguments raised by PSC/LC in their August 13 Reply Memorandum, referred to below as "PSC/LC Reply."

I. Introduction and summary

In this sur-reply Memorandum, JLF Plaintiffs argue four basic points.

A. This Court lacks jurisdiction to impose a common benefit fee assessment on cases that are pending in state courts that are not part of the MDL before this Court.

B. The "consensus" among other counsel in support of this Motion is more the result of common interest than of any indication of the Motion's substantive merit.

C. Unregulated common benefit fee settlements between some (but not all) attorneys and defendants without court approval raise substantial ethical concerns.

D. The proposed assessment amount is excessive based on the only relevant data available.

II. Argument

A. This Court lacks jurisdiction to impose common benefit assessments outside the MDL.

In their Opposition Memorandum, pp. 17-19, JLF Plaintiffs argued that this Court lacks jurisdiction to impose common benefit assessments on cases pending in other courts. *See, e.g.*, *In re Showa Denko*, 953 F.2d 162, 166 (4th Cir. 1992) *and In re Linerboard Antitrust Litigation*, 292 F. Supp. 2d 644, 664 (E.D. Pa. 2003). In their Reply (pp. 25-6), PSC/LC neither distinguish these authorities nor provide any countervailing authority to support their position. As a result, the Court should deny the portion of PSC/LC's Motion seeking to include Paragraph 2B(iv) of Proposed Order No. 22, which extends the assessment to cases filed in state court.

B. The "consensus" among other counsel in support of the Motion is not a persuasive basis for assessing its validity.

At several points in its argument, PSC/LC contend that the consensus among counsel who support the Motion demonstrates its reasonableness. A full review of the facts reveals a different explanation; namely, the Superior Court version of the Motion is supported by all of the parties who will benefit from it, and is opposed by all of the parties who will be harmed by it.

In the Reply Memorandum, PSC/LC make factual assertions that are unverified and unsupported by an affidavit or other evidence. JLF Plaintiffs dispute these assertions, and submit the Affidavit of John Deaton, Esq. (Exhibit A) to clarify several of these disputed facts. Mr. Deaton is local counsel to the plaintiffs Mr. Johnson represents in the Providence County Superior Court. Exhibit A, ¶5.

More specifically, PSC/LC asserts, at p.4 of the PSC/LC Reply, that JLF Plaintiffs' counsel was offered "the opportunity to off-set any loss in fees that he may perceive by

participating in common benefit work." This is not correct. Instead, PSC/LC offered JLF Plaintiffs' counsel the opportunity to perform common benefit work that would offset *some*, but definitely not *all*, of the 12% assessment. Exhibit A, ¶10. While not accepting or ruling out the possibility of performing such work, JLF Counsel objected to this arrangement, because it considered the 12% figure to be excessively high regardless of how much common benefit work they performed. *Id.*, ¶11.

It is also important to clarify the interests of the counsel who assented to the motion filed in Superior Court. To Mr. Deaton's knowledge, he is the only Rhode Island attorney in the Superior Court Kugel action who was not offered a seat on the Steering Committee; therefore, all of the other Superior Court plaintiffs are represented by primary and/or local counsel who hold a seat on the Steering Committee. These other attorneys have a direct financial interest in the amount of the assessment – the higher the assessment, the more money available for them to receive. As a result, the "consensus" in the Superior Court is best viewed as a consensus of interest, rather a disinterested consensus of opinion. This consensus of interest may explain why the consensus among the same counsel in *other* MDL cases (where there was opposition) was to seek an assessment of 3%, 4% or 6%, rather than 12%. These lower assessments were granted by those other courts on the merits. *See* Opposition Memorandum, p.8.

As argued in further detail below, counsel who provide common benefit work in this area are extremely well compensated in a typical case – for example, *according to the data that PSC/LC has presented to the Court*, the overall mean common fund compensation for class action counsel during 1994-2003 was $1,192.43 per hour. (This is not a typographical error.) *See* Logan, Moshman & Moore, *Attorney Fee* Awards, 24 Class Action Reports (March-April,

2003) (cited at p.10 of PSC/LC Reply, and reproduced as Exhibit B to PSC/LC Reply), Page 1, Table.[1] In light of these generous economics and the stark differences between the parties' positions, the mere fact that a group of counsel who would gain a windfall under the Motion support it, while an attorney who would pay for the windfall objects, does not aid the Court in determining the correct amount of the assessment.

C. The proposed option of *per se* valid settlement agreements is deeply problematic.

At pp. 19-25 of the Reply, PSC/LC argue that the potential harms resulting from an unregulated negotiation between PSC/LC and defense counsel to designate a portion of a settlement for common benefit fees are minimized by the requirement of Court of any later fee petition. While this is certainly a helpful protection, it is not adequate to overcome the ethical problems raised by this approach. At p. 21 of the Reply, PSC/LC appear to retreat slightly by acknowledging that any such fee settlement would require court approval along with the rest of the settlement pursuant to the Manual for Complex Litigation. If this is true, then at a minimum, PSC/LC should agree to an amendment of the proposed language in Proposed Order No. 22 that specifies that all common benefit set-aside terms that are negotiated between PSC/LC and the defendants must be reviewed and approved by the Court upon notice to all plaintiffs with the opportunity to be heard before the Court. At such a hearing, IRPA's would have the right to argue that the balance between common benefit fees and payments to the actual plaintiffs is at an appropriate level.

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[1] As Professor Rubenstein testified in his Declaration (¶17a, p. 10), class action counsel receive a higher fee on a proportionate basis than do typical common benefit fund counsel in an MDL, and therefore the comparison is not apt. If, however, the Court accepts PSC/LC's argument that this distinction is meaningless, then one can expect a petition

In fact, however, even this additional protection may be inadequate to comply with the requirements of Rule 1.8(g) of the Rhode Island Rules of Professional Conduct. More specifically, that rule requires the involvement of all clients and all counsel in this type of settlement negotiations involving fees, with a single, explicit exception for class action settlements. In contrast to class action settlements, the clients in this MDL have separate interests and separate counsel. Under those circumstances, the exception carved out of Rule 1.8(g) does not apply, and this rule prohibits the fee settlement mechanism proposed by PSC/LC.

D. The proposed 12% total assessment is excessive.

JLF Plaintiffs oppose the justification for 12% assessment offered by the PSC/LC in its Reply Memorandum on three grounds: (1) the correct practice when setting these amounts is to be conservative on the low side rather than the high side, (2) class action settlement data does not provide an appropriate comparison, and (3) PSC/LC's expert analysis is speculative. We consider each issue in turn.

1. The balance of costs and benefits favors a low assessment, rather than a high one.

Both the Superior Court and the PSC/LC seek to minimize the impact of an excessive assessment, arguing it is better "to err on the high side" because any excess assessments can be refunded, while an inadequate assessment may leave PSC/LC "holding the bag" as other counsel may have exited the litigation.

JLF Plaintiffs submit that this analysis is exactly backward. In practice, courts have had no problem in increasing common benefit assessments during litigation as circumstances dictated, or to approve "common benefit fund" awards for settlements that are in greater amounts

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from PSC/LC that will seek hourly fees in the $1,192.43 range.

that mid-case common benefit assessments. *See, e.g., In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174 (D. Minn. Mar. 7, 2008) (referred to in Professor Rubenstein's Declaration, p. 24) (4% assessment while case is pending, 14.4% common benefit fee after case is settled). This arrangement makes intuitive sense; after all, the master settlement involves extra work by the steering committee to achieve, and brings a substantial extra benefit to those parties and counsel who have not yet settled their cases. Counsel whose cases settle in advance of any class settlement should not have to pay a fee for the negotiation of a settlement that does not benefit them.[2]

On the other hand, an order to impose excessive benefit assessments is not "merely a withholding"; instead, it can have an immediate and long-lasting impact on the management of the litigation. If attorneys know in advance that they can perform work that will yield average compensation of $1,192.43 per hour, and that a large "war chest" is being funded to facilitate payment, there is an obvious risk that the case will be overlitigated. For example, in the current Motion before the Court, the opposition filed by the JLF Plaintiffs was prepared primarily by one attorney (this writer) consulting with a second one (Mr. Johnson). In contrast, the PSC/LC's Motion is signed by a total of twelve attorneys from five firms, include four from Motley Rice in Rhode Island, one from Motley Rice in South Carolina, and three each from law firms in Alabama and Chicago. This "legal team" and the work product it has generated (including a 26-page reply memorandum) is excessive and quite possibly counterproductive. The prospect of a 12% assessment provides the wrong incentive to counsel on a going forward basis.

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[2] For that matter, if the Court found it necessary to assess counsel that already "settled out", it could retain jurisdiction for this purpose, and counsel comply with these assessments in order to remain in good standing with the court and with the bar.

2. Common benefit fees from class action settlements do not provide a valid base of comparison for interim assessments in MDL cases.

It is common for class action settlement fees to equal 12%-30% of the total amount recovered, whereas published common benefit assessments are typically in the 4%-6% range. PSC/LC argues that their proposed amount of 12% is therefore not excessive, as a settlement could end up at this higher level anyway when the case is finished.

Once again, PSC/LC conflates several distinct situations. As Professor Rubenstein explains in his Declaration, Par. 17, pp. 10-11, a fee award to class action counsel can be in the 20%-30% range because they are the only counsel receiving compensation; there are no individually retained plaintiff's counsel (or "IRPA's"). Because of this, class counsel are responsible for the entire client relationship and all of the legal work. Also, the fee paid to class counsel is the entire amount paid by the plaintiff class. This is precisely the distinguishable context in which the United States District Court for Wyoming awarded class counsel an attorney's fee in *In re Copley Pharmaceutical, Inc.,* 1 F. Supp. 1407 (D. Wyo. 1988) (*see* PSC/LC Reply, pp. 10, 13). By comparing "apples to apples" the bulk of these assessments fall in the 4%-6% range, and references to class action "oranges" are not helpful to the Court.

There is a second category where cases begin as MDL's with IRPA's, where the clients already have agreed to pay a contingency fee to one counsel, and a second counsel petitions the court for a share of that fee. Under those circumstances, the court must make two separate determinations.

According to Professor Rubenstein's research, the prevailing practice is to impose a low assessment in the middle of the case, and then higher settlement common benefit fee award later

if circumstances warrant. *See* p. 5, *supra*. As previously stated, it is entirely appropriate for post-settlement awards to be substantially higher due to the additional work performed by PSC/LC, and the additional benefit that accrues to plaintiffs and their counsel.

As a further matter, it is important to understand and appreciate the important role if IRPA's in an MDL. In a class action, the clients are effectively brought into existence by a judicial decree; in contrast, MDL clients are found through the painstaking work of counsel, who expend their time, treasure and good name to "find" the plaintiffs. IRPA's must then "mind" their clients, who are actual people rather than an abstract class. Through a contingency fee agreement, individual counsel's interests are aligned directly with the client. In contrast, an attorney who is "on the clock" may have a financial interest in unnecessary additional litigation (or the involvement of "too many cooks") that may increase the expense of litigation without bringing a corresponding benefit. As a result, it is appropriate for courts to evaluate class action fee petitions in an entirely different light.

3. Professor Kritzer's analysis is speculative and not helpful to the Court.

In support of the Motion, PSC/LC submits the Affidavit of Professor Herbert M. Kritzer, a scholar in the fields of civil justice process and contingency fee practice. The Court should assign little if any probative value to Professor Kritzer's affidavit because he does not have any specific knowledge of the issue this Court must resolve, either from prior experience, prior scholarship, or from specific research conducted in connection with his expert engagement.

Professor Kritzer presents his curriculum vitae and list of publications as an attachment to his affidavit. That document does not present (at least to this reader) any record of scholarship in

the field of common benefit fund work by counsel in class actions or MDL's (in contrast to Professor Rubenstein's knowledge). Professor Kritzer does not have a law degree and does not claim to have litigation experience. In his affidavit, he does not identify what research he conducted to provide the basis for his expert conclusions, other than the review of some articles on class actions (which he acknowledges are distinct from MDL's), *see* ¶11, note 2, and an August 7 email to a person at the Federal Judicial Center. ¶12. Professor Kritzer acknowledges his lack of specific knowledge in the tentative nature of some of his conclusions; for example he states at ¶17 that "it *appears as if* CBW [common benefit work] is typically compensated on a lodestar basis." (emphasis added) The Professor also acknowledges that he has not conducted his own research to learn about this field, as "the time available to [him] to prepare this affidavit did not allow [him] to locate additional assessment orders." Exhibit C, ¶15. In other words, his expert conclusions lack the support of either personal knowledge or appropriate research.

Instead, the dominant theme JLF Plaintiffs see in the affidavit is a discussion of theoretical objections or arguments that lack the benefit of any "reality check." Thus, for example, the affidavit states that it is possible that that the 21 "published" MDL common benefit assessment orders that Professor Rubenstein found after a thorough investigation may not represent a fair sample of the 390 MDL cases Professor Kritzer found on a website. The affidavit does not state, however, any reason why this would be the case. For that matter, the affidavit does not indicate whether the court actually entered assessments orders in any, some or all of these 390 cases – once again, Professor Kritzer lacked the time to provide the proper analysis. In contrast, Professor Rubenstein is a specialist in this area, and he states his opinion that the sample he derived is unbiased. It is true that Professor Kritzer found one or two more data points

than Professor Rubenstein; however, those individual cases have little impact when combined with the database Professor Rubenstein already compiled, certainly not enough to alter his basic conclusion that the general range of these assessments is 4%-6%.

Similarly, Professor Kritzer's attempt, at p.22, to estimate the amount of common benefit work is too rudimentary to be of sufficient value. For example, when he estimates that attorneys will require an average of one minute to read each of the five million pages of discovery produced to date, he does not account for the possibility (or likelihood) of duplication – cases of this kind typically involve multiple copies of documents that are hundreds of pages in length, and it is not necessary to re-read a such a document six or eight times after having read it once.[3]

III. Conclusion

For these reasons, JLF Plaintiffs object to the proposed Assessment Order to the extent that it (1) claims to extend to cases beyond this Court's jurisdiction, (2) approves of an unregulated negotiated settlement of common benefit fee set-aside and (3) calls for an interim benefit assessment outside of the normal 4%-6% range.

Dated: September 2, 2009

Respectfully submitted,

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[3] There is a risk that the same document will be re-read several times if multiple attorneys in different law firms are performing "common benefit" work without sufficient coordination. One hopes that PSC/LC has coordinated assignments to mitigate this form of inefficiency and duplication.

CERTIFICATE OF SERVICE

I, Samuel D. Zurier, hereby certify that a copy of the foregoing Johnson Law Firm Plaintiff's ***Sur-Reply Memorandum In Further Support of Partial Objection to Motion for Entry of an Assessment Order in MDL 1842*** was electronically filed. Those attorneys who are registered with the Electronic Filing System may access these filings through the Court's System, and notice of these filings will be sent to these parties by operation of the Court's Electronic Filing System.

Dated: September 2, 2009

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