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

* * * * * MDL NO. 07-MD-1842
IN RE: *
*
KUGEL MESH HERNIA PATCH * NOVEMBER 10, 2009
PRODUCTS LIABILITY * 1:30 P.M.
LITIGATION *
*
* * * * * PROVIDENCE, RI

BEFORE THE HONORABLE MARY M. LISI,
CHIEF JUDGE

(Plaintiffs' Motion for Entry of Assessment Order)

APPEARANCES:

FOR THE PLAINTIFF
STEERING COMMITTEE:

DONALD A. MIGLIORI, ESQ.
LEAH DONALDSON, ESQ.
Motley Rice LLC
321 South Main Street
Providence, RI 02903

FOR JOHNSON LAW
FIRM PLAINTIFFS:

SAMUEL D. ZURIER, ESQ.
55 Dorrance Street, Suite 400
Providence, RI 02903

FOR THE DEFENDANTS:

JOHN P. HOOPER, ESQ.
MICHAEL K. BROWN, ESQ.
Reed Smith, LLP
599 Lexington Avenue
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Court Reporter:

Karen M. Wischnowsky, RPR-RMR-CRR

1 10 NOVEMBER 2009 -- 1:30 P.M.

2 THE COURT: This is the matter entitled
3 In Re: Kugel Mesh Hernia Patch Products Liability
4 Litigation. The matter is before the Court this
5 afternoon on Plaintiffs' motion for entry of an
6 assessment order in this MDL.

7 The Court has received a partial objection to
8 that motion filed on behalf of the Johnson law firm
9 Plaintiffs. And as I understand it, the Defendants in
10 this case, in the underlying case, have no real
11 opposition to the Plaintiffs' motion.

12 Is that right, Mr. Hooper?

13 MR. HOOPER: That's correct, your Honor.

14 THE COURT: Okay. So that the two parties in
15 interest with respect to this motion are essentially
16 Mr. Migliori representing the Plaintiffs' steering
17 committee and I guess, from what I gather in the
18 papers, everyone except for the Johnson law firm
19 Plaintiffs.

20 MR. MIGLIORI: That's correct, your Honor.

21 THE COURT: Is that about it? And, Mr. Zurier,
22 you're here representing the Johnson law firm
23 Plaintiffs. Is that right?

24 MR. ZURIER: Yes, Judge.

25 THE COURT: Okay. I've read through your

1 papers, and I believe that -- I think it was
2 Mr. Migliori sent to the Court a copy of the decision
3 that was issued by Presiding Justice Gibney in the
4 companion case that is progressing in the Rhode Island
5 Superior Court. So I'm familiar with the decision that
6 Judge Gibney has entered as well.

7 So come on up, Mr. Migliori. And if you would,
8 let's just deal with the high points or low points,
9 however which way you see them.

10 MR. MIGLIORI: Thank you, your Honor. And I'd
11 actually like to ask the Court's indulgence for many
12 reasons this week, and I alluded to one earlier. I've
13 had some very serious issues. So the much smarter
14 attorney in my office, Leah Donaldson, is much more
15 prepared on the legal arguments, but I'd like to give
16 some context.

17 So if the Court would indulge me just three or
18 four minutes before turning it over to Leah, I think
19 the context will help us a lot, and I appreciate the
20 indulgence, your Honor.

21 This came about -- this process of coming up
22 with this order started almost a year ago. In fact, we
23 at one point tried to get a notice provision before
24 this Court just to make sure that we'd have something
25 in place so that we could effectuate this process.

1 We met with every single member of the state's
2 steering committee, the federal court MDL steering
3 committee. We spent literally hundreds of hours trying
4 to write and rewrite this document, and today we stand
5 before you with a document that's been approved and
6 signed on to by every Plaintiff firm that's on the
7 state and federal committees; and also, quite frankly,
8 your Honor, it's been signed on to by the Defendants.

9 So while Mr. Hooper represents that they have no
10 opposition, it's actually a joint motion from the
11 Defendants and Plaintiffs.

12 And the reason why we did that, your Honor, is
13 because the Defendants before this counsel got involved
14 objected because the order put some burdens on them.

15 It adds something to the mentality of how you
16 settle a case to have an assessment against it, and it
17 has provisions that require them to produce notice to
18 us in every settlement that they may effectuate.

19 So it took quite a bit of negotiation and
20 revision with Defendants to come up with what we've
21 offered and presented to you.

22 So as we sit here today, the order -- the
23 proposed order that's before this Court is an order
24 that has been negotiated and agreed upon by all
25 Plaintiffs involved, Defendants involved, and the only

1 objection is the same objection that was heard in the
2 state court, that is, the only objector is Mr. Johnson.

3 In the state court he hired Attorney Deaton to
4 represent his interests. Here it's Mr. Zurier. But
5 essentially you'll see from the papers it's the same
6 objection.

7 We think there should be consistency among the
8 Courts, and we hope that's the ultimate outcome; but
9 there are some specific issues raised that Leah will
10 address on a legal basis.

11 But I just wanted to be clear, your Honor, that
12 from the beginning, this order has been about and this
13 case has been about openness. One of the reasons why
14 we feel so strongly about this assessment order is
15 because we have never kept anybody out of working on
16 this case with us.

17 There is not a Plaintiff's firm that is
18 unwelcome, and we have been aggressive about --

19 THE COURT: I understand that you've extended to
20 Mr. Johnson an offer to work with you on this, but he's
21 declined. Is that so?

22 MR. MIGLIORI: Not only is that so, your Honor,
23 I personally did. When he first voiced objection to
24 this, I had a phone call with him directly.
25 Mr. Johnson actually shares --

1 THE COURT: And if he had agreed to do so, I
2 take it that he would have had a share in any monies
3 that are set aside as a result of the Court's entry of
4 an assessment order. Is that right?

5 MR. MIGLIORI: Subject to your approval,
6 absolutely, your Honor. And that's so important
7 because we honestly believe that the best -- the only
8 way that we've been able to report as we did downstairs
9 that we're ready for this case is to get as much help
10 from firms that are not working in my office, firms
11 from New York that are here just to hear the outcome of
12 this who have signed on to this motion and from, quite
13 frankly, from Texas. We have counsel from all over the
14 country.

15 Mr. Johnson hasn't come to any of these
16 hearings. I personally extended this invitation to
17 him. And the real irony, your Honor, is that
18 Mr. Johnson's first case is with me. I have a case
19 with him.

20 He decided to depart from the agreement that we
21 had to work together and get other cases and hire other
22 counsel. So he's actually representing cases that
23 include me in his objection.

24 I would welcome his participation. I told
25 Mr. Deaton in the state court that he's a talented

1 asbestos mass tort lawyer, I welcome your
2 participation, and I do the same for Mr. Zurier who I
3 have tremendous respect for.

4 But the reality is, this is about a single
5 objector who is not offering any help. He wants a
6 lower assessment and does not, even in the papers,
7 acknowledge that this is a withholding subject to the
8 Court's approval. And with the Court's approval only
9 will the appropriate people get compensated through
10 that fund; and if Mr. Johnson were to help, he would be
11 absolutely entitled to it.

12 So that's the context of how we got here. I
13 didn't want it to come across as if this was sort of a
14 pass-through moment. We've literally spent hundreds of
15 hours trying to come to this point.

16 THE COURT: Oh, I understood that that had been
17 the process that had taken place. Again, having read
18 through Judge Gibney's order and decision, I got a
19 sense that that's where we were.

20 MR. MIGLIORI: And I appreciate that, your
21 Honor. And, again, I appreciate the indulgence.

22 There are four points that were raised in the
23 surreply that are a little bit different from what
24 happened in the state court; and if it's okay, I'd like
25 to ask Ms. Donaldson to --

1 THE COURT: Absolutely. Come on up. She does
2 all the work anyway. I know that.

3 MR. MIGLIORI: I can promise you that, your
4 Honor.

5 MS. DONALDSON: Thank you, your Honor. I'm
6 going to do my best to limit my remarks to the
7 surreply. I was prepared to talk about everything; but
8 based on the fact that the Court is obviously well
9 briefed on this issue, I'm going to just respond to
10 some of the stuff they brought up anew in the surreply.

11 As Don already said, this is a withholding and
12 not a disbursement of funds. So we're not even
13 requesting a disbursement of funds at this time.

14 In the surreply, the objectors consider this a
15 windfall for the PSC or for the firms involved in doing
16 this common benefit work. And I know this Court's
17 aware that everyone here that has been doing this work
18 has done a lot of work in this case. So any payment
19 for common benefit work done would be exactly that, not
20 a windfall.

21 However, as Judge Gibney pointed out in her
22 opinion and that we point out in our papers, it would,
23 however, should certain Plaintiffs be able to
24 participate and get the benefit of this common benefit
25 work without having to make any payment for that, that

1 would be a windfall to those Plaintiffs and those
2 Plaintiffs' attorneys.

3 The case where that's discussed in the First
4 Circuit is of course the In Re: Nineteen Appeals that
5 Judge Gibney cites to in her opinion and we cite to in
6 our papers. I don't want to go into that too much
7 because I know the Court's aware of all of that.

8 What I do want to talk about a little more is
9 what's brought up in the surreply and when it comes to
10 the agreement brought -- the agreement between all
11 these Plaintiffs' attorneys except for the one
12 objecting attorney.

13 And I think that basically the affidavit put
14 forth by Attorney Deaton is misleading in that his
15 cases were not in existence. He states that he's the
16 only -- he believes he's the only state attorney who
17 was not added to the state PSC, for example. And at
18 the time that the state PSC was created, he had no
19 cases, and so that I believe is a little misleading to
20 the Court.

21 In addition, after we became aware that he did
22 have cases, he was offered the opportunity, of course,
23 to come in and do some of this work.

24 The other thing I want to point out is that as
25 Don -- as Mr. Migliori aptly pointed out, not everyone

1 who has done work for common benefit is a PSC attorney
2 and not every PSC firm has done common benefit work;
3 and yet the entire federal group of Plaintiffs,
4 individual Plaintiffs' attorneys is agreeing with this
5 except for the objectors.

6 The other thing that I think is kind of obvious
7 but I will say on the record anyway is that if -- even
8 if Mr. Deaton is the only state individual Plaintiffs'
9 attorney who's not represented on a PSC, that is not
10 the case here in the federal court, as the Court knows.
11 There's only 12 member firms on the PSC here and many
12 more individual attorneys who are represented here by
13 liaison counsel and co-lead counsel.

14 Part of my job is to communicate with all of
15 those attorneys, so I'm very well briefed as to how
16 many attorneys and how active these folks are and how
17 interested they are in these cases, not passive but
18 very actively involved in these cases, and they have
19 not objected to this order.

20 Last I just want to -- I guess it's obvious to
21 this Court, I believe, that any ethical concerns that
22 are raised in these papers are unfounded. There's
23 going to be potential ethical issues --

24 THE COURT: Was that issue raised before
25 Judge Gibney?

1 MS. DONALDSON: It was not.

2 THE COURT: She was very careful, I thought, to
3 address all of the questions that were raised by the
4 objectors. That seems like a new-found basis for
5 objecting.

6 Obviously, those rules are applicable in state
7 court as well. They're exactly the same rules. So
8 that wasn't raised.

9 MS. DONALDSON: Yes, your Honor, it was not, to
10 my knowledge, raised in the state court. And there's
11 going to be potential ethical issues in any phase of
12 litigation.

13 We believe that these objections in and of
14 themselves are unfounded, and we address that in our
15 papers. So I'm not going to go into that again here
16 because I believe they're well addressed in our papers.

17 However, I do want to restate that all of the
18 issues that seem to be raised by the objecting
19 attorneys are addressed in the amended proposed order
20 that we sent to the Court on July 17th.

21 THE COURT: I want to ask you about one of the
22 concerns that Mr. Zurier has raised and make sure I
23 understand how it is that Plaintiffs' side believes
24 that you've addressed that concern.

25 As I understand it, and this is item number A,

1 if you look at the surreply, there's a contention that
2 this Court is lacking jurisdiction to enter an order
3 that would affect cases that are really neither here
4 nor there.

5 As I understand it, these are cases involving
6 the Davol devices that may be pending and probably are
7 in various state courts that for whatever reason were
8 not removed to a federal court and, therefore, part of
9 the MDL and that are not part of the matter that
10 Judge Gibney is presiding over.

11 So I'd like you to spend some time on that one
12 because I think, frankly, of all the ones that the
13 objectors have raised, that's one of the ones that I
14 have a concern about.

15 MS. DONALDSON: Yes, your Honor. Well, the
16 Plaintiffs, we believe that the Court has inherent --
17 we know that the Court has an inherent authority to
18 manage its docket. And we believe that in that
19 inherent authority, you're given the ability and the
20 jurisdiction to enter this order as written.

21 THE COURT: But I think what Mr. Zurier is
22 suggesting is that you are asking me to impose upon the
23 Defendants in this case an obligation to withhold
24 monies from cases that are not before this Court that I
25 have absolutely no jurisdiction over by virtue of the

1 fact that they remained in state courts and to include
2 those funds as part of the common benefit.

3 So that's what I'd like you to address, is how
4 do we deal with that situation.

5 MS. DONALDSON: Well, your Honor, this type of
6 common benefit, you know, using the common fund
7 doctrine, this is the type of thing that's used in
8 federal multi-district litigation and it's addressed
9 inside the multi -- I'm sorry, the Manual For Complex
10 Litigation. For example --

11 THE COURT: But that's not law.

12 MS. DONALDSON: I'm sorry?

13 THE COURT: I know everyone cites it as though
14 it's law. It's a manual.

15 MS. DONALDSON: Absolutely, and it gives us some
16 guidance as to what prior judges have done in similar
17 litigation such as this.

18 So in one case it states on page 321 that MDL
19 judges generally issue orders directing Defendants who
20 settle MDL-related cases to contribute a fixed
21 percentage of that settlement to a general fund to pay
22 national counsel.

23 I think there's past precedent in MDLs to enter
24 an assessment order such as this in which we're
25 withholding funds and in which we have in our proposal

1 put together a process by which we determine whether or
2 not those counsel either will fall under this
3 assessment order or will not. Not every case in which
4 they --

5 THE COURT: As I understand it, one of the
6 amendments you made to the proposed order was to insert
7 the word "substantial benefit" when referring to those
8 cases.

9 So we're not talking about a situation where
10 there may be some very minor incidental benefit but,
11 rather, a situation where Plaintiffs' counsel has
12 derived some, as you term it, substantial benefit from
13 the work of the steering committee here and in state
14 court. Is that it?

15 MS. DONALDSON: Yes, your Honor.

16 THE COURT: And I take it that you and
17 Mr. Migliori and company when the time comes will
18 battle it out with those attorneys to make some kind of
19 a determination as to what amount, if any, is retained
20 by those who are participating in the fund.

21 MS. DONALDSON: Yes, your Honor. And the
22 proposed order, as you know, allows for -- if we are
23 unable to battle that out amongst ourselves, it
24 specifically states that the individual attorney can
25 request a hearing from the Court. So it allows that

1 due process at the right time.

2 THE COURT: Well, except they're not here. It
3 puts an onus on an attorney, let's say, who's filed a
4 lawsuit in Portland, Oregon, who settles with Davol. I
5 have entered the order, and Davol withholds the 12.

6 Walk me through what happens if that attorney
7 says, I didn't get any benefit from anything you guys
8 did. Tell me what recourse that lawyer has under your
9 proposal.

10 MS. DONALDSON: Well, your Honor, under this
11 order, they would have the ability to be heard -- well,
12 first of all, they would have the ability to show us
13 why they don't need to pay anything into the fund at
14 all.

15 THE COURT: So they talk to you, and they can't
16 resolve it. Now where do they go?

17 MS. DONALDSON: Well, your Honor, I believe
18 under this order that you would be willing to hear them
19 on this issue and resolve the issue.

20 THE COURT: So they've got to come here?

21 MS. DONALDSON: I don't know that they
22 physically have to travel here, your Honor. I know
23 your Honor is open to phone conferences and other
24 opportunities so that we can keep this economical and
25 reasonable.

1 THE COURT: Okay. I'm just trying to play it
2 out and think of the worst case scenario, which is what
3 I think we have to do.

4 And, Mr. Zurier, maybe you can tuck this one
5 away because I know that this is an issue that
6 Mr. Johnson has raised, but I don't know whether or not
7 Mr. Johnson has any of those cases. As I saw it, the
8 cases that are listed are all here. So that's less of
9 a problem, as far as I'm concerned.

10 MS. DONALDSON: Your Honor, I want to make -- if
11 there's no further questions, I just have one other
12 point that I wanted to -- it was brought to our
13 attention by Mr. Zurier today that one of the cases
14 that we cite in our response, I believe it was, that we
15 incorrectly talk about some percentages. And it looks
16 like there was a transposition error in numbers.

17 So that was the Ephedra case. So I believe that
18 we were -- I'm sure he'll bring that up when he comes
19 up, but we recognize that that was an error.

20 THE COURT: I don't know, Mr. Migliori is in the
21 crouch. Why don't you go back and find out --

22 MS. DONALDSON: Is he pulling a Don?

23 THE COURT: Well, I'm not sure. Why don't you
24 go back and find out what it is that he either wants to
25 say or wants you to say before you relinquish the

1 podium.

2 MR. MIGLIORI: My partner, Ron Motley, trained
3 me.

4 THE COURT: In the crouch?

5 MR. MIGLIORI: In the crouch. Actually, this is
6 just context again, your Honor. I negotiated that
7 component that you inquired about. And one of the
8 things that we've asked to set up in this process is
9 not burdening the Court or the magistrate judge
10 necessarily, but in this there's a reference to
11 something that's called either -- I think the last term
12 we used was escrow agent or a special master.

13 But in any event, there are some local
14 Providence attorneys that Mr. Hooper and I are talking
15 about that we, after this, assuming there was an order
16 entered, we would approach the Court with somebody
17 you're very comfortable with, that either has either a
18 receivership background or somebody that the Court can
19 feel can give a proper accounting to the monies and
20 make sure that they're properly handled, the right
21 amounts are taken, without the Defendants having to
22 disclose to us individual case settlements because we
23 also represent individual clients.

24 In that we also put in this provision that if we
25 can't agree on whether or not this case should be in or

1 out, that we apply to that person and give some
2 guidance to that person or we can go to some binding
3 arbitration; but the goal would be to work it out, in
4 which I hope we've demonstrated to the Court --

5 THE COURT: I understood that. I'm concerned
6 about the one that doesn't work out and what we do with
7 those.

8 While I have you here, let me ask you this, and
9 I may have missed it in reading all of the papers. I
10 saw that you have suggested an individual to serve as
11 escrow agent. And I didn't see, or maybe I did and I
12 just don't remember it, that there's a provision there
13 for bonding. Tell me what your intention is with
14 respect to that aspect.

15 MR. MIGLIORI: Your Honor, I think our view was
16 to be as inclusive and sort of foretelling as possible
17 in the document, but to really have a subsequent
18 proceeding where we bring an attorney -- I'll be
19 candid, your Honor. I would, and I mentioned to
20 Mr. Hooper, that I would like Justin Shay or somebody
21 who's got a real background in litigation and in
22 receiverships, but somebody of that ilk who could come
23 in and really handle those issues and if bonding were
24 for the protection of him, that we would make sure that
25 that's appropriately handled.

1 But his services would be paid for out of this
2 assessment; that is, part of the assessment collecting
3 is making sure that we're both protected in the masking
4 and auditing --

5 THE COURT: I am concerned about that. So I
6 hope if and when we get to that point that you'll be
7 prepared to address that.

8 MR. MIGLIORI: Absolutely, your Honor. And
9 that's something that at that point we'll be at a point
10 where it's really about protecting everybody's
11 interest, the clients and -- and on the ethical
12 concerns, your Honor, I was concerned, it having only
13 been really raised in the surreply, that the suggestion
14 that this violates Rhode Island's fee sharing
15 provisions of the ethics rules.

16 I think that's highly misleading. This document
17 does not create an attorney/client relationship. And
18 for liability reasons, for so many reasons, this order
19 does not now say that I represent the same client as
20 Mr. Zurier or Mr. Zurier's client.

21 This order says that we're all working together
22 in an MDL and in that we benefit from a common benefit
23 and those who work to everyone's benefit can share in
24 it. That's specially created for multi-district
25 litigation.

1 THE COURT: I understood that.

2 MR. MIGLIORI: And for your authority question,
3 your Honor, the federal court, even more than the state
4 court, has a plenary power. They have the ability to
5 oversee this litigation for the nation under the MDL
6 rules, under the power and the responsibilities given
7 to this Court to administer this, hopefully resolve it
8 and not have to send them back to the districts. There
9 is a plenary power.

10 And component in an MDL litigation is the fact
11 that there are cases for some firms that are filed and
12 some firms that are not filed, some that are filed in
13 the state court, some that are filed in the local
14 court.

15 There are only 22 cases that are not filed with
16 this Court or with judge -- through an MDL or otherwise
17 and Judge Gibney's court in the country, and that's a
18 representation. It's around between 20 and 30
19 according to the last count that we received from
20 Davol.

21 THE COURT: That's news to me. I thought it
22 would be far more than that.

23 MR. MIGLIORI: And it's not. And part of it's
24 because, uniquely, this MDL is in the home state of the
25 Defendant. So we have that protection. And also, your

1 Honor, built in at the same time we created this
2 process of a special master, we had a notice provision.

3 So even without this Court entering, when we
4 settled the Swallow case, the first trial case, the
5 Defendants notified us of its obligations or whatever,
6 and then at the same time they settled two or three
7 cases that were not filed here.

8 They gave us a five-day notice under this order,
9 even though it wasn't in place, we looked at the cases
10 and very candidly, your Honor, we told those Plaintiff
11 lawyers and the Defendants we do not think they fit the
12 definition of substantial contribution -- that we gave
13 a substantial contribution to their resolution, and
14 those funds were not withheld.

15 So we did that on an honor basis, and that's how
16 we foresee this order working. In the end, if we don't
17 have enough common benefit to satisfy the 8 percent of
18 fee and the 4 percent of the expenses, the remaining
19 money from the 8 percent goes back to the attorneys and
20 the remaining money from the 4 percent goes back to the
21 clients.

22 So we really are trying to be fair but not let
23 the opportunity pass by because some cases are now
24 actually settling. Thank you, your Honor.

25 THE COURT: Well, Mr. Zurier, what do you have

1 to say about all of that?

2 MR. ZURIER: May it please the Court, I'm Samuel
3 Zurier, and I'm here on behalf of the Johnson law firm
4 Plaintiffs.

5 And I might start by saying that I originally
6 was sitting second row behind Plaintiffs' steering
7 committee because I thought that was the right place
8 for me because my clients are a very small part of this
9 case.

10 THE COURT: I know. I was the one who suggested
11 that we have you come up front and sit on the other
12 side since, as an objector, you're opposing the motion;
13 but I understand where philosophically you sit.

14 MR. ZURIER: Yes, but also I think it showed
15 that my clients are a very small part of a very large
16 case, and it --

17 THE COURT: Total, how many cases does
18 Mr. Johnson have between here and state court?

19 MR. ZURIER: I don't know the state number,
20 Judge, but I know the federal number's 43.

21 THE COURT: Okay. And correct me if I'm wrong,
22 does he have any of these what I call outlier cases
23 that are not a part of either the state action or the
24 MDL or direct filed here in federal court?

25 MR. ZURIER: I don't think so, Judge. I don't

1 know for sure, but I don't think so. But actually, I
2 think that's a good place for us to start, the fact
3 that Mr. Johnson is a very insignificant player in this
4 case.

5 The Plaintiffs' steering committee said that
6 they don't understand why he didn't come to Rhode
7 Island for the various meetings and conferences in this
8 case, and --

9 THE COURT: I don't remember Mr. Migliori or
10 Ms. Donaldson saying that.

11 MR. ZURIER: Maybe I misheard him, but it's the
12 nature of these multi-district litigation cases that
13 people who were content to litigate in one forum
14 suddenly find themselves brought into a different
15 forum, and they're operating at a distance.

16 Now, as far as the details go, as far as what
17 the conversations were between the attorneys, I'm
18 afraid I'm not able to shed much light on that except
19 to say that I think that what was stated in the
20 affidavit, and I didn't hear it disputed here, was that
21 the offer that was made was that you'll be able to
22 reduce by some amount your assessment by doing the
23 common benefit work, but you will not be able to reduce
24 it entirely. And I think that's what got Mr. Johnson
25 in a position of opposing this thing.

1 THE COURT: Well, but that's a choice. If
2 that's the case, that's a choice he made.

3 MR. ZURIER: Correct, Judge.

4 THE COURT: But as I understand it, his primary
5 objection here is that 12 percent, that is, the 8 plus
6 4, is too much; but as I understand it, Judge Gibney
7 disagreed with Mr. Johnson on that point.

8 And as Mr. Migliori points out and Ms. Donaldson
9 pointed out, this is an assessment. This isn't the
10 final tally.

11 Secondly, he has this concern about cases that
12 are not part of the MDL. This is the last issue I
13 asked Ms. Donaldson to address. And, frankly, I don't
14 know that Mr. Johnson even has standing to raise that
15 since he doesn't seem to represent any of those people
16 or have any of those cases.

17 MR. ZURIER: Well, your Honor, we don't know
18 what clients he's going to get next week. And it seems
19 to me that all the other lawyers had the opportunity to
20 comment on this order, and they may or may not have
21 standing to address the issue.

22 And I think if this order is going to be
23 applicable to the case, that it's only fair for this
24 Court to consider whether it has jurisdiction to enter
25 an order like this.

1 And we cited a couple of cases. We cited the
2 Linerboard case, and we cited the case from the Fourth
3 Circuit in which the Court held it didn't have
4 jurisdiction, and there was no contrary authority that
5 came back from this Plaintiffs' steering committee in
6 their reply memorandum. So as far as we were
7 concerned, we thought that was something that was
8 agreed upon.

9 I might add, by the way, that the question of
10 what to do if someone is free-riding, well, I saw one
11 solution that I found very interesting. It was in the
12 Celebrex case that was cited by Dr. Kritzer, the expert
13 for the steering committee.

14 And in that case, it's out in San Francisco, the
15 judge did this. He said, Look, I'm going to impose
16 these assessments for cases in the MDL. I can do that.
17 I'm going to impose assessments for this Court. I
18 obviously can do that. Now, for these other cases, I
19 can't do anything, but here's what I would say to the
20 steering committee. I would say to the steering
21 committee that you may have a cause of action against
22 these attorneys for free-riding against you, and you
23 can bring that claim against them in their home
24 district.

25 And that, I would submit, is a fair way to

1 resolve these things because it doesn't really seem
2 fair to all these attorneys, particularly there may be
3 an attorney who has nothing to do with this MDL.

4 THE COURT: That's why I asked the question to
5 play it out worst case scenario because I have to
6 concern myself with worst case scenario.

7 MR. ZURIER: And I would submit, your Honor,
8 that that Court's solution says you've got a point, you
9 may have a valid cause of action, you'll just have to
10 go after that deadbeat attorney wherever that attorney
11 is located, that that comports with notions of due
12 process and would save this Court from some difficult
13 jurisdictional questions.

14 Now, in addition, there were two other bases for
15 our objection. One of them had to do with settlements,
16 and I must confess that after having -- I first brought
17 that up because Rule 1.5 talks about fee divisions, and
18 it wasn't clear whether that applied to fee agreements.

19 But after reading the papers from the steering
20 committee, I think they've got the better argument on
21 that section, and we're not pressing it anymore.

22 THE COURT: Mr. Zurier, you are a prince.

23 MR. ZURIER: Well, tell my wife.

24 THE COURT: I'm not going to go there. Maybe I
25 should qualify you're a prince in the courtroom because

1 it's not often that a lawyer will come and stand at the
2 podium and make a concession like that. So I wanted to
3 underscore it.

4 MR. ZURIER: Well, thank you, Judge.

5 THE COURT: Your wife may have other thoughts.
6 We'll leave that for another day.

7 MR. ZURIER: As it happens, I think I can still
8 extract a point from that discussion that bears on the
9 big issue before the Court, namely the amount of the
10 assessment.

11 And the point I think I can extract from that is
12 that the resolution that the steering committee
13 presented was to say, Look, you don't have to worry
14 about this issue that you weren't involved in the
15 settlement because it's ultimately going to come back
16 to the Court for approval, there will be a hearing, and
17 at that point you can decide whether you're in or
18 whether you're out.

19 Well, that's absolutely correct. And as I
20 thought about it, that's because those Plaintiffs have
21 their individually retained Plaintiffs' attorneys, such
22 as Mr. Johnson who's working very hard to represent his
23 clients' interests. And the point of this assessment,
24 your Honor, is to --

25 THE COURT: Is he participating in any of the

1 depositions that have been scheduled, or has he -- can
2 you answer that? If you know.

3 MR. ZURIER: I'm guessing that the steering
4 committee would give a better answer than I can.

5 MR. MIGLIORI: Your Honor --

6 THE COURT: I saw negative head shakes.

7 MR. MIGLIORI: I can represent that it's an
8 unqualified zero percent participation in the
9 litigation on the liability.

10 MR. ZURIER: But the idea is that -- what
11 persuaded me anyhow that it was all right for the
12 steering committee to do all these negotiations was the
13 notion that when everything came back, those clients
14 could talk with their individually retained Plaintiffs'
15 attorney, and that's an example of the importance of
16 his role.

17 And that brings me to the issue of the amount of
18 the assessment. And just as we've heard a lot about
19 the context of dealings among counsel in this case and
20 how that's very important, the point that we pressed
21 before Judge Gibney and we're pressing here is the
22 context of other fee assessments in other cases.

23 And with the Court's permission, I'd like to
24 talk in a little more detail about some of the
25 conclusions that Judge Gibney reached and why we don't

1 agree with that.

2 THE COURT: Well, now, this is not an appellate
3 court for the Superior Court.

4 MR. ZURIER: I appreciate that, Judge, but I
5 might --

6 THE COURT: All I know is that she accepted the
7 12 percent figure that was presented to her by the
8 Plaintiffs.

9 MR. ZURIER: That's right, Judge.

10 THE COURT: And I know that, not you, but your
11 counterpart in state court made the argument that 12
12 percent was too high there as well. She addresses it
13 in her decision.

14 MR. ZURIER: That's right, Judge.

15 THE COURT: But I've got to make an independent
16 determination.

17 MR. ZURIER: That you do, your Honor. And to
18 provide the context, I brought a foam board.

19 THE COURT: I see you have a visual aid.

20 MR. ZURIER: And I might add, by the way, that
21 my first call to the clerk's office was can I use the
22 ELMO or the high tech in this courtroom because I was
23 so excited, I don't get to federal court as much as I'd
24 like, and I had seen a demonstration of it. And the
25 clerk told me that for trials, that's okay; for motion

1 hearings, it's really not encouraged.

2 THE COURT: And I'll tell you why, because I
3 assume what you have on there is probably the graph
4 that was in your papers.

5 MR. ZURIER: Precisely, Judge.

6 THE COURT: And I can look at it. The eyes
7 don't work that well at a distance. So it's better for
8 me when I don't have a jury to just look at it right
9 here instead of having to fiddle with the screen.

10 MR. ZURIER: Actually, I have a sheet handy with
11 that graph on it if the Court would like it.

12 THE COURT: Could you hand it up. Make sure
13 that Ms. Donaldson has a copy.

14 And, Mr. Zurier, I also have to share with you
15 that the last time I dealt with these kinds of
16 numerical graphs was probably my junior year in high
17 school, which was two or three years ago.

18 MR. MIGLIORI: Is that a sign or a cosign?

19 MR. ZURIER: Would it be all right if I put my
20 foam board up?

21 THE COURT: Sure, sure, as long as -- have you
22 shown it to opposing counsel?

23 MR. MIGLIORI: I think we have it.

24 THE COURT: He wants to use the big one, too.

25 MR. MIGLIORI: We can walk over there and watch

1 it.

2 THE COURT: Okay.

3 MR. ZURIER: All right. Now, our position is
4 that the assessment that's being sought here is almost
5 unprecedented. There were a lot of references to this
6 one case, this bone screw case, and Judge Gibney
7 mentioned that as one of the two principal cases in her
8 opinion on the amount, and it is comparing apples to
9 apples because it's an MDL case.

10 We have a lot of discussion about how class
11 action cases are in a different category, and it's this
12 one right here.

13 And then you have one case here at 12 percent,
14 it's called Murphy Oil, and I can discuss it in a
15 minute, and then everything else is over here.

16 Now, we did a little research on the bone screw
17 case, and I don't know why we didn't bring these issues
18 to Judge Gibney's attention. I got the case, and I
19 just looked it up myself. I wanted to find out what
20 was going on. And that was a case which the assessment
21 order itself was Order Number 402. The case later
22 had -- when they awarded fees, it was Order Number
23 1,863.

24 THE COURT: Was it order or was it docket entry?

25 MR. ZURIER: No, the docket entries are around

1 8,000, Judge. Now, I don't know if the judge was
2 entering orders more generously than this Court does.

3 THE COURT: It would depend upon how they were
4 docketing things.

5 MR. ZURIER: Sure. But what I found out about
6 that case and what is found in the fee award case -- by
7 the way --

8 THE COURT: What district was that in, please?

9 MR. ZURIER: Eastern District of Pennsylvania.
10 The case decision that Judge Gibney cites that refers
11 to bone screw is a 2000 decision, and that's not the --
12 that's the decision where they later awarded a fee.
13 It's not the decision where they impose the assessment.

14 The assessment was from 1996, and I have a copy
15 if the Court is interested in looking at it; but it's
16 very sparse, and it just says this is going to be the
17 amount, and it doesn't say why.

18 If you'll look at the 2000 decision, though, you
19 will see that that was a very contentious case. And
20 one of the things that had to take place in that case
21 was to identify the correct Defendants.

22 It wasn't a straightforward matter where you
23 just had a manufacturer of a product. They had to do a
24 lot of work on that; and because of all of that work,
25 the assessment that was imposed may have had to have

1 been higher. Also in that case --

2 THE COURT: How many Plaintiffs were in that
3 case?

4 MR. ZURIER: Three thousand Plaintiffs, Judge,
5 or 3,200. What happened in the 2000 decision that
6 Judge Gibney cited was the Court said, We're going to
7 impose this 17 percent, and one of the reasons why
8 that's the right number for this case is that there's
9 not a lot of money to go around.

10 I think the amount of money they had was a
11 hundred million dollars and/or if you do the math,
12 \$30,000 per Plaintiff. And they said, This is not a
13 lot of money, and that's why we think the 12 percent
14 plus 5 percent is appropriate in this case.

15 And the reason there wasn't a lot of money was
16 that the company that they made the settlement with was
17 having financial problems and that was basically all
18 they could put up.

19 So those are a number of reasons why we think
20 that the bone screw case is not -- it shouldn't be more
21 important than every other case, such as the 20 other
22 cases in which this question has been raised.

23 Now, the next case that Judge Gibney relied on
24 is called Copley Pharmaceutical. It's on page 14 of
25 her decision. And she says that one was 13 percent.

1 Copley Pharmaceutical is not on our chart because it
2 was a class action case, and we do not agree that that
3 was an appropriate comparison to make.

4 Now, the next case, the 12 percent case, is
5 called Turner v. Murphy Oil. And, again, I went back
6 and read a little bit more about that case, and the --
7 there was later a fee distribution in that case after
8 the assessment.

9 The 2006 decision that the steering committee
10 presented to the Court was where the Court said this is
11 what the assessment will be. It was 10 percent plus 2
12 percent. Then a year later they distributed the money,
13 and here's what happened in that case. The citation is
14 from 472 F. Supp. 2d; and, again, I can hand it up to
15 the Court if the Court is interested.

16 THE COURT: That's okay. We'll get it off
17 the -- as long as we have the cite.

18 MR. ZURIER: Sure. So call it Turner v. Murphy
19 Oil II, and the citation is 472 F. Supp. 2d 830,
20 Eastern District of Louisiana, 2007.

21 Now, what happened in that case was that they
22 were able to negotiate a class action settlement with
23 the company, and then the Court did something very
24 interesting at page 871. It said, You know, we
25 collected all these assessments. We're going to refund

1 them to everybody. We are going to just pay the
2 attorneys out of the class action settlement that was
3 just achieved, and there's no need to take a fee from
4 these other folks.

5 The Court increased the amount of the fee by
6 what was in the assessment pot, so that was paid for by
7 the class action Plaintiffs; but the people who had
8 been assessed along the way, that fund was dissolved
9 and --

10 THE COURT: Was that an MDL that included some
11 class action?

12 MR. ZURIER: It was an MDL, Judge. And I must
13 confess, I'm not a specialist in this area; but what
14 seems to have happened is that a settlement was
15 negotiated for a class of victims, if you will. It had
16 to do with an oil spill. And there were some
17 individually represented parties that were -- chose not
18 to be part of that group.

19 THE COURT: How many people were in the MDL
20 itself, how many Plaintiffs? I'm just trying to figure
21 out how it compares with this one because I do have at
22 least a half dozen class actions that we're holding in
23 abeyance that are part of this MDL.

24 MR. ZURIER: Professor Rubenstein's note was
25 several thousand claims in 27 consolidated class

1 actions.

2 THE COURT: But we don't know the breakdown of
3 how many individual claims were part of the MDL?

4 MR. ZURIER: I could check that and update for
5 the Court.

6 THE COURT: We can check it, also. Okay.

7 MR. ZURIER: So we would argue that if you can
8 distinguish bone screw where you say it's somewhat of
9 an outlier and then if you say that Turner v. Murphy
10 Oil that ended up the assessment was refunded, then
11 what you're left with on the curve is 19 data points
12 between 1 and 9 percent.

13 Now, as was mentioned --

14 THE COURT: But included in that number are also
15 some of these absolutely astronomical cases, like
16 Vioxx.

17 MR. ZURIER: Sure. Then the question becomes,
18 suppose you limited your universe to cases with 2,000
19 or fewer Plaintiffs, which is what we have here, and --

20 THE COURT: Well, you have 2,000 or better, I
21 think.

22 MR. ZURIER: Well, okay.

23 THE COURT: Because you have to add this action
24 plus the state action.

25 MR. ZURIER: Okay. Well, I heard the argument

1 from the steering committee to be that if you have
2 astronomically large numbers of Plaintiffs, then you
3 probably need a smaller assessment because the --
4 you're assessing a percentage against a larger pot.

5 And the argument that I heard -- I read them to
6 say was since this case only involves a few thousand
7 folks, that's why we need a higher assessment. And
8 what I wanted to do is --

9 THE COURT: As a practical matter, I think that
10 that makes sense.

11 MR. ZURIER: Okay. What I wanted to do was tell
12 the Court which points on this chart correspond to
13 which percentages. Rather, if we call 2,000 or fewer a
14 small case and greater than 2,000 a large case, what
15 does that say about this chart?

16 Well, you can do that by looking at Professor
17 Rubenstein's declaration, but here are the numbers for
18 2,000 or fewer Plaintiffs.

19 THE COURT: But we have more than 2,000,
20 Mr. Zurier, because what you have to do conceptually,
21 because one of the points that you make, and I think
22 it's well taken, is that there must be coordination
23 between the state actions and the federal actions.
24 Otherwise, you've got chaos and you've got people doing
25 all kinds of forum shopping which would defeat the

1 whole purpose of MDL.

2 So what you have to do is look at these cases as
3 a generic whole. I can tell you now that as part of
4 the MDL here, Barbara, what are we up to, about 1,100?
5 I just saw another CTO come through.

6 THE CLERK: Thirteen something, 1,301
7 approximately.

8 THE COURT: Well, in the MDL, there's around 11,
9 plus we had about 175 direct filed here. Plus Judge
10 Gibney, as I understand it, has another 1,200 there.

11 So you're talking in the aggregate, when you
12 look at all of these cases, a case that's larger than
13 2,000. You're more in the 2,500 range right now.

14 MR. ZURIER: Well, I guess --

15 THE COURT: And I'm pleasantly surprised to hear
16 that there are less than 30 state actions pending out
17 there that are not part of the MDL and not filed in
18 Rhode Island Superior Court. So that's a very small
19 percentage of those outlier cases that you had
20 addressed early on.

21 But go ahead. I think for your number, you
22 can't just look at what's here. You have to look at
23 the total number.

24 MR. ZURIER: Do you want to say 3,000 or fewer?

25 THE COURT: I would say that's more precise.

1 MR. ZURIER: Okay. Well, here's what you're
2 left with at 3,000 or fewer. Okay. Now, bone screw is
3 3,200, but let's include them because it's close. The
4 remaining numbers of the other cases with 3,000 or
5 fewer are 9 percent, 2 at 8 percent, 6-and-a-half
6 percent, 5 at 6 percent, 7 at 4 percent, a 3 percent
7 and a 1 percent.

8 So, I mean, and that shouldn't be a surprise
9 because --

10 THE COURT: Are those the numbers that
11 correspond with the original assessment or are those
12 the numbers of what was actually awarded?

13 MR. ZURIER: I believe that was the tally at the
14 time the Court entered the assessment.

15 THE COURT: Okay.

16 MR. ZURIER: And it shouldn't be a surprise
17 because if you look at the chart here, there just
18 aren't a lot of data points above 9 percent.

19 THE COURT: That part of math I remember, that
20 if you've got the bell curve going. That part I got.

21 MR. ZURIER: Okay. Well, the idea is that it's
22 not as if these points are skewed, large versus small,
23 and there are only two points above 9. So this is just
24 almost unprecedented, and I think that the --

25 THE COURT: Do you agree, however, that whatever

1 percentage that the Court determines for an
2 assessment -- you're not opposed to assessment, per se.
3 You're opposed here, as I understand it, to the
4 percentage that's been advocated by Plaintiffs'
5 steering committee; but you also agree that this is
6 clearly within the discretion of the Court.

7 MR. ZURIER: That's right. And I think that's
8 the next point that Judge Gibney made to say, Look,
9 this is only an assessment. It's not an award. What's
10 the big deal here? Do we have to -- if this is not the
11 best number, is it going to cause harm to anybody?

12 And on that point, I would say, Judge, that if
13 you look at how courts handle these things, you can
14 change the assessment later on.

15 Now, for example, there's the Celebrex case.
16 Now, the reason why the expert for the steering
17 committee wanted to bring this case to the Court's
18 attention was they said, Look, the Johnson law firm for
19 Plaintiffs made a mistake here. What we said in our
20 papers was that the Celebrex case was originally a 4
21 percent case, and then later on they increased it to 8
22 percent because they looked at what was going on in the
23 case and they said, Gee, really 4 percent's not the
24 right number.

25 And the expert, Dr. Kritzer, said, Well,

1 actually it wasn't just 8 percent. There was a
2 scenario whereby it could get to 10 or 12 percent. And
3 he's correct. He read the case correctly.

4 But I would submit to you that that's an example
5 of how courts deal with these situations, and the
6 assessment can get higher, and --

7 THE COURT: They can get lower, too. I mean, I
8 think that's the point of the Court having some
9 discretion in these matters, is to be able to make
10 adjustments when the facts would bear that out.

11 As far as I know, we've had only a handful of
12 settlements. We're about to move forward with the
13 first of the bellwether trials, which I would suggest
14 to you will probably spark some movement in the area of
15 settlement, and everyone will have a pretty good handle
16 on what's going on after the second trial takes place.

17 MR. ZURIER: Yes. And as a matter of fact,
18 Judge, when cases go along in the process, the judges
19 say, the Guidant case is an example of that, Well, the
20 assessment was lower before, but now they've done more
21 work, they've conferred greater benefit on the
22 attorneys and, therefore, the assessment should be
23 higher.

24 Now, it's still within this framework, but the
25 point is that a higher assessment later on can take

1 place. And I would submit to you, and this is
2 something that we already presented --

3 THE COURT: That would be a bit of a problem,
4 though, Mr. Zurier, I can see mechanically, that it's a
5 lot easier to adjust downward than it is to adjust
6 upward as a practical matter because if I were to
7 set -- what number would you suggest to me is the
8 appropriate number, 2 percent, 1 percent?

9 MR. ZURIER: Our graph peaks between 4 and 6
10 percent, Judge.

11 THE COURT: So let's go to 6 with 4 percent
12 going to counsel fees and the other 2 percent going to
13 expenses. Is that about how you'd break it down?

14 MR. ZURIER: That's certainly what Professor
15 Rubenstein --

16 THE COURT: Okay. And so a bunch of cases are
17 settled. The 6 percent is withheld. Now we move ahead
18 and we try two more of these cases and I say, Gee, you
19 know, 6 wasn't enough. Do we go back to all of those
20 people and say, You've got to throw more money into the
21 pot?

22 MR. ZURIER: Well, Judge, that's what the Courts
23 did in Guidant and in Celebrex, and I'm not familiar
24 with a case where the Court lowered the number.

25 THE COURT: But it's a lot easier to give money

1 back than it is to try to squeeze it out after it's
2 already been gone.

3 MR. ZURIER: Here's the other side of that
4 debate though, your Honor. It's our position that if
5 the Court's number is too high, you run the risk of
6 overlitigating the case. Now, in his affidavit --

7 THE COURT: I think, Mr. Zurier, if you were
8 making that argument in the summer of 2007, I might
9 agree with you; but we are so far down the road with
10 this case where counsel are now focusing on pretrial
11 preparation where the bulk of the discovery that needed
12 to be done that is going to be useful to every
13 Plaintiff has already been done.

14 You know, I think that argument is better made
15 at the beginning of the case than two-and-a-half years
16 into its life.

17 MR. ZURIER: That may be so. However, we still
18 noted that while our papers on this involve the work of
19 two attorneys, the papers on the other side involve the
20 work of 12. And we -- I'm sure that they added value
21 to this. Their papers are of the highest quality, and
22 it's very possible that each of the 12 made some kind
23 of contribution so that it was better after they
24 reviewed it than before.

25 However, when that's being paid for on the

1 nickel of the little attorneys, it doesn't seem to be
2 an appropriate thing to do.

3 THE COURT: Well, the little attorney with how
4 many cases?

5 MR. ZURIER: With 43 times two or whatever, your
6 Honor. So --

7 THE COURT: That's not so little.

8 MR. ZURIER: It's still, in our opinion, Judge,
9 the wrong type of incentive.

10 THE COURT: Okay.

11 MR. ZURIER: And as far as the consensus goes, I
12 would just leave with the image of one of my favorite
13 movies, 12 Angry Men.

14 THE COURT: You know, if there had been women on
15 that jury, it would have been a much better story.

16 MR. ZURIER: Twelve angry people. But in any
17 event, there's times when someone can be in a very
18 distinct minority and they could still be correct, and
19 that's our position here.

20 THE COURT: Okay. Well done.

21 Any rejoinder on this side?

22 MR. MIGLIORI: Your Honor, no.

23 THE COURT: All right. I want to thank both
24 sides. I will tell you that, as many of you know, this
25 is the only time that the District of Rhode Island has

1 been graced with an MDL in its history. And I have to
2 say that although it's extra work beyond that which a
3 district judge is ordinarily required to undertake, I
4 have to say that it's days like today when I have such
5 good lawyers making such interesting arguments,
6 bringing in the visual aids, it makes it all
7 worthwhile.

8 I'll take the matter under advisement, issue a
9 written order. And, Mr. Zurier, I'm going to keep my
10 colored chart so that I can refer to it. Thank you
11 all.

12 (Adjourned)

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

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

/s/ Karen M. Wischnowsky

Karen M. Wischnowsky, RPR-RMR-CRR

November 20, 2009

Date