

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

**IN RE: KUGEL MESH HERNIA PATCH
PRODUCTS LIABILITY LITIGATION**

THIS DOCUMENT RELATES TO:
All Actions

§
§
§
§
§
§
§
§
§

MDL Docket No. 07-1842-ML

Chief Judge Mary M. Lisi

**MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR PARTIAL
REIMBURSEMENT OF COMMON BENEFIT ATTORNEYS' EXPENSES
FROM THE COMMON BENEFIT FUND**

Plaintiffs' Steering Committee ("PSC"), by and through Plaintiffs' Liaison Counsel, states as follows in support of its Amended¹ Motion for Partial Reimbursement of Common Benefit Attorneys' Expenses from the Common Benefit Fund:

INTRODUCTION

For more than six years, Plaintiffs' Co-lead Counsel and the PSC have dedicated their time, resources, and energy litigating this case against Defendants on behalf of all plaintiffs who have cases assigned to this Multi-District Litigation ("MDL"). In vigorously prosecuting this case, Plaintiffs' Co-lead Counsel and the PSC was required to expend significant out-of-pocket litigation expenses. Based upon this hard work and financial commitment, publically reported charges by Bard relating to the settlement of the majority of cases in this litigation approaching **\$200 Million**.

¹ Plaintiffs' Co-lead Counsel initially filed a Motion for Partial Reimbursement of Common Benefit Attorneys' Expenses from the Common Benefit Fund on December 12, 2012. [Dkt. No. 3999]. Plaintiffs' Co-lead Counsel hereby amends and re-files that Motion according to the direction provided by the Court. As such, this Motion is meant to supersede and render moot Plaintiffs' previous filing (Dkt. No. 399).

The vast majority of generic (“common benefit”) costs and expenses have already been expended and, as additional settlements are funded, additional substantial funds will be deposited in the Common Benefit Fund. Moreover, Plaintiffs’ Co-lead Counsel has filed a motion in the Superior Court of Rhode Island seeking a transfer of funds from the common benefit fund established in that litigation, in order to account for the fact that there was a significant over-lap in the common benefit expenses incurred in the two related litigations. As such, there will be sufficient funds to reimburse the expenses incurred by those who contributed to the common benefit of all plaintiffs. Plaintiffs’ Co-lead Counsel recommends to the Court that \$1,738,522.76 be disbursed from the Common Benefit Fund and distributed by Liaison Counsel, as set forth below, to reimburse plaintiffs’ counsel for their held expenses in this MDL.

Through this Motion, Plaintiffs’ Co-lead Counsel only ask for the reimbursement of out-of-pocket expenses incurred by plaintiffs’ counsel—prior to July 8, 2011—and *do not* yet ask the Court to order the disbursement and distribution of “attorneys’ fees” to reimburse plaintiffs’ counsel for the services they provided to the benefit of all claimants in this MDL. Those funds are being held in a separate account, and would not be affected in any way by the partial reimbursement of expenses sought through this Motion. While a separate request for reimbursement of attorneys’ fees will likely be forthcoming, it is Co-lead Counsels’ view that reimbursement of costs and expenses should be dealt with first because the calculation of reimbursable attorneys’ fees may take more time, and dispensing with the issue of costs and expenses, first, will better inform the Court of the funds available for full or proportionate reimbursement of attorneys’ fees from the Common Benefit Fund. For the reasons below, the Court should order a reimbursement of costs and expenses incurred for the global benefit of plaintiffs (detailed below) from the Common Benefit Fund.

ARGUMENT

A. The Common Benefit Fund

Pursuant to Practice and Procedure Order Number 22 (“PPO 22”),² the Common Benefit Fund was originally established through contributions by Plaintiffs’ Co-lead Counsel and members of the Plaintiffs’ Steering Committee (“PSC”) amounting to \$1,100,000.00.³ Subsequently, in accord with the directives of PPO 22, 4% of settlement funds were set aside and deposited into the Common Benefit Fund, for the payment of attorneys’ common benefit expenses.⁴ As such, the Common Benefit Fund has continued to accumulate funds, which have been retained in an escrow account established by Plaintiffs’ Liaison Counsel.⁵ As of January 31, 2013, the Common Benefit Expense Fund had a balance of **\$1,363,796.79**. See account statement attached as Exhibit 1. Additionally, Plaintiffs’ Co-lead Counsel filed a motion in the Superior Court of Rhode Island seeking a transfer of \$2,000,000.00 from the common benefit fund established in that litigation. Counsel anticipates that transfer of funds to be approved by the Superior Court of Rhode Island, based upon the significant over-lap in the common benefit expenses incurred in the two related litigations

As such, the Common Benefit Fund will have an excess of funds beyond what is needed to

² Practice and Procedure Order 22 (Dkt. No. 2382) was entered on November 20, 2009, and subsequently amended pursuant to Court Order on December 18, 2009 (Amended Practice and Procedure Order Number 22, Dkt. No. 2415), and again on May, 21, 2012 (Dkt. No. 3795). Unless otherwise stated, all citations to “PPO 22” in this Motion are to Amended Practice and Procedure Order Number 22, Dkt. No. 2415.

³ Plaintiffs’ Co-lead Counsel has moved separately for the reimbursement of those initial assessments.

⁴ PPO 22 also provided for an assessment to be used to reimburse common benefit attorneys’ fees. As stated above, the assessments for fees and expenses have been kept in separate accounts and this Motion does not request the distribution of funds being held to reimburse common benefit attorneys’ fees.

⁵ PPO 22 called for a Special Master to establish an interest-bearing account and act as escrow agent to receive and disburse funds, keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings.

assure that common benefit shared costs can be paid as they are incurred. Defendants' document production has been obtained and reviewed, common benefit discovery is closed, and all of plaintiffs' generic experts have provided reports and have been deposed. Moreover, the bellwether process has been closed. Therefore, very little common benefit expenses and costs will be incurred in the future. Compared to the size of the funds, monthly costs are minimal.

B. Reimbursement of Common Benefit Expenses is Generally Appropriate, and is Also Appropriate at this Time

Through this Motion, Plaintiffs' Co-lead Counsel are requesting an interim distribution to reimburse them for reasonable held expenses incurred from the beginning of this litigation through July 8, 2011. Attorneys who create or preserve a common fund may be reimbursed for reasonable out-of-pocket expenses used to prosecute an action. *See* Herbert B. Newberg, *Attorney Fee Awards* (1986) § 2.19: "Costs Reimbursement in Common Fund Fee Determinations," at 69; *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Moreover, courts have found it appropriate to issue interim reimbursements for costs and expenses in order to "defray PSC member costs" and the "financial hardships created by the economic burden of th[e] litigation." *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litig.*, 768 F. Supp. 912, 935 (D.P.R. 1991) (*reversed on other grounds*). Indeed, even when dealing with an award of attorneys' fees, interim distributions can be appropriate. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (U.S. 1989).⁶ Since the remaining litigation would not disturb the settlement funds already collected, it is proper for costs and expenses to be disbursed before the final conclusion of the case. *See In re San Juan Dupont Plaza Hotel Fire Litig.*, 768 F. Supp. 912.

⁶ While disbursement of attorneys' fees may also be appropriate in the near future, Plaintiffs' Co-lead Counsel and the PSC only seek reimbursement of expenses (and not fees) through this Motion.

C. Disbursement of Expenses is Governed by this Court’s Assessment Order

Plaintiffs’ Liaison Counsel and Plaintiffs’ Co-lead Counsel have been responsible for common benefit fund expense management, subject to Court approval. With regard to disbursements from the Common Benefit Fund, PPO 22 states as follows:

4. Disbursements from the Common Benefit Fund

A. Upon order of the Court, payments may be made from the Common Benefit Fund to attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client(s). Attorneys eligible are limited to Plaintiffs’ Co-lead Counsel, members of the Plaintiff’s Steering Committee, members of Plaintiffs’ Liaison Counsel and other attorneys called upon by them to assist in performing their responsibilities. All time and expenses are subject to proper and timely submission (each month) of contemporaneous records certified to have been timely received by Wexler Wallace LLP.

C. Payments will not exceed the fair value of the services performed, plus any approved multiplier, or the reasonable amount of the expenses incurred and, depending upon the amount of the Common Benefit Fund, may be limited to part of the value of such services and expenses.

PPO 22 ¶4.A and C (Dkt. No. 2415).

In paragraph 4.D, PPO 22 provides that “[n]o amounts will be disbursed without review and approval by the Court or such other mechanism as the Court may deem proper under the circumstances.” *Id.* at ¶4.D. Plaintiffs’ Co-lead Counsel have collected and reviewed expense reports and supporting documentation from each of the submitting-firms. Through this Motion, in accord with PPO 22, Plaintiffs’ Co-lead Counsel seek such review and approval by this Court.

D. “Reimbursable” Expenses Under PPO 22

In Paragraphs 5.D.i-xi, PPO 22 provides a framework for what types of expenses can be reimbursed from the Common Benefit Fund. More specifically, PPO 22 allows reimbursement for

“shared” expenses such as: experts,⁷ deposition transcripts and court reporter costs, document depository,⁸ witness fees, administrative matters⁹ (e.g., bank charges, equipment charges, PSC conference calls, meeting costs, legal and accounting fees), investigative services....” PPO 22, p. 7. “Held” expenses are also compensable, when they inure to the global benefit of MDL plaintiffs. *Id.* Held expenses are expenses authorized, incurred and submitted in the monthly time and expense reports (to Plaintiffs’ Liaison Counsel) that are not client specific. They include: “authorized travel costs, postage, photocopies, computerized legal research and meals.” *Id.*

The Court has issued restrictions on the allowed expenses; including: (1) air travel limited to coach class reimbursement except in extraordinary conditions, (2) hotel rooms must be reasonable, (3) meal expenses must be reasonable and tied to work, (4) miscellaneous travel expenses (tips, luggage handling) are capped at \$50 a trip and must be properly documented, (5) luxury automobile rental is not fully reimbursed unless it is the only rental available, (6) mileage claims must be fully documented, including origin and purpose of trip, and are only reimbursed up to the rate allowed by the IRS, (7) in-house photocopy charges are limited to 15 cents a page and must be logged, and (8) claims for electronic research (Westlaw, Lexis) should be in the exact amount charged to the firm. *Id.* at 8.

⁷ *Accord, Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982) (“district courts have the discretion to reimburse consulting and expert witness fees”).

⁸ *Accord, In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 2006 U.S. Dist. LEXIS 10902 at *55 (N.D. Cal. Feb. 27, 2006) (court ordered that attorneys could look to common fund for reimbursement of shared expenses, including those incurred for document depository).

⁹ *Accord, Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 741 F.Supp. 84, 86 (S.D.N.Y. 1990) (counsel reimbursed for bank maintenance fee); *Acosta v. Master Maintenance*, 192 F. Supp. 2d 577, 599 (M.D. La. 2001) (approving miscellaneous costs).

Finally, while work on representative trials is considered to be common benefit work, and therefore, “bellwether” expenses *are* common fund benefit expenses,¹⁰ PPO 22 excludes individual case expenses when they are not part of the Court approved bellwether and ADR process. More specifically, PPO 22 does not allow payment for: “services and expenses related to a particular case, such as the deposition of a treating physician, excluding common benefit services and expenses related to the bellwether, ADR, and/or neutral evaluation cases, even if such activity results in some incidental and/or consequential benefit to other plaintiffs.” PPO 22 at p. 6 (emphasis added).¹¹

E. Substantial Costs and Expenses have been Incurred, Recorded and Carried in this MDL, and the Expenses Claimed are Acceptable Under PPO 22

Plaintiffs’ Co-lead Counsel is familiar with the work performed and the expenses incurred by members of the PSC and others. Moreover, Plaintiffs’ Co-lead Counsel has reviewed the expense reports, affidavits, and supporting documentation submitted by all firms requesting reimbursements; and in light of the requirements above, believe that the requested disbursement and distribution of expenses is appropriate.¹²

Plaintiffs’ Co-lead Counsel and the PSC have in incurred and carried substantial “held” costs in connection with their efforts on behalf of all litigants in this MDL. Those “held” costs

¹⁰ *See In re Thirteen Appeals*, 56 F.3d 295, 312-13 (1st Cir. 1995).

¹¹ Also specifically excluded is: “time spent on developing or processing individual issues in any case for an individual client (claimant)....” *Id.*

¹² Plaintiffs’ Motion only seeks reimbursement of expenses incurred through July 8, 2011. Some members of the PSC submitted expense reports and affidavits including some expenses incurred after that date. In those situations, Plaintiffs’ Co-lead Counsel has informed the submitting attorneys that the expenses incurred after July 8, 2011, but included in their submissions, will not be reimbursed at this time and those amounts will be deducted from the amount requested from the court. Plaintiffs’ Co-lead Counsel takes no position at this time regarding the appropriateness of reimbursement for any costs and expenses incurred after July 8, 2011 and not included in this Motion. Additionally, Plaintiffs’ Co-lead Counsel takes no position regarding the appropriateness of any attorney’s fees associated with the expenses submitted.

were incurred for the global benefit of all plaintiffs, and include things such as “travel costs, postage, photocopies, computerized research and meals.” PPO 22 at p. 7. These expenses are hard-costs associated with conducting extensive and lengthy discovery relating to two large corporations and multiple products. Moreover, Plaintiffs’ Co-lead Counsel and the PSC incurred significant costs through the bellwether process; a process which resulted in two bellwether trials before this Court. Discovery and trial preparation in this litigation necessitated, among other things, taking the depositions of dozens of Defendants’ employees and third parties and reviewing millions of pages of relevant documents. Indeed, Plaintiffs’ Co-lead Counsel and the PSC not only researched and developed the trial theories in this litigation—they spent years tracking down the evidence necessary to put those theories to the test. And while one of the Defendants, Davol, was located in Rhode Island, this was unarguably a nationwide-litigation requiring counsel to travel to and from all corners of the country to take depositions, to interview witnesses, physicians and experts, to review documents, and to otherwise prepare this litigation for trial. As a result, counsel spent weeks, if not months, away from their homes and families. This Amended Motion asks for reimbursement of the hard costs resulting from that effort.

Throughout this litigation, common benefit expenses have been submitted through monthly expense reports to PSC member firm, Wexler Wallace LLP. Subsequently, in connection with the filing of this Motion, the PSC firms have provided sworn affidavits, detailed ledgers, and back-up documentation in support their requests for reimbursement. *See* attorney affidavits attached as Group Exhibit 2 and supporting documentation. Through July 8, 2011, the total amount of expenses (exclusive of PSC assessments) incurred by Plaintiffs’ Co-lead Counsel and the PSC for the common benefit of this litigation, and for which Plaintiffs’ Co-lead Counsel move for reimbursement through this Motion, is \$1,738,522.76.

A chart of each PSC firms' held costs is provided below. Pursuant to the records submitted, and based upon affirmation of counsel, Plaintiffs' Co-lead Counsel requests reimbursement of common benefit expenses in the following amounts:

Firm Name	Held Expenses
Alvarez Law Firm	18,560.98
Cory Watson Crowder & DeGaris, P.C.	381,483.37
Doughlas & London, P.C.	23,183.43
Henninger Garrison & Davis, LLC	40,467.35
Milberg LLP	67,826.79
Motley Rice LLC	844,037.15
Parker Waichman LLP	11,031.23
Potts Law	81,138.92
Reich & Binstock LLP	43,292.78
Toriseva Law	20,417.14
Wagstaff & Cartmell	60,999.82
Wexler Wallace LLP	89,278.97
Williams Kherkher Hart Boundas, LLP	56,804.83
Total:	1,738,522.76

The expenses in question are the kind that law firms typically bill to their clients, such as copying costs, expert fees and travel expenses. *See generally LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir. 1998). As these expenses were incurred in performing services for all settling plaintiffs, the firms are entitled to reimbursement from the Common Benefit Expense Fund. *See PPO 22; In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001).

F. Interim Reimbursement of Expenses will Not Affect the Common Benefit Fund or Prejudice Pending Cases in the MDL

Because general discovery is closed and the bellwether process has ended, nearly all common benefit work has already been performed and the remaining costs and expenses to be incurred for the

global benefit of plaintiffs (if any) will be minimal. The reimbursement of \$1,738,522.76 in common benefit costs and expenses will not in any way negatively affect the solvency of the Common Benefit Fund because even after the payment of these expenses there will be more than \$1,625,274.03 in the Common Benefit Expense Fund. *See* Ex. 1. Moreover, the Fund will still receive assessments on all judgments and settlements in cases, going forward. As such, it is proper to reimburse the PSC firms for the out-of-pocket expenses they have forwarded (and carried for several years) for the common benefit of all plaintiffs in this MDL.

CONCLUSION

WHEREFORE, Plaintiffs' Co-lead Counsel and the Plaintiffs' Steering Committee respectfully request that this Court enter an Order calling for the reimbursement of costs and expenses from the Common Benefit Fund, as described above, and directing Plaintiffs' Liaison Counsel, Donald A. Migliori, to make such distribution.

Dated: February 11, 2013

Respectfully submitted,

/s/ Donald A. Migliori
Donald A. Migliori (#4936)
MOTLEY RICE LLC
321 South Main Street, Suite 200
Providence, RI 02940-6067
401-457-7700
401-457-7708 FAX

MDL 1842 Plaintiffs' Liaison Counsel