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Court Reporter: Karen M. Wischnowsky, RPR-RMR-CRR

1 7 MAY 2014 -- 9:30 A.M.

2 THE COURT: Good morning. This is the matter of
3 In Re: Kugel Mesh Hernia Patch Product Liability
4 Litigation. It is MDL 1842. And before the Court this
5 morning is the assented motion for an interim payment
6 of common benefit attorneys' fees.

7 I see we have a number of attorneys present in
8 the courtroom today, and participating from afar and
9 allowed to do so only because he is the very special
10 Mr. Michael Brown is on the line.

11 How are you, Mr. Brown?

12 MR. BROWN: Good morning, your Honor. I'm
13 delighted to be here. I'll be here from afar.

14 THE COURT: Kind of creepy, Mr. Brown. Your
15 voice is coming from the sound system. You sound like
16 God.

17 MR. BROWN: I'm trying to perfect that.

18 MR. MIGLIORI: God never thought he was a
19 lawyer.

20 THE COURT: I thought God was a woman. If
21 counsel would be good enough to please identify
22 yourselves for the record and the party you're here
23 representing. Mr. Migliori.

24 MR. MIGLIORI: Thank you, your Honor. Good
25 morning. Don Migliori from the law firm of Motley Rice

1 both as liaison counsel to all Plaintiffs in this MDL
2 and also as co-lead counsel filing this petition for
3 the Plaintiffs' Steering Committee.

4 MR. CORY: Good morning, your Honor. Ernie Cory
5 from Birmingham, co-lead counsel for the Plaintiffs.

6 MR. GAUDREAU: Good morning, your Honor.
7 Russell Gaudreau from Reed Smith. I'm here in person.

8 THE COURT: Oh, so you're the Mr. Brown wannabe.

9 MR. GODREAU: Exactly.

10 THE COURT: Okay. Did you hear that, Mr. Brown?

11 MR. BROWN: I did hear that, your Honor. I'm
12 fine with that.

13 MR. WALLACE: Good morning.

14 THE COURT: You have to yell.

15 MR. WALLACE: Yes, your Honor. Ed Wallace from
16 Chicago on behalf of the Plaintiffs. Pleasure to see
17 you again.

18 THE COURT: We have two gentlemen in the back of
19 the courtroom. I don't know whether you're part of
20 this or you're simply observing.

21 MR. ALVAREZ: Good morning, your Honor. Alex
22 Alvarez from Miami and part of Plaintiffs' Steering
23 Committee.

24 MR. DUPUIS: John Dupuis. I'm with Alex
25 Alvarez's firm.

1 THE COURT: Okay. Can you spell your last name,
2 please. I want to make sure we get it.

3 MR. DUPUIS: D-U-P-U-I-S.

4 THE COURT: Mr. Migliori, you may win this one.

5 MR. MIGLIORI: I may. Should I just sit down?

6 THE COURT: Come on up, and I think we ought to
7 make a record.

8 And so counsel know this as well, we have
9 attempted throughout the life of this MDL to be as
10 transparent as possible and in particular because there
11 are so many Plaintiffs who are represented by their own
12 counsel whose cases were affected by the fact that they
13 were transferred to this Court by the JPML and whose
14 cases have been managed, if you will, by the co-lead
15 counsel appointed by this Court.

16 And so in the interest of full disclosure, I had
17 this motion placed on not only the docket of the case
18 but also the court's website where we have a special
19 location for the MDL so that those Plaintiffs who are
20 not represented by the Plaintiffs' Steering Committee
21 and co-lead counsel but have lawyers of their own would
22 have access to the information, and it is my intention
23 as well to place whatever order is issued today on that
24 website.

25 I want to make sure you know that because you

1 may get calls from individual Plaintiffs who don't
2 understand what this is about.

3 So if you want to make your record,
4 Mr. Migliori, please do.

5 MR. MIGLIORI: I do, your Honor, and if at the
6 end of the record I could also give an update because I
7 think there's also some good news on the total
8 litigation.

9 THE COURT: Okay. Great.

10 MR. MIGLIORI: Thank you, your Honor, for the
11 time. As the Court knows, several years ago when we
12 started this litigation, we asked the Court to enter an
13 assessment order that had both an accounting for
14 assessment for attorneys' fees and for attorneys'
15 costs.

16 We have separately petitioned the Court for
17 costs, and that assessment still continues and should
18 continue until the end of the litigation so that any
19 reimbursement from the cost side can be fairly returned
20 to clients on a pro-rata basis across the entire
21 litigation.

22 And so that's still pending out there. We
23 expect very little, if any, future petition against the
24 costs; but what's very important about that issue is
25 that that money came from clients' proceeds.

1 The money that we're talking about today, your
2 Honor, is an assessment that was agreed to by nearly
3 every single law firm in the country but one against
4 attorneys' fees, and that one law firm was the Steven
5 Johnson law firm; and this Court heard oral argument
6 and took consideration of papers that ultimately found
7 that the assessment of eight percent against the
8 attorney fee portion of this case was appropriate and
9 fair given the totality of the litigation.

10 So what's before us now is the petition to ask
11 for a payment from the attorney fee-only assessment
12 according to the papers or in the distribution that's
13 been agreed to by all parties.

14 We have spent a considerable amount of time
15 going firm by firm reviewing the hours submitted.
16 We've spoken with every single firm that complied with
17 this Court's practice and procedure order allowing for
18 firms to submit time to us.

19 Each firm, after much transparency and
20 discussion, agreed to a certain amount of money; and we
21 have agreed to make this petition using those
22 assented-to values.

23 I think it's important to note for the record
24 that this is a fractional load start, not a multiple
25 load start; that is, when we asked for the eight

1 percent assessment, we said we didn't think that was
2 even enough to cover what will happen; and, in fact,
3 that turned out to be true.

4 The number of hours put into this litigation by
5 these law firms who did, in my view, a tremendous job,
6 their hours are being compensated on a fractional
7 basis, not on a multiplier basis.

8 And so in our papers, we've tried to break it
9 down as neatly as possible showing each firm's
10 relative value given the type of work each firm did,
11 whether it be work done by younger associates on
12 document view versus more experienced attorneys who are
13 working on trial matters, depositions or trials
14 themselves, and we've broken it down. The range of
15 values, again, are well within, in fact below, market
16 value for the time put in.

17 So the motion, we stand on the papers themselves
18 and the analysis in the papers themselves. We think
19 that -- the notice was sent electronically, so we
20 believe that there's full and fair notice to the entire
21 MDL world on what we're doing. We've received no
22 objections since.

23 So we feel that we're really before your Honor
24 -- and of course I've spoken with Mr. Hooper and
25 Mr. Gaudreau about this very issue. There's no

1 position taken by the Defendants other than I guess
2 assent by taking no objection and no issue with it at
3 all.

4 The process has worked smoothly. It will
5 continue to work. There are still pending 900 cases
6 between this court and the state court, and this is
7 where I'd like to get into some of the good news that
8 the Court might not know.

9 The Court very appropriately put into process a
10 settlement procedure to -- and it was through
11 Mr. Hooper's sort of design and Mr. Gaudreau's
12 follow-through with Mr. Hooper, put in a procedure to
13 have firms start to talk to both my firm, Motley Rice,
14 and their firm to try to see on a relative basis,
15 knowing as much as we know about the liability issues,
16 the values and the like, to see if we can start forging
17 some resolutions.

18 We have 917 claims between the two courts, this
19 court having 480 cases still pending before it; but of
20 that 480 cases, your Honor -- and parenthetically,
21 there are four that are waiting to be transferred here.
22 So you can say that there are 480 --

23 THE COURT: Well. . .

24 MR. MIGLIORI: If you don't enter an order
25 saying not to.

1 THE COURT: As of May 1, I am no longer
2 accepting.

3 MR. MIGLIORI: Okay. That's good for us to
4 know.

5 THE COURT: I thought I made that clear to your
6 folks in a conference call at the beginning of April
7 that as of April 30th we were not accepting any more.

8 MR. MIGLIORI: And I do remember that, your
9 Honor, and that won't affect the process because
10 they'll still come into our system the same way.

11 Of the 480 that are here, your Honor, we have
12 been able to effectuate a resolution of 255 claims
13 through the Motley Rice process.

14 And Motley Rice, I will take credit for this,
15 Motley Rice was able to broker a deal with
16 Mr. Johnson's firm despite all of the issues that
17 surrounded from assessment on forward.

18 Reed Smith was very central in it. I'm not
19 taking credit from them or from Bard and their general
20 counsel and the hard work they did. But Joe Rice, my
21 partner, and I were very actively involved with
22 Mr. Johnson. We resolved his cases as well.

23 So if the cases that are under tentative pending
24 settlements resolve as we anticipate they will, we're
25 talking about the federal court having 205 cases left

1 that need to be reviewed.

2 I can tell you that half of those are already
3 under understandings of resolution in our ongoing
4 effort to resolve cases.

5 So we believe that this process both in the
6 state and federal court has worked incredibly well in a
7 very coordinated way.

8 The claims, for example, from Mr. Johnson not
9 only involve this court and the state court, but it
10 also involved a court in Illinois.

11 So as a result of the system set up by this
12 court, we believe that by the end of this summer we
13 should have all but less than 100 cases left where
14 individual resolution or possibly trials would be
15 needed to get the total litigation put to rest.

16 But the time used over the past six to eight
17 months has been used very, very effectively to get real
18 expectations on both sides towards resolution and,
19 quite honestly, for the common benefit.

20 To bring it full circle back to this petition,
21 those will have assessments to them as well. It's our
22 intent to ask that the apportionment for the three
23 co-leads remain in effect.

24 If the Court's so inclined, we could have some
25 kind of notice procedure where when that money does

1 come in, that we provide notice to the Court that the
2 money has come in into the common benefit under the
3 same system and we'd like to distribute it in the
4 percentages that have been assented to.

5 We're totally open to any, but --

6 THE COURT: I think that one on a going-forward
7 basis, Mr. Migliori, again, because I'm in a somewhat
8 awkward position here. As I say, my concern has always
9 been for the folks whose cases are brought not by you
10 or any of the other co-leads but who are represented by
11 separate counsel who are subject to the common benefit
12 fund order.

13 So let's leave the going-forward issue to
14 another day and perhaps a conference where we can
15 devise a format to protect those individuals and give
16 them an opportunity to make whatever arguments they
17 want to make. Not that I'm looking for more work.

18 MR. MIGLIORI: Your Honor, we fashioned our
19 motion that way thinking that that would be the
20 Court's --

21 THE COURT: Yes.

22 MR. MIGLIORI: So I put it out there because it
23 at least will be our intent to move forward; and more
24 importantly in this process, we've reached an agreement
25 that that's how we would proceed. So the Court knows

1 that other than somebody's objection in an individual
2 case, we are all in agreement and we're comfortable
3 with the process subject to the Court's approval.

4 THE COURT: And that's fine. As I say, you
5 understand my concern is with the folks who are not
6 represented by your firm or any of the other two
7 co-lead firms.

8 MR. MIGLIORI: Absolutely.

9 THE COURT: We'll work on that.

10 MR. MIGLIORI: So the interim order, your Honor,
11 is such that if entered as proposed, the firms other
12 than the law firms of Motley Rice, Cory Watson, Wexler
13 Wallace and the Alvarez firms, if those firms will
14 fully discharge their interest in any common benefit
15 future payments. The remaining issues, there's
16 almost --

17 THE COURT: Have those firms given you anything
18 in writing to that effect?

19 MR. MIGLIORI: They have, your Honor. I
20 submitted --

21 THE COURT: Not that I don't trust them.

22 MR. MIGLIORI: Understood. And we debated, when
23 initially we got their signed sworn affidavits, we did
24 it with a state court caption, and we submitted that
25 state court caption to the Court as a courtesy copy.

1 THE COURT: I have that.

2 MR. MIGLIORI: And in that they've each
3 affirmatively sworn to say that they agree with this
4 process and that that will be their final payment.

5 I didn't file it with these papers. Just
6 procedurally, I realized that they're on the wrong
7 caption, and I didn't think that that's something
8 that --

9 THE COURT: I think we ought to have them as
10 part of the record here as well just, you know, belt
11 and suspenders, let's make sure we have everything
12 covered.

13 MR. MIGLIORI: That would be fine, your Honor.
14 I can refile the state papers as an exhibit to this. I
15 can submit them separately with the state court
16 captions.

17 THE COURT: I think what you can do is file
18 them -- hold on one second, and let me just make sure
19 to see whether they need to do new ones.

20 I think, Mr. Migliori, because I'm just looking
21 at Mr. Garrison's affidavit, and my recollection is
22 they're all pretty much the same.

23 MR. MIGLIORI: They are.

24 THE COURT: They refer to the coordinated and
25 consolidated action in Superior Court. They do not

1 refer to the MDL. And so I think, again, belt and
2 suspenders, what I would ask you to do is to submit
3 similar declarations that specifically reference this
4 matter so that we've got that as part of the record in
5 this case. I understand that's the intention.

6 MR. MIGLIORI: And, your Honor, actually what I
7 would propose maybe for more clarity and specificity,
8 if the form of order that we submitted, which is
9 document number 4551 --

10 THE COURT: I have it.

11 MR. MIGLIORI: -- number 2, if that is the order
12 that would be signed, I would be happy to craft an
13 affidavit with the MDL caption that says I have read
14 the papers, I have read the proposed order, I agree
15 that this is the amount that we have agreed to and this
16 is our final common benefit and just make it a very
17 discrete MDL-specific -- and specifically reference the
18 amount because one thing that is missing in the state,
19 they agreed to the concerted actions, and what was
20 meant by that was concerted between the two courts; but
21 it doesn't say it clearly.

22 So this way if we attach this and do something
23 as discrete as what I just suggested --

24 THE COURT: That's fine. And if you can get
25 those in to me, the sooner you get them in, the sooner

1 I can issue the order.

2 And I understand, and I'm very pleased to hear,
3 that the Alvarez firm apparently is -- and that's why I
4 think it's important that we do it this way, because as
5 I understand it from the papers, that the Alvarez firm
6 is saying we're okay with this amount from the federal
7 fund, but we're reserving our rights to fight about the
8 amounts in the state fund.

9 MR. MIGLIORI: Yes. And, again, because we're
10 on the record, I'd like to just make a very short
11 statement about that.

12 The Alvarez firm has been very cooperative.
13 There have been very professional conversations. The
14 three lead counsel have agreed with the Alvarez firm
15 that while we do not agree with their position above
16 and beyond the amount in this order, we've agreed to a
17 range of potential additional value that they can argue
18 for.

19 The only reason we have decided to do that in
20 the state court is because the three firms that are
21 still left in the state court are the ones that are
22 accepting the risk of that decision. So it was more
23 discrete that way.

24 THE COURT: Oh, that's fine. I'm not looking
25 for trouble.

1 MR. MIGLIORI: Understood. I just want the
2 record to be clear that the Alvarez firm --

3 THE COURT: Judge Gibney will have all -- you
4 know, she'll have you in and hear what you all have to
5 say, and I'm just delighted that I don't have any
6 fights in my corner.

7 MR. MIGLIORI: And so their affidavit will be
8 identical to this one, maybe with one more line saying
9 that without waiving our rights to proceed in the state
10 court.

11 THE COURT: Okay.

12 MR. MIGLIORI: And if that works, your Honor, I
13 suspect that if --

14 THE COURT: How soon can you get those, I'll
15 call them, quickie affidavits?

16 MR. MIGLIORI: If I have this Court's permission
17 to use what we've submitted, that is, the proposed
18 order and those amounts, I suspect knowing checks will
19 follow, I should have them within the week.

20 THE COURT: I'll bet you would.

21 MR. MIGLIORI: I'll work on that immediately.

22 THE COURT: Okay.

23 MR. MIGLIORI: And then just for clarification
24 while we're here, when we submit that, in that it's an
25 assented-to motion, I assume that -- the money is in a

1 Bank of Rhode Island account. I assume that I'm able
2 to issue the checks as soon as I receive them and that
3 there's not a need to wait for any appeal period
4 because there's no objection to it.

5 THE COURT: I would think so.

6 MR. MIGLIORI: I just don't want to act outside
7 of the scope. So that would be my intent, as soon as I
8 receive your order, to then disburse it.

9 THE COURT: And I'll issue that as soon as I get
10 those declarations.

11 MR. MIGLIORI: And I think I'll see you in
12 Florida.

13 THE COURT: You will.

14 MR. MIGLIORI: Thank you, your Honor.

15 THE COURT: Mr. Brown, are you still there?

16 MR. BROWN: I'm still here, your Honor.

17 THE COURT: Okay. I was hoping that you hadn't
18 fallen asleep on us.

19 MR. BROWN: How could I do that listening to
20 Don?

21 THE COURT: I do it all the time listening to
22 Don.

23 Are you all set, Mr. Gaudreau?

24 MR. GODREAU: Yes, I am.

25 THE COURT: As I said at the beginning of this

1 hearing, this is an assented-to motion for an interim
2 payment of common benefit attorneys' fees.

3 The Plaintiffs' Steering Committee, co-lead
4 counsel and liaison counsel are seeking a payment of
5 common benefit funds for their work in connection with
6 this MDL.

7 This Court has lived with this MDL since its
8 inception here. I've worked very closely with
9 Magistrate Judge Almond on this case, who handled the
10 bulk of all discovery disputes, and there were many
11 early on.

12 The complexion of this case changed dramatically
13 when we got to the point where we were looking to
14 designate bellwether cases for trial.

15 Since then, we've tried two cases, but -- and
16 since then, the parties have engaged in serious
17 settlement negotiations led very capably and ably by
18 the co-lead counsel; and I'm certainly aware of all of
19 the work done by the other law firms who are listed in
20 the Plaintiffs' Steering Committee.

21 As I say, I'm fully aware of how difficult this
22 case was, how massive it was, and how much of a benefit
23 is conferred on those individuals whose cases were
24 transferred to this MDL by the JPML.

25 Essentially the lawyers who filed those cases

1 all over the country, and I think there were some 2,000
2 or so that were transferred to this court, could ride
3 the coattails of the Plaintiffs' Steering Committee as
4 it relates to generic discovery, which, as I say, was
5 complex and massive in terms of the total number of
6 pages of information that had to be reviewed, the
7 number of depositions that had to be conducted, the
8 legal battles over what was appropriate and what was
9 not appropriate, and just the sheer number of hours
10 that were required.

11 In addition, I would be remiss if I were not to
12 say at this time how much the Court appreciates the
13 involvement of co-lead counsel and the Plaintiffs'
14 Steering Committee in this case for having conducted
15 themselves in as professional a way as they did and in
16 working with Defendants' counsel in bringing about
17 resolution of now, it sounds like, almost 90 percent of
18 the cases that were transferred or filed here.

19 In particular, I would like to acknowledge and
20 to express my appreciation for co-lead counsels'
21 availability, often on short notice, and the
22 willingness on the part of co-lead counsel, and I
23 mention them in particular because those are the folks
24 that I had most of my dealings with, although I know
25 that they then had everybody else do the work, but

1 their willingness to take on some of the more
2 challenging cases, some involving pro se Plaintiffs who
3 didn't have a lawyer to explain to them what was going
4 on, some who had lawyers who needed to have it
5 explained to them.

6 And so we find ourselves here today very close
7 to being able to shut down this MDL. So I'm delighted
8 to hear that, and I would encourage the parties to
9 continue in those efforts.

10 I have reviewed this motion and the breakdown as
11 requested by counsel. I think it is fair and it is
12 reasonable. I also recognize that the Defendants in
13 this case are taking no position, and so it's really
14 incumbent on this Court to scrutinize very closely the
15 information that has been provided to me by
16 Mr. Migliori on behalf of the Plaintiffs' Steering
17 Committee.

18 All of that having been said, I do find that the
19 dollar amounts requested are commensurate with the
20 hours expended and the skill and the effort that was
21 required by the firms who are seeking their portion of
22 this interim payment. And so for all of those reasons,
23 the motion is granted.

24 Mr. Migliori, as soon as you provide to me those
25 MDL-specific declarations from the firms involved, I

1 will enter the order that you've submitted as a
2 proposed order. And, again, that will go out on the
3 public website as well as the docket.

4 MR. MIGLIORI: Thank you very much, your Honor.

5 THE COURT: All right. Mr. Brown, you were
6 brilliant.

7 MR. BROWN: As usual. Thank you, your Honor.

8 THE COURT: As usual. I didn't say that,
9 Mr. Brown.

10 MR. BROWN: I just tried to add a little color
11 to that, your Honor.

12 THE COURT: You did. You did.

13 MR. BROWN: We would like to thank the Court,
14 too. We agree with Don on a lot of the
15 characterization. He and his team have been very
16 helpful in bringing to resolution a number of these
17 other claims, and we're hoping to get across the finish
18 line with those that remain.

19 THE COURT: Great. All right. Thank you all
20 very much.

21 (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.

Dated this 20th day of May 2014

/s/ Karen M. Wischnowsky

Karen M. Wischnowsky, RPR-RMR-CRR
Federal Official Court Reporter