UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

IN RE: KUGEL MESH HERNIA REPAIR PATCH LITIGATION	§	**MDL Docket No. 07-1842-ML**
THIS DOCUMENT RELATES TO:	§	**Chief Judge Mary M. Lisi**
William Caldwell	§	
v.	§	
Craig Owen, M.D., Crown Surgery Medical Group, Southwest Health Care System DBA Inland Valley Medical Center, Davol, Inc. and C. R. Bard, Inc., and DOES 1 through 50, inclusive.	§	
No. 1:12-cv-03710-ML-LDA	§	

JOINT NOTICE OF MOTION OF PLAINTIFF WILLIAM CALDWELL AND DEFENDANTS DAVOL, INC. AND C. R. BARD, INC., FOR DETERMINATION OF GOOD FAITH SETTLEMENT; MEMORANDUM OF LAW IN SUPPORT THEREOF

[CALIF. CODE OF CIV. PROC. § 877.6]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff William Caldwell ("Plaintiff"), and Defendants Davol, Inc. and C. R. Bard, Inc. ("Bard and Davol") will, and hereby do, jointly move the Court, pursuant to California Code of Civil Procedure Section 877.6, for a determination that the settlement between Plaintiff and Bard and Davol is in good faith.

This motion is based on this Notice, the attached Memorandum of Law, the complete files and records of this action, and any other oral or documentary evidence that may be presented to or considered by the Court at the time of hearing.

DATED: September 4, 2015

Respectfully submitted,

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MEMORANDUM OF LAW

I. INTRODUCTORY STATEMENT

This case arises from allegations by Plaintiff William Caldwell ("Plaintiff") of strict product liability, failure to warn, and loss of consortium against Defendants Davol, Inc. and C. R. Bard, Inc. ("Bard and Davol"). Plaintiff filed an Action against Bard and Davol, relating to the design, distribution, manufacture, testing, sale, inspection, implantation, explantation, use, promotion, advertising, sale, administration, research, development, packaging, labeling, marketing, examining, maintenance, supplying, preparation, analyzing, recommendation, display, development, study, production, performance, warning and recall relating to the Composix® Kugel® Hernia Patch(es). More specifically, Plaintiff's claims relate to two Ventralex patches implanted in Plaintiff William Caldwell on June 24, 2011. These two Ventralex patches, nonrecalled products, were explanted due to infection three months after implant on September 20, 2011. The operative reports do not reference any break, buckle, or fold language. Plaintiff also maintains allegations of medical negligence against Craig Owen, M.D., Crown Surgery Medical Group, and Southwest Health Care System dba Inland Valley Medical Center.

Bard and Davol deny any and all liability relating to the Composix® Kugel® Hernia Patch and any other hernia repair product manufactured, distributed, and/or designed by Bard and/or Davol, and believe they have meritorious defenses.

The Parties are fully informed as to the strengths and weaknesses of their respective positions, based on their discovery, investigation, analysis and evaluation of the facts and the law relating to the Action.

Nevertheless, Plaintiff and Bard and Davol (hereinafter referred to collectively as the "Settling Parties") wish to end this litigation early and resolve this matter. Based on recent discussions and negotiation through court ordered settlement conferences, the Settling Parties have resolved their dispute as between Plaintiff and Bard and Davol, and reached a mutually agreeable settlement. Consequently, the Settling Parties request that the Court review their Confidential Settlement Agreement and Release (the "Agreement") under seal and render a finding of good faith.

The parties' settlement is confidential and it is contingent upon this Court's finding of good faith. A determination that the settlement is in good faith will result in Plaintiff filing a dismissal with prejudice as to Bard and Davol.

Plaintiff's settlement with Bard and Davol will not preempt Plaintiff's case against the nonsettling defendants, Craig Owen, M.D., Crown Surgery Medical Group, and Southwest Health Care System dba Inland Valley Medical Center (collectively, "Codefendants"). Subject to this Court's prior Order (Docket # 4895), the Settling Parties have provided copies of the Agreement to the Codefendants for review.

II. STATEMENT OF PERTINENT FACTS

A. The Action Between the Parties.

On June 13, 2012, Plaintiff filed a Complaint in the Superior Court of the State of California for the County of Riverside, No. RIC-1208966 against Craig Owen, M.D., Crown Surgery Medical Group, Southwest Health Care System dba Inland Valley Medical Center, Davol, Inc., C. R. Bard, Inc., and DOES 1-50. On August 14, 2012, Bard and Davol filed a notice of removal and the action was removed to the United States District Court for the Central District of California, Case No. 5:12-cv-01350. On September 11, 2012, a Conditional Transfer

Order (CTO-142) was entered which transferred the case to the United States District Court for the District of Rhode Island as part of the In Re: Kugel Mesh Hernia Repair Patch Litigation, MDL Docket No. 07-1842, and assigned Case No. 1:12-cv-03710-ML-LDA. Plaintiff filed a motion to remand the case to Riverside Superior Court on September 13, 2012, but the Clerk of the Court struck the motion since the case had already been transferred. Plaintiff then filed an opposition to the Conditional Transfer Order on September 18, 2012, and restated its support to remand the case. This opposition remains pending.

On September 6, 2014, this Court issued an Order establishing a formal settlement process. As part of the Order, Bard and Davol conferred with Plaintiff's counsel on January 14, 2015 regarding Plaintiff's claims against Bard and Davol. Further discussions between Plaintiff's counsel and Bard and Davol counsel took place over the weeks that followed the court mandated settlement conference. This settlement agreement is the result of these settlement negotiations, and does not disturb Plaintiff's pending action against the nonsettling codefendants.

On July 17, 2015, loss of consortium Plaintiff Quinn Caldwell filed a Request for Dismissal With Prejudice as to Bard and Davol.

B. Settling Parties Agree in Good Faith to Confidential Settlement.

After successful settlement negotiations in an attempt to resolve their dispute, the Settling Parties have reached an agreement in principle that resolves the dispute between the Plaintiff and Bard and Davol. On or about August 27, 2015, the Settling Parties finalized an agreement entitled "Confidential Settlement Agreement and Release" ("Agreement"). The Court may review the terms of the Agreement pursuant to this Court's Order (Docket # 4895) granting the parties permission to file the Agreement as an exhibit under seal. See Agreement at Exhibit 1 (sealed).

The Agreement reached between the Settling Parties was the result of extensive arms-length negotiations and was not the result of any collusion or fraud, nor was there any intent to make the remaining defendants pay more than their fair share in this matter.

III. ARGUMENT

A. Good Faith Settlement in Federal Court

As part of the In re: Kugel Mesh Hernia Litigation, this Court has applied Rhode Island choice of law analysis to determine which state's substantive law should apply to individual cases. See Ellington v. Davol, Inc., 2012 WL 2021908, *3 (D.R.I. 2012). This Court has noted that since the hernia mesh cases are "essentially an action for personal injury, unless, with respect to the particular issue, some other state has a more significant relationship, the place of injury is the most important factor under a Rhode Island choice-of-law analysis." Id. Here, Mr. Caldwell's mesh was implanted and explanted in California, and his initial complaint was filed in California state court. Consequently, this Court should apply California's good faith settlement statutes to assess whether the parties entered into a good faith settlement.

California's good faith settlement statutes, Cal. Civ. Proc. Code § 877, 877.6 et seq., have been applied by the federal courts in the Ninth Circuit to discharge settling parties whose settlements are deemed, by the federal courts applying California law, to have been made in good faith. See, Commercial Union Insurance Co. v. Ford Motor Company, 640 F.2d 210, cert. denied, (9th Cir. 1981). In cases in which jurisdiction is based on diversity, whether a party may obtain a determination of good faith settlement is controlled by state law. KLS Air Express, Inc. v. Cheetah Transportation LLC, 2008 WL 159191 (E.D. Cal. 2008), 1-2.

In Commercial Union, the Ninth Circuit made a thorough review and analysis of the California case law construing California Code of Civil Procedure, Section 877. The Court

found that "the expansion of section 877 to prevent a party from seeking indemnification from the [settling party] should apply only when the policy of settlement has been furthered and a settlement is made in good faith." 640 F.2d at 213; see also, Owen v. United States, 713 F.2d 1461 (9th Cir. 1983). As discussed more fully below, this settlement has been made in good faith.

B. The Settling Parties Are Entitled To A Determination That Their Settlement Has Been Reached in Good Faith.

1. The Standard for "Good Faith" Settlement

Determination of good faith settlements is set forth in California Civil Procedure Code § 877.6. That section provides in pertinent part:

> (a)(1) Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005…
>
> * * *
>
> (b) The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing.
>
> (c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.
>
> (d) The party asserting the lack of good faith shall have the burden of proof on that issue.

While there is no exact measurement, in evaluating whether a settlement is in "good faith," the Court must weigh the public policy favoring settlement with the competing policy favoring equitable sharing of costs among tortfeasors. The settlement must be within the "reasonable range" or within the "ballpark" taking into consideration the facts and circumstances

of the particular case. Even a disproportionately low settlement may be justified by showing that damages or liability is speculative. Tech-Bilt, Inc. v. Woodward-Clyde & Associates, 38 Cal.3d 488, 499 (Cal. 1985).

In determining whether a settlement satisfies the good faith requirement of Section 877.6, in Tech-Bilt, the Supreme Court of California identified six factors that are to be considered in a court's evaluation: (1) a rough approximation of plaintiff's total recovery and settlor's proportionate liability; (2) the amount paid in settlement; (3) the allocation of settlement proceeds among plaintiff(s); (4) recognition that a settlor should pay less in settlement than he would if he were found liable after a trial; (5) the insurance policy limit of the settling defendant; and (6) the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. Tech-Bill, supra, at 499.

The California Supreme Court stated in Tech-Bilt that the evaluation of whether a settlement is in good faith should be made on "information available at the time of settlement." Id. Additionally, as to the "rough approximation of plaintiffs' total recovery" factors, it is important to note that "[a] plaintiff's claims for damages are not determinative in finding good faith... Rather, the court is called upon to make a 'rough approximation' of what the plaintiff would actually recover." West v. Superior Court, 27 Cal.App.4th 1625, 1636 (1994). As such, in determining a settling defendant's equitable proportionate share of liability, "the judge does not look to the plaintiff's claim for damages; rather the judge tries to determine a 'rough approximation' of what the plaintiff would actually recover if the case should go to trial." Horton v. Superior Court, 194 Cal.App.3d 727, 735 (1987).

Finally, the burden of proof on the party challenging a determination that a settlement has been made in good faith is to demonstrate "that the settlement is so far 'out of the ballpark' ... as

to be inconsistent with the equitable objectives of the statute." Tech-Bilt, at 499-500. In fact, Cal Civ. Proc. Code § 877.6(d) specifically provides that the party asserting the lack of good faith shall have the burden of proof on that issue.

2. The Settlement Reached Between the Settling Parties Meets the Tech-Bilt Standards

a) *Rough Approximation of Plaintiff's Total Recovery and Settlor's Proportionate Liability*

Plaintiff alleges that hernia mesh patches designed, manufactured, assembled, distributed, conveyed and/or sold by Bard and Davol were implanted in Plaintiff William Caldwell. Plaintiff alleges that as a direct and proximate result of Bard and Davol's conduct, he suffered serious injuries and is entitled to damages for serious and permanent injuries, pain and suffering, physical and emotional distress, lost wages and the amount of costs associated with the medical treatment necessary to treat his injuries, any and all consequential damages, punitive damages, as well as interest, attorney fees and costs. Conversely, it is Bard and Davol's position that they have no liability in this matter. The products at issue in this case were nonrecalled products, and were explanted due to infection three months after implant. As such, Bard and Davol believe and would argue at trial that their products were not defective and did not cause Plaintiff's injuries. Thus, the Settling Parties made their decision to settle this matter with full awareness of what Plaintiff's potential total recovery could be and what the proportionate liability for Bard and Davol would be relative to the other defendants.

b) *The Amount Paid in Settlement*

A determination of good faith is found where the "amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for plaintiffs injuries." Tech-Bilt, supra, at 499. The amount of the settlement "must not be grossly

disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be." Id. at 499.

The proposed settlement is significant, especially in light of the defenses available to Bard and Davol, and is certainly within the "reasonable range" of their proportionate share of potential liability. The fact that there is a disparity between the amount of settlement and Plaintiff's claimed damages against Bard and Davol does not preclude a finding of good faith. See Wysong & Miles Company v. Western Industrial Movers, 143 Cal.App.3d 278 (1983), in which the court, approved a settlement of $65,000 in a case involving claimed damages of $7,000,000, because the settling defendant's liability was in serious doubt. Here, liability and causation are at issue as to Bard and Davol at this early stage of the litigation. However, as explained above, Bard and Davol would prefer to avoid the time, cost, and uncertainty of continuing on in this litigation. Thus, the Settling Parties have struck this reasonable settlement.

c) *Recognition That A Settlor Should Pay Less In Settlement Than They Would If They Were Found Liable After A Trial*

Bard and Davol should pay less in settlement than if found liable at trial. The potential verdict value if Bard and Davol are found liable after trial is potentially greater than the amount of the settlement.

d) *The Insurance Policy Limit of the Settling Defendants*

As disclosed in their 10-K filing with the SEC, Bard and Davol's insurance coverage with respect to Hernia Product Claims has been exhausted. Consequently, insurers will not be funding this settlement. Bard and Davol seek to limit any potential liability by settling this case at a pre-trial stage.

e) *Lack Of Collusion, Fraud, Or Tortious Conduct Aimed To Injure The Interests Of Nonsettling Defendants*

Courts also must examine whether there is "the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants." Tech-Bilt, supra, at 499. The Wysong court held that, "settling parties owe the nonsettling defendants a legal duty to refrain from tortious or other wrongful conduct; absent conduct violative of such duty, the settling parties may act to further their respective interests without regard to the effect of their settlement upon other defendants." (Wysong, supra, at p. 289, approving language from Dompeling v. Superior Court, 117 Cal.App.3d 798, 809-810 (1981).) Neither Plaintiff nor Bard or Davol have engaged in any collusion, fraud, or any other tortious or wrongful conduct aimed at injuring the interests of the other defendants in this action while coming to this settlement agreement. Bard and Davol have merely sought to settle with Plaintiff in order to buy their peace. To this end, the Settling Parties will share a copy of the Agreement, subject to The Protective Order, with nonsettling Codefendants.

C. There is No Showing of a Bad Faith Settlement.

In addressing the various factors to be considered by a court in determining whether a settlement is made in good faith, the Court in Tech-Bilt said that any party asserting that settlement was not in good faith has the burden "to demonstrate, if he can, that the settlement is so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the statute." Tech-Bilt, supra, p. 499-500. The settlement agreement between Plaintiff and Bard and Davol is not "so far 'out of the ballpark'" in relation to the facts as set forth above in the Tech-Bilt analysis.

"[A] 'good faith' settlement does not call for perfect or even nearly perfect apportionment of liability. In order to encourage settlement, it is quite proper for a settling defendant to pay less than his proportionate share of the anticipated damages. What is required

is simply that the settlement not be grossly disproportionate to the settlor's fair share," Abbott Ford v. Superior Court, 43 Cal.3d 858, 874-875 (1987). That is precisely the situation here with respect to the settlement reached between Plaintiff and Bard and Davol.

D. Settlement Between Plaintiff and Bard and Davol is Consistent With the Policies Behind Section 877.6 of Encouraging Settlements and Allocating Costs Equitably.

The two policies underlying section 877.6 are: (1) to encourage settlements; and (2) to allocate costs equitably among multiple alleged tortfeasors. Standard Pacific of San Diego v. A.A. Baxter Corporation, 176 Cal.App.3d 577, 588 (1986) (citing Tech-Bilt, supra, at pp. 498¬99.) The United States Court of Appeals for the Ninth Circuit recognized that these policies are preserved by a judicial assessment of the factors that were identified by the Tech-Bilt court, specifically, the six factors discussed and analyzed above in Section B, supra. Federal Savings and Loan Insurance Corporation v. Butler, 904 F.2d 505, 512-513 (9th Cir. 1990) (citing Tech-Bilt, supra). The Ninth Circuit Court of Appeals recognized as well that the settlement figure must not be "grossly disproportionate" to a reasonable person's estimate of the settling defendant's liability at the time of settlement, and that any party which claims a lack of good faith must show, based on analysis of the Tech-Built factors, that the settlement figure is so far "out of the ballpark" as to be inconsistent with the two policies underlying section 877.6. Federal Savings and Loan, supra , at p. 513; citing Tech-Bilt, supra.

In reviewing the settlement between Plaintiff and Bard and Davol under the Tech-Bilt factors affirmed by the Ninth Circuit, all fully discussed supra, the settlement between the Settling Parties is consistent with the underlying policies of § 877.6. The first policy, that § 877.6 encourages settlement, is clearly promoted, inasmuch as the Settling Parties have in fact agreed to a settlement. The second policy, that § 877.6 seeks to allocate costs equitably among potential tortfeasors, is also promoted as set forth above.

IV. CONCLUSION

For the reasons stated above, the Settling Parties hereby respectfully request that this Honorable Court issue an Order stating that under California Code of Civil Procedure, Section 877.6, the settlement between Plaintiff William Caldwell and Defendants Bard and Davol is determined to have been made in good faith, and ordering that any other tortfeasors be barred from bringing any future claims against Bard and Davol for indemnity, contribution or declaratory relief.

DATED: September 4, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September 2015, a true copy of the foregoing was sent by electronic mail and/or first class postage prepaid U.S. Mail to:

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