

**UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND**

In re KUGEL MESH HERNIA PATCH §
PRODUCTS LIABILITY LITIGATION §
§ **MDL Docket No. 07-1842-ML**
THIS DOCUMENT RELATES §
TO ALL ACTIONS § **JUDGE LISI**
§

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SECOND PAYMENT OF
COMMON BENEFIT ATTORNEYS' FEES AND REIMBURSEMENT TO PLAINTIFFS
OF EXCESS COMMON BENEFIT EXPENSE FUNDS**

Pursuant to Practice and Procedure Order 22 (“PPO 22”),¹ Plaintiffs’ Liaison Counsel, Donald A. Migliori, moves this Honorable Court for an order for the second payment of common benefit attorneys’ fees. This motion is for the disbursement of the funds currently collected and deposited in the MDL 1842 Common Benefit Attorneys’ Fees account (“MDL Account”) to the co-lead counsel firms of Motley Rice LLC, Cory Watson, P.C., and Wexler Wallace, LLP.² Notably, these three firms are the only firms with any claim to the MDL account --- every other firm with a prior interest has already had their claims paid and each of them filed signed affidavits with the Court that they relinquished any further rights to the MDL account. The three remaining firms have, from the beginning of these cases, carried the lion’s share of the work and expenses and together submit this motion on an agreed basis.

¹ Practice and Procedure Order 22 (*In re: Kugel Mesh Hernia Patch Prods. Liab. Litig.*, No. 07-1842-ML, Dkt. No. 2382) was entered on November 20, 2009, was subsequently amended pursuant to Court Order on December 18, 2009 (Amended Practice and Procedure Order Number 22, Dkt. No. 2415), and was again amended on May 21, 2012 (Dkt. No. 3795). Unless otherwise stated, all citations to “PPO 22” in this Memorandum are to Amended Practice and Procedure Order Number 22, Dkt. No. 2415.

² As the Court is aware, a largely identical order, for common benefit fee and expense assessments, was entered in the Superior Court of Rhode Island where more than half of the Composix Kugel claims were filed. A similar motion for payment of common benefit fees and a refunding of excess costs and expenses assessments will be filed with the Superior Court. Plaintiff’s Liaison Counsel will provide this Court with a courtesy copy of that motion when it is filed with the Superior Court.

We are also pleased to report that this motion also seeks the return of several million dollars to the litigants themselves, in form of withheld expenses. More specifically, Plaintiffs' Liaison Counsel also requests the entry of an order directing a pro rata refunding of all common benefit funds collected for payment of costs and expenses to plaintiffs. To accomplish that refunding of excess cost and expense assessments to plaintiffs, Plaintiffs' Liaison Counsel requests the ability to contract a settlement administration service to distribute those funds on a pro rata basis, which is the most efficient and cost-effective way to do so, costs for which would be paid from the amassed common benefit expense funds.

I. Proposed Award of Common Benefit Attorneys' Fees

Pursuant to this Court's PPO 22, as amended, an assessment of eight percent (8%) of gross settlement funds paid to Plaintiffs in connection with the Composix Kugel litigation has been set aside in the MDL Account maintained by Plaintiffs' Liaison Counsel for the reimbursement of common benefit attorneys' fees. As of October 30, 2015 the balance in the MDL Account set aside for attorneys' fees is \$2,955,735.17.³

Pursuant to the agreement among all plaintiffs' counsel, the currently requested distribution, and any future distributions, will be allocated solely among the co-lead law firms (Motley Rice LLC, Cory Watson, P.C., and Wexler Wallace, LLP) according to the percentages agreed upon by those firms (and previously awarded by the Court). All other Plaintiffs' firms have agreed—and previously submitted affirmations to the Court—that the Court's prior distribution from the Common Benefit Fund constituted full satisfaction of the services they have provided for the common benefit of the Composix Kugel mesh cases and there is no opposition

³ As of October 30, 2015, the balance in the Superior Court Common Benefit Attorneys' Fee Account is \$2,227,791.73.

to this request.⁴

Plaintiffs' counsel provided this Court with an in depth analysis of the law relating to the reasonableness of these attorneys' fees in connection with their request for an interim distribution of attorneys fees.⁵ See Dkt. No. 4551-1 at 6-14. As plaintiffs' counsel previously argued, an attorneys' fee award of 8% of the Common Benefit Fund would be "far below the average fee award in the First Circuit and other courts. See, e.g., *In re Puerto Rican Cabotage*, 815 F. Supp. 2d 448, 461 (D.P.R. 2011) (recent study found that the average fees awarded within the First Circuit constitute 20% of a total fund). A fee award of 8% is particularly reasonable when compared to fee awards in other mass tort actions. See *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 775 (9th Cir. 1977) (upholding district court's allocation of 20% of fee fund in mass tort action); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 476, 485 (D.N.H. 2007) (awarding fees amounting to 14.5% of the fund); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 2000 U.S. Dist. LEXIS 15980, *32 ("request for 12% of the principal, gross amount of the settlement, plus interest is modest, reasonable and in line with awards received in similar cases"). Dkt. No. 4551-1 at 13-14. Likewise, as plaintiffs' counsel previously argued: "[h]ere, the requested award of eight percent (8%) of settlement funds is presumptively reasonable because it represents the application of a *fractional or negative* multiplier across the board." *Id.* at 8. In light of these and other arguments previously presented to the Court, plaintiffs' counsel suggests that the distribution of the remaining funds set aside for common benefit attorneys' fees is appropriate.

⁴ Co-lead counsel were successful at achieving agreement among all counsel as to the fair value of each firm's common benefit time in the MDL. In the previous request for an interim distribution of common benefit fees, Plaintiff's Liaison Counsel informed the Court of this agreement of all counsel and stated that "[t]he only remaining firms that would have any claims for MDL common benefit time would be the three court-appointed, co-lead law firms: Motley Rice LLC; Cory Watson Crowder & DeGaris; and Wexler Wallace LLP." Dkt. No. 4551-1 at 5.

⁵ To the extent necessary, plaintiffs' counsel incorporates those arguments here by reference.

The three co-lead law firms have accumulated more than 56,000 combined hours in common benefit time.⁶ Additionally, Plaintiffs' Liaison Counsel and the firm of Motley Rice, LLC has given thousands of hours since the last order of payment of MDL common benefit attorneys' fees towards the continuing resolution and disposition of hundreds of claims in the MDL. Plaintiffs' Liaison Counsel, and members of his firm, continue to participate in Court ordered status conferences, pretrial hearings in cases with trial still pending, motions to withdraw as counsel, motions to remand to transferring courts, mediations and, in more than one instance, communications with pro se plaintiffs and their families. Plaintiffs' Liaison Counsel has also directly mediated hundreds of cases in a settlement program that this Court established more than two years ago. Plaintiffs' Liaison Counsel is not seeking any additional compensation beyond the instant prayer for his ongoing role as liaison to this Honorable Court nor for the hundreds of hours expended on assisting in the resolution of any non-Motley Rice LLC claims since the first order awarding common benefit fees. Instead, he herein merely points out that work continues even today on assisting the Court and the parties to wrap up the work of this highly successful MDL. Plaintiffs' Liaison Counsel simply asks that if any credit is to be given to such additional, ongoing work, which Plaintiffs' Liaison Counsel is truly honored to undertake, that such credit be shared among all three co-lead law firms. This litigation has been a team effort from day one. The ultimate, successful disposition of several thousand cases would never have been possible without the dedication of all three firms over the past eight years.

The \$2,955,735.17 remaining in the MDL Account to compensate attorneys' fees is significantly less than the lodestar value of the common benefit time that these three co-lead law firms have put into the litigation over the past nine years. As such, the three co-lead firms have agreed, subject to court approval, to the payment of their common benefit time using an agreed-upon

⁶ The vast majority of all discovery, expert work and trial work was undertaken by the three co-lead counsel law firms.

formula for the apportionment of the remaining common benefit fees as follows:

FIRM	PROPOSED INTERIM FEE
Motley Rice, LLC 55%	\$ 1,625,654.34
Cory Watson 25%	\$738,933.80
Wexler Wallace 20%	\$591,147.03

If and when future assessments are deposited into the MDL Account, the three co-lead firms have further agreed to rely on this pro rata apportionment in making future applications for disbursements of common benefit attorneys' fees. Co-lead counsel have also agreed to make application for common benefit fees in the state court litigation based on this same pro rata apportionment. Finally, as the Court knows, there are very few cases left to resolve, or fund settlements. Given the prior filings with the Court, the opportunity to be heard on that issue, and the affidavits previously filed with the Court, Liaison Counsel respectfully requests that the Order reflect that distributions in the percentages set forth above be made on a quarterly basis, and until all claims are fully funded. The Proposed Order also provides that Liaison Counsel provide the Court with a status report, if and when, the MDL account is finally and fully ready to be closed.

II. Refunding of Excess Funds Collected for Costs and Expenses, and Appointment of Settlement Administrator to Handle Pro Rata Distribution

Pursuant to this Court's PPO 22, as amended, an assessment of four percent (4%) of gross settlement funds paid to Plaintiffs in connection with the Compositx Kugel litigation has been set aside in the MDL Account maintained by Plaintiffs' Liaison Counsel for the reimbursement of costs and expenses. As of October 30, 2015, all approved common benefit costs and expenses incurred by plaintiffs' counsel have been reimbursed; however, the balance in the MDL Account set aside for reimbursement of costs and expenses is \$ 3,314,303.73.⁷ Again, we are pleased to ask the Court to return this money directly to the contributing plaintiffs.

⁷ As of October 30, 2015, the balance in the Superior Court Common Benefit Attorneys' Cost and Expense Account is \$4,612,023.26.

Section 4(E) of PPO 22 provides for the refunding of excess common benefit funds to the contributing plaintiffs; stating:

If the Common Benefit Fund exceeds the amount needed to make all payments of court approved costs, fees, and any Court approved multiplier on any fees, the Court may order a refund to those who have contributed to the Common Benefit Fund. Any such refund will be made in proportion to the amount of the contributions.

As such, Plaintiffs' Liaison Counsel requests that the Court order that the remaining common benefit funds collected for costs and expenses be refunded, on a pro rata basis, to the contributing plaintiffs consistent with the terms of PPO 22.

In order to accomplish this distribution, Plaintiffs' Liaison Counsel requests that the Court enter an order allowing him to contract a settlement administration firm to handle the refunding of money to plaintiffs. For any settlement administrator to return these funds, it will be necessary that Defendant C.R. Bard work with the administrator to provide accurate accounting information for the return of these funds. Plaintiffs' Liaison Counsel specifically requests that the costs for this reimbursement of unused common benefit expense assessments be paid from the MDL Common Benefit Expense Fund.

CONCLUSION

For the foregoing reasons, Plaintiffs' Counsel respectfully requests that this Court enter an Order: (1) calling for attorneys' fees in the amount of \$2,955,735.17 to be disbursed from the Common Benefit Fund and distributed by Plaintiffs' Liaison Counsel to co-lead counsel in accordance with Counsel's agreed plan of allocation; (2) directing a pro rata refunding of all common benefit funds collected for payment of costs and expenses to plaintiffs; and (3) granting Plaintiffs' Liaison Counsel the ability to contract with a settlement administration service to distribute the excess collected common benefit expense funds to plaintiffs on a pro rata basis, costs for which will be charged to the MDL Common Benefit Expense Fund.

Dated: November 16, 2015

Respectfully submitted,

/s/ Donald A. Migliori

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MDL-1842 Plaintiffs' Liaison Counsel

CERTIFICATE OF SERVICE

I, Donald A. Migliori, hereby certify that a copy of the foregoing was electronically filed. Those attorneys who are registered with the Electronic Filing System may access these filings through the Court's System, and notice of these filings will be sent to these parties by operation of the Court's Electronic Filing System.

Dated: November 16, 2015

/s/ Donald A. Migliori

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