UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

IN RE: COLOPLAST CORP. PELVIC SUPPORT
SYSTEMS PRODUCTS LIABILITY LITIGATION MDL No. 2387

PRETRIAL ORDER # 72
(Order Approving the Law Offices of Fenstersheib & Associates, P.A.
Qualified Settlement Fund)

Pending is a Joint Motion for Approval of Qualified Settlement Fund, filed August 19, 2015 [Docket # 357]. The Law Offices of Robert J. Fenstersheib & Associates, P.A. and the Law Offices of Fenstersheib & Berkowitz, P.A. (collectively "Fenstersheib"), as counsel for certain Plaintiffs in this MDL 2387, and Defendant, Coloplast Corp. ("Coloplast") (Fenstersheib and Coloplast, together, the "Parties") have jointly moved the Court for entry of an Order to aid in the efficient processing and administration of a confidential settlement agreement (the "Settlement Agreement") between Fenstersheib and Coloplast to resolve the claims of those certain Plaintiffs (clients of) Fenstersheib, as against Coloplast, relating to the implant of Coloplast pelvic mesh products.

In particular, the Parties' Motion seeks an Order: (1) approving an Escrow Agreement (the "Escrow Agreement"), Exhibit A, which creates the Fenstersheib TVM Settlement Fund (the "Settlement Escrow"), (2) where the Court retains continuing jurisdiction and supervision over the Settlement Escrow, and (3) determining that the Settlement Escrow constitutes a "qualified settlement fund" within the meaning of Section 468B of the Internal Revenue Code of 1986, as amended (the "Code") and its accompanying Treasury Regulation Sections 1.468B-1 *et seq*.

The Joint Motion also requests that other pelvic mesh settlements be afforded the opportunity to be efficiently administered using the same process such that Sub-Accounts be created, per settlement with different defendants, using a single qualified settlement fund, for the certain Plaintiffs represented by Fenstersheib to minimize maintenance costs, as being in the best interests of Plaintiffs.

The Court, having reviewed the Joint Motion and the Escrow Agreement, and finding good and sufficient cause, **FINDS** and **ORDERS** as follows:

1) The Motion is **GRANTED**.

2) The terms of the Escrow Agreement are approved.

3) The Settlement Escrow constitutes a qualified settlement fund within the meaning of Section 468B of the Internal Revenue Code of 1986, as amended, and its accompany Treasury Regulations under Section 1.468B-1 *et seq*.

4) The Court will retain continuing jurisdiction and supervision over the Settlement Escrow, following the terms of the Escrow Agreement.

5) Garretson Resolution Group, Inc., shall serve as Escrow Agent, pursuant to agreement of the Parties. The Escrow Agent shall administer the Settlement Escrow pursuant to the terms and conditions of the Escrow Agreement.

6) U.S. Bank, N.A., shall serve as the Custodian that will hold the funds subject to the Escrow Agreement, pursuant to the agreement of the Parties.

7) Further, the funds held by the Custodian, and managed by the Escrow Agent shall only be disbursed by the Escrow Agent pursuant to and in conformity with the terms and conditions of the Escrow Agreement and Settlement Agreement, which include provisions for payments into MDL funds as appropriate.

8) The Escrow Agent is granted the authority to take any actions consistent with the Escrow Agreement and the Settlement Agreement.

9) The Escrow Agent shall have the authority to conduct any and all activities necessary to administer the Settlement Escrow.

10) With leave of court upon achievement of future settlements, settlements for Fenstersheib Plaintiffs may use a single qualified settlement fund to consolidate tax reporting, tax return preparation, and to minimize maintenance costs, using separate Sub-Accounts for pelvic mesh products manufactured

by those separate defendants, beginning with Coloplast, listed in the Joint Motion.

The Court **DIRECTS** the Clerk to file a copy of this order in 2:12-md-02387 and it shall apply to each member related case previously transferred to, removed to, or filed in this district, where applicable, which includes counsel in all member cases up to and including civil action number 2:15-cv-12712. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at www.wvsd.uscourts.gov.

ENTER: August 31, 2015

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

EXHIBIT A

ESCROW AGREEMENT

THIS ESCROW AGREEMENT (hereinafter referred to as "***Agreement***") is entered into for the purpose of administering settlement proceeds through a settlement escrow account (***"Settlement Escrow"***) established as a qualified settlement fund to resolve tort claims as part of a settlement process for certain individuals' confidential settlements relating to their Coloplast pelvic implants and all other Claims as defined in a Master Settlement Agreement (the "***MSA***") between and among Coloplast Corp., Coloplast Manufacturing US, LLC, Coloplast A/S, and Mpathy Medical Devices, Inc., and their related and affiliated companies (collectively, "Coloplast") and the Law Offices of Robert J. Fenstersheib & Associates, P.A. and the Law Offices of Fenstersheib & Berkowitz, P.A., (collectively "***Fenstersheib***"), acting on behalf of certain claimants represented by Fenstersheib ("***Claimants***"). The MSA, in part, provides for the creation of a qualified settlement fund to resolve or satisfy all claims and complete all payment obligations identified in the MSA. This settlement escrow agreement and the Settlement Escrow account was approved in the filed Order, as a qualified settlement fund, by the U.S. District Court, S. District West Virginia, Charleston Division, in Re: Coloplast Corp. Pelvic Support Systems Product Liability Litigation, MDL No. 2387 (the "***Court***").

This Agreement, established to create the Settlement Escrow account, to hold the total settlement proceeds payable under the terms of the MSA separate from settlement escrow accounts to be established by Fenstersheib under the same Qualified Settlement Fund for other pelvic mesh settlements involving other defendants, per Court Order, is made and entered into, on the last date signed below, by and among:

1. Law Offices of Robert J. Fenstersheib & Associates, P.A. and Law Offices of Fenstersheib & Berkowitz, P.A.; and

2. The Garretson Resolution Group, Inc. d/b/a Garretson Resolution Group, or its successors designated in accordance with this Agreement, and by Court Order, as the Escrow Agent for purposes of settlement, but as Administrator for purposes of qualified settlement fund administration (herein referred to as "***Administrator***"); and

WHEREAS, Coloplast has agreed to pay the sum set forth in the MSA (hereinafter referred to as "***Settlement Proceeds***") into the settlement escrow account in order to, pending satisfaction of the other terms and conditions of the MSA, fully and completely extinguish any potential liability of Coloplast to all settling plaintiffs represented by Fenstersheib, identified as Exhibit A to the MSA;

WHEREAS, Section 2 of the MSA sets forth the terms and conditions: (i) governing the creation of the account, to be established as a "qualified settlement fund" (as defined in *Treas. Reg.* § 1.468B-1(a)); and (ii) governing the deposit of the Settlement Proceeds into that escrow account by Coloplast, to be retained therein and distributed therefrom in accordance with the terms of the MSA and this Agreement;

WHEREAS, a qualified settlement fund for Fenstersheib has been established by the Court and is called the Fenstersheib TVM Settlement Fund (hereinafter referred to as the "***QSF***");

WHEREAS, a Coloplast Sub-Account (the "***Coloplast Sub-Account***") to hold and manage the Settlement Proceeds has been established by the Court's Order.

WHEREAS, the Administrator has arranged to have the Administrator itself and the Bank (defined below) hold the Settlement Proceeds in the Sub-Account, as set forth below;

WHEREAS, the Administrator has agreed to serve as the administrator for the QSF, and all its Sub-Accounts, including the Coloplast Sub-Accounts, and any subsequent Sub-Accounts created by the Court to resolve or satisfy other claims involving settling plaintiffs represented by Fenstersheib, and other TVM defendants, if necessary; and the Administrator has agreed to serve as an escrow agent hereunder;

NOW, THEREFORE, in consideration of the premises and mutual covenants and agreements contained herein, the parties hereby agree as follows.

1. **Incorporation and Primacy of the MSA.** The terms and conditions of the MSA are incorporated herein, in their entirety, by reference. Each party hereto agrees to perform the duties and obligations of such party as set forth in the MSA. To the extent that there is any inconsistency between the terms of the MSA and this Agreement, the terms of the MSA shall control. Unless otherwise specified herein, the defined terms used in the MSA shall also apply in this Agreement.

2. **Appointment of and Acceptance by the Administrator.** Consistent with the terms of the Court Order, Fenstersheib hereby appoints the Administrator to serve, and the Administrator agrees to serve, (a) as the "administrator" (as defined in *Treas. Reg.* § 1.468B-2(k)(3)) for the QSF and (b) in an escrow function hereunder with respect to the Deposit (defined below). The term "Administrator" hereunder shall refer to both functions.

3. **Intent and Purpose of the QSF.** The QSF is being established pursuant to order of the Court to complete the settlement process established to resolve or satisfy one or more contested claims that have resulted or may result from an event (or a related series of events) that has occurred and that has given rise to at least one claim asserting liability arising out of a tort, breach of contract or violation of law. The QSF is subject to the continuing jurisdiction of the Court and is intended to qualify as a "qualified settlement fund" as defined in *Treas. Reg.* § 1.468B-1(a). The purpose of the QSF includes, but is not necessarily limited to, (i) receiving, holding, and investing deposits from Coloplast, following the terms of the MSA and the settlement escrow agreement created therein; (ii) implementing fund settlement agreements (as appropriate) in accordance with their terms, and / or (iii) distributing amounts in accordance with the MSA for those Claimants who qualify for such distributions out of the settlement escrow account, on behalf of Coloplast.

4. **No Authority to Conduct Business.** The purpose of the QSF is limited to the matters set forth in Paragraph 3 hereof, and this Agreement shall not be construed to confer upon the Administrator or the bank any authority to carry on any business or activity for profit (except

the holding and investment of the Deposit (defined below) by the U.S. Bank, N.A. ("Bank"), a financial institution doing business in Minneapolis, MN, in accordance with the terms of Paragraphs 5-6 below).

5. Deposit. Upon execution of this Agreement by all parties hereto and in accordance with the terms of the MSA, Coloplast shall transfer the Settlement Proceeds (hereinafter referred to as the "***Deposit***") to the Bank to be held by the Bank in accordance with the terms of this Agreement, the MSA and any further order of the Court. Subject to and in accordance with the terms and conditions of this Agreement, the MSA and any further order of the Court, the Administrator agrees that it shall cause the Bank to receive, hold in escrow, invest and release or distribute the Deposit as set forth herein. All interest and other earnings on the Deposit shall become a part of the Deposit for all purposes. Within three (3) business days of Deposit, the Administrator shall notify Fenstersheib.

6. Investment of the Deposit. Unless otherwise ordered by the Court, all monies received by the QSF, which include all principal and interest earned thereon, shall be held by the Bank for the benefit of and titled in the name of the QSF and invested in instruments/securities comprised of (a) United States Agency, Government Sponsored Enterprises or Treasury securities or obligations (or a mutual fund invested solely in such instruments); (b) cash equivalent securities including SEC registered money market funds and collateralized money market accounts; and/or (c) deposit and similar interest-bearing, or non-interest bearing accounts subject to Federal Depository Insurance Corporation protections as available. The Bank shall be responsible for any and all investment related decisions, following the instructions of the Administrator and/or its investment advisor pursuant to these terms and conditions, such that the following investment policy is implemented: (1) safety of principal; (2) zero bank balance exposure; and/or (3) the use of zero sweep disbursement accounts to ensure funds remain in custodial or fully insured accounts to avoid an impermissible risk of loss should the financial institution holding the funds fail. The Bank shall not be allowed to distribute any income or principal from the QSF except upon instructions of the Administrator (which instructions shall be given only in accordance with the terms of the MSA) or, if requested, upon the order of the Court upon the joint motion of the parties. Any losses incurred as a result of the investing or other handling of the Deposit shall not be recoverable from Coloplast and Coloplast and its counsel shall have no responsibility for the performance of the Bank or the Administrator. Receipt and/or investment of the Deposit shall be confirmed to Fenstersheib and/or to its' Claimants by the Administrator as soon as practicable by account statement or other reasonable method.

7. Claimants' Interests in the Deposit. The Deposit is the sole property of the QSF. This Agreement shall not operate to make any portion of the Deposit available to Claimants in any fashion, except as specifically set forth in the MSA. To the extent possible, the terms of this Agreement shall be construed so as to prevent Claimants from being in constructive receipt, as determined under federal income tax principles, of any amounts held by the QSF prior to the time when the funds allocated to an individual Claimant's settlement have been released from the QSF as set forth in the MSA, instruction of Fenstersheib, and, as appropriate, the settlement escrow account agreement.

8. Restriction on Release of Funds. Notwithstanding anything herein to the contrary, no funds allocated to an individual Claimant's settlement may be released from the

QSF until the terms and conditions of the MSA have been satisfied.

9. Disbursement of the Deposit. The QSF, by and through the Administrator, shall only make payments to Fenstersheib or the Fenstersheib Plaintiffs from the Coloplast Sub-Account, or such other claimants to the QSF with valid claims and/or liens. The QSF shall be authorized to distribute all attorneys' fees and litigation expenses to counsel for the Fenstersheib Plaintiffs, consistent with existing contingency fee contracts or, to the extent required by law, and, where required by law in an individual case, upon Court approval on motion of Fenstersheib. In directing the Bank to make disbursements of the Deposit, the Administrator shall comply with the terms of the MSA and/or any future order of the Court. Such disbursements may take the form of lump sum distributions and/or periodic payments as specified in paragraph 11 of this Agreement.

10. Use of Interest or Investment Income. Notwithstanding the foregoing, the Administrator is permitted to authorize a distribution of all excess income earned by the QSF, after the payment of fees, expenses and taxes, to the Claimants on a pro-rata basis. For example, if there are four claimants involved in a settlement, with each claimant possessing a 25% interest in the Deposit, and the QSF possesses $100 in net income after payment of fees, expenses and taxes, the $100 would be split evenly among the four claimants. As the example indicates, each claimant's share of the excess income is strictly correlated to their respective percentage interest in the Deposit.

11. Structured Settlements. The QSF, by and through the Administrator, may purchase and assign any structured settlements created under any Release Agreements. The Administrator shall also be authorized to enter into non-qualified assignments for the convenience of the Fenstersheib Plaintiffs to the extent that attorneys' fees are to be paid as part of their obligations under existing contingency fee agreements[1]. Any structured settlement annuity contract shall be issued by a life insurance company that is rated A+ or better by A.M. Best Company.

12. Reports and Accounting. The Administrator may provide, upon request, to Fenstersheib on a monthly and annual basis, statements that shall include, without limitation, a statement of receipts, investment earnings, interest and disbursements. Upon Coloplast's request, the Administrator may provide Coloplast a statement including receipts, investment earnings, interest and disbursements, at the end of any statement period.

13. Tax Matters. Within five (5) business days of receipt of the signed Motion and Order to Establish the QSF, the Administrator shall obtain a federal Taxpayer Identification Number for the QSF. All taxes on the income of the QSF and expenses and costs incurred in connection with the taxation of the QSF (including, without limitation, the expenses of tax attorneys and accountants) shall be paid out of the QSF, shall be considered to be a cost of

[1] Structured Settlement Payments are assigned to a qualified assignee by entering into qualified assignments of such structured settlement payments within the meaning of Section 130(c) of the Internal Revenue Code. The qualified assignee shall, respecting each person who is to receive periodic payments under a settlement agreement, purchase one or more qualified funding assets within the meaning of Section 130(d) of the Internal Revenue Code to fund any structured settlement payments assigned to the qualified assignee. Where attorney fees are to be deferred and paid out over time, Structured Settlement Payments are non-qualified, as they do not meet the requirements of Section 130(c) of the Internal Revenue Code. In those cases, the attorneys would receive the benefits of a non-qualified funding asset as part of deferred compensation, for the convenience of their clients (claimants to the Settlement Escrow's, Coloplast Sub-Account).

administration of the settlement, and shall be paid as instructed by the Administrator. The parties agree the terms and conditions of the MSA, together with this Paragraph 11, shall govern the tax treatment of the QSF. Upon receipt of the Deposit by the Bank, the Administrator shall promptly take all steps necessary for qualifying the QSF as a "qualified settlement fund" within the meaning of *Treas. Reg.* § 1.468B-1 and in accordance with Section 2 of the MSA. These obligations include, without limitation, the following:

(a) Regulation § 1.468B-3 Statement. The Administrator will prepare a "Regulation § 1.468B-3 Statement" pursuant to *Treas. Reg.* § 1.468B-3(e) on behalf of Coloplast and provide copies to Coloplast's counsel for review and approval. The "Regulation § 1.468B-3 Statement" may be a joint statement as permitted under *Treas. Reg.* § 1.468B-3(e)(2)(ii).

(b) Regulation § 1.468B-1 Relation Back Election. If required, the Administrator will prepare and attach to the income tax return of the QSF a "Regulation § 1.468B-1 Relation Back Election" pursuant to *Treas. Reg.* § 1.468B-1(j) for execution by Coloplast and the Administrator. The Administrator will forward a copy of the "Regulation § 1.468B-1 Relation Back Election" to Coloplast promptly after filing the same.

(c) Income Tax Returns. The Administrator will timely and properly prepare and file on behalf of the QSF: (i) federal tax, information and withholding returns in accordance with *Treas. Reg.* § 1.468B-2 and the other provisions of the Internal Revenue Code of 1986, as amended; and (ii) all necessary state and local tax returns.

(d) Notwithstanding any other provision of this Agreement, the parties hereto acknowledge and agree that Coloplast has made no representations or warranties regarding the tax consequences under the MSA and this Agreement and shall have no liability to the Claimants, the Administrator, the Bank or any other party with respect to matters related to such tax consequences. Further, this Agreement and the MSA shall be binding on the parties hereto, and shall continue to apply, notwithstanding the tax consequences under this Agreement and the MSA.

14. Limitation of Coloplast's Liability. Coloplast and its counsel and insurers, if any, shall have no obligation and incur no liability whatsoever with respect to the distribution and administration of the QSF. Following the contribution to the settlement escrow account, Coloplast and its counsel and insurers, if any, shall have no further obligation to contribute to the QSF and no further obligation to Claimants.

15. Payment to Associated Counsel. The Administrator shall be authorized to direct the Bank to distribute all attorney fees and litigation expenses to Fenstersheib, following Paragraph 11 above, and consistent with existing contingency fee contracts, the Court's Order, and to the extent required by law, with any periodic payments made as part of attorney fee payments done for the convenience of the Fenstersheib Plaintiffs.

16. Compensation and Reimbursement of Expenses. The Administrator shall receive compensation following the terms of the Scope of Services agreement executed by Fenstersheib, provided, however, that the fees of, and expenses reasonably incurred by, the Administrator in performing its obligations or enforcing its rights hereunder, including reasonable attorney's fees, shall be paid by the Bank solely from the income earned on the Deposit (payable as requested in writing by the Administrator). Where such income is insufficient, the Administrator's fees and expenses described above and as provided in the Scope of Services agreement, may be charged against the Deposit (principal).

17. Reliance. The Administrator shall have the right to rely upon any affidavit, certificate, letter, notice, electronic mail or other document believed by such party to be genuine and sufficient, and upon any other evidence believed by such party, in its reasonable judgment, to be genuine and sufficient, which may be provided to either of such parties by Associated Counsel.

18. Termination. Upon final distribution of all of the Deposit, the Administrator shall take appropriate steps to wind down the QSF's Coloplast Sub-Account, and thereafter be discharged from any further responsibility with respect to the QSF's Coloplast Sub-Account. Upon completion of such disbursement of all of the Deposit and such winding down as specified herein, this Agreement shall terminate.

19. Resignation or Removal of the Bank or Administrator. The Administrator may resign hereunder upon providing thirty (30) days' prior written notice to Fenstersheib. The Administrator may be removed, with or without cause, by Fenstersheib, at any time by the giving of thirty (30) days prior notice to such party. Upon the effective date of such resignation or removal, the future obligations of the Administrator hereunder shall cease and terminate. The Administrator retains the right to remove the Bank with or without cause, and may designate a replacement bank, upon consulting with Fenstersheib. In the case of a removal of the Bank, the Administrator shall direct the Bank to deliver the Deposit to the successor bank designated by the Administrator. A copy of each instrument of resignation, removal, appointment and acceptance of appointment shall be attached to an executed counterpart of this Agreement in the custody of the Court.

20. Notices. Any notice instrument, or other communication required or permitted to be given by one of the parties to the other under this Agreement, shall be considered as properly given if in writing and: (i) delivered against receipt therefore; or (ii) mailed by registered or certified mail, return receipt requested, and postage prepaid; or (iii) sent by overnight courier,

expenses prepaid; or (iv) sent by telex, telecopy, facsimile or prepaid telegram, in each case addressed as follows:

If to the Administrator:

Sylvius von Saucken, Fiduciary
K. Paige Bainum, Treasury Manager
The Garretson Resolution Group, Inc.
6281 Tri-Ridge Blvd., Suite 300
Cincinnati, OH 45140

Fax: (513) 601-8196
Email: svs@garretsongroup.com
pbainum@garretsongroup.com

If to Fenstersheib & Associates and/or Claimants:

Robert J. Fenstersheib, Esq.
Law Offices of Fenstersheib & Associates, P.A.
520 West Hallandale Beach Blvd.
Hallandale, FL 33009
Phone: (954) 456-2488
Fax: (954) 212-2980
Email: rjf@fenstersheib.com

Sheryl E. Berkowitz, Esq.
Law Offices of Fenstersheib & Berkowitz, P.A.
520 West Hallandale Beach Blvd.
Hallandale, FL 33009
Phone: (954) 456-2488
Fax: (954) 252-2160
Email: seb@fenstersheib.com

All notices given in accordance herewith shall be deemed to have been received by the parties to whom such notices are directed: (i) upon delivery, if delivered personally or sent by telex, telecopy, facsimile, telegraph, or electronic mail; or (ii) three days after the date of transmittal thereof, if sent by registered or certified mail; or (iii) one business day after being deposited with the overnight courier. Any party to this Agreement may change the address to which such communications are to be directed by giving written notice to the other parties.

21. Third Party Beneficiaries. Coloplast is an intended third party beneficiary to this Agreement. This Agreement is for the exclusive benefit of the parties hereto and Coloplast and their respective permitted successors hereunder, and shall not be deemed to give, either express or implied, any legal or equitable right, remedy, or claim to any other entity or person whatsoever.

22. Choice of Laws. This Agreement shall be construed under, and this Agreement and the Deposit shall be governed by, the laws of Florida.

23. Severability. If one of the provisions herein shall for any reason be held to be invalid, illegal, or unenforceable in any respect under applicable law, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

24. Headings. The headings used herein are for reference only and shall not affect the construction of this Agreement.

25. Agreement May Be Executed in Counterparts. This Agreement may be executed in counterparts, whether by original, facsimile or electronic signature, all of which

taken together shall constitute one and the same Agreement.

26. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter of this Agreement, and there are no other written or oral agreements, understandings or arrangements except as set forth herein. The terms of this Agreement may not be modified or waived except in writing signed by all of the parties hereto.

27. General. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, devisees, executors, administrators, personal representatives, permitted successors, trustees, receivers, and permitted assigns. Neither the existence of this Agreement nor the disbursement of the Deposit or any portion thereof shall be construed or interpreted as a limitation or waiver of any rights, remedies, or claims any of the parties hereto may have under any agreement, at law, in equity, or otherwise.

AGREED:

Robert J. Fenstersheib, as authorized agent of
Law Offices of Fenstersheib & Associates, P.A.

Signature

8/17/2015
Date

Sheryl Berkowitz, as authorized agent of
Law Offices of Fenstersheib & Berkowitz, P.A.

Signature

8/17/2015
Date

Sylvius von Saucken, Fiduciary, as authorized agent of
Garretson Resolution Group (Administrator)

Signature

8/17/15
Date