

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARTIN GOLDSTEIN

Plaintiffs,

Civil Action No.: 2:12-cv-6085

- vs -

ZIMMER HOLDINGS INC., AND ZIMMER,
INC.,

Defendants.

MOTION TO WAIVE CONTRIBUTION TO COMMON BENEFIT FUND

NOW COMES Martin Goldstein, through his attorneys, Davis, Saperstein & Salomon, P.C., in the above-captioned matter, and respectfully moves the Court to waive Martin Goldstein's contribution to the "Common Benefit Fund" for the reasons set forth in the attached supporting memorandum.

Respectfully submitted,

/s/ Terrence Smith

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MEMORADUM IN SUPPORT OF MOTION TO WAIVE CONTRIBUTION

Martin Goldstein filed his complaint in the U.S. District Court for the District of New Jersey on September 28, 2012, setting out product liability and other claims against the Defendants for the defective Durom Cup Acetabular Component Mr. Goldstein had implanted in November 2007 and revised in September 2012. .

The case was later consolidated with other matters in MDL 2158 IN RE: DUROM HIP CUP PRODUCTS LIABILITY LITIGATION.

Before the filing of Mr. Goldstein's lawsuit, counsel on his behalf collected all relevant medical records, preserved his prosthetic hardware, obtained information to identify precisely the Durom product at issue, and devoted substantial time and effort to the preparation of the case for formal litigation.

In accordance with this Court's directive, Plaintiffs, through counsel, forwarded all medical records to Defendant in advance of court-ordered mediation.

That mediation took place on January 14, 2015 and successfully concluded the parties' disputes on all issues. As part of that mediation process, Plaintiff paid half of Mediator Alex

Polsky's professional fees. Plaintiff, through counsel, has also negotiated and resolved attendant disputes over medical lien reimbursements. No attorney from any other law firm representing plaintiffs in the Durom Cup litigation, or from the plaintiff Durom Cup Steering Committee, participated in any information exchange, negotiation or other activity on behalf of Mr. Goldstein at any time since the filing of his lawsuit.

Defendant tendered the settlement draft net of the court-ordered common benefit assessment on February 20, 2015.

On January 21, 2011, this Court issued Case Management Order 3, which established a Common Benefit Fund. That Order provided, in part, that beginning December 2, 2010, plaintiffs entering into settlement agreements with the Defendants "are subject to a four percent (4%) assessment of the plaintiff's gross monetary recovery, to be withheld by the Defendants and paid into the Common Benefit Fund." In the Court's Order, the Court also reserved the right to change the percentage based on factors contained in Model Rule of Professional Conduct 1.5 for determining the "reasonableness of a fee." [*Case Management Order 3 at paragraph 3*]

The attorneys at Davis, Saperstein and Salomon are not members of any plaintiffs' committees in this litigation and have not participated in planning or execution of any discovery strategies or discovery negotiations with Defendants.

Neither Plaintiff nor his attorneys have received any assistance from any other attorney or received any substantive information or shared work product from any other attorney. With regard to the case mediation, no information was shared because of the universal confidentiality agreements imposed on all settling plaintiffs. All of the information, time and effort to resolve Mr. Goldstein's case was done by the Davis, Saperstein & Salomon firm.

The Model Rules of Professional Conduct at Rule 1.5(e) states that a division of legal fees between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

Further, federal case law recognizes that the purpose of the common fund is to “compensate attorneys for the time and funds expended by them for the common benefit of all... plaintiffs in the conduct of the litigation...” In Re: *Zyprexa Products Liability Litigation*, 467 F. Supp. 2d 256, 263 (E.D.N.Y. 2006). Counsel for the Plaintiff Martin Goldstein certainly understands the purpose and intent of a Common Fund; however, in this case, all of the work has been performed by Plaintiff’s own counsel. The Plaintiff Martin Goldstein did not benefit from any substantive or procedural work product due to the efforts of the Plaintiffs’ Steering Committee in the Durom Cup MDL. There is, therefore, no equitable basis for these Plaintiffs to pay for benefits they did not receive.

Based on the above, Plaintiff Martin Goldstein respectfully request that the four percent (4%) assessment of the Plaintiffs’ gross monetary recovery pursuant to Case Management Order 3 be waived and that that Defendants be ordered to release the four percent assessment to the Plaintiff Martin Goldstein.

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