

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE ORTHO EVRA PRODUCTS : N.D. Ohio Case No: 1:06-40000
LIABILITY LITIGATION :
: MDL No. 1742
: Judge David A. Katz
: This Document Relates To: : RESPONSE TO STATE COURT
ALL CASES¹ : CLAIMANTS' MOTION TO INTERVENE
: and
: REQUEST FOR ORAL ARGUMENT

MEMORANDUM OF LAW

I. INTRODUCTION

Lead Counsel for the Plaintiffs and the Plaintiffs' Steering Committee (hereinafter "PSC") respectfully submit this Response in Opposition to Plaintiffs Synbar Cumar, Martha Diaz, Melissa Dyer, Renee Fitzgerald, Laura Gyenes, Shell Hadnot, Llonda Hulett, Crystal Lanphere, Paula Lawber, Natira Lyons, Elizabeth McCalvy, Kenee Moore, Mary Munsey, Allison Pace, Felicia Perez, Keisah Perrenoud, JoAnn Pfeiffer, Francesca Pizzarello, Deanna Rock, Jacqueline Simpkins, Candice Sommerfeld, Katie Swisher, Ann Thomas, Michelle Thompson and Linda Topczewski's (hereinafter "State Court Claimants") motion to intervene and to set aside the fee and cost assessment against their settlements set forth in Case Management Order No. 9. The PSC does not object to State Court Claimants' request to intervene, but the PSC strongly objects to their request for an Order relieving them of the 3% MDL assessment. To permit them not to pay the MDL assessment would be fundamentally unfair to (a) all the lawyers who performed common benefit work, and (b) to all the lawyers and plaintiffs who paid the assessment in exchange for receiving the MDL PSC's work.

As demonstrated below, State Court Claimants and their counsel, the Hissey Kientz law firm, clearly benefited from the knowledge and information obtained from the PSC by attorney

¹ State Court Claimants do not have cases filed in the MDL and therefore do not have specific N.D. Ohio case numbers in the Ortho Evra MDL.

G. Erick Rosemond (hereinafter "Erick Rosemond"). State Court Claimants' motion, and the supporting affidavits, are factually inaccurate in that Mr. Rosemond's contacts with the PSC far exceed the "three" contacts suggested in State Court Claimants' motion. That Mr. Rosemond obtained the PSC's work product while an associate at another law firm does not relieve State Court Claimants of their obligation to pay the 3% assessment. State Court Claimants and their counsel are subject to the 3% assessment like all other Ortho Evra plaintiffs who obtained and benefited from the PSC's work product.

The PSC further requests that Oral Argument be held during the Ortho Evra Status Conference, which is already scheduled for January 15, 2008.

II. FACTUAL BACKGROUND

Erick Rosemond was employed as an associate with the Williams Bailey law firm prior to joining his current law firm, Hissey Kientz.² (See Ex. A, G. Erick Rosemond bio from Williams Kherkher website.) While an attorney at Williams Bailey, Mr. Rosemond was not only involved in his own firm's Ortho Evra cases; but, together with attorney Jim Doyle, he worked closely with the Ortho Evra MDL PSC over a period spanning from early 2007 through the summer of 2008.

On February 28, 2007, attorney Jim Doyle, on behalf of the Williams Bailey firm and its attorneys, signed the CMO 9 Agreement agreeing to the 3% MDL common benefit assessment. (See Ex. B.) Although it was Mr. Doyle who actually signed the agreement, Mr. Rosemond was an integral part of the firm's Ortho Evra litigation, and was clearly bound by the Agreement. In fact, once the Williams Bailey firm signed CMO 9, Mr. Rosemond became involved with the PSC's efforts in the MDL. Mr. Rosemond had access to private PSC conference calls, attended private PSC meetings in person, offered his assistance to the PSC, and helped perform litigation action items on behalf of the PSC. During all of these activities, substantial knowledge obtained by the PSC was provided and important litigation strategy discussions were held. Mr.

² At some point after Mr. Rosemond joined Williams Bailey, the firm name changed to the Williams Kherkher firm.

Rosemond needed this knowledge so that he could carry out the tasks and assignments to him and his firm.

1. Mr. Rosemond had access to the PSC's work product through the PSC website.

Specifically, while an attorney at Williams Bailey, Mr. Rosemond had access to the Ortho Evra MDL PSC website. In fact, he personally requested and was provided with access to the MDL PSC website, which can only be accessed with a **secure password by attorneys** who agreed to the 3% assessment. (See Ex. C, E-mails to and from the PSC and Mr. Rosemond re: PSC website password.)³ State Court Claimants and Mr. Rosemond admit that he accessed the PSC website and the PSC work product included therein. (See State Court Claimants' Motion at pp. 4-5; Rosemond Affidavit pp. 1-2.) But how often Mr. Rosemond says he accessed the website, what he found useful, or what exactly he says he reviewed does not matter. The fact is, his firm has access to the PSC website as early as 2007, he was personally provided the password on May 15, 2008, being provided the password was conditioned on agreement to pay the assessment, he accessed the website, and he continued to have unrestricted access to the website. **By virtue of his firm signing CMO 9, and by virtue of his own personal request, Mr. Rosemond was provided the PSC's work product.**

2. Mr. Rosemond obtained PSC work product at a PSC litigation meeting in Detroit in May of 2007.

Mr. Rosemond's exposure to PSC work product goes beyond his access to the PSC's website. He also had access to PSC conference calls and he personally attended PSC meetings at which information developed and strategy was discussed. Specifically, as early as May 22, 2007, he attended a confidential, private strategy meeting organized by the PSC following an Ortho Evra Status Conference. (See Ex. D, E-mails to and from Mr. Rosemond

³ This exhibit and others are being filed under seal, on the basis of work product and/or attorney client privilege, as they reflect the internal workings of the PSC. True and accurate copy of these exhibits are being provided to State Court Claimants, but not to Defendants on this basis.

regarding 5/22/07 Meeting in Detroit.)⁴ He was chosen to attend the meeting by his supervising attorney Jim Doyle, who described Mr. Rosemond as a “seasoned litigator” who would “be a big help” to the PSC. (See Ex. E, 5/9/2007 E-mail from Jim Doyle to Janet Abaray.)⁵ Thus, Mr. Rosemond attended the meeting with the intent of gathering knowledge and assisting the PSC with their efforts to further the MDL litigation. At the time he attended the meeting, the password-protected PSC Ortho Evra website had already been established for over a year, and the PSC had completed a substantial amount of work on behalf of the MDL plaintiffs and all other plaintiffs who had agreed to pay the assessment. The PSC’s work product was presented at the Detroit meeting through handouts and power-point presentations by several PSC members, including Lead Counsel and other members of the Executive Committee.⁶ The meeting was *not* simply a general discussion of the status of the litigation as State Court Claimants suggest. And although Mr. Rosemond downplays the Detroit meeting in his affidavit, at the time he felt that it was a “Great meeting in Detroit” and was “Well done.” (See Ex. F, Emails to and from Mr. Rosemond after the 5/22/07 Meeting.)⁷ Apparently, the meeting went so well that Mr. Rosemond offered to assist the PSC with marketing and manufacturing issues and discovery regarding Defendants’ detail persons. (Id.)

3. Mr. Rosemond obtained PSC work product at a PSC mediation workshop in Chicago in September of 2007.

Contrary to State Court Claimants’ and Mr. Rosemond’s contention, the May 2007 meeting was *not* the only PSC meeting Mr. Rosemond attended. He also attended an Ortho Evra Mediation Workshop presented by the PSC on September 25, 2007 in Chicago, Illinois. (See Ex. G, E-mail confirming that Jim Doyle and G. Erick Rosemond’s would be attending the

⁴ Filed under seal.

⁵ Filed under seal.

⁶ The materials discussed and presented during the May 22, 2007 meeting are not attached due to the confidential nature of the materials and due to the attorney work-product privilege. However, members of the PSC and Executive Committee will be available at the Status Conference on January 15, 2009 to testify regarding their presentations of the PSC’s work product presented at the May 22, 2007 meeting and can provide those materials to the Court for in camera inspection.

⁷ Filed under seal.

9/25/07 meeting; and Ex. H, Attendance sheet confirming his attendance.)⁸ During the Chicago Mediation Workshop, the PSC made presentations on their efforts regarding various aspects of discovery, depositions, motions, and other work assembled by the PSC, which were designed to assist plaintiffs' counsel in their settlement negotiations with Defendants. Again, the presentations were made by members of the PSC and the Executive Committee. In particular, members of the PSC presented mock mediations for settlement of cases, discussed in great detail issues to prepare for during settlement discussions, and provided insight into settlement discussions that had already taken place. One PSC member in particular made a compelling PowerPoint presentation on case-specific causation issues in anticipation of settlement conferences, and also made her PowerPoint presentation available to all attorneys attending the meeting and/or those who signed CMO 9. This workshop put on by the PSC served to educate attorneys on how to prepare their cases in general, how to deal with counterarguments expected to be made by Defendants, and covered detailed complex medical issues concerning alternative causation defenses. There is no doubt that Attorney Rosemond was there. His attendance at this PSC workshop is evidenced by the summary of expenses submitted to the PSC by his former law firm, which documents his flight to Illinois on 9/24/07 and his hotel stay in Illinois from 9/24-25/08. (See Ex. I, Williams Kherkher Expense Summary at p. 4.)⁹ And he benefited greatly from the information presented at the Chicago workshop. It follows that upon his departure from Williams Bailey, State Court Claimants and Hissey Kientz also benefited from his attendance at this meeting.

4. Mr. Rosemond obtained PSC work product just two months prior to joining his new firm Hissey Kientz and presumably still has access to PSC work product.

A few additional facts are worth noting. Although Mr. Rosemond through the Williams Bailey firm had access to PSC work product as early as February 2007, approximately one year

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later, on May 15, 2008, he personally spoke with Co-Lead Counsel for the PSC Janet Abaray about accessing the PSC website. He followed up the phone conversation with an e-mail request for the PSC website password and was personally provided the password and website information on that same day. (See Ex. C, 5/15/08 E-mail correspondence to and from Mr. Rosemond regarding the PSC website.)¹⁰ Two months later, he left Williams Bailey and joined the Hissey Kientz law firm. (See State Court Claimants' Motion at p. 3; Rosemond Affidavit at p. 1.) Shortly after Mr. Rosemond joined the firm, Hissey Kientz settled a group of Ortho Evra cases with Mr. Rosemond listed as Counsel of Record. (See Ex. J, Common Benefit Fund Confirmation form provided by Defendants listing Mr. Rosemond as Counsel of Record.) Presumably then, Mr. Rosemond is the attorney Defendants met with during State Court Claimants' settlement negotiations and is the attorney ultimately responsible for settling State Court Claimants' cases.

5. The PSC has only asserted its right to the 3% assessment in Hissey Kientz cases settled after Erick Rosemond joined the firm.

Finally, MDL Co-Lead Counsel Janet Abaray and the PSC have not taken the position that the 3% MDL assessment applies all of Hissey Kientz's Ortho Evra cases. To the contrary, the PSC has acted in good faith and believes that the 3% assessment only applies in those cases that have settled or will settle after Mr. Rosemond joined the firm and appeared as Counsel of Record. Indeed, the PSC did not claim a right to the 3% assessment with respect to a group of Hissey Kientz cases that settled in March of 2008—before Mr. Rosemond joined the firm as Counsel of Record. Mr. Rosemond was extensively involved in the Ortho Evra MDL litigation upon joining the Hissey Kientz firm, he gained much experience from accessing the PSC's work product through its website, conference calls, meetings and workshops, and therefore it has to be presumed that his knowledge and experience derived from the PSC work

¹⁰ Filed under seal.

product assisted with settlement of the cases in which he appears as Counsel of Record for the State Court Claimants on behalf of Hissey Kientz.

III. LEGAL ARGUMENT

A. The PSC does not object to State Court Claimants' Request to Intervene and Request for Hearing on January 15, 2008.

The PSC does not object to State Court Claimants' motion to the extent it requests intervention in the MDL regarding this limited issue. Whether or not State Court Claimants may intervene as of right or may intervene by permission of the Court is a decision entirely for the Court, and one that is incidental to the substantive issue to be decided. Further, the PSC does not oppose State Court Claimants' request for oral argument on January 15, 2009 during the MDL Status Conference, and in fact joins with State Court Claimants' request that a hearing be held on that date to decide this issue.

B. State Court Claimants' settlements are subject to the 3% assessment provided by CMO 9.

The PSC strongly objects to State Court Claimants' request to set aside the 3% assessment on their settlements. State Court Claimants' argument that their counsel, the Hissey Kientz law firm, never signed the CMO 9 Agreement, and therefore they are not subject to the 3% assessment, regardless of the fact that their counsel of record, Erick Rosemond, had access to the PSC's work product, must fail. Clearly, Mr. Rosemond, State Court Claimants, and the Hissey Kientz firm all benefited from the PSC's work product, Mr. Rosemond was Counsel of Record, and he was hired by Hissey Kientz to be involved in the firm's Ortho Evra litigation. His name was listed as Counsel of Record on the CMO 9 form submitted by Defendants; not attorney Robert Kientz or any other attorney at the Hissey Kientz firm. It is clear that Mr. Rosemond obtained PSC work product and utilized this work product in resolving State Court Claimants' cases. Thus, it is the State Court Claimants' position—not the PSC's—that is illogical.

1. The CMO 9 Agreement between Williams Bailey and the PSC binds the attorneys employed by Williams Bailey, not just the firm.

This really is a simple matter. State Court Claimants admit that attorney Erick Rosemond's former law firm Williams Bailey agreed to the MDL 3% assessment in exchange for access to the PSC's work product. They even admit that Mr. Rosemond personally had access to the PSC's work product, and that they hired Mr. Rosemond to work on their Ortho Evra cases after he was privy to the PSC's work product. As an attorney at Hissey Kientz, he *still* has access to the PSC's work product. State Court Claimants' sole argument—that Mr. Rosemond is merely an "employee" of Hissey Kientz, that he does not have a financial interest in the firm's Ortho Evra cases, and therefore the firm is not bound by the CMO 9 Agreement—just does not make sense.

It is inconceivable that the CMO 9 Agreement would be interpreted to apply theoretically to a law firm, but not the attorneys at the law firm. *That* is illogical. Clearly, the Williams Bailey law firm is bound by the CMO 9 Agreement, and by virtue of their agreement Mr. Rosemond and the other attorneys employed by the firm are also bound by the Agreement. The Agreement does *not* define "Participating Attorneys" as the Williams Bailey firm only, but not its attorneys. It is not expressly stated as such, because it is so apparent. The Agreement does, however, expressly state that any "affiliated counsel" is bound by the Agreement, which demonstrates the intent that any person or firm who obtains access to the PSC work product by virtue of the participating law firm signing the Agreement is also bound by the Agreement. Surely no one would agree that an associate at any of the PSC law firms who have been working on the MDL litigation could leave their firm, join a new firm, and then settle the new firm's Ortho Evra cases in state court without paying the 3% assessment. It follows, therefore, that Mr. Rosemond is bound by the Agreement. Any other interpretation would render the Agreement meaningless and would effectively gut the common benefit doctrine to an extremely large loophole that swallows the doctrine itself.

Furthermore, any doubt as to whether the Agreement applies to Mr. Rosemond because he was an “employee” of the participating law firm, as opposed to being a “partner” or “shareholder” of the firm, is cast aside by the overwhelming facts demonstrating his involvement with the PSC. Mr. Rosemond clearly had access to PSC work product. He doesn’t dispute this. This access did not trickle down to him by virtue of him being an employee of Williams Bailey. He had access to PSC conference calls and personally attended PSC meetings. He offered to assist the PSC with litigation projects. Undoubtedly, he assisted attorney Jim Doyle in reviewing documents and gathering information to assist the PSC with development of discovery concerning the Patch in the Canadian and other foreign markets. (See Ex. K, E-mail Regarding PSC Conference Call with Agenda.)¹¹ And as recently as May of this year, he personally discussed the Ortho Evra MDL litigation with Co-Lead Counsel Janet Abaray and personally accessed the PSC website. He did this just two months before joining Hissey Kientz and appearing as Counsel of Record in their Ortho Evra cases. The benefits Mr. Rosemond obtained from the PSC’s work product cannot be downplayed.

2. The PSC is well within its rights to assert its lien interest in State Court Claimants’ cases.

The PSC has acted in good faith and is well within its rights to instruct Defendants to withhold the 3% MDL assessment from State Court Claimants’ settlement proceeds. Because Mr. Rosemond had access to the PSC’s work product, the PSC has a lien in any Ortho Evra case in which Mr. Rosemond appears as counsel of record. The CMO 9 Agreement expressly states so:

The Participating Attorneys, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to the PSC a lien upon and/or a security interest in any recovery by any client who they represent in connection with any Ortho Evra induced injury, to the full extent permitted by law, in order to secure payment in accordance with the provisions of paragraph 1 of this Agreement. The Participating Attorneys will undertake all actions and execute all documents which are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

¹¹ Filed under seal.

(See Ex. B at ¶ 2.) In fact, it is Hissey Kientz who, being fully aware of Mr. Rosemond's access to PSC work product, has violated the Agreement by opposing the 3% assessment and failing to "undertake all actions and execute all documents" to perfect the PSC's lien. It is disingenuous to suggest that the PSC is attempting an "end run around" the Court's case management order when the facts clearly demonstrate that Mr. Rosemond brought valuable experience and information obtained from the PSC to his new law firm and drew on that knowledge and experience in representing State Court Claimants. To contend that the PSC has somehow violated the Agreement, the law, or this Court's Orders by instructing Defendants to withhold the 3% assessment is simply untrue.

Contrary to State Court Claimant's suggestion, nothing in CMO 9 requires the PSC to petition this Court or the California state court for a separate assessment order, because Mr. Rosemond is already bound by the CMO 9 Agreement. CMO 9 indeed allows the PSC to petition this or a state court for an assessment where equity so requires, but this is *not* one of those situations. To the contrary, CMO 9 clearly permits the PSC to assert its lien in "any case being handled by a plaintiff's attorney with at least one case pending in federal court and/or any state court or unfilled case where the plaintiff's counsel has executed an agreement to cooperate with the MDL[.]" (See CMO 9 at ¶ 1(b).) Furthermore, throughout CMO 9, reference is made to "plaintiffs and their attorneys," not plaintiffs and their law firms. (See CMO 9 at ¶1(a) for example.) To the extent State Court Claimants insist that Mr. Rosemond is not bound by his former firm's signing of the CMO 9 Agreement with the PSC, CMO 9 itself implies that such agreements are not restricted to "law firms," but apply to the attorneys at the law firms. Furthermore, Mr. Rosemond personally requested to be present at PSC meetings and access to the PSC's work product. He signed in at the PSC meetings, and he agreed to be bound by the 3% assessment. Under these circumstances, the PSC acted well within its rights to instruct Defendants to withhold the 3% assessment from State Court Claimants' settlements. To the

extent State Court Claimants now object to paying the 3% assessment, it is an issue they should take up with Mr. Rosemond and the Hissey Kientz firm who should have at the very least made some attempt to shield Mr. Rosemond from their Ortho Evra cases. Hissey Kientz did just the opposite; they drew on the vast knowledge of the information Mr. Rosemond learned from the PSC's hard work and had Mr. Rosemond appear as Counsel of Record. Under these circumstances, it is clear State Court Claimants are required to pay the 3% assessment.¹²

IV. CONCLUSION

For all of the foregoing reasons, the PSC respectfully requests that State Court Claimants' motion be denied.

Respectfully Submitted,

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Co-Lead Counsel for the PSC

¹² Technically, State Court Claimants and the Hissey Kientz firm could be subjected to the 5% assessment, because they failed to lock in the 3% assessment by failing to timely sign the CMO 9 Common Benefit Agreement, knowing they had access to PSC work product.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of January, 2009, a true and accurate copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. A paper copy, including copies of the exhibits filed under seal, was also sent by Ordinary U.S. Mail delivery to the following.

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