

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

WILLIAM R. RICCIARDO and
SUZANNE G. RICCIARDO,

Plaintiffs,

v.

Master Docket No. 09-4414(SDW)(MCA)
MDL No. 2158

ZIMMER HOLDINGS, INC., ZIMMER, INC.,
ZIMMER ORTHOPAEDIC SURGICAL
PRODUCTS, INC., and ZIMMER US, INC.,
Case No. 2:11-cv-003837-SDW-MCA

Defendants.

MOTION TO WAIVE CONTRIBUTION TO COMMON BENEFIT FUND

NOW COMES William R. Ricciardo, through his attorney, Daniel R. Volkema, in the above-captioned matter, and respectfully moves the Court to waive William Ricciardo's contribution to the "Common Benefit Fund" for the reasons set forth in his supporting memorandum.

Respectfully submitted,

/s/ Daniel R. Volkema
Daniel R. Volkema (0012250)
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Attorney for Plaintiffs

MEMORANDUM IN SUPPORT OF MOTION TO WAIVE CONTRIBUTION

William Ricciardo filed his complaint in the United States District Court for the Southern District of Ohio, Eastern Division, on April 20, 2011, setting out his claim against the Defendants for the defective Durom Cup hip prosthesis implanted (bilaterally) in 2008. Subsequently, by transfer order dated June 27, 2011, this case was transferred to the United States District Court for the District of New Jersey to the docket of Federal Judge Susan D. Wigenton and Magistrate Judge Madeline C. Arieo.

Before the filing of Mr. Ricciardo's lawsuit, Plaintiff's counsel, on his behalf, collected Mr. Ricciardo's medical records, preserved his prosthetic hardware, met with his treating physicians and obtained opinion letters on product identification and product defect, developed vocational and economic evaluations and presented an extensive demand package to the Defendants.

Despite months of negotiations with defense counsel for Zimmer, both before and after filing suit in Federal Court, settlement was not achieved, such that mediation pursuant to Court Order was conducted on November 3, 2011, in Columbus, Ohio. Plaintiff shared the cost of flying Mediator Alexander Polsky to Columbus, Ohio, from California, and the costs of mediating the matter on November 3, 2011, to final resolution. Plaintiff also bore the cost of mediating the extensive companion subrogation claim. No attorney from any other law firm representing plaintiffs in the Durom Cup litigation, or from the plaintiff Durom Cup Steering Committee, was present. (*Affidavit, Daniel R. Volkema*)

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 plaintiffs' 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*]

On Monday, August 22, 2011, in the attempt to prepare for mediation, the undersigned counsel for the Plaintiff Ricciardo contacted by e-mail Attorney Wendy R. Fleishman at Lieff, Cabraser, Heimann & Bernstein, requesting information regarding the proposed mediator and requesting any information regarding the Durom Cup which they had developed. When no response came to my e-mail, I made a telephone call to Attorney Fleishman and left a voicemail message identifying myself and the purpose of my call, and gave her my direct dial telephone number where she could reach me. I never received a return phone call or a return e-mail in response to my request for information.

In a further effort to contact someone at the Lieff Cabraser firm to obtain helpful information, I telephoned Attorney Kent L. Klautt at the San Francisco office of Lieff Cabraser, leaving my name, the purpose for my call and my direct dial telephone number. After no call was returned, I made a second call to Mr. Klautt leaving the same information, and again I received no return call. (*Affidavit, Daniel R. Volkema*)

Neither Mr. Ricciardo nor his attorneys have received any assistance from any other attorney nor benefited from any work performed by any other attorney. All of the information, time and effort to resolve Mr. Ricciardo's case was either performed by Mr. Ricciardo or performed by one of his attorneys. (*Affidavit, Daniel R. Volkema*)

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 Plaintiffs William and Suzanne Ricciardo certainly understands the purpose and intent of a Common Fund; however, in this case, all of the work has been performed by Plaintiffs' counsel. The Plaintiffs William and Suzanne Ricciardo did not benefit from any information, discovery or legal research performed by the Plaintiffs' Steering Committee in the Durom Cup MDL. Further, when counsel for the Plaintiffs attempted to get some assistance from the attorney assigned to the Plaintiffs' Steering Committee, she was unresponsive as were other members of her firm. Thus, because no other attorney expended any time or money in support of the Plaintiff Ricciardo's claim, he should not be required to compensate any other attorney pursuant to the Common Fund doctrine.

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

/s/ Daniel R. Volkema
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Motion To Waive Contribution To Common Benefit Fund* was filed electronically this 15th day of November, 2011. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. The parties may access this filing through the Court's system.

/s/ Daniel R. Volkema
Daniel R. Volkema (0012250)
Attorney for Plaintiffs

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Defendants.

AFFIDAVIT OF DANIEL R. VOLKEMA

STATE OF OHIO)
)
COUNTY OF FRANKLIN)ss.

The undersigned, first being duly sworn, hereby deposes and states as follows:

1. I am the attorney for William and Suzanne Ricciardo in the above-captioned matter.
2. The Plaintiffs William and Suzanne Ricciardo and their attorney bore all of the litigation costs including the mediation costs required to pursue and resolve the above-captioned matter.
3. No attorney from any other law firm representing plaintiffs in the Durom Cup litigation, or from the plaintiff Durom Cup Steering Committee, was present at the mediation.
4. In an effort to prepare for the mediation, I e-mailed, on August 22, 2011, and later telephoned, Attorney Wendy R. Fleishman, leaving a message where I identified myself as an attorney representing plaintiffs in the MDL, and requested a return call and requested

information. I provided Attorney Fleishman my direct dial phone number, which has voicemail if there is no answer.

5. Wendy R. Fleishman did not respond to my e-mail, and neither she nor anyone else from Lief Cabraser Heimann & Bernstein telephoned me regarding my request for information.

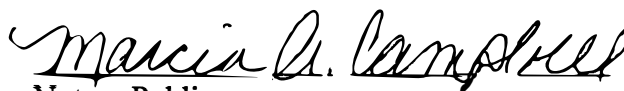
6. In a further effort to obtain information regarding the Durom Cup litigation, I telephoned on two separate occasions Kent L. Klaudt, also a partner at Lief Cabraser in their San Francisco office, where I left a message for him on his voicemail. In that message I identified myself as an attorney representing plaintiffs and requested a return call. I provided my direct dial phone number for his use.

7. Neither Attorney Klaudt nor anyone from his office returned my telephone call and I did not receive or use any information developed by the plaintiffs' Steering Committee or any other attorney to develop, negotiate and resolve this matter on behalf of the Plaintiffs William and Suzanne Ricciardo on November 3, 2011.

Further Affiant sayeth naught.


Daniel R. Volkema

Sworn to before me and subscribed in my presence this 15th day of November, 2011.


Notary Public



MARCIA A CAMPBELL
Notary Public, State of Ohio
My Commission Expires 08-18-2013