

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.

**REPLY TO OPPOSITION TO MOTION TO WAIVE CONTRIBUTION
TO MDL COMMON BENEFIT FUND**

NOW COMES Daniel R. Volkema, counsel for Plaintiffs William R. Ricciardo and
Suzanne Ricciardo, and respectfully replies to Wendy R. Fleishman's opposition to Plaintiffs
William and Suzanne Ricciardo's Motion to Waive Contribution to the MDL Common Benefit
Fund with the supporting memorandum and affidavit.

Respectfully submitted,

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

MEMORANDUM IN SUPPORT

Attached hereto is the Affidavit of Daniel R. Volkema in support of the Plaintiffs William and Suzanne Ricciardo's position that, despite the fact that their counsel contacted the co-liaison counsel to get information and help in presenting their claims, their counsel not only never received any information from any attorneys acting as liaison counsel to the *In Re Durom Hip Cup Products Liability Litigation*, MDL No. 2158, he was unable to even establish contact with them.

Co-liaison counsel correctly argue, in their opposition memo, that, pursuant to Case Management Order 3, the Court would apply "equitable principles" in assessing fees to the fund "in an amount greater than zero and less than or equal to 4%." In Order 3, the Court also reserved "the right to change this percentage based upon the factors set forth in the Model Rule of Professional Conduct 1.5 for determining the reasonableness of a fee." (*Case Management Order 3, paragraph 3.*)

While it may be true that there has been legal work performed by the co-liaison counsel, none of that work was shared with counsel for the Ricciardos, such that none of it benefited them. Plaintiffs are unaware of any depositions, discovery, or expert opinions/testimony obtained by co-liaison counsel—the only experts and documents used by Mr. and Mrs. Ricciardo in their litigation with Zimmer were obtained by their own counsel.

If liaison counsel had performed work that actually benefited "**all of the plaintiffs**," then the common fund doctrine would apply as held in *In re Zyprexa Products Liab. Litig.*, 467 F. Supp. 2d 256, 266 (E.D.N.Y. 2006). But, the court in that case based its rejection of the objections to the common fund fees on the basis of the "large scope and high quality of the work performed by [the Steering Committee] for the common benefits of all plaintiffs," and further

indicated that the members of the Steering Committee had “**conducted a significant amount of discovery**”:

The large scope and high quality of the work being performed by PSC II for the common benefit of all plaintiffs entitle it to compensation beyond the court-limited fees earned by PSC attorneys for the representation of their individual clients. “The interests to be served [by lead counsel in a consolidated litigation] are too important to be left to volunteers (or draftees) who are unpaid in the sense that they get nothing additional.” *In re Air Crash Disaster*, 549 F.2d at 1016.

An objection has been posed to the establishment of a PSC II common benefit fund on the ground of prematurity. PSC II, as already noted, was established by the court on August 16, 2006, and it is argued that it has not yet made sufficient efforts on behalf of all plaintiffs to warrant common benefit compensation. The objection is factually inaccurate. The members of PSC II have conducted a **significant amount of discovery**. [Emphasis added.]

In the instant matter, there has been no showing that any efforts or expenditures of co-liaison counsel benefited “all” of the plaintiffs, in that neither the Plaintiffs nor the Plaintiffs’ counsel sustained any benefit whatsoever. In fact, there has been a contrary showing, *i.e.*, that the attorney for the Plaintiff William R. Ricciardo contacted co-liaison counsel to get information and help with the Ricciardos’ claims, but those co-liaison counsel simply failed to respond to those requests. Surely, co-liaison counsel should not be compensated for ignoring the requests of William R. Ricciardo’s counselor for help with the claim.

Plaintiffs William and Suzanne Ricciardo respectfully disagree with the position taken by co-liaison counsel in their sworn statements (*attached affidavit of Daniel R. Volkema*) and respectfully request that the payment to the common fund be ordered waived or in the alternative be reduced to a small fraction of 4%.

/s/ Daniel R. Volkema
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Reply to Opposition to Motion To Waive Contribution To MDL Common Benefit Fund* was filed electronically this 6th day of December, 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. That the phone system our office has is voice over IP (VOIP) and all voice messages are relayed by e-mail in addition to being available on the phone.
3. The phone number of Kent L. Klautd is 415-956-1000.
4. The telephone number of Wendy R Fleishman is 212-355-9500.
5. That I had our VIOP technician search the data base for any phone call being received from either 415-956-1000 or 212-355-9500.
6. No phone call was received from 415-956-1000.
7. On December 1, 2011 a phone call was received from 212-355-9500.

8. No voice message was ever left on our voice message system or on my personal voice message extension from Kent L. Klaudt or any other attorney from Lief Cabraser Heimann & Bernstein.

9. On December 1, 2010 Attorney Wendy R. Fleishman telephoned me to discuss our motion and asked me when I had telephoned her. I told her it was in August of 2010. In response Ms. Fleishman explained that she was on medical leave during August.

Further Affiant sayeth naught.


Daniel R. Volkema

Sworn to before me and subscribed in my presence this 6th day of December, 2011.


Notary Public



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