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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL INSURANCE COMPANY Claimant-Plaintiff, vs. CALDERA MEDICAL INC., and DENISE M. FLANIGAN, ROSIE JEAN BATES, TAMMY L. MCILROY, BRENDA DEYO, SUSAN STONE, KIMBERLY DURHAM, ELAINE TACK, SHARON PEER, ELIZABETH BAILEY, BARBARA COE, DOREEN ESPARZA, CLARA PERELKA, PEGGY GRUBBS, CONNIE WILLIAMSON, CHRISTINE MATHEWS, KATRINA BAKER, DAWN BURNHAM, NANCY ROBERTS, GLENDA THORNE, BENELLA OLTREMARI, PHYLLIS W. BROWN, JOANNE MONGEAU, SYBIL WASHINGTON and CELINES RAMIREZ, and all others similarly situated Claimants-Defendants	CASE NO. 2:15-cv-00393-SVW-PJW Honorable Stephen V. Wilson **OBJECTORS' RENEWED OBJECTION TO FINAL SETTLEMENT APPROVAL AND CLASS CERTIFICATION**

OBJECTORS' RENEWED OBJECTION TO FINAL SETTLEMENT APPROVAL AND CLASS CERTIFICATION

Settlement Objector-Claimants ("Objectors") in the above-named action, by and through their counsel, Kline & Specter P.C., submit the following Renewed Objection to the Final Settlement Approval and Class Certification.

I. FACTUAL AND PROCEDURAL BACKGROUND

Objectors in the above-named action received a Notice of Proposed Class Action Settlement dated February 8, 2016, in connection with lawsuits against Caldera Medical, Inc. The claims being settled are related to injuries caused by transvaginal mesh ("TVM") products manufactured, marketed, sold and distributed by Caldera and its affiliates and suppliers. *See* Notice of Proposed Class Action Settlement, attached hereto and marked as Exhibit "A".

Following this Notice, Objectors filed an Objection to the Settlement of the Caldera TVM Claims and argued that:

1) The proposed settlement is fundamentally unfair, realistically benefitting only Caldera;
2) Class members are not getting adequate relief and are having their rights abrogated;
3) The proposed settlement has failed to satisfy the limited-fund rationale for a mandatory action pursuant to Fed. R. Civ. P. 23(b)(1)(B) based upon the factors of *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); and
4) Caldera has not contributed all of its assets to the fund and is continuing to generate revenue from the same transvaginal mesh products that injured the claimants that are parties to this proposed settlement.

See Claimants' Objection to the Settlement of the Caldera TVM Claims, attached hereto as Exhibit "B."

On June 13, 2016, this Court held a hearing on the joint motion for final class settlement approval brought by Federal Insurance Company, Caldera, and all individuals asserting claims against Caldera who were named as Claimant-Defendants in this action. Lee Balefsky, Esquire

argued on behalf of the objecting Kline & Specter Claimants at the hearing. On July 25, 2016, this Court issued an In Chambers Order Denying Motion for Final Settlement Approval and Class Certification; and Denying Motion for Attorneys' Fees. *See* In Chambers Order, attached hereto as Exhibit "C".

In denying the Motion this Court stated that:

> The requirements of a Rule 23(b)(I)(B) class have not been satisfied because there is no "definitely ascertained" limited fund that has been entirely placed into the settlement sum. Although the Court agrees that a $20 million valuation is a fair calculation of the value of the Policies discounted by the risk attached to the pending motion for summary judgment, the Supreme Court's narrow construction of Rule 23(b)(l)(B) classes in *Ortiz* does not permit certification for an estimated fund, however fairly or reasonably calculated.
>
> In addition, given that Caldera remains a solvent, operational business, without evidence regarding Caldera's potential liquidated value, it is not clear that the Policies are the only available funds to contribute to the settlement.

See Exhibit "C" p. 5; *Ortiz.* v. *Fibreboard Corp.,* 527 U.S. 815, 834 (1999).

Moving parties then filed a Renewed Joint Motion for Final Settlement Approval and Class Certification and, once again, asked this Court to certify a limited-fund class under Rule 23(b)(1)(B) and to approve a class settlement under Rule 23(e). *See* Renewed Joint Motion for Settlement Approval, attached as Exhibit "D." However, the Renewed Settlement Motion does not cure the deficiencies raised by the Objectors in their objection to the moving parties previous settlement motion and does not adhere to the standards of a limited-fund class set by *Ortiz.* The only difference between the two motions is the addition of the report of Dr. Joseph K. Tanimura, an "expert" retained by Caldera, who opines on the liquidated value of the company. *See* Expert Report of Dr. Tanimura, attached hereto as Exhibit "E".

In order for Objectors to test and counter the unexamined conclusions of Caldera's hand-picked "expert", Objectors asked the Court to compel discovery and to continue the October 17, 2016 Final Settlement Approval Hearing: specifically to conduct the deposition of the Dr. Tanimura and review the documents relied on by Dr. Tanimura while preparing his report. *See* Objectors' Motion to Compel Discovery, attached as Exhibit "F". This Court granted Objectors' request for discovery. *See* In Chambers Order Granting Objectors' Motion to Compel Discovery, attached as Exhibit "G".

Caldera produced 143 responsive documents on October 18, 2016, and the deposition of Dr. Tanimura was conducted on October 25, 2016. Following the review of the documents and Dr. Tanimura's testimony, it is clear that Dr. Tanimura does not qualify as a liquidation valuation expert under the requirements of *Ortiz* and the demands of this Court. Furthermore, his report has completely failed to satisfy the requirements of Rule 23(b)(1)(B). Caldera has still offered no clear, independent, reliable evidence regarding Caldera's potential liquidated value.

II. ARGUMENT

Once again, the moving parties have filed a motion asking for approval of a limited-fund Class, and have yet to comply with the standards of *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In deciding *Ortiz*, the Supreme Court emphasized that a limited fund could not be premised on the mere fact of settlement between class counsel and defense counsel. Rather, the insufficiency of the fund must be concretely demonstrated by "specific evidentiary findings *independent* of the agreement of defendants and conflicted class counsel." *Id.* at 843. (emphasis added).

This Court determined that the evidentiary findings of Caldera in their previous settlement approval motion were insufficient to satisfy the requirements of *Ortiz*, as stated above.

Now moving parties have filed a renewed motion with a declaration from Brian Merade, the same declarant and Caldera employee used as evidence in their previous motion, and an "expert" *retained by Caldera*, Joseph K, Tanimura, Ph.D.

After reviewing the documents provided by Caldera and the October 25, 2016 deposition of Dr. Tanimura, it is clear that Dr. Tanimura is completely unqualified to opine on the liquidated value of Caldera and his conclusions are not "independent evidence" as required by *Oritz*.

Dr. Tanimura's findings are not independent. Not only did Dr. Tanimura completely, uncritically rely on Caldera employees for the majority of the information he used when preparing his reports, Caldera employees, including their General Counsel, made edits and changes to the report itself and "signed off" on the final draft. This report should be disregarded in its entirety and Caldera's attempt at a limited-fund class action settlement approval should once again be rejected.

A. Dr. Tanimura is Unqualified as an Expert to Draft a Report on the Liquidation Value of Caldera.

> Rule 702. Testimony by Expert Witnesses:
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

F.R.E. 702.

On August 12, 2016, Caldera engaged Dr. Joseph K. Tanimura to prepare an expert report demonstrating the liquidation value of Caldera. The engagement letter was dated August 12, 2016 and signed by Dr. Tanimura and Eric Geismar, General Counsel for Caldera. It was

also signed by Michael Kao, Assistant General Counsel for the Berkley Research Group. *See* August 12, 2016 Engagement Letter, CA000724, attached hereto as Exhibit "H".

Prior to his engagement by Caldera, Dr. Tanimura had never previously written a report or opinied on the liquated value of a company:

Q. . . . Have you written reports previously on the liquidated value of a company?
A. No.
Q. All right. So this is - - this case, this is the first case you've written a report opinion on the liqudated value of a company; correct?
A. Yes.
Q. Okay. So I guess the next question would be clear that you've never written a report for a liquidated value of a medical device company; correct? Other than this one.
A. Yes. Correct.

See the October 25, 2016 Deposition of Dr. Tanimura, at pp. 8:22-9:8, attached hereto as Exhibit "I".

Furthermore, Dr. Tanimura is not qualified by the American Society of Appraisers or by any organization in the area of business appraisal:

Q. Okay. Are you qualified by any organization in the area of business appraisal?
A. What do you mean by organization?
Q. Okay. Have you ever heard of the American Society of Appraisers?
A. Yes.
Q. Okay. Are you a member of that organization?
A. No.
Q. Okay. Do you know what the purpose of it is?
A. I believe it's an organization made up of professionals who participate in the appraisal industry.
Q. Are you familiar with the standards that they have issued with respect to appraisals?
A. No.

Dep. p. 9:9-22

Nor has Dr. Taniumura ever been accepted or qualified as an expert in the area of business appraisal:

Q. Have you ever been accepted or qualified as an expert in the area of business appraisal?
A. No.
Q. Have you ever been accepted or qualified as an expert in the area of a patent appraisal?
A. No.

Dep. p. 10:16-21.

Clearly, Dr. Tanimura was not qualified to provide a report regarding the liquidation value of a medical device company like Caldera. He in no way possesses the requisite skills, knowledge, experience, or training necessary to qualify as the type of expert required to provide a report to serve as independent evidence in determining a limited-fund class.

Dr. Tanimura's shortcomings as an expert are further made apparent by his deposition testimony. His testimony revealed that most of the information and methodologically he used in his report was provided to him directly by Caldera employees. He testified during his deposition that it was his understanding as part of his assignment that Caldera would have an opportunity to review the drafts of his report:

Q. Now, part of your understanding of your assignment in this case was that Caldera would have an opportunity to review the drafts of your report or portions of your report?
A. Yes, counsel reviewed my report prior to it being finalized.

Dep. p. 17:4-12.

As demonstrated more thoroughly below, Dr. Tanimura was forced to rely on information, edits and suggestions provided by Caldera employees because he was so unfamiliar with how to provide the liquidation value of a medical device company – or any company for that matter. He was wholly unqualified for this job.

Furthermore, when pressed during deposition, Dr. Tanimura admitted that he did not even know basic information regarding the assets and liabilities of Caldera. If it was not included

on the one balance sheet Caldera turned over or told to him by an employee, Dr. Tanimura made no inquires as to an assets possible existence.

Q. Did you make any other analysis of the earnings power of the company?
A. No.
Q. Is an analysis of the earnings power relevant to what the assets might be worth?
A. Possibly.
Q. Do you know whether Caldera is making any money?
A. I think they are somewhat profitable but I don't know exactly.
Q. Do you have any idea of what the company might sell for?
A. I don't know what the company would sell for as a going concern.

Dep. p. 59:11-23

He did not even know if Caldera owned any real estate because "it wasn't listed on the balance sheet." Dep. p. 60:6-10.

Dr. Tanimura had insufficient facts and data needed to draft a proper report. His principles and methods were unreliable at best. Dr. Tanimura is clearly unqualified as an expert to provide an independent report on the liquidation value of Caldera sufficient to form the basis of a limited-fund class.

B. Dr. Tanimura's Report Was Drafted in Collaboration with Caldera Employees

The Supreme Court reversed the lower court in *Ortiz*, *inter alia*, because the settlement amount resulted from a negotiated agreement of the parties and the district court had uncritically accepted the parties' figures in concluding that the available funds were not enough. *Ortiz* at 848-49. The Court explained that a non-opt-out settlement requires "heightened attention" to the purported justification for binding absent class members, especially because certification of a mandatory settlement effectively concludes the litigation save for a final fairness hearing. *Id.* The Court explained further that "in an action such as this, the settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and insufficiency of the fund, with support in findings of fact following a proceeding in which the

evidence is subject to challenge." *Id.* at 849 (internal citations omitted). The Court emphasized that a limited fund could not be premised on the mere fact of settlement between class counsel and defense counsel. Rather, the insufficiency of the fund must be concretely demonstrated by "specific evidentiary findings independent of the agreement of defendants and conflicted class counsel." *Id.* at 843

Dr. Tanimura's report is not independent. It is the result of collaboration between Dr. Tanimura and Caldera. It is clear from the review of the documents produced by Caldera, and the testimony of Dr. Tanimura, that the majority of conclusions and information contained in his report was based upon the opinions, edits and suggestion of Caldera employees.

Before even beginning his assignment, Dr. Tanimura read this Court's order to "get a sense of what his mandate" was in this matter.

Q. Did you review Judge Wilson's Order?
A. Not in great detail.
Q. Okay. Did -- you reviewed it in some detail.
A. Yes; to get a sense of what my mandate was in this matter.

See Exhibit "I", Dep. at p. 21:3-5.

He was even specifically told by Eric Geismar, General Counsel for Caldera that they would only get "one more shot at this."

Eric Geismar wrote the following in an August 31, 2016 email:

> I still think we need to do a little more fleshing out of the liabilities. The lease, the line of credit and the long-term loan are self-evident and explained in the financial statement. The line items for "Accounts Payable" and "Accrued Liabilities" (about $1 million as of 12/31/15) are not explained. Can we do a little more to flesh out the liability side of the ledger? We're only going to get one more shot at this.

See, August 31, 2016 Valuation Email, CA000646 at 647, attached as Exhibit "J."

As stated above, Dr. Tanimura was aware when he took the assignment that Caldera would have an opportunity to review the drafts of his report prior to its finalization. Dep. p. 17:4-12. He further admitted that Caldera offered suggestions as to editing the report.

Q. Did Caldera, in fact, offer you suggestions as to editing the report?
A. Yes

Dep. p. 19:2-4.

In fact, Caldera ultimately signed off and gave their final approval on anything and everything contained in Dr. Tanimura's "expert" report. In the same August 31, 2016 Valuation email discussed *supra*, Mr. Geismar wrote, "OK, everyone signed off. Please send final." *See* Exhibit "J" at 646. Thus, Caldera signed off on the final report regarding its own valuation. Dr. Tanimura was not even entirely aware *who* was signing off on the report:

Q. If you look at the -- okay. Thank you. If you look at the first page, Page 646, there's an E-mail from you to Eric Geismar dated Wednesday, August 31st, 2016, in reference to valuation, and it says -- and you say to him, cool. I will send final shortly. Sorry for the confusion. See that?
A. Yes.
Q. And then a few minutes later Mr. Geismar writes back to you and he says, okay, everyone signed off. Please send final. Do you see that?
A. Yes.
Q. What's your understanding of who everyone was or is?
A. I didn't have an understanding at the time of who it was.
Q. Did you have an understanding that individuals at Caldera were reviewing your final report?
A. Yes.
Q. Okay. Do you know who was reviewing your final report?
A. No.
Q. Were you aware from your communications with Caldera as to why Judge Wilson had denied the proposed limited fund class action?
A. Only vaguely, based on a conversation with Eric in my review of the minutes from the court proceeding.
Q. What was your vague understanding?
A. That the judge would not approve the settlement without knowing the liquidation value of Caldera.

Dep. pp. 19:20-20:23; Exhibit "J".

Dr. Tanimura testified that communications with Caldera employees were responsible for the majority of the information he used in his liquidation value analysis, and the employees actually contributed to his report:

Q. Who at Caldera contributed to your report, if anyone?
A. Let's see. In Paragraph 9 I refer to communications with Pat Kothari, director of finance for Caldera; Sandra Muhlfeld, vice-president of R&D for Caldera; and Vicki Gail, director of quality and regulatory affairs for Caldera. And those are the Caldera employees who contributed to my report.

Dep. pp. 17:17-25.

There are many, many examples of Caldera employees editing and making suggestions for Dr. Tanimura's report. In an email dated August 30, 2016, Mr. Geismar reviewed Dr. Tanimura's report and then wrote the following, "One more point. Can we explicitly say in the task addressed that this report does not speak to the solvency of Caldera in any way?" *See* August 30, 2016 "Tanimura Report" email, CA000641, attached hereto as Exhibit "K". Dr. Tanimura testified that he did not even recall why Mr. Geismar asked him to include this.

Q. Mr. Tanimura -- excuse me. Mr. Geismar wrote back to you a few minutes later, an hour later, saying, Joe, one more point. Can we explicitly say in the task addressed that this report does not speak to the solvency of Caldera in any way? You see that?
A. Yes.
Q. Does that refresh your recollection that Mr. Geismar told you to include that sentence in your report?
A. Yes, it does.
Q. And he did tell you that; correct?
A. Correct.
Q. Do you know why Mr. Geismar told you to include that sentence in this, in your report?
A. No, I don't.

Dep. p. 34:22-24; Exhibit "K".

Clearly, Dr. Tanimura blindly followed what Caldera employees told him to include and not include in his report.

C. The materials relied upon by Dr. Tanimura were either unreliable or provided to him by Caldera Employees.

Dr. Tanimura relied on very little material other than the information that came directly from Caldera employees. Most of his financial data came from a schedule of assets and liabilities dated June 30, 2016.

Q. Now, on this particular document you, of course, accepted the figures that they -- that were provided to you at face value; correct?
A. Correct.
Q. This is a schedule of assets and liabilities as of June 30th, 2016.
A. Correct.
Q. Did you ask to see a schedule of assets and liabilities at any other time other than as of June 30th, 2016?
A. No.

Dep. p. 28:2-8.; *See* June 30, 2016 Schedule of Assets and Liabilities, attached to Exhibit "E", Tanimura Report at 801.

i. Academic Literature

Dr. Tanimura even required assistance and approval from Caldera when citing to academic literature and reports in order to calculate value. In order to calculate asset valuation, Dr. Taniumra relied on numbers from an academic literature article published more than 9 years ago:

> The estimated liquidation value of Caldera's assets as of June 30, 2016 is $842,905, or 28% of net book value.[5] It is important to note that the 28% figure is consistent with the academic literature. An article in the *Michigan Law Review* by Lynn LoPucki and Joseph Doherty examine corporate liquidations which took place during the 2000 to 2004 period.

See Exhibit "E", Tanimura Report, para. 11.

Dr. Tanimura told Caldera in looking for articles to support his valuation, he was struggling and simply looking for numbers that would "pass scrutiny."

> We are currently searching for a summary article/paper/etc. that provides summary figures for a broad sample. In the absence, we are going to

> collect a small sample of legal filings similar to the Capitol Lakes PDF that you sent yesterday. I need something that will pass scrutiny, so there has to be a systematic search. For example, we could collect 2015 filings from California federal courts. Or we could look for a few apple-to-apple comparisons; i.e., medical device companies.

See August 23, 2016 "A/R" Email, CA000816, attached hereto as Exhibit "L".

Dr. Tanimura testified that Caldera employee Pat Kothari provided the information on historical collection rates for accounts receivable:

> Q. By the way, did you ask someone at the company which of these receivables would be collectable in a forced liquidation? Talking about Caldera's receivables.
> A. We were provided with an aging report on the accounts receivables and Pat Kothari gave us information on historical collection rates for -- of accounts receivables.

Dep. 45:22-24.

ii. Inventory

Under "inventory" listed on Caldera's June 30, 2016 balance sheet are the following: raw materials, finished goods and labor. Dr. Tanimura listed the recovery rate for each as zero. *See* Exhibit "E" Tanimura Report, para. 19. Dr. Tanimura again testified that his conclusions were based upon information provided by employees at Caldera.

> Q. And under your analysis, the recovery rate for all three of those categories would be zero; is that correct?
> A. Correct.
> Q. Part of your conclusion for that was the information that was provided to you by the employees at Caldera; correct?
> A. Correct.

Dep. pp. 46: 22-47:12.

In fact, most questions regarding valuation that Dr. Tanimura had were simply answered by Caldera employees- very little outside research appeared to have been done. He would simply email a list of questions and Caldera would reply with their answers. He spoke to no one at the FDA. He relied on the information that employees such as Vicki Gail gave him.

Q. Do you know how many other companies in the United States manufacture mesh for use of, treatment of women's health conditions known as stress urinary incontinence or pelvic organ prolapse?
A. No; but there are several.
Q. Did you ever speak to anyone at the FDA regarding the possibility of transferring the product registrations from some of Caldera's products to another company?
A. No.
Q. You relied on what Vicki Gail told you about that; correct?
A. Correct.

Dep. p. 49:18-25; *See* August 18, 2016 "Financial Questions" Email, CA000603-608, attached hereto as Exhibit "M".

iii. Patents

Dr. Tanimura never consulted an attorney or outside resource regarding the value of Caldera's patents; instead he relied on a Caldera employee (Sandra Mulhfeld) who specifically told him what to write and how to calculate the value.

Q. -- you'll see an E-mail from Mr. Geismar to you in reference to patent review. See that? Dated Wednesday, August 17th, 2016.
A. Yes, I see it.
Q. Okay. And what he says to you is, hi, Joe. Sandra Muhlfeld at our company has taken a look at our patents with a view towards the possibility of asserting them against other companies in our space. He says, Sandra is not a lawyer but she does have deep technical expertise in our space.

See also, Dep. 53:1-10. *See* August 17, 2016 "Patent Review" Email, CA000628-630, attached hereto as Exhibit "N";

iv. Liabilities

Regarding liabilities, Dr. Tanimura testified that in a forced liquidation of Caldera, liabilities would be collected at 100% but he then admitted that there was no authority cited for that proposition.

Q. And you -- for purposes of your report you assume that in a forced liquidation that all the liabilities would have to be paid at 100 cents on the dollar; correct?
A. Correct.
Q. Right. Okay. And what authority, if any, did you cite for that proposition?

A. It did not cite any authority for that proposition.

Dep. pp. 60:20-61:3.

The operating lease was included in the liabilities listed in Dr. Tanimura's report. However, Dr. Tanimura testified that if "Caldera was liquidated and they did not have to make their lease payments, then there would not be the liabilities."

Q. And there was some discussion as to whether or not it includes -- to include the value of the operating release -- the operating lease; correct?
A. Correct. That's in Footnote 8 in my report.
Q. Right. And what would be the reasons not to include the operating lease amount in the total liabilities?
A. If Caldera was liquidated and they did not have to make their lease payments, then there would not be the liability.

Dep. p. 61:8-15.

Thus, why was the lease included in the report as a liability? In an email dated April 30, 2016, Mr. Geismar wrote that "the way we got from 2.7 tyo 3.6 was adding the value of the operating lease." *See* April 30, 2016 "April 30, 2015 balance sheet" Email, CA000815-815, attached hereto as Exhibit "O". In fact, Dr. Tanimura did not "have an opinion either way."

Q. So you were okay either way.
A. Yes. I don't have an opinion on whether the lease should be included

Dep. p. 64:3-4.

Once again, Dr. Tanimura blindly followed the recommendation of a Caldera employee on determining the value of Caldera.

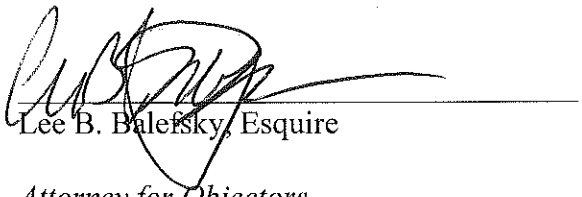
III. CONCLUSION

It is clear that Dr. Tanimura does not qualify as a liquidation valuation expert under the requirements of *Ortiz* and the demands of this Court. Furthermore, his report has completely failed to satisfy the requirements of Rule 23(b)(1)(B). Caldera has still offered no clear, independent, reliable evidence regarding Caldera's potential liquidated value. Based upon the

reasoning set forth above, Objectors therefore request that this Honorable Court reject the Final Settlement Approval.

Respectfully submitted,

KLINE & SPECTER, P.C.

Dated: November 7, 2016 BY: 

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