

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-001338

02/16/2005

JUDGE PENDLETON GAINES

CLERK OF THE COURT
W. Bobrowski
Deputy

FILED: 02/18/2005

IN RE: CONSOLIDATED ZICAM PRODUCT
LIABILITY CASES

DANIEL J RADACOSKY

BRIAN S CAMPF
MARTIN P CLARE
WILLIAM H DOUGLAS
JOSHUA EZRIN
PAUL J GIANCOLA
STEPHEN A KENNEDY
ALAN J LAZARUS
KENNETH LEWIS
SUZANNE MCCANN
BARRY G REED
HART L ROBINOVITCH
JONATHAN D SCHNEIDER
DOUGLAS W SEITZ
RICHARD W SHAPIRO
SUSAN M SHARKO
MITCHELL A TOUPS
JAMES L WARLAUMONT
KEVIN B. WEIN
JOHN N WILBORN

ORDER

Matrixx' and Zicam's "Motion for Relief" was taken under advisement at the conclusion of the hearing on February 11, 2005.

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While the Court does not sit to enforce ethical rules generally, there is no doubt of its inherent authority to regulate the conduct of lawyers who appear before it. Here, the Court finds that Mr. Radacosky's anonymous, message-board postings were made in connection with the representation of his clients in these pending, consolidated cases. No other conclusion is plausible. Mr. Radacosky's failure to disclose his role and direct interest in the issues which are the subject of those message-board postings is, in the Court's view, a violation of ER 4.1(a) ("Truthfulness in Statements to Others") and ER 4.3("Dealing With Unrepresented Person") and potentially a violation of ER 8.4(c) ("Misconduct"). Without deciding the wisdom of Mr. Radacosky's activities or whether those activities conflict with his own clients' interests, it is clear that his postings have no purpose but to harm a litigation adversary.

The Court's power to regulate out-of-court conduct of lawyers who appear before it should be exercised with restraint and caution. Exercise of that power should be limited to circumstances where the integrity of the legal process, the public's respect for the courts or the litigants' interests in a fair and untainted proceeding are directly affected. Matrixx and Zicam ask the Court to enter an order either (1) precluding Mr. Radacosky from making further postings or (2) requiring him to disclose his interest in these cases in any future posting. While the Court is tempted to adopt the latter alternative, it declines to do so at this time and on the record before it for the following reasons:

1. It is not clear to the Court that Matrixx and Zicam do not have a right to identify "painfullyblunt2004" (Mr. Radacosky's nom de plume) on the Yahoo! Finance Internet message board or any other Internet site. The Court has in mind Matrixx' counsel's argument that Matrixx' rights to speak are circumscribed by federal securities regulations, but remains to be persuaded that Matrixx does not have a non-judicial remedy.

2. There is no trial set, and no apparent danger of tainting a prospective jury pool at this time.

3. The harm to Matrixx and Zicam is difficult to assess. The anonymous character of the message board does not reveal the identity of the recipients of Mr. Radacosky's postings. They may be, as Matrixx argues, Matrixx shareholders or prospective shareholders, financial analysts or interested members of the public. Absent some more quantifiable or identifiable harm to Matrixx, the Court is reluctant to intrude into the debate reflected by the postings on the message board.

Nothing in this order should be considered an approval or a justification of Mr. Radacosky's actions. If any of the three factors identified as a basis for the denial of relief should change, or if new issues should arise, Matrixx and Zicam may renew their request.

IT IS HEREBY ORDERED denying without prejudice the motion of defendants Matrixx Initiatives, Inc. and Zicam, LLC, for relief.

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DATED: February 16, 2005

/S/ JUDGE PENDLETON GAINES

PENDLETON GAINES
JUDGE OF THE SUPERIOR COURT