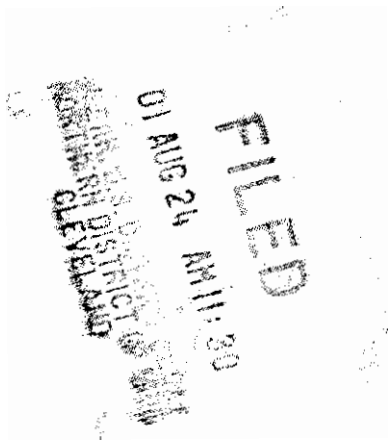

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: INTER-OP HIP PROSTHESIS LIABILITY LITIGATION	:	MDL DOCKET NO. 01-CV-9000 (ALL CASES)
	:	JUDGE KATHLEEN O'MALLEY
This Document Relates To All Cases	:	

OBJECTIONS TO CLASS CERTIFICATION BY PUTATIVE CLASS MEMBER CHARLES J. MITCHELL

COMES NOW Charles J. Mitchell, a member of the class proposed by the Class Plaintiffs and Defendants Sulzer Orthopedics, Inc. (Sulzer) and its related companies, and files these Objections to Class Certification and Preliminary Approval of the Proposed Settlement. Objector Mitchell would show the Court as follows:

INTRODUCTION

Charles Mitchell is a citizen and resident of Port Arthur, Texas. On or about October 18, 2000, he underwent hip replacement surgery, and received a Sulzer hip prosthesis. He has learned that the particular prosthesis that he received was recalled as defective. To date, he has not experienced symptoms sufficient to require replacement of his Sulzer hip prosthesis. He falls within the definition of the class proposed by class plaintiffs in their Class Action Complaint and Motion to Certify. He appears in this proceeding through his counsel for the sole and limited purpose of objecting to conditional certification of the class action and preliminary approved of the settlement.

Mr. Mitchell is represented by the law firm of Baron & Budd, P.C., which specializes in mass tort litigation and has extensive experience in landmark class actions. *See In re Asbestos Litig.*, 90 F.3d 363 (5th Cir. 1996), *rev'd sub nom. Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Joint Eastern and Southern Dist. Asbestos Litig. (In re Eagle-Picher)*, 134 F.R.D. 32 (E.D.N.Y. & S.D.N.Y. 1990); *In re Temple*, 851 F.2d 1269 (11th Cir. 1988).

ARGUMENT

THE COURT SHOULD NOT CONDITIONALLY CERTIFY THE CLASS AND GRANT PRELIMINARY APPROVAL TO THE SETTLEMENT.

More than five years ago, the Sixth Circuit noted "a national trend to deny class certification in drug or medical product liability personal injury cases." *In re American*

Medical Systems, Inc., 75 F.3d 1069 (6th Cir. 1996). That trend has only accelerated in the wake of the United States Supreme Court's landmark decisions disapproving attempts to resolve asbestos litigation through class action settlements in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Recently the Sixth Circuit, applying *Ortiz*, set aside another attempt to resolve liability for injuries caused by a defective medical product through a class action in *In re Telectronics Pacing Systems, Inc.* , 221 F.3d 870 (6th Cir. 2000). At least one other federal court of appeals has similarly rejected an attempt to resolve mass tort litigation through the class action device. *See, e.g.*, *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1196 (9th Cir. 2001).

Despite this trend, class counsel and Sulzer have asked the Court to certify a class action and settlement which, they hope, will resolve all (or almost all) litigation against the company arising out of defective hip and knee implants manufactured by the company. The request was made precipitously; the court was presented with an amended class action complaint and simultaneous settlement on August 15, 2001, and asked to certify the class conditionally and issue preliminary approval of the settlement on August 17, 2001. The Court has set the matter for a hearing on August 28, 2001. Because the class is not legally viable, the Court should decline to certify the class at this time.

A. The Rushed Certification Urged by Proposed Class Counsel and by the Defendants Is Premature, Improper, and Unnecessary.

"A class is not maintainable as a class action by virtue of its designation as such in the pleadings." *In re American Medical Systems*, 75 F.3d at 1079. On the contrary, courts are required "to conduct a 'rigorous analysis' into whether the prerequisites of Rule 23 are met *before* certifying the class." *Id.* at 1078-79, *quoting General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) (emphasis added). This inquiry must be even more rigorous when the Court is presented with a joint motion to certify a class and a simultaneous request to approve a proposed class action settlement; the ability of the class proponents to satisfy the certification criteria requires "undiluted, even heightened, attention in the settlement context." *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 620. And the fact that the certification is only conditional and might be reconsidered at a later time does not reduce the showing required of the class proponents; conditional certification "is not a means whereby the District Court can avoid deciding whether, at that time, the requirements of the Rule have been substantially met." *In re American Medical Systems, Inc.*, 75 F.3d at 1088 n.21, *quoting In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974).

The accelerated procedure urged by the class proponents is inappropriate under the law of this Circuit. Although Rule 23(c)(1) provides that class certification "shall" be decided "as soon as practicable" after the commencement of an action, "this does not mandate precipitate action. The court should defer decision on certification pending discovery if the existing record is inadequate for resolving the relevant issues." *In re American Medical Systems*, 75

F.3d at 1086, *quoting Chateau de Ville Prods., Inc. v. Tams-Whitmark Music Library*, 586 F.2d 962, 966 (2d Cir. 1978).

In this case, the proponents of the class have made no showing at all – other than the conclusory statements of counsel in their pleadings – that this case satisfies the threshold prerequisites for class certification of Rule 23(a) and the further prerequisites of Rule 23(b)(2) and (b)(3). The class proponents imply that expedited certification and approval is necessary so that the costs of defending individual cases may be saved and contributed to the class settlement. But without an accompanying stay of individual litigation – a stay which would patently violate the Anti-Injunction Act, 28 U.S.C. § 2283, as well as due process[1] – immediate certification and approval of the settlement would accomplish little. In any event, a hasty and improper certification would undoubtedly cost the parties more than an appropriate period for investigation and determination of whether this case is indeed suitable for class action treatment. The desire to save defense costs is not adequate reason to deviate from the requirements of the Rule as interpreted by the Supreme Court and the Sixth Circuit.

[1] *See* Plaintiffs' Opposition to Defendant's Motion for Order Enjoining Related Litigation Pending Final Approval of Class Settlement filed by California objectors on August 17, 2001.

B. The Proponents of the Class Have Not Shown Any Likelihood That They Can Satisfy the Prerequisites for Class Certification in Rules 23(a) and 23(b)(3).

The Sixth Circuit has emphasized the need of the proponents of class action to satisfy *all* of the applicable Rule 23 prerequisites. In *In re American Medical Systems, Inc.*, 75 F.3d at 1079. In the interest of brevity, we focus on several of the more obvious deficiencies in the proposed Sulzer class: lack of commonality (Rule 23(a)), lack of predominant common issue (Rule 23(b)(3)), and lack of adequate, unconflicted representation (Rule 23(a)(4)).

1. Commonality and Predominance of Common Issues

Rule 23(a)(2) requires that a class action must present "questions of law or fact common to the class." *In re American Medical Systems*, the Sixth Circuit held that the class plaintiffs had not satisfied the "commonality" requirement of Rule 23(a)(2) because the number and importance of the individual issues in that medical device product liability case subsumed the common question of defect. 75 F.3d at 1081 (noting that to establish the defendant's liability, each class member would have to present individual, specific proof "of reliance, causation, and damages"). The court noted generally that "in medical device products liability litigation of the sort involved here the factual and legal issues often *do* differ dramatically from individual to individual because there is no common cause of injury." 75 F.3d at 1084 (emphasis in original).

The proponents of the class may argue that *In re American Medical Systems* is distinguishable because that case involved several models of an allegedly defective implant

while this case involves one model (or two, if knee implants are included) that the defendant admits is defective. But that distinction does not avoid the effect of the Sixth Circuit's observation that individual issues of *causation and damages*, not of defect, prevented a finding of commonality. 75 F.3d at 1081.

In any event, while the ability of the class proponents to satisfy the threshold "commonality" prong may be debated, it is highly doubtful that the proponents can satisfy the "far more demanding" requirement of Rule 23(b)(3) that the common questions "predominate" over individual issues. *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 624. The *Amchem* Court held that given "the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard." *Id.* Similarly, in this case, the most important issue to be resolved in each case is not the question of defect – especially as the defendants virtually concede that the product was defective – but the individual issues of reliance, causation, and damages. And as in *Amchem*, the disparities in the individual cases are compounded by the very substantial differences in substantive law governing the claims. 521 U.S. at 624. In the absence of the class's common interest in the settlement – which, as *Amchem* established, is not pertinent to the predominance inquiry, 521 U.S. at 623 – the class simply cannot satisfy the predominance requirement of Rule 23(b)(3).

2. Adequacy of Representation (and Avoidance of Intra-Class Conflicts)

The requirement in Rule 23(a)(4) that the named parties will fairly and adequately protect the interests of the class "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625. When class members are competing with each other for the same funds, a conflict exists. This is true even if the class "is not a 'limited fund' case certified under Rule 23(b)(1)(B)" if, as in the proposed Sulzer settlement, "the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability." *Id.* at 626. As the Supreme Court recognized in *Ortiz*, "a class divided between holders of present and future claims . . . requires division into homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel." *Ortiz*, 527 U.S. at 856. The proposed Sulzer class includes present (revision) and future (nonrevision) claims; at a minimum, the proposed class contains claimants with different types of claims and whom are treated differently under the settlement. Bona fide separate representation of these groups was and is required.

Although class counsel appear to pay lip service to the need for separate counsel by designating two subclasses and by identifying separate counsel for the subclasses, they have provided absolutely no indication that the subclasses in fact received separate, independent, unconflicted representation. Rather, the class counsel appear to have embraced the approach rejected by the Supreme Court in *Amchem*: "The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse

groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency." 521 U.S. at 627.

Indeed, the terms of the settlement themselves indicate that a conflict has been "smoothed over" by joint representation. For example, it appears that under the substantive law of some states, a person that has received a defective implant but has not yet experienced physical harm from the implant would have no legally viable claim for damages. But the settlement awards the same level of compensation to such a person as it does to a person with a legally viable claim. It is hard to imagine zealous, unconflicted representatives agreeing to award compensation out of a limited fund to a group of class members with no compensable injury. *Compare Ortiz*, 527 U.S. at 857 ("The very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen.").

Further proceedings may yet reveal that both subclasses received bona fide separate and zealous representation. On this record, however, the Court cannot find that the class has received and will receive the adequate unconflicted representation required by Rule 23(a)(4).

C. The Alleged Benefits of Avoiding Bankruptcy Do Not Allow the Court To Ignore Lack of Compliance with Rule 23

The class action proponents argue that the court should certify the class action and approve the settlement, at least provisionally, because it is a creative response to a crisis and provides the benefit of avoiding bankruptcy, under which the claimants, the defendants, and

society would fare far worse. Both the Supreme Court and the Sixth Circuit have specifically rejected similar pleas to interpret Rule 23 expansively to implement creative responses to perceived crises. In *Amchem*, the Court responded:

> "The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the district court heaped on it."

Amchem, 521 U.S. at 629 (footnote omitted). In *Ortiz*, the Court acknowledged that the class action settlement provided an alternative to litigation that "defies customary judicial administration and calls for national legislation," 527 U.S. at 821, but acknowledged that it was "not free to devise an ideal system for adjudicating these claims." 527 U.S. at 865 (Rehnquist, C.J., concurring). And in *Telectronics*, the Sixth Circuit recognized that the district court could not effectively "discharge" a mass tort debt through a class action settlement, "thereby usurping the bankruptcy scheme through settlement, even if it believes such an avenue to be in the best interests of most of the plaintiffs." 221 F.3d at 880. The court recognized that should a company not have sufficient assets to pay claimants in full, "we have a comprehensive bankruptcy scheme in this country for just such an occurrence." *Id.*

Finally, although a comprehensive discussion of the matter at this time would be impractical and inappropriate, we cannot leave unchallenged the premise of the proponents of the class that victims would be better off under a class settlement such as the one proposed than under a resolution achieved in bankruptcy. A study recently published by the Federal

Judicial Center examined three limited fund class actions and four bankruptcy reorganizations to compare the "fairness and effectiveness of these two means of achieving global resolutions of mass tort liabilities." S. Elizabeth Gibson, *Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations* (Federal Judicial Center 2000) (hereafter "Gibson"). The author of the study concluded that "bankruptcy comes out ahead of limited fund class action settlements with respect to the fairness of the resolution process and the effectiveness of judicial review." Gibson, at 5. The author summarized the relative benefit of bankruptcy over the class action as follows:

> "The confirmation requirement of voting by individual creditors (including tort claimants), the substantive bankruptcy protections for individuals and classes that vote against the plan, and the practice of appointing a future claims representative provide greater protection and opportunity for input for absent tort claimants than is available when a district court approves a limited fund class action settlement. Moreover, tort claimants are treated more equitably in a bankruptcy reorganization with respect to the defendant's other creditors, because all are forced to share the defendant's shortfall; in a limited fund class action settlement, only the tort claimants are forced to compromise their claims."

Gibson, at 5.[2]

[2] One of the cases analyzed by Professor Gibson involved the aborted limited fund class action and later bankruptcy of Eagle-Picher Industries, Inc., a former asbestos manufacturer. Professor Gibson reports that Stanley Chesley (lead counsel for the proposed class in this case) appeared as counsel for the plaintiff class in 1990 and urged the court to approve a settlement whose value was estimated at $260-$280 million. Gibson at 50. Mr. Chesley asserted that the settlement would provide claimants with more value than they would receive in a bankruptcy reorganization, which he estimated to be $180-$190 million. *Id.* The court granted preliminary approval of the settlement, but the company nonetheless filed for bankruptcy protection. Ultimately, the bankruptcy provided the claimants with a value of more than $800 million in 1998. *Id.* at 99. As Professor Gibson acknowledges, "the result was achieved at a high price in terms of time and money" – the bankruptcy took some seven years to resolve – but even when the amount to claimants is discounted to its value in 1990 (Professor Gibson estimates that amount to be $504 million), claimants still received twice as much in the bankruptcy as they would have in the proposed class. *Id.* The purpose of this reference is not to demonstrate conclusively that bankruptcy is always better than resolution through a class action, but to show that the premise that tort claimants fare better under a class action settlement than under a bankruptcy cannot be accepted as a truism.

CONCLUSION

The court should decline certification, and should not approve the proposed settlement.

Respectfully submitted,

BARON & BUDD, P.C.
The Centrum, Suite 1100
3102 Oak Lawn Avenue
Dallas, Texas 75219
214/521-3605
FAX: 214/520-1181

BY _____
BRENT M. ROSENTHAL
Texas State Bar No. 17281075

ALLEN M. STEWART
Texas State Bar No. 19202030

JAMES D. PIEL
Texas State Bar No. 15989800

Counsel for Objector Charles J. Mitchell

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2001, I served a true and correct copy of the foregoing document to the following counsel by Federal Express:

COUNSEL FOR THE PROPOSED CLASS

Stanley M. Chesley, Esq.
WAITE, SCHNEIDER, BAYLESS, ET AL.
1513 PNC Tower - Fourth & Vine Street
Cincinnati, OH 45202
Interim Co-Lead Counsel
Proposed Class Counsel

John R. Climaco, Esq.
CLIMACO, LEFKOWITZ, PECA, WILCOX, ETAL
Ninth Floor, The Halle Building
1228 Euclid Avenue
Cleveland, OH 44115
Interim Co-Lead Counsel
Proposed Class Counsel

R. Eric Kennedy, Esq.
WEISMAN GOLDBERG & WEISMAN CO.,
1600 Midland Building
Landmark Office Towers
Cleveland, OH 44115
Interim Co-Lead Counsel \Liason Counsel

Donald Barrett, Esq.
BARRETT LAW OFFICE, P.A.
404 Court Square North
Post Office Box 987
Lexington, Mississippi 39095
Proposed Class Counsel

Keith M. Fleischman, Esq.
MILBERG WEISS BERSHAD HYNES & LERACH, LLP
One Pennsylvania Plaza
New York, New York 10119-0165
Proposed Class Counsel

Richard S. Wayne, Esq.
STRAUSS & TROY
The Federal Reserve Building
150 East Fourth Street
Cincinnati, OH 45202-4018
Proposed Counsel for Subclass 2

COUNSEL FOR DEFENDANTS SULZER ORTHOPEDICS, INC., ET AL.

Kenneth M. Seeger, Esq.
CROSBY, HEAFFEY, ROACH & MAY
Two Embarcadero Center
Suite 2000
San Francisco, CA 94111

and that on August 24, 2001, I served a copy of the foregoing document on all other counsel on the Sulzer Federal Case List via email.

BRENT M. ROSENTHAL